
# A Critical Analysis of the Seemingly Contradictory Principles of Uniformity and Party Autonomy Underlying the United Nations Convention on the International Sale of Goods (CISG) of 1980: The Objectives Behind these Principles and the Complexities Arising from their Application in the Context of the Main Objectives of the Convention.

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**Mini Dissertation submitted in 2019 to the School of Law in partial fulfilment of the requirements of the degree of Master of Laws in Maritime Law**

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**December 2019**

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## II. ACKNOWLEDGEMENTS

Firstly, I would like to thank my supervisor, Mrs. Deepa Lamb, for her influence in my interest and passion for international trade law, and for her guidance throughout this academic journey.

I would like to thank the University of Kwazulu Natal for the support services offered that assisted me with my research and the writing of this mini dissertation.

A special thanks to my families for their support and prayers.

I would like to thank my mother, Nombuso Mkhize, for her hard work and sacrifices that have pushed me this far, and for always believing in me.

Lastly, I would like to thank my Jehovah for all the challenges and blessings that make me the person I am today.

## III. ABSTRACT

The need for a uniform law governing the cross-border sale of goods, balancing the rights of importers and exporters as well as creating certainty and predictability in the application of international sales law rules, led to the creation of different international instruments and conventions that were enacted and adopted by different states to regulate international sales contracts. A notable example of such private international law instruments that have been adopted by some 85 states, is the United Nations Convention on Contracts for the International Sales of Goods (CISG).

This study seeks to evaluate the question of whether the fundamental principles of promoting uniformity in the laws regulating cross border sales contracts, while still respecting the right to party autonomy, that underpins the CISG, is a workable reality. This question will be evaluated by analysing relevant provisions of the CISG, as well as court and arbitral decisions to see how these forums within diverse CISG member states are interpreting and applying these provisions of the Convention in the context of these seemingly contradictory general principles underpinning the CISG.

Whether the extensive rights to party autonomy provided for under the CISG promotes or hinders its primary objective of achieving uniformity in international sales contracts. The writer will further analyse the compromises made in the drafting of the CISG in order to achieve this goal of international uniformity and the effects of these compromises on the interpretation and application of the Convention.

## IV. List of abbreviations

1. United Nations Convention on Contracts for International Sales Goods - CISG
2. International Institute for the Unification of Private Law - UNIDROIT
3. Uniform Law on International Sales of Goods - ULIS
4. Uniform Law on the Formation of Contracts of International Sales of Goods - ULF
5. United Nations Commission on International Trade Law - UNCITRAL
6. Private international laws - PIL
7. International chamber of commerce - ICC
8. Case Law on UNCITRAL texts - CLOUT
9. International Case Law and Bibliography on CISG - UNILEX
10. CISG Advisory Council - CISG-AC
11. International Commercial Terms - INCOTERMS

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# Chapter 1

## 1.1. Introduction

The changing of the ideological and territorial status of different states and the extension thereof resulted in an increase in trade between states.[1] States could not develop trade rules that apply outside their domestic boundaries and bind other states in order to cater for the rapid growth in cross-border trade.[2] This made it difficult for parties in an international sale to determine which law governs an international sales contract where two or more laws were equally applicable to a contract.[3] This phenomenon is referred to as the conflict of laws.[4] Such a situation led to uncertainty, unpredictability, and non-uniformity in international sales law. Thus, it was necessary to have a uniform law that would regulate such transactions.

A method of determining of applicable law that was available afforded contracting parties the freedom to elect the law to govern their contract providing them with certainty and predictability of the law.[5] This use and application of choice of laws is grounded on the belief that 'parties are allowed to freely participate and influence the market and maximize the welfare and the good of society'.[6] However, this method was subjected to conflicting views. Traditional commercial nations supported the principle of party autonomy which allowed parties maximum control over their contract by giving them the freedom to negotiate without any interference.[7] They wanted a uniform law that would allow parties to exercise their freedom by choosing a uniform international instrument as an alternative law to regulate their transactions. Those that were new in the trade industry wanted a uniform law that would regulate all transactions so that they would be protected

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1 Coetzee J 'A Pluralist Approach to the Law of International Sales' (2017) 20 *PER / PELJ* at 2

2 S Eiselen 'Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa' (1999) 116 *S. African L.J* at 326-327.

3 J Felemegas 'The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation' (2000-2001) *Kluwer Law International* at 115-265, available at https://www.cisg.law.pace.edu/cisg/biblio/felemegas14.html (accessed on 17 April 2019 )

4 Ibid.

5 A Ogunranti 'The scope of party autonomy in international commercial contracts: a new dawn ?' (Dalhousie University Halifax, 2017) at 50.

6 M Zhang 'Contractual Choice of Law in Contracts of Adhesion and Party Autonomy' (2008) 41 *Akron L. Rev.* at 131

7 MT Murphy 'United Nations Convention on Contracts for the International Sale of Goods: Creating Uniformity in International Sales Law' (1989) 12 *Fordham Int'l L.J.* at 728-729

from nations with strong bargaining power whom they feared would resort to adhesion contracts or trade usages that were disadvantageous to them.[8]

This led to the creation of different international instruments that were enacted and adopted by different states to regulate international sales contracts.[9] One such private international instrument is the United Nations Convention on Contracts for International Sales of Goods (CISG).[10]

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### 1.2. The rationale and purpose of the study

The CISG was created for the purpose of unifying international contracts and to satisfy the needs of different legal systems, particularly common law and civil law states' approach to contract law through a uniform law that takes into account different economic, social, and legal systems of its member states and apply for their mutual benefit, enhancing friendly trade relations between states, and removing international trade barriers caused by uncertainty and unpredictability of law applicable in an international sales contract.[11]

It is aimed at reducing trade costs by eliminating the need to spend money learning foreign laws or on litigation costs due to uncertainty of the rights and obligations of the parties in a contract.[12] The CISG has proven to play a huge role in international trade and has influenced a number of laws around the world, on an international, regional,

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[8] Ibid.

[9] L van der Merwe, 'The impact of South Africa's non ratification of the convention on international sale of goods ("CISG") on its trade as well as relations with other countries', (The university of South Africa , 2017) at 9; 'International sales contract(s)' and 'international sales transaction(s)' and 'cross border sales transaction(s)'are hereafter referred to as 'contract(s)'or 'transaction(s)', unless indicated otherwise.

[10] Ibid; The 1980 United Nations Convention on Contracts for International Sales Goods (CISG), hereafter referred to as 'CISG' or 'Convention': Text of the CISG available at https://www.cisg.law.pace.edu/cisg/text/treaty.html (accessed on 03 March 2019)

[11] P Zhen, 'China's Withdrawal of Article 96 of the CISG: A Roadmap for the United States and China to Reconsider Withdrawing the Article 95 Reservation' (2016-2017) *Miami Bus. L. Rev*. at 166; The preamble of the CISG provides that when applying the CISG, contracting parties and legal forums must have regard of: 'The broad objectives in the resolutions adopted by the sixth special session of the General Assembly of the United Nations on the establishment of a New International Economic Order, Considering that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States, Being of the opinion that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade.'

[12] Coetzee op cit (n1)at 11

and domestic level.[13] This is made apparent by the number of states that have ratified it and its popularity.[14] However, the number of state signatories mainly indicate the development of the Convention and the shared need of a uniform law.[15]

Despite the efforts made by the CISG, its goal of creating uniformity is still questionable, particularly with the application of party autonomy that permits parties to opt-out and opt-in of the CISG, and allows for the application of divergent laws in contracts. This study critically analyses the effect of applying party autonomy under the CISG in relation to the objective of uniformity in sales contracts.

### 1.3. Problem statement

This study evaluates whether the fundamental principles of promoting uniformity in the laws regulating cross-border sales contracts, while still respecting the right to party autonomy that underpins the CISG, is a workable reality. This will be evaluated by analysing relevant provisions of the CISG, as well as court and arbitral decisions to see how these forums within diverse CISG member states are interpreting and applying these provisions of the Convention in the context of these seemingly contradictory general principles underpinning the CISG. The study further analyses the compromises made in the drafting of the CISG in order to achieve this goal of international uniformity, and the effects of these compromises.

The study contends that the gaps in the provisions of CISG, the absence of uniform definitions of its terms, and the flexibility of the CISG provisions leads to uncertainty and divergence in the scope and application of party autonomy within the GISG, thus making it difficult to achieve uniformity. The study acknowledges that complete uniformity is impossible as evidenced by the compromises made in creating the CISG as a uniform law applying globally and suggests ways that may be adopted to promote functional uniform application and interpretation of the CISG.

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[13] L van der Merwe op cit (n9)

[14] Zhen op cit (n11)at 166.

[15] T Shumba, 'More than 25 years of the convention on contracts for the international sale of goods (CISG): Rethinking the role of the CISG in the SADC region' *Speculum 29(2)* (unpublished Post-doctoral Research, University of Fort Hare, 2015 ) at 47.

### 1.4. The scope and limitations of the study

The scope of this study is limited to a brief discussion of the background and structure of the CISG, a brief critical analysis of the principle of uniformity in the application of provisions of the CISG in the requirements of its application and the interpretation of its provisions, the application of the principle of party autonomy under the CISG provisions in the indirect application of the CISG, the reservation of the indirect application, the exclusion and modification of the provisions of the CISG, the contract freedom of form, the reservation of the freedom of form, and the application of trade usages. The study will limit the critical analysis to the CISG's goal of promoting uniformity in laws regulating cross-border sales transactions.

### 1.5. Research questions

This study focuses on article 1(1)(a) and article 7 of the CISG promoting a uniform application in the CISG, and article 1(1)(b); article 95; article 6; article 11; article 96; and article 9 of the CISG that allows for the application of the principle of party autonomy and appear to conflict with the primary goal of uniform application of the CISG, resulting from the flexibility and vagueness of the wording of these provisions that opens doors for diverging interpretation of its legal effect and application in contracts.

The study seeks to evaluate:

1. How the structure, application requirements, and interpretive instruments of the CISG influence the primary goal of the CISG?
2. What compromises were made during the negotiation and drafting stage of the Convention that led to the inclusion of the above-mentioned provisions?
3. Whether the flexibility and vagueness of the terms of the above provisions contribute to the divergence application of the CISG?
4. How the compromises made during the drafting of the CISG contribute to the divergences in the interpretation of the above-mentioned provisions?

5. Whether the interpretive instruments in article 7 and the obligations in the preamble of the CISG ensure uniformity in the application and interpretation of the above-mentioned provisions allowing for the application of the principle of party autonomy?
6. Whether applying the principle of party autonomy through the reservations provided in the CISG is workable with the goal of promoting uniformity in the laws regulating international trade sales as reflected in its preamble?

### 1.6. Research methodology

The study is a desktop-based one. It uses doctrinal research by analysing the legal principles through cases and legislation. The study also analyses scholarly literature and academic texts to understand how the CISG has been interpreted and applied by academic scholars.

### 1.7. Thesis outline

Chapter one gives a general introduction of the topic of the study, the rationale and purpose of the study; the problem statement; the scope and limitations of the study; the research questions; and the brief overview of all the chapters of the study. Chapter two discusses the background of the creation of the CISG; the structure of the CISG; and analyses the scope and application of the CISG as per article 1(1)(a).

Chapter three discusses the purpose of the CISG and the principle of uniformity in the interpretation of the CISG in terms of article 7. Chapter four analyses the application of party autonomy in the CISG. First, the study analyses the indirect application of the CISG in article 1(1)(b) and the reservation thereof in article 95. Secondly, the entitlement to exclude or modify the provisions of the CISG in article 6 is evaluated. Thirdly, the study analyses contract freedom of form in article 11. Fourthly, the contracting states' choice to reserve the freedom of form in terms of article 96 will be expounded upon. Lastly, the study analyses the application of trade usages in article 9.

Chapter five critically analyses the problems identified in the analysed provisions of the CISG and interpretations analysed in the previous chapters and suggests alternative methods and interpretations that will assist to achieve uniformity under the CISG. Chapter six gives a conclusion of the study.

## Chapter 2

### Structure and application of the CISG

### 2.1. Introduction

This chapter briefly analyses the application of the CISG in order to give context to subsequent chapters of the study in which the underlying CISG principles of uniformity and party autonomy will be examined, and whether the two can really coexist and enable the Convention to achieve the objectives set out in its preamble.

### 2.2. Background of the CISG

It is worth briefly looking at the history of the adoption of the CISG in order to gain a better understanding of the scope and application of the Convention. In the 1960s the International Institute for the Unification of Private Law (UNIDROIT), with the objective of unifying laws regulating international contracts, drafted the Uniform Law on International Sales of Goods (ULIS) and the Uniform Law on the Formation of Contracts of International Sales of Goods (ULF) in 1964 at the Hague, which came into force in 1972.[16] The countries that adopted these Conventions include Belgium, the Federal Republic of Germany, Italy, Gambia, Israel, San Marino, United Kingdom, and the Netherlands.[17] However, these conventions did not receive support outside Western Europe on the basis that they reflected the interest of Western European states and lacked representation of other nations globally.[18]

In 1966 the United Nations Commission on International Trade Law (UNCITRAL) was established and it represented the interest of all states globally, to ensure uniformity in trade.[19] The UNCITRAL drafted the CISG which was adopted in 1980 and came into

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[16] C Malahlela 'Should South Africa ratify the United Nations convention on contracts for international sale of goods?' (University of Pretoria, 2013) 2-3.

[17] J Honnold **'**The sales convention: background, status, application'(1988) 8 *Journal of Law and Commerce* at 3

[18] Malahlela op cit (n16)

[19] Shumba op cit (n15) at 43

force in 1988 with the objective of promoting uniformity and good faith in cross-border sales contracts entered into by parties who have their place of business in the CISG member states.[20] Eleven countries ratified the CISG in January 1988, these included Argentina, China, Egypt, France, Hungary, Italy, Lesotho, Syria, the United States, Yugoslavia, and Zambia. In December 1987 Austria, Finland, Mexico, and Sweden became member states.[21] The Convention entered into force in these countries in January 1989. Later, on 28 July 1989, Norway acceded to the Convention. Presently, some of the countries that are not singitories of the CISG, are considering ratifying it. Since its adoption, it has been praised as a huge step taken by countries globally to the unification of private international laws and it has influenced several laws around the world, on an international, regional and domestic level.[22]

### 2.3. Structure of the CISG

Proponents of the CISG often attribute its successful application to the simplicity of the structure of the Convention, making it accessible to traders, including the inexperienced. It must, however, be noted that the CISG only applies to the formation of contracts of international sale of goods and the rights and obligations of the parties to such contracts. The CISG is divided into four parts, each part dealing with aspects of the sales contract.

The CISG begins by stating its objectives in its preamble, followed by Part I of the Convention, which sets out the sphere of its application and its general provisions.[23] Part II regulates the formation of a contract under the CISG. Part III regulates the sale of goods, this is the largest part of the CISG. Finally, part IV contains the final provisions of the Convention, mostly regulating the reservations allowed under the CISG.

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[20] L van der Merwe op cit (n9)
[21] AM Garro 'Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods', (1989) 23 *Int'l L.* at 445.
[22] L van der Merwe op cit (n9) supra
[23] UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, United Nations Commission on International Trade Law, United Nations , New York (2012) available at https://www.uncitral.org/pdf/english/clout/CISG-digest--e.pdf (accessed on 07 April 2019); See CISG

### 2.4. Requirements for the application of the CISG

The applicability of the CISG is regulated by article 1(1).[24] Article 1(1)(a) requires the application of the Convention in cross-border transactions that (a) constitute a sale of goods contract; (b) involve parties who have their places of business in different states; and (c) the contracting parties' place of business are in contracting states. These requirements are analysed below.

**(a) Contract for sale of goods**

The CISG does not define what is meant by the 'sale of goods' in article 1(1). This provision appears to imply that transactions involving goods that are not classified as sales contracts, such as the lease of goods, are excluded from the ambit of the CISG.[25] Article 3 extends the scope of application of the CISG to contracts of sale that may have a service element to it, but restrict its application only to transactions in which the sales element predominates the service element, and excludes those contracts in which the buyer provides a 'substantial amount of material' for the production or manufacturing of the goods, as well as those contracts in which the major part of the obligations of the seller is for the supply of labour or other services.[26]

Article 2 of the CISG limits its ambit of application by excluding contracts of sale of certain 'goods', based on the purpose and knowledge of the purpose for which these goods are to be sold.[27] There is a view that 'goods' provided for under the CISG, can be taken to mean tangible property that is capable of delivery.[28] Therefore, transactions

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[24] CISG Article 1(1): '(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States: (a) When the States are Contracting States'.

[25] H M Flechtner *The united nations convention on contracts for the international sale of goods (CISG)* (unpublished lecture I: purposes, background, history, nature, scope and application; University of Pittsburgh (U.S.A.) at 4 available at https://legal.un.org/avl/pdf/ls/Flechtner_outline1.pdf (accessed on 27 May 2019)

[26] 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 Int'l L.J* at 306*;* see CISG

[27] See CISG

[28] B J Richards 'Contracts for the International Sale of Goods: Applicability of the United Nations Convention'(1983) 69 *Iowa L. Rev.* at 224-225; Germany, 17 September 1993, Appellate Court Koblenz, (*Computer chip case*) available at http://cisgw3.law.pace.edu/cases/930917g1.html: The decision of the

involving the transfer of intangible property fall outside of the ambit of application of the CISG.

**(b) Parties' place of business located in separate states**

Article 1(1) provides that the CISG will only apply to a contract if the contracting parties' place of business are in different states, this implies the internationality of a contract.

The absence of a definition of internationality is again evidence of some of the vague and loose terminology used in the Convention, leaving room for conflicting interpretations of this provision of the CISG. The article does not look at whether the goods or the contracting parties will cross international borders, rather the location of the parties business, this clarity is provided in article 1(3).[29] This implies that the CISG can apply to contracts that are domestic sales in nature if the parties' place of business are in separate countries.[30] This view is reflected by legal forums' different interpretations of 'place of business'.[31]

court implied that both the software programme and the tangible disk containing the programme, falls under the application of the CISG.

[29] Richards, op cit (n28) at 223; see CISG article 1(3); 'contracting parties' or contracting party' is hereafter referred to as 'party' or 'parties' This must be read to include third parties acting on their behalf.

[30] J E. Bailey op cit (n26) at 301.

[31] UNCITRAL Digest of Case Law op cit (n23) at 4; Germany, 2 April 2009, Appellate Court Hamm, (*Automobile case*) available at http://cisgw3.law.pace.edu/cases/090402g1.html: The court held that pretrial negotiations and submission to a court jurisdiction does not amount to a derogation from the jurisdiction if the court if in a contracting state; Austria, 29 July 2004, Oberlandesgericht Graz, case no. 5 R 93/04t, available at http://www.unilex.info/cisg/case/2009: The court held that the place of business is not the place where business activities are performed, a place where business management is seated, a place where business assets are located, a place where goods are delivered, or a place where a contract is concluded.; Germany, 28 February 2000, Oberlandesgericht Stuttgart 5. Zivilsenat, case no. 5 U 118/99, available at http://www.unilex.info/cisg/case/829: The court held that the place of business is a stable place where business is chiefly run with independent sphere of authority. If an agent lacks authority to act for the principal party, such agent's place of business will not be considered the placed of business.; Germany, 13 April 2000, Amtsgericht Duisburg, case no. 49 C 502/00, available at http://www.unilex.info/cisg/case/715: The court held that the place of business is where parties actually do business, not where goods are delivered; ICC Arbitration Case No. 9781 of 2000 (*Waste recycling plant case*) available at http://cisgw3.law.pace.edu/cases/009781i1.html: The tribunal relied on the principles that the place of business is the permanent and a stable place, and not merely the place were contracts are negotiated. The tribunal held that the place of conclusion of the contract in May did not determine the intentionality of the contract and that the exception in article 1(2) did not apply because the Claimant knew that other party's place of business was located in Italy before the conclusion of the agreement.

Article 10 assists legal forums in determining the internationality of a contract where a party has more than one place of business.[32] It defines a place of business as a place that has the 'closest relationship with the contract and its performance'.[33] It provides that when a party's place of business cannot be ascertained or there is no place of business, forums must look at the party's habitual residence.[34] This exception is too broad as it allows parties to rely on their habitual residence without placing any limitations. Thus, the parties have a choice between the place of business and their habitual residence. Nonetheless, this promotes the application of the CISG in cases where one party intentionally hides his place of business. However, a choice of foreign law by the parties cannot make an otherwise domestic contract into an international contract.[35]

With regards to the time of the internationality of a contract, article 1(2) limits it to before and at the conclusion of the contract.[36] One court suggested that this must be construed objectively from the surrounding circumstances of a contract. [37] If internationality cannot be ascertained from the dealings of the parties, their contract, or information disclosed by the parties, article 1(2) allows forums to disregard the internationality of a contract, thereby possibly eliminating the application of the CISG.

**(d) Parties from contracting state**

Article 1(1)(a) requires all parties to have businesses in countries that have ratified the CISG. The Convention will apply as the law governing an international contract, even where the parties have not expressly chosen the CISG as the applicable law of that contract.[38] Where the private international law ('PIL') rules of a CISG contracting country

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[32] Legal forum(s) is read as including arbitral tribunal and courts. It is hereafter referred to as 'forum(s)' or 'court(s)'. The study refers to domestic legal forums only, unless indicated otherwise.

[33] Richards, op cit (n28) at 223 at 224; CISG

[34] Ibid; The use term 'place of business' in this study must be read as including a habitual residence.

[35] Ibid

[36] Richards, op cit (n28) at 223; CISG.

[37] United States, 22 November 2002, Federal District Court [Florida] (*Impuls I.D. Internacional, S.L. v. Psion-Teklogix Inc.*) available at http://cisgw3.law.pace.edu/cases/021122u1.html:The contract was concluded between a manufacturer in a non-contracting state ( England) and a business in a contracting sate that had made the article 95 reservation (United states). A defendant from a contracting state subsequently became party to a contract, after the original contract had been concluded. The court held that the defendant's place of business was not relevant at me of litigation, it did not change the internationality of the contract. It is the place of business of the parties in the original contract at the time of contracting that mattered. Thus, the CISG did not apply.

[38] M Wethmar-Lemmer 'Harmonising or unifying the law applicable to international sales contracts between the BRICS states' (2017) *L 3 CILSA* at 385.

calls for the application of the domestic laws of a third country, the provisions of the CISG will prevail, unless it can be shown that such law was incorporated with the aim of excluding the application of the CISG.[39] Article 1(1)(a) does not indicate what is meant by 'contracting state'. However, it can be derived from the interpretation of internationality, that this refers to the contracting countries where the parties' place of business is located. This is supported by article 1(3) which provides that the parties' nationality, commercial status, and status of the contract, will have no effect on the applicability of the CISG.[40] The point that the status of a contract is irrelevant, is misleading because it ignores the limitations of the CISG applicability in articles 2 and 3.[41] The application of the CISG in international contracts does not displace domestic laws, it only limits their application to matters of domestic sales contract. Therefore, two laws apply within a single contract.[42]

### 2.3 **Conclusion**

It is clear that there are interpretational gaps in the provisions of article 1(1) of the CISG. These gaps impact on the uniform application of the CISG. The qualifications provided in articles 3; 2; and 10 do not offer sufficient guidance when determining the applicability of the CISG in a contract, as these provisions also appear to be vague and leave room for conflicting interpretations. To address these issues of interpretation, forums must consider article 7 for guidance. Article 7 of the CISG is analysed in the following chapter of this study.

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39 UNCITRAL Digest of Case Law op cit (n23) at 5
40 CISG
41 CISG
42 UNCITRAL Digest of Case Law op cit (n23) at 5

## Chapter 3

## Principle of uniformity under the CISG

### 3.1. Introduction

This chapter analyses the broad guidelines for uniform interpretation contained in article 7 of the CISG in the context of its primary objective to unify the laws regulating cross-boarder contracts, the gaps created by the broad guidelines in article 7, and the impact of this on the uniformity objective, is analysed.

### 3.2. Uniform interpretation

The textual uniformity of a regulation does not guarantee that the law will be applied uniformly in practice.[43] The accomplishment of the uniform application of the CISG in contracts is dependent on the uniform interpretation of the provisions of the CISG.[44]

The interpretational differences between Civil and Common law legal systems, raise concerns in the uniform application of the CISG. Civil law scholars argue in favour of their legal tradition that considers three elements, namely, 'the wording (grammatical element), the context of the statute (systematic element), the legislative history (historical element), and the purpose of the statute (teleological element).'[45]They propose that their tradition complements the purpose of article 7 to avoid the application of domestic laws, in favour of the general principles of the CISG. Contrary, in the Common law approach, a gap in legislation is determined by the use of the already decided case law.[46] Nonetheless, stating relevant elements to be considered or the relationship between the elements of interpretation, is insufficient because the relationship between elements may produce different results in each state.[47]

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[43] Ibid; JD. Karton & L de Germiny, 'Has the CISG Advisory Council Come of Age?' (2009) 27(2) *Berkeley Journal of International Law* at 450; Larry A. DiMatteo; Lucien Dhooge; Stephanie Greene; Virginia Maurer, 'The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence,' (2004) 24 *Nw. J. Int'l L. & Bus* at 299; R.J.C. Munday, 'The Uniform Interpretation of International Conventions,' (1978) 27 *INT'L & COMP. L.Q.* 450

[44] Karton & de Germiny op cit (n43) at 450 ; DiMatteo et al supra.

[45] G Brandner 'Admissibility of Analogy in Gap-filling under the CISG' (University of Aberdeen, 1999) available at http://www.cisg.law.pace.edu/cisg/biblio/brandner.html (accessed on 06 May 2019)

[46] Ibid

[47] Ibid

The interpretational guidelines contained in article 7 of the CISG offer a solution to these conflicting interpretational methods.[48] However, article 7 lacks guidelines on the standard of uniformity that the CISG wishes to achieve. The wording in article 7 suggests a standard lower than strict uniformity.[49] A relative standard reducing legal barriers in cross- broader sales transactions suffices.[50]

### 3.2.1 Article 7(1): Interpretive instrument

Article 7(1) lists three principles that must guide the interpretation of the provisions of the CISG. These are analysed below.

#### (a) International character

The international character of the CISG complements its application being jurisdiction focused (place of business) rather than party focused (nationality).[51] Article 7(1) does not provide any method or standard of implementing this guideline. It leaves the duty of interpreting this principle on forums. Critics of the CISG warned of the risk of non-uniform interpretation of the Convention by forums suspectable to a 'homeward trend' [52] interpretation of law[53] They feared that forums would not apply the CISG autonomously and rely on their domestic interpretations.[54] One such example evidences the court's failure to consider foreign court judgements in determining what constituted a fundamental breach.[55] The homeward trend results in inconsistencies in the application

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[48] CISG Article 7:'(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.'

[49] DiMatteo op cit (n43) at 310.

[50] Ibid.

[51] DiMatteo op cit (n43) at 308-309

[52] T Kiely 'Good faith & the Vienna Convention on Contract for the International Sale of Goods,'(1999)3 *Vindabona journal of international commercial law and arbitration* at 4: Homeward trend is defined as the probability of legal forums of different socio-economic and legal systems to rely on their domestic understanding of law when faced with uncertain or undefined provisions of law.

[53] DiMatteo op cit (n43) at 302-303

[54] Ibid

[55] Italy, 20 March 1998, Appellate Court Milan, (*Italdecor s.a.s. v. Yiu's Industries (H.K.*) Limited) available at http://cisgw3.law.pace.edu/cases/980320i3.html: The case involved a contract between a buyer from Italy and a seller from Hong Kong. The issue arose in respect of a claim for repayment of partial payment for purchase price of goods following a failure to deliver goods in the country stated in the contract. The case was an appeal in the court in Italy, against the judgement of a court in Hong Kong which refused to confirm the attachment of a bank check. The contract in question was governed by the 1995 Hague Convention. Article 3 of the 1955 Hague Convention as applicable in Italy, provided that the domestic laws of the seller's residential country would be applied in contracts that made no provision for the applicable

of the CISG because it is based on the domestic understanding of the law by a forum involved.[56]

A widely accepted view is that international character requires an autonomous interpretation. [57] Autonomous interpretation requires forums to interpret the CISG independently of any domestic law influence, even when a 'similar concept' has been interpreted or is found within their domestic laws.[58] Furthermore, it means the CISG must not be interpreted in a strict and literal sense, rather in accordance with the promotion of uniformity in the laws regulating cross-border transactions.[59] This implies the need to consider the CISG's legislative history, foreign judgments, and international scholarly literature on the CISG.[60] This method of interpreting the CISG reduces the existing gaps

law, thus Hong Kong law was applied in this contract. However, the contract was silent regarding the law applicable to determine the materiality of the breach leading to the claim. The Italian law permitted legal forums in Italy to apply their domestic laws if they could not ascertain foreign laws that applied in contracts. Accordingly, Italian law applied with the result of making the CISG applicable in terms of article 1(1)(b). The breach in question entitled the buyer to cancel the purchase order and avoid the contract in accordance with the provisions of the CISG. The court in this case interpreted the materiality of the breach based on the laws of Italy and it did not consider the laws of Hong Kong.

[56] DiMatteo op cit (n43)at 219

[57] Ogunranti op cit (n5) at 16; CISG; DiMatteo op cit (n43) at 311; P Schlechtriem, 'Requirements of Application and Sphere of Applicability of the CISG,' (2005) 36 *Victoria U. Wellington L. Rev.* at 789-790

[58] Ibid

[59] L Gama 'CISG-AC Opinion No. 17, Limitation and Exclusion Clauses in CISG Contracts,' (University of Rio de Janeiro, 2015) at 21-22

[60] Ogunranti op cit (n5) at 18; Schlechtriem op cit (n57) at 790; F Ferrari, 'CISG Case Law: A New Challenge for Interpreters,' (1998) Int'l Bus. L.J. at 496 ; Karton & de Germiny op cit (n43) at 456-457; Italy, 31 January 1996, District Court Cuneo, (*Sport d'Hiver di Genevieve Culet v. Ets. Louys et Fils*) available at http://cisgw3.law.pace.edu/cases/960131i3.html:The case was in respect of a contract of sale between a French seller and an Italian buyer. The contract in quiestion was regulated by the CISG. The issue arose from the claim that the seller had delivered non-conforming goods. The seller disputed the claim and alleged that the buyer failed to issue the notice of non-conformity within the reasonable time. Article 38 of the CISG provides that goods must be examined with as short period as practicable in the case concerned, and 39(1) of the CISG waived the buyers right to claim for lack of conformity if notice is not given within a reasonable time. The court relied on the interpretation by scholars that article 38 and article 39 allowed courts to flexibly decide what constitutes a reasonable time in each case. The court considered court decisions passed in Swiss and German to determine what was a reasonable time. The court concluded that the notice given 23 days after the goods had been delivered was not a reusable time, thus notice was untimely.; Austria, 13 April 2000, Supreme Court, (*Machines case*) available at http://cisgw3.law.pace.edu/cases/000413a3.html:The court held that the standard applicable in the sellers country for assessing conformity of goods sold was not relevant unless the contracting parties agreed to incorporate that standard into their contract. The court held that the applicable standard was that set out in article 35(2) of the CISG. Thus, the seller did not have to observe the standard applied in terms of the Austrian law.; Delchi Carrier SpA v. Rotorex Corp., 71 F.3d 1024 (2d Cir. 1995) available at https://law.justia.com/cases/federal/appellate-courts/F3/71/1024/549265/: The court held that uniform interpretation and observance of the international character of the CISG requires an interpretation that is autonomous and not based on domestic laws of the courts. Nevertheless, the court held that Delchi was entitled to pre-judgement interest, without indicating court decisions or foreign interpretations that influenced it's judgement.; Germany, 3 April 1996, Supreme Court, (*Cobalt sulphate case*) available at http://cisgw3.law.pace.edu/cases/960403g1.html:The court held that the differences between the domestic

and inconsistencies within the CISG by creating a uniform understanding of terms and further develops the Convention.[61] Nevertheless, other legal systems have disputed the use of the CISG legal history arguing that interpretation must be inferred exclusively from the wording of legislation.[62] This view is criticised for promoting rigid and inflexible legislation.[63] Moreover, observing foreign judgements creates methodological problems due to different court's hierarchal structures in different jurisdictions since there is no direction in the legislative history or article 7 regarding the authoritative nature of such judgements and whether judgements from non-contracting states must be considered.[64] The consideration of foreign case law is criticised for ignoring that some legal systems, such as the Civil law system, do not record their court decisions, and for overlooking that the availability of foreign decisions does not guarantee the correctness of the

laws of a legal forum and the provisions of the CISG should not matter because autonomous interpretation of law requires interpretation that is not influenced by the domestic laws of a legal forum hearing a matter.

[61] I Schwenzer 'Interpretation and gap filling under the CISG: current issues in the cisg and arbitration' 15 *international commerce and arbitration at* 110

[62] J Honnold, 'Uniform Law For International Sales,'(1999) 3rd ed. *Kluwer Law International* at 120 available at http://www.cisg.law.pace.edu/cisg/biblio/honnold.html#27; 23 October 2007, American Arbitration Association, (*Macromex Srl. v. Globex International Inc.*) available at http://cisgw3.law.pace.edu/cases/071023a5.html: The tribunal did not consider the legislative history of the CISG to define what is 'commercially reasonable', rather it relied on the private international laws. The study reasons that relying on legislative history to interpret terms that are constantly changing as the international trade develop would not promote the purpose of the CISG. Thus, the tribunal's omission to observe legislative history must be viewed as being in compliance with the purpose of the CISG.; New Zealand, 30 July 2010, High Court of New Zealand, (*RJ & AM Smallmon v. Transport Sales Limited and Grant Alan Miller*) available at http://cisgw3.law.pace.edu/cases/100730n6.html: The case relates to a contract of sale of trucks between an Australian buyer and a New Zealand seller. The contract applied the Australian Design Rules (ADRs) to assess the roadworthiness of vehicles. The issue arose from the claim for damages suffered by the buyer as a result of the inability to register the trucks and to fully operate the trucks purchased from the seller. The court had to determine whether the seller was liable for breach resulting from its failure to comply with the registration requirement applicable in the buyer's country. The court held that the determination of the duty of the seller to register the trucks had to be determined in accordance with the requirement applicable in Australia at the relevant time and not in accordance with the standard that was applied in the past. The court held that law must be interpreted in accordance with its purpose and the terms of the Convention. The court was interpreting the contract based on domestic laws. The study submits that it is doubtful that the CISG is to be applied to interpret domestic law provisions. The observance of legislative history should be limited to that of the CISG.

[63] Honnold op cit (n62) at 121

[64] Ferrari op cit (n60) at 501; Bailey op cit (n26) at 293-294; Germany, 8 March 1995, Supreme Court, (*New Zealand mussels case*), available at http://cisgw3.law.pace.edu/cases/950308g3.html: The case concerned a contract between a Swiss seller and a German buyer, for the supply of mussels to be delivered in New Zealand. The issue arose from a claim for breach of contract resulting from the supply of mussels that exceeded the required cadmium countertraction levels. The court held that the seller was not obligated to supply mussels that complied with the requirements of the provisions or laws observed in the seller's state. The court held that the cadmium concertation of mussels supplied was within the limits of the CISG, thus there was no lack of conformity. The court held that the seller will only be bound by the standard of German law if the same standard was applicable in the seller's country. This court decision suggest that decisions of non-contracting states and laws observed in foreign states are not applicable in contracts, and should not be considered.

[64] Bailey op cit (n26) at 294.

interpretation and application of the CISG in such decisions.[65] Also, it is not clear which interpretation prevails if two forums give diverging yet autonomous interpretations of a provision, resulting in conflicting decisions.[66]

This lack of clarity undermines the goal of uniformity because it makes the authority of forum decisions dependent on the interpretation of foreign courts' sovereignty.[67] The absence of a provision regarding the binding force of foreign decisions means they only constitute persuasive authority.[68] Thus, forums must give persuasive authority to foreign forum decisions they deem to be well reasoned.[69]

Autonomous interpretation requires an understanding of foreign laws, it, therefore, creates a need for expert knowledge which forums might not have.[70] This increases transactional costs.[71] Nonetheless, due to the difficulty of amending the CISG to keep up with the pace of the developments in international trade, the flexibility in the autonomous interpretation promotes the development of the Convention and international trade relations among member states in accordance with the CISG preamble.[72]

Domestic laws must be considered as a last resort when interpreting the CISG,[73] and when the legislative history of the CISG or its provision shows that the drafters of the CISG relied on concepts that conflicts with mandatory domestic laws.[74] Autonomous interpretation is not a method of interpretation but a principle that gives preference to certain purposive or systemic influences in interpreting the CISG.[75] Not all terms or concepts must be interpreted autonomously. Certain interpretational mechanisms such as deference to the rules of 'private international law' must be dealt with under domestic

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65 Ferrari op cit (n60) at 502
66 J Froehlich *The Vienna Convention: A uniform approach to fill gaps within the scope of the Convention* (University of Cape Town, 2007) at 17.
67 Bailey op cit (n26) at 294.
68 F Diedrich 'Maintaining Uniformity in International Uniform Law via Autonomous Interpretation: Software Contracts and the CISG', (1996) 8 *Pace Int'l L. Rev*. at 312-313; Froehlich op cit (n66) at 18
69 DiMatteo op cit (n43) at 304 ; Bailey op cit (n26) at 291; AS Aguiar *The law applicable to international trade transactions with Brazilian parties: a comparative study of the Brazilian law, the CISG, and American law about contract formations* (unpublished Master's thesis University of Toronto, 2011) at 34.
70 Schwenzer op cit (n61) at 114
71 Ibid at 118
72 Froehlich op cit (n66) at 12
73 Ibid at 16.
74 Ibid.
75 Ibid

law principles because of the huge role that they plays in CISG gap filling.[76] Nonetheless, it may be difficult to decide which terms are not be interpreted autonomously, thus causing further divergency in cross border transactions.[77]

**(b) Good faith**

The inclusion of good faith as an interpretative guideline in the CISG was a matter of contention among the delegates involved in the negotiation phase of the CISG. Civil law states supported its inclusion on the grounds that parties should act in good faith and observe fair dealing at least in the formation of a contract.[78] While the Common law states opposed it on the grounds that it had no definite meaning and would lead to uncertainty and non-uniformity.[79] These conflicting opinions led to a concession between the delegates, which resulted in the inclusion of good faith only in the interpretation provisions of the CISG. Kiely puts forwards Lord Mansfield's view, in a case, in which he states that good faith should be a principle upon which legal rules are established. Therefore what is of importance is that the rules themselves must be certain and not necessarily the manner in which the rules were established.[80]

Article 7(1) does not define what is meant by good faith, or the standard for determining good faith, or its function.[81] This creates difficulty in applying this principle as it is not clear on whom it is imposed, and when it should be observed.[82] The term 'good faith' may carry different meanings in different legal systems influenced by a myriad of factors.[83] This concept of good faith greatly influences the scope and core character of the CISG, thus, if states have different meanings attached to this concept, there can be no uniformity in the application of the CISG.[84]

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76 Ferrari op cit (n60) at 497
77 Ibid at 499
78 Felemegas op cit (n3); Garro op cit (n21)at 466; Froehlich op cit (n66) at 19; DiMatteo op cit (n43) at 319; 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* at 215
79 Ibid; Kiely op cit (n52) at 4; Viejobueno op cit (n78) at 215 & 216
80 Kiely supra at 3; *Vallejo v. Wheeler, 98 Eng. Rep. 1012, 1017 (K.B. 1774).*
81 Ibid; Felemegas op cit (n3)
82 C Kee & E Munoz 'In Defence of the CISG',(2009) 14 *Deakin L. Rev*. at 104.
83 Felemegas op cit (n3)
84 Ibid; Froehlich op cit (n66) at 19-20

Good faith requires autonomous interpretation, thus, forums must not solely incorporate their domestic interpretation of this principle.[85] This also prohibits reference to the understanding of good faith found in other international conventions or treaties. However, article 7(1) does not explicitly prohibit reference to international conventions. Schlechtriem argues that there is no reason why other international treaties cannot be considered for guidelines as this would be in line with the requirement of giving CISG its international character.[86] Walt submits that looking to international treaties for guidelines may present challenges due to the differences in the purpose for which the treaties were created and the context under which the principle is used.[87] Also, international treaties are only binding on states that have ratified the treaties, therefore imposing an interpretation of a principle contained in one treaty that contracting states might not even be signatories to may result in biased interpretation.[88]

Walt argues that the principle of good faith and fair dealing should be developed according to the structure and content of each legal system in which it is applied, taking into consideration the applicable domestic contract law and the needs of the domestic legal system concerned.[89] Accordingly, when interpreting good faith courts are required to look at the domestic law interpretations to the extent that such laws are suitable for the regulation of cross-boarder sales contracts.[90] However, it is not clear what amounts to suitable laws in this regard.

Another view argues that good faith must be interpreted in light of the standard of 'reasonableness',[91] or the standards of a 'prudent businessman in international trade.'[92] This will be determined by what is normal and acceptable in the relevant trade industry.[93] Nonetheless, the requirement of reasonableness will cause further divergence in the interpretation of CISG because there is no uniform standard to measure the conduct of a

85 Schlechtriem op cit (n57) at 790
86 Ibid
87 S D Walt 'The modest role of good faith in uniform sales law' (2015) 33 (37) *Boston University International Law Journal* at 47
88 Ibid.
89 Ibid.
90 Ogunranti op cit (n5) at 19; Bailey op cit (n26) 296; Froehlich op cit (n66) at 43
91 Honnold op cit (n62) at 101; DiMatteo op cit (n43) at 320
92 Bailey op cit (n26) at 296; Froehlich op cit (n66) at 43 & 49
93 Honnold op cit (n62) at 101

'prudent businessman', thus forums will be inclined to apply their domestic standards when interpreting this principle.[94] It is almost impossible to apply the same standard across member states with vastly different socio-economic, technological, and legal systems without causing prejudice while ensuring fair dealings among the parties involved.

The absence of the definition of good faith in article 7(1) is seemingly resolved by requiring forums to interpret this concept in terms of the guidelines provided in article 7(2).[95] Bailey argues that identifying good faith as an interpretive principle is 'either an empty pronouncement awaiting judicial decisions to give it content or an unfocused aspiration which cannot be effectively applied by any court.'[96] Consequently, this principle of good faith is open to diverse interpretations because of the room that article 7(2) allows for courts to rely on domestic laws by virtue of the application of the rules of PIL.

Moving to the role and time when good faith should be observed,[97] article 7(1) appears to require the consideration of good faith only in interpreting the CISG.[98] This appears to be limited to the interpretation of the provisions of the CISG and to matters expressly provided for under the CISG as per article 7(2), and not necessarily to every term of an international contract in its entirety.[99] The opinion that good faith is a general requirement in contracts was openly rejected during the drafting process of the Convention, therefore adopting this view would be undermining the Convention's drafting process and its outcomes since good faith was included in article 7(1) as a compromised solution to balance the conflicting views between the Common law and Civil law countries that were involved.[100]

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94 Ibid; Froehlich op cit (n66) at 49
95 Ibid
96 Ibid; Bailey op cit (n26) at 296.
97 Felemegas op cit (n3); Froehlich supra at 19
98 Felemegas op cit (n3); Schlechtriem op cit (n57) at 790
99 Walt op cit (n87) at 41 ; Kee & Munoz op cit (n82) at 105; Kiely op cit (n52) at 3; 23 January 1997, ICC Arbitration, Case No. 8611 (*Industrial equipment case*) available at http://cisgw3.law.pace.edu/cases/978611i1.html: The court stated that "[s]ince the provisions of Art. 7(1) of the CISG concerns only the interpretation of the Convention, no collateral obligation may be derived from the promotion of 'good faith'." The court held that the established practice of prompt delivery of the replacements parts of the machinery constituted a binding trade usage in terms of article 9(1) of the CISG.
100 Kiely op cit (n52) at 4

Keily highlights the view that good faith cannot exist in a vacuum and demands participation of the contracting parties in order to have any effect in practice.[101] The promotion of good faith provided for in the Convention, cannot be achieved if the requirement of acting in good faith is limited to the manner in which the provisions of the Convention are interpreted and does not extend to the conduct of the parties.[102] Thus, good faith must be a governing factor in all contractual negotiations giving rise to the rights and obligations of the parties.[103] Requiring a lesser standard would undermine the objective of article 7(1). However, proponents of the application of the principle of good faith to the actual conduct of the contracting parties, do not clarify whether it is to be observed subjectively or objectively.[104]

The absence of a definition of good faith leads to legal uncertainty and increased costs for parties involved in contract disputes.[105] This puts unnecessary strain on trade relations between parties, nonetheless, this is advantageous to the development of

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[101] Kiely op cit (n52) at 3; Walt op cit (n87) at 43; Hungary, 17 November 1995, Budapest Arbitration proceeding, case no. Vb 94124 (*Mushrooms case*) available at http://cisgw3.law.pace.edu/cases/951117h1.html : The arbitral tribunal held that the principle of good faith in article 7(2) required parties to perform their contractual obligation in accordance with the principle of good faith, therefore, issuing a bank guaranteed that has expired was contrary to the standard of good faith.

[102] Kiely op cit (n52) at 3; Walt op cit (n87) at 43 & 54; France, 22 February 1995, Appellate Court Grenoble, (*BRI Production "Bonaventure" v. Pan African Export*) Available at http://cisgw3.law.pace.edu/cases/950222f1.html:The case involved a contract of a sale of jeans between a buyer in the united states of America, in terms of which a French seller had to deliver the goods in South America and Africa. The buyer failed to provide the seller with the proof of the address of the place of delivery. Consequently, the goods were delivered in Span. As a result the seller suffered damages and terminated the contract and refused to make any further delivery. The court held that the buyer had breached the obligation to act in good faith through its conduct, therefore allowing the buyer to litigate would be contrary to the principle of good faith in terms of article 7.; Germany, 8 February 1995, Appellate Court München case no. 7 U 1720/94, (*Automobiles case*) available at http://cisgw3.law.pace.edu/cases/950208g1.html: The case was in respect of a contract of sale of cars in terms of which the buyer was obligated to issue a bank guarantee to the seller for the purchase price. When the cars were ready for delivery, the seller communicated the impossibility of performance due to changes in fluctuation rates. The seller subsequently cancelled the order of cars and claimed for repayment of monies paid under the bank guarantee and for damages suffered due to cancellation. The court aqou held that there were no legal grounds to receive the bank guarantee under the German law since the guarantee was issued for a different purpose, and that the seller did not use the remedy provided in the CISG to mitigate its loss. Thus, the seller would be unduly enriched by the maintaining the bank guarantee. On appeal, the buyer sought to claim for damages for breach of contract by a seller resulting from non-delivery. The court held that allowing the buyer to declare the contract void in trial and to avoid repayment of the guarantees, would be contrary to the principle of good faith because the contract was cancelled after the cars had been ready for delivery. Thus, there was no breach by the seller and contract was cancelled two years prior to the trial. The court stated that it is impossible not to apply good faith when assessing the conduct of the parties due to the nature of the CISG, as it regulates the rights and obligations of parties in a contract.

[103] Froehlich op cit (n66) at 42.

[104] Felemegas op cit (n3)

[105] Walt op cit (n87) at 68

CISG.[106] This flexibility in the interpretation of the principle of good faith allows forums to develop the CISG and to apply it to cater to the needs of parties subject to the ever-evolving laws of international trade.[107]

### 3.2.2 Article 7(2): Matters not expressly settled under the CISG

When a matter cannot be resolved by the application of the guidelines in article 7(1), more interpretive guides are found in article 7(2) which requires forums to first determine whether a matter is governed by the Convention and whether the CISG expressly settles that matter.[108] Article 7(2) acknowledges the insufficiency of the Convention in settling all the aspects of a contract by widening the interpretive guides to include the application of the rules of PIL.

#### (a) Gap filling

Article 7(2) makes it difficult to determine the existence of a gap within the Convention because it does not sufficiently provide the nature of the gap that must be filled by applying the general principles.[109] One view is that the term 'gap' in article 7(2) refers to a situation where the CISG is meant to apply to a particular contractual matter, but it does not contain a specific solution that would resolve a matter,[110] or where there is an unintentional omission of certain provisions regulating certain aspects of a contract.[111] Therefore, a gap relates to a matter that is governed by the Convention, in a sense that the contract meets the application requirements prescribed in article 1 and the application of the CISG is not excluded in terms of any other provisions of the Convention, however, the CISG does not provide a solution to the particular contractual dispute in question.[112] Andersen submits that this definition is too broad as it opens up room for the application of article 7(2) to many contractual situations where the solution may be unclear under the CISG. This threatens uniform interpretation and application of the CISG as forums are

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106 Schwenzer op cit (n61) at 112
107 Ibid.
108 F De Ly 'Sources of international sales law: An clectic model,'(2005) 25 (1) *Journal of Law and Commerce* at 1-12
109 C B Andersen 'General Principles of the CISG -- Generally Impenetrable?' (2008) at 18 available at http://cisgw3.law.pace.edu/cisg/biblio/andersen6.html (accessed on 17 May 2019)
110 Andersen op cit (n109) at 16
111 Ogunranti op cit (n5) at 20; Froehlich op cit (n66) at 20
112 Ibid

likely to adopt interpretations that are in line with their domestic laws when faced with contractual provisions that are not specifically provided for under the CISG.[113]

Ogunranti submits that the existence of a gap in the CISG must be read as the intention of the drafters not to cater to that specific aspect of a contract.[114] In terms of this view, there are no gaps under the CISG and where there is no provision contained within the Convention regulating a matter, the Convention must be considered not to apply to that specific issue.[115] This argument implies that only contractual matters that are covered under the Convention, notwithstanding the exclusions and reservations under the CISG, will be considered under article 7(2). The PIL rules must apply to matters excluded or reserved under the CISG, applying article 7(2) would render the exclusion ineffective and would be contrary to the parties' intentions and contrary to the principle of party autonomy on which the CISG is based.[116] Furthermore, exclusions are not 'internal gaps' within the CISG, rather these that are matters excluded from the ambit of the Convention.[117]

In light of the uncertainties regarding what constitutes a gap in article 7(2), the 'substance-procedure dichotomy' is used to assist in determining the existence of a gap, according to which the Convention is a substantive law and the words 'governed by' contained in article 7(2), must be interpreted as inquiring whether a matter is substantive or procedural in nature.[118] In order to determine whether a matter is a procedural one, one must ask whether there is 'difficulty of finding and applying the foreign rule' and 'the likelihood that the forum's rule will change the outcome in a manner that induces forum shopping.'[119] A matter will be labelled as a procedural matter if it is difficult for a domestic forum to obtain or apply foreign laws in a contract, and if applying foreign laws will have minimal or no impact on the substantive outcome of the sales contract that is involved.[120] This is due to the differences in domestic laws that influenced the creation of the CISG

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113 Andersen op cit (n109) at 19
114 Ogunranti op cit (n5) at 50; Froehlich op cit (n66) at 20
115 Ibid.; Andersen op cit (n109) at 19
116 M Wethmar-Lemmer, 'Party Autonomy and International Sales Contracts,' (2011) *J. S. Afr. L.* at 446.
117 Ibid at 446
118 A J McMahon 'Differentiating between Internal and External Gaps in the U.N. Convention on Contracts for the International Sale of Goods: A Proposed Method for Determining "Governed by" in the Context of Article 7(2)' (2006) 44 *Columbia Journal of Transnational Law* at 994 & 1004*;* Andersen op cit (n109) at 20
119 McMahon op cit (n118) at 1006
120 Ibid at 1006

as an international instrument and the compromises that were made by the countries that were involved in its creation process.

According to this test, domestic forums will conclude that a matter is procedural in nature if it is difficult to find and apply the provisions of the CISG, and if applying such provisions will not resolve the matter. Differences in the classification of a matter as substantive or procedural in nature may lead to uncertainty and non-uniformity in the application of the CISG due to the likelihood of each court adopting its own domestic legal standard of labelling a matter.[121] Thus, this approach should be used as a last resort and forums must decide autonomously whether a matter is procedural or substantive in nature.[122]

**(b) General principles**

Using general principles as a method of filling the gaps in the CISG was subjected to contrasting arguments in the drafting process of the Convention. One argument was that the gaps in the CISG must be filled by applying specific legal rules, such as domestic laws of either party in the contract.[123] The basis of this argument was that reference to general principles creates uncertainty because they are not identified in the CISG, thus applying such principles will not provide proper guidance.[124] Those who advocated for the use of general principles argued that recourse to domestic laws would undermine the international character of the CISG and its goal to create uniformity in the law.[125] A settlement was reached that reflects the final wording of article 7(2), and was the prevailing view of the delegates that were present at the Vienna conference, according to which courts must first refer to general principles, and if those principles cannot be found or do not exist, they must refer to the domestic laws of a contract.[126] The notion of relying on general principles reflects the standard of the Civil law system, as opposed to the Common law system, which strongly relies on case law precedents rather than legislation.[127]

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121 Andersen op cit (n109) at 20
122 McMahon op cit (n118) at 995
123 Froehlich op cit (n66) at 10
124 Andersen op cit (n109) at
125 Froehlich op cit (n66) at 10
126 Ibid at 10 & 11
127 Bailey op cit (n26) at 278 & 296

Article 7(2) indicates that the general principles are to be found within the CISG provisions, thus it becomes the duty of forums to ascertain what is meant by these general principles. The general principles in article 7(2) must be the pillars of the Convention.[128] Determining these undefined general principles can be challenging and a barrier to achieving uniformity in contracts.[129] Critics of the CISG argue that the general principles appear to be a fiction if there is no uniform understanding of what these are, among those who apply the Convention.[130] Furthermore, the development of case law and approaches in interpretations of the Convention results in more diverse approaches regarding the understanding of the general principles.[131] This view implies that the interpretation of the general principles of the CISG since its coming into operation, opens more room for varying interpretations.[132]

What is commonly understood from the wording of article 7(2) is that the general principles must be implied with sufficient clarity or expressly stated in the CISG.[133] This requirement conforms to the goal of promoting uniformity.[134] Without any close connection between the Convention and its general principles, the CISG would not be applied in a consistent manner and this would result in the application of conflicting principles leading to non-uniform law.[135] Furthermore, the words 'based on' provided for in article 7(2), emphasises the need for connection with the CISG, which excludes any general principles developed from domestic laws.[136] The general principles must be developed within the terminology of the CISG provisions.[137] However, general principles that developed beyond the terminology of the Convention, may be admissible in compliance with the mandatory laws of a state. Therefore, the development of general

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128 Brandner op cit (n43)
129 Bailey op cit (n26) at 299.
130 Andersen op cit (n109) at 17
131 Ibid
132 Andersen op cit (n109) at 23
133 Froehlich op cit (n66) at 30
134 Ibid
135 ibid
136 Ibid at 30
137 Brandner op cit (n45); Z Jiang 'In Favor of Appropriate Dynamic Interpretation for the CISG' Legal Uniformity' available at https://www.uncitral.org/pdf/english/congress/Papers_for_Programme/141-JIANG-Interpretation_of_the_CISG.pdf (accessed on 02 December 2019) at 5

principles will not be admitted as the law in force nor be admitted as future law.[138] They must be rules that are recognised at the relevant time but not laws in themselves.

Another view is that article 7(2) excludes the use of general principles developed by comparative legal analysis of laws of different states.[139] General principles developed in this way have no connection with the Convention and are not generally accepted by all member states of the CISG. This highlights that forums will commonly rely on their own domestic laws to develop general principles through comparative legal analysis. However, general principles that are developed outside the Convention, must be allowed if they are accepted at an international level.[140] General principles developed outside the CISG must not conflict with the general principles developed within the CISG, if there is a conflict between such principles, the general principles of the CISG must prevail.[141] This implies that the general principles of other international treaties will be considered but subject to the limits of the principles within the CISG. The connection of general principles with the Convention seems to require a link that is more than the adoption or application of a general principle by another CISG contracting state.

General principles in article 7(2) do not provide direct solutions, they merely function as a guide to forums determining the correct interpretation of contractual provisions.[142] Thus, the flexibility of article 7(2) allows forums to decide if a general principle adequately settles a matter and whether it is appropriate to resort to applicable rules of PIL for solutions.[143] Thus, the identification of general principles does not provide certainty because parties can never be certain that a general principle will adequately resolve a matter and consequently eliminate the need to apply the rules of PIL. It is also not clear whether the rules of PIL will apply where a general principle exists but is not sufficient since article 7(2) calls for the application of the rules of PIL where general principles are not found. Nevertheless, article 7(2) of the CISG prevents the diverging

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[138] Ibid.
[139] U Magnus 'General Principles of UN-Sales Law' (1995) 59(3-4) available at https://www.cisg.law.pace.edu/cisg/biblio/magnus.html (accessed on 17 June 2019)
[140] Ibid
[141] Froehlich op cit (n66) at 32
[142] L Lassila 'General Principles and Convention on Contracts for the International Sale of Goods (CISG) – Uniformity under an Interpretation Umbrella?', (2017) 5 (2) *Russian Law Journal* at 126.
[143] Andersen op cit (n109) at 18.

interpretations of the provisions of the Convention, influenced by domestic laws,[144] ensuring that interpretations adopted by forums conform to the purpose and the principles of the Convention.[145]

The application of the rules of PIL is regulated by the private international legal principle of 'common knowledge', recognised by many states.[146] The application of these rules requires the fulfilment of certain elements, namely, (1) party autonomy; (2) a close connection; and (3) the 'characteristic performance'.[147] Even though the application of the rules of PIL is based on similar rules to that of the application of the Convention, these will result in the application of different laws because one forum might put more emphasis on one principle over another, resulting in legal uncertainty and unpredictable in cases of litigation.[148]

Uniform interpretation is enhanced by the establishment of readily available online information systems, such as UNCITRAL Texts on case law (CLOUT), International Case Law and Bibliography on CISG (UNILEX), UNCITRAL Digest, Pace University CISG website, and the CISG Advisory Council ('CISG-AC') that publish court and arbitral decisions, as well as scholarly writings on the CISG from its diverse member states around the world.[149] Nonetheless, all the information published in these systems is not binding on forums.[150] Furthermore, the information, such as court and arbitral decisions, is not immune to the national, linguistic, and legal backgrounds of the countries in which they come from.[151]

### 3.3. Conclusion

This chapter reveals that there is no uniform understanding or approach for interpreting the terms of article 7 of the CISG. Article 7 merely guides interpretation. The flexibility in the terminology of article 7 allows for the achievement of the overall objectives of the

144 Magnus op cit (n139); Andersen op cit (n109) at 25
145 Ibid; Jiang op cit (n137) at 5.
146 L Wei 'On China's Withdrawal of Its Reservation to CISG Article 1(b)' (2014) 2 *Renmin Chinese L. Rev.* at 302.
147 Ibid.
148 Ogunranti op cit (n5)at 1-2; . Jiang op cit (n137) at 6
149 Wethmar-Lemmer op cit (n38) at 377 & 476; Karton & de Germiny op cit (n43) at 478
150 Bailey op cit (n26) at 310
151 Ibid at 455

CISG, which is not limited to the promotion of uniformity. It is submitted that a strict interpretation of the provisions contained in article 7, would be contrary to the obligations contained in the CISG preamble in relation to the promotion of fair dealings and the consideration of the social, economic, and legal differences of its diverse member states.

## CHAPTER 4

### The principle of party autonomy

### 4.1. Introduction

This chapter analyses the role of the principle of party autonomy under the CISG and its impact in the achievement of the goal of uniformity of law as reflected in the preamble of the CISG.[152] First, the chapter analyses the exercise of party autonomy in the indirect application of the Convention in article 1(1)(b). Secondly, it examines the indirect application of the party autonomy principle when applied by a contracting state that has made the reservation in terms of article 95. Thirdly, when the contracting parties exclude or modify the application of the Convention in terms of article 6. Fourthly, the freedom of contract form provided for in article 11. This chapter also examines the mechanism in terms of article 96, employed by states that have reserved the freedom of form and require contracts made by parties from these states to be in writing. Finally, this chapter examines the application of trade usages in terms of article 9.

### 4.2. What is party autonomy?

The 'principles of party autonomy and contractual freedom, together with trade usage, national laws, uniform laws, and other international instruments of harmonisation, act in tandem to provide a framework that offers a relative degree of legal certainty and predictability, but at the same time also much-needed flexibility.'[153] Party autonomy allows parties to regulate their contracts in the manner that best suits their contractual needs by exercising a choice of law. The CISG reflects this efficiency in its framework.[154]

The principle of party autonomy has a varied history of development in different legal systems.[155] Therefore, in each country, a legal forum will regulate the requirements and limitations for the applicability of the principle of party autonomy differently.[156] This

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[152] The phrase 'contracting state(s)' or 'non-contracting state(s)' is interpreted to refer to CISG contracting or non-contracting states as analysed in chapter two. The phrases 'reserving' and 'non-reserving', or 'declaring' and 'non-declaring' are used interchangeably to denote the exercise of party autonomy as provided for in each relevant provision that is analysed

[153] Coetzee op cit (n1)at 23

[154] Ibid at 23.

[155] Ogunranti op cit (n5) at 25; Coetzee op cit (n1)at 3-4.

[156] Ogunranti supra at 24; T.W. Pounds, 'Party Autonomy - Past and Present', (1970) 12 *S. Tex. L.J*. at 229

absence of uniformity in the application and understanding of party autonomy within the Convention defeats the objective of the CISG to achieve uniformity in the laws governing cross-border sales contracts.[157]

### 4.3. Indirect application of the CISG: Article 1 (1) (b)

Article 1(1) (b) reflects the principle of party autonomy by requiring parties who have their place of business in non-contracting states to apply the Convention if the rules of PIL of a forum lead to the application of the domestic laws of a contracting state.[158] In this case, it is the rules of PIL that trigger the application of the CISG and not the Convention itself.[159] The application of article 1(1) (b) may be excluded by contracting states that have made a reservation in terms of article 95.

### 4.4. Reservation of indirect application: Article 95

Article 95 allowing reserving states to exclude the application of article 1(1) *(b)* was an important provision required for the acceptance and coming into operation of the CISG in its early years.[160] It allows the application of laws outside the CISG to regulate a contract.[161] Thus, an article 95 reservation allows parties from contracting reserving countries to opt-out of the application of the CISG and to apply their domestic laws or the law of their choice in an international contract involving a party who has a place of business in a non-contracting country. The reservation plays a more limited role currently, due to the increasing number of contracting states, making the Convention autonomically applicable to contracts involving more and more parties who have their places of business in contracting states.[162]

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[157] Coetzee op cit (n1)at 3-4; A.D Weinberger 'Party Autonomy and Choice-of-Law: The Restatement (Second), Interest Analysis, and the Search for a Methodological Synthesis' (1976) 4(3) *Hofstra Law Review* 640)

[158] UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods United Nations, (2016) at 5 available at https://www.uncitral.org/pdf/english/clout/CISG_Digest_2016.pdf (accessed on 17 April 2019 ); CISG Article 1(1)*(b)* states that the Convention will apply to contracts: '*(b)* When the rules of private international law lead to the application of the law of a Contracting State.'

[159] UNCITRAL Digest of Case Law supra

[160] U G Schroeter 'CISG-AC Opinion No. 15, Reservations under Articles 95 and 96 CISG', (2013) at 7.

[161] F Ferrari 'What Sources of Law for Contracts for the International Sale of Goods? Why One has to Look Beyond the CISG' (2005) 25 *International Review of Law and Economics* 314–341.

[162] Schroeter op cit (n160) at 7.

The inclusion of article 95 was motivated by socialist states at the Vienna diplomatic conference in support of protecting parties against being subjected to the laws they are unfamiliar with. [163] The socialist states who used standard form contracts that provided them with predictability and mutual benefit, wanted to avoid the risks that could arise from the unpredictability of applying the rules of PIL in terms of article 1(1)(b), thus they wanted the option of excluding the application of these rules in contracts involving a party from a non-contracting state.[164]

The United States of America ('USA') and China made the article 95 reservation.[165] Chinese delegates present at the Vienna conference voiced their concern that the indirect application of the CISG provided for in article 1(1)(b), would have the unanticipated effect of depriving Chinese traders of the advantage of applying the laws of China in contracts involving parties from non-member states of the CISG.[166] The USA wanted maximum clarity on the applicability of the CISG that is threatened by the legal uncertainty and unpredictability of the application of the rules of PIL in terms of article 1(1)(b). [167] Delegates from the USA also supported the exclusion of the CISG in a contract involving parties that have their place of business in reserving states.[168] Another reason for the USA's reservation was to avoid the displacement of its laws through the application of the rules of PIL in terms of article 1(1)(b).[169]

Article 95 declaration can only be made at the time of the deposit of the instrument of acceptance, approval, or accession of the Convention by a state.[170] Failure to make a declaration at this time will result in the waiver of this right.[171] This is the time when a country becomes a contracting state but not necessarily when the CISG becomes enforceable in that state, however, the declaration will only have effect when the Convention enters into force in that country. [172] Likewise, the reservation can be

[163] Wei op cit (n146) at 311.
[164] Zhen op cit (n11) at 146
[165] Ibid at 143
[166] Ibid at 155
[167] Ibid at 164
[168] Ibid 165
[169] Ibid at 165
[170] Schroeter op cit (n160) at 8.
[171] Zhen op cit (n11) at 155.
[172] A M. Vickers 'The choice of law clause in contracts between parties of developing and developed nations' (1981) 11(3) GA. *J. INT'L & COMP. L* at 620.

withdrawn at any time, but the withdrawal will only have effect after the CISG enters into force in the reserving country. .[173]

The effect of article 95 becomes problematic when contracting states making this declaration choose to word it differently from the wording contained in article 95. This can lead to the wording of their declaration being incomplete and incompatible with the wording of article 95 as it appears in the wording of the CISG. [174] Schroeter indicates that a declaration made by Armenia uses words that are not found in article 95 and argues that such a declaration is ineffective outside of Armenia.[175] Such inconsistencies in the interpretation and application of the provisions of the CISG gradually influences the development of the Convention and international trade laws, shaping the domestic understanding and application of CISG provisions.[176]

The difficulty that arises in the application of article 1(1) (b) is that it allows for the application of domestic laws by virtue of the rules of PIL. This is further exasperated through the reservation contained in terms of article 95.

The dominant scholarly view supports the approach that the reservation will be binding in any contract involving a party that has its place of business in an article 95 reserving state, therefore, the Convention will not be applied in a contract even when the parties' choice of law leads to the laws of a non-reserving state.[177] It is submitted that article 95 has been used to exclude the reserving state's duty to apply article 1(1)(b) in terms of the rules of public international laws.[178] Thus, if one of the contracting parties is

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173 Zhen op cit (n11) at 155.
174 Schroeter op cit (n160) at 8.
175 Ibid
176 Schroeter op cit (n160) at 8.
177 Zhen op cit (n11) at 157
178 U G Schroeter 'Reservations and the CISG: The Borderland of Uniform International Sales Law and Treaty Law After Thirty-Five Years' (2015). 41 *Brook.J.Int'lL* at 244-245; July 1993, Appellate Court Düsseldorf (*Veneer cutting machine case*) available at http://cisgw3.law.pace.edu/cases/930702g1.html: The case concerned a contract for the purchase of a cutting machine from a seller who had his place of business in the United states, and a buyer who had his place of business in Germany. The cutting machine was to be delivered and installed in Russia, where the defects in the cutting machine caused injuries to a workman resulting in his death. Following this incident, the buyer sued the seller for payment of the costs of repairs and sought a ruling that the seller discharge its liability against the Russian firm where the machine was delivered. The court had to decide the jurisdiction where the obligations to pay for the claims had to be performed. At the time when the purchase agreement was concluded, Germany had not ratified the CISG, but the United States was a contracting state. Thus, the CISG was not applicable in the contract. However, the conflict of law rules in German indicated the laws of Indiana as applicable in the contract,

located in a reserving state, the rules of PIL of that state will exclude the CISG in compliance with the reservation made in article 95. In a sense, article 95 was incorporated into the CISG as a compromise to ease the concerns of some states who felt that the effect of article 1(1)(b) was too far-reaching, making the Convention applicable even when contracting parties did not intend or foresee the application of the Convention.[179]

### 4.5. **Exclusion or modification of the CISG: Article 6**

The principle of party autonomy under article 6 allows parties to exclude the application of the CISG or alter the effect of the application of most of its provisions by agreement.[180] The wording of article 6 raises a number of uncertainties which may impair the goal of the Convention to achieve uniformity.[181]

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consequently, the CISG became applicable since Indiana was a contracting state. The court did not observe the article 95 reservation made in the United States. However, the CISG was silent regarding the place of performance of the claims provided for in article 45 and article 74. The court applied the general principles in terms of article 7(2) and held that the general rule in terms of article 57(1)(a) of the CISG was that the seller's place of business was the place where the payments for the purchase price had to take place, therefore Indiana laws determined the jurisdiction of the forum in respect of the claims. The court also had to decide whether the seller had a claim for damages in respect of the buyer's liability to Russia arising from death and injury of the workmen. The court held that the obligation owed to the Russian was in respect of an injury claim that arose from the defects in the cutting machine purchased, and that the CISG allowed the indemnity claims as damages. Nonetheless, the court held that the CISG did not govern matters of death and injury as per article 5, thus the buyer could not claim for such under the CISG; Italy, 14 January 1993, District Court Monza, (*Nuova Fucinati v. Fondmetall International*) available at http://cisgw3.law.pace.edu/cases/930114i3.html:The court held that the CISG was not applicable because the parties had chosen Italian law as applicable. The court held that article 1(1)(b) is only applicable if there is no choice of law.

[179] Schroeter op cit (n160) at 13-14 ;Honnold op cit (n62) at 42; Japan, 19 March 1998, Tokyo District Court (*Nippon Systemware Kabushikigaisha v. O.*) available at http://cisgw3.law.pace.edu/cases/980319j1.html: The case related to a contract of sale of cars by a Japanese buyer and a seller who was a permanent resident of the United states and a registered resident of Japan. Following the seller's failure to prepare and to deliver the car to Japan, the seller cancelled the purchase agreement and claimed indemnity for the purchase price and modifications money paid for the delivery of the car. The seller sued in the court in Tokyo in terms of Japanese laws. Japan was not a CISG contracting state. The courts in Tokyo held that it did not have jurisdiction to apply its laws because the contract did not indicate the applicable law. Nonetheless, it referred to the provisions of the CISG to determine the factors that influence the determination of the applicable law. The court applied its conflict of laws in terms of which the United states laws became applicable as the law of the contract. The United states was a CISG contracting state and had made the article 95 reservation. In applying the CISG to the contract, the court in Tokyo did not refer to article 1(1)(b) or consider the reservation made by the United states, it applied the CISG as part of the laws of the united states. The study submits that this case implies that, although non-contracting states are not obligated to observe article 1(1)(b) and the CISG, legal forums are not prohibited from referring to the CISG for guidance.

[180] A I Pribetie 'An Unconventional Truth: Conflict of Law Issues Arising under the CISG,' (2009) 1 *NJCL* at 27; M Wethmar-Lemmer, 'The Vienna Sale Convention and Party Autonomy - Article 6 Revisited,' (2016) *J. S. Afr. L.* at 259 ; CISG Article 6 states that: '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.'

[181] Murphy op cit (n7) at 737.

### (a) Implied exclusion

The proponents of implied exclusion argue that, were only express exclusions allowed in terms of article 6, the wording of the language of article 6 would have clearly stated this and only made provision for express exclusions.[182] Accordingly, forums must determine whether an exclusion has been made, either expressly or implicitly. The word 'implied' was excluded from the wording of article 6 in order to avoid forums from easily concluding that the Convention is excluded without sufficient grounds.[183] Murphy submits that implied exclusions promotes the development of trade by making it easier to contract and allows the application of CISG in accordance with the changing needs of the parties in the ever-changing world of trade.[184] Implied exclusion makes it possible for parties to opt-out of the application the CISG provisions that are not suitable for their trade needs.

Contracting parties have a duty to make clear their intention to exclude the Convention or any part thereof, through their conduct before the conclusion of the agreement.[185] An implicit agreement will be inferred if there is a clear, mutual, and tangible consent to exclude the Convention or any part thereof.[186] This would allow for the protection of weaker parties who fear that parties with stronger bargaining power would impose their laws in a contract.[187]

Different forums have adopted different interpretations of what constitutes an intention to exclude the CISG.[188] However, a forum's failure to apply the CISG in a

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[182] Ibid at 740; F Ferrari, 'Remarks on the UNCITRAL Digest's Comments on Article 6 CISG,' (2005) 25 *J.L. & Com* at 20-21

[183] Murphy supra ; Ferrari supra at 22; Richards op cit (n28) at 237.

[184] Murphy supra at 741.

[185] Wethmar-Lemmer op cit (n313) at 262

[186] Ibid; Ferrari op cit (n182) at 23

[187] Murphy op cit (n7)at 742-743

[188] Ibid at 16 ; Wethmar-Lemmer op cit (n180) at 258; L Spagnolo 'CISG-AC Opinion No. 16, Exclusion of the CISG under Article 6,' (2014) at 15, 16, 20, & 23-24; Switzerland, 16 March 1995, District Court Zug, (*Cobalt case*) available at http://cisgw3.law.pace.edu/cases/950316s1.html: The court held that the parties elected the Swiss law as applicable to a contract because they did not explicitly make reference to the CISG or any foreign law in their submissions and proceedings in the Swiss court. ; 26 September 1995, France Cour d'Appel de Colmar, 1ère chambre civile (*Musgrave Ltd. v. Céramique Culinaire de France S.A.*) available at http://www.unilex.info/cisg/case/236: The court held that the CISG was excluded by the

contract when it is applicable is a breach of its international obligation.[189] Even the conduct of a third party such as legal counsel in litigation who acts as an agent of one of the contracting parties, may tacitly exclude the Convention and vicariously bind the party thereto,[190] but only to the extent that they have been authorised by that party to do so.[191] An agent will be governed by the same rules applicable for interpreting the conduct of a contracting party, as contained in article 8.[192]

The election, by the parties, of the law of a specific state to apply to a contract or any provision therein, will amount to an implicit exclusion of the Convention if such law is not of a contracting state.[193] If, however, this chosen law of a non-contracting state applies to parts of a contract not governed by the CISG, there is no implied exclusion there.[194] Such law will regulate only the specific provisions not governed by the CISG. If the chosen law of a non-contracting state governs aspects of the contract that are equally governable by the Convention, or cover more than that covered within the scope of the Convention, legal forums must conclude that there is sufficient intent of the parties to exclude the CISG or part thereof.[195] The mere use of a contract term from another

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parties' express choice of French domestic law as applicable in the contract; Italy, 19 April 1994, Arbitral Award Ad Hoc Arbitral Tribunal - Firenze (Florence), (*Società X v. Società Y*) at http://www.unilex.info/cisg/case/60: The tribunal held that the CISG was implicitly excluded by the parties' choice to be governed exclusively by Italian law.

189 Spagnolo op cit (n188) at 27

190 Ibid at 28; Italy, 12 July 2000, District Court Vigevano, (*Rheinland Versicherungen v. S.r.l. Atlarex and Allianz Subalpina S.p.A.*) available at http://cisgw3.law.pace.edu/cases/000712i3.html:The court held that the mere fact that the parties only based their arguments on the Italian law and made no mention of the CISG, does not mean they intended to exclude the Convention. Ignorance of law does not constitute an intention. Nevertheless, the Court held that the letter produced by the buyer to prove notice of non-conformity was vague and it did not meet the requires in article 39 of the CISG.

191 Ibid.

192 Ibid

193 Ferrari op cit (n182) at 23-24 & 25-27; Aguiar op cit (n69) at 9; Spagnolo op cit (n188) at 11; 30 July 2001, US District Court for the Northern District of California - 164 F. Supp. 2d 1142 (N.D. Cal. 2001) available at https://law.justia.com/cases/federal/district-courts/FSupp2/164/1142/2459871/**:**The court held that the parties' choice of Colombian laws did not indicate a clear intention to exclude the application of the CISG because Colombia was a signatory of the Convention. The parties did not make reference to Colombian domestic law exclusively.

194 Spagnolo op cit (n188) at 13

195 Wethmar-Lemmer op cit (n180) at 263; Spagnolo op cit (n188) at 14 ;Pribetie op cit (n180) at 40; Germany, 17 September 1993, Appellate Court Koblenz, (*Computer chip case*) op cit (n 28); United States, 29 March 2004, Federal District Court [Pennsylvania], (*Amco Ukrservice et al. v. American Meter Company*) available at http://cisgw3.law.pace.edu/cases/040329u1.html: The legal forums held that, notwithstanding the choice of law of a contracting state law, the CISG did not apply to the distributorship agreements. However, the CISG will be applicable to the sales agreement related to the distributorship agreement, and if the contracts related to sale of goods within the interpretation of the CISG.

jurisdiction, will not amount to a choice of law of that jurisdiction.[196] Similarly, where the provisions of a contract are in conflict with the provisions of the CISG, legal forums must not infer an automatic intention to exclude the Convention or part thereof.[197] The CISG is excluded only if a clear intention to do so by the parties can be inferred.[198]

**(b) Express exclusion**

Murphy criticises the use of implied exclusion as contrary to the goal of uniform law and submits that it is contrary to the wording of article 6.[199]

Proponents of express exclusion argue that article 7(1) of the CISG requires the observance of good faith in interpreting its provisions, this requires an interpretation of article 6 that only permits express exclusion.[200] This protects parties with weaker bargaining power and those who may be new to international trade and lack the

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196 Spagnolo op cit (n188) at 11

197 Ibid at 15

198 Ibid

199 Murphy op cit (n7)at 743; Wethmar-Lemmer op cit (n180) at 262; Germany, 5 April 1995, District Court Landshut, (*Sport clothing case*) available at : http://cisgw3.law.pace.edu/cases/950405g1.html: The case related to a claim by a buyer for restitution following a delivery of non-comforming goods by a seller. The seller had sold sports clothes to the buyer, the clothes did not conform with the contractual quality because they shrank after they have been washed and could not be worn again. The court held that contracting parties can implicitly exclude the application of the CISG through private international law rules. However, in the present case, the CISG was not excluded by the choice of German law since it was a contracting state. Thus, the seller was still entitled to the rights in articles 38 and 39 of the CISG which provided that the claim for non-conformity is waived if notice is not given within the reasonable time under the circumstance of the case. However, the court held that the seller knew of the non-conformity of goods, thus it could not avoid the claim. The court held that the seller refused to take delivery of the clothes after they have been returned by the buyer, and to refund the buyer for the purchase price. The court held that the CISG did not govern the claims for failure to take restitution and that there were no general principles to settle this question. Thus, the court applied the private international laws which led to the application of the German laws; USA, 15 June 2005, U.S. District Court, New Jersey, (*Valero Marketing v. Greeni Oy*) available at http://www.unilex.info/cisg/case/1035: The court held that the choice of laws of New York did exclude the application of the CISG, the parties' rights and obligations remained governed by the CISG to the extent applicable in New York. Thus, the CISG did not apply to contract formation provisions as provided in Part II, private international rules regulated the validity of the confirmation letter. The court held that a choice of law must substantially change the contract terms and must be consented to by the parties; 30 July 2001, US District Court for the Northern District of California - 164 F. Supp. 2d 1142 (N.D. Cal. 2001) op cit **(**n193)

200 Wethmar-Lemmer op cit (n116)at 435 ; Murphy op cit (n7)at 749, 745, & 746-747; W Menezes 'The opting-out and opting-in system of the 1980 Vienne Convention on International Sale of Goods (CISG) Its application in Brazil' (2018) 1(50) *Revista Jurídica* at 132; United States, 11 June 2003, US Court of Appeals for the Fifth Circuit, (*BP Oil International and BP Exploration&Oil INc v. Empresa Estatal Petroleos de Ecuador PetroEcuador et al*) available at http://www.unilex.info/cisg/case/924: The court held that the parties' choice of Ecuador was not sufficient to conclude that the parties intended to exclude the CISG as part of the Ecuadorian law and exclusively apply its domestic laws. The court's decision was based on the view that the principle of good faith required that the choice of law of a contracting state must expressly state that the CISG is excluded and that only the domestic laws of that state will apply in a contract.

knowledge of trade practices, from being prejudiced by implicit application or exclusion of laws.[201] Express exclusions provide legal certainty and prevent the incorrect and prejudicial inference of an implicit agreement to exclude the Convention that may be contrary to the parties' intentions.[202] Also, it avoids non-uniform application of the CISG that may result from legal forums reaching different conclusions of what constitutes an implicit exclusion.[203]

**(c) Limitations to article 6**

Article 6 appears to have a wide ambit of application, but it expressly indicates that its application must comply with article 12 of the CISG as applied in the relevant country.[204] Thus, an agreement to exclude or modify the Convention must be made in accordance with any form requirements that may be applicable in terms of article 12.[205]

Even though the wording of article 6 appears to grant it a wide ambit of application, article 7(1) cannot be excluded or derogated from.[206] Rajski argues that permitting the exclusion of article 7 could threaten the Convention's main goal of uniformity and the observance of good faith.[207] However, those who critique his view, do so on the basis of the uncertainty of the role of the principle of good faith as a general principle of the CISG and the non-recognition of this principle in the laws of many of its contracting state.[208]

4.6. **Freedom of form: Article 11**

Article 11 of the CISG provides that parties have the freedom to decide on the form requirements of their contract.[209] Thus, parties may conclude their contract informally

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201 Murphy supra at 745

202 Wethmar-Lemmer op cit (n116) at 435; Murphy op cit (n7)at 746-747 & 749;

203 Murphy supra at 749

204 U G Schroeter, 'The Cross-Border Freedom of Form Principle under Reservation: The Role of Articles 12 and 96 CISG in Theory and Practice,' (2014) 33 *J.L. & Com*. at 116.

205 Schroeter, op cit (n204) at 116; Spagnolo op cit (n188) at 23;Ferrari op cit (n161) at 330-331

206 G Brennan 'Commercial law and morality' (1989) 17(1) *Melb Uni L.R.* at 100; Kiely op cit (n52) at 5;

207 J Rajski 'article 96' (1987) *Bianca-Bonell Commentary on the International Sales Law* at 659-660

208 E A Farnsworth 'The Eason-Weinmann Colloquim on International and Comparative Law: Duties of good faith and fair dealing under the UNIDROIT Principles, relevant international conventions, and national laws', 3 *Tul. J. Int'l & Comp. L*. at 62; Kiely op cit (n52) at 5

209 CISG Article 11: "A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses."

even if their domestic laws require a contract to be in writing, unless they have their places of business within a contracting state that has made a declaration in terms of article 96.[210]

In the drafting process of the Convention, the inclusion of the freedom of form provision was supported by the majority of Common law countries that do not require contracts to be in writing,[211] and the Western legal systems who argued that the formal writing requirement slows down the speed of contracting. However, this relaxed standard of contract form conflicts with the contract form requirements of socialist countries that emphasises the importance of legal certainty and predictability in law.[212]

The freedom of form permits evidence of a contract from the parties' negotiations, intentions, conduct, and established or pre-contractual practices.[213] DiMatteo argues that the sufficiency of the evidence used to prove a contractual agreement will be determined by the domestic laws governing that contract,[214] and a relevent forum, depending on the circumstances of each case.[215] Article 11 refers to 'any means' of proving a contract without defining what this entails or how it may be limited.[216] It is submitted that such a

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[210] UNCITRAL Digest of Case Law op cit (n23) at 73; United States, 6 July 2010, District Court [Colorado] (*Alpha Prime Development Corporation, Plaintiff, v. Holland Loader*) available at http://cisgw3.law.pace.edu/cases/100706u1.html: The court held that writing is not the only way of proving the terms of a contract.

[211] T Kruger 'Feasibility Study on the Choice of Law in International Contracts - Overview and analysis of existing instruments', General Affairs and Policy of the Hague Conference on Private International Law, Preliminary Document No 22B, March 2007 at 385 available at http://www.hcch.net/upload/wop/genaff_pd22b2007e.pdf (accessed on 07 March 2019 ); O Lando 'Consumers Contracts and Party Autonomy in the Conflict of Laws' ( 1972) 42 *Nordisk Tidsskrift Int'l Ret* at 209 & 210.

[212] Ibid.

[213] DiMatteo op cit (n43) at 324

[214] Ibid at 235

[215] UNCITRAL Digest of Case Law op cit (n23) at 73; Belgium, 24 April 2006, Appellate Court Antwerp, (*GmbH Lothringer Gunther Grosshandelsgesellschaft für Bauelemente und Holzwerkstoffe v. NV Fepco International*) available at http://cisgw3.law.pace.edu/cases/060424b1.html: The court held that although hearing the witness would prove the contract between the parties, it was not helpful; Belgium, 22 May 2002, District Court Hasselt, (*R.B.V. NV. v. J.V. BV*) available at http://cisgw3.law.pace.edu/cases/020522b1.html: The court held that a forum may rely on its own evidence rules to weight the documentary and oral evidence in order to determine the price.

[216] Ibid; J Lookofsky 'Digesting CISG Case Law: How Much Regard Should We Have?' (2004) 8 *V. J. INT'L COM. L. & ARB*. at 89; United States, 29 January 2010, Federal District Court [Pennsylvania], (*ECEM European Chemical Marketing B.V. v. The Purolite Company*) available at : http://cisgw3.law.pace.edu/cases/100129u1.html: The court interpreted 'any means' to mean 'documents, oral representations, conduct, or some combination of the three.' It held that the CISG permits the admission of all evidence to prove the contract, even when such evidence contradicts what is written in the contract.

broad provision has the effect of binding parties to contractual terms that they may not have intended to apply and it increases the possibility of contractual disputes and litigation costs, thus frustrating the goal of the Convention to promote uniformity and trade relations between contracting states.

Article 11 is limited by article 12 which provides that the freedom of form will not be enforceable where one party is from a contracting state that has reserved its application in terms of article 96.[217] Article 12 is also referred to as the 'opt-in' provision in that it imposes a writing formality where it would otherwise not be applicable.[218] Article 12 and article 96 do not entitle contracting parties to apply their own domestic law or to elect another law to regulate the form requirements in the contract.[219] However, it can be argued that the freedom to elect the laws to regulate the form requirement is implied in article 11. Furthermore, parties have an option to exclude the freedom of form under article 6.

The inclusion of article 12 and article 96 was supported by socialist countries, such as the then Union of Soviet Socialist Republic (USSR). The laws of the USSR required all contracts to be concluded in writing. Thus, article 12 and article 96 allowed the USSR to reserve the application of article 11.[220] China also made the article 96 reservation. It operated a "planned economy" with the state as the owner of international businesses and controlling international trade, [221] Chinese delegates present at the Vienna conference voiced their concern that many Chinese traders acting as agents of the state were inexperienced and lacked the knowledge of trade rules. Thus, the laws of China required formal written contracts to avoid prejudice to the state and to promote legal certainty in contracts.[222] When the CISG came into operation in China, the article 96 reservation was made with the view of protecting the state and its traders.[223] However, once Chinese contract laws developed in conformity with more modern trade laws based

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217 UNCITRAL Digest of Case Law op cit (n23) at 74; H Makale 'Freedom of Contract, Party Autonomy and Its Limit Under Cisg' ( 2016) 6(1*) Gül / Hacettepe HFD* at 93-94; CIGS

218 Pribetie op cit (n180) at 27, CISG; Makale supra at 25; Ferrari op cit (n182) at 35

219 Makale op cit (n217) at 25

220 Schroeter op cit (n160) at 211; Viejobueno op cit (n 78) at 211

221 Zhen op cit (n11) at 147

222 Ibid at 148

223 Ibid

on the CISG, allowing contracts to be formed orally, the need for the article 96 reservation fell away, resulting in China withdrawing this declaration in 2013.[224]

### 4.7. **Exclusion of freedom of form: Article 96**

The drafting history of article 96 reflects a compromise that was made to address the concerns of countries that wanted to preserve their domestic law contract form requirements.[225] Article 96 reservation has been mostly used by Common law states whose domestic laws require contracts to be in writing.[226] Article 96 allows contracting states, not contracting parties themselves, to reserve contract form requirements provided for in article 12 of the CISG.[227] Therefore, any exclusion or modification made in terms article 6 must be done in accordance with article 12 and article 96.

An article 96 reservation is available to contracting states that make a writing requirement compulsory in contracts.[228] This is criticised for threatening uniformity of law as it permits a wide possibility of exclusion of the provisions of the CISG and unequal treatment of similar contracts under the CISG, thus preventing the promotion of fair dealings.[229] A contract remains regulated by the CISG, however, the writing requirements will be regulated by domestic laws. Consequently, some provisions of the CISG will be endorseble if they comply with the domestic writing requirements.

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224 Ibid at 150

225 Schroeter op cit (n160) at 9; Viejobueno op cit (n 78) at 210-211

226 Schroeter op cit (n204) at 87-88

227 Schroeter op cit (n160) at 9; CISG Article 96 states that: 'A Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration in accordance with article 12 that any provision of article 11, article 29 or Part II of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in that State.'

228 Schroeter op cit (n160) at 6 & 20; Mexico, 29 April 1996, COMPROMEX, Comisión para la Protección del Comercio Exterior de Mexico, case no. M/21/95, (Conservas la Costena S.A. de C.V. v. Lanis San Luis S.A. & Agro- industrial Santa Adela S.A.) available at http://www.unilex.info/cisg/case/258: The tribunal held that the writing requirement in accordance with article 96 declaration made in Argentina, were met and that the contract was concluded because all the essential contractual terms were in writing. The tribunal held that a different interpretation of the writing requirement would be contrary to the general principles of the CISG. The tribunal held that the exchange of letters of credit between the parties, in favour of the seller, sufficiently proved the existence of a contract and that this contract was binding on the seller and the sub-contracted firm.

229 Rajski op cit (n207) at 659-660

An article 96 reservation can be made at any time.[230] This flexibility allows states the freedom to change or develop their laws to require written form after they have ratified the Convention.[231] Article 96 declaration must be enforced until it is withdrawn in accordance with article 97 even when the domestic laws of the reserving state change.[232] Anything to the contrary would be incorrectly applying the Convention and may result in an invalid contract.[233]

### (a) The binding effect of article 96

There are different views regarding the binding force of an article 96 declaration in contracts involving reserving states and non-reserving states. One view is that it eliminates all contracting states' obligation to apply the freedom of form provision.[234] This is reflected in article 12, which links the effect of article 96 reservation to the place of business of either party to a contract and not a forum.[235] This does not extend to non-contracting states since they have no obligation to consider article 12.[236]

### (b) What law regulates the form requirement

The absence of direction on whether parties can dictate the laws governing the formal validity of contracts or whether this will be determined by the rules of PIL of a forum,[237] has resulted to the uncertainty of law as reflected by the non-uniform approaches used for determining the laws that regulate the form requirements in a contract.

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230 Makale op cit (n217) at 17; CISG.
231 Schroeter op cit (n160) at 17; Schroeter op cit (n204) at 86
232 CISG
233 Schroeter op cit (n160) at 18-19
234 Schroeter op cit (n204) at 97; UNCITRAL Digest of Case Law op cit (n23) at 444.
235 Ibid; Schroeter op cit (n160) at 6 & 22; Schroeter op cit (n204) at 97; China, 17 October 1996, CIETAC Arbitration proceeding, (*Tinplate case*) available at http://cisgw3.law.pace.edu/cases/961017c1.html:The case arose from the sellers failure to deliver tin plates in accordance with the delivery time stipulated in a contract of sale. The contract was regulated by the laws of China. China is a contracting party, therefore the CISG was applicable in the contract subject to the article 96 reservation in terms of which a writing requirement was required in the conclusion, alteration, and termination of a contract. The seller had communicated that is would not be able to deliver the goods due to the strike action at the firm and requested for the extension of the delivery time and modification of price provisions and other contract terms. This was communicated by fax. The arbitral tribunal held that the seller made no written response to the faxes sent by the seller, as required by article 96 of CISG. Thus, there was no acceptance of the terms offered in the faxes and the seller was not relieved from the contractual obligations to deliver on the time stipulated in the sales contract. Further, the strike did not relieve the seller from the obligations because article 14 of CISG made no provisions for force majeure. Thus, the seller was held liable for the financial loss suffered by the buyer due to non-delivery in breach of the contract.
236 Schroeter op cit (n204) supra at 97.
237 Ibid at 99.

One argument is that the mere fact that a party is from a reserving state means a contract is subject to all mandatory writing requirements of that state,[238] notwithstanding that the other party's state has not made the article 96 reservation.[239] Supporters of this view argue that article 96 was meant to protect states that wanted to reserve their contract law writing requirements.[240]

Critics of this approach argue that the universal application of the reserving state's writing form requirements suggest that article 96 reserving states are favored over non-reserving states or non-contracting states, thus the non-reserving states' freedom of choice is unfairly limited.[241] Schroeter contends that this approach is based on a misunderstanding of the effect of article 96 in relation to article 12. Article 12 must be read in conformity with the purpose of article 96.[242] Courts have taken the view that article 96

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[238] Schroeter op cit (n160) at 23-24 ; Russia, 9 June 2004, Tribunal of International Commercial Arbitration, case no. 125/2003, available at http://cisgw3.law.pace.edu/cases/040609r1.html: The case related to a contract of sale between a Russian company that sold goods to a Cyprian firm. The action was for a claim by the seller for payments of the price for goods delivered and penalty for delay in payments with interest. The issue arose from the cancellation and alteration of arbitral clause by an authorised agent acting on behalf of the seller. The arbitral agreement in question was regulated by the laws of Russia that required contracts to be in writing in terms of article 96 of the CISG. The tribunal held that the capacity (authority) of the agent to cancel and change the arbitral agreement had to be determined by the personal laws of the state where the legal entity was established, and not the CISG. The tribunal held that the previous agreement was terminated by the new arbitral agreement signed by the director of the managing company who acted on behalf of the seller, and that the CISG regulated all obligations arising from the new agreement. Nevertheless, the tribunal held that the alteration of the external economic agreement had to conform to the mandatory domestic law requirements of the Russia Civil Code that regulated the interest rates, and that any alteration that is contrary to these requirements will be null. The tribunal concluded that the Russian law requires all alterations or termination of contract terms to be in writing and that the claims based on the parties' contract cannot not be proved by testimonial witnesses alone.

[239] Schroeter op cit (n204) at 101

[240] Schroeter op cit (n160) at 24; China, 6 September 1996, CIETAC Arbitration proceeding, (*Engines case*) available at http://cisgw3.law.pace.edu/cases/960906c1.html: The case related to a contract for purchase of engines. The contract was regulating by the laws of China, thus the CISG applied subject to contract writing form requirement under the laws of China. The issue arose fromm the late delivery of engines. The arbitral tribunal found that the cause of delay in delivery was due to the buyer's misunderstanding regarding the reports of the optional units of the machines. As a result, the manufacturer issued an attachment list only for reference (94 revision), however, the parties signed the contract under the belief that the attachment list was for the machines previously purchased and not the new engines. Another list was issued (92 revision) and the parties confirmed delivery of goods. The dispute related to the 94 revision. The tribunal found that most items listed in the 94 revision did not conform to the contract. Nonetheless, the tribunal held that the 94-revision read with the 92 revision, was a binding agreement and evidenced the delivery of goods in accordance with the contract writing requirements. The tribunal held that the seller had a claim for wrongful delivery and that this claim must be based on the agreement in the 94 revision.

[241] Schroeter op cit (n204) at at 108; Makale op cit (n217) at 93-94

[242] Schroeter op cit (n160) at 28

and article 12 do not entitle reserving states to apply their own domestic laws.[243] Furthermore, the legislative history of the CISG indicates that the universal application of the reserving state's domestic laws was rejected on the grounds that it makes the effect of article 96 too wide.[244] The CISG would have expressly stated if it intended to allow such.[245] Nonetheless, the writing requirement in article 12 will not render an oral agreement invalid if a contracting party was not aware of it or relied on the conduct of another party that contradicts the formal requirement in article 96.[246] This ignores that an

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243 Netherlands, 12 July 2001, District Court Rotterdam (*Hispafruit BV v. Amuyen S.A.*) available at http://cisgw3.law.pace.edu/cases/010712n1.html:The case related to a contract of sale for the purchase of fruits. The contract was not written, however, the buyer had issued letters of credit. The buyer alleged that the contract terms were reflected in these letters. The seller did not dispute this but it argued that the letter of credit did not reflect all the contract terms agreed on by the parties and that there were omitted terms that applied as trade usages and agreed on emails, faxes exchanged between the parties, and orally. The contract in question was regulated by the CISG, however, there was no provisions under the CISG which settled the disputed content of the contract. Thus, the court applied the private international laws of Netherlands in terms of which the laws of Argentina were applicable to the matter. The laws of Argentina required contracts to be in writing in accordance with the article 96 declaration. The court held that the mere fact that Argentina has declared article 96 and that one party has his place of business in Argentina, does not mean its domestic laws will regulate the form requirements. The court held that the applicable law must be determine by the private internal laws of Dutch. The court held that trade usages are important in contract, according to the Dutch private international laws, therefore they must be considered to determine the law applicable. The court held that the agreement in respect of the delivery schedule constituted a binding trade usage in terms article 9(1) of the Treaty of Rome and it was enforceable from the date the parties consented to it. The court held that the law of Argentina was not applicable at this stage,therefore the Netherlands and Dutch laws do not require a writing requirement, accordingly the agreement was binding and valid.The court held that the practice in Netherlands that failure to respond to emails or faxes sent by the seller after the contract had been concluded, may constitute acceptance as per article 9(4) of the Treaty of Rome, will only be enforceable and valid if meets the writing form requirements of the laws of Argentina ; United States, 19 May 2008, Federal District Court [Florida] (*Zhejiang Shaoxing Yongli Printing and Dyeing Co., Ltd v. Microflock Textile Group Corporation*) available at http://cisgw3.law.pace.edu/cases/080519u2.html: The action related to a claim for payment of purchase price that was stipulated in eight purchase orders. The contracting parties had chosen to apply the CISG to their contracts. The plaintiff's place of business was located in China, accordingly the article 96 declaration made by China required contracts to be made in writing. The court held that the parties had concluded a contract in accordance with the rules of the CISG which provided that a contract is concluded as soon as there is an acceptance of an offer. The court held that written purchase orders sent to the defendant constituted an offer, and that the invoices and packaging list sent by the defendant constituted an acceptance of the offer. The court held that there was no written evidence that the plaintiff had altered or waived the defendant's contractual obligation to make payments. Thus, the defendant had a duty to pay and deliver goods in compliance with the contract. The court in this case did not apply the writing requirements in accordance with the laws of China, it only considered the element of writing broadly.

244 Schroeter op cit (n160) at 25

245 Schroeter op cit (n204) at 104

246 DiMatteo op cit (n43 at 327; Aguiar op cit (n69) at 43-44; Netherlands, 07 November1997, (Hoge Raad, J.T. Schuermans v. Boomsma Distilleerderij / Wijnkoperij BV) available at http://www.unilex.info/cisg/case/333: The case involved a party who had a place of business in Russian Federation, and who instituted an action for order for delivery against a vodka producer who had a place of business in Dutch. The action was based on the buyer's legal expectation of a contractual relationship following the payment of purchase price. This expectation was not based on written agreement. The tribunal held that the payment of purchase price did not constitute an offer, thus there was no agreement between the parties. The tribunal held that the Russian Federation laws required contracts to be in writing in accordance with the article 96 reservation. The tribunal held that this had to be determined by the

article 96 declaration can only be excluded or varied by the reserving states themselves and not the parties to a contract and that non-contracting states have no obligation to apply the Convention.[247] This approach creates confusion where two reserving states are involved.[248]

Another view is that the PIL rules must determine the applicable form requirements and the laws regulating those requirements.[249] If the rules of PIL lead to the laws of a non-contracting or reserving state, the domestic laws of that state will apply.[250] If the rules of PIL lead to the laws of a non-reserving state, the Convention will apply as part of its domestic laws with the result of allowing the freedom of form.[251] This approach has been

application of private international laws. The tribunal held that, because the private international laws led to the application of the laws of Netherlands, the CISG was applicable to the formation requirements as part of the laws of Netherlands. The tribunal held that there was no intention to conclude a contract because the Dutch producer had no knowledge that the payments was an offer, and that a reasonable person in the position of the producer would not have been aware of this.; Austria, 6 February 1996, Supreme Court, (Propane case) available at http://cisgw3.law.pace.edu/cases/960206a3.html:The court held that the parties were not bound by the writing requirements in terms of the 'basic agreement' since the essential terms were not agreed on, thus the parities lacked the intention to be bound by such an agreement as trade usages in terms of article 9(1) of the CISG.

247 Schroeter op cit (n204) at 98-99

248 Schroeter op cit (n160) at 26

249 Makale op cit (n217) at 93-94; Rajski op cit (n207) at 659; Schroeter op cit (n204) at 101-103; UNCITRAL Digest of Case Law op cit (n23) at 74 & 444; USA, 16 April 2010, United States Court of Appeals Third Circuit, (Forestal Guarani S.A. v. Daros International Inc.) available at http://www.unilex.info/cisg/case/1537: In a contract involving parties from Argentina under which the CISG was subject to article 96 reservation, and a party who had his place of business in the United states, a non-reserving state. The tribunal held that the CISG was applicable by virtues of both parties having their place of businesses in contracting states. However, the tribunal held that, because the parties did not make a choice of the law that was applicable to formation requirements, plain reading of the CISG requires the application of private international laws for determinating the laws applicable to the form requirements in the contract; Austria, 17 December 2003, Supreme Court (Tantalum powder case) available at http://cisgw3.law.pace.edu/cases/031217a3.html: The court held that the buyer's general terms were valid and constituted a contracts in terms of the parties' choice of Australian law, and that the application of the CISG under the laws of China did not extend to Hong Kong S.A.R.A

250 Ibid

251 DiMatteo op cit (n43) at 327; Aguiar op cit (n69) at 44 ; Netherlands, 07 November1997, (Hoge Raad, J.T. Schuermans v. Boomsma Distilleerderij / Wijnkoperij BV) op cit (n246); Hungary 24 March 1992, Metropolitan Court of Budapest, case no. AZ 12.G.41.471/1991, available at http://www.unilex.info/cisg/case/19: The tribunal had to decide whether the German seller and Hungarian buyer had concluded a sales contract over the telephone. Both parties had their places of business in contracting states, thus the CISG was applicable in terms of article 1(1)(a). The existence of the contract was disputed on the grounds that the laws of Hungary required contracts to be in writing in accordance with the CISG article 12 declaration. The tribunal held that the Hungarian laws did not regulate the matter before it, the private international laws had to be applied to determine the law regulating the formal requirements of contracts. The private international laws of Hungary indicated German laws as applicable, consequently, the CISG applied as part of the German laws. The tribunal held that German laws did not require contracts to be in writing, thus the parties were bound by the contract concluded telephonically.

adopted by Dutch courts.[252] Forums applying PIL must not apply international law instruments such as the UNIDROIT, as this would be in conflict with the purpose the reservation.[253] The applicable law must promote the purpose of article 96 and make it enforceable.[254]

The preferred approach is that the determination of the law regulating the contract form requirements becomes a matter not be expressly settled by the Convention, consequently, the general principles in article 7(2) will apply.[255] Contrary, Schroeter submits that the formal requirements and validity of a contract do not constitute an 'internal gap'.[256]

**(c) Scope of article 96**

The words 'other indication of intention' in article 96 is vague regarding the scope of the declaration.[257] One view submits that the effect of article 96 extends to declarations made in part I-III of the Convention.[258] A preferred view is that article 96 only applies to declarations in respect of the formation, modification, and consensual termination of contracts.[259] Article 96 does not extend to other form requirements for the validity or enforceability of contracts, such as registration of contracts and attachment of stamps.[260]

The scope and effect of article 96 becomes problematic where a contracting state makes a declaration that does not comply with the wording in article 96.[261] The declaration that was made by China made no reference to article 29.[262] It is not clear

252 Schroeter op cit (n160) at 27; Netherlands, 07 November1997, (Hoge Raad, J.T. Schuermans v. Boomsma Distilleerderij / Wijnkoperij BV) op cit (n246); Netherlands, 12 July 2001, District Court Rotterdam (Hispafruit BV v. Amuyen S.A.) op cit (n433): The court applied the CISG in accordance with the private international rules of Dutch. The CISG was not applied exclusively.

253 H Mather 'Choice of Law for International Sales Issues Not Resolved by the CISG,' ( 2001) 20 Journal of Law and Commerce at 200

254 Ibid

255 Schroeter op cit (n160) at 24

256 Schroeter op cit (n204) at 109

257 Schroeter op cit (n160) at 21

258 Ibid

259 bid; Russian Federation, 16 February1998, High Court of Arbitration of the Russian Federation, case no. 29 available at http://www.unilex.info/cisg/case/365: The court held that the contract could not be modified orally over the telephone because Russian laws required contract modifications to be in writing as per article 96 declaration and article 12 of the CISG; see CISG article 29(2)

260 Ibid

261 Schroeter op cit (n204) at 93.

262 Ibid; The declaration made in China states the following: '[t]he People's Republic of China does not consider itself bound by ... article 11 as well as the provision of the Convention relating to the content of article 11.'

whether China intended to exclude the application of article 96 in cases of modification and termination of contracts.[263] One argument is that the declaration made in China suggests that its application is limited to the conclusion of contracts and not the modification or termination of a contract.[264] Another argument is that a proper interpretation of the effect of this declaration must be in accordance with the scope of article 11.[265] Thus, the declaration made in China applies as though it was clear and in accordance with article 96.[266]

### 4.8. **Application of trade usages: Article 9**

Article 9 of the CISG regulates the application of trade usages in a contract.[267] However, the validity of trade usages is not provided for under the CISG, therefore it will be governed by the proper law of a contract.[268]

The inclusion of article 9 was challenged by socialist and developing nations who feared that the application of trade usages would have the effect of imposing usages that are commonly known and used in developed countries, on states that are unfamiliar with such trade usages.[269] They argued that many trade usages were developed by industrialised nations and reflected their interests over those of other nations.[270]

Developing states such as China, disputed the inclusion of implicit application of trade usages where it was unreasonable to conclude that all contracting parties were

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263 Schroeter op cit (n204) at 93

264 Schroeter op cit (n160) at 19.

265 Schroeter op cit (n204) at 93-94

266 Ibid

267 CISG Article 9 reads as follows: '(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves. (2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.'

268 Ogunranti op cit (n5) at 50; S Bainbridge 'Trade Usages in International Sales of Goods: An Analysis of the 1964 and 1980 Sales Conventions,' (1984) 24 *Va. J. Int'l L*. at 619

269 Bainbridge supra; 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* at 12; Viejobueno op cit (n 78) at 202-203.

270 L M Ryan 'The Convention on Contracts for the International Sale of Goods: Divergent Interpretations', (1995) 4 *Tul. J. Int'l & Comp. L*. at 104; Boghossian supra

aware of such trade usage.[271] These nations were also against the application of any trade usages that contradict or exclude the mandatory laws of a country.[272] Developed states such as the United States, on the other hand, maintained that regular observance of usages increased trade flexibility, economic growth, and efficiency in trade.[273] Unlike developing states, these states favoured the implicit application of trade usages if such usages were reasonably known or ought to be known by contracting parties.[274]

The final wording of article 9 reflects the views of the industrialised states in that it allows for the implicit application of trade usages in article 9 (2). However, article 9 does not provide what law will apply if trade usages conflict with the provisions of the CISG applicable in a contract. This gap in the wording of article 9 appears to accommodate the views of socialist states that trade usages must not supersede the provisions of the proper law of a contract.

**(a) What constitutes trade usages**

Trade usages are defined as uniform systemic behaviours adopted by contracting parties in a similar trade industry.[275] The development of international trade usages is influenced by cultural, legal systems, social status, languages, and the geographical positions of each trading nation.[276]

The three theories used for determining the binding force of trade usages in a contract, namely, the contractual approach, the functions approach, and the normative approach, are analysed below.

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[271] Ryan Ibid at 103 & 104;

[272] T N Tuggey 'The 1980 United Nations Convention on Contracts for the International Sale of Goods: Will a Homeward Trend Emerge' (1986) 21 *Tex. Int'l L. J.* at 552; Bainbridge op cit (n268) at 640-641; Ryan op cit (n270) at 103

[273] Ibid

[274] Ibid

[275] C P Gillette 'The Law Merchant in the Modern Age: Institutional Design and International Usages under the CISG,' (2004) 5 *Chi. J. Int'l L*. at 160.

[276] Gillett op cit (n275) at 170; A W Katz 'The Relative Costs of Incorporating Trade Usage into Domestic versus International Sales Contracts: Comments on Clayton Gillette, Institutional Design and International Usages under the CISG,' (2004) 5 *Chi. J. Int'l L.* at 183.

**(b) Article 9(1)**

Article 9(1) of the CISG reflects the contractual approach because it binds parties to their agreed and established practices.[277] Established practices will be inferred if they appear in the formation of a contract and have regulated the parties' contractual relationship.[278] A practice will be established if it can be proved that parties have adopted

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[277] H Jokela 'The Role of Usages in the Uniform Law on International Sales' *(1966) 10 Scandinavian Studies in Law* at 88; France, 13 September 1995, Appellate Court Grenoble, (*Caito Roger v. Société française de factoring*) available at http://cisgw3.law.pace.edu/cases/950913f1.html: The court held that the French buyer and Italian buyer had established a practice of delivering goods after receipt of purchase orders, without questioning the solvency of the buyer. The seller was held to be bound by this usage in terms of article 9. Furthermore, the court held that the seller knew that the goods would be delivered in French, thus the seller was bound by the usages observed. The court held that the seller was liable for abrupt discontinuance of contractual relationship since this principle was observed in French.

[278] Ch. Pamboukis, 'The Concept and Function of Usages in the United Nations Convention on the International Sale of Goods', (2005) 25 *J.L. & Com*. at 114; Bainbridge op cit (n268) at 653; Germany, 13 April 2000, Lower Court Duisburg (*Pizza cartons case*) available at http://cisgw3.law.pace.edu/cases/000413g1.html: The court held that the crediting of the buyer for damages in respect of goods on the past two occasions did not constitute an established practice in terms of article 9(1). The court held that the number of instances this occurred was too small. A practice has to be frequently observed.; Austria, 31 August 2005, Supreme Court, (*Tantalum case*) available at http://cisgw3.law.pace.edu/cases/050831a3.html: 'Contrary to usages, which must be observed in at least one branch of industry, practices within the meaning of article 9(1) CISG are established only between the parties. Practices are conducts that occurs with a certain frequency and during a certain period of time set by the parties, which the parties can then assume in good faith will be observed again in a similar instance. The court held that the incorporation of the general terms written in German language contrary to the English language that was used in negations, constituted a binding usage. The court held that the parties had previously executed their contractual obligations based on the same terms that were written in English. The court held that, although the language of the disputed terms is widely used in German, a trade usage in terms of article 9(1) is established between the parties in a contract and not based on wide observance in trade industry or countries concerned. The court held that factors such as, inter alia, the cost of interpreting a foreign language, the size of transaction, and importance of business deal, must be observe in determining a usage. The court held that the buyer implicitly accepted the terms when it accepted the order form without enquiring or objecting to the language of the terms; Germany, 14 February 2001, Appellate Court Saarbrücken, (*Windows and doors case*) available at http://cisgw3.law.pace.edu/cases/010214g1.htm: The court held that the seller was bound by the terms in a conformation letter. The court held that it was an established trade usage that a confirmation letter will be binding in the absent of any objections regarding its content, unless the contents reflected terms intentionally incorporated by the buyer contrary to what had been negotiated by the parties, with the effect that it cannot be reasonably assumed that failure to object constitute a consent. Thus, the seller's silence amounted to a consent in accordance with trade usages and it changed the terms of the parties' contract to reflect what was in the letter of confirmation; 23 January 1997, ICC Arbitration, Case No. 8611 (*Industrial equipment case*) op cit (n99): The tribunal held that the parties had established a practice of delivering spare parts, thus the seller was obligated to delivery the replacement parts within a reasonable time in accordance with article 9(1) of the CISG. The tribunal held that the binding force of the practice was not based on the principle of good faith in German law. The court held that practices become established by a continued conduct by the parties when it can be reasonably expected by another party that they would be bound; Switzerland, 03 December 1997, Zivilgericht Kanton Basel-Stadt , Case no. P4 1996/00448, available at http://www.unilex.info/cisg/case/372 : The case involved a contract for sale of ship cargoes. The parties had to make payments 30 days after the issue of the bill of lading. The seller in question issued an invoice that stipulated that payments had to made by bank transfer to the seller's account in a Swiss bank. The issue arose from the buyer's failure to make payments for the purchase price. The court had to decide whether the invoice issued by the seller constituted a letter of confirmation and was part of the

a certain behaviour in respect of the same situation without any objection from either party.[279] If one party communicates the intention not to be bound by a trade usage, a reasonable expectation to be bound by such usage, ceases to exist.[280] Trade usages that are unknown or irregular to the parties are therefore excluded in terms of the wording of article 9(1).[281]

Another interpretation of trade usages according to the wording in article 9(1), is that it allows for the application of implied usages where such usages would modify the parties' initial contractual provisions and are deemed to be material to a contract.[282] Thus, the term 'agreed' in article 9(1) infers implied consent.[283] This interpretation suggests that a practice regulating aspects of a contract that are not governed by the Convention and that do not change the material terms of a contract, will not amount to a trade usage for the purpose of article 9(1). Furthermore, usages in terms of article 9(1) and (2) will apply by implication, irrespective of the absence of the word 'implied' in article 9(1).

Bainbridge argues that the Convention excludes customary law and customs as sources of trade usages.[284] This view is opposed on the basis that many widely known trade usages have originated from defined customs that have been 'judicially established' within a particular trade industry.[285] This suggest that customs reflect current practices of a society or trade industry.[286] Thus, trade usages are often established through court decisions.

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contract. The court found that the letter of confirmation under Switzerland was categorised to be part of formation of the contract, and an invoice was categorised as part of the performance process of the contract. Consequently, the note in the invoice did not form part of the contract and did not amount to a letter of confirmation. The court rejected the argument that the stipulation of the place of payment as the seller's bank and the place of performance as the seller's bank, did not establish a practice between the parties in terms of article 9(1) of the CISG. A practice cannot be established based on two contracts.

279 Pamboukis op cit (n278) at 116-117.

280 Honnold op cit (n62) at 126; Gillett op cit (n275) at 176

281 Bainbridge op cit (n268) at 653; Austria, 6 February 1996, Supreme Court, (*Propane case*) op cit (n246)

282 Pamboukis op cit (n278) at 114

283 Austria, 21 March 2000, Supreme Court, (*Wood case*) available at http://cisgw3.law.pace.edu/cases/000321a3.html: The court confirmed the decision of the appellate court. The court held that trade usages in article 9(1) can be international or national, parties may agree to these usages expressly or implicitly. The court held that usages in article 9(2) will be widely known if they are observed by majority of participants in the trade industry involved in a state, and a party who has a place of business in that state can be reasonably expected to know or have known of the usages.

284 Bainbridge op cit (n268) at 657

285 Ibid at 656

286 Ibid

The contractual approach argues that valid usages are binding as part of a contract and prevail over the provisions of the Convention as well as over any non-mandatory national laws applicable in terms of article 7(2).[287] However, one court held that practices that have been observed by the contracting parties on mere tolerance, will not displace the application of the Convention.[288]

**(c) Article 9(2)**

The contractual approach under article 9(2) has made it a requirement to consider usages in the interpretation of a contract.[289] This is based on the objective theory that makes a usage binding if the circumstances or presumed intent suggest the application of a usage.[290] Accordingly, the interpretation and application of usages will differ from case to case.[291]

The wording of article 9(2) appears not to require any agreement or intention in order for trade usages to be binding on the contracting parties, if they ought to have known of the usages.[292] Scholars suggest that the wording of article 9(2) refers to usages that are 'widely known' and 'regularly observed' by the contracting parties operating within a

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[287] P Hellwege 'Understanding Usage in International Contract Law Harmonization,' (2018) 66 *Am. J. Comp. L.* at 133; Bainbridge op cit (n268) at 651-652

[288] Pamboukis op cit (n278) at 114 ; Italy, 7 August 1998 Italy Supreme Court, (*AMC di Ariotti v. Zimm & Söhne*) available at http://cisgw3.law.pace.edu/cases/980807i3.html: The case involved a contract of sale of stockings between an Italian seller and Austrian buyer. The issue arose from the claim by the seller against the buyer for unpaid balance of the contract price. The buyer had made payments of the contract price in Austria to Mr. Bagnoli who acted as an agent of the seller. The buyer had made payments to Mr. Bagnoli in the previous occasion, and Mr. Bagnoli never objected to this. The CISG applied as part of the laws of Italy. Article 57(1) of the CISG provided that the place of payment of the contract price was the seller's place of business but only if the buyer was not obligated to make payments at 'any other particular place'. The supreme court held that this provision applied if the buyer was legally or contractually obligated to make payments at that particular place and not when making payments at that particular place is merely a practice that is not binding but only tolerated by the parties. Such a practice does not establish a place of performance, consequently, it is not a trade usage because it does not comply with the terms of the parties' agreement in article 57(1) of the CISG and there was no justification for derogating from the agreed place of performance.

[289] Jokela op cit (n277) at 85.

[290] Ibid

[291] Tuggey op cit (n272) at 545; CISG.

[292] Pamboukis op cit (n278) at 109; United States, 10 May 2002, Federal District Court [New York], (*Geneva Pharmaceuticals Tech. Corp. v. Barr Labs. Inc.*) available at http://cisgw3.law.pace.edu/cases/020510u1.html: The court held that there was substantial support for the submission that it was an industry usage that issuing of a reference letter constitutes an acceptance of an offer. Thus, the court held that the contract was valid under the relevant domestic laws, and the parties were bound by this practice, consequently, the buyer was obliged to supply clathrate to the plaintiff.

particular trade industry.[293] However, the Convention does not provide direction for when a practice would become regularly observed nor does it provide a standard for determining such regularity.[294] This suggests that trade usages will not apply when the parties are not aware of such usages and lack the intention to be bound by these.[295]

Jokela notes that a better approach to follow when determining whether a trade usage applies, is to consider the functions of that usage.[296] Trade usages can be used to fill gaps in the Convention as provided for in article 8(3) which refers to usages in interpreting the intention of the parties,[297] and to substitute or supplement contract terms as indicated in article 9(2).[298] Thus, complementing the provisions of the CISG from a functional perspective.[299]

The normative approach provides that trade usages in article 9(2) are normative in nature and do not require knowledge or intention of the contracting parties to be

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[293] Tuggey op cit (n272) at 544-545.; United States, 11 June 2003, US Court of Appeals for the Fifth Circuit, (*BP Oil International and BP Exploration&Oil INc v. Empresa Estatal Petroleos de Ecuador PetroEcuador et al*) op cit (n 200): The court held that INCOTERMS constitutes trade usages in terms of article 9(2) because they are widely known in international trade; United States, 26 March 2002, Federal District Court [New York], (*St. Paul Guardian Insurance Company et al. v. Neuromed Medical Systems & Support et al.*) available at http://cisgw3.law.pace.edu/cases/020326u1.html: The case arose from a contract of sale for a magnetic resonance imaging (MRI) machine between a United states buyer and a German seller. The machine was to be delivered by a German company to U.S. However, when the machines arrived, they were damaged. The issue was in respect of the claim for damages by the buyer. The contract of sale in question made reference to "CIF" and not the INCOTERMS. The CISG applied as part of the laws of German. The court held that the delivery terms of the CIF were to be interpreted in terms of the INCOTERMS. The court held that INCOTERMS constituted trade usages in terms of article 9(2) of the CISG because they are widely known and observed in international trade.

[294] Tuggey op cit (n272) at 544-545.

[295] Hellwege op cit (n287) at 142.

[296] Jokela op cit (n277) at 95; Germany, 09 January 2002, Bundesgerichtshof, case no. VIII ZR 304/00, available at http://www.unilex.info/cisg/case/766:The case involved a contract of sale of powder milk between a German seller and a Dutch buyer. The sale was concluded telephonically and later confirmed by letter of confirmation containing standard terms that provided that the seller was not liable for any damages or purchase price that is not in accordance with the price stipulated in the invoice, and required parties to claim for damages in accordance with the conditions and terms in the standard terms. The issue arose from a claim of non-conformity of the milk after it had been resold to a number of other parties and processed. The notice of non-conformity was given later than the time stipulated in the standard terms, thus the seller was not liable. The buyer argued that the damages had occurred on the date of delivery but only became apparent after the processing of milk. The supreme court held that differences in the form requirements of the parties standard terms did not invalidate the contracts, the parties had indicated that the differences in the form requirements were not important in the modification of their agreement. The court held that standard terms agreed to by the parties, were not part of the contract. The standard terms did not cover the lack of uniformity matters, thus the claim for non-uniformity was regulated by the CISG.

[297] Bainbridge op cit (n268) at 234

[298] Hellwege op cit (n287) at 168

[299] Ibid

binding.[300] These usages acquire their binding effect from the law.[301] Hellwege is of the opinion that the view that trade usages become binding by an implied agreement is a case of legal fiction.[302] Jokela points out that the challenge with international trade usages is the identification of the rules that give rise to such usages.[303] He notes that there must be a differentiation between the rules of jurisdiction and commonly known and observed practices that give rise to a trade usage, particularly when usages are derived from court decisions.[304]

Furthermore, the normative approach applies trade usages even when they conflict with the rules and principles of the Convention.[305] Critics of the normative approach argue that trade usages are 'not concerned with the acknowledgment of legal norms or even of customary law, but rather with the determination of the content of the parties [agreement].'[306] Thus, article 9(2) is not concerned with the validity of usages but it simply infers an interpretation of a term or a conduct implied by a usage.[307] This argument relies on the provisions of article 4(a) of the CISG, which excludes the application of the CISG on all matters determining the validity of any of its provisions, or the validity of any applicable usages.[308]

The interpretation and enforceability of trade usages could differ from forum to forum.[309] Legal forums are likely to exercise a certain level of control over foreign usages in international contracts.[310] Their duty to consider the international character of the CISG to determine whether a usage is internationally recognised, is greatly influenced by their limitations and understandings of their domestic laws.[311]

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300 Hellwege op cit (n287) at 134 & 150.
301 Ibid at 135
302 Ibid at 134
303 Jokela op cit (n277) at 94-95.
304 Ibid .
305 Ibid at 95 at 150
306 Hellwege op cit (n287) at 131
307 Ibid.
308 CISG
309 Jokela op cit (n277) at 95
310 Ibid 5
311 Ibid.

The wording in article 9(2) implies that domestic usages that are widely known and regularly observed in international trade, will bind the parties.[312] Internationality in article 9(2) will be established even when a practice is observed in a particular state, provided that it operates and is known by other states participating within a particular trade industry.[313]

**(d) Uniformity within trade usages**

Critics of the CISG warn that the application of the contractual as opposed to the normative approach could have a different outcome in the laws applicable to a contract.[314] Nevertheless, these differences have a minimal impact on the legal effect of trade usages in a contract, thus the application of these two approaches is purely of theoretical relevance.[315] Jokela submits that the appropriate approach to follow when determining the applicability of trade usage under the CISG should combine both the contractual and normative approach, as the elements of these theories appear in both paragraphs of article 9.[316]

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[312] Bainbridge op cit (n268) at 658; UNCITRAL Digest of Case Law op cit (n23) at 66; Austria, 9 November 1995, Appellate Court Graz, (*Marble slabs case*) available at http://cisgw3.law.pace.edu/cases/951109a3.html:The court held that article 9(2) should not be interpreted as prohibiting the use of local or domestic usages, even when such usages are not mentioned in a contract. The court concluded that the seller had participated in the business of the same nature in the same country for a long period , consequently, the buyer was bound by the national usages observed in Australia.; Austria, 21 March 2000, Oberster Gerichtshof, Case no. 10 Ob 344/99g available at http://www.unilex.info/cisg/case/478: The case involved a contract between a German seller and Austrian buyer for delivery of wood. The issue arose from the claim for non-conformity of goods. The domestic usage of German trade required claimants of non-conformity to specify the nature of non-conformity within 14 days. The buyer's failure to make a claim in accordance with this practice resulted in the forfeiture of this right. The court held that local usages do not have to be accepted at an international level to constitute trade usages in terms of article 9(2). Usages had to be recognised by majority of traders in the trade industry concerned. The court held that a party will be assumed to know or to have known of trade usages if such party's place of business is located in the geographical area where trade usages concerned are observed, or a claimant permanently trades in the area where such usages are applied. The court held that parties had previously contracted and made reference to domestic trades usages of Germany. Thus, trade usages prevailed over the provisions of the CISG in article 39.

[313] UNCITRAL Digest of Case Law op cit (n23) at 67; Austria, 15 October 1998, Supreme Court, (*Timber case*) available at http://cisgw3.law.pace.edu/cases/981015a3.html: The court held that trade usages agreed to or practices established between the parties prevail over the CISG's optional provisions. The Austrialian trade usages must be widely known in the geographical area ( Austria and Italy) of the parties in contracts of the industry concerned.

[314] Hellwege op cit (n287) at 141

[315] Ibid at 140

[316] Jokela op cit (n277) at 91

Forums have powers to limit the use of trade usages that are not specialised and can be applied broadly in a contract.[317] It is submitted that this limits the application of practices that have no defined scope of application and can result in the exclusion of all or most provisions of the Convention. These powers ensure that there is certainty and predictability in the application of trade usages. Trade usages cannot be applied as the general law of a contract.[318] Therefore, the Convention allows forums the powers and discretion of ascertaining whether a trade usage reasonably satisfies the requirements for its application in a contract governed by the CISG.[319]

Moreover, the application of trade usages is subject to the rules of the CISG, therefore, contracting parties are free to exclude the application of any trade usage in terms of article 6.[320] Thus, the provision for the application of trade usages in the CISG allows for flexibility of merchant laws and promotes the development of international sales law and trade.[321]

It is not clear what trade usages will prevail when competing international and domestic trade usages equally apply in a contract or conflicts with mandatory laws of a contract.[322] Also, article 9 does not clarify whether conflicting trade usages can exclude the application of the provisions of the Convention. Gillett submits that article 9 allows courts to incorporate trade usages in a contract governed by the CISG and that the application of such usages prevails over any conflicting provision of the Convention.[323] This is based on the primacy of the principle of party autonomy that allows contracting parties to exclude the application of trade usages in terms of article 6. However, Pamboukis is of the view that conflicting domestic usages that are equally applicable in a

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317 Jokela op cit (n277) at 86
318 Ibid
319 Ibid.
320 Pamboukis op cit (n278) at 119; Bainbridge op cit (n268) at 662; Germany, 5 July 1995, Appellate Court Frankfurt, (*Chocolate products case*) available at http://cisgw3.law.pace.edu/cases/950705g1.html: The court held that the letter of confirmation was not binding even though it was a national usage to treat silence as acceptance. The court held that the international character of the Convention requires that trade usages be known by parties in both countries, not just in one state.
321 Bainbridge op cit (n268) at 662
322 Tuggey op cit (n272) at 552.
323 Gillett op cit (n275) at 159

contract will mutually exclude each other, and article 7(2) will be applied to fill the gaps in the parts of the contract that would have been regulated by those usages.[324]

## 4.9. **Conclusion**

This chapter reveals the uncertainties and differences in opinions and interpretations regarding the application of key provisions of the Convention. It examines certain reservations allowed under the CISG, the scope of application and the divergencies in the interpretation of those reservations. These divergent interpretations appear to threaten the achievement of uniformity in law, however, it is submitted that these differences promote the development of trade and fairness. In light of this, it is clear that complete uniformity is not achievable, however, the flexibility and broad terms used in the provisions of the CISG, allow for the observance of the principle of fairness taking into account the socio-economic and legal systems of different states.

[324] Pamboukis op cit (n278) at 122

# Chapter 5

## Critical analysis and observations

### 5.1. Introduction

This chapter critically analyses the arguments and interpretations presented in the previous chapters and their impact on the achievement of uniformity in law. The critical analysis will assist in evaluating the main question posed in the study.

### 5.2. Principle of uniformity

The previous chapters of this study revealed that the creation of the CISG was difficult due to the diversity in legal, economic, social, and political systems of the states that were involved in the drafting process.[325] Thus, compromises had to be made in order to ensure its success and to cater to the different interests of states involved, avoiding the dominance of a single legal system in the CISG. The drafters of the CISG could not reconcile the conflicting views in respect of different fundamental principles, thus they compromised the language of these provisions to accommodate the different points of view.[326] Nevertheless, influential states were reluctant to compromise their position in international trade. The compromises made in the CISG reflect the differences in the bargaining positions of different states that were involved in the drafting of the CISG. Influential states used their position to impose contractual conditions and influence the CISG negotiations in their favour.[327]

#### 5.2.1. Uniform application: Article 1(1) (a)

The difficulty with the wording of the preamble of the CISG is that it does not clearly specify whether its provisions are limited only to contracting states or whether it includes all nations that may be involved in contracts regulated by the CISG. It is submitted that in light of its overall objectives, the preamble must be read to include consideration of the socio-economic and legal systems of non-contracting states.

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325 DiMatteo op cit (n 43) at 122
326 Viejobueno op cit (n 78) at 227
327 Ibid at 202

Chapter two of this study indicated the vague and ambiguous wording of article 1 that threatens the goal of uniform application of the CISG. The study opines that the flexibility of the terms of application set out in article 1(1), complies with the obligations stated in the preamble of the CISG by not imposing a single rigid definition that may not be recognised in some states. This flexibility allows for the Convention to be more widely accessible and acceptable to different states, allowing for cross border participants to trade more easily. The CISG limits the broad application or influence of domestic laws by adding application conditions in articles 1-5 that ensures that there is a level of uniformity in contracts governed by the Convention.

The wording of article 1(2) makes the determination of the internationality of a contract challenging. Article 1(2) suggests that the Convention's applicability is dependent on the parties' knowledge of the internationality of the contract, contrary to article 1(1)(a) which seems to be concerned with the location of the parties' place of business. It is submitted that article 1(2) results in the non-uniform application of the Convention, making it possible for parties to avoid the application of the Convention by not disclosing their place of business at the relevant times. This places a heavy burden on the parties to research the truthfulness of another party's place of business, with the effect of increasing trade costs, which is contrary to the goal of promoting international trade and fair dealing between contracting states.

Nevertheless, the absence of the interpretation of the internationality of a contract in article 1, embraces the differences in the laws of different states and allows for flexibility in determining what constitutes a place of business. In one state, a place of business could refer to the place of registration, in another, it could refer to the main office of a business. Furthermore, the extension of the internationality requirement in article 10(b), to include the habitual residence of the contracting parties, widens the applicability of the CISG to contracts involving persons who may not have a place of business, or intentionally try to hide their places of business. This appears to focus on the country that has jurisdiction over contracting parties rather than the actual place of business. This flexibility promotes the application of the CISG even where parties may lack the knowledge of internationality and in cases where different states have a different understanding of what constitutes a place of business.

### 5.2.2. Uniform interpretation: Article 7

Chapter three revealed that the absence of an international trade court that adjudicate CISG cases and the absence of directions on how forums must observe the international character of the CISG and for determining the binding authority of foreign laws, leaves the duty of autonomous interpretation to legal forums.[328] This appears to imply that the appropriateness of an interpretation will depend on the social, economic, and cultural diversity of each forum. Legal forums are likely to follow interpretations adopted in legal systems similar to theirs or that prescribe to the same values. The availability of interpretations from different foreign states published by the UNICITRAL information systems is not guaranteed to be free of domestic law influences.[329] This may result in biased interpretations due to the imbalance in the number of reported or published case decisions. States that have developed international trade laws are likely to dominate and indirectly influence the interpretation of the CISG through their forum decisions that may be influenced by their domestic laws. The study submits that compelling states to adopt interpretations or rules that conflict with their mandatory laws may weaken trade relations. Thus, the flexibility of article 7 allows legal forums to compare interpretations of different legal forums and to a certain degree even permits diverging interpretations, allowing for the development of domestic laws through the influence of foreign decisions. It is, therefore, submitted that the flexibility in the wording of article 7 allows for relative uniformity promoting trade relations and future development of the Convention.

The study submits that consideration of the legislative history of the CISG to interpret its provisions must be limited to ascertaining the purpose of the provisions of the Convention. The over-reliance on the CISG's legislative history to interpret its provisions may threaten the development of laws governing cross-border sales and the Convention's ability to adapt to the everchanging international trade trends and the evolving needs of parties to cross-border sales transactions.

The study submits that interpretive general principles provided for in article 7 may also result in the non-uniform application of the CISG. The wording of article 7 appears

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328 Jiang op cit (n 137) at 2

329 Bailey op cit (n26) at 310; Ferrari op cit (n182) at 13

to suggest that the conduct of the parties in the performance of contractual obligations, interpretation of contractual terms, and the introduction of new terms in a contract must be in line with the principle of good faith. It can be argued that this reflects the flexibility allowed in the interpretation of the principle of good faith and a uniform standard to apply when interpreting it.

The study additionally submits that the methods provided to resolve internal gaps in article 7 of the CISG do not lead to non-uniformity of law, rather, it is the incorrect interpretation, application, or complete disregard of these methods by legal forums that lead to the non-uniform application of laws. As has been mentioned, a certain degree of flexibility is necessary for the success of a multinational treaty such as the CISG, and the application of domestic laws to interpret a gap may be useful in resolving a contractual dispute, to the extent that it is allowed in terms of the CISG.

The absence of directions for identifying the general principles allows forums the freedom to decide what constitutes the general principles and indicates that there is no closed list of the CISG general principles. What must be certain and uniform is that the general principles are those on which the CISG is based and that may be used to suitably resolve a contractual matter not expressly settled in the CISG. This flexibility may lead to the application of different general principles in similar contractual matters, and forums may prefer to use the general principles that are recognised in their domestic laws to avoid the difficulties of determining their scope and effect.

However, the similarity of the principles does not mean that such principles are understood to mean the same thing or have the same effect. The study submits that the application of general principles developed outside the CISG but that are accepted and uniformly understood at an international level, promotes the development of trade and the international character of the CISG, and allows the Convention to adapt to the ever-changing international trade trends.[330] However, these principles must be limited to those developed by or through the laws of the CISG contracting states and must relate to international sales transactions. Limiting the general principles of the CISG to those that

[330] Jiang op cit (n 137) at 5

can be derived from the CISG text and its legislative history may prevent the reliance on to interpret the CISG.[331]

The study submits that autonomous interpretation of all terms of a contract is not practically achievable. If the terms of a contract to be interpreted are not governed by the CISG and no answer is to be found from any of the provisions of the CISG or by applying its general principles, then legal forums may rely on relevant domestic laws, such as the proper law of the contact, to interpret the term. The application of the rules of PIL as a last resort limits the homeward trend interpretations of the Convention.[332] Nevertheless, the application of the rules of PIL leads to uncertainty and unpredictability of law because the application of these rules is regulated by domestic laws, and each country will apply the rules of PIL differently.

### 5.2.3 Party autonomy

The study indicated in chapter one and chapter four that an important aspect of party autonomy is that it allows the contracting parties to mutually elect the laws that regulate their contracts.[333] This suggests that reservations made by contracting states under article 95 and article 96, that contracting parties are bound by and may not exclude under article 6, do not reflect the principle of party autonomy. It is submitted that this is merely one aspect of party autonomy, and it would be an incorrect reflection to conclude that the Convention does not support party autonomy purely based on this argument. Articles 6; 11; 28; 9, among others, reflect the wide room to exercise party autonomy granted to contracting parties. It is, however, submitted that the success of the application of the Convention and the support of its member states can only be maintained if the compromises, such as the reservations agreed to during the drafting process of the CISG, are enforceable under the Convention. Thus, the intentions of contracting states to bind themselves in terms of article 95 and article 96, must be extended to vicariously bind all parties who have their places of business in those states or who elect to apply the laws of those states to their contracts.

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331 Ibid

332 Ibid at 6

333 C Walsh 'The Uses and Abuses of Party Autonomy in International Contracts' (2010) 60 *U.N.B.L.J.* at 14.

#### 5.2.3.1. Article 95 reservations

As discussed in chapter four of this study, the importance of this reservation can be traced back to the lengthy negotiations leading up to the coming into operation of the Convention. USA and China supported the inclusion of article 95 to avoid the unpredictability of law arising from applying the rules of PIL that makes the application of the CISG uncertain.[334] The article 95 deciaration allows parties from reserving states the advantage of applying their domestic laws rather than applying the rules of PIL that may lead to the application of the laws of a non-contracting state. Hence, it is submitted that any divergencies in the interpretation of the CISG provisions created by this reservation, was a necessary compromise for the creation of a multilateral treaty such as the CISG. Moreover, an ever-increasing number of states that are party to the Convention, considerably minimise any diverging effect of article 1(1)(b) and this reservation.

Nevertheless, the discretion given to legal forums to decide the effect and scope of article 95 reservation in contracts involving a party from an article 95 reserving state, makes the application of the CISG uncertain since its applicability will be determined by the approach adopted in each forum.

#### 5.2.3.2. Exclusion or modification of provisions of the CISG under Article 6

The differences in interpretations of what constitutes an agreement to exclude the Convention discussed in chapter four, makes the application of the CISG and its exclusion in terms of article 6 uncertain. The flexibility of article 6 seems to reflect the compromises that were made during the drafting process of the CISG and the concerns raised by countries who wanted certainty and clarity in the formation of contracts. Thus, contracting parties remain obligated to respect and enforce the form requirements in article 12 and 96 as applied in the relevant country, even when they wish to exclude or vary any other provisions of the CISG in terms of article 6. The flexibility of article 6 allows parties to apply the CISG in a manner that suits their trade needs and trade relations, thus it promotes predictability of the law. Nevertheless, the broad wording of article 6 impacts on the uniform application of the CISG and increases the instances in which legal forums can rely on domestic laws by excluding the Convention in its entirety.

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[334] Zhen op cit (n11) at 143; 164; & 165.

#### 5.2.3.3. Freedom of form in terms of Article 11 and its exclusion in terms of Article 96

Article 11 of the CISG further reflects the application of the principle of party autonomy by not subjecting the parties to any formal requirements for the conclusion of a contract governed by the Convention. States that wish for contracts to be evidenced in writing can enforce this as a requirement by reserving the right to require that all parties having their place of business in these states, reduce their contracts into writing in terms of article 12 and 96. Thus, article 11 allows for the wide acceptability and application of the CISG by diverse states. Furthermore, the flexibility in article 96 permitting contracting states to make a declaration in terms of article 12 and article 96 at any time after the ratification of the Convention, allows contracting states to apply the CISG in accordance with the development of their domestic laws and trends in international trade. However, as there are no uniform rules of applying evidence or interpreting the parties' intentions as provided for in article 11, this flexibility creates uncertainty in the application of the Convention and may frustrate contractual relations between the parties.

The freedom of form has the effect of limiting the role of the CISG to enforcing agreements that are recognised and valid under domestic laws governing the validity of agreements and evidence. Moreover, the predictability sought by delegates that were involved in the drafting process of the CISG may be threatened by the broad wording of article 96 and the absence of direction in cases where all contracting parties are from reserving states. This makes the law uncertain and is likely to lead to the application of the rules of PIL.

#### 5.2.3.4. Application of trade usages: Article 9

The wording of article 9 reflects the compromises reached in the drafting process of the CISG. Article 9(1) represents the views of socialist states that wanted predictability of trade usages, wary of trade usages unknown to the parties, and that are contrary to any other applicable mandatory laws. On the other hand, the application of implied trade usages in article 9(2), reflects the views of industrialised and developed states that favoured the application of trade usages that reflect the commercial practices developed in a particular trade industry.

Due to the differences in the development of trade usages, widely known trade usages may be impractical to apply in some states due to differences in political, social, and legal systems. [335] Furthermore, determining the validity of international usages is left up to the domestic laws of each forum as per article 4(a) of the GISG. Thus, proving the applicability of a trade usage may give rise to further divergencies and legal uncertainty as the rules of evidence will be regulated by non-uniform domestic laws.

The absence of guidance in article 9 regarding the applicable laws in cases of conflicting usages and the provisions of the CISG, permits legal forums to decide what rules will prevail, [336] even allowing the complete exclusion of the CISG through the application of usages. This is contrary to the goal of uniformity since unspecified rules that may differ in every industry are applied to a contract, even when they are contrary to the parties' intentions. Through the wording of article 9(2), parties may even be forced to apply domestic usages from foreign nations that are supposed to be widely known, even when the parties lack knowledge of such usages.

Moreover, the flexibility in article 9 and the absence of guidelines as to the limitations of the applicable usages allows legal forums to enforce trade usages even when such usages conflict with the reservations made by contracting states in terms of article 96 and article 12. This may result in the exclusion of the enforceability of these reservations because trade usages prevail over any applicable conflicting provisions of the CISG. This implies that reservations made by contracting states may be excluded by contracting parties through the application of trade usages.

The study submits that internationality in terms of article 9(2) must be interpreted to refer to the parties' place of business or the state elected by the application of the rules of PIL. This limits the application of trade usages that are observed by non-contracting states and usages derived from domestic laws. This will minimize the problems of interpretation and legal uncertainty because trade usages would be common and acceptable in terms of the standards of all contracting states and based on the values or

[335] Gillette op cip (n 275) at 163
[336] Pamboukis op cit (n 278) at 109.

principles of the Convention. This will be made easier by the observance of the international character of the CISG in terms of article 7(1). Nevertheless, this may be difficult when interpreting domestic usages.

The study submits that the CISG's goal to promote the development of international trade requires parties to build trade relations with other parties from foreign nations. Thus, contracting parties are constantly exposed to different and changing trade trends and rules. The flexibility in the provisions of the CISG allows parties to adapt to these changes and maintain the relevancy and wide application of the CISG in the regulation of cross-border transactions.

### 5.3. Conclusion

This chapter indicates that the common problems with the exercise of party autonomy under various provisions of the CISG is the vagueness and lack of guidance within the Convention on how to interpret these provisions. This creates gaps allowing for reliance on domestic laws through the application of the rules of PIL. Although this flexibility threatens uniformity, it serves different purposes that promote the overall objectives of the Convention reflected in its preamble. The goal of a workable uniformity of laws reduces trade costs by making the Convention more acceptable and relatable to different states. This flexibility in the interpretation of the CISG promotes the development of trade and trade relations, based on a uniform understanding of the law that conforms to a uniform international standard. The method and pace of developing these uniform interpretations reflect the differences in the legal, political, and economic systems of the diverse member states of the CISG influencing the trade behaviour of parties.

The Convention mandates legal forums to interpret the provisions of the CISG having regard of its international character and the diverse interests of its member states. Critics point out that the autonomous interpretation of the CISG may be costly and lead to the non-uniform application of its provisions. However, the interpretative guideline provided in article 7, is further supported by the vast online CISG information systems, publishing CISG court judgements, arbitral awards, and scholarly articles from all over the world. Thus, making the CISG accessible to contracting parties and reducing the cost involved in the application of the CISG, having regard to the international character of the

CISG. The uniform application of the CISG and its international character is, however, impacted by reservations such as article 95 that allow for the application of domestic laws through the rules of PIL. This also leads to the risk of developed states that are experienced in international trade, to have more influence in the development and interpretation of the CISG, thereby benefiting more than the states that are less experienced and have less influence in international trade.

Despite the risk of non-uniformity of the CISG permitted through the flexibility in its application and other key provisions of the CISG, the ever-growing number of contracting states, reported judgements, and arbitral awards indicate that the uniform application of the Convention is a workable and practical reality borne from a relative as opposed to rigid uniformity.

## Chapter 6

### 6. Conclusion

The CISG was created to eliminate trade barriers and to promote the development of trade and trade relations among states through the application of a uniform law. Article 1(1) of the CISG imposes uniform requirements for its applicability to contracts, subject to the provisions of articles 2-5 of the CISG that exclude certain transactions from its scope of application. However, the broad wording of article 1 can allow for the application of domestic laws over that of the Convention. The contradiction in the provisions of article 1(1)(a) and article 1(2) also contribute to the lack of uniformity in the application of the Convention, making it difficult to determine whether the application requirements of the Convention are satisfied.

The interpretive guides in article 7 do not specify the standard for measuring the uniformity it seeks to achieve. The obligations in the preamble of the CISG and the provision for the application of the rules of PIL in interpreting the Convention, suggests that the CISG aims to achieve workable uniformity. The vagueness of the wording of article 7 allows for diverging interpretations, however, proponents of the CISG argue that only an acceptable degree of divergence in interpretations is allowed, based on uniform principles that promote the broad purpose of the Convention. CISG critics argue that, although the use of the UNICITRAL information systems in interpreting the CISG, promotes the international character of the Convention, it plays a very limited role in ensuring uniformity because foreign laws merely have persuasive authority on a legal forum that has the ultimate discretion on how it interprets and applies the provisions of the CISG. Furthermore, there is no guarantee that these systems are free of domestic law influence.

The extension of the applicability of the CISG to parties from non-contracting states in terms of article 1(1)(b), shifts a key determining factor for the application of the CISG from the place of business of the parties to the laws of the country that is indicated by the application of the rules of PIL. This is subject to the reservation contained in article 95 of the CISG.

The effect of article 95 is not clear, however, the prevailing view is that when one of the contracting parties has its place of business in a state that has made a declaration in terms of article 95, the application of the CISG will be excluded even where the rules of PIL lead to the laws of a contracting state that has not made this declaration. Article 95 is not binding on non-contracting states, thus the enforceability of article 1(1)(b) in a contract must be in accordance with the PIL rules. This ensures that no states are favoured by reason of reservations and that the CISG is applied uniformly in all contracts in accordance with the purpose of its provisions.

Article 6 of the Convention reflects the principle of party autonomy by allowing parties to exclude or modify the effect of the Convention in a contract. The informality principle contained in article 11 suggests that both implied and express agreements to exclude, vary, or derogate the provisions of the Convention or any part thereof in terms of article 6, is allowed. Article 6 does not limit the instances in which the CISG or any part thereof may be excluded, thereby increasing the room for the application of domestic laws and for the exclusion of the CISG. However, scholars suggest that the CISG goal of achieving uniformity supports the view that contracting parties must not be allowed to exclude article 7.

The flexibility of the Convention is further reflected in article 11 that allows the freedom of form. Thus, the CISG uniformly regulates contracts that are both expressly or implicitly concluded. This flexibility makes the Convention accessible and limits the cost of contract negotiations.

A contracting party's right to freedom of form is subject to the provisions of article 12 and 96, that is, such right may be limited when contracting with a party that has its place of business in a state that has made the article 96 reservation in terms of article 12. This declaration in terms of article 96 is equally available to all contracting states that require contracts to be writing. The broad wording of article 96 makes its scope and binding force uncertain, thus different theories are proposed to determine its scope of application. The universal application of the writing requirement of a reserving state promotes the uniform application of the CISG and is in accordance with the purpose of article 12 and 96 of the CISG.

The application of trade usages in article 9 to interpret or substitute provisions of the Convention in a contract, minimise trade negotiation cost and allows parties to contract in accordance with their trade interest. The varying theories that are applied to determine the applicability of trade usages, do not change the legal effect of trade usages. The application of widely known trade usages or trade usages that parties ought to know, promotes the global application of uniform rules within different trade industries. Furthermore, although contrary to the goal of global uniformity, limiting trade usages to those observed in contracting states will promote uniformity and trade relations because of shared values and principles.

It is clear that the CISG cannot achieve complete uniformity were legal forums to consider its international character and the diverse interests of its member states, as provided for in article 7 and the preamble of the Convention. Thus, the broad goals of the CISG as stated in its preamble, as well as the application of the principle party autonomy, allow for a relative uniformity in the regulation of law governing cross border sales that is non-rigid, practical, and a workable reality: implementing the CISG goal of uniformity with neutrality and in a manner that promotes the interests of all contracting states while developing a common understanding and interpretation of the provisions of the Convention based on common principles.

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