

Journal of Law & Commerce

Vol. 31 (2012-2013) • ISSN: 2164-7984 (online)
DOI 10.5195/jlc.2013.48 • <http://jlc.law.pitt.edu>

PIL AND CISG: FRIENDS OR FOES?

Franco Ferrari



This work is licensed under a Creative Commons Attribution-Noncommercial-No Derivative Works 3.0 United States License.



This site is published by the University Library System of the University of Pittsburgh as part of its D-Scribe Digital Publishing Program, and is cosponsored by the University of Pittsburgh Press.

PIL AND CISG: FRIENDS OR FOES?*

*Franco Ferrari***

I. INTRODUCTION: UNIFICATION OF SUBSTANTIVE LAW V. UNIFICATION OF PRIVATE INTERNATIONAL LAW

It has often been stated that one of the main goals behind the drafting of the United Nations Convention on Contracts for the International *Sale of Goods*¹ (the “CISG”)² is the creation of certainty and predictability.³ This is unsurprising, given that certainty and predictability constitute “the bedrock desiderata of [any] commercial law,”⁴ and that the need for certainty and predictability is felt even more strongly where the commercial law, such the CISG,⁵ deals with international situations.⁶

* This paper was first published in INTERNATIONALES HANDELSRECHT 89 (2012).

** Professor of Law and Director of the Center for Transnational Litigation and Commercial Law, New York University School of Law; former Legal Officer, United Nations Office of Legal Affairs, International Trade Law Branch. © Franco Ferrari.

¹ For the text of the Convention, see 19 I.L.M. 668 (1980).

² For the various abbreviations suggested, see Axel Flessner & Thomas Kadner, *CISG? Zur Suche nach einer Abkürzung für das Wiener Übereinkommen über Verträge über den internationalen Warenkauf*, ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 347 (1995).

³ See, e.g., Iulia Dolganova & Marcelo Boff Lorenzen, *A Case for Brazil's Adhesion to the 1980 UN Convention on Contracts for the International Sale of Goods*, 13 VINDOBONA J. INT'L COM. L. & ARB. 351, 366 (2009); Lisa M. Ryan, *The Convention on Contracts for the International Sale of Goods: Divergent Interpretations*, 4 TUL. J.L. INT'L & COMP. L. 99, 101 (1995).

⁴ Robert E. Scott, *The Uniformity Norm in Commercial Law: A Comparative Analysis of Common Law and Code Methodologies*, in THE JURISPRUDENTIAL FOUNDATIONS OF CORPORATE AND COMMERCIAL LAW 149, 176 n.3 (Jody S. Kraus & Steven D. Walt eds., 2000); see also Joshua D.H. Karton & Lorraine de Germiny, *Has the CISG Advisory Council Come of Age?*, 27 BERKELEY J. INT'L L. 448, 448-49 (2009) (“A well-functioning commercial system requires a high degree of legal certainty; businesses will hesitate to enter into contractual relationships if they are unable to forecast the risks associated with breakdowns in those relationships.”).

⁵ See, e.g., Marcus G. Larson, Comment, *Applying Uniform Sales Law to International Software Transactions: The Use of the CISG, Its Shortcomings, and a Comparative Look at How the Proposed UCC Article 2B Would Remedy Them*, 5 TUL. J.L. INT'L & COMP. L. 445, 448 (1997) (stating that “[f]or the international practitioner, the Vienna Convention can be a useful and reliable resource in drafting

As far as the drafters of the CISG were concerned, they tried to achieve certainty and predictability by creating a uniform set of substantive rules, with the intention of overcoming the economic players' supposedly worst enemy, *i.e.*, national borders⁷ and the differences between national legal systems,⁸ which constituted (and still constitute)⁹ "an obstacle to economic relationships which constantly increase among citizens of different countries; an obstacle above all for the enterprises that are involved in international commerce and that acquire primary resources or distribute goods in different countries which all have different law."¹⁰

international sales transactions because it provides for greater predictability of the law than would the observation of the respective domestic laws of the home countries of individual contracting parties.”)

⁶ See also Robert Bejesky, *The Evolution in and International Convergence of the Doctrine of Specific Performance in Three Types of States*, 13 IND. INT'L & COMP. L. REV. 353, 398 (2003) (“private sector actors desire enhanced certainty in transnational business dealings”); James J. Callaghan, *U.N. Convention on Contracts for the International Sale of Goods: Examining the Gap-Filling Role of CISG in Two French Decisions*, 14 J.L. & COM. 183, 185 (1995) (“[e]nhancing certainty in the realm of international sales will greatly facilitate the flow of international trade and serve the interests of all parties engaged in commerce”); Hannu Honka, *Harmonization of Contract Law Through International Trade: A Nordic Perspective*, 11 TUL. EUR. & CIV. L.F. 111, 117 (1996) (“[f]ree international trade functions better in a legally harmonized environment than in the opposite situation. Also, harmonization of contract law is presumed to save costs as the ‘legal picture’ is simplified”); Brooke Overby, *Contract, in the Age of Sustainable Consumption*, 27 J. CORP. L. 603, 623 (2002) (according to whom “the development of international business and consumer markets creates needs for uniformity and predictability of law”); in case law, see *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985), where the U.S. Supreme Court expressly referred to “the need of the international commercial system for predictability in the resolution of disputes.”

⁷ For a similar statement, see Errol P. Mendes, *The U.N. Sales Convention & U.S.-Canada Transactions: Enticing the World's Largest Trading Bloc to Do Business under a Global Sales Law*, 8 J.L. & COM. 109, 112 (1988), stating that “time has shown that in fact, national laws are the international merchants and traders [sic] worst enemy.”

⁸ See FRIEDRICH ENDERLEIN & DIETRICH MASKOW, *INTERNATIONAL SALES LAW* 1 (1992) (stating that “[i]t is generally acknowledged that the existence of different national legal systems impedes the development of international economic relations with complicated problems arising from the conflict of laws”); see also Eleanor M. Fox, *Harmonization of Law and Procedures in a Globalized World: Why, What, and How?*, 60 ANTITRUST L.J. 593, 593 (1991).

⁹ See Willem Calkoen, *Globalization and the Future of International Practice of Law from a European Perspective*, EUR. J.L. REFORM 491, 492 (2000).

¹⁰ Francesco Galgano, *Il Diritto Uniforme: la Vendita Internazionale*, in *ATLANTE DI DIRITTO PRIVATO COMPARATO* 245 (Francesco Galgano et al. eds., 5th ed. 2011).

For similar statements, see Nayiri Boghossian, *A Comparative Study of Specific Performance Provisions in the United Nations Convention on Contracts for the International Sale of Goods*, REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) 3, 7 (1999); Roy Goode, *Reflections on the Harmonisation of Commercial Law*, in *COMMERCIAL LAW AND CONSUMER LAW: NATIONAL AND INTERNATIONAL DIMENSIONS* 3, 3 (Roy Cranston & Roy Goode eds., 1993); Albert H. Kritzer, *The Convention on Contracts for the International Sale of Goods: Scope*,

However, the approach taken by the drafters of the CISG—creating a set of uniform substantive law rules—while certainly able to promote certainty and predictability in international commerce, is not the only approach that may result in predictability and certainty.¹¹ The drafting of uniform rules of private international law, an approach that is even much older¹² than the aforementioned one—which is particularly associated with only the latter half of the last century¹³—also does the same.¹⁴ Unlike uniform substantive law, which aims at guaranteeing that all parties from countries where the uniform substantive law is in force have equal access to the substantive law solutions,¹⁵ uniform private international law, by making sure “that courts will apply the same legal rules no matter where the parties litigate the dispute,”¹⁶ “assures a business entering into a contract with a foreign enterprise that no matter what forum a dispute is brought before, the uniform choice-of-law rules will apply the same country’s substantive law.”¹⁷

The foregoing difference leads some commentators to—rightly—suggest that the unification of substantive law rules is, where at all possible, preferred over the unification of private international law rules, on the

Interpretation and Resources, in REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) 147, 147 (1995); Petar Sarcevic, *Foreword*, in INTERNATIONAL CONTRACTS AND CONFLICTS OF LAWS. A COLLECTION OF ESSAYS VII (Petar Sarcevic ed., 1990).

¹¹ See also Peter Winship, *Private International Law and the U.N. Sales Convention*, 21 CORNELL INT’L L.J. 487, 487 (1988).

¹² This is evidenced by the fact that the celebration of the Hague Conference on Private International Law’s 100th anniversary occurred in 1993; in this respect, see, e.g., Kurt Lipstein, *One Hundred Years of Hague Conferences on Private International Law*, INT’L & COMP. L.Q. 553 (1993); Peter Pfund, *The Hague Conference Celebrates its 100th Anniversary*, 28 TEX. INT’L L.J. 531 (1993); Haimo Schack, *Hundert Jahre Haager Konferenz für IPR*, RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 224 (1993).

¹³ See Uwe Blaurock, *The Law of Transnational Commerce*, in THE UNIFICATION OF INTERNATIONAL COMMERCIAL LAW. TILBURG LECTURES 14 (Franco Ferrari ed., 1998); Uwe Blaurock, *Übernationales Recht des internationalen Handels*, in ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 247, 252 (1993); ALINA KACZOROWSKA, INTERNATIONAL TRADE CONVENTIONS AND THEIR EFFECTIVENESS: PRESENT AND FUTURE 1 (1995).

¹⁴ See René David, *The International Unification of Private Law*, in 2 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 73 (1972).

¹⁵ See Franco Ferrari, *Einheitsrecht*, in 1 HANDBUCH DES EUROPÄISCHEN PRIVATRECHTS 376, 377 (Jürgen Basedow et al. eds., 2009).

¹⁶ Winship, *supra* note 11, at 487.

¹⁷ *Id.*; see also Ferrari, *supra* note 15, at 377.

grounds that uniform substantive law rules are “of a higher level”¹⁸ or “superior”¹⁹ vis-à-vis uniform private international law rules.²⁰ From a practical point of view, this means, *inter alia*, that whenever the court of a contracting State to a given uniform substantive law convention has to determine the substantive rules to apply to an international contract *prima facie* governed by that convention, it must resort to that convention rather than to its private international law rules. This result has been justified on two grounds: first, that the rules of a uniform substantive law convention, like the CISG, are more specific insofar as their sphere of application is more limited; and further, that they lead directly to a substantive solution, while resort to private international law requires a two-step approach, that is, the identification of the applicable law and the application thereof.²¹

It must be pointed out, however, that the prevalence of uniform substantive law vis-à-vis private international law (irrespective of whether it is uniform or not), does not necessarily lead to the conclusion, incorrectly drawn by some commentators, that resort to private international law is irreconcilable with the uniform substantive law approach.²² This statement, not unlike similar ones suggesting that uniform substantive law can do

¹⁸ G. Eörsi, *The Hague Conventions of 1964 and the International Sale of Goods*, in ACTA JURIDICA ACADEMIAE SCIENTIARUM HUNGARICAE 324 (1969).

¹⁹ David, *supra* note 14, at 54 (stating that the unification of substantive law rules “is clearly superior: relieving lawyers of the necessity of finding out the provisions, often difficult to discover, of a great diversity of foreign systems, and requiring the judge in every case to apply a system of law which may well be called ‘uniform law.’”).

²⁰ See also Covey T. Oliver, *Standardization of Choice-of-Law Rules for International Contracts: Should There be a New Beginning?*, 53 AM. J. INT’L L. 385, 386 (1959) (referring to the unification of private international law as “a ‘second best’ solution”); for a recent criticism of the view referred to in the text, see John F. Coyle, *Rethinking the Commercial Law Treaty*, 45 GA. L. REV. 343 (2011).

²¹ Tribunale di Vigevano, July 12, 2000, available at <http://cisgw3.law.pace.edu/cases/000712i3.html>; for similar, if not identical wording, see also Tribunale di Rimini, Nov. 26, 2002, available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=823&step=FullText>; Tribunale di Padova, Feb. 25, 2004, available at <http://cisgw3.law.pace.edu/cases/040225i3.html>; Tribunale di Padova, Mar. 31, 2004, available at <http://cisgw3.law.pace.edu/cases/040331i3.html>; Tribunale di Padova, Jan. 11, 2005, available at <http://cisgw3.law.pace.edu/cases/050111i3.html>; Tribunale di Forlì, Dec. 11, 2008, available at <http://cisgw3.law.pace.edu/cases/081211i3.html>; Tribunale di Forlì, Feb. 16, 2009, available at <http://cisgw3.law.pace.edu/cases/090216i3.html>.

²² See Kenneth C. Randall & John E. Norris, *A New Paradigm for International Business Transactions*, 71 WASH. U. L.Q. 599, 612 (1993).

away with recourse to private international law,²³ is incorrect. For certainty and predictability in international commercial transactions to be attained, it is necessary to recognize that there is an unavoidable interplay between private international law and the CISG, as the costs for wrongly relying on the view here criticized are much too high.²⁴ The coming into force of the CISG, in other words, cannot prevent resort to private international law altogether, as this paper will show. There are many instances, some more obvious than other ones, which require resort to private international law.

II. EXPRESS REFERENCES TO PRIVATE INTERNATIONAL LAW IN THE 1964 HAGUE UNIFORM SALES LAWS AND IN THE CISG

The CISG is not the only uniform substantive law instrument in relation to which statements to the effect that the uniform substantive law excludes resort to private international law have been made. Similar statements have been made, for instance, in relation to the CISG's predecessors, the 1964 Hague Uniform Sales Laws.²⁵ Such statements were triggered by the text of the ULIS and the ULF, both of which contain provisions explicitly stating that for the purposes of their application private international law rules were to be excluded.²⁶

Still, despite the aforementioned provisions, even under the 1964 Hague Uniform Sales Laws it was incorrect to state that resort to private international law rules was precluded.²⁷ As one commentator correctly pointed out,

²³ See Ryan, *supra* note 3, at 101 (stating that the CISG as a set of substantive uniform rules "provide[s] more certainty in international sales contracts by eliminating costly choice of law disputes.>").

²⁴ See also Franco Ferrari, *What Sources of Law for Contracts for the International Sale of Goods? Why One Has to Look Beyond the CISG*, *INTERNATIONALES HANDELSRECHT* 1, 19 (2006).

²⁵ See Harold J. Berman, *The Uniform Law on International Sale of Goods: A Constructive Critique*, 30 *L. & CONTEMP. PROBS.* 354, 357 (1965).

²⁶ See Article 2 of the Convention relating to a Uniform Law on the International Sale of Goods, reprinted in 834 *U.N.T.S.* 107, 123 (1972) ("Rules of private international law shall be excluded for the purposes of the present Law, subject to any provision to the contrary in the said Law."). Note that Article 1(9) of the Convention, *id.* at 169, is nearly identical.

²⁷ For a paper examining in depth why the private international law was not irrelevant under the 1964 Hague Uniform Sales Laws, see Jan Kropholler, *Der "Ausschluß" des Internationalen Privatrechts im Einheitslichen Kaufgesetz*, in *RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT* 372 (1974).

[e]ven the adoption of the [1964 Hague] Uniform Law[s] everywhere in the world would not exclude the need for conflicts rules [. . .]; the Uniform Law[s] do not regulate all questions in the sales field [. . .]. In the end, the blackballed rules of private international law will have to be rediscovered and resorted to.²⁸

Unfortunately, only few delegates participating in the 1964 Hague Diplomatic Conference seem to have understood this, which is why the aforementioned provisions, expressly excluding private international law rules from being relevant for the purposes of the 1964 Hague Uniform Sales Laws were inserted in the first place.

The aforementioned provisions make it undoubtedly more difficult to depart from the more traditional way of seeing the relationship between uniform substantive law and private international law as an antagonistic one and, thus, to see that there is room for resort to private international law even where a uniform substantive law instrument is in force in the forum country. Thus, it does not really surprise that statements were made in respect of the 1964 Hague Uniform Sales Laws according to which there is no room for recourse to private international law where uniform substantive law rules apply. What is surprising is that similar statements can also be found in discussions surrounding the CISG. One author, for instance, asserts that “[a]n important function of the CISG is to eliminate, or at least to reduce, the need to resort to conflict of laws rules”;²⁹ another author claims that the CISG “should substantially reduce the need for choice of law by [. . .] courts,”³⁰ or, as yet another author puts it, “[p]arties will be forced to rely upon complicated conflict of law rules in fewer transactions if the Convention is widely applied.”³¹ Even more surprisingly, this view finds support in the UNCITRAL Secretariat’s Commentary on the 1978 Draft Convention on Contracts for the International Sale of Goods,

²⁸ Kurt Nadelman, *The Conflicts Problems of the Uniform Law on the International Sale of Goods*, 14 AM. J. COMP. L. 236, 239–40 (1965).

²⁹ Helen E. Hartnell, *Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods*, 18 YALE J. INT’L L. 1, 6 (1993).

³⁰ Henry Mather, *Choice of Law for International Sales Issues Not Resolved by the CISG*, 20 J.L. & COM. 155, 155 (2001). It should be pointed out that the author later makes a statement that is in contrast with the one cited in the text: “difficult choice-of-law problems will arise when the CISG applies to a transaction but does not resolve all the legal issues before the tribunal.” *Id.* at 156.

³¹ Karen B. Giannuzzi, *The Convention on Contracts for the International Sale of Goods: Temporarily Out of “Service”?*, 28 LAW & POL’Y INT’L BUS. 991, 1014 (1997).

according to which one of the Convention's three principal goals is to "reduce the necessity of resorting to rules of private international law."³²

Even a superficial reading of the CISG shows that these statements are misleading insofar as they make one believe that the CISG's uniform substantive rules preclude resort to private international law: the CISG itself expressly refers in two places (namely in Articles 1(1)(b) and 7(2)) to private international law.³³ Moreover, given the contexts in which reference to private international law is made, the importance of private international law for CISG-related transactions and problems becomes evident. In effect, Article 1(1)(b) lets even the applicability of the CISG itself to depend (where the CISG is not "directly"³⁴ or "autonomously"³⁵

³² U.N. Secretariat, *Commentary on the Draft Convention Contracts for the International Sale of Goods*, 15 U.N. Doc. A/CONF.97/19 (1981) [hereinafter OFFICIAL RECORDS OF THE UNITED NATIONS CONFERENCE].

³³ This has often been pointed out; see, e.g., Franco Ferrari, *Vor Art. 1-6*, in KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT—CISG 37, 43 (Peter Schlechtriem & Ingeborg Schwenzer eds., 5th ed. 2008); Franco Ferrari, *La Convention de Vienne sur la vente internationale et le droit international privé*, J. DU DROIT INT'L 27, 31 (2006).

³⁴ In legal writing, it has often been pointed out that Article 1(1)(a) CISG leads to the CISG's "direct"—or "immediate"—application. See, e.g., FRANCO FERRARI, *THE SPHERE OF APPLICATION OF THE VIENNA SALES CONVENTION* 10 (1995); Ulrich Magnus, *Zum Räumlich-Internationalen Anwendungsbereich des UN-Kaufrechts und zur Mängelrüge*, in PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS 390, 390 (1993); GERT REINHART, *UN-KAUFRECHT: KOMMENTAR ZUM ÜBEREINKOMMEN DER VEREINTEN NATIONEN VOM 11 APRIL 1980 ÜBER DEN INTERNATIONALEN WARENKAUF* 13 (1991); Ingo Saenger, *Art. 1 CISG*, in INTERNATIONALES VERTRAGSRECHT 395, 403 (Franco Ferrari et al. eds., 2d ed. 2012).

For a reference in case law to the CISG's "direct" application pursuant to Article 1(1)(a), see AMTSGERICHT SURSEE, Sept. 12, 2008, available at <http://globalsaleslaw.com/content/api/cisg/urteile/1728.pdf>; Handelsgericht Aargau, June 19, 2007, available at <http://globalsaleslaw.com/content/api/cisg/urteile/1741.pdf>; Swiss Supreme Court, July 11, 2000, available at <http://cisgw3.law.pace.edu/cases/000711s1.html>.

³⁵ For the use of this expression by commentators, see CHRISTPOH BRUNNER, *UN-KAUFRECHT—CISG: KOMMENTAR ZUM ÜBEREINKOMMEN DER VEREINTEN NATIONEN ÜBER VERTRÄGE ÜBER DEN INTERNATIONALEN WARENKAUF VON 1980 UNTER BERÜCKSICHTIGUNG DER SCHNITTSTELLEN ZUM INTERNEN SCHWEIZER RECHT* 14 (2004); Franco Ferrari, *Art. 1*, in KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT—CISG, *supra* note 33, at 54, 75; ULRICH MAGNUS, *WIENER UN-KAUFRECHT—CISG* 83 (2005); Willibald Posch & Ulfried Terlitz, *Entscheidungen des österreichischen Obersten Gerichtshofs zur UN-Kaufrechtskonvention (CISG)*, in INTERNATIONALES HANDELSRECHT 47, 49 (2001); PETER SCHLECHTRIEM & CLAUDE WITZ, *CONVENTION DES NATIONS UNIES SUR LES CONTRATS DE VENTE INTERNATIONALE MARCHANDISES* 15 (2008); in case law, see AMTSGERICHT SURSEE, Sept. 12, 2008, *supra* note 34; Tribunale di Vigevano, July 12, 2000, *supra* note 21; Austrian Supreme Court, Mar. 20, 1997, available at <http://cisgw3.law.pace.edu/cases/970320a3.html>; Tribunal Cantonal Valais, June 29, 1994, available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=177&step=FullText>.

applicable due to the parties having their relevant places of business in different Contracting States to the CISG (Article 1(1)(a)) on a private international law analysis,³⁶ Article 1(1) indeed states that the CISG “applies to contracts of sale of goods between parties whose places of business are in different States: [. . .] (b) when the rules of private international law lead to the application of the law of a Contracting State,”³⁷ thus unambiguously making resort to private international law necessary even for the purpose of the CISG’s own applicability (where the Article 1(1)(a) requirements are not met).

The importance of private international law for the CISG can also be derived from Article 7(2), the CISG’s provision on gap-filling that refers to private international law as a means to determine rules on the basis of which to fill (some of) the CISG’s gaps.³⁸ Aside from Articles 1(1)(b) and

³⁶ For papers on the CISG’s applicability by virtue of Article 1(1)(b), *see, e.g.*, Frank Diedrich, *Anwendung der “Vorschaltlösung” im Internationalen Kaufrecht*, in RECHT DER INTERNATIONALEN WIRTSCHAFT 758 (1993); Franco Ferrari, *Diritto Uniforme Della Vendita Internazionale: Questioni di Applicabilità e Diritto Internazionale Privato*, in RIVISTA DI DIRITTO CIVILE 669 (1995); Franco Ferrari, *CISG Article 1(1)(b) and Related Matters*, in NEDERLANDS INTERNATIONAAL PRIVAATRECHT 317 (1995); Hermann Pünder, *Das Einheitliche UN-Kaufrecht—Anwendung kraft Kollisionsrechtlicher Verweisung nach Art. 1 Abs. 1 lit. b UN-Kaufrecht*, in RECHT DER INTERNATIONALEN WIRTSCHAFT 869 (1990).

³⁷ For recent applications of the CISG by virtue of its Article 1(1)(b), *see* Cámara Nacional de Apelaciones en lo Comercial de Buenos Aires, Oct. 7, 2010, *available at* <http://www.globalsaleslaw.org/content/api/cisg/urteile/2156.pdf>; LG Potsdam, Apr. 7, 2009, *available at* <http://cisgw3.law.pace.edu/cisg/text/090407german.pdf>; Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, Arbitral award No. T-8/08, *available at* <http://cisgw3.law.pace.edu/cases/090128sb.htm>; OLG Düsseldorf, Apr. 21, 2004, *available at* <http://www.cisg-online.ch/cisg/urteile/913.pdf>; OLG Karlsruhe, Dec. 10, 2003, *available at* <http://cisgw3.law.pace.edu/cases/031210g1.html>; AG Basel-Stadt, Aug. 22, 2003, *available at* <http://cisgw3.law.pace.edu/cases/030822s1.html>; HG St. Gallen, Dec. 3, 2002, *available at* <http://cisgw3.law.pace.edu/cases/021203s1.html>; LG Braunschweig, July 30, 2001, *available at* <http://cisgw3.law.pace.edu/cases/010730g1.html>; French Supreme Court, June 26, 2001, *available at* <http://witz.jura.uni-sb.de/CISG/decisions/2606012v.htm>; Downs Investment Pty. Ltd. v. Perwaja Steel SDN BHD, Supreme Court of Queensland, Nov. 17, 2000, *available at* <http://cisgw3.law.pace.edu/cases/001117a2.html>; Cámara Nacional de Apelaciones en lo Comercial, Apr. 24, 2000, *available at* <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/000424a1.html>; Tribunale di Pavia, Dec. 29, 1999, *available at* <http://cisgw3.law.pace.edu/cases/991229i3.html>; OLG Hamburg, Nov. 26, 1999, *available at* <http://cisgw3.law.pace.edu/cases/991126g1.html>.

³⁸ For papers on gap-filling under the CISG, *see, e.g.*, Callaghan, *supra* note 6; Anukarshan Chandrasenan, *UNIDROIT Principles to Interpret and Supplement the CISG: An Analysis of the Gap-Filling Role of the UNIDROIT Principles*, VINDOBONA J. INT’L COM. L. & ARB. 65 (2007); Frank Diedrich, *Lückenfüllung im Internationalen Einheitsrecht—Möglichkeiten und Grenzen richterlicher Rechtsfortbildung im Wiener Kaufrecht*, in RECHT DER INTERNATIONALEN WIRTSCHAFT 353 (1995); Franco Ferrari, *Gap-filling and Interpretation of the CISG: Overview of International Case Law*,

7(b), there are other instances as well, albeit less apparent ones, when resort to private international law cannot be foregone.

III. THE CONCEPT OF PRIVATE INTERNATIONAL LAW UNDER THE CISG

Despite the aforementioned importance for the CISG of the concept “private international law,”³⁹ expressly referred to, as already mentioned, in two places by the CISG text itself, the concept is not defined in the CISG.⁴⁰ One has to wonder whether this means that the concept is to be interpreted, not unlike most other concepts used in the CISG, by having regard to the CISG’s “international character and the need to promote uniformity in its

VINDOBONA J. INT’L COM. L. & ARB. 63 (2003); BETTINA FRIGGE, EXTERNE LÜCKEN UND INTERNATIONALES PRIVATRECHT NACH DEM UN-KAUFRECHT (ART. 7(2)) (1994); Diego Ricardo Galan Barrera, *La Integración de Lagunas en la Convención de las Naciones Unidas sobre los Contratos de Compraventa Internacional de Mercaderías*, in OBLIGACIONES Y CONTRATOS EN EL DERECHO CONTEMPORANEO 311 (Jorge Oviedo Alban ed., 2010); Alejandro M. Garro, *The Gap-Filling Role of the UNIDROIT Principles in International Sales Law*, 69 TUL. L. REV. 1149 (1995); John Y. Gotanda, *Using the UNIDROIT Principles to fill Gaps in the CISG*, in CONTRACT DAMAGES: DOMESTIC AND INTERNATIONAL PERSPECTIVES 109 (Djakhongir Saidov & Ralph Cunnington eds., 2008); Jan Hellner, *Gap-Filling by Analogy: Art. 7 of the U.N. Sales Convention in Its Historical Context*, in STUDIES IN INTERNATIONAL LAW: FESTSKRIFT TILL LARS HJERNER 219 (Jan Ramberg ed., 1990); TATJANA HIMMEN, DIE LÜCKENFÜLLUNG ANHAND ALLGEMEINER GRUNDSÄTZE IM UN-KAUFRECHT (2007); Karin L. Kizer, *Minding the Gap: Determining Interest Rates under the U.N. Convention for the International Sale of Goods*, 65 U. CHI. L. REV. 1279 (1998); Juraj Kotrusz, *Gap-Filling of the CISG by the UNIDROIT Principles of International Commercial Contracts*, 26 UNIF. L. REV. 119 (2009); Pilar M. Perales Viscasillas, *The Role of the UNIDROIT Principles and the PECL in the Interpretation and Gap-filling of CISG*, in CISG METHODOLOGY 287 (André Janssen & Olaf Meyer eds., 2009); Mark N. Rosenberg, *The Vienna Convention: Uniformity in Interpretation for Gap-Filling: An Analysis and Application*, AUSTL. BUS. L. REV. 442 (1992); Peter Schlechtriem, *Interpretation, Gap Filling and Further Development of the UN Sales Convention*, 16 PACE INT’L L. REV. 279 (2004); Lucia Carvalhal Sica, *Gap-Filling in the CISG: May the UNIDROIT Principles Supplement the Gaps in the Convention?*, NORDIC J. COM. L. 1 (2006); Hans Stoll, *Regelungslücken im Einheitlichen Kaufrecht und IPR*, PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS 75 (1993); ÜLRIKE TEICHERT, LÜCKENFÜLLUNG IM CISG MITTELS UNIDROIT-PRINZIPIEN—ZUGLEICH EIN BEITRAG ZUR FWÄHLBARKEIT NICHTSTAATLICHEN RECHTS (2007); Alvaro Rodrigo Vidal Olivares, *La función Integradora de los Principios Generales en la Compraventa Internacional de Mercaderías y los Principios de la UNIDROIT sobre Contratos Comerciales Internacionales*, in ANUARIO DE DERECHO CIVIL 993 (2003).

³⁹ For a detailed analysis of the concept of “private international law” under the CISG, see Franco Ferrari, *Der Begriff des “Internationalen Privatrechts” nach Art. 1 Abs. 1 lit. b) des UN-Kaufrechts*, ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 162 (1998).

⁴⁰ See *supra* note 33, at 32.

application”—i.e. “autonomously,”⁴¹ that is, not in the light of domestic law⁴²—or whether the concept is one of those exceptional concepts that have to be interpreted “domestically?”⁴³

⁴¹ For a reference in legal writing to the need to interpret the CISG “autonomously,” see, e.g., WILHELM-ALBRECHT ACHILLES, KOMMENTAR ZUM UN-KAUFRECHTSÜBEREINKOMMEN (CISG) 28 f. (2000); Camilla B. Andersen, *The Global Jurisconsultorium of the CISG Revisited*, VINDOBONA J. INT’L COM. L. & ARB. 43, 47 (2009); BERNARD AUDIT, LA VENTE INTERNATIONALE DE MARCHANDISES 47 (1990); Wayne R. Barnes, *Contemplating a Civil Law Paradigm for a Future International Commercial Code*, LA L. REV. 677, 754 (2005); Giovanni Bisazza, *Auslegung des Wiener UN-Kaufrechts unter Berücksichtigung ausländischer Rechtsprechung: ein amerikanisches Beispiel*, EUR. LEGAL F. 380, 381 (2004); Allen Blair, *Hard Cases under the Convention on the International Sale of Goods: A Proposed Taxonomy of Interpretive Challenges*, DUKE J. COMP. & INT’L L. 269, 292 (2011); Michael J. Bonell, *Commento all’art. 7 della Convenzione di Vienna*, NUOVE LEGGI CIVILI COMMENTATE 20, 21 (1989); Michael J. Bonell, *La nouvelle Convention des Nations-Unies sur les contrats de vente internationale de marchandises*, DROIT ET PRATIQUE DU COMMERCE INTERNATIONAL 7, 14 (1981); Michael Bridge, *A commentary on Articles 1–13 and 78*, in THE DRAFT UNCITRAL DIGEST AND BEYOND 235, 249 (Franco Ferrari et al. eds., 2004); Michael Bridge, *The Bifocal World of International Sales: Vienna and Non-Vienna*, in MAKING COMMERCIAL LAW: ESSAYS IN HONOUR OF ROY GOODE 277, 288 (Roy Cranston ed., 1997); BRUNNER, *supra* note 35, at 76; STEFAN DEJACO, DAS UN-KAUFRECHT. UNTERSUCHUNG DER ANWENDUNG UND AUSLEGUNG IN DER DEUTSCHEN, ITALIENISCHEN UND ÖSTERREICHISCHEN RECHTSPRECHUNGSPRAXIS 42 (2010); Frank Diedrich, *Maintaining Uniformity in International Uniform Law Via Autonomous Interpretation: Software Contracts and the CISG*, 8 PACE INT’L L. REV. 303 (1996); Larry A. DiMatteo & Daniel T. Ostas, *Comparative Efficiency in International Sales Law*, 26 AM. U. INT’L L. REV. 371, 376 (2011); John Felemegas, *The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation*, REVIEW OF THE CISG 115, 235 (2000–2001); Franco Ferrari, *Interprétation uniforme de la Convention de Vienne de 1980 sur la vente internationale*, REVUE INTERNATIONALE DE DROIT COMPARÉ 813, 827 (1996); Martin Gebauer, *Uniform Law, General Principles and Autonomous Interpretation*, UNIF. L. REV. 683, 686 (2000); Leonardo Graffi, *L’interpretazione autonoma della Convenzione di Vienna: rilevanza del precedente straniero e disciplina della lacuna*, GIURISPRUDENZA DI MERITO 873, 874 f. (2004); Leonardo Graffi, *Spunti in tema di vendita internazionale e forum shopping*, DIRITTO DEL COMMERCIO INTERNAZIONALE 807, 809 f. (2003); Günther Hager, *Zur Auslegung des UN-Kaufrechts: Grundsätze und Methoden*, in FESTSCHRIFT FÜR ULRICH HUBER ZUM SIEBZIGSTEN GEBURTSTAG 319, 320 (Theodor Baums et al. eds., 2006); Peter Huber, *Standard Terms under the CISG*, 13 VINDOBONA J. INT’L COM. L. & ARB. 123, 124 (2009); PETER HUBER & ALASTAIR MULLIS, THE CISG: A NEW TEXTBOOK FOR STUDENTS AND PRACTITIONERS 7 (2007); Monique Jametti Greiner, *Der Vertragsabschluss*, in DAS EINHEITLICHE WIENER KAUFRECHT. NEUES RECHT FÜR DEN INTERNATIONALEN WARENKAUF 43, 43 (Hans Hoyer ed., 1992); Benjamin Hayward, *The CISG in Australia—The Jigsaw Puzzle Missing A Piece*, 14 VINDOBONA J. INT’L COM. L. & ARB. 193, 211 (2010); Nathalie Hofmann, *Interpretation Rules and Good Faith as Obstacles to the UK’s Ratification of the CISG and to the Harmonization of Contract Law in Europe*, 22 PACE INT’L L. REV. 145, 166 (2010); André Janssen, *Die Einbeziehung von allgemeinen Geschäftsbedingungen in internationale Kaufverträge und die Bedeutung der UNIDROIT- und der Lando-Principles*, INTERNATIONALES HANDELSRECHT 194, 199 (2004); MARTIN KAROLLUS, UN-KAUFRECHT. EINE SYSTEMATISCHE DARSTELLUNG FÜR STUDIUM UND PRAXIS 11 (1991); Joshua D.H. Karton & Lorraine de Germiny, *Has the CISG Advisory Council Come of Age?*, 27 BERKELEY J. INT’L L. 448, 458 (2009); Alexander Komarov, *Internationality, Uniformity and Observance of Good Faith as Criteria in Interpretation of*

The importance of the answer to this question becomes evident if one considers the differences that exist between the rules of private international law of different countries. While, for instance, the parties' freedom to

CISG: Some Remarks on Article 7(1), 25 J.L. & COM. 75, 78 (2005); Joseph M. Lookofsky, *In Dubio Pro Conventione? Some Thoughts About Opt-Outs, Computer Programs and Preemption under the 1980 Vienna Sales Convention (CISG)*, DUKE J. COMP. & INT'L L. 263, 275 (2003); Ulrich Magnus, *Konventionsübergreifende Interpretation internationaler Staatsverträge privatrechtlichen Inhalts*, in AUFBRUCH NACH EUROPA. 75 JAHRE MAX-PLANCK-INSTITUT FÜR PRIVATRECHT 571, 572 (Jürgen Basedow et al. eds., 2011); Ulrich Magnus, *Tracing Methodology in the CISG: Dogmatic Foundations*, in CISG METHODOLOGY, *supra* note 38, at 33, 40; Asa Markel, *American, English and Japanese Warranty Law Compared: Should the U.S. Reconsider Her Article 95 Declaration to the CISG?*, 21 PACE INT'L L. REV. 163, 196 (2009); Francesco G. Mazzotta, *Why Do Some American Courts Fail to Get it Right?*, 3 LOY. U. CHI. INT'L L. REV. 85, 101 (2005); ANSELMO MARTINEZ CANELLAS, LA INTERPRETACION Y LA INTEGRACION DE LA CONVENCION DE VIENA. SOBRE LA COMPRAVENTA INTERNACIONAL DE MERCADERIAS DE 11 DE ABRIL DE 1980 119 f. (2004); Anthony J. McMahon, *Differentiating between Internal and External Gaps in the U.N. Convention on Contracts for the International Sale of Goods: A Proposed Method for Determining "Governed by" in the Context of Article 7(2)*, 44 COLUM. J. TRANSNAT'L L. 992, 1000 (2006); PATRICK MELIN, GESETZESAUSLEGUNG IN DEN USA UND IN DEUTSCHLAND 355 (2005); Tobias Müller & Federica Togo, *Die Berücksichtigung der Überzeugungskraft ausländischer Präzedenzfälle bei der Auslegung des CISG—Die neuere italienische Rechtsprechung als Vorreiter und Vorbild*, INTERNATIONALES HANDELSRECHT 102, 102 (2005); EIKE NIKOLAI NAJORK, TREU UND GLAUBEN IM CISG 53 (2000); HANNO NAUMANN, DER REGULINGSBEREICH DES UN-KAUFRECHTS IM SPANNUNGSFELD ZWISCHEN EINHEITSRECHT UND KOLLISIONSRECHT 166 (2000); Vladimir Pavić & Milena Djordjević, *Application of the CISG Before the Foreign Trade Court of Arbitration at the Serbian Chamber of Commerce—Looking Back at the Latest 100 Cases*, 28 J.L. & COM. 1, 24 (2009); Pilar M. Perales Viscasillas, *Art. 7*, in THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALES OF GOODS. COMMENTARY 109, 113 (Stefan Kröll et al. eds., 2011); Ingo Saenger, *Art. 7 CISG*, in INTERNATIONALES VERTRAGSRECHT, *supra* note 34, at 436, 438; Djahongir Saidov, *Cases on CISG Decided in the Russian Federation*, 7 VINDOBONA J. INT'L COM. L. & ARB. 1, 14 (2003); Peter Schlechtriem, *Requirements of Application and Sphere of Applicability of the CISG*, 36 VICTORIA UNIV. WELLINGTON L. REV. 781, 789 (2005); GUDRUN SCHMID, EINHEITLICHE ANWENDUNG VON INTERNATIONALEM EINHEITSRECHT 42 (2004); Marius Sollund, *The U.N. Convention on Contracts for the International Sale of Goods, Article 7(1)—The Interpretation of the Convention and the Norwegian Approach*, NORDIC J. COM. L. 1, 6 (2007/1); MARCO TORSSELLO, COMMON FEATURES OF UNIFORM COMMERCIAL LAW CONVENTIONS. A COMPARATIVE STUDY BEYOND THE 1980 UNIFORM SALES LAW 18 (2004); Thomas Vazquez-Lepinette, *The Interpretation of the 1980 Vienna Convention on International Sales*, DIRITTO DEL COMMERCIO INTERNAZIONALE 377, 387 f. (1995); Tamo Zwinge, *The United Nations Sales Convention: Delimitation, Influences, and Concurrent Application of Domestic Law*, 10 RICH. J. GLOBAL L. & BUS. 227, 230 (2011).

⁴² See John O. Honnold, *The Sales Convention in Action—Uniform International Words: Uniform Applications?*, 8 J.L. & COM. 207, 208 (1988) (stating that "one threat to international uniformity in interpretation is a natural tendency to read the international text through the lenses of domestic law."). See also Andrew Babiak, *Defining "Fundamental Breach" under the United Nations Convention on Contracts for the International Sale of Goods*, 6 TEMP. INT'L & COMP. L.J. 113, 117 (1992).

⁴³ For a reference to concepts that should not be interpreted autonomously, see, e.g., Franco Ferrari, *CISG Case Law: A New Challenge for Interpreters?*, 17 INT'L BUS. L.J. 495, 495 (1998).

choose the law applicable to their contract has long been accepted in many countries,⁴⁴ as in all Member States of the European Union,⁴⁵ a similar choice does not necessarily produce any effect in other countries.⁴⁶ Although this may appear to be the most significant difference, it is certainly not the only one. As far as private international law rules relating to contracts are concerned, many countries have, as have many international conventions⁴⁷ as well as the recent Rome I Regulation,⁴⁸ rejected the doctrine of renvoi; nevertheless, there are a few countries which still accept that doctrine.⁴⁹

But are these differences really relevant? Obviously, such differences would be irrelevant if the concept at hand were to be interpreted autonomously. In this author's opinion, however, the concept at hand is one of the concepts which have to be construed in light of the applicable domestic law,⁵⁰ as also expressly stated by various courts.⁵¹ The CISG

⁴⁴ See Patrick Ross Williams, *The EEC Convention on the Law Applicable to Contractual Obligations*, 35 INT'L & COMP. L.Q. 1, 11 (1986).

⁴⁵ For this statement, see Jürgen Basedow, *Theorie der Rechtswahl oder Parteiautonomie als Grundlage des Internationalen Privatrechts*, 75 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 32, 33 (2011); FRANCO FERRARI, *CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS: APPLICABILITY AND APPLICATIONS OF THE 1980 UNITED NATIONS SALES CONVENTION* 74 (2d ed. 2012).

⁴⁶ For a reference to countries that do not acknowledge party autonomy as connecting factor, see Basedow, *supra* note 45, at 34; see also JOCHEN SCHRÖDER & CHRISTIAN WENNER, *INTERNATIONALES VERTRAGSRECHT: DAS KOLLISIONSRECHT DER TRANSNATIONALEN WIRTSCHAFTSVERTRÄGE* 9 (2d ed. 1998).

⁴⁷ In this respect, see, e.g., Convention on the Law Applicable to Contractual Obligations, art. 15, June 19, 1980, 19 I.L.M. 1492, 1496 ("The application of the law of any country specified by this convention means the application of the rules in force in that country other than its rules of private international law.").

See also Convention on the Law Applicable to International Sale of Goods, art. 15, Dec. 22, 1986, 24 I.L.M. 1575, 1577 (1986) ("In the Convention, 'law' means the law in force in a State other than its choice of law rules."). More recently, see Inter-American Convention on the Law Applicable to International contracts, art. 17, Mar. 17, 1994, 33 I.L.M. 733 ("For the purposes of this Convention, 'law' shall be understood to mean the law current in a State, excluding rules concerning conflict of laws.").

⁴⁸ See Commission Regulation 593/08, art. 20, 2008 O.J. (L 177) 6 (EC) ("The application of the law of any country specified by this Regulation means the application of the rules of law in force in that country other than its rules of private international law, unless provided otherwise in this Regulation.").

⁴⁹ For new support of renvoi, see Adrian Briggs, *In Praise and Defence of Renvoi*, 47 INT'L & COMP. L.Q. 877 (1998); Andrew Dickinson, *Renvoi: The Comeback Kid?*, 122 LAW Q. REV. 183 (2006).

⁵⁰ Ferrari, *supra* note 43, at 245, 252–53.

“merely” constitutes a substantive law convention⁵² and does not set forth any private international law rules.⁵³ This leads one to conclude that where the CISG itself refers to “private international law,” it refers to a domestic concept of “private international law”;⁵⁴ more specifically, it refers to the private international law of the forum,⁵⁵ as confirmed by various courts.⁵⁶ This is why it is, for instance, incorrect to criticize, as some commentators do, an Austrian court’s decision⁵⁷ for employing the doctrine of renvoi on the grounds that the CISG rejects the renvoi doctrine.⁵⁸ As the CISG does not set forth any rule of private international law, it does not deal with the issue of renvoi either. Furthermore, at the time the Austrian decision was rendered, renvoi was a doctrine recognized by Austrian private international law, thus requiring the court to take into account the private international

⁵¹ See Tribunale di Padova, Jan. 11, 2005, *supra* note 21; Tribunale di Padova, Feb. 25, 2004, *supra* note 21.

⁵² Most recently, see Tribunale di Padova, Feb. 25, 2004, *supra* note 21 (expressly stating that the CISG is a uniform convention on substantive law and not one on private international law as sometimes erroneously stated); see also Tribunale di Rimini, Nov. 26, 2002, available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases/2/021126i3.html> (stating that the CISG is a “uniform substantive law convention”); Oberster Gerichtshof [OGH] [Supreme Court] June 29, 1999, docket No. 1 Ob 74/99k (Austria), available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases/2/990629a3.html> (stating the same).

⁵³ ENDERLEIN & MASKOW, *supra* note 8, at 370.

⁵⁴ Ferrari, *supra* note 35, at 78; FERRARI, *supra* note 45, at 76.

⁵⁵ Ferrari, *supra* note 35, at 78; ARND LOHMANN, PARTEIAUTONOMIE UND UN-KAUFRECHT 139 (2005); CHRISTOPH NIEMANN, EINHEITLICHE ANWENDUNG DES UN-KAUFRECHTS IN ITALIENISCHER UND DEUTSCHER RECHTSSPRECHUNG UND LEHRE 73 (2006); HELGA RUDOLPH, KAUFRECHT DER EXPORT- UND IMPORTVERTRÄGS—KOMMENTIERUNG DES UN-ÜBEREINKOMMENS ÜBER INTERNATIONALE WARENKAUFVERTRÄGE MIT HINWEISEN FÜR DIE VERTRAGSPRAXIS 105 (1996); SCHLECHTRIEM & WITZ, *supra* note 35, at 16; SCHMID, *supra* note 41, at 54.

⁵⁶ Tribunale di Padova, Feb. 25, 2004, *supra* note 21; Tribunale di Rimini, Nov. 26, 2002, *supra* note 21; Tribunale di Vigevano, *supra* note 21.

⁵⁷ See Bezirksgericht für Handelssachen Wein [BG-H Wein] [District Court for Commercial Matters of Vienna] Feb. 20, 1992, docket No. 9 C3486/90w (Austria), available at <http://cisgw3.law.pace.edu/cases/920220a3.html>.

⁵⁸ According to some commentators, the CISG’s legislative history clearly shows that the CISG rejected the renvoi doctrine. Indeed, according to the OFFICIAL RECORDS OF THE UNITED NATIONS CONFERENCE, *supra* note 32, at 15, it appears that the “law” to which the rules of private international law have to refer in order to make the CISG applicable by virtue of Article 1(1)(b) is the “substantive law” of a Contracting State. See also Peter Winship, *The Scope of the Vienna Convention on International Sale Contracts*, in INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 28–29 (Nina Galston & Hans Smit eds., 1984) (stating that the “law” referred to in Article 1(1)(b) is “substantive law” on the grounds that “there is a general reluctance to inquire into the conflict of laws rules recognized by another jurisdiction, as suggested, for example, by the general disapproval of the doctrine of renvoi.”).

law rules of the country to which the Austrian private international law lead.

From what has just been said, it becomes apparent that whenever a court has to resort to private international law in the CISG context, it will have to resort to its own private international rules, irrespective of whether the matters in dispute relate to those in respect of which the CISG itself refers to the need for a private international law approach or to one of the many other ones that require resort to private international law.

IV. THE CISG'S LIMITED INTERNATIONAL SPHERE OF APPLICATION

The following parts of this paper will be devoted to identifying the many reasons why it is incorrect to state that the coming into force of the CISG in a given country prevents the courts of that country from having to resort to private international law. Some, albeit not all, of the reasons relate to the CISG's applicability being subject to various requirements, which makes it necessary to clearly distinguish between the CISG's coming into force and its applicability, a distinction that seems to be overlooked by those suggesting that the coming into force of the CISG prevents recourse to private international law.

The first CISG requirement that comes to one's mind when examining the relationship between the CISG and private international law is the CISG's internationality requirement; after all, it is internationality that triggers recourse to private international law.

The CISG's international sphere of application, like its substantive sphere of application,⁵⁹ is limited.⁶⁰ In effect, according to Article 1(1) of the CISG, the internationality of a contract depends solely⁶¹ on the parties having their places of business (or, where the parties do not have a place of

⁵⁹ See *infra* note 82.

⁶⁰ For a paper on the CISG's international sphere of application, see Kurt Siehr, *Der Internationale Anwendungsbereich des UN-Kaufrechts*, in RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 587 (1988).

⁶¹ See Saenger, *supra* note 34, at 401; SCHLECHTRIEM & WITZ, *supra* note 35, at 12; but see Peter Jen-Huong Wang, *Das Wiener Übereinkommen über internationale Warenkaufverträge vom 11. April 1980*, ZEITSCHRIFT FÜR VERGLEICHENDE RECHTSWISSENSCHAFT 184, 187 (1988) (the CISG should be applicable, not unlike the 1964 Hague Conventions, only where the sales contract is also characterized by an objective element such as those provided for by the ULIS and ULF).

business, their habitual residence)⁶²—at the time of the conclusion of the contract⁶³—in different States.⁶⁴

Where this “subjective”⁶⁵ internationality requirement is not met, the CISG will not be applicable *per se*,⁶⁶ even if the contract’s performance involves different States,⁶⁷ as emphasized both in legal writing⁶⁸ and case law.⁶⁹ This, however, does not necessarily signify that the contract for the

⁶² CISG art. 10(b) (“[. . .] if a party does not have a place of business, reference is to be made to his habitual residence.”).

⁶³ Tribunale di Forlì [District Court Forlì] Italy, Dec. 11, 2008, available at <http://cisgw3.law.pace.edu/cases/081211i3.html>; Tribunale di Padova, Jan. 11, 2005, available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=1005&step=FullText>; Tribunale di Padova [District Court Prato] Italy, Feb. 25, 2004, available at <http://cisgw3.law.pace.edu/cases/040225i3.html>; Tribunale di Rimini [District Court Rimini] Italy, Nov. 26, 2002, available at <http://cisgw3.law.pace.edu/cases/021126i3.html>; Tribunale di Vigevano [District Court Vigevano], July 12, 2000, available at <http://cisgw3.law.pace.edu/cases/000712i3.html>; Oberlandesgericht Dresden [OLG] [Dresden Provincial Court of Appeal] Dec. 27, 1999 (Ger.) available at <http://cisgw3.law.pace.edu/cases/991227g1.html>.

⁶⁴ See Polimeles Protodikio Athinon [Multi-Member Court of First Instance of Athens] Greece, 2009, available at <http://cisgw3.law.pace.edu/cases/094505gr.html#ii2>; Tribunale di Padova, Mar. 31, 2004, available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/040331i3.html>; Tribunale di Padova [District Court Padova] Italy, Feb. 25, 2004, available at <http://cisgw3.law.pace.edu/cases/040225i3.html>; Tribunale di Rimini [District Court Rimini] Italy, Nov. 26, 2002, available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/021126i3.html>; Oberlandesgericht Rostock [Appellate Court Rostock] Germany, Oct. 10, 2001, available at <http://cisgw3.law.pace.edu/cases/011010g1.html>; Tribunale di Vigevano [District Court Vigevano] Italy, July 12, 2000, available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/000712i3.html>; Oberlandesgericht Köln [Appellate Court Köln] Germany, May 21, 1996, available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/960521g1.html>; Oberster Gerichtshof [Supreme Court] Austria, Nov. 10, 1994, available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/941110a3.html>; Oberlandesgericht Köln [Appellate Court Köln] Germany, Aug. 26, available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/940826g1.html>.

⁶⁵ ROLF HERBER, *Art. 1, COMMENTARY ON THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS* 19, 21 (Peter Schlechtriem ed., 1998).

⁶⁶ See also *Systems, Inc. v. EMC Corporation*, 2005 WL 705107 (Mass. Super. Feb. 28, 2005), available at <http://cisgw3.law.pace.edu/cases/050228u1.html>. For the parties’ possibility of making the CISG applicable where it does not apply *per se*, see FERRARI, *supra* note 45, at 179.

⁶⁷ On the other hand, where the internationality requirement is met, the contract can be considered international even if goods do not cross any border. See, e.g., Peter Schlechtriem, *From the Hague to Vienna—Progress in Unification of the Law of International Sales Contracts?*, in 2 *THE TRANSNATIONAL LAW OF INTERNATIONAL COMMERCIAL TRANSACTIONS* 125, 127 (Norbert Horn & Clive Schmitthoff eds., 1982).

⁶⁸ See ROLF HERBER & BEATE CZERWENKA, *INTERNATIONALES KAUFRECHT: KOMMENTAR ZU DEM ÜBEREINKOMMEN DER VEREINTEN NATIONEN VOM 11. APRIL 1980 ÜBER VERTRÄGE ÜBER DEN INTERNATIONALEN WARENKAUF* (1991).

⁶⁹ Cf. *Grace Label, Inc. v. Kliff*, 355 F. Supp. 2d 965, 971 (S.D. Iowa 2005), available at <http://cisgw3.law.pace.edu/cases/050125u1.html> (“Kliff suggests that because the contract in question calls for

sale of goods is not an international one; it merely means that it does not meet the CISG's internationality requirement. The importance of this distinction becomes apparent if one considers the consequences of not meeting the CISG's internationality requirement. In this situation, the court will not have to further look into the CISG's applicability; instead, the court will have to turn to its rules of private international law to determine the domestic law applicable to the contract. This law will necessarily be different from that laid down by the CISG, even if the rules of private international law lead to the law of a contracting State. Ultimately, this goes to show that despite the entry into force of the CISG in a given country, there is still a great deal of room for a private international law approach by the courts of that country, even where the CISG substantive applicability requirements (to be dealt with below) are met.⁷⁰

In light of Article 1(2) of the CISG, one can go even further and state that even where the contract also meets the internationality requirement, as set forth in Article 1(1) of the CISG, resort to private international law may be necessary even for internationality-related purposes. Article 1(2) of the CISG requires, as emphasized by many courts,⁷¹ that the internationality

the manufacture of goods in the United States for delivery in Mexico it may be governed by the . . . CISG. The Court does not believe CISG is applicable. It expressly 'applies to contracts of sale of goods between parties whose places of business are in different States,' referring to different countries. . . . The contract was solely between two United States Concerns with places of business in the United States. It provided for the shipment of the goods to Barcel in Mexico, but Barcel was not a party to the contract.").

See also Oberlandesgericht Köln [OLG] [Appellate Court Köln] (Ger.), Nov. 27, 1991, *available at* <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/911127g1.html> (the German court refused to apply the CISG to a case where a German buyer had acquired tickets from a German seller for the 1990 Soccer World Cup final to be handed over in Rome, among others, on the grounds that the contract was not an international one).

⁷⁰ *See infra* text accompanying note 82.

⁷¹ *See* Landgericht Stuttgart [LG] [District Court Stuttgart] (Ger.), Oct. 29, 2009, *available at* <http://cisgw3.law.pace.edu/cases/091029g1.html>; Tribunale di Forlì [District Court Forlì] Italy, Feb. 16 2009, *available at* <http://cisgw3.law.pace.edu/cases/090216i3.html>; Polimeles Protodikio Athinon, [Multi-Member Court of First Instance of Athens] Greece, 2009, *available at* <http://cisgw3.law.pace.edu/cases/094505gr.html#ii2>; High Commercial Court of Belgrade, Apr. 22, 2008, *available at* <http://cisgw3.law.pace.edu/cases/080422sb.html>; Tribunale di Padova [District Court Padova] Italy, Jan. 11, 2005, *available at* <http://cisgw3.law.pace.edu/cases/050111i3.html>; Tribunale di Padova [District Court Padova] Italy, Feb. 25, 2004, *available at* <http://cisgw3.law.pace.edu/cases/040225i3.html>; Tribunale di Vigevano [District Court Padova] Vigevano, July 12, 2000, *available at* <http://cisgw3.law.pace.edu/cases/000712i3.html>; Oberster Gerichtshof [Supreme Court] Austria, Mar. 21, 2000, *available at* http://www.cisg.at/10_34499g.htm; Court of Arbitration of the International

under Article 1(1) be disregarded whenever the fact that the parties have their places of business in different States does not appear either from the contract, or from any dealings between or from information disclosed by the parties, at any time before or at the conclusion of the contract.⁷² By introducing Article 1(2), the drafters of the CISG intended to protect the parties' reliance upon the domestic setting of their contract.⁷³ This intention of the drafters cannot be stressed often enough, given a recent decision by a U.S. court⁷⁴ that appears to have misunderstood this. The U.S. court interpreted Article 1(2) of the CISG to mean that it protects the parties' reliance upon the CISG's (in)applicability. This is incorrect; Article 1(2) CISG merely protects the parties' reliance upon the domestic setting in which their transaction is embedded.

To summarize, where the parties' reliance upon the domestic setting deserves protection, the CISG cannot apply, despite the contract's internationality under Article 1(1). This means that courts have to determine the applicable law by resorting to their rules of private international law, which necessarily will make applicable a set of rules different from those of the CISG, even where its rules of private international law lead to the law of a contracting State.

According to various commentators, the "essential application"⁷⁵ of Article 1(2) of the CISG arises in a case in which one party that has its place of business in one State concludes a contract with another party that has its place of business in that same State, without disclosing the fact that it is acting on behalf of someone else who has his place of business in a different State.⁷⁶ In such a case, the internationality of the transaction depends upon who is considered a "party" to the contract. As pointed out

Chamber of Commerce Case No. 9781 of 2000, available at <http://cisgw3.law.pace.edu/cases/009781i1.html>.

⁷² See AUDIT, *supra* note 41, at 19 (the apparent internationality does not suffice; the parties must know that they have concluded a contract which is to be considered an international one under the CISG).

⁷³ Ferrari, *supra* note 41, at 821, 831; see also Winship, *supra* note 11, at 518 (stating that "Article 1(2) protects parties from surprise by requiring that both parties be on notice that their businesses are in different countries").

⁷⁴ Impuls I.D. Int'l, S.L., Impuls v. Psion-Teklogix Inc., 234 F. Supp. 2d 1267, 1271 (S.D. Fla. 2002), available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/021122u1.html>.

⁷⁵ ENDERLEIN & MASKOW, *supra* note 8, at 31.

⁷⁶ See also OFFICIAL RECORDS OF THE UNITED NATIONS CONFERENCE, *supra* note 32, at 15.

both in legal writing⁷⁷ and in case law,⁷⁸ unlike most other expressions used in the CISG, the concept of party is not one that has to be interpreted “autonomously,” *i.e.*, without having regard to concepts of a particular domestic law.⁷⁹ Rather, the question of who is a “party” to a contract is “to be solved on the basis of the law applicable by virtue of the rules of private international law of the forum.”⁸⁰ This is in line with the view held both in legal writing and case law⁸¹ stipulating that agency is a matter with which the CISG is not concerned.

Ultimately, what has just been said means that courts may at times have to resort to private international law even to determine the internationality of a contract under the CISG, at least when the exporter and the importer are not the only parties involved in the conclusion of the contract.

V. THE CISG’S LIMITED SUBSTANTIVE SPHERE OF APPLICATION

Like all other uniform substantive law conventions,⁸² the CISG’s sphere of application *ratione materiae*⁸³ is limited,⁸⁴ too. This, of course,

⁷⁷ See Ferrari, *supra* note 41, at 25–26.

⁷⁸ See Tribunale di Padova [District Court Padova] Italy, Feb. 25, 2004, available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/040225i3.html>.

⁷⁹ See *supra* note 41 (the need to interpret the CISG “autonomously” has often been referred to).

⁸⁰ Tribunale di Padova [District Court of Padova] Italy, Feb. 25, 2004, available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/040225i3.html>.

⁸¹ For court decisions stating that issues of agency and related matters are not dealt with by the Convention, see Oberlandesgericht Köln [OLG] [Higher Regional Court of Köln] Nov. 13, 2000 (Ger.), available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/001113g1.html>; Tribunale di Vigevano, July 12, 2000, available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/000712i3.html>; Austrian Supreme Court, Mar. 20, 1997, ZEITSCHRIFT FÜR RECHTSVERGLEICHUNG 204 (1997); AG Tessin, Feb. 12, 1996, available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/960212s1.html>; OG Kanton Thurgau, Dec. 19, 1995, SCHWEIZERSCHE ZEITSCHRIFT FÜR EUROPÄISCHES UND INTERNATIONALES RECHT 118 (2000); LG Kassel, June 22, 1995, available at <http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/370.htm>; AG Alsfeld, May 12, 1995, NEUE JURISTISCHE WOCHENSCHRIFT RECHTSPRECHUNGS-REPORT 120 (1996); KG Berlin, Jan. 24, 1994, available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/940124g1.html>; ZG Kanton Basel-Stadt, Dec. 21, 1992, available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/921221s1.html>; LG Hamburg, Sept. 26, 1990, available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/900926g1.html>.

⁸² See Franco Ferrari, *International Sales Law and the Inevitability of Forum Shopping: A Comment on Tribunale di Rimini*, 23 J.L. & COM. 169, 179 (2004); Elbi Janse van Vuuren, *The Termination of International Commercial Contracts for Breach of Contract: The Provisions of the UNIDROIT Principles of International Commercial Contracts*, 15 ARIZ. J. INT’L L. 583, 585 (1998).

means that where a given international contract falls outside that—limited—substantive sphere of application, one has to determine which law applies by resorting to the private international law rules (of the forum).

What has just been said can best be exemplified by referring to Article 2 of the CISG, which restricts the CISG's substantive sphere of application⁸⁵ by expressly excluding a limited number of exhaustively listed⁸⁶ categories of contracts, thus laying down negative applicability requirements in so far as Article 2 requires courts to determine that the contracts in dispute are not of the kind excluded.⁸⁷ These exclusions can be

⁸³ For papers on the CISG's substantive sphere of application, *see, e.g.*, Giorgio De Nova, *L'ambito di applicazione "ratione materiae" della convenzione di Vienna*, RIVISTA DI TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE 749 (1990); STEFAN HÖSS, DER GEGENSTÄNDLICHE ANWENDUNGSBEREICH DES UN-KAUFRECHTS (1995).

⁸⁴ *See, e.g.*, Kevin Bell, *The Sphere of Application of the Vienna Convention on Contracts for the International Sale of Goods*, 8 PACE INT'L L. REV. 237, 249 (1996); Giannuzzi, *supra* note 31, at 992; TORSELLO, *supra* note 41, at 15; Timothy N. Tuggey, *The 1980 United Nations Convention on Contracts for the International Sale of Goods: Will a Homeward Trend Emerge?*, 21 TEX. INT'L L.J. 540, 542 (1986).

⁸⁵ *See* Nerina Boschiero, *Le Convenzioni di diritto materiale uniforme*, 21 TRATTATO DI DIRITTO PRIVATO 231, 276 (Pietro Rescigno ed., 1987); Sergio M. Carbone & Marco Lopez de Gonzalo, *Commento all'art. 2 della Convenzione di Vienna*, NUOVE LEGGI CIVILI COMMENTATE 6, 7 (1989); FERRARI, *supra* note 45, at 129; MAGNUS, *supra* note 35, at 95; PETER SCHLECHTRIEM, UNIFORM SALES LAW. THE UN-CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 28 (1986).

⁸⁶ Commentators have often been pointed out that the list of contracts for the sale of goods excluded from the CISG's sphere of application is exhaustive; *see, e.g.*, ACHILLES, *supra* note 41, at 10; BEATE CZERWENKA, RECHTSANWENDUNGSPROBLEME IM INTERNATIONALEN KAUFRECHT. DAS KOLLISIONSRECHT BEI GRENZÜBERSCHREITENDEN KAUFVERTRÄGEN UND DER ANWENDUNGSBEREICH DER INTERNATIONALEN KAUFRECHTSÜBEREINKOMMEN 155 (1988); FERRARI, *supra* note 45, at 129; MAGNUS, *supra* note 35, at 96.

For an express reference in recent case law to the list being exhaustive, *see* OLG Schleswig-Holstein, Oct. 29, 2002, *available at* <http://cisgw3.law.pace.edu/cases/021029g1.html>.

⁸⁷ For court decisions referring to the lack of applicability of any of the exclusions listed in Article 2 as a requirement for the CISG to apply, *see* Doolim Corp. v. R Doll, LLC, U.S. District Court (S.D.N.Y.), May 29, 2009, *available at* <http://cisgw3.law.pace.edu/cases/090529u1.html>; OLG München, Jan. 14, 2009, *available at* <http://cisgw3.law.pace.edu/cases/090114g1.html>; LG Landshut, June 12, 2008, *available at* <http://cisgw3.law.pace.edu/cases/080612g2.html>; TeeVee Tunes v. Gerhard Schubert GmbH, U.S. District Court (S.D.N.Y.), Aug. 23, 2006, *available at* <http://cisgw3.law.pace.edu/cases/060823u1.html>; LG Gera, June 29, 2006, *available at* <http://cisgw3.law.pace.edu/cases/060629g1.html>; Tribunal Cantonal de Vaud, Apr. 11, 2002, *available at* <http://cisgw3.law.pace.edu/cases/020411s1.html>; OLG Hamm, Nov. 12, 2001, *available at* <http://cisgw3.law.pace.edu/cases/011112g1.html>; Cour d'appel de Colmar, June 12, 2001, *available at* <http://cisgw3.law.pace.edu/cases/010612f1.html>; LG Landshut, Apr. 5, 1995, *available at* <http://cisgw3.law.pace.edu/cases/950405g1.html>; AG Cloppenburg, Apr. 14, 1993, *available at* <http://cisgw3.law.pace.edu/cases/930414g1.html>.

divided into three categories⁸⁸ based on the reasons for the exclusions from the CISG's sphere of application.⁸⁹ In effect, the exclusions are based on either (1) the purpose of the acquisition of the goods (Article 2(a)), (2) the type of sales contract (Article 2(b) and (c)), or (3) the kind of goods sold (Article 2(d), (e) and (f)).⁹⁰

As far as these exclusions go, it is commonly understood that they are farther reaching than those provided for by the 1964 Hague Uniform Sales Laws.⁹¹ This is evidenced, for example, by the exclusion of auction sales from the CISG's substantive sphere of application,⁹² an exclusion that is not found in the 1964 Hague Uniform Sales Laws.⁹³

For a similar reasoning, albeit relating solely to the exclusion provided for in Article 2(a), see OLG Hamm, Apr. 2, 2009, available at <http://www.globalsaleslaw.com/content/api/cisg/urteile/1978.pdf>; OG Aargau, Mar. 3, 2009, available at <http://globalsaleslaw.com/content/api/cisg/urteile/2013.pdf>; Polimeles Protodikio Athinon, docket No. 4505/2009 (no date indicated), available at <http://cisgw3.law.pace.edu/cases/094505gr.html>; Swiss Supreme Court, Dec. 16, 2008, available at <http://cisgw3.law.pace.edu/cases/081216s1.html>; LG Bamberg, Oct. 23, 2006, available at <http://cisgw3.law.pace.edu/cases/061023g1.html>; RB Arnhem, Mar. 1, 2006, available at <http://cisgw3.law.pace.edu/cases/060301n1.html>; LG Neubrandenburg, 3 2005, available at <http://cisgw3.law.pace.edu/cases/050803g1.html>; LG Kiel, July 27, 2004, available at <http://cisgw3.law.pace.edu/cases/040727g1.html>; LG Saarbrücken, June 1, 2004, available at <http://cisgw3.law.pace.edu/cases/040601g1.html>; Audiencia Provincial de Valencia, June 7, 2003, available at <http://cisgw3.law.pace.edu/cases/030607s4.html>; LG Saarbrücken, Nov. 25, 2002, available at <http://cisgw3.law.pace.edu/cases/021125g1.html>; LG Saarbrücken, July 2, 2002, available at <http://cisgw3.law.pace.edu/cases/020702g1.html>; LG München, Feb. 20, 2002, available at <http://cisgw3.law.pace.edu/cases/020220g1.html>.

⁸⁸ See FRIEDRICH ENDERLEIN ET AL., INTERNATIONALES KAUFRECHT 45 (1991); Martin Karollus, *Der Anwendungsbereich des UN-Kaufrechts im Überblick*, JURISTISCHE SCHULUNG 378, 380 (1993); Claude Samson, *La Convention des Nations Unies sur les contrats de vente internationale de marchandises: Etude comparative des dispositions de la Convention et des règles de droit québécois en la matière*, 23 CAHIERS DE DROIT 919, 928 (1982).

⁸⁹ See MAGNUS, *supra* note 35, at 96 (it does not appear that the exclusions are based upon very logical criteria); see also Jorge Caffarena Laporta, *Art. 2*, in *LA COMPRAVENTA INTERNACIONAL DE MERCADERIAS* 59, 59 (Luis Diez-Picazo y Ponce de León ed., 1998).

⁹⁰ See also ENDERLEIN & MASKOW, *supra* note 8, at 32 (“[t]here are three types of restrictions in this article [Article 2];—those based upon the purpose for which the goods were purchased (subpara. (a)),—those based on the type of sales contract (subparas. [b] and [c]),—those based on the kinds of goods sold (subparas. (d), (e) and (f))”); Warren Khoo, *Art. 2*, in *COMMENTARY ON THE INTERNATIONAL SALES LAW* 34, 37 (Massimo C. Bianca & Michael J. Bonell eds., 1987) (stating the same); Paul Volken, *The Vienna Convention: Scope, Interpretation, and Gap-Filling*, INTERNATIONAL SALE OF GOODS, DUBROVNIK LECTURES 19, 34 (Petar Sarcevic & Paul Volken eds., 1986) (stating the same).

⁹¹ See Rolf Herber, *Art. 2*, in *KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT—CISG* 59, 59 (Peter Schlechtriem ed., 2d ed. 1995).

⁹² Even though auction sales are not subject to the CISG, this does not mean that sales at commodity exchanges are excluded from the CISG's sphere of application. Indeed, the sales at

In addition to this type of sale, Article 2 also excludes from the CISG's substantive sphere of application the sale of goods bought for personal use, so as to avoid a conflict between the CISG rules and domestic laws aimed at consumer protection.⁹⁴ Unfortunately, as pointed out by the German Supreme Court in a recent decision, there is still potential for conflict,⁹⁵ since domestic law may, and often does, define "consumer sales" differently, creating cases of potential overlap.⁹⁶ Indeed, for a contract to be a "consumer sale" under the CISG and, thus, to fall outside the CISG's sphere of application under Article 2(a), the contract must be one for the sale of goods bought exclusively for a non-commercial purpose,⁹⁷ *i.e.*, for "personal" use,⁹⁸ as, for example, when the buyer purchases a car⁹⁹ or a

commodity exchanges being "[...] rather rapidfire communication of offers and acceptances" (JOHN O. HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION* 48 n.3 (3d ed. 1999)), they cannot be considered as auction sales; for a similar argument, *see* AUDIT, *supra* note 41, at 29; Mark Kantor, *The Convention on Contracts for the International Sales of Goods: An International Sales Law*, 1 INT'L LEGAL PRAC. 8, 10 (1988).

⁹³ It has often been stated that the exclusion of auction sales constitutes one of the innovative characteristics of the CISG; *see, e.g.*, Carbone & de Gonzalo, *supra* note 85, at 7; Khoo, *supra* note 90, at 36.

⁹⁴ For a similar justification of the Article 2(a) exclusion, *see, e.g.*, HONNOLD, *supra* note 92, at 47; Maureen T. Murphy, Note, *United Nations Convention on Contracts for the International Sale of Goods: Creating Uniformity on International Sales Law*, 12 FORDHAM INT'L L.J. 727, 746 (1989); OFFICIAL RECORDS OF THE UNITED NATIONS CONFERENCE, *supra* note 32, at 16.

⁹⁵ German Supreme Court, Oct. 31, 2001, *available at* <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/011031g1.html>.

⁹⁶ *Id.* ("[to] the extent that the appeal argues that a 'consumer purchase' under Art. 2(a) CISG is excluded from the application of the Convention, this argument cannot be followed. The purchase referred to in Art. 2(a) CISG requires that the seller know or should have known the purpose before or at the time of the conclusion of the contract, whereas, if the buyer is a consumer within the meaning of § 13 BGB, it does not require such knowledge of the seller. This can, therefore, lead to an overlap, where sales contracts are subject to binding national consumer protection laws and, at the same time, to the CISG.")

⁹⁷ *See, e.g.*, ENDERLEIN & MASKOW, *supra* note 8, at 33; *see* German Supreme Court, Oct. 31, 2001, *available at* <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/011031g1.html>.

⁹⁸ Various commentators have stressed the fact that the commercial nature of the goods is irrelevant, what matters is the commercial purpose of the sale contract; *see* Carbone & de Gonzalo, *supra* note 85, at 7; ALBERT H. KRITZER, *GUIDE TO PRACTICAL APPLICATIONS OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS* 71 (1989).

⁹⁹ *See* Austrian Supreme Court, Feb. 11, 1997, *available at* http://www.cisg.at/10_150694.htm; KG Nidwalden, Jan. 5, 1996, *TRANSPORTRECHT-INTERNATIONALES HANDELSRECHT* 10 (1999).

See also LG Düsseldorf, Oct. 11, 1995, *available at* <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/951011g1.html> (where the court did, however, not realize that the sale should have been excluded from the CISG's sphere of application by virtue of Article 2(a), since the good, a generator,

caravan¹⁰⁰ to use it for himself, and not for his business or profession. The fact that the goods are consumer goods is, generally speaking, irrelevant for the purposes of the Article 2(a) exclusion.¹⁰¹ Furthermore, Article 2(a) requires that the “consumer” purpose of the purchase be known (or ought to have been known) to the seller at the time of the conclusion of the contract.¹⁰² Consequently, it is irrelevant whether the seller in effect knows of the non-commercial purpose of the purchase after the conclusion of the contract.¹⁰³

It is worth mentioning that Article 2(a) compares family and household use to personal use. It is doubtful, however, whether the express contemplation of “family and household use” adds anything to the exclusion of the sale of goods bought for personal use,¹⁰⁴ since the former exclusions merely represent examples of “personal use.”¹⁰⁵

As already pointed out,¹⁰⁶ the Article 2 exclusions are based not only upon the purpose of the acquisition of the goods or upon the type of sales contract (such as auction sales, sales on execution, or otherwise by authority of law mentioned in Article 2(c)), but also on the kind of goods sold (Article 2(d), (e) and (f)).¹⁰⁷ In this respect, it must be mentioned that Article 2(d) expressly excludes the sales of stocks, shares, investment securities, negotiable instruments, and money from the CISG’s sphere of

was to be installed to provide for the cooling system on the buyer’s yacht, used merely for pleasure trips).

¹⁰⁰ Hunfeld v. Vos., NEDERLANDS INTERNATIONAAL PRIVAATRECHT 327 (RB Arnhem 1994).

¹⁰¹ See Carbone & de Gonzalo, *supra* note 85, at 7; Johan Erauw, *Waneer is het Weens koopverdrag van toepassing?*, in HET WEENS KOOPVERDRAG 21, 40 (Hans van Houtte et al. eds., 1997); Karollus, *supra* note 88, at 380; BURGHARD PILTZ, INTERNATIONALES KAUFRECHT. DAS UNKAUFRECHT (WIENER ÜBEREINKOMMEN VON 1980) PRAXISORIENTIERTER DARSTELLUNG 34 (1993).

¹⁰² See also ENDERLEIN ET AL., *supra* note 88, at 34; Khoo, *supra* note 90, at 37; Daniela Memmo, *Il contratto di vendita internazionale nel diritto uniforme*, RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE 180, 197 (1983).

¹⁰³ See, e.g., ENDERLEIN & MASKOW, *supra* note 8, at 34; HERBER & CZERWENKA, *supra* note 68, at 25; see also OFFICIAL RECORDS OF THE UNITED NATIONS CONFERENCE, *supra* note 32, at 16.

¹⁰⁴ See also CZERWENKA, *supra* note 86, at 152; Ulrich Huber, *Der UNCITRAL-Entwurf eines Übereinkommens über internationale Warenkaufverträge*, RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 413, 422 (1979).

¹⁰⁵ See Memmo, *supra* note 102, at 196.

¹⁰⁶ See text accompanying *supra* note 88.

¹⁰⁷ See ALEJANDRO GARRO & ALBERTO ZUPPI, *COMPRAVENTA INTERNACIONAL DE MERCADERÍAS* 79 (1990) (expressly stating that the exclusion of some sales is based upon the goods sold).

application,¹⁰⁸ in order to avoid a conflict between CISG rules and domestic rules that often are mandatory.¹⁰⁹

The exclusions of the sale of ships,¹¹⁰ vessels, hovercrafts, and aircrafts¹¹¹ provided for in Article 2(e) fall within the same category as the exclusion of commercial papers and money,¹¹² that is, sales excluded on the basis of the nature of the goods sold.¹¹³

Finally, the exclusion from the CISG's sphere of application of sales contracts regarding electricity¹¹⁴ deserves special mention. According to some authors, the exclusion *de quo* can be justified on the ground of electricity's "unique" nature¹¹⁵ or "[. . .] on the ground that in many legal systems electricity is not considered to be a good."¹¹⁶ Neither justification appears to be convincing.¹¹⁷ Indeed, the former justification overlooks the

¹⁰⁸ See PILTZ, *supra* note 101, at 31.

¹⁰⁹ For this rationale of the Article 2(d) exclusion, see also SCHLECHTRIEM, *supra* note 85, at 30 (exclusion de quo "[. . .] takes into consideration that international securities and currency transactions are governed by their own rules and laws which are often compulsory.").

See also ENDERLEIN ET AL., *supra* note 88, at 47 (Article 2(d) exclusion "[. . .] can be explained by the existence of mandatory domestic rules.").

¹¹⁰ For a case of inapplicability of the CISG to a contract for the sale of a ship, see *Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Arbitral Award No. 236/1997*, <http://www.cisg.law.pace.edu/cisg/biblio/perales1.html>.

¹¹¹ For the inapplicability of the CISG to a contract for the sale of an aircraft, see Rozenberg ed., *ArbPraktika* (1996–1997) No. 65 [219–23], *Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Arbitral Award, Proceeding No. 255* (Mykhaylo Danylko trans., 1997), <http://cisgw3.law.pace.edu/cases/970902r1.html>.

¹¹² See also VINCENT HEUZE, *LA VENTE INTERNATIONALE DE MARCHANDISES. DROIT UNIFORME* 76–77 (1992).

¹¹³ See KRITZER, *supra* note 98, at 72.

¹¹⁴ This exclusion could be found in ULIS art. V.

¹¹⁵ For a similar justification of the exclusion of sales of electricity from the Convention's sphere of application, see, e.g., HEUZÉ, *supra* note 112, at 77 (stating that the exclusion of sales of electricity can be explained on the ground of its nature); OFFICIAL RECORDS OF THE UNITED NATIONS CONFERENCE, *supra* note 32, at 16 (stating that the exclusion of electricity is justified because its sale presents unique problems that are different from those presented by the usual international sale of goods).

¹¹⁶ OFFICIAL RECORDS OF THE UNITED NATIONS CONFERENCE, *supra* note 32, at 16; for a similar justification of the Article 2(f) exclusion, see Samson, *supra* note 88, at 928.

¹¹⁷ For a detailed summary of the different justifications suggested for the exclusion at hand, compare N.R. Merchor, *La regulacion internacional de las operaciones mercantiles enfrentada a un caso extremo: el trafico transfronterizo de energia electrica*, DERECHO DE LOS NEGOCIOS 9 (1995).

fact that there are other goods, such as gas¹¹⁸ and crude oil,¹¹⁹ whose sale presents “unique” problems,¹²⁰ but which are governed by the CISG,¹²¹ as are the sales of other sources of energy.¹²² The latter justification is not convincing either, “[. . .] because the Convention may create its own definition of good.”¹²³ Indeed, the exclusion of electricity sales from the CISG’s sphere of application cannot be justified.

From all of the foregoing, one can easily derive that limitations to the CISG’s substantive sphere of application constitute another reason for resorting to private international law: where a given contract for the international sale of goods falls outside the CISG’s limited substantive sphere of application, one has to determine which law applies by resorting to the private international law rules (of the forum).

VI. THE CISG’S APPLICABILITY REQUIREMENTS *STRICTO SENSU*: ARTICLE 1(1)(B)

Generally, internationality alone—except in very few cases, such as under the 1964 Hague Uniform Sales Laws¹²⁴—is not sufficient to make an international uniform contract law convention applicable. Most uniform contract law conventions also require the existence of a specific link

¹¹⁸ See also HONNOLD, *supra* note 92, at 51 (arguing that the sale of gas is within the Convention); Huber, *supra* note 104, at 419 (stating the same and criticizing the exclusion of the sale of electricity).

¹¹⁹ See also Herber, *supra* note 91, at 64; see James W. Skelton, *CISG and Crude Oil Traders*, 9 HOUS. L. REV. 95 (1986) (detailed discussion of the problems of oil trade and the CISG).

¹²⁰ See also Winship, *supra* note 58, at 1–25 (“[. . .] any suggestion that the problems raised by the excluded items are ‘unique’ overlooks other items, such as oil and gas supply contracts of livestock transactions, which also raise unique problems.”).

¹²¹ See Oberster Gerichtshof [OGH] [Supreme Court] Feb. 6, 1996, No. 10 Ob 518/95 (Austria), available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/960206a3.html> (applying CISG to the sale of gas).

¹²² See Peter Winship, *Energy Contracts and the United Nations Sales Convention*, 25 TEX. INT’L L.J. 365 (1990) (discussion of the issues relating to the sale of energy under the CISG).

¹²³ ENDERLEIN & MASKOW, *supra* note 8, at 35.

¹²⁴ See, e.g., Franco Ferrari, *Specific Topics of the CISG in the Light of Judicial Application and Scholarly Writing*, 15 J.L. & COM. 1, 20–22 (1995) (an analysis of the approach taken by the 1964 Hague Uniform Sales Laws).

between the contract, the parties,¹²⁵ or the places relevant with respect to a specific kind of contract (such as the place of taking over the goods, or the place designated for delivery, relevant for contracts for the carriage of goods¹²⁶) and a contracting State or the law of such a State.¹²⁷ As a consequence, a contract falling within both the international and the substantive spheres of application of an international uniform substantive law convention is generally not governed by that convention, unless the aforementioned connection with a contracting State or the law of a contracting State also exists.¹²⁸

What has just been said holds true with respect to the CISG as well.¹²⁹ Even where a contract is one for the international sale of goods as defined by the CISG, it is not necessarily governed by the CISG, as the CISG also requires either that the parties have their places of business in different contracting States (which leads to the “direct application”¹³⁰ of the CISG by virtue of Article 1(1)(a)) or that the private international law rules of the

¹²⁵ See, e.g., International Institute for the Unification of Private Law, UNIDROIT Convention on International Factoring, May 28, 1988, art. 2; International Institute for the Unification of Private Law, UNIDROIT Convention on International Financial Leasing, May 28, 1988, art. 3.

¹²⁶ See, e.g., Convention on the Contract for the International Carriage of Goods by Road, art. 1, May 19, 1956, 399 U.N.T.S. 189.

¹²⁷ See Marco Torsello, *The CISG's Impact on Legislators: The Drafting of International Contract Conventions*, THE 1980 UNIFORM SALES LAW. OLD ISSUES REVISITED IN THE LIGHT OF RECENT EXPERIENCES 199, 227 f. (Franco Ferrari ed., 2003).

¹²⁸ Franco Ferrari, “*Forum Shopping*” *Despite International Uniform Contract Law Conventions*, INT’L & COMP. L.Q. 689, 697 (2002).

¹²⁹ In legal writing, see Cristina Chiomenti, *Does the choice of a-national rules entail an implicit exclusion of the CISG?*, EUR. LEGAL F. 141, 143 (2005); Franco Ferrari, *Nuove e vecchie questioni in materia di vendita internazionale tra interpretazione autonoma e ricorso alla giurisprudenza straniera*, GIURISPRUDENZA ITALIANA 1405, 1414 (2004); BURGHARD PILTZ, INTERNATIONALES KAUFRECHT 46 (2d ed. 2008); SCHLECHTRIEM & WITZ, *supra* note 35, at 11; Noah Vardi, *Vendita internazionale di beni mobili e saggio degli interessi: la disciplina uniforme convenzionale e legge nazionale*, NUOVA GIURISPRUDENZA CIVILE COMMENTATA 174, 176 (2005); in case law see Tribunale di Forlì [District Court], Dec. 11, 2008, available at <http://cisgw3.law.pace.edu/cases/081211i3.html>; Tribunale di Padova [District Court], Feb. 25, 2004, available at <http://cisgw3.law.pace.edu/cases/040225i3.html>; Tribunale di Rimini [District Court], Nov. 26, 2002, available at <http://cisgw3.law.pace.edu/cases/021126i3.html>; Tribunale di Vigevano [District Court], July 12, 2000, available at <http://cisgw3.law.pace.edu/cases/000712i3.html>.

¹³⁰ See Magnus, *supra* note 34, at 390; SCHLECHTRIEM & SCHWENZER, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG), 28–30, 38 (3d ed. 2010); WOLFGANG WITZ ET AL., INTERNATIONALES KAUFRECHT 40 (2000).

forum¹³¹ lead to the law of a contracting State¹³² (which leads to the “indirect application”¹³³ by virtue of Article 1(1)(b)).

As pointed out by one scholar, by setting forth this further requirement, the drafters of the CISG created a distinction between two types of international contracts for the sale of goods: (1) those contracts to which the CISG applies, and (2) those contracts to which the CISG does not apply and which are therefore subject to the applicable domestic law.¹³⁴ In other words, the drafters themselves created a distinction between contracts for the international sale of goods governed by the CISG and contracts for the international sale of goods governed by sources of law other than the CISG—to be identified, most certainly, on the basis of the rules of private international law.

By introducing the aforementioned requirement, the drafters of the CISG introduced one more reason why resort to private international law cannot necessarily be avoided under the CISG. Not only, due to that requirement, resort to private international law may well be necessary to even determine whether the CISG is applicable at all. As regards the CISG’s “indirect applicability,” this is evident from the wording of Article 1(1)(b) itself, which lets the applicability of the CISG depend, where one or even both parties do not have their place of business in Contracting States,¹³⁵ on whether “the rule of private international lead to the law of a contracting State.”¹³⁶

¹³¹ See Tribunale di Rimini [District Court], Nov. 26, 2002, available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/021126i3.html>.

¹³² For papers on the criterion of applicability referred to in the text, see Christophe Bernasconi, *The Personal and Territorial Scope of the Vienna Convention on Contracts for the International Sale of Goods (Article 1)*, 46 NETH. INT’L L. REV. 137 (1999); Franco Ferrari, *CISG Article 1(1)(b) and Related Matters: Brief Remarks on Occasion of a Recent Dutch Court Decision*, NEDERLANDS INTERNATIONAAL PRIVAATRECHT 317 (1995); Franco Ferrari, *Diritto uniforme della Vendita Internazionale: Questioni di applicabilità e diritto internazionale privato*, in RIVISTA DI DIRITTO CIVILE 669 (1995/II); Winship, *supra* note 11, at 487.

¹³³ FERRARI, *supra* note 45, at 72.

¹³⁴ Paul Volken, *Das Wiener Übereinkommen über den internationalen Warenkauf: Anwendungsvoraussetzungen und Anwendungsbereich*, EINHEITLICHES KAUFRECHT UND NATIONALES OBLIGATIONENRECHT 81, 93 (Peter Schlechtriem ed., 1987).

¹³⁵ See SCHLECHTRIEM, *supra* note 85, at 45, where the author asserts that the CISG can be applicable even if both parties do not have their place of business in Contracting States:

In cases where both parties do not have their places of business in Contracting States, Article 1(1)(b) leads to the application of CISG not only by the courts of Contracting States but also by the courts of non-Contracting States, provided the private international

In practice, this means, for instance, that where a dispute is brought before the court of a Contracting State in which the relevant rules of private international law are either those of the 1980 EEC Convention on the Law Applicable to Contractual Obligations¹³⁷ (the “Rome Convention”) or those of the Rome I Regulation,¹³⁸ the CISG will generally be applicable when the law chosen by the parties or, absent a choice of law, the law having the closest connection with the contract (Art. 4(1) of the Rome Convention) or the law of the seller (Art. 4(1)(a) of the Rome I Regulation), is the law of a Contracting State.¹³⁹

As far as party autonomy under the Rome Convention is concerned¹⁴⁰—and the same holds true for the Rome I Regulation¹⁴¹ that

law of the non-Contracting State makes applicable the sales law of a Contracting State
[. . .].

See also ENDERLEIN & MASKOW, *supra* note 8, at 29, according to whom the solution provided for by Article 1(1)(b) CISG “enables the Convention to be applied also to contracts between the parties of whom one, or in exceptional cases even two, does not have his *place of business in a Contracting State*.” (emphasis in original); see also PILTZ, *supra* note 101, at 52.

¹³⁶ For recent applications of the CISG by virtue of its Article 1(1)(b), see Cámara Nacional de Apelaciones en lo Comercial de Buenos Aires, [CApel.CC.] [Provincial court of appeal in commercial matters] Buenos Aires, sala F, 10/7/2010, available at <http://www.globalsaleslaw.org/content/api/cisg/urteile/2156.pdf>; Landgericht Potsdam [LG] [Regional Court] Apr. 7, 2009, available at <http://cisgw3.law.pace.edu/cisg/text/090407german.pdf>; Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, Arbitral Award No. T-8/08, available at <http://cisgw3.law.pace.edu/cases/090128sb.html>; Oberlandesgericht Düsseldorf [OLG] [Higher Regional Court] Apr. 21, 2004, available at <http://www.cisg-online.ch/cisg/urteile/913.pdf>; Oberlandesgericht Karlsruhe [OLG] [Higher Regional Court] Dec. 10, 2003, available at <http://cisgw3.law.pace.edu/cases/031210g1.html>; Appellationsgericht Basel-Stadt [AG] [Appellate Court] Aug. 22, 2003, available at <http://cisgw3.law.pace.edu/cases/030822s1.html> (Switzerland); Handelsgericht St. Gallen [HG] [Commercial Court] Dec. 3, 2002, available at <http://cisgw3.law.pace.edu/cases/021203s1.html> (Switzerland); Landgericht Braunschweig [LG] [District Court] July 30, 2001, available at <http://cisgw3.law.pace.edu/cases/010730g1.html> (Germany); Cour de Cassation [Cass.] [Supreme Court] June 26, 2001, available at <http://witez.jura.uni-sb.de/CISG/decisions/2606012v.htm> (France); Downs Investment Pty Ltd. v. Perwaja Stell SDN BHD, Supreme Court of Queensland, Nov. 17, 2000, available at <http://cisgw3.law.pace.edu/cases/001117a2.html>; Cámara Nacional de Apelaciones en lo Comercial, sala E [CNCom.] [National Court of Commercial Appeals courtroom E] Apr. 24, 2000, available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/000424a1.html> (Argentina).

¹³⁷ See Rome Convention on Law Applicable to Contractual Obligations, 1980 O.J. (L266), reprinted in I.L.M. 1492 (1980).

¹³⁸ See 2008 O.J. (L 593) 1 177/6 Regulation (EC) No. 593/2008 of the European Parliament and of the Council of June 17, 2008 on the law applicable to contractual obligations (Rome I).

¹³⁹ See FERRARI, *supra* note 45, at 76 f.

¹⁴⁰ For recent papers on the “choice of law” under the Rome Convention, see, e.g., Simon Atrill, *Choice of Law in Contract: The Missing Pieces of the Article 4 Jigsaw?*, INT’L & COM. L.Q. 549 (2004); Adrian Briggs, *On drafting agreements on choice of law*, LLOYD’S MAR. & COM. L.Q. 389

replaced the Rome Convention as regards contracts concluded on or after 18 December 2009—this does not raise too many problems, it being a concept widely acknowledged throughout European private international law codifications long before even the coming into force of the foregoing European instruments.¹⁴² This is why party autonomy does not cause too many difficulties with respect to contracts for the international sale of goods,¹⁴³ as evidenced by the fact that several courts¹⁴⁴ as well as arbitral

(2003); Eleonora Finazzi Agrò, *Autonomia privata e scelta di regole non statuali quali diritto applicabile*, DIRITTO DEL COMMERCIO INTERNAZIONALE 604 (2005); Jonathan Hill, *Choice of Law in Contract under the Rome Convention: The Approach of the UK Courts*, INT'L & COMP. L.Q. 325 (2004); JASPERS MICHAEL BO, NACHTRÄGLICHE RECHTSWAHL IM INTERNATIONALEN SCHULDVERTRAGSRECHT (2002); Erik Jayme, *L'autonomie de la volonté des parties dans les contrats internationaux entre personnes privées*, ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 14 (1991); Peter Mankowski, *Stillschweigende Rechtswahl und wählbares Recht*, in DAS GRÜNBUCH ZUM INTERNATIONALEN PRIVATRECHT 63 (Stefan Leible ed., 2004); Peter Mankowski, *Überlegungen zur sach- und interessengerechten Rechtswahl für Verträge des internationalen Wirtschaftsverkehrs*, RECHT DER INTERNATIONALEN WIRTSCHAFT 2 (2003); PETER NYGH, AUTONOMY IN INTERNATIONAL CONTRACTS (1999); CHRISTIANE RÜHL, RECHTSWAHLFREIHEIT UND RECHTSWAHLKLAUSELN IN ALLGEMEINEN GESCHÄFTSBEDINGUNGEN (1999).

¹⁴¹ See Michael Bogdan, *The Rome I Regulation on the Law Applicable to Contractual Obligations and the Choice of Law by the Parties*, NEDERLANDS INTERNATIONAAL PRIVAATRECHT 407 (2009); Claudia Hahn, *La liberté de choix dans les instruments communautaires récents Rome I et Rome II: L'autonomie de la volonté entre intérêt privé et intérêt général*, in DROIT INTERNATIONAL PRIVÉ: TRAVAUX DU COMITÉ FRANÇAIS DE DROIT INTERNATIONAL privé 187 (2010); Helmut Heiss, *Party Autonomy*, in ROME I REGULATION. THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS IN EUROPE 1 (Franco Ferrari & Stefan Leible eds., 2009); Stefan Leible, *Choice of the Applicable Law*, in LE NOUVEAU RÈGLEMENT EUROPÉEN "ROME I" RELATIF À LA LOI APPLICABLE AUX OBLIGATIONS CONTRACTUELLES 61 (Eleanor Cashin Ritaine & Andrea Bonomi eds., 2008); Rolf Wagner, *Der Grundsatz der Rechtswahl und das mangels Rechtswahl anwendbare Recht (Rom I-Verordnung): ein Bericht über die Entstehungsgeschichte und den Inhalt der Artikel 3 und 4 Rom I-Verordnung*, PRAXIS DES INTERNATIONALEN PRIVAT-UND VERFAHRENSRECHTS 377 (2008).

¹⁴² See FERRARI, *supra* note 45, at 78.

¹⁴³ *But see* Tribunale Civile di Monza, Jan. 14, 1993, available at <http://cisgw3.law.pace.edu/cases/930114i3.html> (Italy) (stating that the rules of private international law to which Article 1(1)(b) refers cannot be applied when the parties have expressly chosen the law applicable to their contractual relationship); see Franco Ferrari, *Diritto uniforme della vendita internazionale: questioni di applicabilità e diritto internazionale privato*, RIVISTA DI DIRITTO CIVILE 669 (1995); Franco Ferrari, *Uniform Law of International Sales: Issues of Applicability and Private International Law*, 15 J.L. & COM. 159 (1995); see also Giorgio De Nova, *Risoluzione per eccessiva onerosità e Convenzione di Vienna*, CONTRATTI 580 (1993) (criticizing the foregoing decision, albeit for reasons that do not relate to the interpretation of Article 1(1)(b)).

¹⁴⁴ See Hoven van Beroep [HvB] May 17, 2002, No. 2001/AR/0180 (Belg.), <http://cisgw3.law.pace.edu/cases/040517b1.html> (applying the CISG due to the choice of French law as the applicable law); Cour de cassation [Cass.] Dec. 17, 1996 (Fr.), <http://cisgw3.law.pace.edu/cases/961217f1.html> (annulling the appellate court's decision not to apply the CISG to a contract

tribunals¹⁴⁵ have already relied upon the parties' designation of the applicable law to make the CISG applicable under Article 1(1)(b).

Absent a choice of law, the Rome Convention makes applicable the law of the country with which the contract is most closely connected, as also pointed out by several court decisions rendered under the CISG.¹⁴⁶ Since it is presumed that the contract is most closely connected with the country where the party who is to effect the contract's characteristic performance has its place of business¹⁴⁷—and since the monetary obligation is generally not the characteristic one, as expressly stated by a German

concluded between a French seller and an Irish buyer which contained a choice of law clause leading to the law of a Contracting State); Rb. 7 Juni 1995 (Smits BV/Jean Quetard) (Neth.), <http://cisgw3.law.pace.edu/cases/950607n1.html> (applying the CISG due to the choice of Dutch law as the law applicable to the contract); Bundesgerichtshof [BGH] May 11, 2010 (Ger.), *available at* <http://www.globalsaleslaw.com/content/api/cisg/urteile/2125.pdf> (choosing German law); Oberlandesgericht [OLGZ] Feb. 22, 1994 (Ger.), *available at* <http://cisgw3.law.pace.edu/cases/940222g1.html> (applying the CISG to a contract concluded between a Dutch seller and a German buyer by virtue of the parties' choice of German law as the applicable law and, thus, the law of a Contracting State); Oberlandesgericht [OLGZ] Jan. 8, 1993 (Ger.), *available at* <http://cisgw3.law.pace.edu/cases/930108g1.html> (applying the CISG by virtue of the choice of German law to a contract concluded between a Turkish seller and a German buyer at a date on which Germany was a Contracting State but not Turkey); Landgericht [LG] Feb. 15, 1996 (Ger.), *available at* <http://cisgw3.law.pace.edu/cases/960215g1.html> (applying the CISG due to the parties' choice of German law).

¹⁴⁵ See, e.g., Schiedsgericht der Handelskammer Hamburg, Mar. 21, 1996, *available at* <http://cisgw3.law.pace.edu/cases/960321g1.html> (applying the CISG to a contract concluded between a German buyer and a Hong Kong seller by virtue of the [hypothetical] choice of German law as the law applicable to the contract); Case No. 8324 of 1995 (ICC Int'l Ct. Arb.), *available at* <http://cisgw3.law.pace.edu/cases/958324i1.html> (applying the CISG to a sales contract by virtue of the choice of French law, the law of a Contracting State, as the applicable law).

¹⁴⁶ See Oberlandesgericht [OLGZ] Feb. 10, 1994 (Ger.), *available at* <http://cisgw3.law.pace.edu/cases/940210g1.html>; Oberlandesgericht [OLGZ] June 13, 1991 (Ger.), *available at* <http://cisgw3.law.pace.edu/cases/910613g1.html>; Oberlandesgericht [OLGZ] Sept. 27, 1991 (Ger.), *available at* <http://cisgw3.law.pace.edu/cases/910927g1.html>; Oberlandesgericht [OLGZ] Nov. 20, 1992 (Ger.), *available at* <http://www.globalsaleslaw.org/content/api/cisg/urteile/54.htm>; Landgericht [LG] Aug. 25, 1994 (Ger.), *available at* <http://www.unilex.info/case.cfm?pid=1&do=case&id=150&step=FullText>; Rb. Amsterdam 5 Oktober 1994 (Tuzzi Trend Tex Fashion GmbH/W.J.M. Keijzer-Somers) (Neth.), *available at* <http://www.unilex.info/case.cfm?pid=1&do=case&id=124&step=FullText>; Rb. Roermond 6 Mei 1993 (Gruppo IMAR s.p.a./Protech Horst) (Neth.), *available at* <http://www.unilex.info/case.cfm?pid=1&do=case&id=94&step=FullText>; Rb. Arnhem Dec. 30, 1993 (Nieuwenhoven Viehandel GmbH/Diepeveen—Dirkson B.V.) (Neth.), *available at* http://www.uncitral.org/pdf/english/clout/abstracts/A_CN.9_SER.C_ABSTRACTS_7.pdf.

¹⁴⁷ See EC Convention, *supra* note 47, art. 4(2).

court¹⁴⁸—the law applicable to international sales contracts is generally, where the presumption is not rebutted,¹⁴⁹ the law of the seller,¹⁵⁰ since it is the seller who has to execute the characteristic performance¹⁵¹ consisting of the transfer of ownership and the delivery of the goods,¹⁵² as confirmed by both state courts¹⁵³ and arbitral tribunals.¹⁵⁴

¹⁴⁸ See Oberlandesgericht [OLGZ] Jan. 16, 1992 (Ger.), available at <http://www.globalsaleslaw.org/content/api/cisg/urteile/47.htm> (expressly stating that “the payment of money does never constitute the characteristic performance”).

¹⁴⁹ E.g., Landgericht [LG] June 22, 1995 (Ger.), available at <http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/370.htm> (Case in which the presumption contained in Article 4(2) EEC Convention on the Law Applicable to Contractual Obligations was rebutted and the law of the buyer was applied rather than the law of the seller).

¹⁵⁰ See, e.g., Oberster Gerichtshof [OGH] Nov. 8, 2005 (Austria), available at <http://www.globalsaleslaw.org/content/api/cisg/urteile/1156.pdf>; Hoven van Beroep [HvB] Jan. 22, 2007, No. 2006/AR/384 (Belg.), available at <http://cisgw3.law.pace.edu/cases/070122b1.html>; Hoven van Beroep [HvB] May 15, 2002, No. 2001/AR/0180 (Belg.), <http://cisgw3.law.pace.edu/cases/020515b1.html>; Finnish Supreme Court, Oct. 14, 2005, available at <http://cisgw3.law.pace.edu/cases/051014f4.html>; Oberlandesgericht [OLGZ] May 30 2011 (Ger.), available at <http://cisgw3.law.pace.edu/cases/110530g1.html>; Oberlandesgericht [OLG Z] May 12, 2010 (Ger.), available at <http://www.globalsaleslaw.org/content/api/cisg/urteile/2155.pdf>; Oberlandesgericht [OLGZ] Nov. 9, 2010 (Ger.), available at <http://www.globalsaleslaw.org/content/api/cisg/urteile/2204.pdf>; Oberlandesgericht [OLGZ] Dec. 20, 2004 (Ger.), available at <http://www.globalsaleslaw.org/content/api/cisg/urteile/997.pdf>; Oberlandesgericht [OLGZ] Oct. 6, 2004 (Ger.), available at <http://www.globalsaleslaw.org/content/api/cisg/urteile/996.pdf>; Landgericht [LG] May 28, 2004 (Ger.), available at <http://www.globalsaleslaw.org/content/api/cisg/urteile/850.pdf>; Landgericht [LG] July 15, 2003 (Ger.), available at <http://www.globalsaleslaw.org/content/api/cisg/urteile/813.pdf>; Amtsgericht Geldern [AG] Aug. 17, 2011 (Ger.), available at <http://www.globalsaleslaw.org/content/api/cisg/urteile/2302.pdf>; Rb. Dec. 3, 2008 (6ty Foods B.V./HendriksPluimveeverwerking N.V.) (Neth.), <http://cisgw3.law.pace.edu/cases/081203n1.html>.

¹⁵¹ See, e.g., Achim Kampf, *UN-Kaufrecht und Kollisionsrecht*, RECHT DER INTERNATIONALEN WIRTSCHAFT 297, 298 (2009); Susana Navas Navarro, *UN-Kaufrecht: Anwendungsbereich und Vertragsschluss in der spanischen Rechtsprechung*, 6(2) INTERNATIONALES HANDELSRECHT 74, 75 (2006); Burghard Piltz, *Neue Entwicklungen im UN-Kaufrecht*, NEUE JURISTISCHE WOCHENSCHRIFT 553, 555 (2000); Claire Reifner, *Stillschweigender Ausschluss des UN-Kaufrechts im Prozess?*, 2(2) INTERNATIONALES HANDELSRECHT 52, 54 (2002); Franz-Josef Schillo, *UN-Kaufrecht oder BGB?—Die Qual der Wahl beim internationalen Warenkaufvertrag—Vergleichende Hinweise zur Rechtswahl beim Abschluss von Verträgen*, 6 INTERNATIONALES HANDELSRECHT 257, 259 (2003).

¹⁵² See FERRARI, *supra* note 45, at 80; Morten Fogt, *Rechtzeitige Rüge und Vertragsaufhebung bei Waren mit raschem Wertverlust nach UN-Kaufrecht*, 10(3) ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 580, 584 (2002).

¹⁵³ See, e.g., Landgericht [LG] Berlin [Regional Court] Mar. 24, 1998, available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=440&step=FullText>; Landgericht [LG] München [Regional Court] May 6, 1997, available at <http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/341.htm>; Landgericht [LG] Siegen [Regional Court] Dec. 5, 1995, available at <http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/287.htm>; Rb. Amsterdam, 5 Oktober 1994, available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=440&step=FullText>.

As regards the Rome I Regulation, the result is basically the same, since its Article 4(1)(a) states that “a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence.”¹⁵⁵

From what has just been said one can easily gather that the suggestion that the CISG prevents resort to private international law is obviously untenable, as the CISG’s (indirect) applicability depends entirely on a private international law approach.

VII. THE CISG’S APPLICABILITY REQUIREMENTS *STRICTO SENSU*: ARTICLE 1(1)(A)

While Article 1(1)(b) expressly requires resort to private international law to lead to the CISG’s applicability, according to both courts¹⁵⁶ and commentators¹⁵⁷ Article 1(1)(a) leads to the CISG’s “direct” applicability without the need for any such resort, as Article 1(1)(a) “merely” requires that the parties have, at the time of the conclusion of the contract,¹⁵⁸ their

www.unilex.info/case.cfm?pid=1&do=case&id=124&step=FullText; Rb. Zwolle, Mar. 1, 1995, available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=152&step=FullText>.

¹⁵⁴ See, e.g., Int’l Comm. Arb. Award No. 8611, available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=229&step=FullText>; ICC Court of Arbitration, Arbitral Award No. 7197, J. DU DROIT INT’L 1030 (1993).

¹⁵⁵ For papers on the law applicable absent a choice under the Rome I Regulation, see, most recently, Franco Ferrari, *The Applicable Law in the Absence of Choice: Some Remarks on Article 4 of the Rome I Regulation (and Where it Comes From)*, in *STUDI IN ONORE DI ALDO FRIGNANI* 217 (Gianmaria Ajani et al., 2011); Ulrich Magnus, *Article 4 Rome I Regulation: The Applicable Law in the Absence of Choice*, in *ROME I REGULATION. THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS IN EUROPE*, *supra* note 141, at 27.

¹⁵⁶ See Amtsgericht [AG] Sursee, Sept. 12, 2008, available at <http://www.globalsaleslaw.org/content/api/cisg/urteile/1728.pdf>; Cass., 20 Settembre 2004, n.18902, available at <http://cisgw3.law.pace.edu/cases/040920i3.html>; Oberster Gerichtshof [OGH] [Supreme Court] Sept. 10, 1998, available at <http://www.globalsaleslaw.org/content/api/cisg/urteile/646.pdf>; Bundesgerichtshof [BGH] [Federal Court of Justice] Dec. 11, 1996, available at <http://cisgw3.law.pace.edu/cases/961211g1.html>.

¹⁵⁷ See also HERBER & CZERWENKA, *supra* note 68, at 19; MAGNUS, *supra* note 35, at 83; LOHMANN, *supra* note 55, at 37.

¹⁵⁸ See Tribunale di Forlì, Dec. 11, 2008, available at <http://cisgw3.law.pace.edu/cases/081211i3.html>; Tribunale di Padova, Jan. 11, 2005, available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=1005&step=FullText>; Tribunale di Padova, Feb. 25, 2004, available at <http://cisgw3.law.pace.edu/cases/040225i3.html>; Tribunale di Rimini, Nov. 26, 2002, available at <http://cisgw3.law.pace.edu/cases/021126i3.html>; Tribunale di Vigevano, July 12, 2000, available at <http://>

relevant place of business in different contracting States. This, however, is not necessarily correct. There are instances where even the CISG's "direct" applicability will depend on the outcome of a private international law analysis. This is true, for example, in respect of those instances where an agent is involved in the conclusion of the sales contract and the agent's place of business is located in a country other than that in which the principal's place of business is located. In these instances, the CISG's "direct" applicability, will depend on whether it is the agent or the principal who is party to the contract with the opposing party.¹⁵⁹ Since, however, the CISG does not deal with the issue of agency, as often stated both by courts¹⁶⁰ and commentators,¹⁶¹ resort to private international law is necessary to determine the law applicable to the principal-agency relationship,¹⁶² as it is on the basis of that applicable law that the issue of who is party to the contract will need to be decided.¹⁶³ Most domestic laws will decide the issue on the basis of whether the agent disclosed the

cisgw3.law.pace.edu/cases/000712i3.html; Oberlandesgericht [OLG] Dresden [Provincial Court of Appeal] Dec. 27, 1999, *available at* <http://cisgw3.law.pace.edu/cases/991227g1.html>.

¹⁵⁹ See also *supra* text accompanying note 75.

¹⁶⁰ For court decisions stating that issues of agency and related matters are not dealt with by the Convention, see, apart from the decisions cited *supra* in note 81, Oberlandesgericht [OLG] Schleswig [Appellate Court] Oct. 24, 2008, *available at* <http://cisgw3.law.pace.edu/cases/081024g1.html>; Landgericht [LG] Landshut [District Court] June 12, 2008, *available at* <http://cisgw3.law.pace.edu/cases/080612g2.html>; CIETAC, Dec. 10, 2007, *available at* <http://cisgw3.law.pace.edu/cases/071210c1.html>; Tribunal cantonal du Valais, Apr. 27, 2007, *available at* <http://cisgw3.law.pace.edu/cases/070427s1.html>; Cour d'Appel [CA] [regional court of appeal] Versailles, Oct. 13, 2005, *available at* <http://cisgw3.law.pace.edu/cases/051013f1.html>; CIETAC, Oct. 1, 2005, *available at* <http://cisgw3.law.pace.edu/cases/051000c1.html>; Tribunal cantonal du Valais, May 27, 2005, *available at* <http://cisgw3.law.pace.edu/cases/050527s1.html>; CIETAC, Apr. 2005, *available at* <http://cisgw3.law.pace.edu/cases/050400c1.html>; CIETAC, Feb. 28, 2005, *available at* <http://cisgw3.law.pace.edu/cases/050228c1.html>; CIETAC, Sept. 1, 2004, *available at* <http://cisgw3.law.pace.edu/cases/040900c1.html>; Shanghai No. 1. Intermediate People's Court, Mar. 23, 2004, *available at* <http://cisgw3.law.pace.edu/cases/040323c1.html>; CIETAC, Mar. 12, 2004, *available at* <http://cisgw3.law.pace.edu/cases/040312c1.html>; Tribunale di Padova, Feb. 25, 2004, *available at* <http://cisgw3.law.pace.edu/cases/040225i3.html>.

¹⁶¹ See Saenger, *supra* note 34, at 402–03; Kurt Siehr, *Art. 1, in* KOMMENTAR ZUM UN-KAUFRECHT 9, 13 (Heinrich Honsell ed., 2d ed. 2010).

¹⁶² See Milena Djordjevic, *Art. 4, in* UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) 62, 70 (Stefan Kröll et al. eds., 2011); in case law see Amtsgericht [AG] Sursee [District Court] Sept. 12, 2008, *available at* <http://cisgw3.law.pace.edu/cases/080912s1.html>; Landgericht [LG] Kassel [District Court] June 22, 1995, *available at* <http://cisgw3.law.pace.edu/cases/950622g1.html>.

¹⁶³ See Ferrari, *supra* note 43, at 496–97.

principal or not.¹⁶⁴ If the agent did not do so, it is generally the agent who will be bound rather than the principal. The opposite is true where the agent did disclose the principal.¹⁶⁵

But even where no agent is involved and the parties to the contract have their relevant place of business in two different contracting States the CISG's applicability pursuant to Article 1(1)(a) may be doubtful—and resort to a private international law analysis necessary, since the CISG provides for the possibility for contracting States to declare certain reservations which have an impact on the CISG's direct applicability, *i.e.*, even when both parties have their relevant place of business in a contracting State.

One such reservation is that provided in Article 94. Pursuant to this provision, “[t]wo or more Contracting States which have the same or closely related legal rules on matters governed by this Convention may at any time declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those States.” The rationale behind this provision, introduced upon the request of the Scandinavian countries,¹⁶⁶ the only ones to declare this reservation,¹⁶⁷ is to make the CISG inapplicable to contractual relationships between parties that have their places of business in countries that have a sales law that is largely uniform,¹⁶⁸ thus allowing regional unification efforts not to become superfluous.¹⁶⁹ Consequently, the CISG will not be applicable where both

¹⁶⁴ See, e.g., Oberlandesgericht [OLG] Köln [Provincial Court of Appeal] Nov. 13, 2000, available at <http://cisgw3.law.pace.edu/cases/001113g1.html>.

¹⁶⁵ See Ferrari, *supra* note 35, at 68.

¹⁶⁶ See OFFICIAL RECORDS OF THE UNITED NATIONS CONFERENCE, *supra* note 32, at 436.

¹⁶⁷ See the updated list of contracting States that also includes the reservations declared by those States, <http://www.uncitral.org>.

¹⁶⁸ See Joseph Lookofsky, *Alive and Well in Scandinavia: CISG Part II*, 18 J.L. & COM. 289, 290 (1999).

¹⁶⁹ For papers on the relationship between the CISG and regional unification efforts, see, e.g., Luca Castellani, *Ensuring Harmonisation of Contract Law at Regional and Global Level: the United Nations Convention on Contracts for the International Sale of Goods and Role of UNCITRAL*, UNIF. L. REV./REVUE DE DROIT UNIFORME 115 (2008), available at <http://www.unidroit.org/english/publications/review/articles/2008-1&2/115-126.pdf>; Juan Coetzee & Mustaqeem de Gama, *Harmonisation of Sales Law: An International and Regional Perspective*, 10 VINDOBONA J. INT'L COM. L. & ARB. 15 (2006); Franco Ferrari, *El papel de la unificación regional en la unificación del derecho de compraventa*, in *COMO SE CODIFICA HOY EL DERECHO COMMERCIAL INTERNACIONAL?* 227 (Jürgen Basedow et al. eds., 2010); Franco Ferrari, *Universal and Regional Sales Law: Can they coexist?*, 8 UNIF. L. REV./REVUE DE DROIT UNIFORME 177 (2003); Petar Sarcevic, *The CISG and Regional*

parties have their relevant place of business in contracting States that made an Article 94 declaration, making it necessary to resort to the private international law rules of the forum to determine the applicable law. If the applicable law is that of a contracting State (independently of whether it declared a reservation or not), the CISG will not apply; rather the applicable domestic law will apply. This view appears to be shared by most authors, with respect to a line of cases in which the court is located in a State that made an Article 94 declaration. However, there is a dispute as to whether or not the court of non-reservation contracting States have to take into consideration Article 94 declarations, *i.e.*, whether judges from non-reservation contracting States will have to apply domestic law rather than the CISG to a contract concluded between two parties having their places of business in reservation contracting States. According to the preferable view,¹⁷⁰ the courts of non-reservation contracting State will not have to take into consideration that reservation, and, consequently, will have to apply the CISG pursuant to Article 1(1)(a). This approach is taken because Article 94 does not have an impact on the status of contracting State of any contracting State declaring such reservation. Of course, if one were to adopt the opposing view, then recourse to a private international law analysis would be necessary in similar cases to determine the applicable (domestic) law.

VIII. THE CISG'S ARTICLES 92 AND 93 RESERVATIONS AS REASONS FOR THE NEED FOR RECOURSE TO PRIVATE INTERNATIONAL LAW

Article 94 CISG is not the only CISG provision to have an impact on the CISG's direct applicability and, thus, to impose a private international

Unification, in THE 1980 UNIFORM SALES LAW: OLD ISSUES REVISITED IN THE LIGHT OF RECENT EXPERIENCES (Franco Ferrari ed., 2003).

¹⁷⁰ See ACHILLES, *supra* note 41, at 266; BRUNNER, *supra* note 35, at 541; ENDERLEIN ET AL., *supra* note 88, at 293; Harry M. Flechtner, *The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and other Challenges to the Uniformity Principle in Article 7(1)*, 17 J.L. & COM. 187, 194 (1998); Ingeborg Schwenzer & Pascal Hachem, *Art. 94, in COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG)* 1186, 1188 (Ingeborg Schwenzer ed., 3d ed. 2010); ULRICH SCHROETER, UN-KAUFRECHT UND EUROPÄISCHES GEMEINSCHAFTSRECHT 365 (2005); Marco Torsello, *Reservations to International Uniform Commercial Law Conventions*, UNIF. L. REV./REVUE DE DROIT UNIFORME 85, 97 (2000); WITZ ET AL., *supra* note 130, at 579.

law analysis. Article 92 also does this; actually, the very purpose behind the introduction of this provision was to allow some countries, namely Denmark, Finland, Norway and Sweden, to rely on a set of rules other than those of the CISG, specifically their (regionally unified) own rules.¹⁷¹ These countries proposed to allow contracting States to make a declaration pursuant to which they would not be bound by either Part II or Part III of the CISG, dealing with the “Formation of Contract” and “the Rights and Obligations of the Parties” respectively. In doing so, they intended to make sure that their rules on formation of contract would not be replaced by the CISG’s rules on formation.¹⁷² This is why all the aforementioned Scandinavian countries made a declaration according to which they would not be bound by Part II of the CISG (on “Formation of Contract”). Whether these countries were fully aware of the consequences of a similar declaration is doubtful. Given the rationale behind their proposal to introduce the possibility of declaring that reservation, it appears that these countries were convinced that a simple declaration would ensure the applicability of their own domestic law. This view is not tenable. The effect of an Article 92 declaration is much more limited, as well as much more complicated. It is more limited insofar as there will be instances where the CISG will still prevail over the law of the reservation State;¹⁷³ it is more complicated insofar as the declaration of an Article 92 reservation obliges courts of contracting States to resort to a private international law analysis, thus showing once again that the CISG cannot do away with resort to private international law, even where both parties to the contract have their relevant place of business in a contracting State to the CISG.

¹⁷¹ See also Winship, *supra* note 58, at 1–45.

¹⁷² It should be noted that no domestic rule is *per se* replaced by the CISG, as the CISG solely applies to “international” contract for the sale of goods. Thus, the CISG does not impact domestic law, in the sense that it does not *per se* modify the domestic rules which already exist. In effect, due only to its persuasiveness, the CISG has constituted the model of recent revisions of domestic law. See, e.g., EVELYN NAU, DAS GEWÄHRLEISTUNGSRECHT IN BGB, UN-KAUFRECHT UND DEN REFORMVORSCHLÄGEN DER SCHULDRECHTSKOMMISSION: EIN VERGLEICH UNTER BESONDERER BERÜCKSICHTIGUNG DER RICHTLINIE (1999/44/Eg) ÜBER DEN VERBRAUCHSGÜTERKAUF (2003); Peter Schlechtriem, *10 Jahr CISG—Der Einfluß des UN-Kaufrechts auf die Entwicklung des deutschen und des internationalen Schuldrechts*, INTERNATIONALES HANDELSRECHT 12 (2001); Peter Schlechtriem, *International Einheitliches Kaufrecht und neues Schuldrecht*, in DAS NEUE SCHULDRECHT IN DER PRAXIS 71 (Karsten Schmidt et al. eds., 2003); Karin Sein & Irene Kull, *Die Bedeutung des UN-Kaufrechts im estnischen Recht*, INTERNATIONALES HANDELSRECHT 138 (2005).

¹⁷³ See the text accompanying notes 177 ff.

The effect of this reservation is set forth in Article 92 CISG itself: a party that has its relevant place of business in an Article 92 reservation State is considered to have its place of business in a non-contracting State for the purposes of the Part excluded.¹⁷⁴ Thus, where one party has its place of business in such a State, the CISG can never be applicable in its entirety by virtue of Article 1(1)(a) CISG in its entirety.¹⁷⁵ Article 1(1)(a) will merely lead to the application of the Part by which both States in which the parties have their places of business are bound.¹⁷⁶ This does not necessarily mean that the Part to which the reservation relates does not apply;¹⁷⁷ rather, that Part's applicability will depend on whether the rules of private international law of the forum lead to the law of a Contracting State that did

¹⁷⁴ See ACHILLES, *supra* note 41, at 264; HERBER & CZERWENKA, *supra* note 68, at 394; PILTZ, *supra* note 101, at 51; ILARIA SANNINI, L'APPLICAZIONE DELLA CONVENZIONE DI VIENNA SULLA VENDITA INTERNAZIONALE NEGLI STATI UNITI 69 (2006); Torsello, *supra* note 170, at 96.

See Oberlandesgericht Hamm [OLG Hamm] [Appellate Court] Ger., Apr. 2, 2009, available at <http://www.globalsaleslaw.com/content/api/cisg/urteile/1978.pdf>; Valero Marketing v. Greeni Oy, 373 F. Supp. 2d 475 (D.N.J. 2005), *rev'd and remanded*, 242 F. App'x 840 (3d Cir. 2007), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/050615u1.html>; Standard Bent Glass Corp. v. Glassrobots Oy, 33 F.3d 440 (3d Cir. 2003), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/030620u1.html>; Turku Court of Appeal, Fin., Apr. 12, 2002, available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/020412f5.html>; Corte d'appello di Milano, It., Jan. 23, 2001, available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/010123i3.html>.

¹⁷⁵ See Lookofsky, *supra* note 168, at 292; Peter Mankowski, *Art. 92 CISG*, in INTERNATIONALES VERTRAGSRECHT, *supra* note 34, at 953, 955; Torsello, *supra* note 170, at 98.

¹⁷⁶ See also FERRARI, *supra* note 45, at 68.

In light of what has just been said, the decision in CLOUT Case No. 362, Oberlandesgericht Naumburg [OLG Naumburg] [Provincial Court of Appeal] Ger., Apr. 27, 1999, available at <http://cisgw3.law.pace.edu/cases/990427g1.html>, is incorrect (It makes applicable the CISG in its entirety by virtue of Article 1(1)(a), even though one of the parties to the contract had its place of business in Denmark, one of the Contracting States that declared an Article 92 reservation.); *contra* CLOUT Case No. 121, Oberlandesgericht Frankfurt [OLG Frankfurt] [Provincial Court of Appeal] Mar. 4, 1994, available at <http://cisgw3.law.pace.edu/cases/940304g1.html> (applying the CISG pursuant to its Article 1(1)(a), even though at the moment of the conclusion of the contract one of the parties had its place of business in Sweden, a Contracting State that had declared an Article 92 reservation).

For a critique of these decisions, see also Morten Fogt, *Rechtzeitige Rüge und Vertragsaufhebung bei Waren mit raschem Wertverlust nach UN-Kaufrecht*, ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 580, 587 (2002).

¹⁷⁷ See also HERBER & CZERWENKA, *supra* note 68, at 393; Lookofsky, *supra* note 168, at 294-95; *contra* PILTZ, *supra* note 101, at 51 f.

not make such a declaration.¹⁷⁸ If they do, the Part excluded will apply by virtue of Article 1(1)(b),¹⁷⁹ as also stated in case law.¹⁸⁰

It should be noted, however, that according to both commentators¹⁸¹ and courts,¹⁸² the foregoing solution applies not only if a dispute is brought before the courts of a Contracting State that did not declare an Article 92 reservation, but also where the forum is located in a State that did declare such a reservation.

Where, on the contrary, the private international law rules lead to the law of a contracting State that had declared the Article 92 reservation, that State's domestic law will apply, a view held, among others, by a German court.¹⁸³ The court held that since both Germany and Denmark were contracting States at the moment of the conclusion of the contract, the CISG applied by virtue of Article 1(1)(a), except in so far as the formation of the contract was concerned. Since Denmark had made an Article 92 reservation by virtue of which it is not bound by Part II of the CISG, it cannot "be considered a contracting State within paragraph (1) of Article 1

¹⁷⁸ See ACHILLES, *supra* note 41, at 264; ENDERLEIN ET AL., *supra* note 88, at 290; Flechtner, *supra* note 170, at 193; Joseph Lookofsky, *The Scandinavian Experience*, in THE 1980 UNIFORM SALES LAW, *supra* note 127, at 95, 107.

¹⁷⁹ See MAGNUS, *supra* note 35, at 441; Mankowski, *supra* note 175, at 955; WITZ ET AL., *supra* note 130, at 576.

¹⁸⁰ See CLOUT Case No. 134, Ogerlandesgericht München [OLG München] [Provincial Court of Appeal] Mar. 8, 1995, available at <http://cisgw3.law.pace.edu/cases/950308g1.html> (The court held that the CISG was applicable to the rights and obligations of the parties by virtue of Article 1(1)(a), but that the issue of the contract's formation could not be governed by Part II (Formation of Contracts) of the CISG, at least not by virtue of Article 1(1)(a), since Finland had declared an Article 92 reservation and therefore could not be considered a Contracting State in respect to that Part. Nevertheless, the court held that by virtue of Article 1(1)(b) the CISG had to govern the formation as well, since the German private international law rules made German law applicable to that issue); *but see* Langericht Bielefeld [LG Bielefeld] [District Court] Dec. 12, 2003, available at <http://cisgw3.law.pace.edu/cases/031212g1.html> (applying German domestic law rather than Articles 14–24 CISG which the court should have applied due to the rules of private international law leading to the law of Germany, a Contracting State that had not declared an Article 92 reservation).

¹⁸¹ See ACHILLES, *supra* note 41, at 264; HERBER & CZERWENKA, *supra* note 68, at 394; Lookofsky, *supra* note 168, at 297.

¹⁸² See CLOUT Case No. 309, Østre Landsret [Eastern Appellate court] Den., Apr. 23, 1998, available at <http://cisgw3.law.pace.edu/cases/980423d1.html>.

¹⁸³ Compare CLOUT Case No. 228, Oberlandesgericht Rostock [OLG Rostock] [Provincial Court of Appeal] Ger., July 27, 1995, available at <http://cisgw3.law.pace.edu/cases/950727g1.html>; see also Turku Court of Appeal, Fin., Apr. 12, 2002, available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/020412f5.html>; CLOUT Case No. 143, Fovarosi Birosag [FB Budapest] [Metropolitan Court of Budapest] Hung., May 21, 1996, available at <http://cisgw3.law.pace.edu/cases/960521h1.html>.

of [the] Convention.”¹⁸⁴ The German court therefore correctly resorted to its private international law rules and applied Danish domestic non-uniform law to the formation of the contract.

What has just been said clearly shows that the very existence of Article 92 CISG suggests that it is incorrect to hold that the CISG prevents recourse to private international law.

A reasoning similar to the foregoing one applies in those cases where at least one of the parties to the contract has its place of business in a territorial unit of a contracting State that made an Article 93 declaration pursuant to which the CISG does not extend to that territorial unit: by virtue of Article 93(3) the CISG cannot apply (at all) by virtue of Article 1(1)(a) CISG,¹⁸⁵ because the party that has its place in that territorial unit is considered to have its place of business in a non-contracting State.¹⁸⁶ Consequently, where the forum is located in a contracting State, the CISG can only be applicable to such a contract by virtue of Article 1(1)(b), provided that the rules of private international law lead to the law of a contracting State that did not declare an Article 93 reservation.¹⁸⁷ Where the rules of private international law lead to either the law of the reservation State or that of a non-contracting State, rules other than those of the CISG will apply. Irrespective, however, of the law ultimately applicable, what is important is that it must be determined by means of the private international law rules.

IX. THE CISG’S LIMITED SCOPE OF APPLICATION: INTERNAL GAPS

While the foregoing reasons for resort to private international law not becoming superfluous with the coming into force of the CISG all somehow relate to the CISG’s applicability, these reasons are not the only ones.

¹⁸⁴ CISG art. 92(2).

¹⁸⁵ See Alfonso-Luis Calvo Caravaca, *Art. 93*, in *LA COMPRAVENTA INTERNACIONAL DE MERCADERIAS*, *supra* note 89, at 713, 715; Malcolm Evans, *Art. 93*, in *COMMENTARY ON THE INTERNATIONAL SALES LAW*, *supra* note 90, at 645, 648; Franco Ferrari, *Art. 93*, in *KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT—CISG*, *supra* note 33, at 999, 1000; HERBER & CZERWENKA, *supra* note 68, at 396.

¹⁸⁶ See MAGNUS, *supra* note 35, at 861; PILTZ, *supra* note 101, at 51.

¹⁸⁷ If the rules of private international law were to lead to the law of a contracting State that declared an Article 92 reservation, the CISG would not be applicable to the contract but for the Part of the CISG that that State had decided to be bound by.

Recourse to a private international law analysis may be necessary even where the CISG is applicable. This can easily be derived from the CISG itself which, as mentioned earlier,¹⁸⁸ expressly refers to the need for resort to private international in relation to the issue of gap-filling.

Even though some commentators state that the CISG is “a comprehensive code governing international sales of goods”¹⁸⁹ and “addressing contracting generally”¹⁹⁰ and, therefore, governs all international sales transactions¹⁹¹ and “exhaustively deals with all problems,”¹⁹² the CISG is neither a comprehensive code nor does it constitute an exhaustive body of rules,¹⁹³ *i.e.*, it does not provide solutions to all matters that may originate from an international sale.¹⁹⁴ From this one can easily gather how important the issue of gap filling is. And it is in relation to this issue as well that express reference is made in the CISG to the need to resort to the rules of private international law (of the forum).¹⁹⁵

In effect, pursuant to Article 7(2), resort to private international law is to be had for the purpose of solving “matters governed by [the CISG] which

¹⁸⁸ See the text accompanying note 38.

¹⁸⁹ Overby, *supra* note 6, at 606; see also Michael Bradley et al., *The Purposes and Accountability of the Corporation in Contemporary Society: Corporate Governance at a Crossroads*, 62 LAW & CONTEMP. PROB. 9, 82 (2000) (stating that the CISG “presents a comprehensive code governing contracts for the international sale of goods”).

¹⁹⁰ Lorne Clark & Jeffrey Wool, *Entry into Force of Transactional Private Law Treaties Affecting Aviation: Case Study—Proposed UNIDROIT/ICAO Convention as Applied to Aircraft Equipment*, 66 J. AIR L. & COM. 1403, 1411 n.30 (2001).

¹⁹¹ See, e.g., Tom McNamara, *U.N. Sale of Goods Convention: Finally Coming of Age?*, 32 FEB. COLO. LAW. 11, 16 (2003), stating that “the Convention presumptively and automatically governs all international trade transactions within the CISG’s scope (an international sales contract)”; see also Gary Friedman et al., *Issues in Marketing and Sales Activities for Biotech Companies Around the World*, 66 PLL/PAT 953, 964 (2001), “The UN’s Convention on Contracts for the International Sale of Goods (“CISG”) is contract law worldwide for those countries that have ratified it.” See CLOUT Case No. 636 Camara Nacional de Apelaciones en lo Comercial de Buenos Aires [Second Instance Court of Appeal] Arg., July 21, 2002 “*Cerveceria y Maleria Paysandu S.A. v. Cerveceria Argentina S.A./conformity of goods*,” available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/020721a1.html>, stating that “the Convention becomes the common law of the international sale of goods in the countries that adopt it.”

¹⁹² Bundesgericht [BGer] [Federal Supreme Court] Switz., Feb. 19, 2004, available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=979&step=FullText>.

¹⁹³ See Giuseppe Benedetti, *Commento all’art. 4 della Convenzione di Vienna*, NUOVE LEGGI CIVILI COMMENTATE [View New Civil Commentated] 9, 9 (1989).

¹⁹⁴ See also Franco Ferrari, *What Sources of Law for Contracts for the International Sale of Goods? Why One Had to Look Beyond the CISG*, 25 INT’L REV. L. & ECON. 314, 315 (2006).

¹⁹⁵ See *supra* text accompanying note 38.

are not expressly settled in it,” *i.e.*, for filling the gaps *praeter legem*,¹⁹⁶ or “internal,”¹⁹⁷ or “hidden”¹⁹⁸ gaps, and those which cannot be filled by resorting to the general principles the CISG is based on.¹⁹⁹ Thus, in relation to these matters the CISG expressly provides for resort to private international law to determine the applicable law, but solely as “ultima ratio.”²⁰⁰ This means that pursuant to Article 7(2) CISG, once it has been

¹⁹⁶ See, e.g., Arthur B. Colligan, *Applying the General Principles of the United Nations Convention on Contracts for the International Sale of Goods to Fill the Article 78 Interest Rate Gap in Zapata Hermanos, S.A. v. Hearthside Baking Co. Inc. (2001)*, 6 VINDOBONA J. INT’L COM. L. & ARB. 40, 48 (2002); Felemegas, *supra* note 41, at 276; Ferrari, *supra* note 41, at 842; Graffi, *supra* note 41, at 879; Philip Hackney, *Is the United Nations Convention on the International Sale of Goods Achieving Uniformity?*, 61 LA L. REV. 473, 478 (2001); McMahon, *supra* note 41, at 1002; Viscasillas, *supra* note 41, at 112; for the use of the expression in case law, see Tribunale di Padova [Ordinary Court of First Instance] It., Feb. 25, 2004, available at <http://cisgw3.law.pace.edu/cases/040225i3.html>.

¹⁹⁷ BAWAR BAMMARNY, TREU UND GLAUBEN UND UN-KAUFRECHT (CISG) 160 (2011); Jürgen Basedow, *Uniform Law Conventions and the UNIDROIT Principles of International Commercial Contracts*, 5 UNIF. L. REV. 129, 135 (2000); BRUNNER, *supra* note 35, at 77; DEJACO, *supra* note 41, at 43; McMahon, *supra* note 41, at 1003; Boris Paal, *Methoden der Lückenfüllung im Vergleich: UN-Kaufrecht und BGB*, ZEITSCHRIFT FÜR VERGLEICHENDE RECHTSWISSENSCHAFT 64, 79 (2011); Schwenzer & Hachem, *supra* note 170, at 120, 134; SCHMID, *supra* note 41, at 173; Claude Witz, *Trois questions récurrentes de la vente internationale de marchandises au sein du même arrêt*, DALLOZ CHRONIQUE 2796, 2798 (2002); see Amtsgericht Sursee [District Court] Switz., Sept. 12, 2008, available at <http://cisgw3.law.pace.edu/cases/080912s1.html>; Oberlandesgericht Frankfurt [OLG Frankfurt] Ger., Oct. 6, 2004, available at <http://cisgw3.law.pace.edu/cases/041006g1.html>.

¹⁹⁸ BAMMARNY, *supra* note 197, at 160; Diedrich, *supra* note 38, at 353.

¹⁹⁹ For papers concerning the CISG’s general principles, see, e.g., Camilla B. Andersen, *General Principles of the CISG—Generally Impenetrable?*, in SHARING INTERNATIONAL COMMERCIAL LAW ACROSS NATIONAL BOUNDARIES: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday 13 (Camilla B. Andersen & Ulrich Schroeter eds., 2008); Franco Ferrari, *Principi generali inseriti nelle convenzioni internazionali di diritto uniforme: l’esempio della vendita, del “factoring” e del “leasing” internazionali*, RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE 651 (1997); Franco Ferrari, *General Principles and International Uniform Commercial Law Conventions: A Study of the 1980 Vienna Sales Convention and the 1988 UNIDROIT Conventions on International Factoring and Leasing and the UNIDROIT Principles*, 10 PACE INT’L L. REV. 157, 163 (1998); Phanesh Koneru, *The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principles*, 6 MINN. J. GLOBAL TRADE 105, 131 (1997); Ulrich Magnus, *Die allgemeinen Grundsätze im UN-Kaufrecht*, RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 469 (1995); Ulrich Magnus, *General Principles of UN Sales Law*, INT’L TRADE & BUS. LAW ANNUAL 33 (1997); Alvaro Rodrigo Vidal Olivares, *La función integradora de los principios generales en la compraventa internacional de mercaderías y los principios de la UNIDROIT sobre contratos comerciales internacionales*, ANUARIO DE DERECHO CIVIL 993 (2003).

²⁰⁰ See Klaus Bacher, *Landesspezifische Auslegung von Einheitsrecht?*, in Festschrift für Peter Schlechtriem zum 70. Geburtstag 155, 162 (Ingeborg Schwenzer & Günther Hager eds., 2002); Bonell, *supra* note 41, at 25; BRUNNER, *supra* note 35, at 77; FABIAN BURKART, INTERPRETATIVES ZUSAMMENWIRKEN VON CISG UND UNIDROIT PRINCIPLES 202 (2000); Ferrari,

established that a matter is governed by the CISG, albeit not expressly settled by it, one has to first determine whether a general principle can be identified upon which the CISG is based and which allows one to settle the matter.²⁰¹ To the extent that recourse to a general principle underlying the CISG cannot settle the matter, Article 7(2) does not just allow resort to the rules of private international law, it imposes such resort.²⁰² This does not mean that recourse to the rules of private international law should be abused.²⁰³ Rather, one has to always keep in mind that the drafters of the CISG wanted to close the types of gaps at hand as much as possible from

supra note 33, at 156, 184; FRIGGE, *supra* note 38, at 306; URS PETER GRUBER, *METHODEN DES INTERNATIONALEN EINHEITSRECHTS* 306 (2004); MELIN, *supra* note 41, at 407; TOBIAS MALTE MÜLLER, *AUSGEWÄHLTE FRAGEN DER BEWEISLASTVERTEILUNG IM UN-KAUFRECHT IM LICHT DER AKTUELLEN RECHTSPRECHUNG* 13 (2005); NIEMANN, *supra* note 55, at 27; SANNINI, *supra* note 174, at 52; SCHMID, *supra* note 41, at 53; Christian Thiele, *Anmerkung zu OLG Koblenz, 18. 11. 1999*, *INTERNATIONALES HANDELSRECHT* 111, 112 (2001); *see, e.g., Macromex Srl. v. Globex International Inc.*, Case No. 50181T 0036406, Certified Award (International Centre for Dispute Resolution of the American Arbitration Association 2007), *available at* <http://cisgw3.law.pace.edu/cases/071023a5.html>; *DB Gas & Oil ApS v. JSC Novoil*, Case No. KG-A40/30570-01, Certified Award (Federal Arbitration Court for the Moscow Region 2001), *available at* <http://cisgw3.law.pace.edu/cases/010625r1.html>; *Industrial Equipment (Ger. v. sp.)*, Case No. 8611/HV/Jk, Certified Award (Court of Arbitration of the International Chamber of Commerce 1997), *available at* <http://cisgw3.law.pace.edu/cases/978611i1.html>.

²⁰¹ For recent case law expressly referring to this gap-filling approach, see RB Arnhem, July 29, 2009, docket No. 172927/HA ZA 08-1230, unpublished; Hof van Cassatie [Cass.] [Court of Cassation] Bel., June 19, 2009, *available at* <http://cisgw3.law.pace.edu/cases/090619b1.html>; RB Amsterdam, June 3, 2009, docket No. 403763/HA ZA 08-2073, unpublished; Hilaturas Miel, S.L. v. Republic of Iraq, Aug. 20, 2008 (U.S. S.D.N.Y.), *available at* <http://cisgw3.law.pace.edu/cases/080820u1.html>; Economic Court of the City of Minsk, Apr. 10, 2008, *available at* <http://cisgw3.law.pace.edu/cases/080410b5.html>; Court of Breda, Neth., Feb. 27, 2008, *available at* <http://www.unilex.info/case.cfm?pid=1&do=case&id=1339&step=FullText>; District Court in Bardejov, Oct. 29, 2007, *available at* <http://cisgw3.law.pace.edu/cases/071029k1.html>; *Equipment and Spart Parts (Ger. V. Russ.)*, Case No. 54/200+, Certified Award (Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry 2006), *available at* <http://cisgw3.law.pace.edu/cases/061229r1.html>.

²⁰² For a similar conclusion, see Bonell, *supra* note 41, at 83, 86 stating that the “recourse to domestic law for the purpose of filling gaps under certain circumstances is not only admissible, but even obligatory.”

²⁰³ The danger of an abuse of the recourse to the rules of private international law is considerable: “It is enough to state that no general principles can be found and therefore the only way out it to resort to private international law.” Gyula Eorsi, *General Provisions, in* *INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS*, ch. 2, at 1, 12 (Nina M. Galston & Hans Smit eds., 1984).

within the CISG itself,²⁰⁴ so as to promote the uniformity aimed at by the CISG. It is, however, worth pointing out that recourse to general principles constitutes merely one method of filling gaps from within.²⁰⁵ One has to wonder whether Article 7(2) of the CISG also covers other methods of legal reasoning, such as analogical application.²⁰⁶ In this respect, this author shares the opinion of those commentators who assert not only that the CISG permits resort to analogy as a means to fill gaps, but also that “[i]n the case of a gap [praeter legem] in the Convention the first attempt to be made is to settle the unsolved question by means of an analogical application of specific provisions.”²⁰⁷ However, when the matters settled in the CISG and the issue the internal gaps refers to are not so closely related that it would be justified to adopt a different solution.²⁰⁸ One must resort to the general principles as contemplated in Article 7(2) CISG. This procedure differs from the analogical application in that it does not resolve the specific case solely by extending specific provisions dealing with analogous matters,

²⁰⁴ ENDERLEIN & MASKOW, *supra* note 8, at 58, point out that Article 7(2)’s major concern is to make sure that the gaps are “closed [. . .] from within the Convention. This is in line with the aspiration to unify the law which [. . .] is established in the Convention itself.”

²⁰⁵ For the following, see also Franco Ferrari, *Uniform Interpretation of the 1980 Uniform Sales Law*, 24 GA. J. INT’L & COMP. L. 183, 217 (1994).

²⁰⁶ See also JORGE ADAME GODDARD, *EL CONTRATO DE COMPRAVENTA INTERNACIONAL* 77 (1994); for a clear distinction between analogical application and the recourse to general principles, see JAN KROPHOLLER, *INTERNATIONALES EINHEITSRECHT* 292 (1974).

²⁰⁷ Bonell, *supra* note 41, at 78. The analogical application as a method of gap-filling has been admitted by other authors as well; see ENDERLEIN & MASKOW, *supra* note 8, at 58, where the authors state that

gap-filling can be done, as we believe, by applying such interpretation methods as extensive interpretation and analogy. The admissibility of analogy is directly addressed in the wording contained in the CISG because it is aimed at obtaining, from several comparable rules, one rule for a not expressly covered fact and/or a general rule under which the fact can be subsumed.

See also Felemegas, *supra* note 41, at 280; FRIGGE, *supra* note 38, at 292; Hackney, *supra* note 196, at 478; HERBER & CZERWENKA, *supra* note 68, at 50; ROLAND LOEWE, *INTERNATIONALES KAUFRECHT* 33 (1989); Paal, *supra* note 197, at 88; Schwenzer & Hachem, *supra* note 170, at 136; *contra* Harm Peter Westermann, *Art. 7 CISG*, in 3 MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH 2038, 2044 (6th ed. 2012).

²⁰⁸ For a similar criterion employed in order to distinguish the analogical approach from recourse to general principles, see Bonell, *supra* note 41, at 79 (stating that if cases expressly settled by specific provisions and the case in question are so analogous “that it would be inherently unjust not to adopt the same solution,” the gap should be closed by resorting to the general principles); for a critique of this criterion, see Rosenberg, *supra* note 38, at 451 (affirming that “[t]here are inherent problems with an ‘inherently unjust’ test”). See also GODDARD, *supra* note 206, at 77.

“but on the basis of principles and rules which because of their general character may be applied on a much wider scale.”²⁰⁹

Ultimately, what has been said thus far means that recourse to the rules of private international law “represents under the [. . .] uniform law a last resort to be used only if and to the extent that a solution cannot be found either by analogical application of specific provisions or by the application of ‘general principles’ underlying the uniform law as such,”²¹⁰ which, it is worth pointing out, promotes uniformity as much as the autonomous interpretation of the CISG mentioned earlier.

X. THE CISG’S LIMITED SCOPE OF APPLICATION: EXTERNAL GAPS

At this point, it is worth pointing out that a private international law analysis has not been resorted to often to fill the aforementioned (internal) gaps. Where courts and commentators have resorted to a general principle at all, they have generally settled the matter through the general principle, thus avoiding the need for a private international law analysis.

The aforementioned matters have, however, to be distinguished from the matters that are excluded from the CISG’s limited scope of application.²¹¹ These matters—labelled either “external gaps”²¹² or gaps “intra legem”²¹³—must, despite the lack of a specific provision to that

²⁰⁹ Bonell, *supra* note 41, at 80.

²¹⁰ *Id.* at 83.

²¹¹ See Franco Ferrari, *Das Verhältnis zwischen den Unidroit-Grundsätzen und den allgemeinen Grundsätzen internationaler Einheitsprivatrechtskonventionen. Zugleich ein Beitrag zur Lückenfüllung in staatlichen Gerichten*, JURISTENZEITUNG 9, 10 (1998); McMahon, *supra* note 41, at 992; Paal, *supra* note 197, at 65 (2011); see American Arbitration Association, Arbitral Award of Oct. 23, 2007, available at <http://cisgw3.law.pace.edu/cases/071023a5.html>.

²¹² For the use of this expression, see, e.g., Basedow, *supra* note 197, at 135; FRIGGE, *supra* note 38, *passim*; ALDO FRIGNANI & MARCO TORSELLO, *IL CONTRATTO INTERNAZIONALE* 444 (2d ed. 2010); André Janssen & Sörren Claas Kiene, *The CISG and Its General Principles*, in *CISG METHODOLOGY*, at 261, 264 (André Janssen & Olaf Meyer eds., 2009); Viscasillas, *supra* note 41, at 112; Paal, *supra* note 197, at 80; Schwenzer & Hachem, *supra* note 170, at 134; see Amtsgericht Sursee [AG Sursee] [District Court] Switz., Sept. 12, 2008, available at <http://cisgw3.law.pace.edu/cases/080912s1.html>; for remarks criticizing the use of the expression mentioned in the text, see Ernst A. Kramer, *Uniforme Interpretation von Einheitsprivatrecht—mit besonderer Berücksichtigung von Art. 7 UNKR*, ÖSTERREICHISCHE JURISTISCHE BLÄTTER 137, 147 n.90 (1996).

²¹³ Colligan, *supra* note 196, at 48; DEJACO, *supra* note 41, at 43; Felemegas, *supra* note 41, at 277; Graffi, *supra* note 41, at 879; Hackney, *supra* note 196, at 478; McMahon, *supra* note 41, at 1002;

effect, directly be solved in conformity with the law applicable by virtue of the rules of private international law²¹⁴ (or, where applicable, with other uniform substantive law conventions),²¹⁵ as also pointed out in case law.²¹⁶ This approach is completely different from the one relating to the one to be adopted in respect of the internal gaps. From this, one can easily derive not only how important the exact distinction between the aforementioned types of gaps is, but also how the attitude towards resort to private international law may shape how certain matters are dealt with. In effect, whereas some commentators will have resort to private international law only rarely, because they are convinced that the CISG displaces the need for such resort and feel more comfortable with recourse to general principles, and, therefore, will have no problem interpreting the CISG's scope broadly, other commentators will be inclined to favor the private international law approach.²¹⁷

This problem is not limited to commentators; courts also have difficulties in determining whether a matter has to be settled by resorting to the CISG's general principles rather than by having recourse to private international law to determine the substantive rules to apply. This is evidenced, for instance, by the contradictory case law in respect of the

in case law, *see* Tribunale di Padova, It., Feb. 25, 2004, *available at* <http://cisgw3.law.pace.edu/cases/040225i3.html>.

²¹⁴ Janssen & Kiene, *supra* note 212, at 261; MAGNUS, *supra* note 35, at 124; Thomas Pfeiffer, *Die Entwicklung des Internationalen Vertrags-, Schuld- und Sachenrechts in den Jahren 1995/1996*, NEUE JURISTISCHE WOCHENSCHRIFT 1207, 1212 (1997).

²¹⁵ Bonell, *supra* note 41, at 75, also stresses that “[a] first condition for the existence of a gap in the sense of Article 7(2) is that the case at hand relates to ‘matters governed by [the] Convention.’ Issues which are not within the scope of the Convention have been deliberately left to the competence of the existing non-unified national laws.”

²¹⁶ *See* Tribunale di Padova, It., Mar. 31, 2004, *available at* <http://cisgw3.law.pace.edu/cases/040331i3.html>.

The missing criteria on the base of which the rate of interest is to be determined has generated a dispute in doctrine among those who sustain that the question is dealt with by the Convention, even if not expressly (internal gap), and those who, on the other hand, believe that the determination of the rate of interest is a subject excluded from the scope of application of the Convention (external gap). In the first hypothesis, it is possible to make reference to the general principles of the Convention; meanwhile, in the second, it is necessary to make reference to the rules of private international law, in order to identify the applicable substantive law.

²¹⁷ One must wonder however, whether it is true, as stated by Winship, *supra* note 11, at 529, that “[a] reader trained in the civil law will feel more comfortable with this [general principles] approach than a common lawyer.”

determination of the place of performance of monetary obligations other than that of the payment of price.²¹⁸

When determining the place of payment of compensation due for non-conformity of the goods one court, for instance, stated that “if the purchase price is payable at the place of business of the seller” under Article 57,²¹⁹ then “this indicates a general principle valid for other monetary claims as well.”²²⁰ In a comparable situation, another court, considering an action for restitution of an excess in the price received by the seller, stated that there was a general principle under which “payment is to be made at the creditor’s domicile.”²²¹ The Austrian Supreme Court, which had previously adopted the reverse principle, decided that the gap of the CISG in respect of the legal consequences of avoidance, particularly with regard to the performance of restitution obligations, was to be filled by means of a general principle of the CISG, according to which “the place for performance of restitution obligations should be determined by transposing the primary obligations—through a mirror effect—into restitution obligations.”²²²

Whereas all the foregoing decisions assume that the matter is governed by, albeit not expressly settled in, the CISG, there is one decision which, in this author’s opinion correctly, denies the existence of a general principle under the CISG to be used to determine the place of performance for all monetary obligations²²³ and determines the place of performance more

²¹⁸ For a detailed analysis of the place of performance of the monetary obligations and its effects, see, e.g., DOMINIK K. LEHNER, *ERFÜLLUNGORT UND GERICHTSSTAND FÜR GELDSCHULDEN IM NATIONALEN RECHT UND IM INTERNATIONALEN EINHEITSRECHT* (1991).

²¹⁹ See the text of Article 57 CISG: “(1) If the buyer is not bound to pay the price at any other particular place, he must pay it to the seller:

(a) at the seller’s place of business; or

(b) if the payment is to be made against the handing over of the goods or of documents, at the place where the handing over takes place.

(2) The seller must bear any increase in the expenses incidental to payment which is caused by a change in his place of business subsequent to the conclusion of the contract.”

²²⁰ CLOUT Case No. 49, Oberlandesgericht Düsseldorf [OLG Düsseldorf] [Provincial Court of Appeal] Ger., July 2, 1993, available at <http://cisgw3.law.pace.edu/cases/930702g1.html>.

²²¹ Cour d’appel Grenoble, Oct. 23, 1993, *REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ* 756 (1997).

²²² CLOUT Case No. 422, Oberster Gerichtshof [Supreme Court] Aus., June 29, 1999, docket No. 1 Ob 74/99k available at <http://cisgw3.law.pace.edu/cases/990629a3.html>.

²²³ Cour d’appel Paris [CA Paris] [Appeal Court] Fr., Jan. 14, 1998, available at <http://cisgw3.law.pace.edu/cases/980114f1.html>.

correctly by resorting to the law applicable by virtue of its private international law rules.²²⁴

XI. THE CISG'S LIMITED SCOPE OF APPLICATION AND ARTICLE 4 CISG

From the foregoing, it becomes apparent how important the distinction between the various types of gaps and their identification really are. Unfortunately, however, the CISG does not set forth specific criteria on how to make the distinction. Article 4 CISG provides, however, some help, as it contains a (non-exhaustive²²⁵) list of matters the CISG is not concerned with, namely the validity of the contract or of any of its provisions or of any usage as well as the effect which the contract may have on the property in the goods sold.

At first sight, the aforementioned part of Article 4 does not seem to cause any problems (one author even stated that the provision at hand was superfluous since it only stated the obvious²²⁶). Quite the contrary is true. The insertion, for instance, of the introductory wording to Article 4(a) and (b) "except as otherwise expressly provided in this Convention," leads to the conclusion that even where a dispute concerns a matter listed either in Article 4(a) or Article 4(b) and, thus, apparently excluded from the CISG's scope of application and therefore left (mostly) to the applicable law to be determined by resorting to the rules of private international law of the forum, one cannot simply disregard the CISG. Rather, one has to first examine whether the CISG provides a solution for the specific problem.²²⁷ With reference to the validity, for instance, which according to Article 4(a) is a matter excluded from the CISG's scope of application,²²⁸ this means

²²⁴ See Ferrari, *supra* note 38, at 228.

²²⁵ Peter Huber, *Some Introductory Remarks on the CISG*, INTERNATIONALES HANDELSRECHT 228, 231 (2006); ANNE-KATHRIN SCHLUCHTER, DIE GÜLTIGKEIT VON KAUFVERTRÄGEN UNTER DEM UN-KAUFRECHT: WIE GESTALTET SICH DIE ERGÄNZUNG DES EINHEITSRECHTS MIT DEUTSCHEN UND FRANZÖSISCHEN NICHTIGKEITSNORMEN? 26 (1996).

²²⁶ Khoo, *supra* note 90, at 45.

²²⁷ See Franco Ferrari, *Jurisprudence concernant les questions non abordées par la CVIM*, INT'L BUS. L.J. 835, 836 (1998).

²²⁸ For a similar affirmation is case law, see *MSS, Inc. v. Maser Corporation*, No. 3:09-CV-00601, 2011 WL 2938424 at 3 (M.D. Tenn. July 18, 2011); available at <http://cisgw3.law.pace.edu/cases/110718u1.html>; HG Aargau [Commercial Court] Switzerland, h Mar. 10, 2010, available at <http://www.globalsaleslaw.org/content/api/cisg/urteile/2176.pdf>; Tribunal cantonal du Valais [Higher

that one has to first look into whether the validity issue in dispute is expressly dealt with by the CISG before resorting to the law applicable by virtue of the private international law rules. This is why, for instance, one cannot automatically resort to private international law rules to solve problems relating to the formal validity of the contract, since the CISG is (“expressly”) concerned with it: Article 11 provides that a contract governed by the CISG need not be concluded in or evidenced by writing and is not subject to any other requirement of form, thus dealing with an issue that in many legal systems is considered to be an issue of validity.²²⁹

The aforementioned problem is not the only one that arises from the exclusion of validity from the CISG’s scope of application. Another (rather important) one is that of defining “validity” for the purposes of the CISG. The importance of that definition becomes evident when one considers how different the definitions found in the various legal systems actually are.²³⁰ Various attempts at defining the concept were made by U.S. courts;²³¹ according to those courts’ decisions, a validity issue is “any issue by which the domestic law would render the contract void, voidable, or unenforceable.”²³² Whether this definition will prevail remains to be seen.

Cantonal Court] Switzerland, Jan. 28, 2009, *available at* <http://cisgw3.law.pace.edu/cases/090128s1.html> (CISG-online Case 2025); *Berry v. Ken M. Spooner Farms, Inc.*, No. C05-5538FDB, 2006 WL 1009299, at 1–2 (W.D. Wash. Apr. 13, 2006); China International Economic and Trade Arbitration Commission (CIETAC), June 1, 2005, *available at* <http://cisgw3.law.pace.edu/cases/040600c1.html> (CISG-online Case 1909); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Feb. 3, 2004, *available at* <http://cisgw3.law.pace.edu/cases/040203r1.html> (CISG-online Case 1180); *Geneva Pharmaceuticals Tech. Corp. v. Barr Laboratories, Inc.*, 201 F. Supp. 2d 236, 282 (S.D.N.Y. 2002); *Asante Technologies, Inc. v. PMC-Sierra, Inc.*, 164 F. Supp. 2d 1142, 1152 (N.D. Cal. 2001); Oberster Gerichtshof [Supreme Court] Austria, Sept. 7, 2000, *available at* http://www.cisg.at/8_2200v.htm (CISG-online Case 642); Hof van Beroep Antwerpen [Appellate Court] Belg., June 18, 1996, *available at* <http://cisgw3.law.pace.edu/cases/960618b1.html> (CISG-online Case 758).

²²⁹ Peter Schlechtriem & Martin Schmidt-Kessel, *Art. 11, in* KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT—CISG, *supra* note 33, at 236, 237.

²³⁰ For a comparative overview of the existing concepts of validity, *see* ERNST A. KRAMER, *DER IRRTUM BEIM VERTRAGSSCHLUSS: EINE WELTWEIT RECHTSVERGLEICHENDE BESTANDSAUFNAHME* (1998).

²³¹ *Berry A. v. Ken M. Spooner Farms, Inc.*, No. C05-5538FDB, 2006 WL 1009299, at 2 (W.D. Wash. 2006), *available at* <http://cisgw3.law.pace.edu/cases/060413u1.html>; *Geneva Pharmaceuticals Tech. Corp. v. Barr Labs. Inc.*, 201 F. Supp. 2d 236, 282 (S.D.N.Y. 2002), *available at* <http://cisgw3.law.pace.edu/cases/020510u1.html>.

²³² The definition cited in the decision referred to in the text was borrowed from Hartnell, *supra* note 29, at 45, to which the courts expressly refer.

What can be said, however, is that even in applying that definition the outcome of those decisions that had to deal, for instance, with the issue of whether a contract was validly concluded by a third person acting on behalf of one of the parties would not have been different: that issue would still be considered one left to the applicable national law to be determined on the basis of the rules of private international law, since agency, as mentioned on several occasions already, is not governed by the CISG; neither is the validity of standard contract terms, as correctly pointed out in case law:²³³ that issue is also left to the law applicable by virtue of the rules of private international law.

However, Article 4(a) does not only exclude from its scope the validity of the contract or of its provisions, such as the retention of title clauses inserted into the contract,²³⁴ but also the validity of usages, which is why this issue as well is left to the domestic law to be identified by means of the relevant private international law rules.²³⁵ This validity issue must, however, be distinguished from that of how usages are to be defined, under which circumstances they are binding for the parties and what their relationship is with the rules set forth in the CISG, as these issues are dealt with in Article 9.²³⁶

²³³ See Oberster Gerichtshof [Supreme Court] Aus., Sept. 7, 2000, available at http://www.cisg.at/8_2200v.htm; RB Zutphen [District Court] Neth., May 29, 1997, available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=353&step=FullText> (CISG-online Case 546); AG Nordhorn [Petty District Court] Ger., June 14, 1994, available at <http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/259.htm> (CISG-online Case 259).

²³⁴ See Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, July 15, 2008, available at <http://cisgw3.law.pace.edu/cases/080715sb.html> (CISH-online Case 1795); Usinor Industrie v. Leeco Steel Products, Inc., 209 F. Supp. 2d 880, 886–87 (N.D. Ill. 2002), available at <http://cisgw3.law.pace.edu/cases/020328u1.html>; Roder Zelt- und Hallenkonstruktionen GmbH v. Rosedown Park Pty Ltd and Reginald R Eustace, Federal Court, South Australian District, Adelaide, Apr. 28, 1995, available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=197&step=FullText>; OLG Koblenz [Provisional Court of Appeal] Ger., Jan. 16, 1992, available at <http://www.cisg-online.ch/cisg/urteile/47.htm>.

²³⁵ See Oberster Gerichtshof [Supreme Court] Aus., Mar. 21, 2000, available at http://www.cisg.at/10_34499g.htm.

²³⁶ See Oberster Gerichtshof [Supreme Court] Aus., Oct. 15, 1998, available at <http://cisgw3.law.pace.edu/cases/981015a3.html> (CISG-online Case 380).

Article 4 also makes clear that the CISG does not govern the passing of property of the goods sold,²³⁷ thus making it necessary, once again, to resort to private international law rules to determine the applicable law.

XII. PERSONAL INJURY AND OTHER MATTERS NOT GOVERNED BY THE CISG

Article 4 CISG is, however, not the only provision that expressly lists matters not governed by the CISG. According to its Article 5, the CISG is not concerned with the liability for death or personal injury caused by the goods to any person either, as also pointed out in case law.²³⁸ Not unlike Article 4, at first sight Article 5 seems not to raise any problems; unfortunately, this is not true at all. One problem relates, for instance,²³⁹ to whether the exclusion really is a general one, *i.e.*, whether it really covers the liability for death or personal injury caused by the goods to “any person.” In this respect it has been correctly pointed out that the exclusion covers “both injury to the buyer or others persons participating at least indirectly in the contract and also injury to non-participating third parties.”²⁴⁰ As a consequence of the liability for death or personal injury “to

²³⁷ See also OLG München [Provincial Appellate Court] Ger., Mar. 5, 2008, available at <http://cisgw3.law.pace.edu/cases/080305g1.html>; China International Economic and Trade Arbitration Commission, Arbitral Award of Apr. 18, 2008, available at <http://cisgw3.law.pace.edu/cases/080418c1.html>; Usinor Industeel v. Leeco Steel Products, Inc., 209 F. Supp. 2d 880, 885 (N.D. Ill. 2002), available at <http://cisgw3.law.pace.edu/cases/020328u1.html>; St. Paul Insurance Company et al. v. Neuromed Medical Systems & Support et al., 00 CIV. 9344 (SHS), 2002 WL 465312, at 5 (S.D.N.Y. 2002), *aff'd*, St. Paul Guardian Ins. Co. v. Neuromed Med. Sys., & Support, GMBH, 53 F. App'x 173 (2d Cir. 2002), available at <http://cisgw3.law.pace.edu/cases/020326u1.html>.

²³⁸ See HG Zürich [Commercial Court] Switz, Apr. 26, 1995, available at <http://cisgw3.law.pace.edu/cases/950426s1.html>.

²³⁹ For papers dealing with Article 5 CISG, see Rolf Herber, *UN-Kaufrechtsübereinkommen: Produkthaftung—Verjährung*, MONATSSCHRIFT FÜR DEUTSCHES RECHT 105 (1993); Rolf Herber, *Mangelfolgeschäden nach dem CISG und nationales Deliktsrecht*, IHR 187 (2001); DYDRA KUHLEN, *PRODUKTHAFTUNG IM INTERNATIONALEN KAUFRECHT. ENTSTEHUNGSGESCHICHTE, ANWENDUNGSBEREICH UND SPERRWIRKUNG DES ART. 5 DES WIENER UN-KAUFRECHTS (CISG)* (1997); Dirk Otto, *Produkthaftung nach dem UN-Kaufrecht*, MONATSSCHRIFT FÜR DEUTSCHES RECHT 533 (1992); Dirk Otto, *Nochmals—UN-Kaufrecht und EG-Produkthaftungsrichtlinie*, MONATSSCHRIFT FÜR DEUTSCHES RECHT 306 (1993); DIRK SCHNEIDER, *UN-KAUFRECHT UND PRODUKTEHAFTPFLICHT* (1995).

²⁴⁰ KUHLEN, *supra* note 239, at 61; see also AUDIT, *supra* note 41, at 36; MAGNUS, *supra* note 35, at 143; Jean-Pierre Plantard, *Un nouveau droit uniforme de la vente internationale: La Convention des Nations Unies du 11 avril 1980*, J. DU DROIT INT'L 311, 327 (1988); Reinhart, *supra* note 34, at 25.

any person” being excluded from the CISG’s scope of application, the buyer’s claims for pecuniary loss resulting from a claim against the buyer itself for personal injury caused by the goods the buyer sold in a sub-sale is also excluded from the CISG’s scope of application²⁴¹ and, therefore, has to be decided in conformity with the domestic law to be identified by means of the relevant rules of private international law.

Whereas liability for personal injury is excluded from the CISG’s scope, liability for damage caused to property is not.²⁴² This, of course, may cause a conflict between contractual claims based on the CISG and tort claims based on domestic law.²⁴³ The issue is whether the damaged party can also bring a tort claim or whether the CISG pre-empts that possibility, even though the CISG, as correctly pointed out in case law, is not concerned with tort law.²⁴⁴ In this author’s opinion,²⁴⁵ the view according to which the CISG is exclusively applicable,²⁴⁶ *i.e.*, that it also prevails over all domestic tort law,²⁴⁷ is to be rejected.²⁴⁸ The reason for this can be summarized as follows:

²⁴¹ AUDIT, *supra* note 41, at 36; FRANCO FERRARI, VENDITA INTERNAZIONALE DI BENI MOBILI. ART. 1-13. AMBITO DI APPLICAZIONE. DISPOSIZIONI GENERALI 105 n.13 (1994); Ferrari, *supra* note 41, at 103; HERBER, *supra* note 65, at 50; for a court decision holding the opposite view, see OLG Düsseldorf [Provincial Court of Appeal] Ger., July 2, 1993, available at <http://www.cisg-online.ch/cisg/urteile/74.htm>.

²⁴² FERRARI, *supra* note 103, at 106; KRITZER, *supra* note 98, at 95; Peter Schlechtriem, *The Borderland of Tort and Contract—Opening a New Frontier?*, 21 CORNELL INT’L L.J. 467, 471 (1988); contra Muna Ndulo, *The Vienna Sales Convention 1980 and the Hague Uniform Laws on International Sale of Goods 1964: A Comparative Analysis*, 38 INT’L & COMP. L.Q. 1, 5 (1989); in case law see HG Zürich [Commerical Court] Switz., Apr. 26, 1995, available at <http://cisgw3.law.pace.edu/cases/950426s1.html>.

²⁴³ As the CISG pre-empts the applicability of domestic contract law, domestic rules that classify product liability as a contract law issue cannot be applied concurrently with the CISG.

²⁴⁴ Geneva Pharmaceuticals Tech. Corp. v. Barr Labs. Inc., 201 F. Supp. 2d 236, 286 (S.D.N.Y. 2002), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/020510u1.html#svia>; Viva Vino Import Corporation v. Farnese Vini S.r.l., CIV. A. 99-6384, 2000 WL 1224903, at 1 (E.D. Pa. 2000), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/000829u1.html>.

²⁴⁵ See Ferrari, *supra* note 33, at 132, 135.

²⁴⁶ For this view, see, however, KUHLEN, *supra* note 239, at 114; Otto, *supra* note 239, at 537; GRITLI RYFFEL, DIE SCHADENERSATZHAFTUNG DES VERKÄUFERS NACH DEM WIENER ÜBEREINKOMMEN ÜBER INTERNATIONALE WARENKAUFVERTRÄGE VOM 11. APRIL 1980 136 (1992).

²⁴⁷ See Herber, *supra* note 239, at 105.

²⁴⁸ CZERWENKA, *supra* note 86, at 168; Ulrich Magnus, *Aktuelle Fragen des UN-Kaufrechts*, ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 79, 95 (1993); Plantard, *supra* note 240, at 327; Mauro Tescaro, *Il concorso tra i rimedi contrattuali di cui alla Convenzione di Vienna sulla vendita internazionale di beni mobile (CISG) e i rimedi domestico*, CONTRATTO E IMPRESA/EUROPA 319, 329

If the goods are defective—non-conforming to the contract or not—and cause bodily injury, we are outside the scope of the CISG, Article 5. But even if only property damages were caused, [...] we are outside the principal domain of interests created by contracts and protected by contractual remedies, and would have entered the field of genuinely extra-contractual remedies. Therefore, a tort action for property damages caused by defective and non-conforming goods should not be barred by an omission to give notice within reasonable time under Article 30 of CISG.”²⁴⁹

Furthermore, the solution advocated here is also more compatible with the CISG’s dispositive nature: if the CISG were to deal exclusively with all the claims—whether contractual or extra-contractual—arising from personal injury and the CISG were to be excluded (or the relevant provisions were derogated from), the damaged party would not be able to claim damages for the personal injury at all. This cannot be. If this is true, then, however, one may have to have recourse to private international law to determine, for instance, the applicable tort law.

The aforementioned matters expressly listed as falling outside the CISG’s scope of application are not the only ones the CISG is not concerned with. There are many other matters that do fall outside the CISG’s scope of application²⁵⁰ and are left to the applicable law which, where no other uniform law convention applies, such as the UNCITRAL Convention on the Limitation Period in the International Sale of Goods, is to be determined by means of the private international law rules of the forum. Among the matters identified by courts and commentators as not being at all governed by the CISG are, among others, the validity of a choice of forum clause,²⁵¹ the validity of a penalty clause,²⁵² the validity of

(2007); Peter Schlechtriem, *Einheitliches UN-Kaufrecht. Das Übereinkommen der Vereinten Nationen vom 11. April 1980 über Verträge über den internationalen Warenkauf (CISG)*, JURISTENZEITUNG 1040 (1988); in case law see most recently *Electrocraft Arkansas, Inc. v. Super Electric Motors, Ltd. et al.*, 4:09CV00318 SWW, 2009 WL 5181854, at 7 (E.D. Ark. 2009), available at <http://cisgw3.law.pace.edu/cases/091223u1.html>; *Geneva Pharmaceuticals Tech. Corp. v. Barr Labs. Inc.*, 201 F. Supp. 2d 236, 287 (S.D.N.Y. 2002).

²⁴⁹ Schlechtriem, *supra* note 242, at 473–74.

²⁵⁰ For an overview, see apart from the paper quoted in note 227, Claude Witz, *CVIM: interprétation et questions non couvertes*, 1 INT’L BUS. L.J. 253 (2001).

²⁵¹ See *Camara Nacional de los Apelaciones en lo Comercial, Argentina* [Appellate Court] Arg., Oct. 14, 1993, available at <http://www.uc3m.es/uc3m/dpto/PR/dppr03/cisg/sargen6.htm>.

²⁵² See *Serbian Chamber of Commerce, Arbitral Award of July 15, 2008*, available at <http://www.globalsaleslaw.org/content/api/cisg/urteile/1795.pdf>; *OLG Hamburg*, Jan. 25, 2008, available at <http://cisgw3.law.pace.edu/cases/080125g1.html>; *Tribunal of International Commercial*

a settlement agreement,²⁵³ the assignment of receivables,²⁵⁴ the assignment of contract,²⁵⁵ statute of limitations,²⁵⁶ the issue of whether a court has

Arbitration at the Russian Federation Chamber of Commerce and Industry, Arbitral Award Mar. 1, 2006, *available at* <http://cisgw3.law.pace.edu/cases/060301r1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Arbitral Award Jan. 13, 2006, *available at* <http://cisgw3.law.pace.edu/cases/060113r1.html>; China International Economic and Trade Arbitration Commission, Arbitral Award Dec. 7, 2005, *available at* <http://cisgw3.law.pace.edu/cases/051207c1.html>; China International Economic and Trade Arbitration Commission, Arbitral Award Nov. 9, 2005, *available at* <http://cisgw3.law.pace.edu/cases/051109c1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Arbitral Award Apr. 27, 2005, *available at* <http://www.globalsaleslaw.org/content/api/cisg/urteile/1500.pdf>; China International Economic and Trade Arbitration Commission, Arbitral Award Sept. 1, 2004, *available at* <http://cisgw3.law.pace.edu/cases/040900c1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Arbitral Award June 9, 2004, *available at* <http://cisgw3.law.pace.edu/cases/040609r1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Arbitral Award May 24, 2004, *available at* <http://cisgw3.law.pace.edu/cases/040524r1.html>; RB Koophandel Hasselt, June 17, 1998, *available at* <http://www.law.kuleuven.ac.be/int/tradelaw/WK/1998-06-17.htm>; Hof van Beroep Antwerpen, June 18, 1996, *available at* <http://www.law.kuleuven.ac.be/int/tradelaw/WK/1996-06-18.htm>; Hof Arnhem, Aug. 22, 1995, *available at* <http://cisgw3.law.pace.edu/cases/950822n1.html>; ICC Court of Arbitration, Arbitral Award No. 7197, J. DU DROIT INT'L 1028 (1993).

²⁵³ See LG Aachen, May 14, 1993, *available at* <http://cisgw3.law.pace.edu/cases/930514g1.html>.

²⁵⁴ See HG Aargau, Nov. 26, 2008, *available at* <http://cisgw3.law.pace.edu/cases/081126s1.html>; District Court Trnava, Sept. 17, 2008, *available at* <http://www.globalsaleslaw.org/content/api/cisg/urteile/1991.pdf>; OLG Hamburg, Jan. 25, 2008, *available at* <http://cisgw3.law.pace.edu/cases/080125g1.html>; Regional Court Kosice, May 22, 2007, *available at* <http://cisgw3.law.pace.edu/cases/070528k1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Arbitral Award May 27, 2005, *available at* <http://cisgw3.law.pace.edu/cases/050527r1.html>; Tribunale di Padova, Feb. 25, 2004, *available at* <http://cisgw3.law.pace.edu/cases/040225i3.html>; Supreme Court of Poland, Dec. 19, 2003, *available at* <http://cisgw3.law.pace.edu/cases/031219p1.html>; Austrian Supreme Court, Sept. 7, 2000, *available at* http://www.cisg.at/8_2200v.htm; Austrian Supreme Court, June 25, 1998, *available at* <http://www.unilex.info/case.cfm?pid=1&do=case&id=347&step=FullText>; German Supreme Court, Feb. 12, 1998, *available at* <http://cisgw3.law.pace.edu/cases/980212g1.html>; OG Kanton Thurgau, Dec. 19, 1995, *available at* <http://cisgw3.law.pace.edu/cases/951219s1.html>; Trib. Comm. Nivelles, Sept. 19, 1995, *available at* <http://www.law.kuleuven.ac.be/int/tradelaw/WK/1995-09-19.htm>; OLG Hamm, Feb. 8, 1995, RIW 153 (1997); BG Arbon, Dec. 9, 1994, *available at* <http://www.unilex.info/case.cfm?pid=1&do=case&id=172&step=FullText>.

²⁵⁵ See German Supreme Court, Feb. 15, 1995, *available at* <http://cisgw3.law.pace.edu/cases/950215g1.html>.

²⁵⁶ See Maxxsonics USA, Inc. v. Fengshun Peiying Electro Acoustic Co., Ltd., 2012 WL 962698 (N.D. Ill. 2012); Swiss Supreme Court, May 18, 2009, *available at* <http://www.globalsaleslaw.org/content/api/cisg/urteile/1900.pdf>; AG Basel-Stadt, Sept. 26, 2008, *available at* <http://www.globalsaleslaw.org/content/api/cisg/urteile/1732.pdf>; Court of First Instance of Athens, Docket No. 4505/2009 (no date indicated), *available at* <http://cisgw3.law.pace.edu/cases/094505gr.html>; Supreme Court Slovak Republic, Apr. 30, 2008, *available at* <http://www.globalsaleslaw.org/>

jurisdiction,²⁵⁷ and generally, any other issue of procedural law,²⁵⁸ the assumption of debts,²⁵⁹ the acknowledgement of debts,²⁶⁰ the effects of the contract on third parties²⁶¹ as well as the issue of whether one is jointly liable.²⁶² One court ruled that the question of who has priority rights in the goods as between the seller and the third party creditor was also beyond the

content/api/cisg/urteile/1873.pdf; Audiencia Provincial de Valencia, Mar. 13, 2007, *available at* <http://turan.uc3m.es/cisg/sespan69.htm>; OLG Köln, Feb. 13, 2006, *available at* <http://www.globalsaleslaw.org/content/api/cisg/urteile/1219.pdf>; Cour d'Appel Versailles, Oct. 13, 2005, *available at* <http://cisgw3.law.pace.edu/cases/051013fl.html>; Regional Court Bratislava, Oct. 11, 2005, *available at* <http://cisgw3.law.pace.edu/cases/051011k1.html>; OLG Linz, Aug. 8, 2005, *available at* <http://www.globalsaleslaw.org/content/api/cisg/urteile/1087.pdf>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Arbitral Award June 2, 2005, *available at* <http://cisgw3.law.pace.edu/cases/050602r1.html>; KG Nidwalden, May 23, 2005, *available at* <http://cisgw3.law.pace.edu/cases/050523s1.html>; LG Bamberg, Apr. 13, 2005, *available at* <http://cisgw3.law.pace.edu/cases/050413g1.html>; Hof van Beroep Gent, Oct. 4, 2004, *available at* <http://cisgw3.law.pace.edu/cases/041004b1.html>; OLG Karlsruhe, July 20, 2004, *available at* <http://cisgw3.law.pace.edu/cases/040720g1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Arbitral Award of June 9, 2004, *available at* <http://cisgw3.law.pace.edu/cases/040609r1.html>; Hof van Beroep Gent, May 17, 2004, *available at* <http://cisgw3.law.pace.edu/cases/040517b1.html>; Tribunal of International Commercial Arbitration at the Ukraine Chamber of Commerce and Trade, Arbitral Award of Apr. 15, 2004, *available at* <http://cisgw3.law.pace.edu/cases/040415u5.html>; Tribunale di Padova, Feb. 25, 2004, *available at* <http://cisgw3.law.pace.edu/cases/040225i3.html>; RB Koophandel Ieper, Jan. 29 2001, *available at* <http://www.law.kuleuven.ac.be/int/tradelaw/WK/2001-01-29.htm>; Austrian Supreme Court, Sept. 7, 2000, *available at* http://www.cisg.at/8_2200v.htm; Tribunale di Vigevano, July 12, 2000, *available at* <http://cisgw3.law.pace.edu/cases/000712i3.html>; OLG München, Jan. 21, 1998, *available at* <http://www.cisg-online.ch/cisg/urteile/536.htm>; Austrian Supreme Court, June 25, 1998, *available at* <http://www.unilex.info/case.cfm?pid=1&do=case&id=347&step=FullText>; LG Heilbronn, Sept. 15, 1997, *available at* <http://www.cisg-online.ch/cisg/urteile/562.htm>; Cour de Justice de Genève, Oct. 10, 1997, *available at* <http://cisgw3.law.pace.edu/cases/971010s1.html>; LG Düsseldorf, Oct. 11, 1995, *available at* <http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/180.htm>; OLG Hamm, June 9, 1995, *available at* <http://cisgw3.law.pace.edu/cases/950609g1.html>; ICC Court of Arbitration, Arbitral Award No. 7660/KJ, ICC INTERNATIONAL COURT OF ARBITRATION BULLETIN 69 (1995).

²⁵⁷ See HG Kanton Zürich, Apr. 26, 1995, *available at* <http://cisgw3.law.pace.edu/cases/950426s1.html>.

²⁵⁸ See KG Wallis, Feb. 21, 2005, *available at* <http://cisgw3.law.pace.edu/cases/050221s1.html>; German Supreme Court, July 11, 2000, *available at* <http://www.cisg.law.pace.edu/cisg/text/000711s1german.html>.

²⁵⁹ See Austrian Supreme Court, Apr. 24, 1997, *available at* <http://cisgw3.law.pace.edu/cases/970424a3.html>.

²⁶⁰ See OLG Hamm, June 23, 1998, *available at* <http://cisgw3.law.pace.edu/cases/980623g1.html>.

²⁶¹ See *Usinor Industrie v. Leeco Steel Products, Inc.*, 209 F. Supp. 2d 880, 886–87 (N.D. Ill. 2002), *available at* <http://cisgw3.law.pace.edu/cases/020328u1.html>; German Supreme Court, Feb. 12, 1998, NJW 3205 (1998).

²⁶² See LG München, Jan. 25, 1996, *available at* <http://www.cisg-online.ch/cisg/urteile/278.htm>.

scope of the CISG and had therefore to be governed by the applicable domestic law.²⁶³

Whereas there is not too much dispute as to whether the foregoing matters are excluded from the CISG's scope of application, there are matters in respect of which case law is contradictory. This is true, to just give one example, in respect of set-off. Although the majority of cases rightly exclude it from the matters the CISG is concerned with,²⁶⁴ there are some instances²⁶⁵ in which courts stated that set-off was governed by the

²⁶³ *Usinor Industrieel v. Leeco Steel Products, Inc.*, 209 F. Supp. 2d 880 (N.D. Ill. 2002), available at <http://cisgw3.law.pace.edu/cases/020328u1.html>.

²⁶⁴ See *Maxxsonics USA, Inc. v. Fengshun Peiying Electro Acoustic Co., Ltd.*, 2012 WL 962698 (N.D. Ill. 2012); Bundesgerichtshof [Federal Supreme Court] Ger., June 23, 2010, available at <http://www.globalsaleslaw.org/content/api/cisg/urteile/2129.pdf>; AG Basel-Stadt [Appellate Court] Switz., Sept. 26, 2008, available at <http://www.globalsaleslaw.org/content/api/cisg/urteile/1732.pdf>; OLG Köln [Provincial Appellate Court] Ger., May 19, 2008, available at <http://cisgw3.law.pace.edu/cases/080519g1.html>; Monomeles Protodikio Thessalonikis docket n. 43945/2007 [Single-Member Court of First Instance of Thessalonika], available at <http://cisgw3.law.pace.edu/cases/080002gr.html>; BGer [Supreme Court] Switz., Dec. 20, 2006, available at <http://www.globalsaleslaw.org/content/api/cisg/urteile/1426.pdf>; LG Bamberg [District Court] Oct. 23, 2006, <http://www.globalsaleslaw.org/content/api/cisg/urteile/1400.pdf>; OLG Köln [Provincial Appellate Court] Ger., Feb. 13, 2006, available at <http://cisgw3.law.pace.edu/cases/060213g1.html>; HG Zürich [Commercial Court] Switz., Dec. 22, 2005, available at <http://cisgw3.law.pace.edu/cases/051222s1.html>; OLG Linz [Appellate Court] Austria, Mar. 23, 2005, available at <http://cisgw3.law.pace.edu/cases/050323a3.html>1376; OLG Stuttgart [Provincial Appellate Court] Ger., Dec. 20, 2004, available at <http://cisgw3.law.pace.edu/cases/041220g1.html>; OLG Düsseldorf [Provincial Appellate Court] Ger., July 22, 2004, available at <http://cisgw3.law.pace.edu/cases/040722g1.html>; Bundesgericht [Supreme Court] Switz., July 7, 2004, available at <http://cisgw3.law.pace.edu/cases/040707s1.html>; Oberster Gerichtshof [Supreme Court] Austria, Oct. 22, 2001, available at <http://cisgw3.law.pace.edu/cases/011022a3.html>; Tribunale di Vigevano [District Court] It. July 12, 2000, available at <http://cisgw3.law.pace.edu/cases/000712i3.html>; AG Duisburg [Petty Court] Ger., Apr. 13, 2000, available at <http://cisgw3.law.pace.edu/cases/000413g1.html>; OLG München [Provincial Appellate Court] Ger., Mar. 11, 1998, available at <http://cisgw3.law.pace.edu/cases/980311g1.html>; KG Freiburg, Jan. 23, 1998, TRANSPORTRECHT-INTERNATIONALES HANDELSRECHT 13 (2000); LG Hagen [District Court] Oct. 15, 1997, available at <http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/311.htm>; LG München [District Court] Ger., May 6, 1997, available at <http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/341.htm>; OLG München [Provincial Appellate Court] Ger., July 9, 1997, available at <http://www.cisg-online.ch/cisg/urteile/282.htm>; OLG Düsseldorf [Provincial Appellate Court] Ger., Apr. 24, 1997, available at <http://www.cisg-online.ch/cisg/urteile/385.htm>; OLG Düsseldorf [Provincial Appellate Court] Ger., July 11, 1996, RIW 958 (1996); LG Duisburg, Apr. 17, 1996 [District Court] Ger., available at <http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/186.htm>.

²⁶⁵ For the application of the Convention to set-off in respect of receivables all arising out of contracts governed by the Convention, see AG Duisburg [Petty Court] Ger., Apr. 13, 2000, available at <http://cisgw3.law.pace.edu/cases/000413g1.html>; OLG München [Provincial Appellate Court] Ger., July 9, 1997, available at <http://www.cisg-online.ch/cisg/urteile/282.htm>.

CISG provided that the receivables all arose from contract governed by the CISG.

From the foregoing remarks it becomes evident that the very nature of the CISG—it being a non-exhaustive uniform substantive law convention—makes it impossible for it to exclude all resort to private international law.

XIII. CISG AND PARTY AUTONOMY

Even where all of the CISG's positive applicability requirements (the international one, the substantive one, the temporal one, the personal/territorial one) are met and the issues to be dealt with by the court are governed by the CISG, resorting to private international law may be necessary. The most obvious reason for this is Article 6 of the CISG, which allows the parties to "exclude the application of this Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions." By providing for this possibility, which business apparently takes advantage of rather often²⁶⁶ for fear of the unknown,²⁶⁷ the drafters of the CISG reaffirmed, despite some reservations,²⁶⁸ one of the general principles already embodied in the 1964 Hague Uniform Sales Laws,²⁶⁹ that is, the principle according to which the primary source of the rules governing

²⁶⁶ For this assertion, see Robert Koch, *Wider den formularmäßigen Ausschluß des UN-Kaufrechts*, NEUE JURISTISCHE WOCHENSCHRIFT 910, 910 (2000); Kritzer, *supra* note 10, at 148; Richard M. Lavers, *CISG: To Use or Not to Use?*, 21 INTERNATIONAL BUSINESS LAWYER 10, 10 (1993); Lenden Webb, *International BBB Ratings à la Ebay: A Proposal for an Improved Online Better Bureau to Facilitate International Business Transactions*, 35 CAL. W. INT'L L.J. 127, 129 (2004); Katharina Pistor, *The Standardization of Law and Its Effect on Developing Economies*, 50 AM. J. COMP. L. 97, 111 (2002).

²⁶⁷ For this reason behind the CISG's exclusion, see McNamara, *supra* note 191, at 11, referring to John E. Murray Jr., *The Neglect of CISG: A Workable Solution*, 17 J.L. & COM. 365, 365 (1998).

²⁶⁸ During the drafting process, some States expressed reservations to the principle of party autonomy laid down in Article 6 CISG; "[t]heir concern was that, in practice, the principle could be abused by the economically stronger party imposing his own national law or contractual terms far less balanced than those contained in the Convention," Michael J. Bonell, *Art. 6*, in COMMENTARY ON THE INTERNATIONAL SALES LAW, *supra* note 90, at 51, 51; *see also* 1 UNCITRAL YEARBOOK 168 (1968–1970); 2 UNCITRAL YEARBOOK 43–44 (1971); 3 UNCITRAL YEARBOOK 73 (1973).

²⁶⁹ Despite some textual differences, Article 6 CISG is based upon Article 3 ULIS, as has often been pointed out; *see, e.g.*, Bonell, *supra* note 41, at 51; Rolf Herber, *Art. 6*, in KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT, *supra* note 91.

international sales contracts²⁷⁰ is party autonomy.²⁷¹ By stating that the CISG can be excluded, the drafters clearly acknowledged the dispositive nature of the CISG²⁷²—emphasized also in case law²⁷³—and the “central

²⁷⁰ For papers on the sources of international sales law, see Franco Ferrari, *What sources of law for contracts for the international sale of goods? Why one has to look beyond the CISG*, INTERNATIONALES HANDELSRECHT 1 (2006); Franco Ferrari, *Quelles sources de droit pour les contrats de vente internationale de marchandises? Des raisons pour lesquelles il faut aller au-delà de la CVIM*, INT'L BUS. L.J. 403 (2006).

²⁷¹ For a similar statement, see AUDIT, *supra* note 41, at 37 (stating that “the Convention makes of the parties’ will the primary source of the sales contract”); see also Daan Dokter, *Interpretation of exclusion-clauses of the Vienna Sales Convention*, RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 430, 432 (2004); Friedrich Enderlein, *Die Verpflichtung des Verkäufers zur Einhaltung des Lieferzeitraums und die Rechte des Käufers bei dessen Nichteinhaltung nach dem UN-Übereinkommen über Verträge über den Internationalen Warenkauf*, PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS 313, 314 (1991); Hans Hoyer, *Der Anwendungsbereich des Einheitlichen Wiener Kaufrechts*, in DAS EINHEITLICHE WIENER KAUFRECHT, *supra* note 41; MAGNUS, *supra* note 35, at 149.

In case law see Polimeles Protodikio Athinon, Greece, Docket No. 4505/2009 [Court of First Instance] Greece, available at <http://cisgw3.law.pace.edu/cases/094505gr.html>; Tribunale di Padova [District Court], Feb. 25, 2004, available at <http://cisgw3.law.pace.edu/cases/040225i3.html>; Foreign Trade Court of Arbitration attached to the Yugoslav Chamber of Commerce, Arbitral Award Serb., Dec. 9, 2002, available at <http://cisgw3.law.pace.edu/cases/021209sb.html>; Tribunale di Rimini [District Court] It., Nov. 26, 2002, available at <http://cisgw3.law.pace.edu/cases/021126i3.html>; Hof Beroep Gent [Commerce Tribunal] Belg., May 17, 2002, available at <http://www.law.kuleuven.ac.be/int/tradelaw/WK/2002-05-17.htm>; Kh Ieper [Commerce Tribunal] Belg., Jan. 29, 2001, available at <http://www.law.kuleuven.ac.be/int/tradelaw/WK/2001-01-29.htm>; LG Stendal [District Court], Oct. 12, 2000, available at <http://cisgw3.law.pace.edu/cases/001012g1.html>; Bundesgerichtshof [Federal Supreme Court] Dec. 4, 1996, available at <http://cisgw3.law.pace.edu/cases/961204g1.html>; Juzgado Nacional de Primera Instancia en lo Comercial n.10 [Court of First Instance] Arg., Oct. 6, 1994, available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=178&step=FullText>.

²⁷² BRUNNER, *supra* note 35, at 72; Sergio Carbone, *L'ambito di applicazione ed i criteri interpretativi della convenzione di Vienna*, in LA VENDITA INTERNAZIONALE. LA CONVENZIONE DELL'11 APRILE 1980 63, 78 (1981); Sergio Carbone & Riccardo Luzzatto, *I contratti del commercio internazionale*, in 11 TRATTATO DI DIRITTO PRIVATO 111, 131 (Pietro Rescigno ed., 1984); Erauw, *supra* note 101, at 47; FERRARI, *supra* note 45, at 154; Herber, *supra* note 269, at 84; Rolf Herber, “*Lex mercatoria*” und “*Principles*”—gefährliche Irrlichter im internationalen Kaufrecht, INTERNATIONALES HANDELSRECHT 1, 1 (2003); ALESSANDRA LANCIOTTI, NORME UNIFORMI DI CONFLITTO E MATERIALI NELLA DISCIPLINA CONVENZIONALE DELLA COMPRAVENDITA 146 (1992); JOCHEN LINDBACH, RECHTSWAHL IM EINHEITSRECHT AM BEISPIEL DES WIENER UN-KAUFRECHTS 67 (1996); MAGNUS, *supra* note 35, at 149; Reinhart, *supra* note 34, at 26; Giorgio Sacerdoti, *I criteri di applicazione della convenzione di Vienna sulla vendita internazionale: diritto uniforme, diritto internazionale privato e autonomia dei contratti*, RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE 733, 744 (1990); Ingo Saenger, *Art. 6 CISG*, in INTERNATIONALES VERTRAGSRECHT, *supra* note 34, at 431, 432; SCHLECHTRIEM & WITZ, *supra* note 35, at 24; Claude Witz, *L'exclusion de la Convention des Nations Unies sur les contrats de vente internationale de marchandises par la volonté des parties (Convention de Vienne du 11 avril 1980)*, RECUEIL DALLOZ CHRONIQUE 107 (1990); WITZ ET AL., *supra* note 130, at 71.

role which party autonomy plays in international commerce and, particularly, in international sales.²⁷⁴

As far as party autonomy is concerned, it must be pointed out that Article 6 CISG refers to two different lines of cases:²⁷⁵ one where the CISG's application is excluded, the other where the parties derogate from—or modify the effects of—the provisions of the CISG on a substantive level.²⁷⁶ These two situations differ from each other in that the former does,

²⁷³ For an express reference to the CISG's non-mandatory nature, see OG Kanton [Commerce Court] Switz., May 19, 2008, available at <http://globalsaleslaw.com/content/api/cisg/urteile/1738.pdf>; Shanghai High People's Court [Appellate Court] China, May 17, 2007, available at <http://cisgw3.law.pace.edu/cases/070517c1.html>; Tribunal cantonal de Vaud [Civil Court] Switz., Nov. 24, 2004, available at <http://globalsaleslaw.com/content/api/cisg/urteile/1842.pdf>; Tribunal Cantonal du Jura [Civil Court] Switz., Nov. 3, 2003, available at <http://www.cisg-online.ch/cisg/urteile/965.pdf>; Suprema Corte di Cassazione [Supreme Court] It., June 19, 2000, available at <http://cisgw3.law.pace.edu/cases/000619i3.html>; Oberster Gerichtshof [Supreme Court] Austria, Mar. 21, 2000, available at <http://cisgw3.law.pace.edu/cases/000321a3.html>; Oberster Gerichtshof [Supreme Court] Austria, Oct. 15, 1998, available at <http://cisgw3.law.pace.edu/cases/981015a3.html>; HG Wien [Commercial Court] Austria, Mar. 4, 1997, available at <http://www.cisg.at/1R4097x.htm>; Tribunal Cantonal Valais [Appellate Court] Switz., June 29, 1994, available at <http://cisgw3.law.pace.edu/cases/940629s1.html>.

²⁷⁴ Michael J. Bonell, *Commento all'art. 6 della Convenzione di Vienna*, NUOVE LEGGI CIVILI COMMENTATE 16, 16 (1989); see also Carbone, *supra* note 272, at 78 (comparing the reaffirmation of party autonomy as a basic principle of the CISG to “the recognition of a necessity for the development of international commerce”); for similar statements, see Samuel Date-Bah, *The United Nations Convention on Contracts for the International Sale of Goods, 1980: Overview and Selective Commentary*, 11 GHANA L. REV. 50, 54 (1979); Enderlein, *supra* note 271, at 316; Hoyer, *supra* note 271, at 41; PETER SCHLECHTRIEM, EINHEITLICHES UN-KAUFRECHT 21 (1981).

²⁷⁵ For this statement, see also Bonell, *supra* note 268, at 53; ESPERANZA CASTELLANOS RUIZ, AUTONOMIA DE LA VOLUNTAD Y DERECHO UNIFORME EN LA COMPRAVENTA INTERNACIONAL 37 (1998); LOHMANN, *supra* note 55, at 127; TOMAS VAZQUEZ LEPINETTE, COMPRAVENTA INTERNACIONAL DE MERCADERIAS. UNA VISION JURISPRUDENCIAL 86 (2000); WOLFGANG WASMER, VERTRAGSFREIHEIT IM UN-KAUFRECHT 21 (2004).

²⁷⁶ For this distinction, see also LANCIOTTI, *supra* note 272, at 148 f.; Dieter Martiny, *Kommentar zum UN-Kaufrecht*, in 7 MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH 1639, 1655–56 (Hans-Jürgen Sonnenberger ed., 2d ed. 1989); Sacerdoti, *supra* note 272, at 745–46.

For decisions referring to the fact that parties may exclude the application of the CISG or derogate from or vary the effect of most of its provisions, see ZG Basel-Stadt [Civil Court] Switz., Nov. 8, 2006, available at <http://cisgw3.law.pace.edu/cases/061108s1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Arbitral Award, June 30, 2006, available at <http://cisgw3.law.pace.edu/cases/060630r1.html>; OLG Linz [Appellate Court] Austria, Jan. 23, 2006, available at <http://cisgw3.law.pace.edu/cases/060123a3.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Arbitral Award, Mar. 16, 2005, available at <http://cisgw3.law.pace.edu/cases/050316r1.html>; HG St. Gallen [Commercial Court] Switz., Feb. 11, 2003, available at <http://cisgw3.law.pace.edu/cases/030211s1.html>; Ajax Tool Works, Inc. v. Can-Eng Manufacturing Ltd., U.S. District Court (North. Dist.

according to the CISG, *per se* not encounter any restrictions,²⁷⁷ whereas the latter is limited, since there are provisions the parties are not allowed to derogate from.²⁷⁸

For the purpose of this paper, this distinction is important insofar as the rules to be applied in case of exclusion of the CISG are different from those to be applied in case the parties derogate from (or modify the effect of) the provisions of the CISG.

In the former case, the courts will have to resort to their rules of private international²⁷⁹ to determine the applicable law (which, whenever they lead to the law a contracting State, make applicable that State's domestic sales law²⁸⁰). Thus, where the parties do not choose the applicable law when excluding the CISG, the courts will have to determine the applicable law by means of objective connecting factors; since these factors, at least in Europe,²⁸¹ lead to the application of the "law of a country,"²⁸² courts will not be able to apply non-binding rules, such as the UNIDROIT Principles of International Commercial Contracts (hereinafter UNIDROIT Principles).²⁸³ Where, on the other hand, the parties choose the applicable law, it is on the basis of their rules of private international that courts have to determine whether the choice is to be taken into account, at

Illinois, E.D. 2009), available at <http://cisgw3.law.pace.edu/cases/030129u1.html>; Tribunal cantonal du Vaud [Appellate Court] Switz., Apr. 11, 2002, available at <http://cisgw3.law.pace.edu/cases/020411s1.html>.

²⁷⁷ For this statement, see Franco Ferrari, *CISG rules on exclusion and derogation: Article 6, in THE DRAFT UNCITRAL DIGEST AND BEYOND*, *supra* note 41, at 114, 117 f.; Hoyer, *supra* note 271, at 41; LOHMANN, *supra* note 55, at 195.

²⁷⁸ See Bonell, *supra* note 268, at 61 f.; Rüdiger Holthausen, *Vertraglicher Ausschluss des UN-Übereinkommens über internationale Warenkaufverträge*, RECHT DER INTERNATIONALEN WIRTSCHAFT 513, 515 (1989); Karollus, *supra* note 88, at 381; in case law see Tribunale di Vigevano [District Court] It., July 12, 2000, available at <http://cisgw3.law.pace.edu/cases/000712i3.html>.

²⁷⁹ For this conclusion, see also Bonell, *supra* note 274, at 19; Kren Kostkiewicz & Ivo Schwander, *Zum Anwendungsbereich des UN-Kaufrechtsübereinkommens*, in Festschrift Neumayer 33, 48 (Ferenc Majoros ed., 1997); MAGNUS, *supra* note 35, at 153.

²⁸⁰ For this solution, see also Herber, *supra* note 91, at 85; Martiny, *supra* note 276, at 1656; Siehr, *supra* note 60, at 600.

²⁸¹ Outside Europe, however, see Article 9 of the *Inter-American Convention on the Law Applicable to International Contracts*, 33 INT'L LEGAL MATERIALS 732, 735 (1994).

²⁸² See, e.g., Article 4(1) of the *Convention on the Law Applicable to Contractual Obligations*, reprinted in 19 INT'L LEGAL MATERIALS 1492, 1493 (1980).

²⁸³ For court decisions expressly stating that the Unidroit Principles are not binding, see, e.g., Tribunale di Padova [District Court] It., Jan. 10, 2006, available at <http://cisgw3.law.pace.edu/cases/060110i3.html>.

least in those countries the rules of private international law of which are laid down by either the Rome Convention or the Rome I Regulation.

Where, on the contrary, the parties modify the effect of provisions of the CISG through the contract, the rules that are resorted to are basically those laid down in the contract itself. This does not mean, however, that resort to private international is completely superfluous in this line of cases either. The courts will in any case have to determine whether the various contract clauses violate the mandatory rules of the law applicable. These are determined once again on the basis of the rules of private international law.

This goes to show that resorting to private international law may also be relevant even if the contract meets all of the CISG's applicability requirements and the issue to be dealt with is one governed by the CISG, given the parties' possibility to exclude the CISG or derogate from its provisions.

XIV. THE PRINCIPLE OF FREEDOM FROM FORM REQUIREMENTS AND THE ARTICLE 96 RESERVATION

Resort to private international may, however, be necessary even where all applicability requirements are met, the issue to be dealt with falls into the CISG's scope of application and the parties have not excluded the CISG or derogated from its provisions. This is true regarding the issue of formal validity of contracts governed by Article 11 of the CISG which, according to both commentators²⁸⁴ and courts,²⁸⁵ sets forth the principle of freedom

²⁸⁴ See ACHILLES, *supra* note 41, at 30; GODDARD, *supra* note 206, at 73; BAMBARNY, *supra* note 197, at 167; Bonell, *supra* note 41, at 80; DEJACO, *supra* note 41, at 44; Felemegas, *supra* note 41, at 285; HERBER & CZERWENKA, *supra* note 68, at 50; HUBER & MULLIS, *supra* note 41, at 34; Janssen & Kiene, *supra* note 212, at 276 f.; KARL NEUMAYER & CATHERINE MING, CONVENTION DE VIENNE SUR LES CONTRATS DE VENTE INTERNATIONALE DE MARCHANDISES. COMMENTAIRE 126 (1993); Mather, *supra* note 30, at 158; Posch & Terlitza, *supra* note 35, at 50; Reinhart, *supra* note 34, at 32; Schwenzer & Hachem, *supra* note 170, at 136; Christian Thiele, *Erfüllungsort bei der Rückabwicklung von Vertragspflichten nach Art. 81 UN-Kaufrecht—ein Plädoyer gegen die herrschende Meinung*, RECHT DER INTERNATIONALEN WIRTSCHAFT 892, 894 (2000); *contra* Greiner, *supra* note 41, at 46 f.

²⁸⁵ See RB Arnhem [District Court] Neth., Jan. 17 2007, available at <http://cisgw3.law.pace.edu/cases/070117n1.html>; Tribunale di Padova [District Court] Neth., Mar. 31, 2004, available at <http://cisgw3.law.pace.edu/cases/040331i3.html>; Tribunale di Padova [District Court] It., Feb. 25, 2004, available at <http://cisgw3.law.pace.edu/cases/040225i3.html>; RB Rotterdam [District Court] Neth., July 12, 2001, available at <http://cisgw3.law.pace.edu/cases/010712n1.html>; Bger [Supreme Court] Switz., Sept. 15, 2000, available at <http://cisgw3.law.pace.edu/cases/000915s2.html>;

from form requirements. Thus, a contract for the international sale of goods does generally not need to be concluded in writing and is not subject to any other specific requirement as to form.²⁸⁶ This means, *inter alia*,²⁸⁷ that a contract can, as already confirmed by various court decisions, also be concluded orally²⁸⁸ as well as through the conduct of the parties.²⁸⁹

Still, pursuant to Article 12 of the CISG, which the parties are not allowed to derogate from,²⁹⁰ the foregoing principle does not necessarily apply where at least one of the parties to the contract governed by the CISG has its place of business in a State that has declared a reservation under Article 96 of the CISG.²⁹¹ In this line of cases, any provision “that allows a contract of sale or its modification or termination by agreement or any

Compromex [Mexican Comm’n for the Protection of Foreign Trade] Mex., available at <http://www.uc3m.es/cisg/rmexi2.htm>; Oberster Gerichtshof [Supreme Court] Austria, Feb. 6, 1996, available at <http://131.152.131.200/cisg/urteile/224.htm>.

²⁸⁶ See most recently District Court in Trnava, Slov., Mar. 9, 2011, available at <http://cisgw3.law.pace.edu/cases/110309k1.html>; District Court in Michalovce, Slov., Oct. 11, 2010, available at <http://cisgw3.law.pace.edu/cases/101011k1.html>.

²⁸⁷ For a more detailed analysis, see Franco Ferrari, *Writing requirements: Articles 11–13*, in THE DRAFT UNCITRAL DIGEST AND BEYOND, *supra* note 41, at 206–15; Franco Ferrari, *Form und UN-Kaufrecht*, in INTERNATIONALES HANDELSRECHT 1 (2004).

²⁸⁸ See Golden Valley Grape Juice and Wine, LLC v. Centrisys Corp., 2012 WL 347897 at 3 (E.D. Cal. 2010), available at <http://cisgw3.law.pace.edu/cases/100121u1.html#iii>; MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D’Agostino S.p.A., 144 F.3d 1384, 1389 (11th Cir. 1998), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases/2/980629u1.html>; Oberster Gerichtshof [Supreme Court] Austria, Feb. 2, 1995, ZEITSCHRIFT FÜR RECHTSVERGLEICHUNG 248 (1996); OLG München [Provincial Court of Appeal] Ger., Mar. 8, 1995, available at <http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/145.htm>; for an example of a case where an oral contract was held to be valid, see OLG Köln [Provincial Court of Appeal] Ger., Feb. 22, 1994, available at <http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/127.htm>.

²⁸⁹ For this statement, see District Court in Michalovce Slov., Oct. 11, 2010, available at <http://cisgw3.law.pace.edu/cases/101011k1.html>; KG Zug [District Court] Switz., Dec. 14, 2009, available at <http://globalsaleslaw.com/content/api/cisg/urteile/2026.pdf>; HvB Gent [Appellate Court] Bel., May 17, 2002, available at <http://www.law.kuleuven.ac.be/int/tradelaw/WK/2002-05-17.htm>; OLG München, Mar. 8, 1995, available at <http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/145.htm>.

²⁹⁰ For an express reference in case law to the fact that the parties are not allowed to exclude or derogate from Article 12 of the CISG, see OLG Linz [Appellate Court] Austria, Jan. 23, 2006, available at <http://cisgw3.law.pace.edu/cases/060123a3.html>.

²⁹¹ See CISG art. 96

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

offer, acceptance or other indication of intention to be made in any form other than in writing does not apply.²⁹² This means, that Article 12 leads to the principle of freedom from writing requirements set forth in Article 11 CISG not being applicable *per se* when one party has its relevant place of business in a State that declared an Article 96 reservation.²⁹³ What consequences this has on the applicable writing requirements is subject to dispute. According to one view, the sole fact that one party has its place of business in a State that declared an Article 96 reservation does not necessarily mean that the writing requirements of that State will apply.²⁹⁴ In this author's opinion, this view is to be preferred over the view that where one party has its relevant place of business in a State that declared an Article 96 reservation, the contract must necessarily be concluded or evidenced or modified in writing.²⁹⁵ The law to be applied (and, thus, whether a given writing requirement must be met) will depend on the law to which the rules of private international of the forum lead.²⁹⁶ Thus, where the private international law of the forum leads to the law of a Contracting State that has declared an Article 96 reservation, that State's writing requirements will have to be applied. Where, however, the rules of private international law lead to the law of a Contracting State that has not declared an Article 96 reservation, the contract will not need to meet any writing requirement, a view also held in case law.²⁹⁷

²⁹² CISG art. 12.

²⁹³ See Kh. Hasselt [Commerce Tribunal] Belg., May 2, 1995, available at <http://www.law.kuleuven.ac.be/ipr/eng/cases/1995-05-02.html>.

²⁹⁴ See *Forestal Guarani S.A. v. Daros International, Inc.*, 613 F.3d 395, 398–400 (3d Cir. 2010), available at <http://cisgw3.law.pace.edu/cases/100721u1.html>; *RB Rotterdam* [District Court] Neth., July 12, 2001, available at <http://cisgw3.law.pace.edu/cases/010712n1.html>.

²⁹⁵ For this view, see *Vyshshi Arbitrazhnyi Sud Rossyiskoi Federatsii* [High Arbitration Court] Russ., Feb. 16, 1998, available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/980216r1.html>; *RB Koophandel Hasselt*, May 2, 1995, available at <http://www.law.kuleuven.ac.be/ipr/eng/cases/1995-05-02.html>.

For this view in legal writing, see GARRO & ZUPPI, *supra* note 107, at 70; RODOLFO C. HUSSONMOREL, *LA COMPRAVENTA INTERNACIONAL DE MERCADERIAS* 40 (2004).

²⁹⁶ See also *Forestal Guarani S.A. v. Daros International, Inc.*, 613 F.3d 395, 400 (3d Cir. 2012), available at <http://cisgw3.law.pace.edu/cases/100721u1.html>.

²⁹⁷ See *RB Rotterdam* [District Court] Neth., July 12, 2001, available at <http://cisgw3.law.pace.edu/cases/010712n1.html>; *Hoge Raad* [Supreme Court] Neth., Nov. 7, 1997, available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=333&step=FullText>.

This shows how important resorting to private international law is despite the CISG being applicable, if the issue is one governed by the CISG and the parties have not excluded the CISG.

XV. CONCLUSION

The preceding remarks show that the CISG's coming into force has not made recourse to private international law superfluous. This is due, to the fact that the CISG does not govern all international contracts for the sale of goods: some contracts are not "international" enough to meet the CISG's internationality requirement set forth its Article 1(1).²⁹⁸ Some other contracts are not governed by the CISG due to the CISG's limited substantive sphere of application, which is owed to the fact that the drafters of the CISG themselves recognized that their unification effort could not fit all contracts²⁹⁹ and therefore expressly excluded some contracts from its substantive sphere of application.³⁰⁰ Other contracts involve parties that are linked to countries that simply do not want the CISG to apply to certain issues or to contracts with certain parties and therefore have declared reservations that make the CISG either totally or partially inapplicable.³⁰¹ Also, even where the CISG is applicable, it does not necessarily solve a given issue, since, as pointed out, the CISG does not constitute an exhaustive body of rules.³⁰² Furthermore, the parties' possibility to exclude the CISG or derogate from (most of) its provisions³⁰³ shows that recourse to private international law is not pre-empted even where all of the CISG applicability requirements are met and the issue falls into the CISG's scope of application. But even where the parties have not opted-out of the CISG and the CISG governs a given issue, resorting to private international law may be required.³⁰⁴

²⁹⁸ See *supra* text accompanying notes 59 ff.

²⁹⁹ See Michael G. Bridge, *Uniformity and Diversity in the Law of International Sale*, 15 PACE INT'L L. REV. 55, 56 (2003), stating in respect of the CISG that it "should not however be thought that all international sales are alike and that one single uniform sales law should be provided on a 'one size fits all' basis."

³⁰⁰ See *supra* text accompanying notes 82 ff.

³⁰¹ See *supra* text accompanying notes 166 ff.

³⁰² See *supra* text accompanying notes 189 ff.

³⁰³ See *supra* text accompanying notes 266 ff.

³⁰⁴ See *supra* text accompanying notes 284 ff.

From this it clearly follows that it is an oversimplification to state that the CISG makes resorting to private international law superfluous. By creating a (false) sense of certainty as to the rules applicable to a contract for the international sale of goods,³⁰⁵ namely those of the CISG, this oversimplification may be more dangerous for one's interests, and, ultimately, more costly than the awareness of the CISG constituting an incomplete³⁰⁶ set of default rules³⁰⁷ with a limited applicability.

Only when there is awareness as to the CISG's limitations and, thus, to its non-autarkic character,³⁰⁸ can one really understand the relationship between the CISG and private international law which is not an antagonistic one; the CISG and the rules of private international law necessarily co-exist. For the elaboration of future unification efforts this should be taken into account, since only if the elaboration of uniform substantive law rules goes hand in hand with the elaboration of uniform private international law rules can one really reach uniform solutions.

³⁰⁵ It has often been pointed out that the CISG promotes certainty as to the rules applicable to contracts for the international sale of goods; *see, e.g.*, Djakhongir Saidov, *Methods for Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods*, 14 PACE INT'L L. REV. 307, 308-09 (2002).

³⁰⁶ *See* Paul B. Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, 39 VA. J. INT'L L. 743, 779 (1999).

³⁰⁷ For a reference to the CISG's default character, *see, e.g.*, Lookofsky, *supra* note 41, at 270 n.46; Charles Sukurs, *Harmonizing the Battle of the Forms: A Comparison of the United States, Canada, and the United Nations Convention on Contracts for the International Sale of Goods*, 34 VAND. J. TRANSNAT'L LAW L. 1481, 1483 (2001).

³⁰⁸ For this conclusion, *see* Bridge, *supra* note 299, at 72.