Department of Law

Aalborg University

The purpose of the CISG

Part IV Final Provisions

Can uniformity as a goal within the CISG be
measured and do reservations have an effect on that goal?

Study no: 20143062
Inger Anna Lena Þórðardóttir Ericson
Thesis in Law on International Contract Law
Aalborg. 14/08/2020
Characters: 139.560

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2 Abstract

I dette speciale diskuteres den FN-konvention, der omhandler aftaler om internationale køb, og dens formål, med fokus på ensartethed og historikken bag ved de forskellige forbehold i CISG. Hvorfor de er en del af konventionen, hvilke lande der har valgt at tage forbehold, hvilken betydning det har haft, både hvad angår indførelse og tilbagetrækning.

De Forenede Nationers konvention om aftaler om internationale køb, til dagligt kaldet CISG, bliver i dette speciale fremadrettet henvist til som CISG eller 1980 Vienna konventionen.

"Formålet med CISG er at skabe en moderne, ensartet og retfærdig ordning for kontrakter vedrørende internationalt salg af varer. Således bidrager CISG betydeligt til introduktion af sikkerhed i kommercielle transaktioner og faldende transaktionsomkostninger." [1]

Metodevalg tager hensyn til både spørgsmålene som er rejst og CISG som internationalt fænomen. Specialet vil reflektere over konventionen og hvordan den er fortolket, både med hensyn til internationale obligationer og de forskellige artikler i den, der er relevante. Den vigtigste her er Artikel 7 i CISG, som giver rammen om hvordan konventionen skal fortolkes. Ensartetheden som emne er enormt bredt så for at holde fokus på, at svare de relevante spørgsmål har forfatteren afgrænset nogle emner, trods deres vigtighed i CISG-sammenhæng, for eksempel "*god tro*" og "*validitet*"[2].

Forskellene og lighederne mellem sprogudgaverne bliver undersøgt. Oversættelse og indførelse af en international lov sker ikke uden problemer grundet ting såsom sprog og kulturforskelle. Indførelsen af selve konventionen bliver undersøgt, og ligeledes hvordan CISG har udviklet sig i gennem de sidste 40 år. Hvad er de primære og sekundære kilder, som kan og skal bruges når 1980 Vienna Konventionen bliver anvendt. Det er relevant at undersøge forbindelsen mellem en international konvention og lov som CISG, private internationale lovregler og national lovgivning.

Forfatteren går ind i spørgsmålet om hvorvidt ensartetheden kan måles og hvilket resultat der måtte komme ud af en sådan måling. Der lægges specielt vægt på alle forbehold fra CISG i Artikel 92-96 og hvordan de er anvendt i praksis, såvel som Artikel 97+98. Hvilken positive og negative

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[1] Present author's translation of "United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG) United Nations Commission On International Trade Law." Accessed August 10, 2020. https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg.

[2] Present author's translation of the wording "good faith" in Article 7 of the CISG and "validity" in Article 4.

betydning de har for ensartetheden som 1980 Vienna Konventionens formål, som er hovedspørgsmålene i dette speciale. Efter at have undersøgt og reflekteret på de fornævnte emner afslutter forfatteren med sine konklusioner.

3 Introduction

The United Nations Convention on Contracts for the International Sale of Goods, or CISG is a treaty which goal was to establish a uniform platform for international commerce. The CISG is a product of UNCITRAL, the United Nations Commission on International Trade Law*." UNCITRAL was established in 1966. It was composed of eminent international trade law individuals from 29 countries and later increased to 36 (according to a plan of distribution*".[3] At the Vienna Convention in 1980, 62 nations participated.[4] A draft was presented, discussed and modified until a final treaty was ready for signature at the end of the convention. It was passed with a 2/3rd majority in the final vote, 42 countries voted for the convention while 10 abstained.[5] The convention became effective in the "*first 20 signed"*[6] contracting states in 1988. The final version of the CISG is a total of 101 substantive provisions/articles, which are divided into four parts. After the preamble, it starts with Part I, which entails the rules on Spare of Application and General Provisions, next is Part II about the formation of a contract. Part III of the CISG entails the substantive rules for the sales contract, and part IV of the CISG final public international law provisions.[7] The convention is ratified by 93 countries of the world's 200 or so countries. It is still growing in numbers as more countries become Contracting States, the latest Guatemala, Laos and Democratic People's Republic of Korea,[8] making the CISG an extremely successful treaty and instrument of international trade law.

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[3]Thomas Neumann, "An Exploration of Article 80 CISG," no. January (2011), http://www.statsbiblioteket.dk/au/showrecord.jsp?record_id=sb_4469557. P 62

[4] Peter Schlectriem, "Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods" (Vienna: Manz, 1986). Page 19

[5] Schlectriem. Page 19

[6] Schlectriem. Page 19, fn

[7] Peter Schlectriem and Ingeborg Schwenzer, *Commentary on the UN Convention on the International Sales of Goods (CISG*, ed. Ingeborg Schwenzer, Fourth edi (Oxford University Press, 2016). Page 3

[8] UNCITRAL. (2019), "Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG)," accessed August 4, 2020, https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status.

The goal and purpose of the CISG is clearly expressed in its Preamble. The purpose being to have a uniformed law regarding international sales, excluding commercial sales,[9] service as well as sales of certain types of goods, since it was clear that different set of rules, laws, cultures and economical status amongst nations proposes a hindering effect on global trading. [10] " *The provisions in the CISG was a political compromise between nations with extremely different juridical, political, economic and cultural systems"*. [11] The positive effects being, despite for example the initial fears regarding the CISG amongst the lesser industrial and weaker economic nations , that it increases the security and balance between international traders and can potentially remove the uncertainty that can derive from disputes settled by various, and often unfamiliar to one or both parties, private international law. Lowering the cost both in formation process and specially when it comes to litigation of disputes. Different opinions are on the value of the Preamble[12] in regards to interpreting the CISG and gap filling. Some reject the possibility that the Preamble has any role in that while others feel the Preamble along with Article 7 emphasize the goals of the CISG as being *"universality, uniformity and internationality"* [13]

The Final Provisions where build on the earlier UN Conventions prepared by UNCITRAL, the 1974 Limitation Convention and the 1978 Convention on the Transport of Goods by Sea (Hamburg Rules). The first draft of the Final Provisions was submitted to UNCITRAL, by the Secretariat after it had been requested to do so by Resolution of the General Assembly and was submitted in a revised form at the Vienna Conference. [14] The final provisions and mainly the reservations in regards to this thesis work, where drafted to try to meet the need to increase the likelihood of states ratifying the convention. By that, recognizing both the failure of the previous ULIS and ULF and as stated by the General Assembly "*Having regard for the need to take into account the different*

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[9] "United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG) | United Nations Commission On International Trade Law," accessed August 10, 2020, https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg.

[10] Thomas Neumann, "Juristen - De Nordiske Landes Tilbagekald Af Forbeholdet Mod CISG Del II.Pdf" (Juristen nr.4, 2012). Page 186-190

[11] Present author's translation of T. Neumann " De Nordiske landes tilgbagekaldelse af forbeholdet mod CISG del II"

[12] "UNCITRAL DIGEST 2016," accessed April 22, 2020, https://www.uncitral.org/pdf/english/clout/CISG_Digest_2016.pdf. Page 19, Preambles

[13] Stefan Kröll, Loukas Mistelis, and Pilar Perales Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG) Commentary*, Second Edi (Verlag C.H. Beck oHG, 2018). Page 129

[14] Schlectriem and Schwenzer, *Commentary on the UN Convention on the International Sales of Goods (CISG*. Page 1240

social and legal systems in harmonizing the rules of international trade law".[15] When the 1980 Vienna Convention was held, drafts where presented to the participants on what later became reservations in Article 92,93,94 and 96. Article 95 had not been introduced at that time. The reasons behind each reservation where different motives or concerns from states on the applicability of the CISG. Those initiatives resulted in negotiations at the 1980 Vienna Convention that produced The Final Provisions Article 89-101. The drafted articles where dealt with in the Second committee and amendments from that committee was then discussed in plenary, voted upon and adopted as the provisions as we know them today.

The CISG was now ready and could produced a common platform for all parties involved. However, getting uniformed law does not mean getting uniformed results. But how do you measure uniformity? It seems fairly obvious that if only a handful of States would have ratified the CISG, as was the case with their predecessors ULF and ULIS, the need for such measure of uniformity would never arise. The case is never the less that the CISG now has 93 contracting States and the indication is that more will follow judging by resent additions. On the other hand, the fact that some of the newest additions have implemented the CISG with reservations, would indicate that reservations are still quite relevant.

3.1 Problem Statement

Can uniformity as a goal within the CISG be measured and do reservations have an effect on that goal?

By working from the notion that uniformity was the ultimate goal, how is that goal reached? Can it even be said that the goal is clear? Is it possible or even desirable to achieve uniformity in such different legal and cultural systems? How do you measure Uniformity? And does the usage of reservations in the Final provisions of the CISG, hinder or promote that goal? In order to answer those questions different approaches will be applied.

The first approach could be to look at the history and background of the CISG, and how did the drafters wish to achieve this goal? Did they anticipate some or most of the factors, or in worst case scenario any, that would stand in the way of the uniformity? Can this approach answer the underlying ideology behind the Uniformity goal?

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[15] United Nations General Assembly, "Resolutions and Decisions Adopted by the General Assembly During Its Fifty-Ninth Session (A/60/L.1, Vol. 3, p. 38).," n.d. page 216

The second approach could be to focus on the text of the Convention, where the wording uniformity is both present in the preamble of the Convention and in Article 7 (gap filler), making it fairly obvious that Uniformity it is one of the highest goals of the Convention. How should the CISG be interpreted, and do other treaties or obligations effect that interpretation?

The third approach could be to put emphasis on the how the CISG is implemented and how language effects that since the CISG has 6 official languages. Focusing on current application and interpretations of both CISG in general and its provisions as it is found in practice and literature. Mainly focusing on article 6 – 7, Private International Law and legal sources.

The final approach could be to see how the usage of reservations promotes or hinders uniformity? Why do the reservations exist within the CISG? Using the legislative history to try and answer that, focusing on which states declare the reservations, the application and interpretation of all reservations in practise to see if we can understand the effects of reservations within the CISG.

4 Method

To address those approaches and focus on trying to answer the questions already risen in the attempt to analyse and answer the questions if the uniformity as a goal can be measured and what role reservations in the Final Provision have on that goal, one has to choose relevant methodology.

The first question “what is the law?” referring to the CISG as the law and possible issues surrounding that will be answered by applying legal comparative and dogmatic methods. As the next question becomes “why is the law like that?” searching for explanation surrounding issues that have risen from the first question the historical legal method will be applied. The third question “How is the law?” and the corresponding effort in addressing how the law is interpreted and applied by using black letter method. In the end we have the question “how could the law be?” in regards to the answers already established at this point, the legal policy method will be applied to cast light on issues that still are unanswered, unsettled or need further development. [16] Focusing on using the methods described below and delimiting some aspects that either are deemed to comprehensive for

[16] Aleksandra Tolea, “The Reservation Against the Freedom of Form Principle; An Exploration of the Effect of Article 96 CISG on the on the Private Parties.” (2018).

this thesis or it will be explained why it has been delimited along the process. Relevant questions will be asked in the analysis before summing up the conclusions in the end.

4.1.1 The comparative method and the dogmatic method

"The comparative method is founded upon the actual observation of the elements at work in a given legal system; whereas the dogmatic method is founded upon analytical reasoning "[17]The dogmatic method will be applied to some extent mainly by describing, analysing and systemizing the existent legal status. This will be done by looking at the CISG as international law, legislative history, commentaries, principles, official records, scholarly work and case work. Direct casework will not be applied in the dogmatic method, meaning that casework will not be referenced to identified issues that arise from analysing different matters. Since the thesis is about an international treaty adopted by several nations all with different legal systems and economic, political and cultural differences the comparative method will primarily be applied by reflecting on International treaties, language, CISG initiatives, foreign legal systems and databases.

4.1.2 Historical legal Method

As pointed out above it is necessary to look at the history behind the drafting and making of the CISG, this will be done to get a better overview and understanding of the wording, interpretations and thoughts of the historical work. The preparatory work is as important as the treaty itself and by applying the historical legal method, possible issues raised by the adoption of the CISG can be reflected on.

4.1.3 Black Letter Method and Legal theory

The Black Letter Method approach is to concentrate on the "letter of the law". The aim being to clarify and describe the law on a specific field of law, at the given time. In this thesis the approach

[17] J.Paul Lomio, Henrik S. Spang-Hanssen, and George D Wilson, *Legal Research Methods in a Modern World: A Coursebook*, Third edit (Djøf, 2011). Page 60

will be to analyse primary and secondary sources, identify legal issues that could be investigated and even developed further.[18]

4.1.4 Legal Policy method

The legal policy considerations within this thesis will be based on critical evaluation of various effects that emerge in the analysis of this thesis as it presents itself, since it is not advised to have an opinion about necessary changes or suggestions for further development unless an accurate knowledge of the law is established. [19]

4.2 Delimitation

With the research questions established, how and with what methods and sources the questions will be attempted to answer with primary focus on the CISG as Private International law. How it has progressed throughout time, across borders, state and legal multiformity. Not all articles in the CISG will be addressed only those who are deemed relevant for the analytic work. What interpretations and principals have become black letter law and what issues are still unresolved. The focus will also be on how and if we can measure uniformity by utilizing the aforementioned methods in the analysis, leaving out an important principle in the CISG in Article 7(1) .. "*observation of good faith...*" and refraining from going into depths of Validity issues in Article 4. In addressing Article 96, Article 11 on form requirements and related matters in Article 29 and Part II will not be analysed separately. The depository period when States accede to the Convention, declare or withdraw reservations will not be analysed despite what role it can have on the measurement of uniformity.

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[18] "Writing A Law Dissertation Methodology," accessed August 6, 2020, https://www.lawteacher.net/law-help/dissertation/writing-law-dissertation-methodology.php.

[19] Tolea, "The Reservation Against the Freedom of Form Principle; An Exploration of the Effect of Article 96 CISG on the on the Private Parties."

5 CISG history

The CSIG is not the first uniform sales law, before the successful CISG emerged there was the ULIS and ULF treaties from the Hague Convention dating back from 1964. ULIS, The Uniform Law for the International Sale of Goods and the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF) where met with very limited success, both treaties only ratified by nine states. Therefore, when courts where confronted with disputes that derived from International Sales in pre-CISG context, questions involving contract formation, obligations, remedies for breach and other contractual dilemmas in International sales, they were obliged to make a choice of law determinations, which often ended up with a choice between the private international laws instead of relying on the treaties rule set and practice[20]

The final product produced 101 articles after being formed, drafted, discussed, amended and finally voted upon and signed at the Vienna convention in 1980. UNCITRAL fortunately did not have to invent the wheel, so to speak, since they had the previous ULF, ULIS and the research of Ernst Rebel, who is often considered the founder of the Uniform International Sales Law[21]. The UNCITRAL Working Group, presented a finished first draft in 1976, which was ratified with a few amendments in 1977. The second draft, known as the New York draft was incorporated in 1978. The Secretary-General then circulated this 1978 Draft Convention among the governments of UN member states for their opinions and comments. It formed the basis for the work of the Vienna Conference in 1980 where the final provisions where signed after the 62 national participants had gone through, amended and finally approved the CISG[22]entered into force January 1st 1988 when the first eleven state ratified the convention.[23]

Most commentators agree that the drafting of the CISG was a phenomenal thing and just the fact that so many states have become Contracting State plays a large part, in the measurement of uniformity. On the other hand, how the CISG is interpreted, implemented and practiced are a vital part of answering the research questions.

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[20] Joseph Lookofsky, *Understanding the CISG, 5 Udgave* (Djøf, 2017). Page 4

[21] Schlectriem, "Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods." Page 17

[22] Schlectriem. Page 18

[23] Lookofsky, *Understanding the CISG, 5 Udgave*.

5.1 Interpretation

The first choice is to use the CISG itself to interpret and understand provisions relevant to this thesis work, starting off by looking at Article 7 on how the CISG should be interpreted. But since the CISG is a treaty the one of the first question would be how treaties could be interpreted? The Vienna Convention on the law of Treaties from 1969 (1969 Vienna Convention) *"has been described as the 'treaty on treaties' and contains among other things rules of interpretation in articles 31 to 33"*[24]. The potential dilemma with applying the interpretation of the 1969 Vienna Convention has three relevant issues. One is that it has not been ratified by all CISG states.[25] The second being, because of Article 4 of the 1969 Vienna Convention it has no retroactive effect to treaties. Meaning that it is not applicable to treaties concluded by states before the 1969 Vienna Convention entry into force.[26] The third being the fact that the 1969 Vienna Convention applies to obligations between states and not private parties. The 1969 Vienna Convention is in practice applied to situations despite the fact that it is predominantly not applicable. However, it is widely admitted that the interpretations provided in Article 31-33 of 1969 Vienna Convention represent a general codification of international customary law and can therefore be applicable in regards to states that have not ratified the aforementioned Convention.[27]

Focus has to be on the third issue since that it is mostly relevant to the Final provisions of the CISG. [28]Article 31-33 of the 1969 Vienna Convention state that the interpretation of treaties should be in good faith and with concern to the ordinary meaning. Going on to show the relevance of the usage of preparatory work and the circumstances of its conclusion, when the meaning is ambiguous or obscure; or leads to a result which is manifestly absurd or unreasonable. The wording "*ordinary meaning*" in the 1969 Vienna Convention refers to the normal, regular and usual meaning of the given word at a given time, referring to the fact that the interpretation may change over time.[29] With that in mind the intentional meaning of the drafters is relevant as well as developments over

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[24] Neumann, "An Exploration of Article 80 CISG."

[25] Burundi, Bahrain, Fiji, France, Iceland, Iraq, Israel, Mauritania, Norway, Romania, San Marino, Singapore, Uganda and Venezuela,

[26] Azerbaijan, Benin, China, Cuba, Ecuador, Georgia, Guinea, Hungary, Luxembourg, Poland and Switzerland

[27] Tolea, "The Reservation Against the Freedom of Form Principle; An Exploration of the Effect of Article 96 CISG on the on the Private Parties." Page 44

[28] Neumann, "An Exploration of Article 80 CISG." Page 23

[29] Neumann. Page 24

time that can either affirm the drafters meaning of a word or evolve through unified application by relevant states.

The official languages are important and in theory equal[30], and if Article 31 and 32 do not resolve the issue "*the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted".* [31] Interpretations will be analysed further, in regards to relevant articles to answer the questions about uniformity and if and how reservations affect uniformity, with focus on the difference between parties' contractual obligations and state obligations.

5.2 Article 7

The importance of Article 7 is enormous, as it is said to be the backbone of how the CISG is to be interpreted and applied in practice. According to UNCITRAL the connection between the Preamble (the goals of the CISG) and Article 7 in regards to uniformity:

"The third clause also describes particular aspects of the Convention that advance those goals—specifically, the status of the CISG as a set of "uniform rules" (emphasis added) for international sales, and its success in "taking into account the different social, economic and legal systems." The emphasis here on uniformity and on transcendence of particular legal and socioeconomic traditions is amplified in article 7(1) of the substantive CISG, which mandates that the Convention be interpreted with regard "to its international character and to the need to promote uniformity in its application."" [32]

As stated in the last subsection interpretations of treaties are important as international obligations of states. Equally, if not more important is how the CISG itself is interpreted and used in practice, now that 40 years have passed since the birth, for a lack of a better word, of the CISG occurred.

At present times we are fortunate enough to have several examples and cases to see how CISG is being practiced in real life. Throughout that time the biggest obstacles have been interpretations of the CISG both in regards to the CISG principles and if the CISG is applicable to the contract itself, or more yet the conflict itself. Meaning that adjudicator interpret the conflict in accordance to the given set of rules/law at any given time. This has not been without it's sets of issues throughout the

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[30] See subsection "Language"

[31] "Vienna Convention on the Law of Treaties (1969)," n.d. Article 31-33

[32] "UNCITRAL DIGEST 2016." Page 19 Preamble

growth span. *"Perhaps the single most important source of non-uniformity in the CISG is the different background assumptions and conceptions that those charged with interpreting and applying the Convention bring to the task."*[33]

By the words of the late, Professor John Hannold *"The Convention, faute de mieux, will often be applied by tribunals (judges or arbitrators) who will be intimately familiar only with their own domestic law. The tribunals, regardless of their merit, will be subject to a natural tendency to read the international rules in light of the legal ideas that have been embedded at the core of their intellectual formation. The mind sees what the mind has means of seeing"*. [34] A phenomenon called the Homeward trend.

To avoid falling into the all too familiar trend of interpreting an international conflict by applying domestic rules, adjudicators have to focus on applying the appropriate laws and principles and focus on the principles in Article 7 of CISG. Art. 7 of the CISG is a political compromise and show principles on how the conventions should be interpreted, stating:

"(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade." [35]

International character, uniformity in its application and observance of good faith is the backbone of paragraph 1 of Article 7. In this thesis the importance of all three matters is recognised the but for the purpose of this writing the observation of good faith is left out of further analysis.

Focusing on the first part of this provision it states that in order to promote uniformity in its applications of the CISG, participants must interpret the principles in regards to the international character. Therefore, only when a principle or an interpretation, not already established within the international CISG regime, is absent, can a good decision be derived from Article 7(2) latter part or by virtue of the rules of private international law.

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[33] Harry M Fletchner, "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 Journal of Law and Commerce, 1998, https://www.cisg.law.pace.edu/cisg/biblio/flecht1.html. Page 200

[34] Fletchner. Page 200

[35] "UNCITRAL DIGEST 2016." Article 7 page 42

Article 7(2): *"**Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.*** "[36]

Article 7(2) of the CISG is a gap filling rule, as UNCITRAL did in a way predict that problems would arise that the CISG could not or does not in itself solve. If the solution is not to be found in the CISG, it provides for two step procedure. Firstly, matters that are 'governed' but not settled by the CISG and secondly 'general principles on which the Convention is based' have to be reflected on in the process to fill the gaps. If these procedures fail, then it comes to domestic rules, decided by conflict rules of the forum.[37] (see subparagraph regarding **PIL**)

The compromise of the CISG refers both to concept and principles that are in many cases supposed to be different from the national ones since uniform law conventions in their core are intended to be as neutral as possible so it is applicable by the masses. Choosing one form of wording instead of another is designed to fit the masses and, in most cases, does not stipulate a concept deriving from a specific domestic law system.

The CISG interpreters must therefore be aware of so called *faux-amis* and strive to focus on what is expressly settled in the CISG and what is not. However, if it is apparent from legislative history that the drafters wanted a given concept/wording or principle to be interpreted in light of a specific domestic law system, one can and is allowed to have recourses to that's legal systems understanding.[38] "*Unfortunately, however, courts do not always comply with this mandate to interpret the CISG autonomously, nor do they seem to resort to 'nationalistic' interpretations only where justified by the legislative history. Rather, a closer look at some decisions allows one to state that a 'homeward trend' is discernible, at least by some courts. This trend is deplorable because it promotes parochialism and thus defeats the very purpose of the CISG*"[39]. Luckily there are many great decisions ruled by different adjudicators of the world, such as in USA, Spain, Switzerland,

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[36] "UNCITRAL DIGEST 2016." Page 42

[37] Schlectriem and Schwenzer, *Commentary on the UN Convention on the International Sales of Goods (CISG*. Page 132

[38] Franco Ferrari, "Homeward Trend and Lex Forism Despite Uniform Sales Law (1/2009) P15-42," 13 Vindobona Journal of International Commercial Law & Arbitration, 2009, http://www.cisg.law.pace.edu/cisg/biblio/ferrari17.html#24. Page 18-19

[39] Ferrari. Page 19

Italy and Austria[40] that have specifically stated that their ruling focuses on the international character interpretation and autonomously applying the rules and principles in CISG and excluding in many cases the national interpretations of a given issue. Article 7 is viewed by many as one of the most important provisions of the CISG and abundance of opinions, commentaries and interpretations are available on the subject and the principals that this article portrays. It is definitely of great importance in answering the research question regarding uniformity albeit only a fraction of relevant issues has been portrayed. That approach has been taken since it is the present author opinion that although Article 7 is indeed important, it´s role becomes predominantly important in how the CISG is interpreted in regards to issues that are governed by CISG and how to fill external gaps and analysing all aspects of Article 7 cannot give a clear answer on how uniformity is measured. Henceforth, further analysis into other factors is required.

5.3 Private International Law

As pointed out, the usage of Article 7 allows recourse to private international law if the interpretation of a given matter gives cause to do so. But witch choice of law is applicable to the matter is determined by many factors. If the interpretations of the adjudicator do not produce a solution of a matter being settled within the CISG, or not governed by the CISG e.g. because the usage of reservation excludes it from applying to the contract, and must seek answers elsewhere it should be done in a way that respects the states obligations. It can be seen in various interpretations of which rule of law applies to scenarios depending on where the seller, buyer and even the court are located. Furthermore, within the CISG depending on if it is a Contracting State, Non-Contracting State or a Reservation Contracting State.

The choice of law is not necessarily all together obvious and can in many cases be unknown to contracting parties at time of formation, or come as an unexpected issue if a dispute arises. If the adjudicators are faced to determine which private international law applies to the situation they have to do so according to applicable rules of that forum, whilst respecting their International obligations. The connection between private international law choice and the CISG is important because different set of rules can possibly produce different set of outcomes. That would defy the goal of the CISG to have unified and predictable laws that governs international trades law.

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[40] Camilla B Andersen, "The Uniform International Sales Law and the Global Jurisconsultorium," 24 Journal of Law and Commerce , 2005, http://www.cisg.law.pace.edu/cisg/biblio/andersen3.html.

The perception is, that the drafters of the CISG recognized the fact that all matters are not settled by the rules of the CISG directly, they seem to have allowed space for further development in correlation with private international law. If a given matter is to be resolved by private international law, numerous sets of rules could apply in the process of determining which rules apply, the most common ones being the 1955 Hague Convention on the Law Applicable to International Sales of Goods, the Rome Convention and the Rome I Regulation, the two latter concerning EU Member states. Today we have 93 Contracting States of which 20 have a declared and active Reservations. Of those 93 Contracting States 22 are not Contracting States of the 1955 Hague Convention on the Law Applicable to International Sales of Goods.

If the adjudicators are located in the Contracting State and the choice of law is to be determined according to the 1955 Hague Convention the choice of law is generally the law at the sellers place that governs the sale, but there are two exceptions to this rule; one if the buyer accepted the offer in his State the laws of the buyer applies and the second one is case of sales at stock exchanges or auctions the law at the place of the stock exchange or auction determines the law of choice. In other cases, the Rome Convention that entered into force in 1991 or the Rome I Regulation from 2008 will determine the applicable law to contractual obligations.

The Rome Conventions and Rome I Regulation is in force where the seated court is located in an EU Member State, provided that the state has not ratified the 1955 Hague Convention (Denmark is the only EU member state that did not ratify the Rome I Regulation but is on the other hand an Contracting State to the 1955 Hague Convention). Both Rome Convention and the Rome I Regulations state that the applicable law of choice is at the seller´s place of business, with the exceptions that the applicable law may be of the State with which the contract is marginally more closely connected than with the seller´s State and consumer sales (that may in rare exceptions fall under the scope of the CISG for example by virtue of CISG Article 2(a)) are under certain circumstances governed by the law is of the buyers place. [41]

As stated, at time of writing 22 Contracting States and Reservation Contracting States of the CISG are not members of the 1955 Hague Conventions and some are not EU members[42]. The result of

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[41] Ulrich Magnus, "The Scandinavian Reservation under Art. 92 CISG," 1999.

[42] "1955 Hague Convention on Private International Law," accessed August 5, 2020, https://www.hcch.net/en/instruments/conventions/status-table; UNCITRAL. (2019), "Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG)."

this unharmonized set of rules could result in an entirely unexpected scenario to the contracting partner or partners. A possible unknown set of rules could be applicable in determining which private international law should govern the conflict ruling in future cases. This unforeseeable possibility is a good example of why the CISG was created with the purpose of harmonizing and unifying international sales law to try and minimize the uncertainties that can arise in a cross-border trading. One possible solution to this issue is to clearly state the choice of law applicable to the contract, within the contract, so the recourse to private international law choice unknown or unfamiliar to parties do not become relevant.

5.4 Language

The CISG is applied in an international context in a world of multiple languages, where some are connected and others are not. The relevant question to ask is, has this fact any bearing on the CISG´s uniformity goal and if so, how? The CISG has 6 official languages English, French, Chinese, Spanish, Russian and Arabic and even those 6 official versions are not identical. Some translations and meanings are not the same or at least are open for discussions and interpretation both by scholars, adjudicators, and all those who practice within the CISG regime (traders/lawyers and etc.).

Should a case involving disputes about a meaning of a given language interpretations occur, the first thing that should be considered is the matter regarding issues stemming from State obligations or the contract itself. As stated before recourse to interpreting the matter applying the 1969 Vienna Convention on the laws of Treaties should only be applied to matters related to the state and not the contract itself. According to the 1969 Vienna Convention, in case of discrepancies in an international text, resolution should be made to the rules of interpretation of treaties in article 31-33 and state that if no particular text prevails in comparing the official language versions recourse should be made to the *"meaning which best reconciles the texts, having regard to the object and purpose of the Treaty."*

Different views are apparent amongst CISG commentators on which one of the official versions should prevail, some feel that it should be the English and French since that where the languages the

drafters used in the making of the CISG while others like Camille Andersen objects to the notion of the English version being the best. Arguing it is both politically incorrect and Eurocentric. [43]

According to the DIGEST 2016 all 6 original versions are equal, yet recognizing that some issues can arise and how to interpret such issues. One could argue that translated versions are unlikely to prevail against one of the original ones when put to the test. The research pertaining to this thesis, did not unearth any casework challenging the interpretations of difference language versions within the CISG available to date, but such an issue could present itself in the future.

5.5 Implementation

First of all, to achieve some form of practical uniformity, the CISG needs to be implemented by as many nations as possible. As the CISG has already been ratified in almost half of the world's nations, it is fair to say that the CISG is steadily growing in numbers to this day. It is not only important to implement the CISG, but also to do so correctly, thus speaking mainly about the textual part, or the language and see if that affects uniformity.

As Germain[44] pointed out there are 3 prominent issues in regards of translating a legal text, focusing on the first two and leaving out the third (being contractual issues arising from translated documents not understood by all of the parties involved). The first issue being that there is not one official language but as stated above there are 6 and multiple unofficial languages The second issue is the implementation/ratification of the CISG Contracting States, specially the States that do not use the 6 official languages, e.g. the German version, serving the German speaking nations Austria, Germany and Switzerland.[45] The translation team quickly ran into issues regarding their work *"there is evidence that the existence of several official language versions of the CISG produces textual non-uniformity. Consider the following passage by Paul Volken describing the preparation of a German language translation of the Convention: After the international adoption of a new multilateral convention, the German-speaking countries usually meet in order to prepare a common German-language version of the new instrument. Since the French version always serves as the official text in Switzerland, Swiss delegates to the translation meetings must be especially careful to*

[43] Andersen, "The Uniform International Sales Law and the Global Jurisconsultorium."

[44] Claire M. Germain, "CISG Translation Issues: Reducing Legal Babelism," *SSRN Electronic Journal*, no. 2011 (2012): 1–20, https://doi.org/10.2139/ssrn.2120620.

[45] Schlectriem and Schwenzer, *Commentary on the UN Convention on the International Sales of Goods (CISG)*. P. 23-24

avoid unacceptable discrepancies between the French and the German versions. With respect to the Vienna Sales Convention, the translation meeting was held in January 1982 in Bonn, and the preparatory draft of the translation was drawn up on the basis of the official English text. At the meeting, three out of four Swiss interventions were raised against deviations from the French version that were considered too far-reaching. The meeting made it clear that in most instances the deficiencies were not due to the basic German draft, but to the fact that the original English and French texts contained discrepancies."[46]

Are the nations, not implementing the 6 official language versions, failing to translate the text correctly and how are legislators implementing the text into national laws? Since there is no UNCITRAL or UN official vetting of such translations it can easily be presumed that there is a high risk that discrepancies will and have occurred[47].

Norway did not use incorporation when implementing the CISG into their legislation but chose to incorporate some parts of the CISG into Norwegian domestic laws and doing so by translating one of the official language versions. Not only did they leave out some parts of the Convention but also changed the structure so even the Article numbers did not match the CISG, making it extremely difficult to understand. Hagstrøm[48] did go as far as stating that this approach should not be followed and this particular method was widely criticized. Fortunately, Norway has subsequently made changes to their act and incorporated the official English version of the CISG.

Even though other translated versions are unofficial, they are definitely not unimportant, as the translated versions eventually serve as a primary source of The Convention for those States that do not have one of the 6 official version in their own language[49]. Different interpretation outcomes have and will arise depending on factors such as what states are involved, what the drafter's intensions were, what languages are involved, the ordinary meaning of the word and principles. In some cases, the contract itself and the process of formatting it could come into play, even though the last point definitely depends on if the matter is interpreted as a matter of states obligations or

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[46] Fletchner, "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)."

[47] Fletchner. Page 193

[48] Viggo Hagstrøm, "CISG-Implementation in Norway, an Approch Not Advisable," *Internationales Handesrecht* 6 (2012). Page 248

[49] Fletchner, "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)." Page 190

contractual between private parties. The new additions to Contracting States have the luxury of learning from the 40-year-old history of the CISG should they choose to apply it. Referring to the trials and errors from the veteran-States of the CISG.

5.6 Article 6

Another article plays a big part in the quest to establish parameters in attempting to answer the question if uniformity can be measured and that is Article 6 of the CISG, stating the following:

"The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions."[50]

The article 6 constitutes *Ius Dispositivum*-the right to derogate, it *"permits the parties to derogate from the provisions or vary their effect, e.g., by merger clauses "*[51]. Meaning that participants of the CISG contracts can choose to exclude some or all provisions of the CISG, with the exception of perhaps the written requirement in Article 12, in their contracts. The so called opt in/opt out is available as a result of a compromise by the conventions makers, striving to make the CISG as widely adopted as possible, whilst respecting the need to acknowledge the trader's absolute contractual freedom.

Professor Gerhart has argued that the CISG's ultimate goal of achieving uniformity should be balanced against the interest in ensuring the acceptability of the Convention over the long term. He analogizes the CISG to a bridge, and suggests that *"interpretation that weakens faith in the bridge by the nations that supported its construction, or that drives parties to resort to other regimes, will ultimately weaken the bridge or render it useless."* [52]As Karen Cross stipulates in her article, she points out that one only needs to go online to find a vast amount of opt out clauses available for commentators to use in their contracting work.

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[50] "UNCITRAL DIGEST 2016."

[51] "CISG Advisory Council Opinion No. 3: Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG, 17 PaceInt'lL. Rev. 61 (2005)," 2005, https://digitalcommons.pace.edu/pilr.

[52] Karen Cross, "Parol Evidence Under the CISG: The 'Homeward Trend' Reconsidered," *Ohio State Law Journal, 68* 68, no. 1 (2007): 133–60. Page 144

In the history of making article 6 it was attempted to introduce a requirement that any exclusion should be made "expressly" but it was unsuccessful.[53] This illustrates the fact that the drafters of the CISG regarded the party autonomy as an important factor. They chose to risk predictability by not restricting it as suggested, and most likely attract more usage of the CISG instead. Adjudicators have encountered numerus issues with interpreting the usage of Article 6. To mention some of them, it can be anything from weather the parties in question explicitly opted out or if it was an error in the final draft. Was the intent by the choice of forum to excludes the CISG and if so, which private international law should be applied in resolving the issue.[54] The numerous issues that can arise from this article as well as the vast variations of contracts that are formed under the normal applications of party autonomy, has an obvious effect on uniformity but not necessarily in a negative way. If the CISG did not respect party autonomy in the way it is done, one could imagine that such rigorous law would not be as widely used as it is today. One could argue that Article 6 shows the drafters understanding and respect to develop the CISG in a way that it could both function in international trading and progress over time.

5.7 Primary and secondary source

The general definition on law sources according to Article 38 of the Statute for the International Court of Justice in Public International Law is divided into Primary and secondary sources in the following manner.

"Article 38

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- ***a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;***
- ***b. international custom, as evidence of a general practice accepted as law;***

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[53] Schlectriem and Schwenzer, *Commentary on the UN Convention on the International Sales of Goods (CISG)*. Page 102

[54] "Article 6 Cases," accessed August 14, 2020, https://cisgw3.law.pace.edu/cgi-bin/isearch?DATABASE=cases2&SEARCH_TYPE=ADVANCED&ISEARCH_TERM=articles/6&ELEMENT_SET=TITLE&MAXHITS=500.

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto."[55]

Meaning that 1(a-c) are primary sources and (d) is soft law or secondary sources and paragraph 2 states that paragraph 1 does not prejudice the power of the Court over an arbitrary if both parties agree thereto. This general definition has no legal bindings in regards to the CISG but illustrates a valid argument in how legal sources can be defined.

What are the primary and secondary sources when it comes to the CISG and rulings relating to international sales of Goods contracts, is not a clear-cut answer in all aspects? If reservations are involved the matter becomes even more complicated because of their dual characteristics of residing somewhere between treaty law and international private law.[56]

Unfortunately, there is no court of the UN or UNCITRAL that has the function of HIGHEST court in regards to CISG or international sales nor do the UN or UNCITRAL provide for any protocol, doctrine or rules on how the CISG should be interpreted. Having an instrument to weed though national decisions and give unified interpretations would most likely benefit uniformity in the applications of the CISG. It can be augmented that such an instrument in an International scale could slow down the development of the CISG since rulings from such institutes normally take years (just to have the case processed by such International high courts), and over the 40 year span of the CISG a lot has happened and developed in regards to legal sources. Since such an instrument is not a part of the CISG we are left with the implementations of the CISG and related casework in the hands of states and national courts to be interpreted and ruled upon. Thereby, have 93 states that are considered Contracting States (some Reserving) all from different legal systems and in many cased interpret the CISG in different ways as pointed out before.

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[55] CJ. (2020), "Statute of the Court | International Court of Justice," accessed August 7, 2020, https://www.icj-cij.org/en/statute#CHAPTER_II.

[56] Ulrich Schroeter, "Reservations and the CISG: The Borderland of Uniform International Sales Law and Treaty Law After Thirty-Five Years," *Brooklyn Journal of International Law* 41, no. 1 (2016). Page 208

In regards to the CISG we now have rulings on many provisions from different national courts that in many cases can be considered both primary and secondary sources for other courts. It being a primary source if it has been excepted as an international custom or general practice accepted as law, or in the CISG case validated by other courts, but since national courts have no clear obligation to follow foreign case law then it could arguably function as soft law or secondary source. An argument against this view could be seen in Article 7(1) where regards is to be had to international character in international trades and the fact that UNCITRAL also promotes the usage of foreign casework in rulings.

As stated in the subsection regarding Article 7, the CISG does neither govern all matters, nor can all matters be solved within the CISG. If a given matter is not expressly or completely regulated by the CISG, the matter should be resolved by the general principles of which the CISG is based upon. However, Article 7 of the CISG does not determine any general principles, with the exception of "good faith". Many principles have been established over the CISG´s lifespan such as "*reasonableness*" that has become a black letter rule in CISG application. Commentators do not agree if such principles can only be formed from the CISG itself or if other external principles can be used in conformity with the CISG.[57] Such principles as found in *lex mercatoria*[58], PICC[59] and PECL [60].

The most common view and modern trend, is that the PICC adequately fill the gap and supplement interpretations when no general principles within the CISG are found. Although some commentators disagree with that interpretation and feel it can only serve as an additional argument and not as a principal. When matters are excluded from the CISG those principles are fully applicable. Regarding the PECL most commentators agree that because they are a regional

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[57] Momberg Uribe, R. (2011) *CHANGE OF CIRCUMSTANCES IN INTERNATIONAL INSTRUMENTS OF CONTRACT LAW. THE APPROACH OF THE CISG, THE PICC, THE PECL CHANGE OF CIRCUMSTANCES IN INTERNATIONAL INSTRUMENTS OF CONTRACT LAW. THE APPROACH OF THE CISG, PICC, PECL AND DCFR*. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1270575.

[58] "The Lex Mercatoria (Old and New) and the TransLex-Principles | Trans-Lex.Org," accessed August 12, 2020, https://www.trans-lex.org/the-lex-mercatoria-and-the-translex-principles_ID8.

[59] "UNIDROIT Principles 2016 - International Institute for the Unification of Private Law," accessed August 12, 2020, https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016.

[60] "Principles of European Contract Law - PECL | Trans-Lex.Org," accessed August 12, 2020, https://www.trans-lex.org/400200/_/pecl/.

instrument and not international their value is diminished.[61] Wether scholarly work belongs to the primary source or secondary is not an easily answered question. As stated, "*On one hand, it is a primary source since it can provide the international context, object and purpose called for, especially due to lack of access to case law which is a primary source. On the other hand, it would not be correct to have primary outset in scholarly works, as they are not legal sources in the sense that they cannot establish rights or obligations."*[62].

The need for CISG casework, interpretations and defined principles was obvious early on. According to case law on UNCITRAL texts, facts about CLOUT from 2013 *"open, rule-based, predictable, non-discriminatory trading system" is key to ensuring countries' development"*.[63] Going on to state the importance of harmonized application of the CISG and recognizing that access to information about applications around the world is not always readily available.

The CLOUT system was designed in 1988 (operational in 1993) to address this issue and gather information about relevant court decisions and arbitral awards in countries applying those text. Now, that database is available to everyone, more casework is being added every month and UNCITRAL even promotes voluntary additions to be sent in for evaluations before published with credits. *"CLOUT facilitates the widespread distribution of such information, and thus enables and encourages users to take into account the decisions of judges and arbitrators in countries other than their own, thus promoting international awareness of the texts."*[64]

Because there where so many cases in the CLOUT the COMMISION back in 2001 requested a tool that would select information on the interpretation on the CISG in a *"clear, concise and objective manner"*. That resulted in the DIGESTS, first published in 2004, then 2008, 2012 and the latest one dating back from 2016[65]. Hopefully we can expect a new one to emerge soon.

Participants within in the CISG regime have a great source of established interpretations of principles, decisions, history and scholarly work available today, such as the aforementioned CLOUT and DIGEST. Another great private initiative is the CISG Advisory Council, that has been

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[61] Kröll, Mistelis, and Perales Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG) Commentary*. P 142-143

[62] Neumann, "An Exploration of Article 80 CISG."

[63] United Nations, "Facts about CLOUT," n.d., www.uncitral.org/uncitral/en/case_.

[64] Nations.

[65] "UNCITRAL DIGEST 2016."

award observer status within the UNCITRAL and UNIDROIT for their work, providing critical and valuable opinions on CISG related issues. Furthermore, the CISG users have databases as UNIDROIT, UNILEX, Pace Law School CISG Database, and many others available online (of different quality and in different languages),[66] all are an invaluable resource in the process of achieving autonomous interpretations and application of the CISG.

Many commentators do not only see the textual issues, interpretations, implementation, party autonomy nor the practice of the CISG as the only major factors in how uniformity can be measured, but the usage of reservations, not only in the treaty itself but by declared reservations by the Contracting states. It will therefore be looked more closely into the reservation's in regards to CISG and Uniformity in the following chapters.

6 Reservations in general

By means of a reservation or reservations, a State that would otherwise be considered fully part of the relevant Convention and thus entirely bound by its provisions, declares that it does not wish to express its consensus on a specific provision of the Convention. The state becomes a party of the Convention, while modifying, for the reserving State, the provisions of set Convention to which the reservations relates to the extent of the reservation. In multilateral Conventions, reservations are often referred as a counter-offer or a compromise in the context of bilateral negotiations, meaning that a State can become a party of the Convention with reservations instead of not becoming a contracting state at all.

It is important to clarify that the reservations create no reciprocal effect in the non-reserving Contracting states. As a general rule, from the perspective of the party whose place of business is located in a non-reserving Contracting state the reservations should be regarded as if it was not there and the Convention applicable in full, unless the transaction involves a reserving state and somehow influences the way the trade is regulated. This might be the case in different scenarios depending on if the place of business for one or both parties and also when the forum is located in another state, reserving/non-reserving or even not a contracting state at all and lastly when the law

[66] "CLOUT - UNCITRAL Database," accessed August 5, 2020, https://www.uncitral.org/clout/index.jspx; "UNCITRAL DIGEST 2016"; "UNILEX Database," accessed August 5, 2020, http://www.unilex.info/; "CISG Databace Pace Law," accessed August 5, 2020, https://iicl.law.pace.edu/cisg/cisg; "UNIDROIT," accessed August 5, 2020, https://www.unidroit.org/instruments/commercial-contracts/.

applicable is decided to be one of the different states (non/reserving/contracting) This will be analysed in the next chapter.[67]

6.1 1969 Vienna Convention / CISG

In terms of customary public international law as codified in Article 2(1)(d) of the 1969 Vienna Convention on the Law of Treaties, a reservation is:

"a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State".[68]

This is a commonly accepted definition, yet the subject of reservations has often been the cause of difficult legal problems, academic conundrums and speculations surrounding them. The CISG authorizes five such reservations in its Articles 92-96, though oddly enough even the numbers of the reservations in the CSIG, seem to be a matter of some dispute. Professor Ulrich in his article divided the foremost commentators into three schools for thought, the majority amongst them assume that the CISG recognises five reservations, Article 92,93,94,95 and 96. What is maybe not surprising is that this group of commentators justify their assumption on the wording of Article 98, "no reservations are permitted except those EXPRESSLY authorized in this Convention".

The second group of commentators interpret the final previsions of the CISG to contain no reservations, in spite of the reference to "reservations" in Article 98, this group focuses on the strict difference between declarations and reservation. Their argument for their believes, is the language of especially Article 92 and 96, or the fact that the Articles never mentions the term reservation and therefore exclusively should be interpreted as declarations.

The third and last group recognises that Article 92, 94 and 96 in the CISG provide for reservations, but questions and doubts whether Article 93 constitutes as a reservation in the strict sense but a federal clause. Highlighting a long-standing debate within general treaty law, where the prevailing view today is that federal state clauses are not reservations in the sense of Article 2(1)(d) of the

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[67] M. Torsello, "Reservations to International Uniform Commercial Law Conventions," *Uniform Law Review - Revue de Droit Uniforme* 5, no. 1 (2000): 85–120, https://doi.org/10.1093/ulr/5.1.85. Page 89

[68] "Vienna Convention on the Law of Treaties (1969)."

1969 Vienna Conference on the Law of Treaties.[69]

6.1.1 Reservations vs. declarations and federal clause

As pointed out there are three different focuses on the definitions of the last provisions of CISG, Articles 92-96. If we look more closely on the first group focusing on the fact that Article 92-96 of the CISG are in fact reservations despite the lack of the term "reservations" in the language therein, as it has little baring when it comes to the legal qualifications of these treaty provisions. The aforementioned Article 2(1)(d) of the 1969 Vienna Convention on the Law of Treaties makes this clear by defining **reservations** as "*unilateral statement however phrased or named"* [70].

This is even affirmed by the legislative history of the CISG. If we look to the history of the legislative work behind article 89-101, specially in regards to art 92-96 and 98, the drafters both suggested and discussed the possibility of the wording reservations and declarations in the final wordings of the articles. In the 6th meeting of the second delegations committee, held on 26th of March 1980, the Austrian delegators felt that is was important not to allow reservations to be made to the convention since they would weaken it and give rise to uncertainty.

"MR. TARKO recognizes that reservations permitted by article X, what later became article 96, were acceptable as a compromise, but the lack of any provision that no other reservation were permissible would enable a state to make a reservation to any article as it saw fit. He therefore proposed that article Y [became CISG article 98] be added, so that no reservations other than those already agreed upon could be made. As it stood, his delegation's amendment (A/CONF.97/C.2/L.4) referred to the initial wording of article (X) [became CISG article 96], as it had been put forward at the beginning of the Conference. In view of subsequent events, however, the proposed text should be revised to read: "No reservation or declaration other than those made in accordance with articles B, C, (X) or G [became CISG article 93, CISG article 94, CISG article 96 and CISG article

[69] Schroeter, "Reservations and the CISG: The Borderland of Uniform International Sales Law and Treaty Law After Thirty-Five Years." Page 212-214

[70] United Nations, *Treaty Handbook Prepared by the Treaty Section of the Office of Legal Affairs*, 2002.

92] shall be permitted." The wording was, mutatis mutandis, identical with that of article 39 of the Prescription Convention" [71]

France then suggested the wording;

"No reservation or declaration other than those expressly provided for in this Convention shall be permitted."[72] *Mr. Roman acting as the Assistant Secretary of the Committee pointed out in connection with the Austrian amendment, that the proposal as amended appeared to specify that declarations in general were not permitted. As the purpose of the amendment was to prevent reservations and declarations which contained reservations, it might be sufficient to refer to "reservations" only so as to avoid including general declarations not containing reservations, such as those often made by States at the time of accession".*

After that it was suggested that the Committee would vote on the two different wordings (meaning with or without the word declarations in the final wording of article 98). Mr. TARKO further explains his delegation's choice for the wording declarations, that the final clauses referred only to declarations and would most likely confuse many on the difference between declarations proper and declarations containing reservations. If the wording "reservations" was clear MR. TARKO affirmed that his delegations would agree if the suggested wording would be amended to refer to what later became art. 92,93,94 and 96. Japan then asked that reference to art. 93 should be removed since it was not a reservation in the strict sense. Therefor, referring to it being a federal clause. The Assistant secretary of the Committee then suggested the following wording, recognizing that art. 93 did not, strictly speaking, constitute as a reservation;

"No reservations shall be permitted except those expressly authorized in this Convention".

At the 11th meeting on April 10th 1980, Article 98 was adopted after being voted upon by 42 votes to none, with 1 abstention.[73] It seems that the term "declaration" predominantly employed by the drafters of Articles 89-101 of the CISG, is not an alternative to reservations but as a broader more comprehensive term of the word.

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[71] A/CONF.97/19, "United Nations: Conference on Contracts for the International Sale of Goods A/CONF.97/19," *International Legal Materials*, vol. 19, 1980, https://doi.org/10.1017/s0020782900048828.

[72] A/CONF.97/19.

[73] Joseph Lookofsky, "The 1980 United Nations Convention on Contracts for the International Sale of Goods Article 92 Declarations," Published in J. Herbots editor / R. Blanpain general editor, International Encyclopaedia of Laws - Contracts, Suppl. 29 , December 2000, https://cisgw3.law.pace.edu/cisg/biblio/loo92.html.

During the draft and discussions amongst the delegates at the CISG convention in Vienna, there was an agreement that today's Article 92,94 and 96 constituted as reservations however they are phrased or named. Article 93 was regarded as a slightly more complicated case, since it was fairly obvious that Article 93 is a form of federal clause and at this stage Article 95 had not been proposed in the final provisions.[74]

6.1.2 Reservations (in other treaties)

Reservations are as so eloquently put, for a lack of better term, by Camilla Anderson[75] a "necessary evil", and most commentators agree that having them in the final version of the CISG was necessary at the time of signature of the Vienna Convention in 1980. If we look towards the predecessors of the CISG both ULF and ULIS neither of those treaties included any form of reservations. Both treaties failed miserably as stated before, only ratified in a handful of states, and many believe that including the reservations in the CISG would increase the likelihood of attracting more States to become Contracting States, even though it was only as a Reserving Contracting State. Meaning that the alternative would be that a reluctant state would likely become a NON-Contracting State.

Without focusing too heavily on reservations in other treaties it is still interesting to contemplate on the food for thought, if reservations possible contributed to the success of the treaty itself? According to Article 19 of the 1969 Vienna Convention a State may, when signing, ratifying, accepting, approving or acceding to a treaty, make a reservation unless:

> *"(a)The reservation is prohibited by the treaty;*
> *(b)The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or*
> *(c)In cases not falling under the above two categories, the reservation is incompatible with the object and purpose of the treaty."*[76]

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[74] Torsello, "Reservations to International Uniform Commercial Law Conventions." P 216

[75] Camilla B Andersen, "Recent Removals of Reservations under the International Sales Law-Winds of Change Heralding a Greater Unity of the CISG1," *Journal of Business Law*, vol. 8, 2012.

[76] Nations, *Treaty Handbook Prepared by the Treaty Section of the Office of Legal Affairs*.

Reservations declared by a state can operate differently and possible have different outcomes depending on the location of the forum. Whether it is reserving Contracting State, a non-reserving Contracting State or a non-Contracting State. By interpretation the reservation may become relevant because there are other elements than just the forum of the dispute itself which link the transaction to a reserving State.[77]

6.2 Reservations and the CISG

The CISG permits in accordance to Article 98, five different groups of reservations within the final provision of the CISG that have different effect as listed below:

1. Article 92: Reservation that allow the splitting and partial exclusion of the Convention's applicability.
2. Article 93: The so-called Federal State clause. Excluding the application of the CISG in specific territorials.
3. Article 94: Reservation available to the States with identical or closely related legal Rules.
4. Article 95: Reservation that limit the sphere of application of the Convention as a whole, by excluding one of its alternative criteria of applicability.
5. Article 96: Reservation that affect the substance of the Convention.[78]

6.2.1 Article 98

"No reservations are permitted except those expressly authorized in this Convention".[79]

As stated above the CISG only permits reservations EXPRESSLY PERMITTED in the convention meaning that no other than the 5 reservations stipulated in the convention are permitted, although some commentators do mean that it is possible to make reservations to other provisions in the Convention by interpretations. Many disagree with that point of view, and the vague or broad language of the Convention could argue the possibility that a hidden reservations presents itself within the convention itself, though the present author would agree with the interpretations that the

[77] Torsello, "Reservations to International Uniform Commercial Law Conventions." Page 92

[78] Torsello. Page 94

[79] "UNCITRAL DIGEST 2016." Page 431

wording EXPRESSLY PERMITTED eliminates the usage of hidden reservations deriving from other provisions then the final ones. This view is supported in the tenth report by Alain Pellet on reservations in treaties, and the legislative history.[80]

"It has always been understood that a reservation cannot be formulated (let alone "made") where this was expressly or implicitly prohibited by a clause of the treaty,"[81].

This provision does on the other hand not prevent states from making other declarations although the legal effects of that declaration is to be determined by general PIL. One such declaration is Germany's declaration that it would not apply the CISG in rulings where one of the parties has made an Article 95 declaration.[82]

6.2.2 Article 92

"(1)A Contracting State may declare at the time of signature, ratification, acceptance, approval or accession that it will not be bound by Part II of this Convention or that it will not be bound by Part III of this Convention.

***(2)A Contracting State which makes a declaration in accordance with the preceding paragraph in respect of Part II or Part III of this Convention is not to be considered a Contracting State within paragraph (1) of article 1 of this Convention in respect of matters governed by the Part to which the declaration applies.*"**[83]

As stated, one could argue that Article 92 is the most far reaching reservations of the 5 reservations[84] if we analyse and work from the notion that only the 5 previously stated reservations are permitted. By granting the states to ratify only parts of the convention and declaring not to be bound by the whole Convention excluding either or both Part II, The formation of Contract and Part III, Sale of Goods.

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[80] See subsection Article 98

[81] Alain Pellet, "Reservations to Treaties: Tenth Report on Reservations to Treaties by Mr. Alain Pellet, Special Rapporteur DOCUMENT A/CN.4/558," 2005.

[82] See subsection 4.2.5

[83] "UNCITRAL DIGEST 2016."

[84] Lookofsky, *Understanding the CISG, 5 Udgave*.

Article 92 reservation must be made at the time of signature, ratification, acceptance, approval or accession but may be withdrawn by the State by a formal notification pursuant to Article 97. [85] Article 92 reservation can only be declared and affirmed at the time of signature, ratification, acceptance, approval or accession. Meaning that when e.g. the Scandinavian states signed the treaty and made an Article 92 reservation, its only function was a notice at that time, because the reservation is only effective if confirmed upon ratification. [86]

In the drafting formation of Article 92 it was mainly the Scandinavian States that expressed their lack of interesse to ratify the Convention if this reservation was not included, giving them the option to exclude some parts of the CISG. One of the main arguments in favour of the Article 92 reservation was that it would facilitate a wider ratification of the CISG since States could adopt parts of the CISG or as a whole. But in truth the main reason was that the Scandinavian States did not agree with some of the contents of the formation part and how different it was from their own legal system. Mostly, they were opposed to the option made in Article 16(1) of the CISG, about revocability of an offer as well as they wanted to have a uniform Nordic Sales Act.

When the final draft was signed Denmark, Sweden, Finland and Norway where the only countries to declare this Reservation and chose to exclude part II of the CISG in their implementation of the Convention. Oddly enough Iceland made no such declaration although they did not incorporate Part II of the CISG into their Sale of Goods act.[87] This reservation was widely criticised, mainly because the reservation challenged uniformity because there was more than one version of the convention in the CISG states. If there was a conflict between a seller from e.g. Norway and a buyer from Italy that are by default of Article 1(1)(a) both considered contacting States. But due to the fact Norway had made an Article 92 reservations the same version of the CISG does not apply and then two contrasting CISG versions could govern the ruling, one with Part II and another without and the forum must choose which one applies to the conflict resolution. [88]

Another issue is that CISG could apply trough virtue of Article 1(1)(b) if private international law rules at the seat of arbitration lead to the application of Italian substantive law, then CISG including

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[85] Lookofsky. Page 187

[86] Schlectriem and Schwenzer, *Commentary on the UN Convention on the International Sales of Goods (CISG*. Page 1253

[87] Magnus, "The Scandinavian Reservation under Art. 92 CISG."

[88] Andersen, "The Uniform International Sales Law and the Global Jurisconsultorium." Page 108-109

Part II should be applied as Italy is a full contracting state. [89]All four States that had made an Article 92 reservation have subsequently withdrawn their Article 92 reservations, in Denmark with effect from 1st of February 2013, in Finland with effect from 1st of June 2012, in Norway with effect from 1st of November 2014 and in Sweden with effect from 1st of December 2012. That means the previous reservation States are now considered full contracting States in regards to part II.

However, the withdrawal does not have a retroactive effect on contracts formulated before the withdrawal took effect. One issue still remains unclear, if a contract formation started before or after the withdrawal came into effect. Since there are little preambles in the drafting history, not much legal literature and lack of case law regarding the matter, it is not resolved. [90]

At time of this writing there are no states that have a declared and active Article 92 reservation and most commentators hope it will stay that way, yet recognizing the threat it entails of having this option available.

6.2.3 Article 93.

"(1) If a Contracting State has two or more territorial units in which, according to its constitution, different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

(2) These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

(3) If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party is located in that State, this place of business, for the purposes of this Convention, is considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends.

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[89] Kröll, Mistelis, and Perales Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG) Commentary*. P 1175

[90] Neumann, "Juristen - De Nordiske Landes Tilbagekald Af Forbeholdet Mod CISG Del II.Pdf." Page 190

(4) If a Contracting State makes no declaration under paragraph (1) of this article, the Convention is to extend to all territorial units of that State."[91]

"*The article enables a Contracting State to restrict the application of the CISG to certain of its territorial units (for example, a Federal State, canton, province or union republic which must, however have certain constitutional independence*)"[92] often referred as the Federal clause. Certain federal states lack competence over matters governed by the CISG with respect to individual territorial units, i.e. Denmark over the Faroe Islands. [93]

It is quite evident why this reservation is available since this provision allows member states of a Federation to maintain their autonomy in determining whether or not they desire to become a Contracting States to the effect of the Convention.[94] In the draft of this clause, the Secretariat had proposed two alternatives to this provision at the request of Australia and Canada. Alternative one would allow a Federal State to suspend the application of individual article in respect of which it had no legislative competence. Alternative two was after amendments the options chosen since the Second Committee´s discussions led to emphasize that non-applications of individual articles in a complex convention as the CISG, was virtually impossible.[95]

Article 93 reservation must be declared at the time of signing, ratifying or acceding and confirmed in accordance with Article 97(1). The declaration can be amended at any time by making a new declaration pursuant to Article 93(1) in fine. A declaration is necessary if territorial units are to be excluded from the application of the CISG but the wording of Article 93(1) is however, unclear if a declaration is necessary if the convention is to be applied to all its territorial units.[96] As such, applicability of the Convention cannot be established via article1(1)(a).

To this date there are four Contracting States that have made formal Article 93 declarations, Denmark stating that the Convention shall not apply to the Faroe Islands and Greenland, meaning that if the place of business is in one of those territories applicability of the Convention cannot be

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[91] "UNCITRAL DIGEST 2016." Page 422

[92] Schlectriem and Schwenzer, *Commentary on the UN Convention on the International Sales of Goods (CISG*. P 1256

[93] Kröll, Mistelis, and Perales Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG) Commentary*. P 1177

[94] Torsello, "Reservations to International Uniform Commercial Law Conventions." P 93

[95] Schlectriem and Schwenzer, *Commentary on the UN Convention on the International Sales of Goods (CISG*. P 1255

[96] Schlectriem and Schwenzer. P 1256

established via Article 1(1)(a)[97]. New Zealand, declared that the CISG should not be applicable to the Cook Islands, Niue and Tokelau. Australia, declared that the CISG would not be applied in the territories of Christmas Island, the Cocos (Keeling) Islands and the Ashmore and Cartier Islands.

The fourth Contracting State, Canada, made different declarations. The first one was made at Canada´s accession pursuant to Article 93 and listed the territories that the CISG should apply to, Canada later made two other declarations adding more territorial units, the latest one from 18th of June 2003. After this declaration, the CISG is applicable in all Territorial units of Canada. [98] China has not made any declarations that CISG is not applicable to Hong Kong and Macao.

Prior to the retrocession of Hong Kong to the Peoples Republic of China the Convention did not apply to Hong Kong. China deposited with the Secretary General of UN a declaration announcing that the UN conventions to which China was a part of would apply to Hong Kong. CISG was not on that list, however because China has made no formal declaration regarding Article 93 reservation for Hong Kong the Convention automatically extends to all China's territorial units, including Hong Kong, despite the fact that majority opinion in reported case law seems to be that the SISG does not apply to Hong Kong. Most casework related to this article stems from this lack of clarity regarding China and Hong Kong. The fact that Hong Kong has released a press release on the proposed application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) to the Hong Kong Special Administrative Region[99] is extremely positive and hopefully they will become a CISG state in the anticipated future.

6.2.4 Article 94.

"(1) Two or more Contracting States which have the same or closely related legal rules on matters governed by this Convention may at any time declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those States. Such declarations may be made jointly or by reciprocal unilateral declarations.

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[97] "UNCITRAL DIGEST 2016." Page 422

[98] Kröll, Mistelis, and Perales Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG) Commentary*. page 1176

[99] "Public Consultation on Proposed Application of CISG to the Hong Kong Special Administrative Region Commences," accessed August 13, 2020, https://www.info.gov.hk/gia/general/202003/02/P2020030200316.htm.

(2)A Contracting State which has the same or closely related legal rules on matters governed by this Convention as one or more non-Contracting States 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.

(3)If a State which is the object of a declaration under the preceding paragraph subsequently becomes a Contracting State, the declaration made will, as from the date on which the Convention enters into force in respect of the new Contracting State, have the effect of a declaration made under paragraph (1), provided that the new Contracting State joins in such declarations or makes a reciprocal unilateral declaration.[100]*"*

Article 94 enables states which have closely related legal rules on sale of goods to exclude the application of the CISG, or parts thereof, in contacts concluded between a party with its place of business in different states with such closely related rules. The exclusion may be accomplished via joint or reciprocal unilateral declarations.[101] In contrast to other reservations, those under Article 94 can be made at any time.

"*Article 94 addresses different scenarios of States involved. Paragraph 1 deals with two or more Contraction States making use of the reservation. Paragraph 2 deals with the situation where only one of the States having a harmonized sales law is also a Contraction State of the CISG. This declaration excludes the obligation to apply the CISG pursuant to Article 1(1)(b); it therefore has no effect if the declaring State has also made a declaration under Article 95. Finally, Article 94(3) governs the case where a non-Contracting State, which was the subject of a declaration by a Contracting State under Article 94(2), subsequently becomes a Contracting State. Article 94(3) requires a positive declaration by the new State for the reservation to apply, which otherwise lapses because it can be given only by agreement between two Contracting States."*[102]

In the draft history of Article 94 it was assumed that not only the Scandinavian states would declare this reservation since the Benelux states, New Zealand and Australia had also indicated their interest in making use of this reservation.[103] To this date the 5 Nordic states are the only ones who

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[100] "UNCITRAL DIGEST 2016." Page 424

[101] "UNCITRAL DIGEST 2016."

[102] Schlectriem and Schwenzer, *Commentary on the UN Convention on the International Sales of Goods (CISG*. page 1259. Paragraph 2

[103] Schlectriem and Schwenzer. P 1258

have declared an Article 94 reservation, Iceland, Finland, Norway, Sweden and Denmark. There is some uncertainty as to what areas a reservation under Article 94 may cover, two or more declaring Contracting States have by their own definition closely related rules "on matters governed by this Convention. It is clear that the States rules (contra CISG) govern matters about contracts of sale in Part III as well as the formation of contract in Part II, as well as other smaller areas may be excluded.[104] Disagreement is whether other aspects, such as consumer protection or product liability, where the Conventions rules are rather rudimentary as compared to the law in many Contracting States, are excluded by the wording of Article 94. Some commentators feel that an exclusion must be of a certain breadth but the broad wording of Article 94 hardly justifies that interpretation. And such an approach would lead to a new and rather complicated interpretation when the CISG should be applied or not. [105]

The wording of Article 94(1) and (2) stipulates that the rules of the convention governing the subject matter should not be applied when Contracting States have declaration pursuant to Art. 94. Uncertainty arises regarding disputes, between parties of said declared States, when the dispute is settled by adjudicators in a Contracting State which has not made an Article 94 declaration. The adjudicators could apply the CISG or domestic rules due to the applicable private international law rules. Some commentators feel that the CISG should apply since other States are not bound by the reservation in Art. 94, but the prevailing view is that the adjudicators in such case should respect the Article 94 reservation and settle the matter in accordance to that as result of freedom of contract as an fundamental value in the CISG . However, if the parties involved in the contract have expressly agreed upon the law of another Contracting State, that has no such reservation, the adjudicators should apply the CISG.

Whether States fulfil the requirements of having the "same or closely related legal rules" is to be decided by the relevant States making the declaration. As M.Rosello pointed out the very notion of *"states which have closely related legal rules"* is regrettable vague, since it does not give any clear indication as to the degree of similarity required to determine whether or not States have closely related or same legal rules. Although he recognizes that it appears to be widely accepted in legal writing that the Scandinavian legal family fulfil the requirements for adoption of the reservation in Article 94. But on the other hand, points out the problems that would arise from situations if States

[104] Schlectriem and Schwenzer. page 1259

[105] Kröll, Mistelis, and Perales Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG) Commentary*. page 1182

from different legal families as for instance the Romanistic family, would claim Article 94 reservation with "the same or closely related legal rules. Such a scenario undermines the ultimate goal of the CISG as uniformed International Commercial law Convention.[106]

The declarations made by the Nordic States are problematic in certain respects, mainly because the rules in those States are only closely related but defiantly not the same. A new sale of Goods act came into force in Finland 1988, Norway 1989, Sweden 1991 while Iceland adopted a new Sale of Goods Act similar to the Norwegian one from 2000 (that of which Norway has subsequently changed in accordance to CISG and Iceland has not, nor has Iceland ratified the convention[107]) Denmark on the other hand has not adopted a new Sale of Goods Act[108]. Therefor it is highly uncertain that the rules between Denmark and the other 4 States, could be said to fulfil the requirement of the "closely related rules. *"Therefore, it is not clear whether the declarations are in accordance with public international law requirements. However, even if the rules are considered not to be closely related, a court or a tribunal should, when finding out what rules should be applicable to the dispute, should not disregard the declarations made".*[109] It appears that Denmark is the only State that is in breach, so it would be appropriate solution that Denmark either changes their domestic Sales act in accordance to the other Scandinavian States or withdraws their Article 94 reservation in accordance to Article 97.

When the 5 Nordic states, Iceland, Finland, Denmark, Sweden and Norway declared their Article 94 reservation they did so in the following manner:

Finland:

Upon ratification:

"With reference to Article 94, in respect of Sweden in accordance with paragraph (1) and otherwise in accordance with paragraph (2) the Convention will not apply to contracts of sale where the parties have their places of business in Finland, Sweden, Denmark, Iceland or Norway."

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[106] Torsello, "Reservations to International Uniform Commercial Law Conventions." Page 102-105

[107] Fletchner, "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)."

[108] Jan Ramberg, "The Vanishing Scandinavian Sales Law" (Stockholm, 2007), https://www.scandinavianlaw.se/pdf/50-16.pdf. Page 258

[109] Kröll, Mistelis, and Perales Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG) Commentary*. page 1184

28 November 2011

"In addition to the previous declaration made under Article 94 the Republic of Finland declares, in respect of Iceland in accordance with paragraph (1) and otherwise in accordance with paragraph (2), that the Convention will not apply to the formation of contracts of sale where the parties have their places of business in Finland, Iceland, Denmark, Norway or Sweden."

Denmark:

"3) under paragraph 1 cf. paragraph 3 of article 94 that the Convention shall not apply to contracts of sale where one of the parties has his place of business in Denmark, Finland, Norway or Sweden and the other party has his place of business in another of the said states,

"4) under paragraph 2 of article 94 that the Convention is not to apply to contracts of sale where one of the parties has his place of business in Denmark, Finland, Norway or Sweden and the other party has his place of business in Iceland."

2 July 2012

"[...] In addition to the previous declaration made under Article 94 Denmark declares, in respect of Iceland in accordance with paragraph 1, in respect of Finland and Sweden in accordance with paragraph 1 cf. paragraph 3 and in respect of Norway in accordance with paragraph 2 that the Convention will not apply to the formation of contracts of sale where the parties have their places of business in Denmark, Iceland, Finland, Sweden or Norway."

Norway:

Reservation made upon signature and confirmed upon ratifica tion:

[*Same reservation, mutatis mutandis, as the one made by Finland.*]

Upon ratification:

[*Same reservation, mutatis mutandis, as theone made by Finland.*]

14 April 2014

"[...] in addition to the previous declaration made [on] 20 July 1988 under Article 94, Norway

declares, in respect of Iceland in accordance with paragraph 1 and otherwise in accordance with paragraph 1 cf. paragraph 3, that the Convention will not apply to the formation of contracts of sale where the parties have their places of business in Norway, Denmark, Finland, Iceland or Sweden."

Iceland:

12 March 2003

Declaration:

"Pursuant to article 94, paragraph 1, the Convention will not apply to contracts of sale or to their formation where the parties have their places of business in Denmark, Finland, Iceland, Norway or Sweden."

Sweden:

Déclarations:

[Same reservation, mutatis mutandis, as the one made by Finland.]

25 May 2012

"In addition to the previous declaration made under Article 94 Sweden declares, in respect of Iceland in accordance with paragraph 1, in respect of Finland in accordance with paragraph 1 cf. paragraph 3 and otherwise in accordance with paragraph 2, that the Convention will not apply to the formation of contracts of sale where the parties have their places of business in Sweden, Finland, Denmark, Iceland or Norway."[110]

Speculations have been why the states (with the exception of Iceland) declared an Article 94 declaration at the same time as they deposited their article 92 withdrawal. Ulrich did in his article

[110] "United Nations Treaty Collection," accessed August 4, 2020, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10#EndDec.

point out that they wanted to assert that the CISG Part II did not apply to inter-Nordic trades. [111] This is most likly a political reason since the withdrawal of Article 92 was supposed to be unilateral and although it is stated by all States involved that the withdrawal should be considered to be unilateral it ended up being an individual withdrawal (further explained in chapter 5). Furthermore, it can be pointed out that if Article 94 declarations are considered unilateral then the withdrawal of one state has an effect on the other states (see subsection 4.2.7)

There are no states other than the Nordic states that have declared and have an active Article 94 reservations. A possible future usage of this reservation, specially in the light of that the reservation can be declared at any time not just upon ratification, acceptance, approval or accession of the CISG and the fact that EU directives and treaties are by design meant to be applied in uniformity within member states. As Ulrich pointed out in his review of the status of reservation after 35 years from the 1980 Vienna Convention that in the political environment of the EU a pressure could arise upon Contracting States to give precedence to regional law that could result from a duty to guarantee the full application of rules/directives issued by e.g. EU directive or regulation. An example of such a duty is:

"*Article 351(2) of the Treaty on the Functioning of the European Union which obliges EU Member States to take all appropriate steps to eliminate the incompatibilities established to the extent that a concurrent international agreement is not compatible with EU Treaties or EU secondary law*"[112].

If such a pressure should come from the EU regarding CISG, the EU could theoretically request that Contracting states should denunciate the CISG in accordance with Article 101 of the CISG. Should an EU member state refuse to comply, the Commission could take action under Article 226 of the Treaty on the Functioning of the European Union before the European Court of Justice against the state or states that failure to comply to fulfil their obligations. And the EU Commission has taking action against non-compliance in the past and could in theory do so again in this regard. Although this is a scenario that could occur this is luckily a hypothetical scenario that could be detrimental to the development and uniformity of the CISG.

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[111] Ulrich G. Schroeter, "The Withdrawal of Reservations under Uniform Private Law Conventions," *Uniform Law Review* 20, no. 1 (2015): 1–18, https://doi.org/10.1093/ulr/unv007.

[112] Schroeter, "Reservations and the CISG: The Borderland of Uniform International Sales Law and Treaty Law After Thirty-Five Years." p. 252-253

A possible alternative to Contracting States denunciating the CISG in compliance to this EU´s hypothetical request would be a declaration in accordance to Article 94, by that giving EU law precedence over the CISG and the EU member states still being considered Contracting States, albeit as Reserving Contracting States.

One could argue that the "need" for this reservation is not relevant today in an environment that is more towards Internationalism then Regionalism. But because it seems that the Nordic States "want" to have this reservation, in their regional trades, withdrawal of Article 94 reservation is not likely.

6.2.5 Article 95

"Any State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph (1) (b) of article 1 of this Convention."[113]

This reservation, which should exclude the application of the Convention in case to which Article 1(1)(b) applies, was accepted by the Conference in plenary following a Czechoslovakian proposal, even though it had been rejected in the Second Committee. The Articles purpose is to allow Contracting States who are not willing to accept the applicability of the CISG pursuant to Article 1(1)(b) to declare that they will not be bound by that subparagraph.[114]

In the first years after the Convention entry into force, the importance of this reservation was quite relevant, mainly because the two major trading nations China and USA both made use of this reservation. Now a days the numbers of Contracting states are much higher, and if both parties are Contracting States the CISG applies pursuant to Article 1(1)(a), thereby making a recourse to Article 1(1)(b) inessential. But until every State has acceded to the Convention issues regarding Article 95 reservation will remain.[115] Just as with the other reservations in the CISG, the issues with

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[113] "UNCITRAL DIGEST 2016." Page 426

[114] Kröll, Mistelis, and Perales Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG) Commentary*. page 1185

[115] Ulrich G. Schroeter, "CISG-AC Opinion No. 15, Reservations under Articles 95 and 96 CISG, Rapporteur: Professor Doctor Ulrich G. Schroeter, University of Mannheim, Germany. Adopted by the CISG Advisory Council Following Its 18th Meeting, in Beijing, China on 21 and 22 October," 2005, http://www.cisg.law.pace.edu/cisg/CISG-AC-op15.html.

the reservation in Article 95 are not simple or altogether clear in interpretation. According to CISG Advisory Committee opinion nr: 15;

"The precise effects of an Article 95 reservation on the Convention's practical application raise a number of difficult questions which have earned Article 95 CISG a reputation as the probably most complex and perhaps the most challenging to understand among the CISG's reservations".

Depending for example if the parties are too be considered as a full Contracting/Non-Contracting or Contracting State that has declared reservations or where the seized forum is located and what rules of law should apply.

If e.g. a seller's place of business is in a Contracting State which has declared an Article 95 reservation and the buyer is in a non-Contracting State the CISG, Article 1(1)(a), does not apply. If the court finds that the laws of e.g. China applies and the seat of the tribunal is in that State then all facts speak in favour of respecting the Article 95 declaration, and that **it will not be bound** by Article 1(1)(b) and the CISG does not apply to the conflict.[116] It is, according to some commentators, quite possible, to apply the CISG to relationships between parties from (some or all) non-Contracting States; however, the Adjudicators are under no obligation to do so.

In practice a reservation State will not apply the CISG in such situations but the domestic rules applicable to the contract. [117]The wording ***not bound*** in Article 95 leaves many commentators in disagreement over the rare situation where a State court in a non-reserving Contracting State has to deal with one party coming from a reserving Contracting State. In this case CISG is not applicable on account of Article 1(1)(a) and the court therefor has to apply the conflict of laws rules and may thereby adjudicate the ruling by laws of a fully Contracting State if the requirements in Article 1(1)(b) are met.

Many agree that the court still may not apply the CISG but should apply the same law that an Article 95 reservation Contracting State would apply. A well know German "*interpretive declaration*"[118] in Article 2 in the *Vertragsgesetz* supports this interpretation. The Germans do not have an Article 95 reservation declaration but on the other hand Germany did declare that they would not apply the CISG if their conflict of laws rules lead to the law of a Contracting State which

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[116] Kröll, Mistelis, and Perales Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG) Commentary*. Page 1187

[117] Schlectriem and Schwenzer, *Commentary on the UN Convention on the International Sales of Goods (CISG*. page 1262

[118] Torsello, "Reservations to International Uniform Commercial Law Conventions." P 117

had made a declaration under Article 95. But the majority view that by the wording in Article 95 "NOT BOUND by" refers to the applicability of the CISG in such cases. [119] Hens fore referring the difference in wording in Article 95 vs. Article 92 and 93 which the two latter contain a provision according to which the state making the declaration SHOULD NOT be regarded as a contracting State in matters covered by the declaration.[120] As M.Torsello said in his article;

".. the Article 95 reservation should not be considered effective vis-à-vis any other than the reserving State, at the same time, it makes sense to affirm that the reservation does not impact on the status of "Contracting State"[121]

Party autonomy is a vital and important part of the CISG as previously stated and one ruling from Germany has indicated that an Article 95 declaration does not preclude application of the CISG where the parties agreed upon the application of the CISG during legal proceedings.[122] "*The precise effects of an Article 95 reservation on the Convention's practical application raise a number of difficult questions which have earned Article 95 CISG a reputation as the 'probably most complex and perhaps the most challenging to understand among the CISG's reservations* "[123] According to the Advisory Council opinion 15 it is helpful to distinguish between the effect of an Article 95 reservation, varying if the dispute is resolved ;

1. **In courts of Contracting States that have made an Article 95 declaration:** *"By providing that a declaring State 'will not be bound' by Article 1(1)(b) CISG, Article 95 CISG makes clear that this reservation merely removes the declaring State's obligation under public international law to apply the Convention in accordance with Article 1(1)(b) CISG. Making use of the reservation does, on the contrary, it itself not prevent the courts in the declaring State from applying the Convention in cases where the prerequisites of Article 1(1)(a) CISG are not met, since the Article 95 reservation does not impinge upon the declaring State's freedom to apply the Convention despite its missing obligation to do so. Such a situation is most likely to arise in practice in cases in which two contracting parties - at least one of which does not have its place of business in a CISG*

[119] Schlectriem and Schwenzer, *Commentary on the UN Convention on the International Sales of Goods (CISG*. page 1263

[120] Kröll, Mistelis, and Perales Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG) Commentary*. Page 1188

[121] Torsello, "Reservations to International Uniform Commercial Law Conventions." page 110

[122] "UNCITRAL DIGEST 2016." Page 426

[123] "CISG Advisory Council Opinion No. 15," accessed April 22, 2020, http://www.cisg.law.pace.edu/cisg/CISG-AC-op15.html.

Contracting State (because then Article 1(1)(a) CISG would apply) - choose the Convention as the law applicable to their contract, either by way of an 'isolated' choice of the CISG or by choosing the law of a CISG Contracting State: In such a case, many courts are likely to accept the parties' choice of the CISG, thereby respecting party autonomy as recognized by the rules of private international law of the forum. At least two courts of second instance in the People's Republic of China, an Article 95 CISG-reserving State, adopted the same position and applied the CISG although the prerequisites of Article 1(1)(a) CISG were in casu not fulfilled."[124]

Different views also arise in a situation where the contract does not meet the requirements of Article 1(1)(a), the contract has no choice of law clause and the choice of contract law assigned is that of an non-reservations contracting by the court. Should the CISG be applied in this scenario? Most commentators view is that the CISG should apply to this contract as the chosen law by virtue of private international rules of the forum, some go as far as say that the court has an obligation to do so.

The opposite view is that since the forum resides in an Article 95 reservation State and legislators in that state have excluded the usage of Article 1(1)(b) it should only apply the rules of law to be CISG when the requirements of Article 1(1)(a) are met. Most commentators agree with the first view and advocate for the interpretations that the CISG could apply even if the requirements of Article 1(1)(a) are not met. [125]

2. **In courts of Contracting States that have not made an Article 95 declaration**: Many commentators argue "*that it is only the reservation state which is not bound to apply Article 1(1)(b) and that courts and tribunals in states without Article 95 declarations are bound by their ratifications to apply the CISG in a case where the private international law rules lead to the application of the law in Contracting States that have not made a declaration"*[126] Arguments for this view is supported by both the history of the CISG and the wording in Article 95 and how it differs from Article 92,93 and even 94 and that despite an Article 95

[124] Schroeter, "CISG-AC Opinion No. 15, Reservations under Articles 95 and 96 CISG, Rapporteur: Professor Doctor Ulrich G. Schroeter, University of Mannheim, Germany. Adopted by the CISG Advisory Council Following Its 18th Meeting, in Beijing, China on 21 and 22 October."

[125] Marlene Wethmar-Lemmer, "Applying the CISG via the Rules of Private International Law: Articles 1(1)(b) and 95 of the CISG - Analysing CISG Advisory Council Opinion 15," *De Jure* 49, no. 1 (2016): 58–73, https://doi.org/10.17159/2225-7160/2016/v49n1a4. P 66-67

[126] Kröll, Mistelis, and Perales Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG) Commentary*. P 1188

declaration the state is still to be considered as a Contracting State. The other interpretation of Article 95 in this scenario it that the courts should respect the Article 95 Reservation and not apply the CISG, Germany has in their declaration in regards to Article 95 supported this view. Despite those opposite interpretations it is the view of most commentators and CISG connoisseurs that the CISG should be applied if the prerequisites of Article 1(1)(b) are fulfilled, even if the rules of law are applicable to a Contracting State that has made an Article 95 reservation.[127]

3. **In courts of Non-Contracting State***: "When the forum is located in a Non-Contracting State, there is at the outset no obligation of any sort under public international law to take Article 95 CISG into account, as there is no obligation to apply Article 1(1)(b) CISG: Both provisions are only directed at CISG Contracting States. Any effect that an Article 95 CISG reservation can have, must therefore result from the private international law of the forum, and is as such a merely 'indirect' effect. An indirect effect of this kind will usually arise when the private international law rules of a Non-Contracting State lead to the application of a CISG Contracting State that has made an Article 95 reservation: In such a case, the court is likely to apply the domestic law of that State and not the CISG, because a judge in that State - in view of Article 1(1)(b) CISG being inapplicable - would do the same"* .[128] A contradicting view is supported by many authors stating that the CISG should apply, by a virtue of it being part of the law of the CISG contracting State, in this scenario, because even though a State has made an Article 95 reservations it is still considered an Contracting State. It all comes down to interpretation and *lex causae*. [129]
4. **In arbitral proceedings**: *" The effect of Article 95 CISG in arbitration proceedings is similar to its effect in courts of Non-Contracting States, since the Convention neither creates any obligations for arbitration tribunals (whether their place of arbitration is located in a CISG Contracting State or not), nor for Contracting States in respect of arbitration tribunals having their place of arbitration in that State. The application of Article 1(1)(b) CISG (and of Article 95 CISG affecting such application) can therefore,*

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[127] Schroeter, "CISG-AC Opinion No. 15, Reservations under Articles 95 and 96 CISG, Rapporteur: Professor Doctor Ulrich G. Schroeter, University of Mannheim, Germany. Adopted by the CISG Advisory Council Following Its 18th Meeting, in Beijing, China on 21 and 22 October."

[128] Schroeter. comment 3.18

[129] Wethmar-Lemmer, "Applying the CISG via the Rules of Private International Law: Articles 1(1)(b) and 95 of the CISG - Analysing CISG Advisory Council Opinion 15." page 69-73

again, only be an 'indirect' one, created and governed by the lex arbitri and by arbitration rules agreed upon by the parties, and not by the Convention itself. The rules about the substantive law to be applied by arbitral tribunals are often more flexible in their content than rules of private international law to be observed by courts. "[130]

6.2.6 Article 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"[131]

Article 96 reservation can be declared at any time, it was added to the New York Draft by way of compromise do to the fact that many States had or have requirements that a contract has to be concluded or be evidenced by writing. Most provisions in the CISG are written not to be embodied to one particular legal system but to be autonomous so to fit all legal systems. Article 96, along with all other reservations, is designed to accommodate specific needs of States at the expense of predictability and uniformity.[132] Most commentators view that an Article 96 reservation is only allowed in states that have legislation that require ALL contracts of sale governed by the CISG to be concluded in or be evidenced by writing and feel it is supported by the drafting history of the provision. The Netherland committee suggested this wording *"A Contracting State whose legislation requires* ***all*** *or* ***certain types*** *of contracts of sale to be concluded in or evidenced by*

[130] Schroeter, "CISG-AC Opinion No. 15, Reservations under Articles 95 and 96 CISG, Rapporteur: Professor Doctor Ulrich G. Schroeter, University of Mannheim, Germany. Adopted by the CISG Advisory Council Following Its 18th Meeting, in Beijing, China on 21 and 22 October." comment 3.19

[131] Uncitral, "UNCITRAL UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods," accessed April 22, 2020, http://www.uncitral.org. Page 428

[132] Tolea, "The Reservation Against the Freedom of Form Principle; An Exploration of the Effect of Article 96 CISG on the on the Private Parties." Page 92

writing may [...] make a declaration [...] that any provision [...] which allows a contract of sale [...] to be made in any form other than in writing shall not apply to the contracts concerned where any party [...]"[133] but was voted upon and rejected by a close majority. A minority group of commentators feel that the provision itself nor it´s drafting history provide for a measurable threshold in the content and scope of domestic form of legislation and that the previously mentioned interpretation is only theoretically in barring states that have no domestic legislative imposing writing requirements from making an Article 96 reservation. [134]

To date have the following 10 States declared an active Article 96 reservation, Argentina, Armenia, Belarus, Chile, Latvia, Paraguay, Russian Federation, Ukraine, Vietnam and the latest addition in 2019 Democratic People´s Republic of Korea. [135] 5 States have in accordance with Article 97(4) withdrawn their previous declared Article 95 reservation, China in 2013, Estonia in 2004, Hungary in 2015, Latvia in 2012 and Lithuania in 2013. [136] The reservation must be respected by courts even though the requirements for an Article 96 reservations is no longer fulfilled until a State has formally withdrawn its Article 96 reservation by declaring it in accordance to Article 97(4). [137]

Sphere of application and effect according to the UNCITRAL 2016 DIGEST is *"Both the language and the drafting history of article 12 confirm that, under the provision, an article 96 declaration operates only against the informality effects of article 11, article 29, or Part II of this Convention; thus article 12 does not cover all notices or indications of intention under the Convention, but is confined to those that relate to the expression of the contract itself, or to its formation, modification*

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[133] Schroeter, "CISG-AC Opinion No. 15, Reservations under Articles 95 and 96 CISG, Rapporteur: Professor Doctor Ulrich G. Schroeter, University of Mannheim, Germany. Adopted by the CISG Advisory Council Following Its 18th Meeting, in Beijing, China on 21 and 22 October." comment 4.5

[134] Torsello, "Reservations to International Uniform Commercial Law Conventions."

[135] UNCITRAL. (2019), "Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG)."

[136] Kröll, Mistelis, and Perales Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG) Commentary*. Page 1191

[137] Schroeter, "CISG-AC Opinion No. 15, Reservations under Articles 95 and 96 CISG, Rapporteur: Professor Doctor Ulrich G. Schroeter, University of Mannheim, Germany. Adopted by the CISG Advisory Council Following Its 18th Meeting, in Beijing, China on 21 and 22 October"; Comment 4.7 Schlectriem and Schwenzer, *Commentary on the UN Convention on the International Sales of Goods (CISG*. Page 1264

or termination by agreement"[138] Meaning that even though the wording in Article 12 "any….other indications of intention" is open for interpretation but luckily both the history and purpose of Article 96 seem helpful in that retrospect. When drafting the provisions, it was added to accommodate concern of mainly east European and some current or previous Communist/socialist States that required contracts to be made or evidenced in writing. Those requirements are sufficiently fulfilled by limiting the effects of the reservation to the formation, modification or termination in agreement stages. It is therefore no need to extend the effects of the reservation to performance related declarations such as Article 26,39,50,49(1)(b),47,64(1)(b) and Part III.

As seen by UNCITRAL´s 2016 Digest and most commentator of the CISG the practiced interpretation of Article 96 is not unified.

"Article 12 provides that the Convention's freedom-from-form-requirements principle is not directly applicable where one party has its relevant place of business in a State that made a declaration under article 96, but different views exist as to the further effects of such a declaration. According to one view, the mere fact that one party has its place of business in a State that made an article 96 declaration does not necessarily bring the form requirements of that State into play; instead, the applicable form requirements—if any—will depend on the rules of private international law ("PIL") of the forum. Under this approach, if PIL rules lead to the law of a State that made an article 96 reservation, the form requirements of that State will apply; where, on the other hand, the law of a Contracting State that did not make an article 96 reservation is applicable, the freedom-from-form-requirements rule of article 11 governs. Another view is that, if one party has its relevant place of business in an article 96 reservatory State, writing requirements apply."[139]

Most commentators argue their point of view on how they feel the interpretations should be in different circumstances but the mere fact that there is a long list of case work accessible that confirm the different points of view on Article 96 interpretation[140] the issue is undetermined. This difference in interpretation is a valid argument that affirms the point of view that so many commentators of the CISG have, that reservations defy the uniformity principles and purpose of the

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[138] "UNCITRAL DIGEST 2016."

[139] Uncitral, "UNCITRAL UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods." Page 428

[140] "UNCITRAL DIGEST 2016." page 428

CISG.[141] Arguably the very existence of a reservation is a clear sign that the subject matter covered by the matters to which the reservation refers defy uniform regulation, even though it is safe to assert that ”*reservations permitted by a Convention usually reflect the quality of the work done and the degree of agreement actually reached*.” [142]

6.2.7 Article 97

1) Declarations made under this Convention at the time of signature are subject to confirmation upon ratification, acceptance or approval.

(2) Declarations and confirmations of declarations are to be in writing and be formally notified to the depositary.

(3) A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary. Reciprocal unilateral declarations under article 94 take effect on the first day of the month following the expiration of six months after the receipt of the latest declaration by the depositary.

(4) Any State which makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal is to take effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

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[141] Andersen, “Recent Removals of Reservations under the International Sales Law-Winds of Change Heralding a Greater Unity of the CISG1”; Ulrich G Schroeter, “RESERVATIONS AND THE CISG: THE BORDERLAND OF UNIFORM INTERNATIONAL SALES LAW AND TREATY LAW AFTER THIRTY-FIVE YEARS,” 2016.

[142] Torsello, “Reservations to International Uniform Commercial Law Conventions.” P 88

(5)A withdrawal of a declaration made under article 94 renders inoperative, as from the date on which the withdrawal takes effect, any reciprocal declaration made by another State under that article.[143]

All reservation declared, by states, and permitted in accordance to Article 98, can be withdrawn at any given time as pursuant to Article 97. Additionally, a State which after becoming a contracting state, subsequently no longer wishes to apply Part II or Part III, can denounce one of those Parts or the convention in whole as pursuant to Article 101. According to the 2016 Digest no casework has been reported citing issues regarding Article 97. According to commentary on this article the withdrawal of Article 94(1) is processed and has a different effect than the other reservations. Meaning that because an Article 94(1) reservation has a reciprocal unilateral effect between two or more states then the withdrawal of one State renders inoperative any reciprocal declarations previously made.[144]

7 History and Status of the CISG Reservations

In regards to having unfolded the legal and textual interpretations today, and classified the reservations of the CISG, it is come to the point to assess their status today and throughout the time span.

At the time of the writing there are 93 Contracting States, the latest being Lao People's Democratic Republic entering into force 1/10/2020, Lao´s has also declared an Article 95 Reservations upon accession of the CISG. Summarizing the Contracting States by Article number, valid and active at time of writing, it is the following:

Article 93: Denmark, New Zealand and Australia.

Article 94: Denmark, Sweden, Norway, Finland and Iceland.

Article 95: Armenia, China, Lao´s (entry into force 1/10/2020), Singapore, Slovakia, St. Vincent and The Grenadine and USA.

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[143] "UNCITRAL DIGEST 2016." Page 430

[144] Kröll, Mistelis, and Perales Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG) Commentary*. page 1195

Article 96: Armenia, Belarus, Chile, Democratic People's Republic of Korea, Paraguay, Russian Federation, Ukraine and Vietnam.

Other:

1. Germany declared the following "The Government of the Federal Republic of Germany holds the view that Parties to the Convention that have made a declaration under article 95 of the Convention are not considered Contracting States within the meaning of subparagraph (a) (b) of article 1 of the Convention. Accordingly, there is no obligation to apply - and the Federal Republic of Germany assumes no obligation to apply - this provision when the rules of private international law lead to the application of the law of a Party that has made a declaration to the effect that it will not be bound by subparagraph (1) (b) of article 1 of the Convention. Subject to this observation the Government of the Federal Republic of Germany makes no declaration under article 95 of the Convention."[145] Meaning that German courts will not apply Article 1(1)(b) CISG in sales where Article 95 reservation states are involved.
2. China has made no formal CISG declaration about an Article 93 Reservations regarding Hong Kong and Macao. Though, due to a Chinese UN declaration in 1997 regarding Hong Kong, commentators have debated whether Hong Kong should or should not be considered a territorial unit to which the Convention extends to. Majority of cases reported rule in accordance to the interpretation that the CISG does not apply to the territory of Hong Kong. *"According to one case and several commentators argue that the declaration made by China does not fulfil the declaration requirements of Article 93 and that therefore the CISG extends to Hong Kong"*[146]. As stated, hopes that this will change is in the horizon.
3. Another CISG Contracting State which has not made a declaration under Article 95 CISG, but employs a different application then the rules of private international law should determine. The Netherlands has, in Article 2 of the Dutch Implementing CISG Act dated December 18, 1991, regarded as domestic law, requested foreign judges in Article 95 reservation States not to apply Dutch law should the PIL rules lead to that applications but rather application of the CISG. Foreign states do not have a legal obligation to apply this rule but it can be interpreted by this, that the Netherland has indicated that they prefer the

[145] "United Nations Treaty Collection."

[146] Kröll, Mistelis, and Perales Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG) Commentary*. page 1178

usage of CISG which enhances uniformity rather than one that derives from domestic law. [147]

If we look to the history and progression of the CISG over the last 40 years we can establish unique changes have occurred in regards to the CISG and reservations. The withdrawal of reservations in treaty practice are quite rare in general and for an extended period the CISG was no different, with the rare exception of Canada´s withdrawal in 1992, of its Article 95 reservation for British Colombia that was only valid for 3 months.[148] At the twenty-fifth birthday of the CISG in 2005, 21 of the then 65 contracting states where declared Reservations Contracting States (about 32%).[149] In 2011 a wave of withdrawals emerged, with both the much celebrated Nordic Article 92 withdrawal, when all the Scandinavian counties withdrew their reservation. Following Latvia, China and Lithuania withdrawing their Article 96 Reservations.

When Denmark, Finland, Norway and Sweden withdrew their Article 92 Reservation, most commentators rejoiced over the fact that it meant that after the depository period of 6 months, no Contracting state had an active and valid Article 92 reservation. According to Camilla´s article UNCITRAL expected a joint deposit of notification regarding the removal of Article 92 reservation, mostly because all four countries initially declared the reservation in conjunction with each other and the initial public declaration to withdraw the Article 92 reservation was jointly issued stating the following:

"According to the four Nordic countries directly concerned (Finland, Denmark, Norway and Sweden), this withdrawal should be considered as a unilateral declaration which took effect in accordance with the second sentence of article 97(3), on the first day of the month following the expiration of six months after the date of its receipt by the depositary, i.e. on 1 June 2012."[150]

That did not happen and the four states deposited their notification separately, Finland being the first. UNCITRAL then only needed clarification on how to process the notifications, if it should be treated as a unilateral declaration, which meant Finland´s notification would not be processed until

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[147] "CISG Advisory Council Opinion No. 15."

[148] Schroeter, "The Withdrawal of Reservations under Uniform Private Law Conventions." Page 2

[149] Schroeter, "Reservations and the CISG: The Borderland of Uniform International Sales Law and Treaty Law After Thirty-Five Years."

[150] Schroeter, "The Withdrawal of Reservations under Uniform Private Law Conventions."

the other three States deposited their notification, or if the notification should be treated as an individual notification. When Finland replied with a request to process the notification individually and there for starting the 6-month mandatory waiting period according to Article 97(4) before the other 3 states had even deposited their notifications. This ruffled a lot of political feathers in all countries and the mentioning of probable postponement from a source within the Danish ministry was not considered good news for CISG enthusiasts.[151] Luckily all countries went along with the removal of the Article 92 reservations, coming into force in Finland 1.6.2012, Sweden 1.12.2012, Denmark 1.2.2013 and Norway 1.11.2014. The deposited notifications from Finland was as following:

"On 28 November 2011, Finland notified the Secretary-General that it withdrew the following declaration under article 92 made upon signature and confirmed upon ratification:
Finland will not be bound by Part II of the Convention.
According to the four Nordic countries directly concerned (Finland, Denmark, Norway and Sweden), this withdrawal should be considered as a unilateral declaration which took effect in accordance with the second sentence of article 97 (3), on the first day of the month following the expiration of six months after the date of its receipt by the depositary, i.e. on 1 June 2012."[152]

The other three states have the following:

"Norway: Same reservation, mutatis mutandis, as the one made by Finland."[153]

"Sweden: Same reservation, mutatis mutandis, as the one made by Finland."[154]

Denmark: wording not available

What is noticeable is the wording "unilateral declaration" since it was both notified and processed as individual declarations for all four States.

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[151] Andersen, "Recent Removals of Reservations under the International Sales Law-Winds of Change Heralding a Greater Unity of the CISG1." P 7-11

[152] "United Nations Treaty Collection."

[153] "United Nations Treaty Collection."

[154] "United Nations Treaty Collection."

The hope was at that point in time, that more reservation Contracting States withdrew their reservations and as Camilla points out in 2012 the hope was that China would remove their Article 95 reservations, and the renowned CISG expert Harry Flechtner had put great efforts into arguing for the same removal in USA[155]. Neither states have deposited a notification in that regards, leaving withdrawals of Article 95 untouched since Canada removed theirs. Two of the three latest additions to contracting States, entry into force in 2020 have accessioned the convention as Reservation Contracting States, Democratic People's Republic of Korea declared an Article 96 Reservation and Lao People's Democratic Republic declared an Article 95 Reservation, that could be an indicator that the reservations are not going anywhere. Arguments against that view could be the following facts, one being the fact that article 95 reservation is one that becomes more redundant by every addition to Contracting States since Article 1(1)(a) applies between two Contracting States rendering the effects of an Article 95 reservations useless. Another is that while the option to withdraw reservations pursuant to Article 97, reservations are not an eternal unity but a possibility for States to choose an alternative version to their application of the CISG that can be altered by means of withdrawal at any point. Another factor could be that CISG popularity, predictability and usage in today's political and international climate of trading increases even further so that new Contracting States ratify the CISG without any reservations in the future.

8 Formal and Substantive Uniformity

Aforementioned factors have been analysed in the attempt that to determine if the ultimate goal of the CISG, uniformity can be reached. This is not an easily answered question. Possibly in light of the fact that we neither have a clear idea or picture on how to achieve that goal nor how to accurately measure it.

Enormous literature is available on the topic and the question alone has enough material to analyse in a dissertation. In this thesis focus has been of some of the factors that can shed light on the matter, both from a positive and negative perspective. The success of the CISG cannot be denied by the mere fact that almost half of the world nations have ratified the CISG and of those 93 states,

[155] Andersen, "Recent Removals of Reservations under the International Sales Law-Winds of Change Heralding a Greater Unity of the CISG1." 7-13

nine out of ten leading trading nations are member states,[156] the 10th being the United Kingdom. It has been stated;

"Although the overall advantages of the CISG are now undisputable, there remain several criticisms regarding the application of the CISG to international commercial transactions which still seem to nourish a strong adverse view on the Convention in certain legal systems. Having a closer look at these criticisms, however, reveals that they are in part unfounded as they stem from general misunderstandings and in all other cases appropriate solutions can be developed"[157]

There are off course different opinions on how and if the CISG can develop;

"Those arguing in favour of an extensive interpretation, letting the CISG develop and expand in scope to obtain greater formal uniformity, rather than dwelling in the legislative history, must do so accepting greater uncertainty and thereby the risk of decreased substantive uniformity. On the other hand, opponents of such approach, in preferring predictability and certainty, will trade greater formal uniformity in favour of substantive uniformity and respect for the original compromise"[158]

One can argue the fact that so many nations from different legal families/systems have developed their domestic laws with a strong influence from the CISG, States as Finland, Norway, Sweden, many of the previous Soviet Union States, Baltic states like Estonia, China and Germany are a clear sign on just how successful and respected the CISG is.[159] But the success can not only be measured in how many states have ratified the CISG, especially if the CISG is being excluded in its applications either by the partners involved, state regulations, rules of private international law or simply by default or human error.

In regards to this thesis some factors seem to have more weight to them than others when analysing and attempting to measure them. By this referring to the interpretation of the CISG, private international law rules, different language versions, implementation of the CISG, party autonomy, legal sources and last but not least reservations. If we look at the fact that in the today's world of trading the environment is much more towards internationalism then nationalism the need for

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[156] Ingeborg Schwenzer and Pascal Hachem, "The Cisg-Successes and Pitfalls," *American Journal of Comparative Law* 57, no. 2 (2009): 457–78, https://doi.org/10.5131/ajcl.2008.0013. Page 457

[157] Schwenzer and Hachem.

[158] Anne Rossen, Marie Hummelshøj Pedersen, and Thomas Neumann, "View of How Far Does the Dynamic Doctrine Go? Looking for the Basis of Precontractual Liability in the CISG," 2020, https://journals.aau.dk/index.php/NJCL/article/view/5397/4748.

[159] Schwenzer and Hachem, "The Cisg-Successes and Pitfalls." page 462-463

uniform law is high. But are the laws catching up to the speed of trading? If two parties from different states are considering a trade a number of laws become relevant to the trade before they decide to engage in cross border transaction, i.e. one being contractual law, others being tax law or procedural law.[160] CISG is just one of the possible law applicable to the trade though arguably an important law.

The development in regards to interpretations of the CISG, over the last 40 years, has provided for some black letter rules and principles that diminish the risk of relying on domestic interpretations of a given matter that should be resolved within the CISG. One case is worth mentioning in regards to uniformity and interpretations and that is the renowned New Zealand Mussel case. As Harry Fletchner pointed out in is article *"Failure to appreciate the complexity of the Convention's uniformity principle, and indulging instead a rigid and inflexible view of the demands of uniformity have, I believe, led some courts and commentators into error"* and used the opinion of the *Oberlandesgericht Frankfurt am Main* (appeal court of Germany) in the New Zealand Mussel case to demonstrate his view .

The case is about a German buyer who bought mussels produced in New Zealand from a Swiss company and subsequently attempted to avoid the contract after the product was declared **not completely safe** because it contained levels of cadmium exceeding what was advised in a directive by the German Health Department. The ruling found that the goods did not violate Article 35(2)(a) and the German buyer was in violation when he avoided the contract. In arguing that the mussels were fit for ordinary use, despite the violation of the health directive, the court ruled such regulations had no role to play in whether the goods conformed to the contract under Article 35(2)(a) because the requirement was that the Convention should be interpreted in an unified fashion, implying that the uniformity principles require a single, global standards of merchantability for mussels (and by virtue any other products) under Article 35(2)(a). The author points out that this would be a gross misreading of both Article 7(1) and Article 35. Asserting that the wording in "*Article 35(2)(a)-"fit for the purposes for which goods of the same description would ordinary be used"-is a general standard, designed, I believe, to be flexible enough to accommodate different*

[160] Jan M. Smits, "Problems of Uniform Sales Law – Why the CISG May Not Promote International Trade," *SSRN Electronic Journal*, 2013, 1–11, https://doi.org/10.2139/ssrn.2197468.

expectations and conditions of trade"[161] furthermore explaining his opinion by arguing that the drafters of the CISG wrote this provision with the intention to accommodate a certain amount of non-uniformity in order to allow the CISG to function in the vast differences that occurs in world trading. He goes further into asserting that the uniformity goal of Article 7(1) should or would never demand one universal standard of fitness of ordinary use. The German Supreme Court affirmed this ruling but on a far me defensible reasoning, stating that regulations in the buyer's state are relevant if one of two conditions are met, the seller was aware of the regulation or if the same regulations exist in the seller's state.[162][163] Most agree that the ruling and opinions of the German Supreme Court in this case is a great example of how the CISG should be interpreted.

A connection between PIL and CISG is necessary and even recognized in Article 7 of the CISG, but to achieve uniformity a clear line has to be held between the two. As Camilla pointed out in her article that practitioners, judges and even states have to address the CISG as a unique discipline in law *"It must be recognized that uniform law cannot be applied like other international law with any exploration of the boundaries of its application, nor can it be treated as internal domestic law which is exclusive to one jurisdiction or region."* Focusing on that the CISG law is international, free from influences that are purely domestic and that it is uniform in application by respecting its international character.[164]

As stated above there is no official doctrine, law, guidelines or High Court that determines how cases should be ruled upon but the usage of foreign case work and scholarly work between jurisdiction would facilitate a uniform development of the CISG if used properly. Many commentators agree that the teachings of comparative law and CISG in law schools around the world will promote usage and henceforth increase application uniformity in the future, it was also mentioned as a suggestion by the General Assembly in 1978 when preparing for the 1980 Vienna Convention, albeit only in developing countries[165]. With knowledge comes power. If the CISG

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[161] Fletchner, "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)."

[162] Fletchner; "Germany 8 March 1995 Supreme Court (New Zealand Mussels Case) [Translation Available]," accessed August 8, 2020, http://cisgw3.law.pace.edu/cases/950308g3.html.

[163] "» 8 March 1995 [VIII ZR 159/94], BGHZ 129, 75 German Law Archive," accessed August 8, 2020, https://germanlawarchive.iuscomp.org/?p=145.

[164] Andersen, "The Uniform International Sales Law and the Global Jurisconsultorium."

[165] Assembly, "Resolutions and Decisions Adopted by the General Assembly During Its Fifty-Ninth Session (A/60/L.1, Vol. 3, p. 38)."

seems to be an unfamiliar and unpredictable instrument it can and most likely will result in both parties opting out of the CISG as law of choice and states being reluctant to opt in as Contacting States.[166]

Uniformity of the CISG in the light of language can be divided into two different factors. One being the different official language of the CISG and the other being their usage in implementing and ratifying the convention and the latter being the language of the contract itself. Germany has a great deal of important rulings within the CISG regime, and even though Germany is using an unofficial translated version of the GISG it seems to have been translated in such a manner that issues regarding that has not caused any relevant issues that could not be resolved by means of relating to the official language versions and drafting history[167]. Cases involving interpretation of the language of the contract itself have arisen but none regarding the language versions of the CISG to the present authors knowledge.

In regards to reservations Camilla Andersen pointed out the following "*The question which this leaves us with today, is whether the declarations present problems in pursuit of uniform application today. The answer is nuanced*" [168] Meaning that that reservations as analysed above are most definitely a double-edged sword. The most obvious positive being that reservations, particularly in the early years, contributed to the ratification of the CISG. For example, is it very likely that the Nordic countries would not have become Contracting States at all if not for the Article 92 and 94 Reservations, be that as it may, at least they became Reservation Contracting States. The Nordic countries had the advantage of "test driving" the convention with both reservations only to find out that they were ill advised in their Article 92 reservations and after twenty years withdrew their 92 Article reservation, but unfortunately there seems to be no indications that the Nordic countries are willing to withdraw their 94 Article reservation.[169]

The other edge of the sword, is as pointed out in analysing the reservations permitted in the CISG is that the usage of said provisions has proven quite detrimental in practice. Many of them have

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[166] Rossen, Pedersen, and Neumann, "View of How Far Does the Dynamic Doctrine Go? Looking for the Basis of Precontractual Liability in the CISG."

[167] Schwenzer and Hachem, "The Cisg-Successes and Pitfalls." page 466-467

[168] Andersen, "Recent Removals of Reservations under the International Sales Law-Winds of Change Heralding a Greater Unity of the CISG1." P 5

[169] Schroeter, "Reservations and the CISG: The Borderland of Uniform International Sales Law and Treaty Law After Thirty-Five Years." page 229

undetermined issues in both application and interpretation. Commentators seem to disagree if reservations have been declared by too many Contracting States or if the fact that so many states have withdrawn their declared reservations indicates that concerns related to reservation should be minimal. [170] By the words of the CISG-AC declaration nr 2 *"Today's weakening (or altogether vanished) need for the reservations in Articles 92–96 CISG stands in contrast to their continuing detrimental effect upon the Convention's practical application: Any use of reservations under the Convention inevitably undermines the considerable measure of uniformity that exists and increases the likelihood of confusion regarding the application of the CISG.* Going on to say "*In light of these considerations, the CISG Advisory Council recommends that States which newly acceed to the Convention do so without making any declarations under Articles 92–96 CISG."*[171]

Most commentators agree with the general view that in the economic, social and cultural climate of the world trade today the need for reservations in the CISG is redundant and only defy uniformity, however it is to be measured. UNCITRAL is on the CISG 40th celebratory year in 2020 enacting a series of "*awareness-raising events and technical assistance activities to celebrate the 40th anniversary of the CISG in 2020 ("CISG@40"). The CISG@40 activities pursue several goals*"[172] one of them being *" to broaden CISG coverage by supporting the withdrawal of declarations and the territorial extensions for existing States parties."*[173]

Another factor is matters that where left unresolved in the making of the CISG. Issues like validity in Article 4, in short the drafters tried to negotiate an interpretation regarding validity issues regarding the scope of the CISG but failed to do so, and to not further delay the process of concluding the conference the matter was left as we know it today, or the controversial Article 4. Final wording resulting in a matter that many commentators have pointed out that defies uniformity and development, "*validity exception poses "a particular danger" to the development of a uniform and coherent jurisprudence under the Convention".*[174] Clear usage of primary and secondary legal

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[170] Schroeter. P 208

[171] "CISG-AC Declaration No.2," n.d., http://www.cisgac.com/cisgac-declaration-no2/.

[172] "CISG@40 | United Nations Commission On International Trade Law," accessed August 13, 2020, https://uncitral.un.org/en/cisg40.

[173] "CISG@40 | United Nations Commission On International Trade Law."

[174] 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 Uniformity Is a Fundamental Theme and a Central Value in the United Nations Convention on Contracts F" 7, no. 1 (1998). p 199

sources promotes uniformity by asserting the CISG as a predictable law and therefore adding value to uniformity.

9 Conclusion

When the CISG was formed the goal was clear, Uniform law regarding international sales. First question is if the goal can be measured? To be able to measure it one has to be able to determine the meaning of Uniformity. No clear answer is to that question since nothing in the Legislative history, The CISG itself nor the development of the CISG in practice, answers that question. The CISG itself has one provision that directly refers to Uniformity, Article 7, but fails to produce any means to measure Uniformity. By examining all the factors researched in this thesis one could argue that the need for such measurement to be established in the CISG is unnecessary. Instead of trying to measure it why not shift the focus on the word Uniformity, the reason behind that choice of word, and how it is interpreted within the CISG.

What can come from that approach is better understanding of the concept itself, Uniformity. Legislative history reveals some instruments on how the drafters of the CISG wanted to achieve the goal of Uniformity. One being, to make the CISG as independent and universal as possible. This was done by having as many delegates from all sorts of legal, cultural and economic systems participate in the 1980 Vienna Convention (and all preparations regarding drafts and proposals). In that way the final product is mostly regarded as an extremely well written International law, applied by almost half of the world´s nations. In that fact lies the answer to the question if it is possible to achieve uniformity amongst such diverse States. The ever-evolving trade environment from domestic to international, makes Uniformity even more desirable today then it was in the 1970's.

Did the drafters and makers of the CISG anticipate any factors that could stand in the way of the Uniformity goal? The CISG is built on their predecessors ULF and ULIS, that failed miserably, only ratified by 9 states. Giving the drafters some idea on how they could do better. In that respect the legislative history has shed a light on numerous matters. In the drafting history the makers of the CISG listed several ways they saw possible to achieve that goal early on, e.g. educating lawyers from developing countries. The fact that even before the convention was held in Vienna in 1980 drafts and discussions regarding reservations had already been introduced as a tool that states could negotiate when the CISG convention was held, in the hopes that it would promote more States to ratify the convention. Lo and behold, States that most likely would not have become Contracting States if not for the reservations, did accede to the CISG.

The number of States that have become Contracting States does not answer the underlying ideology behind the CISG since more factors come into play. Predominantly identified in how the CISG is interpreted, implemented and practiced.

The connection between the 1969 Vienna Convention and the CISG can become relevant in regards to interpretation but should only play a part in States obligations and not between private parties. The CISG itself in Article 7 provides for a clear tool on how matters should be interpreted. Article 7 was on the other hand written in such a manner that it acknowledges the limitations of the CISG scope. The CISG does not specify exactly how it should be interpreted or implemented, nor does it provide for answers on exactly what legal sources should apply nor concrete guidance on the hierarchy of sources. Meaning recourse to other means of interpretations is required e.g. Private international law where that is acceptable, and external gap fillers.

Article 6, that respects party autonomy is a great example to look at in regards to understanding underlying ideology behind the Uniformity goal. The respect for party autonomy risks uncertainty in applications of the CISG, but on the other hand more uniformity was probably reached because of this provision.

One could argue that showing both ends of the Uniformity scale would at least answer what is not the underlying ideology. One end being, that not enough states would accede to the CISG in the beginning and the other end being interpretations of the CISG demanding one global standard of interpretations on all CISG governed matters. A good example of this is this can be found in the New Zealand Mussel case.

Some feel that this uncertainty around CISG is a flaw in the CISG making while others feel that the fact that the CISG is written is such a manner gives room for development over time, albeit that such freedom has generated some bad results over the 40-year lifespan of the CISG e.g. relying on domestic interpretations where broader International interpretations should have been applied.

The aforementioned reservations are arguably on of the most defying factor of Uniformity within the CISG since all reservations stop the full unrestricted application of the Convention and therefore always play a negative part in the CISG´s Uniformity goal. Not only because of that fact, but also because so many of them have so many undetermined issues on how they should be interpreted and applied in practice. The UNCITRAL and most commentators want to minimize the usage of reservations and have celebrated all those States that have withdrawn their previously declared

reservations in the past. Unfortunately, two of the three latest additions as Contracting States, have acceded the CISG with reservation and that can and should raise concern on the matter.

The CISG celebrates 40 years in 2020 and although some uncertainties still remain around the CISG, it gives just cause to celebrate the CISG´s successes thus far, as being one of the most successful Uniformed International law. UNCITRAL is continuing the work on further uniformity, new edition of the DIGEST and taking actions to accelerate the achievement of the symbolic number of 100, presumably in the near future.

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