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DIFFICULTIES INHERENT IN THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG)

BY

DEEPA RAJU ABRAHAM
ABRDEE002

Supervisor: Professor RH Christie

Master of Laws
University of Cape Town
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DECLARATION

I hereby declare that I have read and understood the regulations governing the submission of the degree of Master of Laws dissertations, including those relating to length and plagiarism, as contained in the rules of the University of Cape Town, and that this dissertation conforms to those regulations.

Signed at Cape Town on 1 November 2007

Signed by candidate

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DEEPA RAJU ABRAHAM

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DEDICATION

To my parents for their loving support.

CHAPTER 1

1.1. Introduction

The United Nations Convention on Contracts for the International Sale of Goods (CISG) is increasingly governing the law of international sale of goods.[1] The CISG is a multilateral treaty that governs the rights and obligations of parties to international sales contracts.[2] It is designed to foster international trade by making it easier and more economical to buy and sell raw materials, commodities and manufactured goods in trans-national commerce through the adoption of a unified legal approach. [3]

Since the coming into operation of the CISG on 1 January 1988, it has been adopted by some 65 states[4] including the United States of America, Canada, Germany, France, Italy, the Netherlands, Belgium, Spain, Switzerland, Singapore, Zambia, Lesotho, Australia, New Zealand etc.[5] However, South Africa, the United Kingdom, Japan, India, most of the Middle East, South East Asian and African countries, Portugal, Brazil and Central America have not yet ratified the CISG.[6] Besides English, the CISG is also available in five other languages: Arabic, Chinese, French, Russian and Spanish.[7]

The application of the CISG is not solely dependant on its ratification by a state. In terms of Article 1 (1) (b) of the CISG, it applies to contracts of sale of goods between parties whose places of business are in different states if the rules of

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[1] C Hugo 'The United Nations Convention for the International Sale of Goods: Its scope of application from a South African perspective' 1999 *South African Mercantile Law Journal* 1-27at 1.

[2] T McNamara 'United Nations Convention on Contracts for the International Sale of Goods' Presented to the National Association of Purchasing Management' Denver Affiliate (November 2000), available at http://www.dgslaw.com/articles/334336.html (accessed on 6 April 2005).

[3] Ibid.

[4] CISG: Table of Contracting States, available at http://www.cisg.law.pace.edu/cisg/countriesl (accessed on 19 April 2005).

[5] Hugo op cit n 1 at 2.

[6] Ibid at 2.

[7] Texts of the CISG available at http://cisgw3.law.pace.edu/cisg/text/text.html (accessed on 19 May 2005).

private international law lead to the application of the law of a contracting state (a state that has ratified the CISG).[8] Therefore, despite the fact that South Africa has not yet ratified the CISG, it may nevertheless apply it in accordance with the principles of private international law.[9] A South African court may be called upon to apply the CISG, and similarly a South African buyer or seller may to his surprise or consternation discover that the contract is governed by the CISG.[10] In addition to the above, the CISG is also applicable if the parties to an international contract of sale chose the CISG as a compromise choice of law, thereby avoiding disagreements between the parties as to which law governs the contract.[11] Furthermore, even though the law of sales in most countries, like in South Africa, has largely developed to meet the needs and complexities of domestic sales, it may not be specifically tailored to meet those of international sales.[12] The CISG on the other hand is of fairly recent origin and developed taking into consideration a multitude of different social, economic and legal systems.[13] The adoption of the CISG would therefore be a desirable step in updating the South African law, even if it is only in international transactions.[14]

Although most of the countries in Southern Africa share a common legal background with regard to contract (Roman-Dutch law), there is no unified law of sale, and as far as the rest of Africa is concerned, even a common legal heritage is lacking.[15] The creation of a uniform law for international sales, such as the CISG, is therefore aimed at eliminating any unnecessary legal barriers impeding trade.[16] One of the objectives of the CISG is to promote peaceful co-existence among states, by developing international trade on the basis of equality and

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[8] S Eiselen 'Adoption of the Vienna Convention for the International Sale of Goods (The CISG) in South Africa' (1999) 116 *SALJ* 323-370 at 343.
[9] Hugo op cit n 1at 3.
[10] Ibid at 3.
[11] K Bell 'The sphere of application of the Vienna Convention on Contracts for the International Sale of Goods' 1996 Pace International Law Review 237-258 at 237.
[12] Eiselen op cit n 8 at 342.
[13] Hugo op cit at 1.
[14] Eiselen op cit at 343.
[15] Ibid at 324.
[16] Hugo op cit n 1 at 1.

mutual benefit.[17] As most developing states depend greatly on their foreign trade,[18] the promotion of democracy and political stability in Africa, especially in Southern Africa, is in no small way dependent on the healthy economic growth and development of the region.[19] Freedom of trade, including free movement of goods within the region is of great importance for the development of the region as a whole.[20]

The practical importance of the CISG can no longer be overlooked in South Africa, not by practitioners and not by our legal curricula.[21] However, most traders and lawyers, especially those who do not routinely conduct international transactions, are unaware of, or at least unfamiliar with, the CISG.[22] When the CISG was finalised more than twenty years ago, legal scholars predicted that it would be widely endorsed by the international commercial community and rapidly become a world commercial law, largely supplementing domestic law, which was not specifically tailored to international transactions.[23] Unfortunately though, we now face the reality that the CISG suffers from neglect, as well as ignorance and even fear.[24]

This study aims at increasing awareness of the CISG in South Africa, with regard to its drafting history and what it seeks to achieve. The study also focuses on the Convention's goal to unify the laws governing international sales and looks at some of the reasons and factors including *inter alia*, the structural difference in the social, legal and economic traditions of the different contracting states, the compromises made in the drafting of the CISG, different language versions of the convention, certain reservations and declarations allowed in the Convention, the

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[17] L M Ryan 'The Convention on Contracts for the International Sale of Goods: Divergent interpretations' 1995 Tulane Journal of International and Comparative law 99-118 at 100
[18] Ibid at 101.
[19] Eiselen op cit n 8 at 324.
[20] Ibid.
[21] Ibid at 327
[22] McNamara op cit n 2.
[23] Ibid.
[24] Ibid.

"homeward trend" in applying the Convention etc. which results in the non-uniform interpretation and application of the CISG. In conclusion, the study highlights some of the pros and cons South Africa should consider in deciding whether or not to ratify the CISG and makes certain recommendations to ensure the wider international acceptance and application of the CISG.

1.2 Historical Background of the CISG

One of the constant problems facing merchants in international trade law has been the diversity of national legal systems and the complexity of the rules of private international law for determining which legal system applies.[25] Therefore, the desire of merchants that a universal body of laws govern their contracts across national borders is as old as international trade itself.[26] The CISG is an extraordinary and extremely notable example of international legal cooperation to achieve uniformity.[27]

The Convention is the product of more than two generations of international negotiations.[28] The result is a document unanimously approved by delegations representing 62 national legal systems at a diplomatic conference convened by the United Nations General Assembly in Vienna in 1980.[29] Thus the CISG is sometimes referred to as the "Vienna Sales Convention".[30]

The origins of the CISG may be traced back to the early 1930's when scholars, lawyers and traders began to explore the possibility of creating a uniform law to govern international trade.[31] Work on the CISG began with the Institute for the

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[25] GA Bartons 'The United Nations Convention on the Contracts for the International Sale of Goods' (1985) 18 Comparative and International Law Journal of South Africa 21-35 at 22.
[26] Ibid.
[27] McNamara op cit n 2.
[28] R. Krieger 'The United Nations Convention on the Contracts for the International Sale of Goods: An assessment of its impact on international transactions' (1989) 106 SALJ 184-191 at 184.
[29] Ibid.
[30] McNamara op cit.
[31] Ibid.

Unification of Private Law (UNIDROIT).[32] This institute appointed a committee to research the possibility of developing an international uniform law of sales and contract formation.[33] In 1935, the committee submitted a preliminary draft and it was circulated among the members of the League of Nations to comment upon.[34] Most nations commented favourably and work commenced on a second draft.[35] This project, however, was interrupted in 1939 by the start of World War II.[36]

In 1951, this second draft was tabled at the International Hague Conference on the Unification of Sales law.[37] A special Commission appointed by the conference prepared a third draft which was presented in 1956, a rework of which was published in 1958 and formed the basis of the draft published in 1963 and was finally discussed in the Hague Conference of 1964.[38] The conference adopted two conventions: The Uniform Law of International Sale of Goods (ULIS) and the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF).[39] Both these conventions were adopted in English and French and entered into force in 1972.[40]

Complaints about the ULIS and ULF surfaced almost immediately after the 1964 Conference, especially in the United States.[41] Only nine nations acceded to or ratified the 1964 Sales Conventions: Belgium, the Federal Republic of Germany, Gambia, Israel, Italy, Luxembourg, the Netherlands, San Marino and the United

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[32] L.K Tomko 'United Nations Convention on the International Sale of Goods, its effect on the United States and Canadian sales law' 1988 University of Detroit law Review 73-96 at 74.
[33] Ibid.
[34] A H Kastely 'Unification and community: A rhetorical analysis of the United Nations Sales Convention' (1988) 8 Northwestern Journal of International Law and Business 574-622 at 578.
[35] Tomko op cit n 32 at 74.
[36] Kastely op cit n 34 at 578.
[37] Eiselen op cit n 8 at 334.
[38] Ibid.
[39] Tomko op cit n 32 at 75.
[40] Ibid.
[41] P Winship 'Private international law and the United Nations Sales Convention' 1988 Cornel International Law Journal 487-533 at 501.

Kingdom.[42] The three main reasons for these new laws not being widely ratified were as follows: Firstly, they were primarily a European creation[43] and many countries felt that their laws or interests were not adequately represented, and thus refused to adopt the conventions.[44] Secondly, the uniform laws were too long and too complicated.[45] Finally, complaints were raised concerning the ambiguity in the language caused by adopting the conventions in only French and English.[46]

When it became apparent that the 1964 texts (ULIS and ULF) would not be widely accepted, new efforts were begun, and the United Nations Commission on International Trade Law (UNCITRAL) was established and included representatives from every region of the world.[47]

UNCITRAL was intended to promote "the progressive harmonization and unification of the law of international trade."[48] In its first session in 1968, UNCITRAL decided to give priority to a much needed review of the 1964 sales conventions.[49] In a survey conducted by the UN Commission, it was found that many governments did not look favourably upon the 1964 Sales Conventions and did not intend to become a party to them. Among these were the United States, the U.S.S.R and China.[50]

In 1969, UNCITRAL appointed a working group on the International Sale of Goods, and instructed it to either modify the 1964 Uniform Laws or develop new

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[42] Kastely op cit n 34 at 579.
[43] J S Ziegel 'The future of the International Sales Convention from a common law perspective' (2000) 6 New Zealand Business Law Quarterly 336-347 at 337.
[44] Tomko op cit n 32 at 75.
[45] Ziegel op cit n 43 at 337.
[46] Tomko op cit at 75.
[47] P Lansing and N Hauserman 'A Comparison of the Uniform Commercial Code to UNCITRAL's Convention on Contracts for the International Sale of Goods' (1980) 6 North Carolina Journal of International Law and Commerce Regulation 63-80 at 64.
[48] Ibid.
[49] Winship op cit n 41 at 502.
[50] Ibid.

texts capable of wider acceptance by countries of different legal, social, and economic systems.[51]

The initial intention of UNCITRAL was to follow UNIDROIT's lead and prepare two separate drafts, but in 1978 UNCITRAL decided to integrate the two drafts and presented a unified draft to the General Assembly.[52] This unified draft formed the basis of the CISG, which was finally accepted in its present form at a diplomatic conference in Vienna in 1980.[53]

The conference adopted the draft Convention with relatively few amendments and it was accepted by a majority of 42 of the 62 states that participated in the proceedings.[54] However, in terms of article 99 of the Convention, the CISG only came into effect on 1 January 1988, a year after the tenth state ratified the convention on 22 December 1986.[55] The final acceptance of the CISG was delayed because many states waited for the United States to ratify it before committing themselves, which the United States finally did together with China and Italy on 11 December 1986.[56]

Despite the lack of success of the ULIS and ULF, they cannot be regarded as a complete failure. They exerted a great influence in the drafting and the contents of the CISG, and they continue to be an important source of historical and doctrinal research.[57] A party to the CISG cannot simultaneously be a party to the 1964 Hague Conventions, but must renounce the latter before becoming a party to the former.[58]

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[51] Kastely op cit n 34 at 580.
[52] Lancing and Hauserman op cit n 47 at 65.
[53] McNamara op cit n 2.
[54] Eiselen op cit n 8 at 337.
[55] Ibid.
[56] Ibid.
[57] Ziegel op cit n 43 at 337.
[58] H Booysen 'The International Sale of Goods' (1991/1992) 17 South African Yearbook of International Law 71-89 at 76.

South Africa was not represented at the 1980 conference in Vienna.[59] In fact, due to its internal race policies, the United Nations actively promoted the exclusion of South Africa from world trade relationships and encouraged boycotts against the country.[60] All that has changed since 1994 and South Africa is now a welcome and respected member of the international family of nations.[61]

1.3 Scope of Application and Structure of the CISG

For the purposes of this study, I feel that it is necessary to consider briefly the scope and structure of the CISG, referring specifically to those articles which define its sphere of application.

A notable feature of the CISG is that its provisions are logically arranged, and, on the whole, the drafting style is lucid and the wording simple and uncluttered by complicated subordinate clauses.[62] It has 101 articles and is divided into four principal parts. Part I (articles 1-13) defines the scope of application of the convention, and includes other general provisions; part II (articles 14-24) governs the formation of the contract; part III (articles 25-88) governs the rights, obligations and remedies of the parties to international contracts of sale, and part IV (articles 89-101) defines the relationship of the convention to other international agreements and establishes the reservations a state may make in ratifying the convention.[63]

The CISG contains three important limitations: Firstly, it applies only to international contracts.[64] Article 1 (1) provides that the convention applies to contracts of sale of goods between parties whose places of business are in different states. Furthermore, the states to which both parties belong must have

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[59] Bartons op cit n 25 at 21.
[60] Eiselen op cit n 8 at 324.
[61] Ibid.
[62] Ziegel op cit n 43 at 338.
[63] Krieger op cit n 28 at 184 (see the CISG).
[64] Ibid at 185.

adopted the convention, or the rules of private international law must lead to the application of the law of a contracting state.[65]

Secondly, it governs only the commercial sale of goods. The CISG does not define a contract of sale of goods; article 3 (1), however, provides that contracts for the supply of goods to be manufactured or produced are to be considered sales.[66] In terms of article 2 of the CISG, consumer contracts are completely excluded from the sphere of application of the convention, as are contracts involving the sale of securities, ships, vessels, hovercraft or aircraft, and electricity.[67]

Thirdly, in certain specific circumstances the CISG is inapplicable.[68] Questions involving the validity of contracts are outside the ambit of the convention, as is the effect which the contract may have on the property in the goods sold (article 4), and any liability of the seller for defective goods causing death or personal injury of any person (article 5).[69] Therefore, questions dealing with these matters will be covered by the applicable domestic laws as determined by international choice of law provisions.[70]

Apart from the above exclusions, the convention's dominant motif is freedom of contract and so, in terms of article 6, the parties may exclude the convention all together, derogate from or vary any of the effects of its provisions.[71] This principle of party autonomy is one of the basic principles underlying the CISG. The underlying idea is to reassure traders who are generally wary of being subjected to unfamiliar rules.[72]

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[65] Article 1 (1) of the CISG.
[66] Booysen op cit n 58 at 77.
[67] Ziegel op cit n 43 at 337.
[68] Krieger op cit n 28 at 185.
[69] Ziegel op cit at 337.
[70] Tomko op cit n 32 at 79.
[71] Ziegel op cit n 43 at 338 (Article 12 of the CISG allows a contracting party to stipulate that in deviation from the convention's general rule, contracts of sale and any modification of a contract must be in writing or evidenced in writing.).
[72] Hugo op cit n 1 at 21.

Article 6 provides only for the exclusion of the convention; it mentions nothing about adoption.[73] However, business moves much quicker than law, and it is not difficult to imagine a situation where entrepreneurs from two non-contracting states wish to use the CISG in their negotiations as a compromise choice of law.[74] They should be allowed to do so, provided the parties subject their contract to the CISG by agreement.[75] A provision allowing for, and regulating the effect of agreements made to apply the convention, was not included in the CISG due to the drafting problems caused by divergent domestic approaches as to what rules were considered "mandatory".[76] Therefore, where the parties expressly incorporate the CISG, it is not applied as convention, but as contract.[77] Traditionalists might shudder at the prospect of allowing parties to select non-national laws to govern their contract,[78] but this is only because they lose sight of the fact that in this type of situation the CISG is applied not as convention, but as contract.[79] The law applied is still therefore wholly domestic law.[80]

The CISG contains certain general principles in terms of which it should be interpreted.[81] In interpreting the convention, regard should be had to its international character, to the need to promote uniformity in its application, and to the observance of good faith in international trade.[82] Questions concerning matters governed by the CISG which are not expressly settled in the convention, are to be settled in conformity with the general principles on which it is based, or failing such principles, in conformity with the law applicable by virtue of the rules

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[73] Bell op cit n 11 at 257.
[74] Ibid.
[75] Hugo op cit n 1 at 25.
[76] Ibid at 26.
[77] Ibid.
[78] Bell op cit n 11 at 257.
[79] Hugo op cit n 1at 26.
[80] Ibid.
[81] Booysen op cit n.58 at 78.
[82] Article 7 (1) of the CISG.

of private international law.[83] Thus, in the case of a lacuna, general principles should be abstracted from the CISG itself and if such an approach is unsuccessful, then the rules of private international law should be applied to determine the national legal system to be applied to the lacuna.[84] The idea behind this article is that state courts should adopt an international approach when interpreting the convention rather than doing so in terms of their own national laws.[85] Reference to a national legal system is kept as a last resort.[86]

In terms of the CISG, an international sale need not be concluded in or evidenced by writing and is subject to no other requirement as to form. It may be proved by any means, including witnesses.[87] Writing includes a telegram or a telefax.[88]

Article 1 (1) (b) of the CISG, in terms of which it is applicable to a contract of sale of goods when the rules of private international law lead to the application of the law of a contracting state, has proved to be somewhat controversial.[89] The incorporation of conflict of laws analysis into the Treaty increases the number of situations in which the Convention applies, and may even lead to its application in instances not contemplated by the contracting parties.[90] A number of states were uneasy with the reach and uncertainty of art 1 (1) (b).[91] This led to the compromise embodied in art 95, which provides that a state may at the time of ratification declare that it will not be bound by article 1(1) (b)) of the CISG.[92] The United States, China, the Czech Republic and the Slovakian Republic exercised this option.[93]

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[83] Article 7 (2) of the CISG.
[84] Booysen op cit n 58 at 79.
[85] Ibid.
[86] Ibid.
[87] Article 11 of the CISG.
[88] Article 13 of the CISG.
[89] Hugo op cit n1 at 9.
[90] Bell op cit n 11 at 248.
[91] Ibid.
[92] Bartons op cit n 25 at 31.
[93] Hugo op cit at 9.

This article 95 reservation narrows the applicability of the Convention and enlarges the applicability of the domestic law.[94] It could be advantageous to a contracting state whose domestic law is modern and well suited to international transactions; however it is not advisable for states with domestic laws that are ill-suited to international transactions to make this declaration.[95]

Another important reservation that might also impact upon the sphere of application of the CISG is found in art 92. In terms of art 92 (1) of the CISG, a state may at the time of signature, ratification, acceptance, approval or accession, declare that it will not be bound by part II (dealing with the formation of the contract) or by part III (the major part of the CISG dealing with the obligations of the parties, their remedies and the passing of risk).[96] The Scandinavian countries, Denmark, Norway, Finland and Sweden have made use of this article to exclude part II of the CISG.[97] Not surprisingly, no country has yet excluded part III, as, without part III, the CISG would be substantially meaningless.[98]

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[94] Bell op cit n 11 at 248.
[95] Ibid.
[96] Hugo op cit n 1 at 11.
[97] Ibid.
[96] Ibid.

CHAPTER 2

2. 1 CISG and the Unification of International Sales Law

Since it entered into force in January 1988, the CISG has generated a great deal of comment and evaluation by scholars and practitioners around the world. Much of the commentary, both favourable and critical, focuses on the Convention's goal to unify the law governing international commerce, seeking to substitute one law for the many legal systems that now govern this area.[99] This quest for uniformity in international business transactions goes back to the medieval lex mercatoria, and is rooted in the need to promote similar or equitable rules and regulations which will enable predictability in international sale contracts.[100] In short, the need for internationally similar rules is created by the need for contracting parties to be able to meet on common ground.[101]

It is this quest for unification that motivates states to adopt the CISG, which by all counts represents the international community's most ambitious effort in creating a uniform law of international sales.[102] Yet this description of the Convention's goal as a simple unification of the laws ignores the complex context of the Convention's drafting and ratification.[103] One way to understand this point is to think about what is required to unify the law on an international scale, bearing in mind that the world we live in is very large, complicated and varied, spanning many continents and covering a multitude of very different cultures, languages, legal systems and people.[104]

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[99] Kastely op cit n 34 at 575.
[100] CB Anderson 'Uniformity in the CISG in the first decade of its application' 2001 University of Copenhagen Law School, Formations and Perspectives of International Trade Law 289-297at 291.
[101] Ibid.
[102] J E Bailey 'Facing the truth: Seeing the Convention on Contracts for the International Sale of Goods as an obstacle to a uniform law of international sales' (1999) 32 Cornell International Law Journal 273-317 at 274.
[103] Kastely op cit n 34 at 575.
[104] Anderson op cit n 100 at 289.

To unify the law among nations means to subject people around the world to a single set of rules and principles and to have them understand and conform to these rules and principles as they would to the laws of their own communities.[105] This in turn requires that the unified system is able to respond to future changes and develop in a uniform fashion.[106] Thus, it is clear that the progress made in establishing legal uniformity at the Vienna Conference could only have been achieved through a process of negotiation and compromise on the part of the states involved, in order to successfully integrate different concepts and ideas into an independent, workable and meaningful system of international sale rules.[107]

One of the most unique features of the CISG is that it was forged from the world's different legal systems yet in order to promote uniformity, it has had to detach itself from the idiosyncrasies of any one legal system; it is the product of the civil, socialist and common law systems of contract.[108] As such it is a unique hybrid of all three.[109] Furthermore, as is stated in the preamble of the CISG, in order to develop international trade and remove the barriers thereto, the Convention attempts to accommodate the social and economic differences between the various states.

Despite the drafters' attempts to create uniformity, however, fundamental structural differences in the social, legal, and economic traditions among the different states give rise to different intentions when entering into international contracts, and this may result in divergent interpretations of the CISG. [110]

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[105] Kastely op cit n 34 at 576.
[106] Ibid at 576.
[107] S. Viejobueno 'Progress through compromise: The 1980 United Nations Convention on Contracts for the International Sale of Goods' (1995) 28 Comparative and International Law Journal of South Africa 200-227 at 202.
[108] L A Dimatteo 'The CISG and the presumptions of enforceability: Unintended contractual liability in international business dealings' (1997) 22 Yale Journal of International Law 111-230 at 133.
[109] Ibid.
[110] Ryan op cit n 17 at 100.

The unification of international sales law is one of the primary goals of the CISG, and it could never have been achieved without the cooperation of, and compromises made by, the various states represented at the Vienna conference. In this chapter we will examine some examples of the compromises made in the drafting of the CISG. This examination not only highlights the significant structural differences between the nations represented at Vienna, but more importantly, it also contributes towards a better understanding of the many gaps and shortcomings of the Convention in a number of important aspects of the sales contract.[111] Compromises made in the process of drafting the CISG reveal, in particular, the tensions, on matters of legislative policy, between developed and developing nations on the one hand, and capitalist and socialist states on the other, as well as the conceptual gaps existing between the civil law and common law legal traditions.[112]

2.2 Conflicting Views of Developing and Socialist Countries with those of the Industrialised, Developed Countries

As has been noted frequently, the CISG is a product of compromise rather than consensus. It is an international compromise negotiated by countries with extremely diverse economies and governments.[113] Of course, it would be unrealistic to expect any international negotiation to produce complete unanimity: persuading nations that their own laws are not suitable as international legal standards is bound to generate tension.[114] Indeed, the actual negotiations of the CISG were marked by obstinacy and confrontation, but the problem with the CISG is that these disagreements were worn away through attrition rather than resolved by consensus.[115]

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[111] Viejobueno op cit n 107 at 202.
[112] Ibid at 203.
[113] Ryan op cit n 15 at 101.
[114] Harvard Law Review Association 'Unification and uncertainty: The United Nations Convention on Contracts for the International Sale of Goods' 1984 Harvard law Review 1984-2000 at 1988.
[115] Ibid.

During the drafting process of the CISG, resolutions were often passed without voting on them, persistent objections were dispelled by entering reservations on record, the negotiators often declined to reconcile conflicts over fundamental principles, instead, they sought to compromise on linguistics.[116] Therefore, in an effort to accommodate and lessen the differences between these varying social, legal and economic traditions, the CISG contains some vague and abstract language.[117]

This loose terminology in the CISG coupled with the differences between the various nations, especially the differences between developed and developing nations, is likely to result in conflicting interpretations of the CISG.[118]

The five sections of the CISG which are of most concern to developing nations and conducive to varied interpretations by developed and developing states are: usage of trade, the need for writing, open price terms, the notice requirement for non-conforming goods, and a force majeure provision.

2.2.1 **Usage of Trade**

In term of article 9 of the CISG, the parties are bound by any usage to which they have agreed and any practices which they have established between themselves.[119] They are also considered to be bound by any usage of which they knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.[120] This final version of article 9 was agreed upon after much debate and objections were raised over the matter, which persisted throughout the drafting history of the CISG.[121]

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[116] Ibid at 1988.
[117] Ryan op cit n 17 at 101.
[118] Ibid at 102.
[119] Art 9 (1) of the CISG.
[120] Art 9 (2) of the CISG.
[121] Kastely op cit n 34 at 609.

The scope and application of trade usage in contract interpretation turned into an issue with political overtones that sharply divided the UNCITRAL delegates.[122] This controversy emerged between the views of representatives from socialist and developing countries and those from Western, developed countries.[123]

Developed nations place great emphasis on flexibility of contracts, custom, and usage as means of increasing mercantile flexibility and economic efficiency.[124] As a result, these nations tend to allow custom and usage to play a larger role in their interpretation of contracts.[125] In contrast, developing and socialist states rely heavily on written rules and the express agreements of the parties, rather than depend on a more flexible and uncertain outcome under a usage of trade.[126] They are of the view that trade usages should only be applied if the parties explicitly agreed to them in the contract and they do not violate statutory provisions.[127]

Aside from the need of planned economies for security and foreseeability in contractual relationships, the main reason why many developing and socialist countries are suspicious of the impact of trade usages in the international sphere[128] is that their merchants typically are new to international trade and might be unaware of the established trade usages.[129] This concern in turn revived the second major objection to the use of trade usage: traditional trade usage has been developed without the participation of the developing nations

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[122] A M Garro 'Reconciliation of legal traditions on the U.N. Convention on Contracts for the International Sale of Goods' available at www.cisg.law.pace.edu/cisg/text/garro14,55.html (accessed on 28 September 2005).
[123] Ibid.
[124] Ryan op cit n 17 at 102.
[125] Ibid at 103.
[126] Ibid.
[127] Garro op cit n 122.
[128] Ibid.
[129] Kastely op cit n 34 at 609.

and reflects the interests of powerful traders at the expense of weaker traders.[130]

Mexico and Russia, in particular, expressed their concern that the subordination of national law to normative and interpretive usages could result in the imposition of unfair usages or inequitable practices, which are usually laid down by the economically stronger party to the detriment of the weaker party.[131] In the United States, for example, individuals who engage in a particular trade are treated as though they ought to have known its trade usages, even if that person is a newcomer to the industry.[132]

Much debate and deliberation took place over this issue at the Vienna Convention due to an amendment submitted by China to the effect that only "reasonable" usages be made binding, and by a Czechoslovakian suggestion that a usage may be binding only if it "is not contrary to this Convention."[133] Both these amendments were rejected in relatively close votes.[134] Opponents of these amendments argued, first, that issues of the validity of usages was left to domestic law under Article 4[135], and second, that respect of the parties right to determine the terms of their contract required that the usages to which they had agreed should be given effect even if they conflict with other provisions of the Convention.[136]

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[130] Ibid.
[131] Ryan op cit n 17 at 104.
[132] Ibid.
[133] Kastely op cit .34 at 610.
[134] Ibid.
[135] **Article 4** of the CISG: The Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with;
(a) the validity of the contract or any of its provisions or of any usage;
(b) the effect which the contract may have on the property in the goods sold.
[136] Kastely op cit at 610.

With all these opposite views on the conference table, it was clear that the issue had to be settled through a compromise.[137] Article 9 evolved as both a partial answer to the objections raised and as a compromise within them.[138] Subsection 1 of article 9 provides that parties are not bound to follow trade usage if they so agree, yet subsection 2 provides that parties are considered to have impliedly agreed to widely known usages of which they ought to have known.[139]

A good example of the compromise embodied in article 9(2) can be seen in *E.H.T.M. Peters v Kulmbacher Spinnerei and Co. Produktions KG* (1996).[140] In this case, a Dutch buyer ordered yarn from a German seller. The seller replied to the buyer's order by fax and later sent a formal confirmation of order which referred to the standard terms of the German Association of Yarn Traders. The standard terms provided that the interest rate in case of late payment was to be 4% over the discount rate of the Deutsche Bundesbank. After delivery, the seller commenced an action for payment of the purchase price and interest according to its standard terms.

In this matter, the Court observed as follows:

(1) There are no significant differences between the provisions of the CISG (article 9) and German and Dutch law when determining whether or not the standard terms become part of the contract.
(2) Without stating which law it applied, the Court found that the standard terms had become part of the contract.

In reaching this conclusion, the Court took into account the fact that these standard terms are regularly used in the particular trade concerned. Therefore, owing to its experience as a businessman in this trade, the buyer could not have been unaware of the use of these widespread standard terms referred to by the seller, nor of the specific provisions on interest. Furthermore, the Court held that the buyer ought to have known about the standard terms due to the fact that it had already concluded contracts with the seller in the past. The seller was thus awarded the purchase price and interest at the rate fixed by the standard terms.

Article 9, however, fails to specify whether usages supersede conflicting provisions of the Convention.[141] This omission is probably due to objections

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[137] Garro op cit n 122.
[138] Kastely op cit at 609.
[139] Ibid.
[140] All the case summaries in chapter 2 of this study were formulated from the case abstracts provided in the UNILEX online database on CISG case law, available at http://www.unilex.info (accessed on 2 December 2005)
[141] Garro op cit n 122.

from delegates of socialist countries, who insisted that usages should not override statutory provisions to the contrary.[142] However, the commentary to the Draft Convention and the principle of party autonomy embodied in article 6[143] indicates that a usage that has been expressly or impliedly accepted by the parties supersedes a conflicting provision of the Convention.[144]

An example of how the principle of party autonomy embodied in article 6 has been considered in determining that usages expressly or impliedly accepted by the parties supersede conflicting provisions of the CISG can be seen in an Austrian case (*Oberster Gerichtshof, 2000*).[145] In this case a German seller and an Austrian buyer concluded a contract for the delivery of wood. The buyer alleged non-conformity of the goods and sent the seller a written complaint stating that the goods were not of the promised quality and refused to pay the price. Referring to local German usages in the wood trade, the seller claimed that the buyer had to specify the precise nature of the lack of conformity within 14 days and since the buyer did not do so, it had lost its right to the claim. On the other hand, the buyer counter-argued that it had given proper notice of the non-conformity, and that the local usage was not applicable in an international sales contract governed by CISG.

The buyer lost its case in the lower court and the Supreme Court denied it the right to a retrial. In its decision, the Court stated as follows:

(1) although the CISG does not deal with the validity of usages,[146] it does deal with the application of usage;[147]
(2) a local usage need not be internationally accepted and that in order to be considered widely known and regularly observed in international trade, (Art. 9(2) CISG), a usage has to be recognised by the majority of the people acting in the trade concerned;
(3) Furthermore, a party ought to have known of a particular usage if the party had its place of business in the geographical area where the usage was applicable, or if the party permanently dealt within the area where the usage is applicable.

Therefore, owing to the fact that the parties had previously concluded contracts on the supply of wood with each other, and the seller had clearly referred to the local usage in its order form, the Court found that the buyer

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[142] Ibid.
[143] Article 6 of the CISG: The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.
[144] Garro op cit n 122.
[145] Op cit n 140.
[146] Article 4 of the CISG.
[147] Article 9 of the CISG.

ought to have known of the local German usage. The usage then prevails over the provisions of CISG, including Art. 39.

One approach suggested during the course of the debate over article 9 was to focus on the validity of usages under domestic law, as preserved in article 4 of the CISG, and to develop standards of fairness and equality as an aspect of validity.[148] Article 4 was written expressly to preserve national law on the validity of usages as well as other elements of the contract, yet this solution tends to undermine the goal of the convention to unify international sales by diverting this important issue to domestic law.[149]

Although Article 4 of the CISG leaves the validity of trade usages to be determined by domestic law, the fear that trade usages will work to the advantage of the more powerful traders still exists.[150] The national laws of most developing states do not give effect to trade usages in the sale of goods, with the result that developing nations' interpretation of Article 9 is extremely narrow.[151]

It is suggested that article 9 should be interpreted in order to promote the observance of good faith in international trade, as mandated by article 7 of the CISG in determining whether or not a particular trade usage operates to the advantage of powerful traders.[152] Article 9 should be interpreted as stating that a usage perpetuating domination by the powerful threatens the spirit of good faith in international trade and therefore is not impliedly incorporated into contracts under article 9(2).[153] Furthermore, in order to avoid conflicting interpretations of Article 9, it is advisable that both contracting parties explicitly detail any applicable trade usages and customs in their contract.[154]

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[148] Kastely op cit n 34 at 611.
[149] Ibid.
[150] Ryan op cit n 17 at 104.
[151] Ibid.
[152] Kastely op cit at 612.
[153] Ibid.
[154] Ryan op cit at 104.

2.2.2 Writing Requirement

Article 11 of the CISG states that 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.

A good example of this is a case involving a Finnish seller and a Swiss buyer (*Helsinki Court of Appeals, 2000*),[155] who entered into a contract for the sale of plastic carpets. The buyer was granted the exclusive right to sell plastic products to wholesalers in Switzerland. In 1996, without any written contract, the parties agreed that the sale would also include Power-turf carpets. However, from the beginning of 1997, the seller granted exclusive selling rights of Power-turf carpets in Europe to a Danish distribution company. When the buyer sent the seller a written confirmation concerning the amount of 10,000 units to be delivered, the seller only delivered the first consignment of 207 units, stating that the sale would not be carried out in its totality because of the exclusive selling rights agreement concluded with the Danish company.

The Court of First Instance held that the contract was governed by CISG as the parties had their places of business in Contracting States.

As to the merits of the matter, the Court held that according to article 11 of the CISG, a contract of sale need not be concluded in or evidenced by writing and may be proved by any means. Moreover, according to article 13 of the CISG, "writing" includes telegram and telex. Therefore, since the parties had orally agreed on exclusive selling rights in Switzerland and the seller had in 1996 made an agreement granting the exclusive selling rights to another company, the buyer subsequently lost its exclusive rights without any notice. The Court held that the seller's behaviour constituted breach of contract and the buyer was entitled to damages and interest to be determined according to Finnish law. The seller appealed against the court's judgement; however, the Court of Appeals upheld the judgement off the court of first instance.

This article of the CISG (article 11) favours developed nations, many of whose legal systems have abandoned the formal requirement of writing with regard to contracts for the sale of movable goods, on the ground that it does not correspond to the conditions in which many such transactions are concluded.[156] Article 11 reflects the necessity of having international transactions freed from formal requirements, especially in the context of international trade relationships

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[155] Op cit n 140.
[156] Viejobueno op cit n 107 at 211.

where, due to modern means of communication, many transactions are concluded at great speed and are not paper based.[157]

Contracts can be made and lost within seconds if another merchant is able to enhance his bargaining power faster than other merchants, thereby securing the contract for the international sale of goods.[158] Thus, the imposition of a writing requirement would interfere with the speed deemed necessary by merchants of developed states.[159]

Most developing and socialist states, in contrast, require written proof of a contract, since the main function of contracts in these states is to further the objectives of a planned, state-run economy.[160] The position of these states was preserved by the insertion of article 96, which permits states that require contracts to be evidenced in writing to declare article 11 inapplicable to sales contracts concluded between parties having their place of business in these states.[161] In this case, the ordinary private international law rules of the state in question will determine the formalities of the conclusion of a valid contract.[162] This was a clear-cut compromise taking the form of a declaration allowed by the Final Provisions of the Convention.[163]

A good example of the compromise embodied in article 9 can be seen in the case where a Russian buyer and a Bulgarian seller (*Parties are unknown, Held in the High Court of Arbitration of the Russian Federation, 1998)*[164] entered into a written contract for the sale of goods. The contract contained a choice of law clause in favour of Russian law. The seller commenced arbitration proceedings against the buyer claiming damages for breach of contract on account of the buyer's failure to pay the price. The buyer defended itself on the grounds that

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[157] O. Lando 'The CISG, the UNIDROIT principles and the principles of European contract law in a global commercial code' available at http://www.iue.LAW/ReseaechTeaching/EuropeanPrivateLaw/Conferences/Lando_CISG.pdf (accessed on 26 September 2005).
[158] Ryan op cit n 17 at 106.
[159] Ibid.
[160] Ibid.
[161] Viejobueno op cit n 107at 211.
[162] Ibid.
[163] Garro op cit n 122.
[164] Op cit n 140.

the contract had been modified by the parties over the telephone, and that the price had already been paid but the money was stolen from the foreign bank, as was evidenced by a penal prosecution pending abroad.

The Court held that the contract was governed by CISG as the parties had chosen to apply the law of a Contracting State.[165]

As to the buyer's argument concerning modification of the contract, the Court noted that the Russian Federation maintains the declaration made by the former USSR in accordance with Article.12 and 96 of the CISG. Therefore, any provision of article11 and article 29 that allows a contract of sale or its modification or termination by agreement to be made in any form other than in writing does not apply where any party has its place of business in the Russian Federation. On this ground, the Court held that the contract could not be validly modified by the oral agreement of the parties.

The above approach, however, tends to favour developing and socialist states over developed states, thus a developed state would be hesitant to enter into a contract that requires it to be in writing.[166] On the other hand, the rules of private international law may determine that the law of the developed state applies, in which case the contract need not be in writing, and developing and socialist states may be uneasy about entering such a contract.[167]

The views of the different states in terms of the formalism of a contract are so varied that the CISG does not even attempt to thoroughly address the differences in interpretation, Instead, in an attempt to provide a compromise, it allows states to opt out of the writing provisions.[168]

2.2.3 Open Price Terms

In terms of article 14 (1) of the CISG, a proposal for concluding a contract constitutes an offer if it is sufficiently definite. A proposal is sufficiently definite if it indicates the goods and expressly or impliedly fixes or makes provisions for

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[165] Article 1(1) b of the CISG.
[166] Ryan op cit n 17 at 107.
[167] Ibid at 108.
[168] Ibid.

determining the quantity and the price.[169] The United States delegation was unsuccessful in attempting to change the language of article 14 (1) in favour of "open-price" offers.[170]

At the drafting of the CISG, socialist countries objected to open price terms because certainty of their contracts is essential to their transactions, and because the parties are expected to conform their contracts to a predetermined macroeconomic governmental plan.[171] Some civil law systems also view contracts of sale with open-price terms with hostility, particularly when the unilateral fixing of the price works to the disadvantage of the weaker party.[172]

In addition, it was argued at the Vienna conference that contracts without a fixed price do not serve the interests of the developing countries as a result of the unfavourable terms of trade for raw materials, as opposed to the price of manufactured goods.[173]

A more flexible system may be practicable or at least tolerable in countries or economic systems with comparatively large homogeneous and well-known market structures.[174] In the United States, for instance, the policy prevailing on this matter encourages the conclusion of sales contracts for long-term supplies, leaving the price and quantity of goods open to be adjusted in the light of sellers' output and buyers' requirements.[175]

In spite of the insistence of the US delegation to the convention to this effect, proposals to do away with the requirement of a fixed or determinable price failed

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[169] Article 14 (1) of the CISG.
[170] Garro op cit n 122.
[171] Ryan op cit n 17 at 109.
[172] Garro op cit n 122..
[173] Viejobueno op cit n 108 at 213.
[174] Ibid.
[175] Garro op cit.

at the Vienna conference as a result of opposition by the Soviet Union, a number of developing countries, France and other states.[176]

In one case (*Parties are unknown, Held at Tribunal of Int'l Commercial Arbitration at the Russian Federation Chamber of Commerce, 1995*),[177] an Austrian firm (the claimant) brought a claim against a Ukrainian firm (the respondent) for damages resulting from the latter's refusal to deliver a certain quantity of goods. The respondent denied liability on the grounds that no such agreement had been reached between itself and the claimant.

In settling this dispute, the tribunal noted that, under article 14 of the CISG, a proposal for concluding a contract should be sufficiently definite. It was considered to be such if it indicated the goods and expressly or implicitly fixed or made provision for determining their quantity and price. A telex communication from the respondent regarding the delivery of the goods within a specified period indicated the nature of the goods and their quantity. However, it omitted to indicate the price of the goods or any means of determining their price. The indication in the telex that the price of the goods in question would be agreed ten days prior to the beginning of the new year could not be interpreted as making provision for determining the price of the goods, but was merely an expression of consent to determine the price of the goods at a future date by agreement between the parties. The claimant, who confirmed the contents of the telex communication, thus expressed its consent to the price of the goods being made subject to further agreement between the parties.

Agreement on the price had not subsequently been reached by the parties. The respondent indicated to the claimant that it was not possible to conclude a contract for the specified quantity of goods. Finding that no contract had been concluded between the parties, the tribunal dismissed the claim.

As a result of the insistence on a more flexible system by the developed nations, an uneasy compromise was finally reached, not by amending article 14(1) but by inserting a new provision in article 55 (under the section dealing with the obligations of the buyer).[178]

Article 55 of the CISG provides that, where a contract has been validly concluded but does not expressly or impliedly fix or make provisions for

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[176] Viejobueno op cit n 107 at 213.
[177] Op cit n 140.
[178] Garro op cit n 122.

determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned.[179]

In a German case (*Parties are unknown, Held at Oberlandesgericht Rostock, 2001*),[180] some difficulties arose as to what the quantity of goods ordered was and at what their price was. Referring to article 55 of the CISG, the Court assumed that the parties, in the absence of any indication to the contrary, had implicitly agreed to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned. In order to determine such price, the Court referred to the usual price list for the goods.

Article 55 stands in glaring contradiction to Article 14 (1) of the CISG, for it implies that a contract may be "validly concluded" even though it "does not expressly or implicitly fix or make provision for determining the price."[181] Several attempts have been made to explain this away and none of them are truly convincing.[182]

On the one hand, scholars such as Professor J Honold (Uniform Law for International Sales under the 1980 United Nations Convention, 1982) are of the opinion that a contract with an un-stated price may be validly concluded.[183] On the other hand, scholars such as Professor Farnsworth believe that article 55 only operates if a contract has been validly concluded, and this cannot be the case, in light of article 14, where the offer does not contain a reference to the price.[184]

The political and economic differences between developing, socialist, and developed states may result in dissimilar interpretations of Article 14 of the

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[179] Article 55 of the CISG.
[180] Op cit n 140.
[181] Garro op cit n 122.
[182] Lando op cit n.157.
[183] Garro op cit.
[184] Viejobueno op cit n 107 at 214.

CISG.[185] The language of this provision is such that developing states can construe it narrowly and claim that if the price term was left open, then the offer would not be "sufficiently definite," or that the contract itself was invalid, and therefore it would not fall within the jurisdiction of the CISG.[186] Developed states, on the other hand, would interpret the language of the provision broadly, interpreting the phrase, "expressly or implicitly fixing or making provision for determining the price," to allow an implicit reference to the price generally charged at the time of the conclusion of the contract for goods sold in similar circumstances.[187]

2.2.4 Force Majeure Provision

In general terms, it can be said that force majeure occurs when the performance of a contract is impossible due to unforeseeable events beyond the control of the parties.[188] Under Article 79 of the CISG, a party is not liable for failure to perform any of his obligations if it can be proved that the failure was due to an impediment beyond his control.[189] In addition, the party must prove that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract, or to have avoided or overcome it or its consequences.[190] The CISG drafters especially chose the term "impediment" to denote an objective, outside force that interferes with performance.[191] Article 79 may excuse performance where an impediment either renders performance impossible or frustrates the purpose of the contract.[192]

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[185] Ryan op cit n 17 at 109.
[186] Ibid.
[187] Ibid at 109.
[188] J Rimke 'Force Majeure and Hardship: Application in international trade practice with specific regard to the CISG and the UNIDROIT principles of international commercial contracts' 1999-2000 Pace Review on the Convention of Contracts for the international Sale of Goods, Kluwer 197-243 at 198.
[189] Ryan op cit n 17 at 112.
[190] Ibid.
[191] J M Bund 'Force Majeure Clauses: drafting advice for the CISG practitioner' (1998) 13 Journal of Law and Commerce 381-413 at 386.
[192] Ibid.

Although all legal systems take notice of, and provide for the discharge of the duty to perform of one or both parties when a contract has become unexpectedly onerous or impossible to perform, the conditions under which they allow the defence of force majeure vary.[193]

Developed states usually employ a stringent interpretation of force majeure.[194] For instance, in the United States, Section 2-615 of the Uniform Commercial Code (UCC) provides that a delay in delivery or non-delivery in whole or in part by a seller does not result in breach of his duty under a contract for sale, if performance as agreed has been made impracticable by the occurrence of a contingency, the non-occurrence of which was the basic assumption on which the contract was made or by compliance in good faith with any foreign or domestic governmental regulation or order, whether or not it later proves to be invalid.[195] Use of this provision, however, is extremely limited. Among the few instances under which the provision is triggered are: "a severe shortage of raw materials or supplies due to war, embargo, local crop failure, unforeseen shutdown of major sources of supply or the like."[196]

In *Raw Materials Inc. v. Manfred Forberich* GmbH & Co, KG (U.S. District Court, *Northern District of Illinois, East. Div, 2004*),[197] a claim arose out of a contract between a German seller and a US buyer. The former agreed to sell and deliver 15,000-18,000 metric tonnes of used Russian railroad rail to the latter. The buyer alleged breach of contract and fraud relating to the seller's failure to deliver the goods and applied for summary judgment.

The seller contended that its failure to perform should be excused on force majeure grounds as it was precluded from shipping the rail by the fact that St. Petersburg port unexpectedly froze over at the time of delivery, preventing vessels from entering and exiting the port.

The parties agreed that their contract was governed by the CISG. Since the contract did not contain any express force majeure provision, the Court

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[193] Rimke op cit n 188 at 198.
[194] Ryan op cit n 17 at 113.
[195] Rimke op cit n 188 at 203.
[196] Ryan op cit n 17 at 113.
[197] Op cit n 140.

examined article 79 of the CISG. In applying article 79 of the CISG the Court used as a guide case-law interpreting analogous provisions of the domestic law on excuse, an approach used by other Federal Courts. The Court applied a three stage test: (1) whether an impediment occurred, (2) whether the impediment made performance impractical, and (3) whether the impediment was foreseeable.

The Court stated that summary judgment may only be granted where there is no genuine issue as to material fact. In this matter however, there was a question of fact as to whether the early freezing of the port prevented the seller's performance and whether it was foreseeable. The Court therefore dismissed the buyer's application for summary judgment and stated that the seller's force majeure defence may be viable.

On the other hand, in another case (Bulgarian Chamber of Commerce and Industry, 1998),[198] a Russian seller and a Bulgarian buyer entered into a contract of sale of steel ropes. After receiving the first shipments, the buyer sent several faxes to the seller, asking to stop deliveries. The buyer then paid only part of the price for the delivered goods and refused to pay the rest. Following negotiations that led to no result, the seller sued to obtain full payment and interest. The buyer raised a counterclaim for reimbursement of expenses for import taxes, shipment, storage and commission for the goods delivered after it had asked to stop shipment.

The Arbitration Court held that the buyer's faxes were to be considered as mere offers to modify the contract, which the seller was not obliged to accept either under the contract or under the CISG.

Furthermore, the buyer's reasons for asking to stop the delivery did not meet the requirements of article 79 of the CIDG on exemption from liability for failure to perform. The buyer had alleged a negative development in the market situation, problems with the storage of the goods, revaluation of the currency of payment and a decrease of trade volume in the construction industry. Such events were to be considered part of the buyer's commercial risk and were thus not impediments amounting to exemption (force majeure). On the contrary, they could have been reasonably expected by the buyer upon conclusion of the contract.

In light of their more fragile economic and political conditions, developing countries tend to give force majeure provisions a far more lenient

[198] Ibid.

interpretation.[199] This may result in divergent interpretations of Article 79 of the CISG.

2.2.5 Notice Requirements for Nonconforming Goods

Article 38 (1) of the CISG requires a buyer to examine the goods or cause them to be examined, within as short a period as is practicable in the circumstances. In addition to that, article 39 (1) states that the buyer loses the right to rely on a lack of conformity of the goods, if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it, or ought to have discovered it.

An example is a Russian case, *Dr. S Serguuev Handelsagentur v. DAT-SCHAUB A/S (Held at So -OG Handelsretten, the Maritime and Commercial Court of Copenhagen, 2002).*[200] In this case a Russian buyer ordered a load of fish from a Danish seller. The parties had entered into agreements with each other previously, however, they had only once before entered into an agreement for the sale of fish with each other. The documents relating to the agreement included a specification provided by the seller on the buyer's request. This specification included a description of the species of the fish - the name also given in Latin, the size of the fish, the manner of packing case and the date of production [the catch]. Subsequently, the seller confirmed the order, repeating the description, but omitting the name in Latin. Subsequently, in an invoice issued by the seller to the buyer, the name in Latin was also omitted, but otherwise the invoice described the fish as in the specification

Shortly after delivery the buyer gave notice to the seller, claiming lack of conformity concerning the species of the fish. The parties argued for several months without reaching a solution. During these months the fish were stored in freezer containers at the buyer's expense. Seven months after the delivery, the buyer gave notice to seller, stating that the time of production was not that agreed in the contract. Subsequently, the parties agreed to an expert appraisal of the fish. The buyer then sued the seller claiming damages. It argued that the species of the fish did not conform to the agreement. It also argued that the packaging of the fish showed that they had been caught prior to the agreed time and that the expert appraisal had established a lack of conformity in relation to the quality of the fish existing at the time of delivery. The seller disclaimed any liability and filed an independent claim against the buyer for payment of the outstanding price.

Without making any reference to articles 8 or 9 of the CISG, the Court stated

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[199] Ryan op cit n 17 at 113.
[200] Op cit n 140.

that the usual way to specify the species of the fish in commercial transactions is to use its Latin name. In the business relationship between the parties it was normal procedure to provide a specification to describe the goods. As the buyer had placed his order on the basis of this specification, and as the fish delivered were in accordance with the Latin name in the contract, the Court decided that there was no lack of conformity (Art. 35(1) CISG).

In relation to the production time and quality of the fish, the Court also ruled in favour of the seller. It stated that the buyer could easily have examined the packaging of the fish and thereby seen the time of production, or it could have checked the fish itself at the time of delivery. Thus, the buyer had not examined the fish within as short a period as practicable (Art. 38 (1) CISG). By not giving prompt notice to the seller concerning time of production and quality, the buyer had lost its right to rely on lack of conformity for these reasons (Art 39 (1) CISG).

The Court finally stated that the buyer not did have a reasonable excuse for its failure to give the required notice (Art. 44 CISG).

Furthermore, article 39 (2) states that, in any event the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer; unless this time-limit is inconsistent with a contractual period of guarantee. Read together, these articles require a buyer to examine the goods within the shortest practicable period and to give notice to the seller within a reasonable time after the buyer discovers or ought to have discovered non-conformity.[201] The buyer's failure to give timely notice results in the loss of remedies for non-conformity.[202]

At the Vienna Conference, few substantive areas caused more debate than those concerning the procedures to follow in cases of non-conformity.[203] The most controversial issues centred around the period of time within which the buyer is required to discover non-conformity, the nature and timing of the buyer's obligation to give notice of non-conformity, and the consequences of the buyer's failure to give such notice.[204]

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[201] Viejobueno op cit n 107 at 220.
[202] Ibid.
[203] Garro op cit n 122.
[204] Ibid..

The debates during the 1980 diplomatic conference reveal a clear divergence between the views of those from developed and developing countries on the need to protect the seller when the buyer claims the non-conformity of the goods.[205]

Developing nations are typically frequent buyers of heavy machinery needed for development, and fear that defects in the machinery may not become apparent until long after delivery, or that the buyers may fail to recognize defects in the goods or to appreciate the disastrous results of late or no notice.[206] In addition, merchants from developing states tend to be less knowledgeable about commercial practices concerning the international sale of goods and, therefore, may be unaware of their duty to provide prompt notice of nonconforming goods.[207]

Delegates from developing countries, especially Ghana, vehemently objected to the loss of the buyer's right to rely on non-conformity as a consequence of failure to give notice, on the ground that it was too harsh a punishment, especially as in the situation envisaged it was the seller, and not the buyer, who has committed the breach of contract.[208]

Professor Date-Bah, an active participant in the negotiations on behalf of Ghana, explained that his country (as is the case in many other developing countries) has numerous important tradesmen who are illiterate, and that it often becomes necessary to call in foreign experts in order to carry out tests on imported, complicated machinery.[209] In these circumstances, it was argued that

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[205] Viejubueno op cit at 220.
[206] Ryan op cit n 17 at 110.
[207] Ibid at 111.
[206] Viejobueno op cit n 107 at 221.
[209] Garro op cit n 122.

the examinations would take much longer than in developed countries, where expertise is normally readily available.[210]

Furthermore, in many instances, it is simply not possible for developing countries to give notice of lack of conformity within a reasonable time due to deficient transportation services and lack of modern technology.[211] Frequently, delivered goods remain in the port of arrival for more than two years and delivery to their final destination is often delayed.[212] It was also said that in many developing countries, illiterate tradesmen will often learn of the notice requirement only after they consult specialised counsel with regard to some aspect of the transaction, e.g. a breach of contract by the seller, as in some of these countries there is no similar obligation to give a written notice of such non-conformity.[213]

Delegates from developed countries, on the other hand, stressed that the practice of short-time notice of lack of conformity was essential to settle disputes quickly and effectively.[214] The United States, for example, requires the buyer to notify the seller within a reasonable period of time that he is rejecting the goods, so that the seller may attempt to make a conforming delivery if the time for performance has not yet expired.[215] Some representatives of developed countries were particularly concerned with the seller's need to obtain evidence and to ascertain the validity of the buyer's claim.[216] Allowing an extended period of time for notification of non-conformity would create difficulty and uncertainty in this regard, particularly in the event of re-sale.[217]

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[210] Viejobueno op cit at 221.
[211] Ryan op cit at 111.
[212] Garro op cit.
[213] Viejobueno op cit n 107 at 221.
[214] Ibid.
[215] Ryan op cit n 17 at p110 {U.C.C. § 2-602 (1), § 2-508 (1)}.
[216] Viejobueno op cit at 221.
[217] Ibid.

Developing nations' efforts to eliminate the provision requiring notice within a reasonable time and the sanction for the buyer's failure to give notice were unsuccessful. This precipitated a crisis at the Conference, because some delegates feared that the failure to give some deference to the objections over notification of defects might result in the developing nations refusing to ratify the Convention.[218]

The delegates were forced to search for a compromise solution between the views of the representatives of some industrialized countries, who were convinced that eliminating all of the buyer's rights to recover would effectively ensure strict compliance with the notice requirements, and those of some representatives of developing countries, who would have been satisfied with a rule that required notice, but objected to the loss of all of the buyer's remedies as a result of failure to provide timely notification.[219]

After much debate, in an effort to appease developing states, the CISG adopted several exemptions to the strict notice rule.[220] In terms of article 40 of the CISG, the seller is not entitled to rely on the provisions of article 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware of, and which he did not disclose to the buyer.

For example, in *Beijing Light Automobile Co. Ltd v. Conell Limited Partnership (arbitration Institute of the Stockholm Chamber of Commerce - Stockholm, Sweden, 1998),*[221] a US seller and a Chinese buyer concluded a contract for the sale of a press to be used by the buyer for the production of frame rails for light trucks. The parties agreed on an 18-month guarantee. The press was constructed and first assembled in the United States. The seller had replaced a part of the press with a substitute part but it had neither informed the buyer thereof nor instructed the buyer's engineers as to how to install it. The press was then disassembled for delivery to the buyer's factory, where it was reassembled by the buyer's technicians and put in operation. For almost three years the buyer used the press continuously without incident. Finally the press failed resulting in

[218] Garro op cit n 122.
[219] Ibid.
[220] Ryan op cit n 17 at 111.
[221] Op cit n 140.

serious damage to the press itself. Only after the failure of the press, did the buyer realise that a part of the press had been replaced with a device which deviated from the seller's drawings.

The buyer commenced arbitration proceedings claiming damages for non-conformity of the press to the contractual specifications. In particular, the buyer alleged that the failure of the press was caused by the substitute part, which was less reliable that the part normally used by the seller and indicated in the seller's instructions and drawings.

The seller contended that the buyer's claim for damages was time-barred because of the expiration of the contractual guarantee period. It also alleged that the parties had derogated both from the CISG's provisions in article 35 and from articles 38 and 39 of the CISG, and in so doing, the parties had also derogated from article 40 of the CISG. In any case, the buyer had not complied with the requirements of articles 38 and 39 of the CISG. The buyer responded that no limitation period should apply since the seller had promised that the press would last for at least thirty years.

The Tribunal found that the contractual documents provided to the buyer did not contain any detailed description of how the substitutive part was to be installed and that the failure of the substitutive part could not be held due to the buyer's negligence during installation or maintenance. The substitutive part of the press was not fit for the long, continuous unfailing operation of the press that the buyer expected and that was the purpose of its investment. The press, therefore, falling short of what the buyer was entitled to expect under Art. 35(2) CISG, was non-conforming.

As to the time-bar issue, it was undisputed that the buyer had given notice of the alleged non-conformity well beyond not only the 18-month contractual period but also the two-year limitation period indicated in article 39(2) of the CISG. Therefore the Tribunal deemed it necessary first to establish whether article 40 of the CISG was applicable and whether or not the parties had derogated from it. Under article 40 of the CISG the seller is not entitled to rely on the examination and notice requirements of articles 38 and 39 of the CISG if the lack of conformity relates to facts of which it knew or could not have been unaware of and which it did not disclose to the buyer. The Tribunal's conclusion was that the parties had not derogated from article 40 of the CISG and that the application of this provision prevented the seller from relying on the expiration of both the CISG and contractual terms.

The Tribunal found that the seller could not have been unaware of the fact that the proper installation of the substitutive part was critical and that improper installation by the buyer could lead to serious failure of the press within a period of time other than that which the buyer was entitled to expect under the contract since the seller had done nothing to eliminate the risk, it had consciously

disregarded apparent facts which were of evident relevance to the non-conformity and which, in fact, had caused the failure of the press. Moreover the seller had not complied with its duty to disclose the non-conformity, because it had failed to provide instructions on, or supervise, the installation, which had caused the non-conformity. As a result of the above, the buyer was not time-barred from presenting the claim for damages and the seller was liable in damages for non-conformity of the press.

Furthermore, under article 44 of the CISG, a buyer may deduct the value of the defect from the price if he has a "reasonable excuse" for not giving prompt notice.[222]

In *Nurka Furs v. Nertsenfokkerij De Ruiter BV (Held in Gerechtshof's Hertogenbosch, 1997)*,[223] a Greek buyer and a Dutch seller concluded a contract for the sale of furs. Shortly after delivery the furs were sent to a third party for processing, which noticed that some of the furs were defective. As a result the buyer commenced an action against the seller claiming avoidance of the contract as well as damages. The seller contested the extent as well as the nature of the damages and alleged that the buyer had failed to give notice in time.

At first instance, the Court held that the contract was governed by CISG. The Court further held that the buyer had lost its right to rely on a lack of conformity as it did not examine the goods 'within as short a period as practicable in the circumstances', i.e. before processing of the goods, and as it had not given timely notice of the defects. The Court considered the notice that was given three weeks after the goods were sent to the third party for processing as not timely, considering that at that moment the goods had already undergone processing. The buyer appealed.

The appellate Court confirmed the lower Court's decision. It specified that article 38 of the CISG does not impose a duty on the buyer to examine the goods; however, omission of examination deprives the buyer of the right to rely on a lack of conformity of the goods.

Furthermore, the Court addressed the issue of whether the buyer had a reasonable excuse for its failure to give the required notice (article 44 of the CISG). Considering that the buyer could have had the goods examined earlier because an expert could have taken a sample at the moment of delivery, and taking into account the existing means of communication, the Court found that the buyer did not have a reasonable excuse.

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[222] Ryan op cit n 17 at 111.
[223] Op cit n 140.

Articles 40 and 44 serve as a compromise solution, which retains the presumption in favour of the seller's right to receive timely notice, but permits limited recovery to the buyer with a reasonable excuse for failing to give such notice.224 The compromise reached in article 44 has been criticised for its lack of clarity as to what constitutes a "reasonable excuse."[225]

The term "reasonable excuse" is open to divergent interpretations by parties from developed states as opposed to those from developing states, as well as the courts, depending upon the traditions of, and the circumstances surrounding, the contracting parties.[226] Although, this is one of those compromises that can properly be characterized as "uneasy", it embodies a fair accommodation of the competing interests of buyers and sellers of complex machinery.[227] As such, and in light of the CISG's acknowledgment of legal, social, and economic differences, a variety of interpretations of the term "reasonable excuse" should be accepted.[228]

2.3 Common Law – Civil law Differences

Before the Second World War, the civil law approach was predominant in the various draft rules on international sales.[229] In fact, one of the most frequent criticisms directed at the two Hague Sales laws of 1964 was that their drafting style was too similar to that traditionally used for codification in civil law countries.[230] They were, furthermore, considered too abstract and dogmatic by jurists from other legal systems.[231]

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[224] Viejobueno op cit n 107 at 221.
[225] Garro op cit n 122 .
[226] Ryan op cit n 17 at 111.
[227] Garro op cit n 122.
[228] Ryan op cit n 17 at 112.
[229] Garro op cit.
[230] Viejobueno op cit n 107 at 203.
[231] Ibid.

The situation changed with the CISG, which represents a compromise between the civil law and common law systems, sometimes reflecting concepts that are unique to one system and not the other.[232]

It was no easy task to create a convention that would be acceptable to such a large number of countries with different legal systems and divergent political and economic policies.[233] What made it especially difficult was the opinion of participating delegates that their own legal system was superior to other systems, and the expectation that concepts and techniques of their domestic law would be embodied in the CISG.[234] This made reaching a consensus among the different states present at the Vienna Conference nearly impossible. In fact, in the case of the CISG, even a compromise became difficult to achieve.

However, the Convention's compromises to accommodate the conceptual gaps between Civil and Common law jurisdictions were not accompanied by the same level of political intensity common to other more pressing and controversial topics, such as the conflict of interest between developed and developing countries.[235] Most of the debates between delegates from the two major legal traditions were waged over differences in legal technique rather than economic or political issues.[236]

Some of the issues that emerged as particularly problematic in this category were the following: (1) the role of the common law notion of "consideration;" (2) whether an offer should become effective at the time of the offeree's dispatch of the acceptance, or at the time the acceptance reaches the offeror; (3) whether an offer stating a fixed period of acceptance should be considered irrevocable;

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[232] 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, Kluwer 3-75 at 9.
[233] Ibid at 8
[234] Ibid
[235] Garro op cit n 122.
[236] Ibid.

and (4) whether the primary remedy for breach of a contract of sale should be specific enforcement or alternative relief.[237]

2.3.1 The Role of the Common law Doctrine of Consideration

The concept of consideration raised the most friction between the two legal systems.[238] In common law countries, a contract requires consideration to be enforceable, a concept unknown in civil law systems.[239] The traditional common law doctrine of consideration refers to a counter-value i.e. an act or a promise that must be given, not only when contracts are originally formed, but also when pre-existing contracts are modified.[240] Therefore, at common law, when an agreement to modify a contract merely increases or reduces the obligations of one of the parties, the agreement may be unenforceable since it is not supported by "consideration".[241] Civil law systems impose no comparable restriction and are not familiar with this doctrine.[242]

By not mentioning the doctrine of consideration, the Convention has therefore adopted the civil law approach. This is however of less significance than it seems: The initial sale contract itself always includes "consideration" due to the exchanged promises to deliver and to pay; and the restrictions imposed by the doctrine of consideration would heavily reduce the value of the Convention in terms of unifying the law on the formation of the contract, and it would be inconsistent with article 29 (1) of the CISG, which allows the modification of the contract "by the mere agreement of the parties." [243] Also, common law delegates did not object to its omission, since the restriction posed by the

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[237] Viejobueno op cit n 108 at 204.
[238] M. Wesiack 'Is the CISG too much influenced by civil law principles of contract law rather than common law principles of contract law? Should the CISG contain a rule on the passing of property?' 2004 available at www.cisg.law.pace/edu/cisg/biblio/wesiack.html (accessed on 30 September 2005.
[239] Ibid.
[240] Viejobueno op cit n 107 at 204.
[241] Garro op cit n 122.
[242] Ibid.
[243] Wesiack op cit n 238.

doctrine on the parties' ability to adapt their transactions to new circumstances has already generated pressure to modify this traditional common law rule.[244]

2.3.2 Perfection of the Contract

A minor difference between common law and civil law countries concerned the moment when the acceptance to an offer becomes effective. The classic civil law approach is that an acceptance is not effective; until it reaches the offeror, thus placing the risk of transmission of a written acceptance on the offeree.[245] Because the offeree was the party that selected the medium of communicating the acceptance, the offeree is considered in the best position to insure against possible delays and hazards.[246] On the other hand, under the common law "mail-box" rule, a written acceptance is effective on its dispatch.[247] Accordingly, the risk of delay or loss of the acceptance rests on the offeror provided the offeree dispatched the acceptance by a medium expressly or impliedly authorized by the offeror.[248]

Article 18(2) of the CISG generally endorses the civil law approach. Article 16 (1), however, preserves an important consequence of the "mail-box" rule: It stipulates that an offer may not be revoked if the revocation reaches the offeror after the dispatch of the acceptance.[249] Consequently, while receipt is crucial for the effectiveness of the offer, dispatch remains the standard to determine the timeliness of its revocation.[250]

Moreover, in one important situation, the Convention does not follow the receipt theory. According to article 18(3), the acceptance is effective at the moment the offeree indicates assent by performing an act, "such as one relating to the

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[244] Viejobueno op cit n 107at 204.
[245] Garro op cit n 122.
[246] Ibid.
[247] Wesiack op cit n 238.
[248] Garro op cit 122.
[249] Viejobueno op cit n 107 at 205.
[250] Ibid.

dispatch of the goods or payment of the price."[251] Therefore, although the Convention adopts the receipt theory for the most part, a closer look at the practical consequences of the provisions on the formation of contract reveals a well-balanced compromise between civil law and common law principles.[252]

2.3.3 Revocability of Offers

Many civil law countries treat offers as irrevocable for a reasonable time unless the offeror indicates the contrary, thus giving the offeree reasonable time to consider the offer and respond to it. This rule applies even more so to offers explicitly containing a fixed period for acceptance.[253] Under French law, for instance, although the revocation of an offer is permitted – particularly if the offer states a fixed time for acceptance - the offeror is bound to indemnify the offeror or to pay damages in case of revocation.[254]

In contrast, the common law approach has been to grant the offeror the freedom to abandon the deal until the formation process of the contract is quite advanced.[255] Under common law an offer may be revoked before acceptance, since the offeree has not yet paid consideration, even if the offer states a fixed period for acceptance.[256] This is the general approach taken by the Convention in article 16(1), which sets forth the common law presumption of revocability. However, in an effort to balance common law and civil law doctrines, article 16 contains two important exceptions in paragraph 2, which restrict the offeror's power to revoke on two alternative grounds: (a) a promise or other indication by the offeror that the offer is irrevocable; or (b) acts by the offeree in reliance on the offer.[257]

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[251] Garro op cit n 122.
[252] Ibid
[253] Wesiack op cit n 238.
[254] Viejobueno op cit n 107 at 206.
[255] Garro op cit n 122.
[256] Wesiack op cit n 238.
[257] Viejobueno op cit n 107 at 206.

The language adopted in article 16(2)(a) is described in the summary of UNCITRAL deliberations as a compromise, but its drafting history indicates that at least two interpretations of this provision are possible.[258] For a civil lawyer it would be natural to accept that if a fixed date for acceptance is given, as provided in sub-paragraph (a), this indicates that the offer is irrevocable until the expiry of the stated period, although not thereafter.[259] For a common law lawyer, on the other hand, the time fixed for acceptance would only mean that an answer has to be given within this period, but is not in itself sufficient to make the offer irrevocable.[260] Article 16 therefore does not contain a compromise, but only masks the differences between the legal systems.[261] This is a clear example of a "compromise" entered into with mental reservations on both sides; each side keeping its own view on what was agreed.[262]

2.3.4 Specific Performance

The disparity between civil law and common law approaches to the law of sale was particularly evident in the field of remedies for breach of contract.[263] In this area, the scope of the remedy requiring specific performance of contractual obligations was one of the most difficult issues encountered in the preparation of the CISG.[264]

In civil law countries, the primary remedy for a breach of contract is the non-breaching party's right to compel specific performance.[265] The common law, on the other hand, traditionally relies on damages as the prevailing remedy; specific

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[258] Garro op cit.
[259] Viejobueno op cit at 206.
[260] Ibid.
[261] Wesiack op cit n 238.
[262] Garro op cit n 122.
[263] Viejobueno op cit n 107 at 207.
[264] Ibid.
[265] Wesiack op cit 238.

performance is only available if the damages are inadequate, such as where the subject matter is unique or irreplaceable.[266]

Consistent with the traditional preference of civil law systems for specific relief, the CISG gives the right to require specific performance to both the seller and the buyer. Article 46 confers on the buyer the right to demand specific performance of the seller's obligations to deliver the goods and the documents, and transfer ownership over the goods.[267] Article 62 entitles the seller to require the buyer to pay the price and take delivery or perform his other obligations.[268]

While there has been opposition to these provisions, the CISG nevertheless provides the right to require specific performance. The rationale behind adopting this provision is that the formation of a contract is reached with the consensus of both parties.[269] Thus, each party is entitled to receive exactly what he contracted for.[270] Another reason, which applies especially to international sales, is that buyers in certain countries cannot find the goods contracted for in local markets or any other accessible markets, and even when the goods are available; it is difficult to substitute goods of the same quantity and quality as specified in the contract.[271]

For largely historical reasons, the right to obtain specific performance is uncongenial to common law lawyers, who sought a compromise solution satisfactory to their legal tradition.[272] A compromise was found in article 28 of the CISG, which states that a court is not bound to enter a judgment for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention. This provision ensures that common law courts will not have to abandon their traditional position at the cost of uniformity, although it would not, of course, protect a party from a common

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[266] Ibid
[267] Garro op cit.
[268] Ibid.
[269] Boghossian op cit n 232 at 21.
[270] Ibid.
[271] Ibid.
[272] Garro op cit n 122.

law country against the granting of specific performance by a court in a civil law country.[273]

In *Magellan International Corporation v. Salzgitter Handel GMBH (Held in the U.S. District Court of Illinois, 1999)*,[274] a United States distributor entered into negotiations with a German trader with a view to reaching an agreement for the purchase of steel bars from a Ukrainian manufacturer. During the negotiations in which the seller acted as middle-man between the U.S. buyer and the Ukrainian manufacturer, the parties agreed on several matters; quantity of the goods, amount and method of payment and instructions for manufacturing. Nevertheless, a dispute arose when the seller, in view of the buyer's refusal to modify the letter of credit issued for payment, threatened not to perform its contractual obligations and to sell the goods elsewhere. The buyer brought an action for anticipatory breach of contract claiming damages and specific performance of the seller's obligations.

As to the applicable law, the Court found that, according to the facts alleged by Plaintiff, the parties had agreed that either the Illinois version of the Uniform Commercial Code (UCC) or CISG would apply. The Court held that CISG was the law governing the dispute as a result of the fact that both parties had their places of business in Contracting States and did not expressly opt out of CISG.

The court found in favour of the buyer and awarded him damages arising out of the fundamental breach made by the seller.

Finally, in dealing with the buyer's plea for specific performance, the Court stated that this remedy is generally available under CISG (article 46(1) of the CISG); with the exception that a Court is not bound to enter judgment for specific performance unless it would do so under its own law of contracts (article.28 of the CISG). After having recalled that, according to modern judicial interpretation of Par. 2-716 (1) UCC, specific performance may be granted when the buyer proves the difficulty of obtaining similar goods on the market, the Court upheld the buyer's claim.

Article 28 has nonetheless been criticized on the ground that it is unlikely that it will be applicable in practice since, given the wide discretion which common law courts enjoy in this respect; there are virtually no instances in which a court cannot in certain circumstances order specific performance in respect of similar contracts of sale.[275] Because the draftsmen of the Convention were unable to

[273] Ibid.
[274] Op cit n 140.
[275] Viejobueno op cit n 107 at 210.

agree on a uniform substantive rule, an action for specific performance will depend on the vagaries of the forum's law.[276]

2.4 Conclusion

Due to the long process of negotiations and endless debates involved in the drafting of the Convention, it was very difficult for the drafters to reach any form of consensus on the provisions of the CISG. This is not surprising, considering the fact that the states involved in the drafting process of the CISG represented such different political, economic and legal traditions.

Some uneasy compromises had to be made in order to complete the task of creating a new uniform sales law when even a workable compromise could not be reached; the drafters of the Convention chose a contradictory technical formulation based on the lowest common denominator.[277] Then again, it would be unrealistic to expect an international negotiation to achieve full unanimity.

However, some clear-cut and meaningful compromises, which would provide the parties with proper guidance, were reached during the negotiation process. Therefore, considering the many structural differences among the states represented at UNCITRAL, which made it extremely difficult to achieve meaningful compromises, the gaps and shortcomings of the Convention that resulted from those compromises demand our understanding and, at least up to a certain point, our satisfaction.[278]

The success of the CISG in unifying the laws of international sales should also be judged by looking at the extent of signatures, ratification, and accessions to the Convention from countries of varied economic, political, and legal backgrounds. Since its coming into operation on 1 January 1988, the CISG has been adopted by some sixty five states. Furthermore, the CISG, with all its

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[276] Garro op cit n122.
[277] Ibid.
[278] Ibid.

shortcomings, is still more desirable than the uncertainty of foreign laws and complicated private international law rules that must be identified, understood, and proven in court.[279]

[279] Ibid.

CHAPTER 3

3.1 Other reasons for the Non-Uniformity in the Interpretation and Application of the CISG

From the onset it has been emphasized that the success of the CISG would be dependent on its uniform interpretation and application.[280] The Preamble of the CISG provides that the creation of uniform sales rules is the Convention's contribution to the development of international trade. The crowning statement on the importance of uniformity to the Convention, however, may be found in article 7(1) of the CISG, which identifies the promotion of uniformity in the application of the CISG as one of the basic interpretative principles of the Convention. Some commentators however, expressed great fears that, owing to different language versions of the CISG, the lack of clear definitions and vagueness of terms, it would be very difficult for countries with different interpretation styles and cultures to interpret and develop the CISG uniformly.[281]

In addition to the compromises made in the drafting of the CISG and the differences in social, legal and economic systems of contracting states discussed in chapter 2 of this study, other practical reasons for the non-uniformity in the interpretation and application of the Convention's text may be attributed to: the different language versions of the CISG; the reservations made by contracting states and the Convention's reference to national laws to determine certain questions.[282] Each of these factors and their effect on the uniformity in the application of the Convention deserves further comment.[283]

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[280] Eiselen op cit n 8 at 360.
[281] Ibid.
[282] HM Flechtner 'The several texts of the CISG in a decentralises system: Observations on translation, reservations and other challenges to the uniformity principle in Article 7(1)' (1998) 17 Journal of law and Commerce 187-217.
[283] Ibid

3.1.1 Several Language Versions of the CISG

At the 1980 diplomatic conference in Vienna, the text of the Convention was approved in a single copy of Arabic, Chinese, English, French, Russian and Spanish languages, each text being equally authentic.[284] The first difficulty with having the Convention approved in six official languages is simply the practical problem of producing adequate translations without error.[285]

Professor Flechtner uses the following example to illustrate how different language versions of the same CISG provisions contribute substantially different texts.[286]

> Article 71(1) of the English text of the CISG states that a party must suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a *substantial* part of his obligations as a result of:
> (a) a serious deficiency in his ability to perform or in his creditworthiness; or (b) his conduct in preparing to perform on or in performing the contract.
>
> Article 72(1) on the other hand, states that if prior to the date for performance of the contract it is clear that one of the parties will commit a *fundamental* breach of contract, the other party may declare the contract avoided.
>
> Many authors have argued that in terms of the English text of the CISG, it appears that avoidance of a contract under article 72 requires the prospect of a more serious breach than in the case of the mere suspension of performance under article 71. This view is largely based

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[284] See end of CISG text: Done at Vienna, this eleventh day of April, one thousand nine hundred and eighty, in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.
[285] Kastely op cit n 34 at 591.
[286] Flechtner op cit n 282.

on the fact that the English version of article 72 requires the threat of a "fundamental breach of contract," whereas the English text of article 71 requires only the possibility that a party would not perform a "substantial part of his obligations." The thrust of the argument is that the drafters would not have used two different phrases ("fundamental breach" as opposed to non-performance of a "substantial part of his obligations"), and in particular two different adjectives ('fundamental" as opposed to "substantial"), had they not intended to distinguish the seriousness of the threatened breach that would satisfy the standards of the respective articles. This argument however, is much harder to make under the French text of the CISG. In the French text both article 71 and 72 use the same adjective to describe the seriousness of the threatened breach that would trigger their provisions. In both, the standard is a breach or non-performance that is "*essentielle*" i.e. article 71 states that to justify suspension, a party must threaten non-performance of "une partie *essentielle* de ses obligations" and article 72 requires a threat of "une contravention *essentielle* au contrat" to warrant avoiding the contract. The French text uses the same adjective to describe the severity of the threatened breach, thus undercutting any argument that article 72 requires a higher degree of certainty that a future breach will occur in order to justify permanent avoidance as compared to temporary suspension of performance as provided for in article 71, particularly when a different adjective equivalent to the article used in the English text in article 71 – "*substantielle*" – was available to the drafters of the French text.

Furthermore, language reflects the diversity of different cultures and societies.[287] Therefore, the words used in one language will carry implications different from those in another language.[288] The terms "offer and acceptance"

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[287] D Shelton 'Reconcilable differences? The interpretation of multiple treaties' (1997) 20 Hastings International and Comparative Law Review 611-638 at 612.
[288] Ibid.

for example, carry a rich heritage of legal doctrine in English, and their equivalent in Western European languages have similar depth.[289] Yet the translations of these words used in other official language texts, such as Chinese and Arabic do not carry similar implications.[290] Although attention was given to all official language versions of the Convention, debate tended to focus on legal concepts drawn from either the civil law or the common law traditions.[291] As a result most of the words and concepts used in the Convention are Anglo-American or Western European in nature.[292]

The textual non-uniformity caused by the six official language versions of the CISG is only part of the problem. Many unofficial translations of the CISG are being made for those whose languages do not fall with any of the six official language versions. Such translations constitute the primary source of Convention provisions for courts, arbitral panels and practitioners that work in a language lacking an official version.[293] It is, of course, inevitable that discrepancies and inaccuracies will crop up in such unofficial translations as they would in any translation.[294] The fact that there is no official vetting of such translations by UNCITRAL presumably increases the risk of deviations.[295]

Despite some of the textual non-uniformity caused due to the many official language versions of the CISG, it is important to note the many advantages of having six official language versions of the Convention. It facilitated the broad acceptance that the CISG has in fact achieved, it provides an appropriate symbol of the diverse world in which the Convention operates, and it certainly

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[289] Kastely op cit n34 at 592.
[290] Ibid.
[291] Ibid.
[292] Ibid.
[293] Flechtner op cit n 282 for example, the German translation commissioned by the governments of Austria, Germany and Switzerland. There is also an Italian translation of the CISG.
[294] Ibid.
[295] Ibid.

would be useful to parties whose language corresponds to one of the official versions.[296]

Diedrich states:[297]

> 'if there are several equally authentic texts of a multilingual convention, it is questionable for an autonomous interpretation to let some languages prevail over others simply because of practical reasons as with the CISG, where there are as many as six languages involved...As the international legislator declares, since all these languages are equally authentic; no language may prevail. A lawyer must find the accurate text ('*texte juste*") by comparing them all.
>
> "if such comparison reveals disparity between the authentic texts that cannot be rectified then the interpretation rule in article 33 of the 1969 Vienna Convention on the Law of Treaties has to be applied and which provides that the real or normative intention of the final diplomatic conference is decisive...The intention of the international legislator in the final diplomatic conference can be found by way of a historical interpretation of the *travaux preparatoires*...'

As the basis of an autonomous interpretation, it is reasonable to examine the English and French texts of the CISG to find a *texte juste*, because these were the languages in which the deliberations and legal negotiations among the representatives of the contracting states took place.[298] It can be presumed then, that the English and French texts of the CISG best represent the intention of the representatives at the 1980 diplomatic conference in Vienna as to the exact wording of the Convention's final text.[299]

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[296] Ibid.
[297] F Diedrich 'Maintaining uniformity in international uniform law via autonomous interpretation: software contracts and the CISG' (1996) 8 Pace International Law Review 317-318.
[298] Ibid.
[299] Ibid.

Parties may wish to include in their contracts a language clause, for example, "The applicable text of the Convention shall be the official United Nations text in the language in which this contract is written."[300]

3.1.2 Reservations (Declarations) and Their Effect

The CISG allows contracting states to make "reservations or "declarations" at the time of its signature, ratification, acceptance, approval or accession that it will not be bound by a part or some aspect of the Convention.[301] Article 98 of the CISG states that no reservations are permitted except those expressly authorised by the Convention. The provision in article 98 was an attempt by the drafters of the CISG to try and limit the non-uniformity arising from such reservations.[302] Despite their attempts however, reservations have produced substantial non-uniformity in the text of the Convention in force in the various countries that have ratified the CISG.[303] Article 92 to 95 of the Convention authorises five reservations.

Article 92(1) of the CISG permits a contacting state to declare that it is not bound by Part II (provisions on contract formation) or Part III (provisions on the substantive rights and obligations arising out of a contract of sale) of the Convention. The Scandinavian countries, Denmark, Norway, Finland and Sweden have made use of this article to exclude part II of the CISG.[304] The text of the Convention in force in these countries, therefore, omits eleven provisions found in the version of the CISG in force in states that did not make the article 92 reservation.[305] Furthermore, article 92 (2) of the CISG provides that a contracting state which makes a declaration in accordance with article 92 (1) in respect of part II and part III of the Convention is not to be considered a

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[300] Annotated Text of CISG, Testimonium: Authentic Languages of text, commentary edited by AH Kritzer http://www.cisg.law.pace.edu/cisg/countriesl (Accessed on 15 August 2007).
[301] Article 92 and 98 of the CISG.
[302] Flechtner op cit n 282.
[303] Ibid.
[304] Hugo op cit n 1 at 11.
[305] Flechtner op n 282 .

contracting state within paragraph (1) of article 1 of the Convention[306] in respect of matters governed by the part to which the declaration applies. Professor Hugo illustrates the effect of this provision using the following example:[307]

> Assume that the parties are South African and Swedish, and the forum is in Germany. The dispute is whether in fact the parties have concluded a contract. In terms of German private international law, this question is to be governed by Swedish law. Sweden has ratified the CISG but has excluded part II as envisaged in article 92 of the CISG. Does the German court apply the CISG? The answer is clear. In terms of article 92(2), Sweden is not a "contracting state" for purposes of determining whether a contract has been concluded. Therefore, the German court must apply the domestic law of Sweden.

Article 93 of the CISG permits a contracting state that has two or more territorial units in which according to its constitution, different systems of law are applicable to declare that the Convention extends to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time. Article 93 declarations have been made in Canada (to the effect that the CISG applies to all provinces and territories), Australia (to the effect that the CISG does not apply to Christmas Island, Territory of Kokos Islands, as well as Ashmore and Cartier Island), and Denmark (to the extend that the CISG does not apply to the Faroe Islands or Greenland).[308] The effect of this declaration on the sphere of application of the CISG can be seen in article 93 (3).[309] For example, a party located in Greenland, a territory to which the

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[306] Article 1(1) of the CISG provides that this Convention applies to contracts of sale of goods between parties whose places of business are in different states:
(a) when the states are contracting states; or
(b) when the rules of private international law lead to the application of the law of a contracting state.

[307] Hugo op cit n 1 at 11.

[308] Ibid at 12.

[309] Article 93(3) of the CISG: If, by virtue of a declaration under this article, this Convention extends to one or more but not all the territorial units of a contracting state, and if the place of business of a party is located in that state, this place of business, for the purpose of this

CISG does not extend pursuant to Denmark's reservation under article 93 is not deemed to be in a "contracting state" for purposes of article 1, even though Greenland is a part of Denmark, and Denmark has ratified the Convention.[310]

Article 94(1) of the CISG provides that two or more contracting states which have the same or closely related legal rules on matters governed by this Convention may at any time declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their place of business in those states. Such reservations may be made unilaterally or by reciprocal unilateral declarations. Article 94 (2) further provides that a contracting state that has the same or closely related legal rules in matters governed by the CISG as one or more non-contracting states may at any time declare that the Convention is not to apply to contracts of sale or their formation where the parties have their place of business in those states. Denmark, Finland, Norway and Sweden have made the declarations authorized by article 94 of the CISG, in order to preserve the sales rules that they have developed for intra-Scandinavian trade.[311]

Article 95 of the CISG permits a contacting state to declare that it is not bound by subparagraph (1) (b) of Article 1 of the Convention.[312] This reservation has been made by an interesting group of five countries: China, the Czech Republic, Singapore, Slovakia and the United States.[313] The effect of the reservation is to remove a critical scope provision from the text of the CISG that is in force in five countries, including the United States.[314] The version of the Convention in force in those countries provides that the CISG only applies when the requirements of

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Convention, is considered not to be in a contracting state, unless it is a territorial unit to which the Convention extends.

[310] Flechtner op cit n 282.

[311] Ibid.

[312] Op cit n 306.

[313] Flechtner op cit.

[314] Ibid.

article 1(1) (a) are met i.e. when both parties to a sales transaction are located in contracting states.[315]

Article 96 of the CISG provides that a contracting state whose legislation requires contracts of sale to be contracted in or evidenced by writing may at any time make a declaration in accordance with article 12 that any provision of article 11[316] and 29[317], 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 place. Such declarations have been made by Argentina, Chile, China, Estonia, Hungary, Russia and the Ukraine.[318] The potential for undermining international uniformity by allowing reservations to articles 11 and 29 is great. For example, Argentina's reservation excludes application of article 11 and 29. Thus, Argentine rules regarding the necessity and sufficiency of writing for formation, termination and modification of contract will apply to contracts otherwise governed by the CISG.[319] However, those Argentine rules regarding the necessity and sufficiency of writing are not likely to be the same rules of the other eight nations which have opted out of coverage under articles 11 and 29.[320] This declaration does not necessarily mean that the contract must be in writing.[321] It merely eliminates the provisions of the CISG.[322] Whether or not the contract must be in writing is accordingly to be determined by the legal system

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[315] Ibid.
[316] Article 11 of the CISG: 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 proven by any means including witnesses.
[317] Article 29 of the CISG: (1) a contract may be modified or terminated by the mere agreement of the parties.
(2) A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement.
However, a party may be precluded by his conduct from asserting such a provision to the extend that the other party has relied on that conduct.
[318] Hugo op cit n 1 at 17.
[319] Bailey op cit n 102 at 312.
[320] Ibid.
[321] Hugo op cit at 17.
[322] Ibid.

governing the contract under private international law.[323] Therefore, if a party located in the United States and a party located in Argentina entered into an agreement of sale of goods, the issue of whether or not the agreement is subject to a writing requirement will depend on a choice of law analysis.[324] If private international law principles lead to Argentine law, Argentine law will apply. If private international law principles lead to the United Slates law, United States law will apply. The result in the latter situation is quite ironic, because one party to the sales contract is Argentina and Argentina has made an article 96 reservation, the transaction becomes subject to domestic U.S. Statute of Frauds requirements.[325] This is the case, even though the United States by failing to make an article 96 declaration in effect declared its willingness to forego its Statute of Frauds rules and accept oral international sales contracts.[326] Therefore, whether the text includes provisions eliminating writing requirements varies even in a State that has not made the article 96 reservation, depending on whether one of the parties is located in another State that made the reservation.[327]

Bailey states:[328]

> 'One cannot speak of a single CISG with regard to articles 11 and 29, one must speak in terms of 10 CISGs which as a result of reservations, contain the law of nine different nations regarding the sufficiency of writing in forming, modifying and terminating a contract.'

This problem of reservation-produced variations of the CISG is further complicated by the particular language used by the nation declaring the reservation. For example, China declared a reservation only with regard to article 11 which covers formation of contracts; China did not make a reservation

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[323] Ibid.
[324] Flechtner op cit n 282.
[325] Ibid.
[326] Ibid.
[327] Ibid.
[328] Bailey op cit n 102 at 312.

regarding article 29 which allows a contract to be orally terminated or modified.[329] While it seems illogical to require a contract to be in writing but allow it to be orally modified or terminated, this is exactly what the Chinese reservation purports to do.[330] Permitting such reservations in this situation requires parties to an international sales contract to be familiar with three layers of law: (1) the standard CISG provisions, (2) the reservations each of their countries may have made to the CISG, and (3) the individual national laws regarding the sufficiency of writing in the formation of a contract.[331] A court in this situation does not simply apply the CISG, but must determine which country's version of the CISG applies and even though that nation is a party to the CISG, the court must determine whether the country's domestic law applies as a result of the reservation.[332] There are many instances in which a court can err in this situation. The complexity of the analysis alone is an obstacle to achieving uniformity.[333]

Over 40% of Contracting States have made reservations and in several cases multiple reservations.[334] These reservations result in significant variations on the text of the CISG in force in Contracting States.[335] Variations ranging from changing the meaning of the term "Contracting State" to eliminating a subpart of the article dealing with applicability, to excising an entire eleven- provision component of the Convention.[336]

3.1.3 Incorporation of Non-Uniform National Law into the CISG

Article 4 of the CISG provides that the Convention governs only the formation of the contract of sale and the rights and obligations of the seller and buyer arising

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[329] Ibid.
[330] Ibid.
[331] Ibid.
[332] Ibid.
[333] Ibid.
[334] Flechtner op cit n 282.
[335] Ibid.
[336] Ibid.

out of such a contract in particular, except as otherwise expressly provided in this Convention, it is not concerned with:

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

As is clear from article 4(a) of the CISG, it is not concerned with the validity of the contract itself, or of any of its terms, or of any usage. The validity of the contract must accordingly be determined by the relevant domestic law.[337] The term refers to the material validity of the contract. It essentially embraces any circumstances which may render the contract invalid barring the formation of the contract.[338] Thus, questions regarding legal and contractual capacity, lawfulness, error and the existence of authority are to be determined by domestic law.[339] The purpose of the validity exception was to preserve national rules that embodied important social values and which could not be waived by the agreement of parties to a contract.[340] Thus, even where a sales contract is governed by the CISG, validity issues remain subject to the non-uniform rules of individual states.[341] For this reason it has been asserted that the validity exception poses a particular danger to the development of a uniform and coherent jurisprudence under the Convention.[342]

Kevin Bell states:[343]

> 'Article 4 is likely to create more problems in litigation than any other provision of the Convention. Since there is no uniformity among jurisdictions on the grounds for declaring a contract invalid, article 4 may well be proven to be a 'methodological quagmire,' blocking the

[337] Hugo op cit n 1 at 16.
[338] Ibid.
[339] Ibid at 17.
[340] Flechtner op cit n 282.
[341] Ibid.
[342] Ibid.
[343] Bell op cit n 11 at 253.

development of a 'jurisprudence of validity,' and hindering the evolution of an effective international sales law.'

Article 4(b) of the CISG further avoids the issue of passing of title in goods.[344] The drafters of the CISG were careful here not to intrude into the sensitive realm of creditors' rights and insolvency proceedings.[345] Questions regarding the transfer of retention of ownership are therefore to be determined in accordance with the legal system indicated by the private international law of the forum.[346] On the basis of this provision, the German Oberlandesgericht in Koblenz, held that the CISG should not be applied to determine the validity of a retention of title clause in the sale of a ship by a Dutch manufacturer to a German company.[347]

Article 5 of the CISG provides that the Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person. This is the case whether the injury is to the buyer himself or to any other person.[348] Thus, claims arising from death or personal injury are determined by domestic law.[349] The decision to exclude claims based on death and injury to person was taken with little debate and no opposition.[350] The reasons for exclusion include the rapid and uneven development of national law regulating product liability, and the possibility of specialised international solutions to the problem.[351] The only complexity with regard to this provision occurs when both property losses and personal injuries arise out of the same incident, as is frequently the case.[352] The economic damage caused by a defect will be

[344] Ibid at 254.
[345] Ibid.
[346] Hugo op cit n 1 at 18.
[347] Ibid - 5 U 534/91 16 Jan 1992 (UNILEX D 1992-4).
[348] Ibid at 19.
[349] Ibid.
[350] Bell op cit n 11 at 254.
[351] Ibid.
[352] Ibid.

determined by the Convention's damage rules, while the graver harm will be resolved through application of the residual municipal law.[353]

Furthermore, article 28[354] of the CISG expressly subjects the availability of specific performance as a remedy to the rules of the jurisdiction of the adjudicating tribunal.[355] In other instances, references to domestic national law are implied. Article 7(2)[356] of the CISG even establishes an express methodology for determining when to make implied refrences to national law, by providing that questions not expressly settled in the Convention are first to be answered by reference to the general principles of the CISG and then, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law. [357]

Such instances of express and implied references to national law to deal with issues that would otherwise be within the scope of the convention naturally import non-uniformity into the CISG.[358] In sales governed by the Convention, for example, interest rates on monetary awards[359] and the availability of specific performance[360] will vary from transaction to transaction depending on the jurisdiction whose substantive law applies and the forum in which disputes are being resolved.[361]

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[353] Ibid.
[354] Article 28 of the CISG: If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgment for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.
[355] Flechtner op cit n 282.
[356] Article 7(2) of the CISG: 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.
[357] Flechtner op cit.
[358] Ibid.
[359] Ibid – interest rates payable under article 78 of the CISG is a matter not expressly dealt with in the Convention. It is generally held to be governed by the applicable national law.
[360] Article 28 of the CISG, see n 354.
[361] Flechtner op cit n 282.

3.1.4 Domestic Preconceptions or Homeward Trend

The sources of non-uniformity discussed up to this point, by no means exhaust the subject. Perhaps the single most important source of non-uniformity in the CISG is the different background assumptions and conceptions that those charged with interpreting and applying the convention bring to the task.[362] A phenomenon sometimes called the "homeward trend."[363] The drafters of the CISG, mindful that this might occur, wrote in the Secretariat Commentary to article 7 that it is especially important to avoid differing contractions of the provisions of this Convention by national courts, each dependent upon the concepts used in the legal system of the country of the forum.[364]

A striking example of the homeward trend is an Italian case[365] where the Court of Appeal of Milan held that late delivery was a fundamental breach entitling avoidance of the contract under article 49 of the CISG without undertaking the examination required by the CISG of whether the late delivery amounted to a fundamental breach under article 25 of the CISG.[366] The court used the Italian conception of fundamental breach rather than the CISG's autonomous meaning to bypass this essential step.[367]

Furthermore, in relation to articles 38 and 39 which regulate the examination of delivered goods and the giving of notices of defects, the CISG advisory council reports[368] that while many of the decisions that have been reported to date are unobjectionable on their facts, there has been a tendency on the part of some

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[362] Ibid.
[363] N Whittington 'Comment on Professor Schwenzer's paper' (2005) 4 Victoria University of Wellington Law Review 809-813 at 810.
[364] Explanatory note by the UNCITRAL Secretariat on the United Nations Convention on Contracts for the International Sale of Goods, Article 7 Pace Law School CISG Database, available at http://www.cisg.law.pace.edu accessed on 6 November 2005.
[365] Corte di Appello Milan, 20 March 1998 available at http://www.cisg.law.pace.edu
[366] Whittington op cit n 363 at 810.
[367] Ibid.
[368] CISG AC opinion NO 2, Examination of the Goods and Notice of Non-Conformity: Articles 38 and 39, 7 June 2004 available at http://www.cisg.law.pace.edu

courts to interpret CISG articles 38 and 39 in the light of the analogous provisions in their domestic law.[369]

It will not be easy for a court to shed its domestic perspective and look at the case before it with unfamiliar eyes, no longer influenced by the law of its own domestic law.[370] However, that courts do so is critical to the CISG's goal of uniformity. Courts must look to foreign decisions for guidelines and this task is made easier with the recent growth of online CISG databases.[371] Furthermore, when dealing with the CISG, decision makers must distance themselves from domestic preconceptions, and look at the case through CISG tinted glasses.[372] A fear of the unknown is understandable, but not an excuse for not applying the clear words of the Convention when necessary.[373]

3.2 Conclusion

Although the CISG represents an immense step towards a uniform set of international sales rules, it does not, and could not, achieve complete uniformity of those rules.[374] As a result of the various factors and reasons discussed in chapters two and three of this study, substantial non-uniformity is built into the Convention and the processes by which it is applied.

A closer look at the interpretational guidelines embodied in article 7(1)[375] of the CISG reveals that it does not mandate absolute uniformity of results under the Convention. It provides only that in interpreting the CISG, regard has to be had to the need to promote uniformity in its application, an approach that presumably recognizes the actual achievement of uniformity may not always be the result.[376]

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[369] Whittington op cit at 810.
[370] Ibid.
[371] Ibid at 811.
[372] Ibid.
[373] Ibid.
[374] Flechtner op cit n 282.
[375] Article 7(1) of the CISG: In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the onservance of good faith in international trade.
[376] Flechtner op cit.

In addition, article 7(1) treats the need to promote uniformity only as a consideration in interpreting the Convention, rather than an inviolable principle.[377] Furthermore, promoting uniformity is only one of many considerations[378] mentioned in article 7(1) and there is nothing in the provision to suggest that promoting uniform results is to be given precedence over the other considerations.[379] Article 7(1) does not mandate a doomed quest of an unobtainable and, many would argue, ultimately harmful ideal of rigid uniformity.[380]

[377] Ibid.
[378] In addition to the need to promote uniformity, article 7(1) of the CISG also provides that in the interpretation of the Convention, regard is to be had to its international character and the need to promote the observance of good faith in international trade, see n 375.
[379] Flechtner op cit n 282.
[380] Ibid.

CHAPTER 4

4.1 Experience with the CISG thus far

One reason many consider the CISG a hallmark in international law is its wide acceptance and ratification by countries around the world. The number of CISG adopting states compares very favourably with the success rate of most other United Nations and UNIDROIT sponsored initiatives in the commercial law area.[381] As of 29 July 2005, only the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards has fared better with 137 ratifications.[382]

Considering the fact that so many countries have adopted the CISG, as well as the involvement in the drafting process by a broad range of countries with different cultural and legal backgrounds, one might believe that it would have resulted in an evenly broad acceptance and application of the Convention.[383] However, it appears that this has not quite been the case, as the geographical allocation of CISG-related case law shows. On 5 December 2005, a computerised search of the arguably most comprehensive and up-to-date CISG case database on the Internet operated by the Pace University Law School ("Pace database"), established the following results: out of a total of 1685 cases listed, the United States accounts for 73 decisions, followed at a distance by New Zealand (9), Australia (10) and Canada (11).[384] In comparison, Germany has reported 391 decisions, followed by Switzerland (127), the Netherlands (126), Belgium (118), and Austria (105).[385] These statistics may however, be somewhat criticized as underestimating the use of the CISG since approximately 80% to 90% of international commercial transactions contain mandatory alternative dispute resolution provisions for mediation, conciliation and/or

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[381] Ziegel op cit n 13 at 341.
[382] Available at http://www.nortonrose.com (accessed on 15/12/2005)
[383] H. Lutz 'The CISG and the Common Law Courts: Is There Really a Problem?' (2004) 35 Victoria University of Wellington Law Review 711-733 at 714.
[384] Ibid .
[385] available at http://www.cisg.law.pace.edu/cisg (accessed on 5/12/2005).

arbitration.[386] As a result many CISG disputes may never make it to court; many arbitration proceedings are informal, private and confidential.[387] However, even recognizing the significant place of arbitration in transnational commerce, many Contracting States still lag behind in CISG use and adjudication.[388] Furthermore, the overwhelming majority of developing countries have not ratified the Convention [389]and out of 53 African states, only 8 are parties to the Convention.[390]

Professor Notage suggests the following reasons why lawyers and academics have not necessarily embraced the CISG:[391]

> A problem for lawyers is that they prefer the familiar. In this case, that means good old national domestic laws, including precedent contracts or clauses found lurking in a law firm's computers or clients' box files. However, besides a love for precedence, a more specific reason for legal practitioners' preference of the familiar, of course, is that they have invested costs in their pre-existing stock of knowledge. Investing in new knowledge about the CISG and updating precedents may seem to involve too much pain for too little direct gain.
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> The subset of poorly decided CISG cases seem to attract the most attention and scholarly criticism, which may be well-intentioned and quite constructive. However, these cases may remain disproportionately prominent in the memories of those considering whether or not to adopt the CISG. For this reason, the CISG may become less prominent for

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[386] McNamara op cit n 2.
[387] Ibid.
[388] Ibid.
[389] See map on the Pace Law University website, available at http://www.cisg.law.pace.edu/cisg
[390] Burundi, Egypt, Guinea, Lesotho, Mauritania, Uganda and Zambia. Ghana signed but never ratified the Convention.
[391] L Nottage 'Who's Afraid of the Vienna Sales Convention (CISG)? A New Zealander's View from Australia and Japan' (2005) 39 Victoria University of Wellington Law Review 815-845 at 829-839

many practitioners in countries that have not yet acceded to it, and even in those that have.

Legal practitioners practicing in the classical common law legal traditions are cautious about applying the CISG because of a sense that it incorporates a very different vision of contract law than the classical English common law. The latter was reluctant to (1) find binding relations have been entered into, (ii) add obligations not sourced in the parties' express agreement, and (iii) allow contractual relations to be altered over time. Practitioners are more sensitive to these realities when applying the CISG than academics, who do not have to face up to busy and sometimes grumpy judges used to the old ways. Practitioners also face vastly more complex factual situations than academics, who have to rely primarily on selected and greatly abbreviated court judgments. These clashes in legal principles and reasoning may be one of the reasons that explain the disparity in CISG case law between the more classical common law jurisdictions such as Australia and New Zealand, and the United States which has a more flexible contract law system.

Other considerations related to traditional legal reasoning and supporting institutions especially in Anglo-Commonwealth jurisdictions is that they tend to retain a more literal approach to statutory interpretations. This explains why the courts there seem less open, for example, to the invitation in article 7(1) to apply the Convention in an international spirit. The way forward now, would be to draw on the increasing quantity and quality of CISG related case law around the world. However, most of that comes from civil law countries, and precedents from those courts seem to have far less footing in the courts of countries such as Australia and New Zealand even though they have increased references to judgments from other Anglo-Commonwealth courts. The same applies to the United States, despite an otherwise less strict approach to precedent, and more openness generally to substantive considerations. Anglo-Commonwealth

countries still seem to prefer bright-line rules over broad standards, generating more detailed statutes.

4.2 Recommendations to Promote the Adoption and Application of the CISG.

Lack of familiarity with the CISG may induce lawyers to avoid it because they fear the unknown, as well as the uncertain risks that may flow therefrom.[392] Lawyers will continue to avoid the CISG unless they are confident in their own sophisticated understanding of the Convention and their willingness to rely upon fair and reasoned applications.[393] The CISG could fail simply because it is ignored.[394] It is far too important an instrument of international trade and commerce for this to happen.

The solution to this problem of ignorance lies in educating and informing legal practitioners about the CISG.[395] Efforts must be increased to educate at the practitioner level.[396]

Professor Nottage makes the following recommendations:[397]

> Primary responsibility for promoting education about the CISG and engagement with it lies with international organizations such as UNCITRAL. UNICITRAL has made efforts to make CISG related case law and articles internationally accessible through its case law digest combined with reports of the Advisory Council centred on Pace University. UNCITRAL should also raise the possibility of a protocol to the CISG, or even a model law on international sales. It should also form

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[392] J E Murray 'The neglect of the CISG: A workable solution' (1998) 17 Journal of Law and Commerce 365-379 at 376.
[393] Ibid.
[394] Ibid.
[395] C Sukurs 'Harmonizing the battle of the forms: A comparison of the United States, Canada and the United Nations contracts for the international sale of goods' available at http://www.yorku.ca/osgoode/cisg/writings/sukurs.htm (accessed on 24 July 2007).
[396] Ibid.
[397] Nottage op cit n 391 at 840-845.

a working group to consider possible improvements to the Convention, as it has done since 2000 in the area of international commercial arbitration.

Law reformers in countries that have already acceded to the CISG should remain active in promoting it. They should publish regular follow-up reports on their experience with the CISG, review world-wide promising case law developments, as well as the more problematic decisions, and offer drafting suggestions to get around the latter.

Law firms must hire outside consultants and experts on the CISG to educate their legal practitioners on the application of the CISG.

Educators have a responsibility to approach and convey information regarding the CISG cautiously. Their analysis of the CISG must not be too critical, over-stating risks involved in engaging with the CISG. Educating students on the CISG is probably easier at the post-graduate level or through continued legal education seminars. Teaching more about the CISG at the undergraduate level is also important, but not an easy task. It would probably be best to incorporate it as part of a course in international commercial law. Furthermore, instructors need to back up their teaching with cutting-edge research. They must continue improving the design and delivery of their curriculum and allow for the publication of research that can reach out to a broader audience.

4.3 The Reasons For and Against South Africa's Adoption of the CISG

4.3.1 Reasons for Adopting the CISG

Professor Eiselen summarises the main advantages of South Africa adopting the CISG as follows:[398]

[398] Eiselen op cit n 8 at 367.

I. A simplification of the legal environment within which international sales operate by having available one set of domestic rules which is internationally accepted;
II. A global uniform approach to international sales, independent of the intricacies of private international law;
III. A reduction in the number of foreign legal systems that may potentially apply to the international contracts of sale of Southern African traders;
IV. The opportunity to unify the law of sales applicable in the Southern African region;
V. Saving of legal expenses;
VI. The removal of unnecessary trade barriers, supporting the growth of international trade;
VII. The initial uncertainty ascribed to the CISG has been largely eliminated by the available case law and commentaries on the Convention;
VIII. Accepting a legal regime which already is applied by the majority of South Africa's trade partners;
IX. Acceptance of a modern sales code which was specifically fashioned for international trade and takes sufficient notice of international trade practice and usages as well as the needs of South Africa as a developing country;
X. The fact that the Convention embraces the basic principles on which the South African law of contract and law of sale are based, such as party autonomy, freedom of contract, freedom of form, the sanctity of the contract, and foreseeability. The Convention improves, modernizes and simplifies, without revolutionising;

Shishir Dholakia states further reasons for adopting the CISG:[399]

[399] S Dholokia 'Ratifying the CISG – India's options' Presented in "Celebrating Success: 25 years United Nations Convention for the international Sale of Goods" at the Singapore

First, the CISG achieves simplification and unification of the law relating to international sale of goods.

Second, over two thirds of the countries have ratified the CISG.

Third, eminent scholars' commentaries help in the unified interpretation and application of the CISG.

Fourth, the decisions rendered on different provisions of the CISG and collected in the case law on UNCITRAL texts ("CLOUT") and elsewhere encourage the belief that in due course, there will be greater uniformity in interpretation and application of the CISG.

Fifth, the CISG supersedes the Uniform law on the International Sale of Goods ("ULIS"), which itself took many years to be formulated. The ULIS was not very successful, but the CISG has removed many of its shortcomings. Growing international trade requires that the CISG be used to bolster the trading community's confidence.

4.3.2 Reasons against the Adoption of the CISG

Professor Eiselen aptly summarises the disadvantages of adopting the CISG as follows:[400]

I. The legal uncertainty caused by introducing a new set of rules of sale;
II. The legal uncertainty caused by broadly formulated rules containing many undefined and new terms which have to be developed in the international arena by courts and arbitral tribunals without any hierarchy and no principles of *stare decisis*;
III. The introduction of foreign solutions to well known problems;

International Arbitrators Centre Conference, September 2005 available at http://www.cisgw3.law.pace.edu/cisg/biblio/dholakia.html (accessed on 15 July 2007).
[400] Eiselen op cit n 8 at 368.

IV. The general irrelevance of the Convention due to the fact that in most instances it is excluded by the parties in practice;
V. The compromise character of the Convention, which blunts the solutions and evades many of the real issues;
VI. The absence of certain underlying principles;
VII. Legislative measures are not the most suitable means to create legal unification or solve the problems created by diverse laws and conflict issues;
VIII. The law is robbed of its flexibility and is fossilized in a code which is almost impossible to change;
IX. The integrity of the Convention is threatened by diverse interpretational approaches and traditions.

Shishir Dholokia summarises some of the disadvantages[401] pointed out by academics and practitioners dealing with the CISG as follows:[402]

> The CISG is not comprehensive. It does not concern itself with the validity of the contract, i.e. with the issues of illegalities, misrepresentation or fraud relating to the contract.
>
> CISG uses imprecise language for a common law lawyer. Language that is too wide and inexact and therefore leads to uncertainty.
>
> Courts of different countries, partly due to imprecise language, have interpreted provisions of the CISG inconsistently, further hindering the object of uniformity and simplification.
>
> The CISG is equally authentic in each of the six languages, namely, Arabic, Chinese, English, French, Russian and Spanish. There are many ways for divergence in the different language versions to occur. Sometimes the text in the original language does not permit precise

[401] Many of which have been discussed in depth in chapters 2 and 3 of this study.
[402] Dholokia op cit n 399.

translation. Sometimes the text is misunderstood by the translator. Sometimes typographical errors are not caught by proofreaders who do not know the subject matter. The various language versions must be rigorously compared by persons who are concerned with the substance of the project. This is a tedious task, but ideally should be done each time the text is revised. If it is not, the quality of the comments and proposals of the participants, and therefore the legal solutions on which they finally agree, will be adversely affected.

Another disadvantage of the CISG is that it makes compromises conceptually and linguistically to accommodate the conflicting demands of the civil law and the common law legal traditions, leading to lack of clarity.[403]

4.4 Conclusion

'Buyers and sellers need to plan and deal with risk. They do so with carefully drafted contracts. To increase the chance that the contract will be performed, the legal system ought to meet the following standards: (a) it must define whether the contract would be regarded as validly made; (b) it must provide for application of norms that reflect the customs of commercial community; and (c) it must offer remedies that either induce performance or compensate for non-performance.'[404]

Eventually South Africa's international traders and legal practitioners will have to assess if the CISG meets the above standards of what a good law of contract is. A good contract law is one that enables the buyer and the seller to approach their lawyer requesting him to predict, as far as possible, what a court would do if a dispute were to arise.[405] The more predictable the outcome, the better the

[403] See chapter 2 of this study for an in-depth discussion on the compromises made in the drafting of the CISG to suite the needs of civil law and common law legal traditions.
[404] Stated by Macaulay in his essay published in (1977) 11 Law and Society Review at 507 as referred to by Dholakia op cit n 399.
[405] Ibid.

contract law.[406] Ultimately, the CISG would be a good contract law for South Africa only if it turns out to meet the above standard.

[406] Ibid.

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