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THE EXPERT WITNESS AND THE CISG

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## THE EXPERT WITNESS AND THE CISG

*Alejandro Osuna González*\* \*\*

### I. INTRODUCTION

Anyone involved in litigation knows the importance of expert witness evidence, particularly when the issue to be brought before a court or arbitral tribunal can make the difference between success and failure. The expert witness is expected to bring specialized knowledge to the dispute resolution process. The role of expert witnesses has often been criticized, accusing the witnesses of being nothing more than “team players,” ready to support the views of the advocates who proposed them. Others view them as an indispensable part of dispute resolution because of their ability to bring their expertise to facilitate the decision-making process.

In the context of a dispute involving the United Nation’s Convention on Contracts for the International Sale of Goods (“CISG”),<sup>1</sup> litigants often offer expert evidence to prove issues regarding contract formation through electronic means, industry practices, lack of conformity of the goods, damages, and, on occasion, on the CISG itself, to courts and arbitration tribunals. In this paper, a brief description is made of the role of the expert witness in Mexican law, United States law and in international commercial arbitration, followed by commentary of the role that experts should play in cases governed by the CISG.

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\*\* To Professor Flechtner: thank you for making the CISG fun, exciting, and musical.

<sup>1</sup> U.N. Comm’n on Int’l Trade Law, United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3 [hereinafter CISG].

*A. Witness in Mexico—Commercial Litigation*

Like many legal systems, the Mexican Commercial Code<sup>2</sup> provides that facts are to be proven by the party relying on them,<sup>3</sup> while foreign law is a fact to be proven in court.<sup>4</sup> With regards to expert witnesses, a Mexican judge will usually allow it when issues in the dispute require specialized knowledge in science, art, technique, profession or industry.<sup>5</sup> Once a litigant has designated the expert, and if the judge admits the evidence, she must appear within a period of three days with a signed statement accepting the appointment and must attach an original or a certified copy of her license or documents that show her expertise; a statement that she is knowledgeable of the issues for which she has been appointed, and she has the ability to issue an opinion. The expert is obligated to present her report within the ten days after she submitted her acceptance.

The party proposing the expert must provide a questionnaire or list of issues that the expert witness is to address in his report. The opposing party may offer its own witness and pose additional questions to the expert. Failing to do so, is construed as an acquiescence to whatever findings the expert submits. Once the expert witness reports have been submitted, the law provides that if he finds that they are contradictory, the judge may order that a third expert be appointed by the court appointed (*tercero en discordia*). The third expert's fees are to be paid by both litigants.

The third expert is appointed by the court from among those that are authorized by local judiciary councils or may be proposed by professional organizations (bar associations, artistic or scientific associations or from public or private universities, chambers of industry and commerce).<sup>6</sup> The court-appointed expert shall submit his opinion at the evidentiary hearing or at any other date that the judge may order.

Each party may seek to recuse the court-appointed expert within the five days following notice of the expert's acceptance and swearing-in, and may be recused if he is a relative of any one of the parties, attorneys, the judge or

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<sup>2</sup> Published in 1889, the Mexican Commerce Code provides both substantive (contract rules) and procedural rules.

<sup>3</sup> Código de Comercio [CCom], Diario Oficial de la Federación [DOF] 07-10-1889 (Mex.).

<sup>4</sup> *Id.* art. 1197.

<sup>5</sup> *Id.* art. 1253.

<sup>6</sup> *See id.* art. 1257.

clerks, or if he is civil kin with any one of those persons. Other causes for recusal are: if the expert has issued a report regarding the same case; if she has provided services as an expert to any one of the parties; or if she has an interest in the outcome of the case. Finally, if there is a close friendship or evident animosity towards any one of the parties.<sup>7</sup> If a party moves to recuse the court-appointed expert, the expert will be provided notice of the motion and evidence. If the expert acknowledges the grounds for recusal, she will be immediately substituted. If she denies the cause, a hearing is to be held where the parties will present their evidence and the judge will make a ruling. Under Mexican law, the judge is not bound by the findings of the court-appointed expert; the third-experts opinion is intended to assist the judge in making a final determination regarding the issue in question, but often times his involvement is more that of a tie-breaker.<sup>8</sup>

Concerning the proof of foreign law, the Commerce Code treats it as a fact to be proven in court. The Federal Civil Code, which contains the applicable conflicts of law rules in commercial matters, provides that judges applying foreign law, must do so just like a foreign judge would, and for such purposes the judge may obtain the necessary information regarding the text of the law, if it is in force and its scope of application.<sup>9</sup> Mexico is a party to the Inter-American Convention on Proof and Information on Foreign law, which sets out the rules for cooperation between signatory states for the exchange of legal information, and it provides, among other means of obtaining information, that it may be submitted by way of an affidavit.<sup>10</sup> In practice, foreign law is often proven by litigants through expert witness reports.

### *B. Expert Witness Testimony in the U.S. Legal System*

In the U.S. legal system, a key provision is Federal Rule of Evidence 702, which provides that an expert may testify in the form of an opinion or otherwise if the expert's scientific, technical or other specialized knowledge

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<sup>7</sup> See *id.* art. 1256.

<sup>8</sup> *Banco Minero v. Ross*, 172 S.W. 711, 714 (Tex. 1915).

<sup>9</sup> Jorge A. Vargas, *Mexican Law in California and Texas Courts and the (Lack of) Application of Foreign Law in Mexican Courts*, 2 MEXICAN L. REV. 45, 69 (2009).

<sup>10</sup> Inter-American Convention on Proof of and Info. on Foreign Law, art. 1, May 8, 1979, 53 53 U.N.T.S 24393.

will assist the trier of fact to understand the evidence or to determine a fact in issue.<sup>11</sup> Rule 706 provides that federal courts may on their own motion order the appointment of an expert and may request that the parties submit nominations.<sup>12</sup>

With regards to foreign law, Rule 44.1 provides that a party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing.<sup>13</sup> In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence.<sup>14</sup> The court's determination must be treated as a ruling on a question of law.<sup>15</sup>

### *C. Expert Witness Testimony in the Context of International Commercial Arbitration*

In the context of international commercial arbitration, the United Nations Commission on International Trade Law [UNCITRAL] Model Law on International Arbitration has been adopted at a national or supranational level by many countries, including Mexico, and at the state level by eight states in the United States.<sup>16</sup> Article 23 of the Model Law provides that the parties may submit with their statement the evidence with which they plan to rely on.<sup>17</sup> Though not expressly mentioned, evidence includes expert witness reports.<sup>18</sup>

Article 26(1) of the UNCITRAL Model Law provides that arbitral tribunals have the power to appoint experts to report to it in specific issues and may order a party to provide relevant information to produce or provide access to documents, goods or other property for inspection.<sup>19</sup> In a case heard in Germany involving an Italian patent law issue, a party attempted to have an award set aside claiming that the tribunal was not knowledgeable of that

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<sup>11</sup> FED. R. EVID. 702.

<sup>12</sup> *Id.* at 706.

<sup>13</sup> *Id.* at 44.1.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> U.N. Comm'n on Int'l Trade Law, Model Law on Int'l Comm. Arb., June 21, 1985, 24 I.L.M. 1302, 1489 U.N.T.S. 3 (2006) [hereinafter Model Int'l Arb. Law].

<sup>17</sup> *Id.* arts. 23, 52.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* arts. 26, 52.

law and had a duty to call for a neutral expert, and that its failure to do so gave grounds to have the award set aside.<sup>20</sup> The argument was dismissed.

After the expert has submitted his report, Article 26(2) provides that at the request of a party or *ex officio*, the expert shall participate in a hearing where the parties shall have an opportunity to question him and to bring their own expert witnesses to testify on the points at issue.<sup>21</sup>

## II. EXPERT WITNESS AND THE CISG—A SAMPLE OF CASES

### *A. Expert for the Proof of a Widely-Known Usage in International Trade*

Article 9(1) of the CISG concerns the incorporation of a usage and practices established between the parties (their “contractual” history).<sup>22</sup> Article 9(2) addresses the implied incorporation of the parties of a usage which the parties knew or ought to have known and which is widely known and regularly observed by parties involved in the trade concerned established between themselves.<sup>23</sup> Article 9 does not address the issue of proof and validity of usages.<sup>24</sup> With regard to trade usages which are widely known, proving some may be a simpler task, such as the implied incorporation of the International Chamber of Commerce’s Incoterms by way of Article 9(2).<sup>25</sup>

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<sup>20</sup> Bayerisches Oberstes Landesgericht [BayObLG] [Bavarian Supreme Court] Dec. 15, 1999, 4Z Sch 23/99 (Ger.).

<sup>21</sup> *Id.* art. 26.

<sup>22</sup> CISG, *supra* note 1, art. 9(1).

<sup>23</sup> *Id.* art. 9(2).

<sup>24</sup> See C. MASSIMO BIANCA & MICHAEL J. BONELL, COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 103–15 (Dott. A. Giuffrè ed., 1st ed. 1987) (reproduced with permission of Dott. A. Giuffrè Editore, S.p.A., 110).

<sup>25</sup> See *St. Paul Guardian Ins. Co. v. Neuromed Med. Sys. & Support*, No. 00 Civ. 9344 (SHS), 2002 U.S. Dist. LEXIS 5096 (S.D.N.Y. 2002) (The parties relied on expert witnesses to explain issues of German law and incorporation of the Incoterms by way of CISG Article 9(2).); see also *BP Int’l Ltd. v. Empresa Estatal de Petróleos de Ecuador*, 332 F.3d 333 (5th Cir. 2003) (The case involved the sale of unleaded gasoline, but issues arose regarding gum content. The contract provided for application of the laws of the Republic of Ecuador. Seller relied on expert witness reports. The case also addressed issues of incorporation of Incoterms by way of CISG Article 9(2)). At least two cases from the Mexican First Circuit have addressed the issue of Incoterms and the CISG. See *Intercoms. Su relevancia en las operaciones aduaneras de importación deriva de su utilidad para determinar el valor en aduana de Americanas*, Tribunal Colegiados de Circuito, [TCC], *Semanario Judicial de la Federación y su Gaceta*, tomo XXVII, Mayo de 2008, 193/2007, Pagina 1051 (Mex.) (This case involved the application of Mexican customs law, but the decision addressed the recognition that the International Chamber of Commerce’s Incoterms are a usage as described and incorporated through CISG Article 9(2). Another

But it may not be that simple with regards to more technical usages that are limited to very specific sectors of industry. In these circumstances, an expert witness would be useful in proving the applicability of such a usage. In *Treibacher Industrie, A.G. v. Allegheny Technologies, Inc., et al.*, TDY Industries, Inc. an Austrian seller of hard metal powder sold shipments to a U.S. buyer.<sup>26</sup> After receiving some of the powder, the buyer refused to take delivery of the amount remaining under the contract, claiming that the goods had been delivered “on consignment.”<sup>27</sup> According to the buyer, the term meant that it was only obligated to pay for the goods it intended to use.<sup>28</sup> The buyer had in fact bought powder from another seller at a lower price.<sup>29</sup> The seller filed a complaint to demand payment of the amount it would have received from the buyer for all the powder.<sup>30</sup> The parties disputed the meaning of the term “consignment” contained in the contracts.<sup>31</sup> Buyer brought in an expert to support its position, claiming that under the industry usage “consignment,” no sale occurred unless buyer used the powder.<sup>32</sup> Seller countered, arguing that during the parties’ dealings over a period of seven years, the term “consignment” meant that the buyer had a duty to pay for all the powder specified in the contract, while the seller would delay billing the buyer until the powder had actually been used.<sup>33</sup> The court found that, in fact, the parties were bound by practices they had established between themselves.<sup>34</sup>

Another issue is that of the so-called “letters of confirmation.” The question can arise whether a letter of confirmation constitutes a usage that is widely known and widely observed. A letter of confirmation is a document intended to memorialize an oral agreement reached by the parties, written by one of them shortly after concluding negotiations. While some legal systems

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case cites to the Incoterms as a means of interpreting the parties’ intent in a contract for the international sale of goods.).

<sup>26</sup> See *Treibacher Industrie, A.G. v. Allegheny Techs., Inc.*, 464 F.3d 1235, 1236 (11th Cir. 2006).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 1237.

<sup>29</sup> *Id.* at 1236.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 1237.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 1240.

have recognized letters of confirmation by way of case law,<sup>35</sup> in other legal systems the concept is not even known.<sup>36</sup> This is not to say that the practice is non-existent at the international level, nor that it is generally unobserved, but in some jurisdictions the law may have not yet caught up with commercial practice. Its existence may require evidence in the form of an expert to prove that it has (or has not) become prevalent, even if it was not ten or fifteen years ago when some cases addressing the issue were first published in the UNILEX Database.

Another interesting issue is trade usage and how they can potentially displace rules in the CISG. In a case decided by the Austrian Supreme Court, at issue was whether a trade usage concerning notice of lack of conformity trumped the rules of notice under Articles 38 and 39 of the CISG.<sup>37</sup> The case involved two Austrian nationals; the buyer, who had its place of business in Italy, claimed that there were non-conformities in wood it had purchased and was refusing to pay the price.<sup>38</sup> Buyer also claimed he had made an oral notice to seller.<sup>39</sup> Seller alleged Austrian usage in the wood trade industry which, if applicable, would prevail over the general provisions of the CISG's rules on notice for lack of conformity.<sup>40</sup> Seller argued that in the trade usage, per Article 9(2) of the CISG, a seven-days notice for lack of conformity was typical; buyer argued that the notice had been consistent with the requirements of CISG Articles 38 and 39.<sup>41</sup> The appellate court remanded the case to decide whether the usages were different than those under the CISG.<sup>42</sup>

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<sup>35</sup> Zivilgericht Kanton Basel-Stadt, P 4 1991/238, Dec. 21, 1992 (Switz.) (In this case, the Court held the sales contract had been validly concluded through the letter of confirmation sent by the Austrian seller to the Swiss company, as a rule recognized under both the Austrian and Swiss domestic law.); see also Esser Michael, *Commercial Letters of Confirmation in International Trade: Austrian, French, German and Swiss Law and Uniform Law Under the 1980 Sales Convention*, 18 GA. J. INT'L & COMP. L. 427, 427 (1988).

<sup>36</sup> See *Kolmar Petrochemicals Americas, Inc. v. Idesa Petroquímica Sociedad Anónima de Capital Variable*, Primer Tribunal Colegiado en Materia Civil del Primer Circuito [TCC], 127/2005, Marzo 2005 (Mex.).

<sup>37</sup> *Ginza Pte Ltd v. Vista Corp Pty Ltd.* (2003), 2030 WASC 11, 11 (Austl.).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*



*B. The Expert Witness to Prove Lack of Conformity*

Article 35 of the CISG addresses the core of seller's obligation: the duty to deliver goods which conform to the contract.<sup>43</sup> This issue often arises as a *shield*, in the context of a seller filing an action for the price and a buyer defending that it should be released from paying (or to pay a reduced price) because the goods were non-conforming.<sup>44</sup> The issue can also materialize as a *sword* when the buyer institutes an action for damages claiming a lack of conformity against the seller.<sup>45</sup>

The *Chicago Prime Packers* case is an example of the importance of the expert witness in a dispute involving quality of goods.<sup>46</sup> The case involved a Colorado seller and a Canadian buyer of pork ribs.<sup>47</sup> When the final customer began to process the meat, he discovered that there were some issues with the quality and asked the United States Department of Agriculture (USDA) to inspect the goods.<sup>48</sup> The USDA found that while some units were good, others were putrid, and proceeded to condemn the entire shipment.<sup>49</sup> Seller continued to press for the price and ultimately obtained a judgment against

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<sup>43</sup> CISG, *supra* note 1, art. 35.

(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.

(2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:

(a) are fit for the purposes for which goods of the same description would ordinarily be used;

(b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;

(c) possess the qualities of goods which the seller has held out to the buyer as a sample or model

(d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.

(3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* In any case, success for buyer will also depend on whether he has provided seller with a notice of non-conformity within a reasonable period of time after he has discovered, or ought to have discovered, specifying the nature of the lack of conformity in accordance with Article 39 of the CISG, or if the defect was so obvious that seller could not have been unaware of it.

<sup>46</sup> *Chi. Prime Packers v. Northam Food Trading*, 320 F. Supp. 2d 702 (N.D. Ill. 2004).

<sup>47</sup> *Id.* at 705–06.

<sup>48</sup> *Id.* at 706.

<sup>49</sup> *Id.* at 707.

the Buyer, a decision that would later be confirmed on appeal.<sup>50</sup> The reasoning behind the appellate court's decision was that the buyer had failed to prove that the goods were non-conforming at the time the risk of loss had passed to it.<sup>51</sup> Under Article 36 of the CISG, a seller is liable in accordance with the contract for any lack of conformity which exists at the time when the risk passes to buyer.<sup>52</sup> However, under Article 66 of the CISG, loss or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price.<sup>53</sup> In this case, an expert witness report could have been outcome determinative, since his opinion could have shed light on whether the meat was putrid at the time the risk of loss was transferred, as was argued in buyer's defense to his lack of payment.

A different result came in the case *Schmitz-Werke GmbH & Co. v. Rockland Industries, Inc.* (No. 00-1125).<sup>54</sup> This matter involved the claim of a lack of conformity of certain fabric.<sup>55</sup> The seller argued that the buyer had the burden of demonstrating the existence and the nature of the defect in the fabric before it can recover for breach of warranty, and that for buyer to show the nature of that defect, that expert testimony was required.<sup>56</sup> Buyer countered that expert testimony was not required because all it needed to show was that the goods were unfit for the particular purpose—transfer printing.<sup>57</sup> While acknowledging that local law, in cases involving products liability, the buyer must prove that the goods were defective, nothing in local law provided that in cases such as this an expert is always required.<sup>58</sup> What buyer was able to prove was that it had competence for the standard transfer printing process, and it was thus able to infer that the fabric was not suitable.<sup>59</sup>

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<sup>50</sup> Chi. Prime Packers v. Northam Food Trading, 408 F.3d 894, 900 (7th Cir. 2005).

<sup>51</sup> *Id.* at 899.

<sup>52</sup> See CISG, *supra* note 1, art. 36(1).

<sup>53</sup> *Id.* art. 66.

<sup>54</sup> *Schmitz-Werke GmbH & Co. v. Rockland Industries Inc.*, 271 F. Supp. 2d 734 (D. Md. 2003).

<sup>55</sup> *Id.* at 735.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 736.

<sup>58</sup> *Id.* at 737.

<sup>59</sup> *Id.*

### C. *The Damages Expert*

Under the CISG's Article 74, a party's damages for breach of contract consists of a sum equal to the loss, including loss of profit suffered because of the breach.<sup>60</sup> The purpose is full compensation.<sup>61</sup> The aggrieved party may opt for a substitute transaction per Article 75<sup>62</sup> of the CISG, or current price damages per Article 76.<sup>63</sup>

In a Mexican Court, a damages expert would need to take into account the substantial differences between the Commerce Code, the Federal Civil Code and the CISG. Per Article 376 of the Commerce Code, once a contract for the sale of goods has been perfected, the performing party is entitled to demand from the breaching party, either the rescission of the contract or specific performance, as well as damages.<sup>64</sup> A party may not demand performance (or rescission) if it has not first performed. This creates an expensive burden, because a buyer would have to consign the money to a court or deposit goods in a warehouse to prove it has performed, making it

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<sup>60</sup> CISG, *supra* note 1, art. 74.

<sup>61</sup> *Id.*

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

<sup>62</sup> *See id.* art. 75:

If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under Article 74.

<sup>63</sup> *See id.* art. 76:

(1) If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under Article 75, recover the difference between the price fixed by the contract and the current price at the time of avoidance as well as any further damages recoverable under Article 74. If, however, the party claiming damages has avoided the contract after taking over the goods, the current price at the time of such taking over shall be applied instead of the current price at the time of avoidance.

(2) For the purposes of the preceding paragraph, the current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at such other place as serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.

<sup>64</sup> Código de Comercio [CCom], art. 376, Diario Oficial de la Federación [DOF] 07-10-1889 (Mex.).

expensive to pursue an action for breach of contract in Mexico. This is substantially different from the CISG. Once it has become evident that there has been a breach and the contract has been avoided,<sup>65</sup> the affected party is released from their pending obligations.<sup>66</sup>

Mexican law does not formally recognize substitute transaction damages or current price damages, but there is nothing that would impede a party from claiming them under domestic law. However, the lack of exposure to the concept could clearly present difficulties for a court to properly interpret the CISG without the aid of an expert witness.

The other issue that a damages expert would have to address is the limits to amounts that may be claimed. Under Article 74 of the CISG, damages may not exceed the amount that the party in breach foresaw or should have foreseen at the time of the conclusion of the contract, in light of the facts and matters he then knew or ought to have known, as a possible consequence of the breach.<sup>67</sup> Clearly, the CISG presents a more liberal view than the restrictive Article 2110 of the Federal Civil Code (which supplements the Commerce Code on this issue).<sup>68</sup> Under the Federal Civil Code, damages must be the immediate and direct consequence of the lack of performance of an obligation that were caused or should have necessarily been caused.<sup>69</sup> As stated by the Federal Circuit Court:

*What the law has sought to do is to exclude the compensation for all of those damages that have not resulted directly and immediately from the circumstance causing the injury, because they were produced by one of the effects of the same incident, . . . otherwise, there would be no limit in terms of liability even in those instances in which his conduct was only a remote and partial factor.<sup>70</sup>*

Another aspect that may present some difficulties to the inexperienced are current price damages under CISG Article 76. In *Agrofrut Rengo S.A. v.*

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<sup>65</sup> See CISG, *supra* note 1, arts. 26, 72(3). Either by a notice of avoidance per CISG Article 26 or because the other party has declared he will not perform his obligations as provided for under CISG Article 72(3).

<sup>66</sup> See CISG, *supra* note 1, art. 81.

<sup>67</sup> *Id.* art. 74.

<sup>68</sup> Código Civil Federal [CC], art. 2110, Diario Oficial de la Federación [DOF] Aug. 31, 1928 (Mex.).

<sup>69</sup> *Id.*

<sup>70</sup> Daños Y Perjuicios. Deben Ser Consecuencia Inmediata Y Directa Del Evento Dañoso. Octavo Tribunal Colegiado de Circuito. Semanario Judicial de la Federación, Décima Época, libro 60, Noviembre de 2018, Tesis I.8.C.68, Página 2207 (Mex.).

*Levadura Azteca, S.A. de C.V.*, the failure to properly argue the issue and offer a damages expert was fatal to the seller's claims for loss of profit and market price damages.<sup>71</sup> This case involved a Chilean seller of canned fruit and a Mexican buyer, who had originally contracted to purchase 58 containers of product.<sup>72</sup> After receiving the first 22 with some delay (which buyer never claimed constituted a fundamental breach), buyer abruptly cancelled the contract.<sup>73</sup> Seller claimed damages for the price of the delivered goods plus interest, as well as damages suffered because of the cancellation of the contract.<sup>74</sup> Citing Article 375 of the Commerce Code, which was inapplicable, the court granted seller the price and interest, but refused to grant seller the damages for the cancelled portion of the contract, claiming that it had already done so when it granted seller the interest on the amounts owed.<sup>75</sup> However, under the CISG damages and interest are not mutually exclusive.<sup>76</sup> Agrofrut appealed, claiming that the judge had wrongfully applied Mexican law to the case.<sup>77</sup> The appellate court found that because seller had not shown that it had incurred extraordinary expenses to manufacture the goods, buyer's cancellation of the pending shipments did not constitute loss, and repeated the same mistake by finding that a granting of interest constituted a grant of damages.<sup>78</sup> The same mistakes were reiterated when Agrofrut took its case to the Federal Circuit court.<sup>79</sup> In my opinion, counsel could have prevailed had it argued Article 76 of the CISG and provided evidence of current price for the goods, as well as damages recoverable under Article 74 to make seller whole.

Another case that failed for not presenting a damages expert was one decided by the Oberlandesgericht Celle on September 2, 1998.<sup>80</sup> In this case, a Dutch seller delivered vacuum cleaners to a German buyer, who, after

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<sup>71</sup> Agrofrut Rengo, S.A. v. Levadura Azteca, S.A. de C.V., Acuerdo del Quinto Tribunal Colegiado en Materia Civil del Primer Circuito, [TCC], 293/2005 (Mex.).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> CISG, *supra* note 1, art. 82

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> CLOUT Case No. 318 [Oberlandesgericht Celle, Germany, Sept. 2, 1998], <http://cisgw3.law.pace.edu/cases/980902g1.html>.

selling them, objected to their quality and refused to make payment.<sup>81</sup> The seller sued for the price and buyer sought a set-off for loss of profit.<sup>82</sup> The court of first instance allowed the claim for the price but disregarded the set-off claimed by the buyer.<sup>83</sup> On appeal, the appellate court found that the seller was entitled to the price because the buyer had been unable to return the vacuum cleaners.<sup>84</sup> In regard to the set-off, the buyer lost because it failed to assess its damages as provided for under Article 74 of the CISG.<sup>85</sup> The court also held that had it been provided with the vacuum cleaners' current market price, an abstract calculation based on the difference between the price fixed by the contract and the current market price, it would have been admissible under Article 76 of the CISG.<sup>86</sup>

In *Semi-Material Co. v. MEMC Elec. Materials, Inc.*, defendants MEMC Electronic Materials Inc. and MEMC Pasadena Inc. (jointly "MEMC") sought to exclude certain expert witness testimony in a matter pending in United States District Court for the Eastern District of Missouri.<sup>87</sup> Semi-Materials brought an action against MEMC, alleging fraud and breach of contract under the CISG.<sup>88</sup> Semi-Materials proffered an expert to show the damages caused by defendants' breach.<sup>89</sup> Defendants sought to exclude the evidence, claiming it was unreliable.<sup>90</sup> Defendant claimed that the expert should have conducted an analysis under Article 74 of the CISG rather than Article 76, claiming the latter was inapplicable.<sup>91</sup>

#### *D. Expert Witness on Foreign Law*

It is not uncommon for cases involving the CISG to require expertise on foreign law. In the United States case *St. Paul Guardian Insurance Company*

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Semi-Material Co. v. MEMC Elec. Materials, Inc.*, No. 4:08CV434 (JCH), 2009 U.S. Dist. LEXIS 113335 at \*14–15 (E.D. Mo. 2009).

<sup>88</sup> *Id.* at \*10.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 833.

*v. Neuromed Medical Systems & Support*, a subrogee of a U.S. buyer of a mobile magnetic resonance imaging system (“MRI”) instituted an action against a German manufacturer under a CIF contract, which provided that title would remain with seller until paid in full and for the application of German law.<sup>92</sup> Buyer’s subrogee claimed damages from seller after the buyer received damaged goods.<sup>93</sup> The seller’s position was that it was not liable since risk of loss had passed once it delivered the MRI to the vessel at the port of shipment.<sup>94</sup> The buyer contended that, because title was still vested with seller until complete payment had been received, this was an issue to be resolved under German law.<sup>95</sup> Both parties submitted their expert witness reports to explain German law.<sup>96</sup> After the court conducted its own research, it sided with the expert opinion submitted by the defendants, which included the application of the CISG, since the parties had not made what the expert considered an effective opting-out of the CISG.<sup>97</sup> The court also relied on the experts to rule that both under the CISG and German law, Neuromed’s retention of title did not implicate retention of the risk of loss or damage.<sup>98</sup> The Court granted the motion to dismiss for failing to state a claim on which relief could be granted.<sup>99</sup>

In a case decided by the Oberlandesgericht, March 5, 2008, an Italian commercial car dealer had resold a car that it had previously bought from a German commercial car dealer to an Italian client.<sup>100</sup> The car, however, would turn out to be stolen and was seized and returned by the Italian police to its rightful owner.<sup>101</sup> The buyer sought damages from seller per CISG Article 74, while the seller claimed an exemption under CISG Article 79.<sup>102</sup> At issue was whether the buyer was entitled to avoid the contract and claim damages even if buyer was unable to return the car to the seller after it was

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<sup>92</sup> *St. Paul Guardian Insurance Co.*, U.S. Dist. LEXIS 5096 at \*3–4.

<sup>93</sup> *Id.* at \*3.

<sup>94</sup> *Id.* at \*4–5.

<sup>95</sup> *Id.* at \*12.

<sup>96</sup> *Id.* at \*6.

<sup>97</sup> *Id.* at \*7.

<sup>98</sup> *Id.* at \*14.

<sup>99</sup> *Id.* at \*17.

<sup>100</sup> CLOUT Case No. 1233 [Oberlandesgericht München, Germany, Mar. 5, 2008], <http://cisgw3.law.pace.edu/cases/080305g1.html>.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

seized by the police.<sup>103</sup> On first instance, the lower court found that the seller was entitled to rely on Article 79 of the CISG because it found that the breach was due to an impediment beyond seller's control.<sup>104</sup> Prior to the sale, the seller had enquired as to the status of the vehicle.<sup>105</sup>

On appeal, the buyer argued that the court of first instance had erred by assuming that the requirements of Article 79 had been met, as evidenced by the fact that it had initiated inquiries, and thus asked that the decision be overturned.<sup>106</sup> The buyer claimed that the first lower court's decision was correct in finding that Article 79 applied.<sup>107</sup> During the proceedings, the buyer relied on an expert witness report to address the issue of what rights the consumer had vis-à-vis the buyer, after the police authorities had taken the vehicle from the consumer.<sup>108</sup> With the aid of the expert witness report, the Italian buyer was able to show that, under Italian law, the consumer was allowed to avoid the contract after being evicted from the vehicle, which occurred when the police seized it.<sup>109</sup> As a consequence, the buyer was entitled to claim avoidance and damages against the seller.<sup>110</sup>

In another case applying the CISG, the dispute involved a sale of gunpowder to a buyer defense ministry and its government, but a particular issue required the involvement of an expert witness on issues of law to determine whether the defense ministry or the national government were the proper parties to the arbitration.<sup>111</sup> After hearing both sides, the arbitrator determined that only the ministry was party to the case.<sup>112</sup>

#### *E. The Expert Witness on the CISG*

Some cases have relied on expert witness testimony to explain issues concerning the CISG, both in court and in arbitration. That this may happen

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<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> Greek Powder & Cartridge Co. S.A. (Greece) v. The Ministry of Defence (Iraq), Case No. 7094/CK/AER/ACS ("Pyrkal Decision") (Jan. 31, 2003).

<sup>112</sup> *Id.*



from time to time is not unusual, given that the CISG, even though adopted almost 40 years ago, continues to be ignored by many in the legal community. When the CISG was adopted, the promise was that it would act as a single set of uniform rules for the international community, thus reducing transaction costs. Merchants and their lawyers would no longer need to research the content of foreign law (or hire foreign counsel), which drove up the cost of transacting business across international borders, as well as the cost of appearing before a court or arbitral tribunal to seek enforcement of a contract: parties would no longer need to rely on paid experts to prove foreign law.<sup>113</sup> Though there have been some advances in terms of its interpretation, there are still many judges and counsel that consider the Convention foreign law, even in countries that have ratified the CISG. What if we simply give in and start treating the CISG as foreign law?

### III. WHAT IF WE TREAT THE CISG LIKE FOREIGN LAW?

Courts in a country that has not adopted the CISG would likely allow expert evidence to explain its scope and applicability, since it would be foreign law, and a fact to be proven in court. But even in countries that have adopted the CISG, the intervention of an expert would be justified because the CISG is part of a distinct set of rules of uniform international law that has a method of interpretation that differs from that of domestic law.<sup>114</sup>

Not all local courts have followed through with the mandate under Article 7 of the CISG to take into account its international character, the need to promote its uniform application and the promotion of good faith in international trade. A court's unawareness or lack of experience with the CISG's method of interpretation (which requires the interpreter to take into account its international character, the need for uniform interpretation and the promotion of good faith), would make it an easy prey to the homeward trend of interpretation. Though there are signs that this practice is receding from U.S. courts, for years those courts would issue rulings with that cringe-worthy citation that "*there [were] hardly any cases interpreting the CISG,*"

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<sup>113</sup> Michael Kabik, *Through the Looking-Glass: International Trade in the "Wonderland" of the United Nations Convention on Contracts for the International Sale of Goods*, 9 INT'L TAX & BUS. LAW 408, 409 (1992) ("*The C.I.S.G. reduces problems of proof of foreign law in US Courts since the C.I.S.G. is domestic law, and foreign contract law does not govern the contract between parties under the jurisdiction of contracting states (absent an affirmative exclusion or derogation)*").

<sup>114</sup> See BIANCA & BONNELL, *supra* note 24.

or that it was proper to rely on case law interpreting the UCC. When faced with a CISG case, Mexican courts still make grandiose announcements that they will apply the CISG, only to fall back on the law with which they are most familiar—the Mexican Commerce and Civil Codes, including its case law—failing to cite to international CISG case law, treatises, digests, or to Opinions of the Advisory Council.

How a motion to submit an expert witness on the CISG will be received will vary on a country-by-country basis. The first issue is whether the CISG has been ratified or not by the country. If it has not been ratified, it is more likely the courts will allow the parties to rely on experts to inform the court of the CISG, because it would be foreign law. In most legal systems, foreign law is considered a fact that needs to be proven in court.

If the CISG has been ratified, whether an expert witness report will be allowed will depend on procedural rules, and to how strong the principle of *jura novit curiae* has been imbedded in the legal tradition (though it is my understanding that German and Brazilian courts sometimes rely on expert opinions on domestic law). The same is true in the United States in regard to intellectual property law, where it is common to find lawyers as expert witnesses.

In my opinion, there is room for the expert witness on the CISG. Their work would not have to come at an exorbitant cost, a concern that is often voiced regarding the cost of expert witnesses. An expert would know where to find information regarding the CISG in a more expedient manner than an attorney unfamiliar with the subject matter, so that their use would not undermine the purpose of unifying and making the resolution of disputes more efficient and predictable.

With a few recent exceptions, most national judges are generalists and address a wide variety of disputes. It would be ludicrous to expect them to be experts in identifying foreign case law, treatises, or legislative history with the same level of understanding and efficiency as a person that is knowledgeable in the *lex mercatoria*.

An expert could serve the purpose of informing the court regarding the rules of international and uniform interpretation of the CISG. Even if it would be improper to expect that the CISG be invoked or proved as foreign law, it would be worse to limit the parties from relying on expert testimony.

Finally, my proposal is that there be one expert, proposed by the court, at the suggestion of the parties, or from a specialized private body such as the CISG-Advisory Council.

