



What Sources of Law for Contracts for the International Sale of Goods? Why One has to Look Beyond the CISG

Franco Ferrari

Verona University School of Law, Italy

1. Introduction

Commentators have often stated that the 1980 United Nations Convention on Contracts for the International Sale of Goods¹ (hereinafter: CISG)² is a success³, so much so that it led one commentator to hail it as “arguably the greatest legislative achievement aimed at harmonizing private commercial law.”⁴ Since the CISG is in force in 64 countries⁵ and covers more than two-thirds of world trade⁶ and is increasingly applied both by state

E-mail address: fferrari@mail.univr.it.

¹ For the English text of the United Nations Convention on Contracts for the International Sale of Goods, see 19 I.L.M. 668 (1980). The text of the other official versions (i.e. Arab, Chinese, French, Russian and Spanish) can be found in Commentary on the International Sales Law. The 1980 Vienna Sales Convention 681–806 (Cesare M. Bianca, Michael J. Bonell, eds., 1987), and in *The Convention for the International Sale of Goods. A Handbook of the Basic Materials* 169–246 (Daniel B. Magraw and Reed Kathrein, 2nd ed., 1990).

² For a paper examining the various acronyms used for the United Nations Convention on Contracts for the International Sale of Goods in legal writing, see Axel Flessner and Thomas Kadner, *CISG? Zur Suche nach einer Abkürzung für das Wiener Übereinkommen über Verträge über den internationalen Warenkauf vom 11. April 1980*, *Zeitschrift für europäisches Privatrecht* 347 (1995).

³ See, most recently, Stacey A. Davis, *Unifying the Final Frontier: Space Industry Financing Reform*, 106 *Com. L. J.* 455, 477 (2001); Sandeep Gopalan, *The Creation of International Commercial Law: Sovereignty Felled?*, 5 *San Diego Int'l L. J.* 267, 289 (2004); Kazuaki Sono, *The Rise of Anational Contract Law in the Age of Globalization*, 75 *Tul. L. Rev.* 1185, 1185 (2001).

⁴ Joseph M. Lookofsky, *Loose Ends and Contorts in International Sales: Problems in the Harmonization of Private Law Rules*, 39 *Am. J. Comp. L.* 403, 403 (1991).

⁵ For an up-dated list of contracting States, see the UNCITRAL website at <<http://www.uncitral.org>>.

⁶ See John C. Kleefeld, *Rethinking “Like a Lawyer:” An Incrementalist’s Proposal for First-Year Curriculum Reform*, 53 *J. Leg. Ed.* 254, 262 note 29 (2003); Michael van Alstine, *Dynamic Treaty Interpretation*, 146 *U. Penn. L. Rev.* 687, 689 (1998).

courts and arbitral tribunals, the CISG's success is rarely questioned.⁷ The CISG's "world-wide success"⁸ and its supposedly global reach⁹ are, however, misleading, insofar as they make one believe that the CISG is "a comprehensive code governing international sales of goods"¹⁰, "addressing contracting generally"¹¹, and therefore governs all international sales transactions¹² and "exhaustively deals with all problems."¹³ But the CISG neither governs all international sales transactions¹⁴, nor, despite some statements to the contrary in case law¹⁵, does it deal with all issues that may arise in connection with these transactions.¹⁶ Ultimately, this means that it is not sufficient to rely on the rules of the CISG when importing

⁷ See, however, James E. Bailey, *Facing the Truth: Seeing the Convention on Contracts for the International Sale of Goods as an Obstacle to a Uniform Law of International Sales*, 32 *Cornell Int'l L. J.* 273 (1999); Paul B. Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, 39 *Va. J. Int'l L.* 743 (1999); Steven Walt, *Novelty and the Risks of Uniform Sales Law*, 39 *Va. J. Int'l L.* 671 (1999).

⁸ Michael Joachim Bonell, *Do we Need a Global Commercial Code?*, 106 *Dick. L. Rev.* 87, 88 (2001); Petar Sarcevic, *The CISG and Regional Unification*, in *The 1980 Uniform Sales Law. Old Issues Revisited in the Light of Recent Experiences* 3, 15 (Franco Ferrari, ed., 2003).

⁹ For a reference in legal writing to the CISG's universal reach, see, e.g. Isabelle Barrière-Brousse, *La création normative des États. Point de vue privatiste*, in *La mondialisation du droit* X139 (Eric Loquin and Chatherine Kessedjian, eds., 2000); John Duncan Jr., *Nachfrist was Ist? Thinking Globally and Acting Locally: Considering Time Extension Principles of the U.N. Convention on Contracts for the International Sale of Goods in Revising the Uniform Commercial Code*, Brigham Young L. Rev. 1363, 1365 (2000); Philippe Kahn, *Convention de Vienne du 11 avril 1980—Caractères et domaine d'application des règles conventionnelles*, *Droit et pratique du commerce international* 385, 395 (1989); in case law, see ICC Court of Arbitration, *Arbitral award n. 6281*, *Journal du droit international* 1114 (1989).

¹⁰ Brooke Overby, *Contract, in the Age of Sustainable Consumption*, 27 *J. Corp. L.* 603, 606 (2002); see also Michael Bradley et al., *The Purposes and Accountability of the Corporation in Contemporary Society: Corporate Governance at a Crossroads*, 62 *Law & Contemp. Prob.* 9, 82 (2000), stating that the CISG "presents a comprehensive code governing contracts for the international sale of goods."

¹¹ Lorne Clark & Jeffrey Wool, *Entry into Force of Transactional Private Law Treaties Affecting Aviation: Case Study—Proposed UNIDROIT/ICAO Convention as Applied to Aircraft Equipment*, 66 *J. Air L. & Com.* 1403, 1411 note 30 (2001).

¹² See, e.g. Tom McNamara, *U.N. Sale of Goods Convention: Finally Coming of Age?*, 32-Feb. *Colo. Law.* 11, 16 (2003), stating that "the Convention presumptively and automatically governs all international trade transactions within the CISG's scope (an international sales contract);" see also Gary Friedman et al., *Issues in Marketing and Sales Activities for Biotech Companies Around the World*, 66 *PLI/Pat* 953, 964 (2001), "The UN's Convention on Contracts for the International Sale of Goods ("CISG") is contract law worldwide for those countries that have ratified it."

In case law see Cámara Nacional de Apelaciones en lo Comercial de Buenos Aires, 21 July 2002, available at <<http://cisgw3.law.pace.edu/cisg/wais/db/cases2/020721a1.html>>, stating that "the Convention becomes the common law of the international sale of goods in the countries that adopt it."

¹³ Schweizerisches Bundesgericht, 19 February 2004, full text available at: <<http://cisgw3.law.pace.edu/cisg/wais/db/cases2/040219s1.html>>.

¹⁴ For a similar statement, see Heidi Stanton, *How to Be or Not to Be: The United Nations Convention on Contracts for the International Sale of Goods, Article 6*, 4 *Cardozo J. Int'l & Comp. L.* 400, 430 (1996).

¹⁵ See, apart from the decision quoted *supra* note 13, Cour de Justice de Genève, 15 November 2002, available at <<http://www.cisg-online.ch/cisg/urteile/853.pdf>>.

¹⁶ For a similar conclusion, see Karen B. Giannuzzi, *The Convention on Contracts for the International Sale of Goods: Temporarily Out of "Service"?*, 28 *Law & Pol'y Int'l Bus.* 991, 1016 (1997) (stating that the CISG does "not to provide an "exhaustive" body of rules, nor is it intended to provide solutions to all problems that can originate from an international sale").

or exporting internationally. Other sources of law also have to be taken into account¹⁷; in some instances, these other sources are the sole ones upon which practitioners will be able to rely.

The purpose of this paper is to show the reasons why other sources of law are, and will continue to be, relevant for international sales transactions (relating to goods)¹⁸, despite the CISG's entry into the field. When identifying these reasons, I will not dwell on the most obvious one: the fact that despite its supposedly global reach¹⁹, the CISG, like any other substantive law convention²⁰, is not in force in every country of the world. Consequently, if a dispute relating to an international sales transaction is brought before a court from a non-contracting State, that court is not bound to look into the CISG.²¹ Unless that court is bound by any other set of uniform substantive rules relating to international sales transactions, as are English courts²² (since both the ULF²³ and the ULIS²⁴, the CISG's predecessors, are still in force in England), the court has to resort to the rules of private international of the forum to determine the applicable law. This does not necessarily prevent the CISG from applying²⁵, provided that the rules of private international law lead to the law of a

¹⁷ See Claire M. Germain, *The United Nations Convention on Contracts for the International Sale of Goods: Guide to Research and Literature*, 24 Int'l J. Leg. Info. 48, 52 (1996), stating that "researchers must acquire some familiarity with any applicable foreign sales law and choice of law rules because the Convention does not deal with all international sales transactions."

¹⁸ This paper will not deal with the international sale of immoveables, as it is obvious that the CISG does not govern it and that necessarily other sources of law will have to be applied.

¹⁹ See, apart from the authors quoted *supra* note 9, Kazuaki Sono, *The Vienna Sales Convention: History and Perspective*, in *International Sale of Goods. Dubrovnik Lectures 1, 1* (Petar Sarcevic and Paul Volken, eds., 1986).

²⁰ See Franco Ferrari, 'Forum shopping' despite International Uniform Law Conventions, 51 ICLQ 689, 703 (2002).

²¹ That the applicability of the CISG in cases where the court is located in a non-contracting State cannot be based upon the CISG's own rules of applicability (Articles 1(1)(a) or 1(1)(b) CISG), since the courts of non-contracting States are not bound by them, has been pointed out, for instance, by Hermann Pünder, *Das Einheitliche UN-Kaufrecht—Anwendung kraft kollisionsrechtlicher Verweisung nach Art. 1 Abs. 1 lit. b UN-Kaufrecht*, *Recht der internationalen Wirtschaft* 869, 872 (1990); for a detailed analysis of this issue, see, e.g. Franco Ferrari, *CISG Art. 1(1)(b) and Related Matters: Brief Remarks on the Occasion of a Recent Dutch Court Decision*, *Nederlands Internationaal Privaatrecht* 317 (1995).

²² England has not yet entered into force the CISG; for an analysis of the reasons behind this choice, as well as its impact on import and export to and from England, see, e.g. Ahmad Azzouni, *The adoption of the 1980 Convention on the International Sale of Goods by the United Kingdom*, available at <<http://cisgw3.law.pace.edu/cisg/biblio/azzouni.html>>; Anette Gärtner, *Britain and the CISG: The Case for Ratification—A Comparative Analysis with Special Reference to German Law*, *Review of the CISG* 59 (2000–2001); Barry Nicholas, *The United Kingdom and the Vienna Sales Convention: Another Case of Splendid Isolation?* (Rome, 1993), also available on the Internet at the following address: <<http://soi.cnr.it/~crdcs/crdcs/nicholas.htm>>; Alison E. Williams, *Forecasting the Potential Impact of the Vienna Sales Convention on International Sales Law in the United Kingdom*, *Review of the Convention on Contracts for the International Sale of Goods (CISG)* 9 ff. (2000–2001).

²³ 3 I.L.M. 864 (1964).

²⁴ 3 I.L.M. 855 (1964).

²⁵ For this conclusion, see, e.g. Michel Pelichet, *La vente internationale de marchandises et le conflit de lois*, *Recueil des Cours* 9, 38–39 (1987); Jean-Pierre Plantard, *Un nouveau droit uniforme de la vente internationale: La Convention des Nations Unies du 11 avril 1980*, *Journal du droit international* 311, 321 (1988); Pünder, *supra* note 21, at 872; Gert Reinhart, *UN-Kaufrecht. Kommentar zum Übereinkommen der Vereinten Nationen vom 11. April 1980 über Verträge über den internationalen Warenkauf* 14 (1991).

contracting State²⁶; this means, however, that where the rules of private international law lead to the law of one of the more than 125 non-contracting States, the CISG will not apply; instead, a domestic set of rules will govern the international sales transaction. Thus, as long as the CISG has not gained real world-wide acceptance, there always will be room for other sources of law to govern international sales transactions.

This conclusion, however, is valid not only in those cases where court proceedings are initiated in non-contracting States. Since the CISG itself opens the door for other sources of law to apply (either concomitantly or, in some instances, even exclusively), the courts of contracting States, i.e. those States that entered into force the CISG and are therefore bound by it, will also have to take into account these other sources of law.

2. The CISG's conflict of conventions rule

Since the drafters of the CISG were aware of the increasing number of substantive uniform law conventions and, thus, of the possibility of different uniform law conventions being applicable to the same contract, they, like the drafters of other recent substantive uniform law conventions²⁷, introduced a provision, Article 90 CISG, designed specifically to deal with this potential conflict of conventions.²⁸ According to this provision, the CISG “does not prevail over any international agreement which has already been or may be entered into and which contains provisions concerning the matters governed by this Convention, provided that the parties have their places of business in States parties to such agreement.” Consequently, where (1) a contracting State to the CISG is also a contracting State to another international agreement, (2) that agreement deals with sales law issues; and (3) the parties have their respective place of business in contracting States to that agreement, the CISG gives way to that agreement, thus opening the door for other sources of law to govern the international sales transaction in dispute before the court of a contracting State. In other words, Article 90 CISG clearly constitutes one of the reasons why courts of contracting States to the CISG, too, may have to take into account sources of law other than the CISG.

Unfortunately, however, Article 90 CISG is not very clear about what other sources of law may have to be taken into account, nor is it clear about their relationship with the CISG²⁹, thus creating a lot of uncertainty rather than eliminating it.³⁰

²⁶ For a representative case in which the CISG was applied by courts of non-contracting States pursuant to the rules of private international law leading to the law of a contracting State, see, e.g. *Rechtbank van Koophandel Kortrijk*, 16 December 1996, available at <<http://www.unilex.info/case.cfm?pid=1&do=case&id=340&step=FullText>>.

²⁷ See Article 38 of the United Nations Convention on the Assignment of Receivables in International Trade, 41 I.L.M. 776, 791 (2002); Article 17 of the UNIDROIT Convention on International Financial Leasing, 27 I.L.M. 931, 939 (1988); Article 15 of the UNIDROIT Convention on International Factoring, 27 I.L.M. 943, 949 (1988).

²⁸ For discussions of the conflict of conventions in the area of private law, see, e.g. Carine Brière, *Les conflits de conventions internationales en droit privé* (2001).

²⁹ Rolf Herber, *Art. 90*, in *Commentary on the United Nations Convention on Contracts for the International Sale of Goods (CISG)* 688, 688 (Peter Schlechtriem, ed., 1998), stating that “this provision is of considerable substantive importance, but its precise effect is unclear.”

³⁰ *Contra* Roland Loewe, *The Sphere of Application of the United Nations Sales Convention*, 10 *Pace Int'l L. Rev.* 79, 87 (1997), stating that the Article 90 reservation as well as the other “reservations are a little regrettable, but do not materially weaken the worldwide effectiveness of the UN Sales Convention.”

As far as the former issue is concerned, it may suffice to recall that Article 90 has given rise to various disputes, such as whether the international agreements to which it refers must be agreements on substantive law or whether agreements on private international law also can prevail over the CISG. Although some commentators favour the latter view³¹, it appears that the Article 90 requirement that the agreement “contains provisions concerning the matters governed by this Convention” limits the agreements that can prevail over the CISG to agreements on substantive law.³² Since the CISG itself is a substantive law convention³³ and does not at all provide private international law rules to determine the applicable law³⁴, only other substantive law agreements can trump the CISG.

Another dispute regarding the nature of the international agreements that can displace the CISG relates to whether these agreements must be multilateral, as suggested by some authors³⁵, or whether bilateral agreements, too, can prevail over the CISG, as more correctly suggested by some authors³⁶, some of whom base this conclusion on the comparison between the different official language versions of the CISG.³⁷

Moreover, Article 90 itself is not very useful in determining whether European directives, such as the consumer credit directives³⁸, the Product Liability Directive³⁹ and the Directive on Consumer Sales⁴⁰, are “international agreements” in the sense of Article 90 and, thus,

³¹ See Beate Czerwenka, *Rechtsanwendungsprobleme im internationalen Kaufrecht Das Kollisionsrecht bei grenzüberschreitenden Kaufverträgen und der Anwendungsbereich der internationalen Kaufrechtsübereinkommen* 163 f. (Berlin, 1988); Lajos Vekas, *Zum persönlichen und räumlichen Anwendungsbereich des UN-Einheitskaufrechts*, *Praxis des internationalen Privat- und Verfahrensrechts* 342, 342 (1987); Peter Winship, *The Scope of the Vienna Convention on International Sales Contracts*, in *International Sales. The United Nations Convention on Contracts for the International Sale of Goods* 1–2, 1–41 (Nina M. Galston and Hans Smit, eds, 1984).

³² See Franco Ferrari, *Art. 90*, in *Kommentar zum Einheitlichen UN-Kaufrecht–CISG*, 842, 842–843 (Peter Schlechtriem and Ingeborg Schwenzer, eds., 4th ed., 2004); Peter Kindler, *Die Anwendungsvoraussetzungen des Wiener Kaufrechtsübereinkommens der Vereinten Nationen im deutsch-italienischen Rechtsverkehr*, *Recht der internationalen Wirtschaft* 776, 770 (1988).

³³ In this respect see, most recently, Tribunale di Padova, 25 February 2004, *Giurisprudenza di merito* 867, 868 (2004), expressly stating that the CISG “is a uniform convention on substantive law and not one on private international law as sometimes erroneously stated;” see also Tribunale di Rimini, 26 November 2002, *Giurisprudenza italiana* 896 (2003) (available at <<http://cisgw3.law.pace.edu/cisg/wais/db/cases2/021126i3.html>>), stating that the CISG is a “uniform substantive law convention.”

³⁴ For this conclusion, see also Fritz Enderlein and Dietrich Maskow, *International Sales Law. United Nations Convention on Contracts for the International Sale of Goods. Convention on the Limitation Period in the International Sale of Goods* 370 (1992).

³⁵ Fritz Enderlein et al., *Internationales Kaufrecht* 286 (1991) (stating that “Article 90, however, is to cover only multilateral treaties;” thus contradicting an earlier statement according to which “the contracting States can conclude deviating agreements in the future, both bilateral and multilateral.” *Id.*

³⁶ See, e.g. Franco Ferrari, *Art. 90 CISG*, in 6 *Münchener Kommentar zum HGB* 758, 758 (Karsten Schmidt, ed., 2004).

³⁷ See Herber, *supra* note 29, at 689.

³⁸ See Council Directive, 87/102/EEC, OJ 1987 L 42, p. 48 *et seq.*; Council Directive 90/88/EEC, OJ 1990 L 61, p. 14 *et seq.*

³⁹ See Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning the liability for defective products, OJ 1985 L 210, p. 29 *et seq.*

⁴⁰ See Council Directive 94/44/EEC on certain aspects of the sale of consumer goods and associated guarantees, OJ 1999 L 171, p. 12 *et seq.*

can displace the CISG. In this author's opinion, although these directives undoubtedly fulfil the substantive requirement set forth in Article 90 insofar as they contain "provisions concerning the matters governed by [the CISG]," it is doubtful that they qualify as "international agreement[s]" for purposes of Article 90.⁴¹ The sole fact that the EU member States have an obligation, under a treaty entered into force before the CISG, to transpose the directives into their domestic law does not make them "international agreements."⁴² Directives, therefore, cannot prevail over the CISG, at least not on the grounds of Article 90 CISG.

Article 90, like any other rule on conflict of conventions, attempts to define the CISG's relation to other agreements.⁴³ Unfortunately, Article 90 does not really succeed in doing so. It does not, for instance, solve the issue of whether the CISG cannot apply at all where the requirements set forth in Article 90 are met⁴⁴ or whether it still will apply to those issues the prevailing international agreement is not concerned with⁴⁵, as a kind of gap-filler.⁴⁶ Nor does Article 90 deal with the issue of what convention will apply when the requirement that both parties have their places of business in contracting States to the other agreement is not met. In this instance, Article 90 cannot be resorted to in order to justify the prevalence of the other international agreement.

From these explications, it becomes clear that Article 90 leaves open more questions than it solves, thus creating uncertainty as to the rules governing a particular international sales transactions and generating costs. Whether this is in line with the overall goal of the CISG is doubtful.

3. The CISG's reservations as potential openings for other sources of law

Article 90 is not the only CISG provision to open the door for other sources of law. Article 92 also does so; actually, the very purpose behind the introduction of this provision was to allow some countries, namely Denmark, Finland, Norway and Sweden, to rely on their regionally unified rules rather than those of the CISG. These countries proposed to allow contracting States to make a declaration pursuant to which they would not be bound by either Part II or Part III of the CISG, dealing with the "formation of contract" and "the rights and obligations of the parties," respectively. In doing so, they intended to make sure that their rules on formation of contract would not be replaced by the CISG's rules on formation. This is why all the aforementioned Scandinavian countries made a declaration according

⁴¹ For this conclusion, see Ferrari, *supra* note 36, at 759; Peter Schlechtriem, *Einleitung*, in *Kommentar zum Einheitlichen UN-Kaufrecht—CISG*, *supra* note 32, 27, 34.

⁴² *Contra*, Rolf Herber, *Mangelfolgeschäden nach dem CISG und nationales Deliktsrecht*, *Internationales Handelsrecht* 187, 190–191 (2001); Wolfgang Witz et al., *Internationales Einheitskaufrecht* 574–575 (2000).

⁴³ For a discussion of the way the rules on conflict of conventions found in international commercial law conventions work, see Peter Winship, *Final Provisions of UNCITRAL's International Commercial Law Conventions*, 24 *Int'l Law* 711, 726 *et seq.* (1990).

⁴⁴ For these requirements, see the text following note 28.

⁴⁵ For this view, see, e.g. Enderlein and Maskow, *supra* note 34, at 369, according to whom the prevailing conventions "do not fully exclude the CISG. The provisions of the CISG fill the gaps to the extent to which those are contained in other agreements."

⁴⁶ For this view, see, apart from the authors cited in the preceding note, Winship, *supra* note 31, at 1–42.

to which they would not be bound by Part II of the CISG (on “Formation of Contract”). Whether these countries were fully aware of the consequences of a similar declaration is doubtful. Given the rationale behind their proposal to introduce the possibility of declaring that reservation, it appears that these countries were convinced that a simple declaration would ensure the applicability of their domestic law. This is incorrect. The effect of an Article 92 declaration is much more limited, as well as much more complicated. It is more limited insofar as there will be instances where the CISG will still prevail over the law of the reservation State; it is more complicated insofar as the declaration of an Article 92 reservation obligates courts of contracting States to resort to their private international law rules, thus potentially making applicable an array of domestic laws (to the issues dealt with in the Part excluded by the reservation State), even though both parties to the contract have their places of business in States that did enter into force the CISG.

The effect of an Article 92 reservation can be summarized as follows: a party that has its relevant place of business in a State that has made an Article 92 declaration is to be considered as having its place of business in a non-contracting State for the purposes of the Part excluded.⁴⁷ Thus, where one party has its place of business in such a State, the court of a contracting State will not be able to apply the CISG by virtue of Article 1(1)(a) in its entirety⁴⁸; rather, Article 1(1)(a) will merely lead to the applicability of that Part of the CISG that binds both States in which the parties have their place of business.⁴⁹ This does not necessarily mean that the Part to which the declaration refers cannot apply⁵⁰; rather, that Part’s applicability will depend on whether the rules of private international law of the forum lead to the law of a contracting State that did not make an Article 92 declaration.⁵¹ If they do, the Part excluded will apply by virtue of Article 1(1)(b)⁵²—and according to recent case law, this is true even where the forum is located in a State that made an Article 92 declaration.⁵³ Where, however, the private international law rules lead to the law of the contracting State that declared the Article 92 reservation, that State’s domestic law will apply.⁵⁴ Of course, where the rules of private international lead to the law of a non-contracting State, that law’s rules (relating to the issues dealt with in the Part excluded) will apply. Thus, Article 92, like Article 90, opens the door for sources of law other than the CISG to be relevant in the courts of contracting States.

⁴⁷ See, e.g. Wilhelm-Albrecht Achilles, *Kommentar zum UN-Kaufrechtsübereinkommen (CISG)* 264 (2000).

⁴⁸ See Kurt Siehr, *Art. 1*, in *Kommentar zum UN-Kaufrecht* 43, 52 (Heinrich Honsell, ed., 1997); Joseph Lookofsky, *Alive and Well in Scandinavia: CISG Part II*, 18 J. L. & Com. 289, 292 (1999); Marco Torsello, *Reservations to International Uniform Commercial Law Conventions*, *Unif. L. Rev.* 85, 98 (2000).

⁴⁹ Franco Ferrari, *CISG and Private International Law*, in *The 1980 Uniform Sales Law*, *supra* note 8, at 19, 37.

⁵⁰ For this conclusion, see also Rolf Herber and Beate Czerwenka, *Internationales kaufrecht, Kommentar zu dem Übereinkommen der Vereinten Nationen vom 11. April 1980 Über Vertage Über den Internationalen Warenkauf*, 391, 393 (1991); Lookofsky, *supra* note 48, at 294–295.

⁵¹ Achilles, *supra* note 47, at 264; Enderlein et al., *supra* note 35, at 290; Harry M. Flechtner, *The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and other Challenges to the Uniformity Principle in Article 7(1)*, 17 J. L. & Com. 187, 193 (1998).

⁵² See, e.g. OLG München, 8 March 1995, available at <<http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/145.htm>>.

⁵³ See Østre Landsret, 23 April 1998, available at <<http://www.cisg.dk/olk23041998danskversion.htm>>.

⁵⁴ Enderlein and Maskow, *supra* note 34, at 375.

A similar reasoning applies in those cases where at least one of the parties to the contract has its place of business in a territorial unit of a contracting State that made an Article 93 declaration pursuant to which the CISG does not extend to that territorial unit: by virtue of Article 93(3) the CISG cannot apply (at all) by virtue of Article 1(1)(a), since the party that has its place in that territorial unit is considered as having its place of business in a non-contracting State. Consequently, where the forum is located in a contracting State, the CISG can only be applicable to such a contract by virtue of Article 1(1)(b), provided the rules of private international law lead to the law of a contracting State that did not declare an Article 93 reservation.⁵⁵ Where the rules of private international law lead to either the law of the reservation State or that of a non-contracting State, rules other than those of the CISG will apply. From this, one can easily derive that Article 93 also constitutes a CISG provision that opens the door for other sources of law and which courts of contracting States have to take into account.

Although declarations made pursuant to Article 94 CISG trigger the need for a similar private international law analysis, they do so for different reasons, as an Article 94 declaration does not have the effects of an Article 92 or Article 93 declaration. A State declaring an Article 94 reservation will not be considered a non-contracting State. The rationale of this provision, introduced upon the request of the Scandinavian countries⁵⁶, the only ones to declare this reservation⁵⁷, is to make the CISG inapplicable to contractual relationships between parties that have their places of business in countries that have a sales law that is largely uniform.⁵⁸ This means that only where both parties have their places of business in contracting States that made an Article 94 declaration will the CISG not apply, thus making it necessary to resort to the private international law rules of the forum to determine the applicable law. If the applicable law is that of a contracting State (independently of whether it declared a reservation or not), the CISG will not apply; rather the applicable domestic law will apply. This view appears to be shared by most authors, at least in respect to the line of cases in which the court is located in a State that made an Article 94 declaration. There is a dispute, however, as to whether the courts of other contracting States, as well, have to take into consideration Article 94 declarations, i.e. whether judges from non-reservation States will have to apply domestic law rather than the CISG to a contract concluded between two parties having their places of business in reservation States.

Independently of the solution to this dispute, Article 94 CISG clearly shows that the CISG itself recognizes the importance of other sources of law relating to sales transactions. The Article allows those States “which have the same or closely related legal rules on matters governed by the [CISG]” to make an Article 94 declaration. The Article also excludes the

⁵⁵ If the rules of private international law were to lead to the law of a contracting State that declared an Article 92 reservation, the CISG would not be applicable to the contract but for the Part of the CISG that that State had decided to be bound by.

⁵⁶ See United Nations Conference on Contracts for the International Sale of Goods, *Official Records: Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committees* (Vienna, 10 March–11 April 1980) 436 (United Nations ed., 1981) [hereinafter *Official Records*].

⁵⁷ See the updated list of contracting States that also includes the reservations declared by those States to be found on the Internet at <<http://www.uncitral.org>>.

⁵⁸ See Lookofsky, *supra* note 48, at 290.

applicability of the CISG in courts of States that made an Article 94 declaration if both parties to a contract have their place of business in such a State.

4. The CISG's limited substantive sphere of application

The final provisions referred to are not the only reasons why courts of contracting States cannot limit themselves to looking at the CISG. Another reason relates to the fact that the sphere of application *ratione materiae* of the CISG⁵⁹ is limited⁶⁰ (but this is true in respect of any international uniform contract law convention).⁶¹ Therefore, there will always be contracts for the international sale of goods which will be governed by rules, determined by application of the private international law rules of the forum, and that differ from the rules in the CISG.

In this respect, Article 2 CISG is paramount, as it expressly restricts the CISG's substantive sphere of application by excluding certain categories of international sales contracts from the CISG's sphere of application. These exclusions can be divided into three categories, based either on the purpose of the acquisition of the goods (Article 2(a)), on the type of sales contract (Article 2(b) and (c)), or on the kind of goods sold (Article 2(d), (e) and (f)).⁶²

These exclusions are farther reaching than those provided for by the CISG's predecessor, the 1964 Hague Uniform Sales Laws.⁶³ This is evidenced, for example, by the exclusion of auction sales from the sphere of application of the CISG⁶⁴, an exclusion that is not found in the 1964 Hague Uniform Sales Laws.⁶⁵

⁵⁹ For papers on the CISG's substantive sphere of application, see, e.g. Giorgio De Nova, *L'ambito di applicazione "ratione materiae" della convenzione di Vienna*, *Rivista di trimestrale di diritto e procedura civile* 749 (1990); Stefan Höss, *Der gegenständliche Anwendungsbereich des UN-Kaufrechts* (1995).

⁶⁰ For this statement, see, among other authors, Kevin Bell, *The Sphere of Application of the Vienna Convention on Contracts for the International Sale of Goods*, 8 *Pace Int'l L. Rev.* 237, 249 (1996); Giannuzzi, *supra* note 16, at 992; Marco Torsello, *Common Features of Uniform Commercial Law Conventions. A comparative Study beyond the 1980 Uniform Sales Law* 15 (2004); Timothy N. Tuggey, *The 1980 United Nations Convention on Contracts for the International Sale of Goods: Will a Homeward Trend Emerge?*, 21 *Texas Int'l L. J.* 540, 542 (1986).

⁶¹ See Franco Ferrari, *International Sales Law and the Inevitability of Forum shopping: A Comment on Tribunale di Rimini*, 26 *November 2002*, 23 *J. L. & Com.* 169, 179 (2004).

⁶² For a similar tripartite, see also Enderlein and Maskow, *supra* note 34, at 32 (stating that "[t]here are three types of restrictions in this article [Article 2] – those based upon the purpose for which the goods were purchased (subpara. (a)) – those based on the type of sales contract (subparas. [b] and [c]), those based on the kinds of goods sold, (subparas. (d), (e) and (f))"; Warren Khoo, *Art. 2*, in *Commentary on the International Sales Law*, *supra* note 1, 34, 37 (stating the same); Paul Volken, *The Vienna Convention: Scope, Interpretation, and Gap-Filling*, in *International Sale of Goods*. Dubrovnik Lectures, *supra* note 19, 19, 34 (stating the same).

⁶³ See, for a similar affirmation, Rolf Herber, *Art. 2*, in *Kommentar zum Einheitlichen UN-Kaufrecht–CISG* 59, 59 (Peter Schlechtriem, ed., 2nd ed., 1995).

⁶⁴ Even though auction sales are not subject to the CISG, this does not mean that sales at commodity exchanges are excluded from the CISG's sphere of application. Indeed, the sales at commodity exchanges being "rather rapid-fire communication of offers and acceptances," they cannot be considered as auction sales. John O. Honnold, *Uniform Law for International Sales Under the 1980 United Nations Convention* 46, at 48 note 3 (3rd ed., 1999); for a similar argument, see Bernard Audit, *La vente internationale* 29 (1990); Mark Kantor, *The Convention on Contracts for the International Sales of Goods: An International Sales Law*, 1 *International Legal Practice* 8, 10 (1988).

⁶⁵ It has often been stated that the exclusion of auction sales constitutes one of the innovative characteristics of the CISG; see, e.g. Sergio M. Carbone and Marco Lopez de Gonzalo, *Commento all'art. 2 della Convenzione di Vienna*, *Nuove Leggi Civ. Commentate* 6, 7 (1989).; Khoo, *supra* note 62, at 36.

Article 2 also excludes the sale of goods bought for personal use from the CISG's sphere of application, so as to avoid a conflict between CISG rules and domestic laws aimed at consumer protection.⁶⁶ Unfortunately, as pointed out by the German Supreme Court in a recent decision, there is still potential for conflict⁶⁷, since domestic law generally defines "consumer sales" differently. Indeed, for a contract to be a "consumer sale" under the CISG, the contract must be one for the sale of goods exclusively bought for a non-commercial purpose⁶⁸, i.e. for "personal" use⁶⁹, as, for example, when the buyer purchases the car⁷⁰ or a caravan⁷¹ to use it for himself, as opposed to for his business. The fact that the goods are consumer goods is generally speaking irrelevant for the purposes of the Article 2(a) exclusion.⁷² Furthermore, Article 2(a) requires that the "consumer" purpose of the purchase be known (or ought to have been known) to the seller at the time of the conclusion of the contract.⁷³ Consequently, it is irrelevant whether the seller knows of the non-commercial purpose of the purchase after the conclusion of the contract.⁷⁴

Article 2(a) compares family and household use to personal use, but it is doubtful whether the express contemplation of "family and household use" adds anything to the sphere of application of the exclusion of the sale of goods bought for personal use⁷⁵, since the former exclusions merely represent examples of "personal use."⁷⁶

Some Article 2 exclusions are based on the kind of goods sold (Article 2(d), (e) and (f)). For instance, Article 2(d) expressly excludes the sales of stocks, shares, investment

⁶⁶ For a similar justification of the Article 2(a) exclusion, see, e.g. Honnold, *supra* note 64, at 47; Maureen T. Murphy, Note, *United Nations Convention on Contracts for the International Sale of Goods: Creating Uniformity on International Sales Law*, 12 *Fordham Int'l L. J.* 727, 746 (1989); *Official Records*, *supra* note 56, at 16.

⁶⁷ Bundesgerichtshof, 31 October 2001, available at <<http://cisgw3.law.pace.edu/cisg/wais/db/cases2/011031g1.html>>.

⁶⁸ See, e.g. Enderlein and Maskow, *supra* note 34, at 33; in case law see Bundesgerichtshof, 31 October 2001, available at <<http://cisgw3.law.pace.edu/cisg/wais/db/cases2/011031g1.html>>.

⁶⁹ Various commentators have stressed the fact that the commercial nature of the goods is irrelevant, what matters is the commercial purpose of the sale contract; see Carbone and Lopez de Gonzalo, *supra* note 65, at 7; Albert H. Kritzer, *Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods* 71 (1989).

⁷⁰ See Oberster Gerichtshof, 11 February 1997, available at <http://www.cisg.at/10_150694.html>; KG Nidwalden, 5 January 1996, *Transportrecht-Internationales Handelsrecht* 10 (1999).

⁷¹ Rechtbank Arnhem, 27 May 1993, *Nederlands Internationaal Privaatrecht* 327 (1994).

⁷² See Carbone and Lopez de Gonzalo, *supra* note 65, at 7; Johan Erauw, *Waneer is het Weens koopverdrag van toepassing?*, in *Het Weens Koopverdrag* 21, 40 (Hans van Houtte et al., eds., 1997); Martin Karollus, *Der Anwendungsbereich des UN-Kaufrechts in Überblick*, *Juristische Schulung* 378, 380 (1993); Burghard Piltz, *Internationales Kaufrecht. Das UN-Kaufrecht (Wiener Übereinkommen von 1980) in praxisorientierter Darstellung* 34 (1993).

⁷³ See also Enderlein et al., *supra* note 35, at 34; Khoo, *supra* note 62, at 37; Daniela Memmo, *Il contratto di vendita internazionale nel diritto uniforme*, *Rivista trimestrale di diritto e procedura civile* 180, 197 (1983).

⁷⁴ For a similar statement in legal writing see, e.g. Enderlein and Maskow, *supra* note 34, at 34; Herber and Czerwenka, *supra* note 50, at 25; see also *Official Records*, *supra* note 56, at 16.

⁷⁵ See also Czerwenka, *supra* note 31, at 152; Ulrich Huber, *Der UNCITRAL—Entwurf eines Übereinkommens über internationale Warenkaufverträge*, *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 413, 422 (1979).

⁷⁶ For this conclusion, Memmo, *supra* note 73, at 196.

securities, negotiable instruments, and money from the CISG's sphere of application in order to avoid a conflict between CISG rules and domestic rules which often are mandatory.⁷⁷

The exclusions of the sale of ships, vessels, hovercrafts, and aircrafts provided for in Article 2(e) fall within the same category as the exclusion of commercial papers and money⁷⁸, that is, sales excluded on the basis of the nature of the goods sold.⁷⁹

Finally, the exclusion from the CISG's sphere of application of sales contracts regarding electricity⁸⁰ deserves special mention. According to some authors, the exclusion *de quo* can be justified on the ground of the electricity's "unique" nature⁸¹ or "[. . .] on the ground that in many legal systems electricity is not considered to be a good."⁸² Neither justification appears to be convincing.⁸³ Indeed, the first one overlooks the fact that there are other goods whose sale presents "unique" problems⁸⁴, such as the sale of gas⁸⁵ and crude oil⁸⁶ which, on the contrary, are governed by the CISG⁸⁷, as are the sales of other sources of energy.⁸⁸ The second one is not convincing, "[. . .] because the Convention may create its own definition of good."⁸⁹ Indeed, the exclusion of electricity sales from the sphere of application of the CISG cannot be justified.

This short description of the international sale contracts that are excluded from the CISG's substantive sphere of application clearly shows that there is a lot of room for law

⁷⁷ For this rationale of the Article 2(d) exclusion, see also Peter Schlechtriem, *Uniform Sales Law*. The UN-Convention on Contracts for the International Sale of Goods 28, 30 (1986), stating that the exclusion *de quo* "takes into consideration that international securities and currency transactions are governed by their own rules and laws which are often compulsory." See also Enderlein et al., *supra* note 35, at 47, stating that the Article 2(d) exclusion "can be explained by the existence of mandatory domestic rules."

⁷⁸ See also Vincent Heuzé, *La vente internationale de marchandises*. Droit uniforme 76–77 (1992).

⁷⁹ For a similar affirmation, see Kritzer, *supra* note 69, at 72.

⁸⁰ This exclusion could be found in Article 5 of the ULIS.

⁸¹ For a similar justification of the exclusion of sales of electricity from the Convention's sphere of application, see, e.g. Heuzé, *supra* note 78, at 77 (stating that the exclusion of sales of electricity can be explained on the ground of its nature); *Official Records*, *supra* note 56, at 16 (stating that the exclusion of electricity is justified because its sale presents unique problems that are different from those presented by the usual international sale of goods).

⁸² *Official Records*, *supra* note 56, at 16; for a similar justification of the Article 2(f) exclusion, see Claude Samson, *La Convention des Nations Unies sur les contrats de vente internationale de marchandises: Etude comparative des dispositions de la Convention et des règles de droit québécois en la matière*, 23 *Cahiers de droit* 919, 928 (1982).

⁸³ For a detailed summary of the different justifications suggested for the exclusion at hand, compare N. R. Merchor, *La regulacion internacional de las operaciones mercantiles enfrentada a un caso extremo: el trafico transfronterizo de energia electrica*, *Derecho de los Negocios* 9 (1995).

⁸⁴ For this argument, see also Winship, *supra* note 31, at 1–25, stating that "any suggestion that the problems raised by the excluded items are "unique" overlooks other items, such as oil and gas supply contracts of livestock transactions, which also raise unique problems."

⁸⁵ For this conclusion, see also Honnold, *supra* note 64, at 51 (arguing that the sale of gas is within the Convention); Huber, *supra* note 75, at 419 (stating the same and criticizing the exclusion of the sale of electricity).

⁸⁶ See also Herber, *supra* note 63, at 64. For a detailed discussion of the problems of oil trade and the CISG, see James W. Skelton, *CISG and Crude Oil Traders*, 9 *Houston J. Int'l L.* 95 (1986).

⁸⁷ For a case applying the CISG to the sale of gas, see Oberster Gerichtshof, 6 February 1996, available at <<http://cisgw3.law.pace.edu/cisg/wais/db/cases2/960206a3.html>>.

⁸⁸ For a discussion of the issues relating to the sale of energy under the CISG, see Peter Winship, *Energy Contracts and the United Nations Sales Convention*, 25 *Texas Int'l L. J.* 365 (1990).

⁸⁹ Enderlein and Maskow, *supra* note 34, at 35.

other than that laid down by the CISG to govern international sales contracts. Which law will *in concreto* be applicable is to be determined by resorting to the rules of private international law of the forum.

5. The CISG's limited international sphere of application

Sources of law other than the CISG are relevant not only when the contract for the international sale of goods does not fall within the substantive sphere of application of the CISG. The limited international sphere of the CISG's application also creates room for other sources of law, even when the contract is one for the sale of goods governed by the CISG. In effect, according to Article 1(1), only those contracts for the sale goods that are concluded between parties that, at the time of the conclusion of the contract, have their respective place of business (or, where the parties do not have a place of business, their habitual residence)⁹⁰ in different States⁹¹ are subject to the CISG.

Where this "subjective"⁹² internationality requirement is not met, the CISG will not be applicable *per se*⁹³, even if the contract's performance involves different States. This, however, does not necessarily signify that the contract for the sale of goods is not an international one; it merely means that it does not meet the CISG's internationality requirement. The importance of this distinction becomes apparent if one considers the consequences of the CISG's internationality requirement not being met. In this situation, the court will not have to look further into the CISG's applicability; instead, the court will have to turn to its rules of private international law to determine the law applicable to the contract. This law will necessarily be different from that laid down by the CISG, even if the rules of private international law lead to the law of a contracting State. Ultimately, this goes to show that despite the entry into force of the CISG, there is still a lot of room for other sources of law, even in those cases where the contract is one that falls within the CISG's substantive sphere of application.

In the light of Article 1(2) CISG, one can even go further and state that even where the contract also meets the internationality requirement as set forth in Article 1(1) CISG, there is room for other law to apply to the entirety of that contract: Since Article 1(2) CISG requires, that internationality be disregarded whenever it does not appear either from the contract or from any dealings between or from information disclosed by the parties at any time before or at the conclusion of the contract, the internationality as defined in Article 1(1) CISG may be irrelevant even where it exists if it was not apparent⁹⁴ before

⁹⁰ See Article 10(b): "[I]f a party does not have a place of business, reference is to be made to his habitual residence."

⁹¹ See, e.g. Tribunale di Padova, 31 March 2004, available at <<http://cisgw3.law.pace.edu/cisg/wais/db/cases2/040331i3.html>>; Tribunale di Rimini, 26 November 2002, available at <<http://cisgw3.law.pace.edu/cisg/wais/db/cases2/021126i3.html>>.

⁹² Rolf Herber, *Art. 1*, in *Commentary on the UN Convention on Contracts for the International Sale of Goods*, *supra* note 29, at 19, 21.

⁹³ For the parties' possibility of making the CISG applicable where it does not apply *per se*, see Franco Ferrari, *Art. 6*, in *Kommentar zum Einheitlichen UN-Kaufrecht–CISG*, *supra* note 32, at 123, 136 *et seq.*

⁹⁴ According to Audit, *supra* note 64, at 19, the apparent internationality does not suffice; the parties must know that they have concluded a contract which is to be considered an international one under the CISG.

or at the conclusion of the contract. By introducing Article 1(2), the drafters of the CISG wanted to protect the parties' reliance upon the domestic setting of their contract.⁹⁵ Given a recent decision by a United States court⁹⁶, this cannot be stressed enough. That court appears to have misunderstood this; it interpreted Article 1(2) CISG to mean that it protects the parties' reliance upon the CISG's inapplicability. This is incorrect; Article 1(2) CISG merely protects the parties' reliance upon the domestic setting in which their transaction is embedded.

Where this reliance deserves protection, the CISG cannot apply, despite the contract's internationality according to Article 1(1). This means, once again, that the court has to determine the applicable law by resorting to its rules of private international law, which necessarily will lead to a set of rules different from those of the CISG, even where its rules of private international law lead to the law of a contracting State.

According to various commentators⁹⁷, the "essential application"⁹⁸ of Article 1(2) CISG occurs where a party that has its place of business in one State concludes a contract with another party that has its place of business in that same State, without disclosing that it is acting on behalf of someone else who has his place of business in a different State.⁹⁹ In this case, the internationality of the transaction depends upon who will be considered a "party" to the contract. Unlike most other expressions used in the CISG, the concept of party is not one that will have to be interpreted "autonomously," i.e. without having regard to concepts of a particular domestic law.¹⁰⁰ Rather, the question of who is a "party" to the contract is "to be solved on the basis of the law applicable by virtue of the rules of private international law of the forum."¹⁰¹ This is in line with the view held both in legal writing and case law¹⁰² stipulating that agency constitutes a matter with which the CISG is not concerned.

Ultimately, what has just been said means that even in order to determine the internationality of the contract under the CISG itself, courts will have to take into account sources of substantive law other than the CISG, at least when exporter and importer are not the only ones involved in the conclusion of the contract.

⁹⁵ Franco Ferrari, *The CISG's sphere of application: Articles 1–3 and 10*, in *The Draft UNCITRAL Digest and Beyond. Cases, Analysis and Unresolved Issues in the U.N. Sales Convention* 21, 31 (Franco Ferrari et al., eds., 2004).

⁹⁶ *Impuls I.D. Internacional, S.L., Impuls I.D. Systems Inc., and PSIAR, S.A., Plaintiffs, vs. Psion-Teklogix Inc., Defendant*, US District Court, Southern District of Florida, available at <<http://cisgw3.law.pace.edu/cisg/wais/db/cases2/021122u1.html>>.

⁹⁷ Herber, *supra* note 92, at 28.

⁹⁸ Enderlein and Maskow, *supra* note 34, at 31.

⁹⁹ See also *Official Records*, *supra* note 56, at 15.

¹⁰⁰ The need to interpret the CISG "autonomously" has often been pointed out; see, e.g. Audit, *supra* note 64, at 47.

¹⁰¹ Tribunale di Padova, 25 February 2004, available at <<http://cisgw3.law.pace.edu/cisg/wais/db/cases2/04022513.html>>.

¹⁰² See, e.g. Oberlandesgericht Köln, 13 November 2000, available at <<http://cisgw3.law.pace.edu/cisg/wais/db/cases2/001113g1.html>>; Tribunale di Vigevano, 12 July 2000, available at <<http://cisgw3.law.pace.edu/cisg/wais/db/cases2/000712i3.html>>.

6. The CISG's applicability requirements *stricto sensu*

Generally, internationality by itself – except in very few cases, such as under the 1964 Hague Uniform Sales Laws¹⁰³ – is not sufficient to make an international uniform contract law convention applicable. Most uniform contract law conventions also require the existence of a specific link between the contract, the parties¹⁰⁴, or the places relevant in respect to a specific kind of contract (such as the place of taking over the goods or that designated for delivery, relevant for contracts for the carriage of goods¹⁰⁵) and a contracting State or the law of such a State.¹⁰⁶ As a consequence, a contract falling within the substantive and international sphere of application of an international uniform contract law convention is not governed by that convention, unless the requisite connection with a contracting State or the law of a contracting State exists.¹⁰⁷

This principle holds true in respect to the CISG as well. Even where a contract is one for the international sale of goods as defined by the CISG, it is not necessarily governed by the CISG, as the CISG also requires either that the parties have their places of business in different contracting States (“direct application”¹⁰⁸ by virtue of Article 1(1)(a)) or that the rules of private international law of the forum¹⁰⁹ lead to the law of a contracting State (“indirect application”¹¹⁰ by virtue of Article 1(1)(b)).

As pointed out by one scholar, this requirement creates a distinction between two types of international contracts for the sale of goods, i.e. those contracts to which the CISG applies and those to which it does not apply and are therefore subject to the applicable domestic law.¹¹¹ In other words, the drafters themselves have created room for sources of law other than the CISG to apply to an international contract for the sale of goods, even where this contract meets the CISG's substantive and international applicability requirements.

This becomes even more evident if one looks at the reason behind permitting an Article 95 reservation. Article 95 was introduced as a response to criticism that arose during

¹⁰³ For an analysis of the approach taken by the 1964 Hague Uniform Sales Laws, see, e.g. Franco Ferrari, *Specific Topics of the CISG in the Light of Judicial Application and Scholarly Writing*, 15 J. L. & Com. 1, 20–22 (1995).

¹⁰⁴ See, e.g. Article 2 of the UNIDROIT Convention on International Factoring, *supra* note 27; Article 3 of the UNIDROIT Convention on International Financial Leasing, *supra* note 27.

¹⁰⁵ See, e.g. Article 1 of the Convention on the Contract for the International Carriage of Goods by Road, 399 U.N.T.S. 189.

¹⁰⁶ See Marco Torsello *The CISG's Impact on Legislators: The Drafting of International Contract Conventions, in The 1980 Uniform Sales Law. Old Issues Revisited in the Light of Recent Experiences*, *supra* note 8, 99, 227 *et seq.*

¹⁰⁷ Franco Ferrari, “Forum shopping” *et droit matériel uniforme*, *Journal du droit international* 383, 394–396 (2002).

¹⁰⁸ See Ulrich Magnus, *Zum räumlich-internationalen Anwendungsbereich des UN-Kaufrechts und zur Mängelrüge*, *Praxis des internationalen Privat- und Verfahrensrechts* 390, 390 (1993); Peter Schlechtriem, *Internationales UN-Kaufrecht* 9–10 (2nd ed., 2003); Witz et al., *supra* note 42, at 40.

¹⁰⁹ See Tribunale di Rimini, 26 November 2002, available at <<http://cisgw3.law.pace.edu/cisg/wais/db/cases/021126i3.html>>.

¹¹⁰ Franco Ferrari, *International Sale of Goods. Applicability and Applications of the United Nations Convention on Contracts for the International Sale of Goods* 67 (1999).

¹¹¹ Paul Volken, *Das Wiener Übereinkommen über den internationalen Warenkauf; Anwendungsvoraussetzungen und Anwendungsbereich*, in *Einheitliches Kaufrecht und nationales Obligationenrecht* 81, 93 (Peter Schlechtriem, ed., 1987).

the Diplomatic Conference against the CISG's "indirect application," by virtue of Article 1(1)(b).¹¹² In effect, "an Article 95 declaration narrows the applicability of the Convention and enlarges the applicability of the domestic law of the declaring State"¹¹³, where the CISG does not apply by virtue of Article 1(1)(a). Independently of whether one agrees with the suggestion that an Article 95 declaration will ensure that the domestic law of the reservation State applies where the CISG is not applicable by virtue of Article 1(1)(a)¹¹⁴, one cannot deny that Article 95 CISG constitutes but another provision that opens the door to sources of law different from the CISG. Where, for instance, a US court has to decide a dispute relating to a contract for the international sale of goods concluded between an exporter that has its place of business in the US, a country that declared an Article 95 reservation, and an importer that has its place of business in England, a country that is not yet a contracting State to the CISG, due to the Article 95 reservation declared by the US, the CISG will not apply. Where the rules of private international of the US forum lead to the *lex fori*, the UCC will apply.¹¹⁵

7. The CISG's limited scope of application

The CISG, like any other international uniform substantive law convention, does not deal with all the matters that can arise from an international contract for the sale of goods. In other words, the CISG's scope of application is also limited¹¹⁶, as can easily be derived from various CISG provisions, such as Article 4 that contains a non-exhaustive list of matters the CISG is not concerned with, such as the validity of the contract or of any of its provisions.¹¹⁷

Matters referred to in this list must be dealt with by resorting to rules other than those of the CISG.¹¹⁸ Since, however, the introductory wording to Article 4(a) and (b) also states that those matters are not dealt with "except as otherwise expressly provided in this Convention," even where a dispute concerns a matter listed either in Article 4(a) or 4(b) and, thus, is apparently excluded from the CISG's scope of application and therefore left

¹¹² For references to this criticism of Article 1(1)(b), see, e.g. Gyula Eörsi, *A Propos the 1980 Vienna Convention on Contract for the International Sale of Goods*, 31 Am. J. Com. L. 333, 353 (1983); Giorgio Sacerdoti, *I criteri di applicazione della convenzione di Vienna sulla vendita internazionale: diritto uniforme. Diritto internazionale privato e autonomia dei contratti*, Rivista trimestrale di diritto e procedura civile 733, 739–740 (1990).

¹¹³ Honnold, *supra* note 64, at 39.

¹¹⁴ For a strong criticism of the suggestion referred to in the text, see, most recently, Ferrari, *supra* note 95, at 48 *et seq.*

¹¹⁵ For this conclusion, see also Pelichet, *supra* note 25, at 43–44.

¹¹⁶ See Torsello, *supra* note 60, at 19–20 and 97 *et seq.*; for a distinction between sphere of application and scope of application, see most recently Franco Ferrari, *Art. 4*, in *Kommentar zum Einheitlichen UN-Kaufrecht—CISG*, *supra* note 32, at 99, 100; Peter Schlechtriem, *Anwendungsvoraussetzungen und Anwendungsbereich des UN-Übereinkommens über Verträge über den internationalen Warenkauf (CISG)*, Archiv für die juristische Praxis 337, 340–341 (1992).

¹¹⁷ For papers on this issue, see, e.g. Armin Dawwas, *Die Gültigkeit des Vertrages und das UN-Kaufrecht* (1998); Wolfgang Drasch, *Einbeziehungs- und Inhaltskontrolle vorformulierter Geschäftsbedingungen in Anwendungsbereich des UN-Kaufrechts* (1999).

¹¹⁸ See Oberster Gerichtshof, 22 October 2001, available at <<http://cisgw3.law.pace.edu/cisg/wais/db/cases2/011022a4.html>>; Oberster Gerichtshof, 13 April 2000, available at <<http://cisgw3.law.pace.edu/cisg/wais/db/cases2/000413a3.html>>; AG Duisburg, 13 April 2000, available at <<http://cisgw3.law.pace.edu/cisg/wais/db/cases2/000413g1.html>>.

to external sources of law, one cannot simply resort to external sources. Rather, one has to first examine whether the CISG provides a solution for the specific problem.¹¹⁹ With reference to validity, for instance, this means that one has to first look into whether the validity issue in dispute is “expressly” dealt with by the CISG before resorting to the law applicable by virtue of the private international law rules. This is why, for instance, one cannot automatically resort to the external rules applicable by virtue of the rules of private international law to solve problems relating to the formal validity of the contract, since the CISG is (“expressly”) concerned with it.¹²⁰ Article 11 provides that a contract governed by the CISG need not be concluded in or evidenced by writing and is not subject to any other requirement of form, thus dealing with an issue that, in many legal systems, is considered to be an issue of validity.¹²¹

Article 4 does not, however only exclude the validity of the contract or of its provisions, such as the retention of title clauses inserted into the contract¹²², the validity of a choice of forum clause¹²³, the validity of a penalty clause¹²⁴, the validity of a settlement agreement.¹²⁵ Although Article 9 deals with the issues of how usages are to be defined, under which circumstances they are binding for the parties, and what their relationship is with the CISG rules, the CISG does not “expressly provide otherwise” with respect to the validity of usages. As a result, as the German Supreme Court has concluded¹²⁶, that issue is left to applicable domestic law.

Furthermore, Article 4 also makes clear that the CISG does not govern the passing of property of the goods sold¹²⁷, thus making it necessary to have recourse to external rules to deal with this matter.

Article 4 is not the only CISG provision to expressly identify matters not governed by the CISG. According to Article 5, the CISG is not concerned with the liability for death or personal injury caused by the goods to any person, either.¹²⁸ Liability for damage caused

¹¹⁹ Franco Ferrari, *Jurisprudence concernant les questions non abordées par la CVIM*, *Revue de droit des affaires internationales* 835, 836 (1998).

¹²⁰ Achilles, *supra* note 47, at 18; Ingo Saenger, *Art. 4*, in 3 BGB 2774, 2775 (Hein Georg Bamberger and Herbert Roth, eds., 2003).

¹²¹ Peter Schlechtriem, *Art. 11*, in *Kommentar zum Einheitlichen UN-Kaufrecht–CISG*, *supra* note 32, at 202, 203.

¹²² See, e.g. *Roder Zelt- und Hallenkonstruktionen GmbH v. Rosedown Park Pty Ltd and Reginald R Eustace*, Federal Court, South Australian District, Adelaide, 28 April 1995, available at <<http://www.unilex.info/case.cfm?pid=1&do=case&id=197&step=FullText>>.

¹²³ See *Camara Nacional de los Apelaciones en lo Comercial*, 14 October 1993, available at <<http://www.uc3m.es/uc3m/dpto/PR/dppr03/cisg/sargen6.htm>>.

¹²⁴ See *Rechtbank van Koophandel Hasselt*, 17 June 1998, available at <<http://www.law.kuleuven.ac.be/int/tradelaw/WK/1998-06-17.htm>>.

¹²⁵ See *LG Aachen*, 14 May 1993, *Recht der internationalen Wirtschaft* 760 (1993).

¹²⁶ See *Oberster Gerichtshof*, 21 March 2000, *Internationales Handelsrecht* 40 (2001).

¹²⁷ See also *Usinor Industrieel, v. Leeco Steel Products Inc.*, S. District Court for the Northern District of Illinois, Eastern Division, 28 March 2002, 2002 Westlaw 655540 (N.D.Ill.); *St. Paul Guardian Insurance Co. et al. v. Neuromed Medical Systems & Support et al.*, US District Court for the Southern District of New York, 26 March 2002, 2002 US Dist. Lexis 5096 (S.D.N.Y.).

¹²⁸ See, e.g. Rolf Herber, *UN-Kaufrechtsübereinkommen: Produkthaftung–Verjährung*, *Monatsschrift für deutsches Recht* 105 (1993); Rolf Herber, *Mangelfolgeschäden nach dem CISG und nationales Deliktsrecht*, *Internationales Handelsrecht* 187 (2001).

to property, however, is not excluded from the CISG's scope, as pointed out both in legal writing¹²⁹ and case law¹³⁰; consequently, this matter, too, will be subject to sources of law other than the CISG.

The same can be said for most of the other matters that, albeit not expressly excluded from the CISG's scope of application, are not governed by it¹³¹, such as the assignment of contract¹³², the assumption of debts¹³³, the acknowledgement of debts¹³⁴, the effects of the contract on third parties¹³⁵, the issue of whether one is jointly liable¹³⁶ as well as set-off.¹³⁷

Other matters are not governed by the CISG, either; in their respect, recourse to the rules of private international of the forum may have to be forgone in favor of the application of a uniform substantive law convention in force in the forum State. This is true, for instance, in respect of the statute of limitations, as this matter may be subject to the United Nations Convention on the Limitation Period in the International Sale of Goods¹³⁸, UNCITRAL's firstborn.¹³⁹

From what has just been said, it becomes evident that there is a lot of room for sources of law (both purely domestic and more international ones) other than CISG to apply to international contracts for the sale of goods, even where these contracts are subject to the CISG.¹⁴⁰

8. CISG and party autonomy

Even where all of the CISG's positive applicability requirements (the international one, the substantive one, the temporal one, the personal/territorial one) are met and the issues to be dealt with by the court are governed by the CISG, sources of law other than the CISG are not necessarily irrelevant. The most obvious reason for this is certainly Article 6 CISG, which allows the parties "exclude the application of this Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions." By providing for

¹²⁹ See, e.g. Franco Ferrari, *Vendita internazionale di beni mobili. Art. 1–13. Ambito di applicazione. Disposizioni generali* 101, 106 (1994).

¹³⁰ See HG Kanton Zürich, 26 April 1995, *Transportrecht-Internationales Handelsrecht* 54 (1999).

¹³¹ For a recent overview, see Claude Witz, *CVIM: interprétation et questions non couvertes*, *Revue de droit des affaires internationales* 253 (2001).

¹³² See Bundesgerichtshof, 15 February 1995, published in the English online at <<http://cisgw3.law.pace.edu/cisg/wais/db/cases2/950215g1.html>>.

¹³³ See Oberster Gerichtshof, 24 April 1997, *Zeitschrift für Rechtsvergleichung* 89 (1997).

¹³⁴ See OLG Hamm, 23 June 1998, available at <<http://cisgw3.law.pace.edu/cisg/wais/db/cases2/980623g1.html>>.

¹³⁵ See *Usinor Industrie v. Leeco Steel Products Inc.*, S. District Court for the Northern District of Illinois, Eastern Division, 28 March 2002, 209 F. Supp. 2d 880 (N.D. Ill. 2002); Bundesgerichtshof, 12 February 1998, available at <<http://cisgw3.law.pace.edu/cisg/wais/db/cases2/980212g1.html>>.

¹³⁶ See LG München, 25 January 1996, available at <<http://www.cisg-online.ch/cisg/urteile/278.htm>>.

¹³⁷ See, e.g. Oberster Gerichtshof, 22 October 2001, available at <<http://cisgw3.law.pace.edu/cisg/wais/db/cases2/011022a4.html>>; Tribunale di Vigevano, 12 July 2000, published in English in 20 J. L. & Com. 209 (2001).

¹³⁸ Reprinted in 13 I.L.M. 952 (1974); Protocol Amending the Convention, reprinted in 19 I.L.M. 696 (1980).

¹³⁹ Peter Winship, *The Convention on the Limitation Period in the International Sale of Goods: The United States Adopts UNCITRAL's Firstborn*, 28 Int'l Law 1071 (1994).

¹⁴⁰ For this conclusion in case law, see Gerichtspräsident Laufen, 7 May 1993, available at <<http://cisgw3.law.pace.edu/cisg/wais/db/cases2/930507s1.html>>.

this possibility, which business apparently take advantage of rather often¹⁴¹ for fear of the unknown, the drafters of the CISG reaffirmed, despite some reservations¹⁴², one of the general principles already embodied in the 1964 Hague Uniform Sales Law, that is, the principle that the primary source of the rules governing international sales contracts is party autonomy, or, as some courts have put it, the principle of “the prevalence of party autonomy.”¹⁴³ By stating that the CISG can be excluded, the drafters clearly acknowledged the CISG dispositive nature¹⁴⁴ – emphasized also in case law¹⁴⁵ – and the “central role which party autonomy plays in international commerce and, particularly, in international sales.”¹⁴⁶

Article 6 relates to two different lines of cases: one where the CISG’s application is excluded, the other where the parties derogate from – or modify the effects of – the provisions CISG on a substantive level.¹⁴⁷ These two situations differ from each other in that the CISG does not restrict the scope of the former, whereas it does limit the latter, as there are provisions from which the parties are not allowed to derogate.

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

In the former case, the courts will have to resort to their rules of private international law¹⁴⁸ to determine the applicable law (which, whenever they lead to the law of a contracting State, make applicable that State’s domestic sales law). Thus, where the parties do not choose the applicable law when excluding the CISG, the courts will have to determine the applicable law by means of objective connecting factors; since these factors, at least

¹⁴¹ For this assertion, see, e.g. Robert Koch, *Wider den formularmäßigen Ausschluß des UN-Kaufrechts*, *Neue Juristische Wochenschrift* 910, 910 (2000); Katharina Pistor, *The Standardization of Law and Its Effect on Developing Economies*, 50 *Am. J. Comp. L.* 97, 111 (2002).

¹⁴² During the drafting process, some States expressed reservations to the principle of party autonomy laid down in Article 6 CISG: “[t]heir concern was that, in practice, the principle could be abused by the economically stronger party imposing his own national law or contractual terms far less balanced than those contained in the Convention,” Michael J. Bonell, *Art. 6*, in *Commentary on the International Sales Law*, *supra* note 1, 51,1.

¹⁴³ See Trib. Rimini, 26 November 2002, available at <<http://cisgw3.law.pace.edu/cisg/wais/db/cases2/021126i3.html>>; Hof Beroep Gent, 15 May 2002, available at <<http://cisgw3.law.pace.edu/cisg/wais/db/cases2/020515b1.html>>; Rechtbank Koophandel Ieper, 29 January 2001, available at <<http://www.law.kuleuven.ac.be/int/tradelaw/WK/2001-01-29.htm>>; Landgericht Stendal, October 12, 2000, *Internationales Handelsrecht* 32 (2001).

¹⁴⁴ See Sergio M. Carbone, *L’ambito di applicazione ed i criteri interpretativi della convenzione di Vienna*, in *La vendita internazionale. La Convenzione dell’11 aprile 1980* 61, 78 (1981) Claude Witz, *L’exclusion de la Convention des Nations Unies sur les contrats de vente internationale de marchandises par la volonté des parties (Convention de Vienne du 11 avril 1980)*, *Receuil Dalloz Chron.* 107, 107 (1990).

¹⁴⁵ For an express reference to the CISG’s non-mandatory nature, see *Cassazione civile*, 19 June 2000, see, e.g. *Oberster Gerichtshof*, 15 October 1998, available at <<http://cisgw3.law.pace.edu/cisg/wais/db/cases2/981015a3.html>>.

¹⁴⁶ Michael J. Bonell, *Commento all’art. 6 della Convenzione di Vienna*, *Nuove Leggi civili commentate* 16, 16 (1989).

¹⁴⁷ For this distinction, see, e.g. Alessandra Lanciotti, *Norme uniformi di conflitto e materiali nella disciplina convenzionale della compravendita* 148 f. (1992).

¹⁴⁸ For this conclusion, see, e.g. Bonell, *supra* note 146, at 19.

in Europe¹⁴⁹, lead to the application of the “law of a country”¹⁵⁰, courts will not be able to apply non-binding rules, such as the UNIDROIT Principles of International Commercial Contracts (hereinafter: UNIDROIT Principles). Where, on the other hand, the parties choose the applicable law, courts will have to apply their rules of private international law to determine whether to accede to that choice. Where the Convention on the Law Applicable to Contractual Obligations applies, courts must take into account the parties’ choice by virtue of its Article 3, as long as it is a choice of “law.”¹⁵¹ The choice of a non-binding set of rules, such as the UNIDROIT Principles, does not yet constitute a choice of “law.”¹⁵² This means that the UNIDROIT Principles cannot prevail over the mandatory rules of the (objectively) applicable law; they can, however, prevail over that law’s dispositive rules.

Where the parties modify the effect of provisions of the CISG, the applicable rules will not have to be determined by means of a private international law approach, but rather by looking at the contract itself. The same is true if the parties derogate from any provision; in this case, where the contract does not provide for any solution to the issue dealt with in the provision the parties derogated from, courts must resort to the applicable law and not, as suggested by one commentator, to the general principles of the CISG, used pursuant to Article 7(2) CISG to fill internal gaps.

What has just been said does, however, not apply to Article 12 CISG, according to which where at least one of the parties to the contract governed by the CISG has its place of business in a State that has declared a reservation under Article 96, the parties may not derogate from or vary the effect of Article 12. In those cases, pursuant to Article 12 the principle of freedom from form requirements does not apply per se.¹⁵³ Opposing views exist as to the effects of the Article 96 reservation. According to one view, where at least one party has its relevant place of business in a State that made an Article 96 reservation, the contract must be concluded or evidenced or modified in writing.¹⁵⁴ This view should be rejected in favor of that pursuant to which the sole fact that one party has its place of business in a State that declared an Article 96 reservation does not necessarily make applicable the form

¹⁴⁹ Outside Europe, see, however, Article 9 of the Inter-American Convention on the Law Applicable to International Contracts, 33 I.L.M. 732, 735 (1994).

¹⁵⁰ See, e.g. Article 4(1) of the Convention on the Law Applicable to Contractual Obligations, reprinted in 19 I.L.M. 1492, 1493 (1980).

¹⁵¹ See, e.g. Michael J. Bonell, *La moderna lex mercatoria tra mito e realtà*, *Diritto del commercio internazionale* 315, 326 (1992); Ugo Villani, *La Convenzione di Roma sulla legge applicabile ai contratti* 80–81 (2nd ed., 2000).

¹⁵² See, e.g. Franco Ferrari, *Das Verhältnis zwischen den UNIDROIT-Grundsätzen und den allgemeinen Grundsätzen internationaler Einheitsprivatrechtskonventionen*, *JuristenZeitung* 9, 16–17 (1998); Peter Mankowski, *Überlegungen zur sach- und interessengerechten Rechtswahl für Verträge des internationalen Wirtschaftsverkehrs*, *Recht der internationalen Wirtschaft* 2, 11–12 (2003).

¹⁵³ In legal writing, see Harry M. Flechtner, *The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and other Challenges to the Uniformity Principle in Article 7(1)*, 17 *J. L. & Com.* 187, 196 (1998); in case law see, e.g. *Rechtbank van Koophandel*, 2 May 1995, available at <<http://www.law.kuleuven.ac.be/int/tradelaw/WK/1995-05-02.htm>>.

¹⁵⁴ The High Arbitration Court of the Russian Federation, 16 February 1998, referred to online at <<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/980216r1.html>>; *Rechtbank van Koophandel Hasselt*, 2 May 1995, available at <<http://www.law.kuleuven.ac.be/int/tradelaw/WK/1995-05-02.htm>>.

requirements of that State¹⁵⁵, a view adopted in a recent case.¹⁵⁶ Instead, it will depend on the rules of private international law of the forum whether any form requirements have to be met.¹⁵⁷ Consequently, where those rules lead to the law of a State that declared an Article 96 reservation, the form requirements of that State will have to be complied with¹⁵⁸ (where they exist¹⁵⁹); where, on the other hand, the law applicable is that of a contracting State that did not declare an Article 96 reservation, the principle of freedom from form requirements laid down in Article 11 CISG applies.

From what has been said in respect of Article 6, it becomes evident how many sources of law other than the CISG can be relevant to solve disputes relating to international contracts for the sale of goods to which the CISG could be applicable.

9. CISG and usage

Article 6 is not the only CISG provision that opens the door for other sources of law to apply to international contracts for the sale of goods to which the CISG applies. Article 9 CISG is also relevant in this respect, as this dispositive¹⁶⁰ provision expressly makes relevant sources other than the CISG, “more highly tailored to the requirements of a particular industry”¹⁶¹, when stating both that “[t]he parties are bound by any usage to which they have agreed and by any practices which they have established between themselves” (Article 9(1)) and that “[t]he parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned” (Article 9(2)).

As far as Article 9(1) is concerned, it refers to two different sources, namely usages and practices established between the parties. As for “usages,” Article 9(1) does not define the expression; it merely states that usages bind the parties to the extent that the parties have (expressly or implicitly¹⁶²) agreed to them. The lack of a definition, however, does

¹⁵⁵ See, e.g. Achilles, *supra* note 47, at 267.

¹⁵⁶ Rechtbank Rotterdam, 12 July 2001, *Nederlands Internationaal Privaatrecht* 458 (2001).

¹⁵⁷ Herber and Czerwenka, *supra* note 50, at 399–400; Ulrich Magnus, *Wiener UN-Kaufrecht (CISG)* 759, at 767 (13th revised ed., 1999).

¹⁵⁸ Werner Melis, *Art. 11*, in *Kommentar zum UN-Kaufrecht*, *supra* note 48, 06, 110; Witz et al., *supra* note 42, at 122.

¹⁵⁹ Although according to Article 96 only those States are allowed to declare an Article 96 reservation “whose legislation requires contracts of sale to be concluded in or evidenced by writing,” it appears that some States, such as Argentina and Chile made a reservation although their domestic law does not meet that requirement.

¹⁶⁰ Michael J. Bonell, *Commento all'art. 9 della Convenzione di Vienna*, *Nuove leggi civili commentate* 37, 38 (1989).

¹⁶¹ Clayton P. Gilette, *Harmony and Stasis in Trade Usages for International Sales*, 39 *Va. J. Int'l L.* 707, at 708 (1999).

¹⁶² *Official Records*, *supra* note 56, at 19; Achilles, *supra* note 47, at 36; Michael J. Bonell, *Art. 9*, in *Commentary on the International Sales Law*, *supra* note 1, at 103, 107; Bonell, *supra* note 160, at 39; Franco Ferrari, *La rilevanza degli usi nella convenzione di Vienna sulla vendita internazionale di beni mobili*, *Contratto e impresa* 239, 247 (1994); Wener Melis, *Art. 9*, in *Kommentar zum UN-Kaufrecht*, *supra* note 158, at 98, 99; Huber, *supra* note 75, at

not warrant recourse to domestic notions or definitions, as this would run counter to the *ratio conventionis*.¹⁶³ As is the case with most of the terms used in the CISG, the concept of usage must be interpreted autonomously¹⁶⁴, without resorting to the domestic law of the courts or to any other particular domestic concepts or perceptions.¹⁶⁵ Accordingly, usages within the meaning of the CISG include all those actions or modes of behaviour (including omissions¹⁶⁶), which are generally and regularly observed in the course of business transactions in a specific area of trade or at a certain trade centre¹⁶⁷, and independently of whether the relevant commercial circles believe that they are binding. In contrast to usages to which the parties are bound under Article 9(2) CISG¹⁶⁸, it is not necessary that the usages referred to in Article 9(1) be “widely known”¹⁶⁹ or international.¹⁷⁰ Local, regional or national usages may also be relevant if the parties agreed to them.¹⁷¹

50; Helga Rudolph, Kaufrecht der Export und Import Verträge, Kommentierung des UN-Übereinkommens über Internationale Warenkaufverträge mit Hinweisen für die Vertragspraxis 143 (1996); Witz et al., *supra* note 42, at 54–55; to the same effect in the case law, see Oberster Gerichtshof, 21 March 2000, Internationales Handelsrecht 40 (2001); for a different point of view, see Jorge Adame Goddard, El Contrato de Compraventa Internacional 80–81 (1994); Gillette, *supra* note 161, at 713.

¹⁶³ Ferrari, *supra* note 129, at 187; Volker Holl and Oliver Keßler, “Selbstgeschaffenes Recht der Wirtschaft” und Einheitsrecht—Die Stellung der Handelsbräuche und Gepflogenheiten im Wiener UN-Kaufrecht, *Recht der internationalen Wirtschaft* 457, 458 (1995).

¹⁶⁴ Achilles, *supra* note 47, at 35–36; Bonell, *supra* note 162, at 111; Michael J. Bonell, *Die Bedeutung der Handelsbräuche im Wiener Kaufrechtsübereinkommen von 1980*, österreichische Juristische Blätter 385, 386 (1985); Alfonso Calvo Caravaca, *Art. 9*, in *La compraventa internacional de mercaderías. Comentario de la Convención de Viena*, 132, 140 (Luis Diez-Picazo, ed., 1997); Ferrari, *supra* note 129, at 187; Herber and Czerwenka, *supra* note 50, at 57; Melis, *supra* note 158, at 99; Witz et al., *supra* note 42, at 54.

¹⁶⁵ Magnus, *supra* note 157, at 152; likewise Frank Diedrich, *Autonome Auslegung von Internationalem Einheitsrecht. Computersoftware im Wiener Kaufrecht* 77 (1994); Franco Ferrari, *Besprechung von Magnus, Wiener UN-Kaufrecht*, *Praxis des internationalen Privat- und Verfahrensrechts* 64, 65 (1997); Werner Melis, *Art. 7*, *Kommentar zum UN-Kaufrecht*, *supra* note 48, 85, 87; Paolo Torzilli, *The Aftermath of MCC-Marble: Is This the Death Knell for the Parol Evidence Rule?*, 74 *St. John's L. Rev.* 843, 859 (2000); in the case law, see OLG Karlsruhe, 25 June 1997, available at <<http://cisgw3.law.pace.edu/cisg/wais/db/cases2/970625g1.html>> (stating that German legal terms such as mistake [*Fehler*] and “warranted characteristics” [*zugesicherte Eigenschaften*] are not transferable to the CISG); Gerichtspräsident Laufen, 7 May 1993, available at <<http://cisgw3.law.pace.edu/cisg/wais/db/cases2/930507s1.html>> (stating that the CISG should be interpreted autonomously and not from the respective national law viewpoint held by the individual applying the law).

¹⁶⁶ Ferrari, *supra* note 162, 244.

¹⁶⁷ Melis, *supra* note 158, at 99; Magnus, *supra* note 157, at 173.

¹⁶⁸ On this point, see *infra* the text accompanying notes 182 *et seq.*

¹⁶⁹ To this effect, see Andreas Lüderitz and Anja Fenge, *Art. 9 CISG*, in *13 Bürgerliches Gesetzbuch mit Einführungsgesetzen und Nebengesetzen*, 30, at 31 (Jürgen F. Baur, ed., 13th ed., 2000); Magnus, *supra* note 157, at 173–174; in case law, see Oberster Gerichtshof, 15 October 1998, available at <<http://cisgw3.law.pace.edu/cisg/wais/db/cases2/981015a3.html>>.

¹⁷⁰ Melis, *supra* note 158, at 101; Martin Karollus, *UN-Kaufrecht. Eine systematische Darstellung für Studium und Praxis* at 51 (1991); in case law, see Oberster Gerichtshof, 21 March 2000, *Internationales Handelsrecht* 40 (2001).

¹⁷¹ Achilles, *supra* note 47, at 36; Bonell, *Die Bedeutung der Handelsbräuche im Wiener Kaufrechtsübereinkommen von 1980*, *supra* note 164, at 388.

Where these usages have been validly agreed to¹⁷², they prevail over the rules of the CISG¹⁷³, as do the practices established between the parties¹⁷⁴ that Article 9(1) CISG also refers to, without, however, defining them. Commentators have defined these practices as manners of conduct that are regularly observed by or have been established between the parties to a specific transaction, whichever the case may be.¹⁷⁵ The individual practice between the parties, rather than the general practice, is thus decisive.¹⁷⁶ This necessarily presupposes a business relationship characterised by a certain duration as well as the conclusion of number of contracts.¹⁷⁷ This is why it is no surprise that one court stated, for instance, that the conclusion of merely two contracts does not create such practices¹⁷⁸, nor can such practices arise from one single delivery of goods between the parties.¹⁷⁹

As mentioned¹⁸⁰, when an established practice exists between the parties, it trumps the provisions of the CISG; when, on the other hand, this practice contrasts with a usage agreed upon by the parties, it is that usage that prevails.¹⁸¹

This usage referred to in Article 9(1) is not to be confused with the usage referred to in Article 9(2), according to which, absent any agreement to the contrary, the parties are bound by specific international trade usages that fulfil certain requirements. For one, in order to bind the parties, these usages must be widely known and regularly observed in

¹⁷² Whether the usages agreed to by the parties are valid will depend on the domestic law applicable by virtue of the rules of private international law of the forum; see Adame Goddard, *supra* note 162, at 83; Holl and Keßler, *supra* note 163, at 460; Melis, *supra* note 158, at 100; Lüderitz and Fenge, *supra* note 169, at 32; in case law, see Oberster Gerichtshof, 15 October 1998, available at <<http://cisgw3.law.pace.edu/cisg/wais/db/cases2/981015a3.html>>.

¹⁷³ Adame Goddard, *supra* note 162, at 81; Fritz Enderlein et al., *supra* note 35, at 70–71; Ferrari, *supra* note 129, at 192; Herber and Czerwenka, *supra* note 50, at 57–58; Holl and Keßler, *supra* note 163, at 460; Melis, *supra* note 158, at 101; Karollus, *supra* note 170, at 50; Plantard, *supra* note 25, at 317; Rudolph, *supra* note 162, at 143; in case law, see Oberster Gerichtshof, 21 March 2000, *Internationales Handelsrecht* 40 (2001).

¹⁷⁴ Calvo Caravaca, *supra* note 164, at 138; Rudolph, *supra* note 162, at 143; Magnus, *supra* note 157, at 174; Witz et al., *supra* note 42, at 105–106.

¹⁷⁵ Bonell, *Die Bedeutung der Handelsbräuche im Wiener Kaufrechtsübereinkommen von 1980*, *supra* note 164, at 387; Karollus, *supra* note 170, at 51; Piltz, *supra* note 72, at 69.

¹⁷⁶ See Bonell, *Art. 9*, in *Commentary on the International Sales Law*, *supra* note 162, at 106; Bonell, *supra* note 160, at 39; Ferrari, *supra* note 129, at 189; Herber and Czerwenka, *supra* note 50, at 56–57; Holl and Keßler, *supra* note 163, at 457; Melis, *supra* note 158, at 100; Karollus, *supra* note 170, at 51; Lüderitz and Fenge, *supra* note 169, at 31; Magnus, *supra* note 157, at 174; Karl Neumayer and Catherine Ming, *Convention de Vienne sur les contrats de vente internationale de marchandises. Commentaire* 116 (1993); Rudolph, *supra* note 162, at 143; Torsello, *supra* note 60, at 143.

¹⁷⁷ See also Schlechtriem, *supra* note 108, at 50, who mentions the requirement of a certain continuity and duration of a practice.

¹⁷⁸ ZG Kanton Basel-Stadt, 3 December 1997, available at <<http://www.unilex.info/case.cfm?pid=1&do=case&id=372&step=FullText>>; but see also AG Duisburg, 13 April 2000, available at <<http://cisgw3.law.pace.edu/cisg/wais/db/cases2/000413g1.html>>, where it is explicitly pointed out that a certain duration and continuity does not yet exist in the case of two previous deliveries.

¹⁷⁹ LG Zwickau, 19 March 1999, available at <<http://www.cisg-online.ch/cisg/urteile/519.htm>>.

¹⁸⁰ See *supra* the text accompanying note 174.

¹⁸¹ See Achilles, *supra* note 47, at 38; Calvo Caravaca, *supra* note 164, at 138; Ferrari, *supra* note 129, at 192; Alejandro Garro and Alberto Zuppi, *Compraventa internacional de mercaderías* 79, at 62 (1990); Piltz, *supra* note 72, at 69; Reinhart, *supra* note 25, at 35; for a different opinion, see Magnus, *supra* note 157, at 175 (proposing a case-by-case approach); see Enderlein et al., *supra* note 35, at 71 (holding the view that practices should take precedence).

the particular international trade concerned¹⁸²; this does not mean that all persons who are active in that particular branch of trade must know those usages¹⁸³; neither is it necessary that the usages be known throughout the world.¹⁸⁴ According to Article 9(2) CISG, it is necessary, however, that the parties knew or ought to have known about the usages.¹⁸⁵ This last element shows that a usage can apply “notwithstanding personal ignorance of its existence.”¹⁸⁶

When the aforementioned prerequisites are met, the usages are applicable¹⁸⁷ and take precedence over the CISG¹⁸⁸, as confirmed by recent case law.¹⁸⁹ However, in the event of a contradiction between, on the one hand, the usages agreed upon by the parties or the practices established between them and, on the other hand, the usages that are applicable by virtue of Article 9(2), the former take precedence.¹⁹⁰ As can clearly be derived from the introductory wording of Article 9(2), the usages applicable by virtue of that provision are also trumped by individual contractual clauses.¹⁹¹

What has been said in respect of Article 9 CISG clearly shows that the rules governing an international contract for the sale of goods are not necessarily only those laid down by the CISG, even where the CISG itself applies. But it also shows that it is important to determine on what grounds one rule applies, as that rule’s position in the hierarchy of sources of law for international sales contracts depends on those grounds.

¹⁸² See Oberster Gerichtshof, 15 October 1998, available at <<http://cisgw3.law.pace.edu/cisg/wais/db/cases2/981015a3.html>>.

¹⁸³ Magnus, *supra* note 157, at 176.

¹⁸⁴ Also see Achilles, *supra* note 47, at 37; Audit, *supra* note 64, at 46; Bonell, *Die Bedeutung der Handelsbräuche im Wiener Kaufrechtsübereinkommen von 1980*, *supra* note 164, at 391; Calvo Caravaca, *supra* note 164, at 142; Ferrari, *supra* note 129, at 199; Herber and Czerwenka, *supra* note 50, at 58–59; Rudolph, *supra* note 162, at 145; Hans van Houtte, *Algemene bepalingen en interpretatie*, in *Het Weens Koopverdrag*, *supra* note 72, at 53, 65.

¹⁸⁵ Ferrari, *supra* note 129, at 195; Herber and Czerwenka, *supra* note 50, at 58; Gillette, *supra* note 161, at 719; Dietrich Maskow, *The Convention on the International Sale of Goods from the Perspective of the Socialist Countries*, in *La vendita internazionale*, *supra* note 144, at 39, 58; Neumayer and Ming, *supra* note 176, at 117; Torsello, *supra* note 60, at 145; in case law, see Arbitral Tribunal the CCI, Arbitral Award No. 8324/1995, Unilex; ZG Kanton Basel-Stadt, 21 December 1992, available at <<http://cisgw3.law.pace.edu/cisg/wais/db/cases2/921221s1.html>>.

¹⁸⁶ Gillette, *supra* note 161, at 715.

¹⁸⁷ *Contra*, stating that usages always apply provided that the parties have not expressly excluded them, *Geneva Pharmaceuticals Technology Corp./Barr Laboratories Inc.*, US District Court for the Southern District of New York, 10 May 2002, 2002 WL 959574 (S.D.N.Y. 2002).

¹⁸⁸ See Audit, *supra* note 64, at 45; Piero Bernardini, *La compravendita internazionale*, in *Rapporti contrattuali nel diritto internazionale* 77, 82 (1991); Franz Bydliński, *Das allgemeine Vertragsrecht*, in *Das UNCITRAL-Kaufrecht im Vergleich zum österreichischen Recht* 57, 76 (Peter Doralt, ed., 1985); Calvo Caravaca, *supra* note 164, at 144; Garro and Zuppi, *supra* note 181, at 62; Gillette, *supra* note 161, at 711; Honnold, *supra* note 68, at 131; *Official Records*, *supra* note 60, at 19; Rudolph, *supra* note 162, at 145.

¹⁸⁹ Oberster Gerichtshof, 21 March 2000, available at <<http://cisgw3.law.pace.edu/cisg/wais/db/cases2/000321a3.html>>; Oberster Gerichtshof, 15 October 1998, available at <<http://cisgw3.law.pace.edu/cisg/wais/db/cases2/981015a3.html>>.

¹⁹⁰ See Achilles, *supra* note 47, at 35; Bonell, *supra* note 201, at 40; Gillette, *supra* note 161, at 722; Herber and Czerwenka, *supra* note 50, at 58; Lüderitz and Fenge, *supra* note 169, at 31; Magnus, *supra* note 157, at 175.

¹⁹¹ See Gillette, *supra* note 161, at 722; in case law see OLG Saarbrücken, 13 January 1993, available at <<http://www.cisg-online.ch/cisg/urteile/83.htm>>; for a less clear cut statement, see Honnold, *supra* note 64, at 130.

10. The CISG's reference to domestic law

Another provision also shows how important sources of law other than the CISG are for solving disputes governed by the CISG, namely Article 28. Pursuant to this provision, if, in accordance with the provisions of the CISG, “one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.”

This provision was intended by the drafters to limit the importance of the remedy of specific performance¹⁹² which, pursuant to Articles 46(1) and 62, is routinely available under the CISG¹⁹³, independently of the kind of obligation that is not being performed, as long as the obligation relates to the performance of the contract.¹⁹⁴ In allowing courts not to enter a judgement for specific performance where they would not do so under their own law, the drafters of the CISG tried to reach a compromise between those jurisdictions, generally associated with common-law¹⁹⁵, such as England¹⁹⁶, where the primary remedy is damages, and those (basically civil law¹⁹⁷) jurisdictions, where courts will grant specific performance more routinely. This compromise does not mean, however, that courts are bound not to enter a judgement for specific performance when they would not do so under their own law; rather, it is left to the discretion of the courts¹⁹⁸ to enter a judgement

¹⁹² For a similar affirmation, see Fatima Akaddaf, *Application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) to Arab Islamic Countries: Is the CISG Compatible with Islamic Law Principles?*, 13 *Pace Int'l L. Rev.* 1, 40 (2001); Ingo Saenger, *Art. 28 CISG*, in BGB, *supra* note 120, at 2803, 2803; Antonio Cabanillas Sanchez, *Art. 28*, in *La compraventa internacional de mercaderías*, *supra* note 164, at 229, 231; Rudolph, *supra* note 162, at 193; Peter Winship, *Domesticating International Commercial Law: Revising UCC Article 2 in Light of the UN Sales Convention*, 37 *Loyola L. Rev.* 43, 68 (1991).

¹⁹³ For a very convincing paper in favor of the remedy of specific performance being routinely available under the CISG, see Steven Walt, *For Specific Performance under the United Nations Sales Convention*, 26 *Tex. Int'l L. J.* 211 (1991).

¹⁹⁴ Thus, Article 28 CISG does not apply, for instance, in respect of the obligation to pay damages; see Cabanillas Sanchez, *supra* note 192, at 231; Alexander Lüderitz and Christine Budzikiewicz, *Art. 28 CISG*, in 13 *Bürgerliches Gesetzbuch mit Einführungsgesetz und Nebengesetzen*, *supra* note 169, at 57, 58; Saenger, *supra* note 192, at 2803; Witz et al., *supra* note 42, at 224 and 226.

¹⁹⁵ Saenger, *supra* note 192, at 2803; Cabanillas Sanchez, *supra* note 164, at 232; Garro and Zuppi, *supra* note 181, at 141 *et seq.*; Martin Karollus, *Art. 28*, in *Kommentar zum UN-Kaufrecht*, *supra* note 48, at 298, 300–301; Sohpie Stijns and Raf Van Ransbeeck, *De rechtsmiddelen (algemeen)*, in *Het Weens Koopverdrag*, *supra* note 72, at 207; Walt, *supra* note 193, at 218 for a comparative analysis of specific performance in the US and in England, see, most recently, Robert Bejesky, *The Evolution in and International Convergence of Specific Performance in Three Types of States*, 13 *Ind. Int'l & Comp. L. Rev.* 353 *et seq.* (2003).

¹⁹⁶ Peter A. Piliounis, *The Remedies of Specific Performance, Price Reduction and Additional Time (Nachfrist) under the CISG: Are these worthwhile changes or additions to English Sales Law?*, 12 *Pace Int'l L. Rev.* 1, 10 (2001).

¹⁹⁷ It should be noted, however, that many authors overlook that not all civil law jurisdictions follow the same rules; in Italy, for instance, specific performance is not readily available “in respect of similar contracts of sale;” in this respect, see Andrea Fusaro, *Commento all'art. 28 della Convenzione di Vienna*, *Nuove Leggi civili commentate* 117, 118 (1989).

¹⁹⁸ Vincent Heuzé, *La vente internationale de marchandises—droit uniforme* 359 360 (2nd ed., 2000); Ole Lando, *Salient Features of the Principles of European Contract Law: A Comparison with the UCC*, 13 *Pace Int'l L. Rev.* 339, 350 (2001); Witz et al., *supra* note 42, at 225.

for specific performance even if under their own law they would not do so.¹⁹⁹ Indeed, from Article 28 it can easily be derived that “courts are not obliged not to enter such a judgement.”²⁰⁰ An obligation merely exists where the courts would enter such a judgment under their own law.²⁰¹ In this case, “Article 28 gives no discretion to a court. If specific relief *would* be ordered under [domestic law], a court *must* make the remedy available under the CISG. The injured buyer, not the court, has discretion by way of electing between remedies.”²⁰² The obligation to enter a judgment for specific performance thus depends on the court’s “own law in respect of similar contracts of sale not governed by this Convention.”

From what has been said, and for the purpose of this paper, the importance of the concept of the court’s “own law”²⁰³ becomes apparent. According to most commentators, the expression solely refers to the substantive law of the forum²⁰⁴; the private international law rules of the forum are not to be taken into account.²⁰⁵ “Any other interpretation would defeat the apparent purpose of Article 28 of respecting the legal traditions of the forum State.”²⁰⁶ “As clarified, the restriction provided by Article 28 is: A court need not order specific performance unless it would do so under its own domestic substantive law.”²⁰⁷

Ultimately, this means that Article 28 opens the door for as many domestic laws as there are States, as the question of whether an obligation for courts to enter a judgment for specific performance will depend on the substantive law of the forum.²⁰⁸ This provision’s potential for “forum shopping” has often been pointed out in legal writing.²⁰⁹

¹⁹⁹ Saenger, *supra* note 192, at 2804; Ole Lando, *Art. 28*, in *Commentary on the International Sales Law*, *supra* note 1, 232, 237; Enderlein et al., *supra* note 35, at 108; Alejandro Garro, *Cases, Analyses and Unresolved Issues in Articles 25–34, 45–52*, in *The Draft UNCITRAL Digest and Beyond. Cases, Analysis and Unresolved Issues in the U.N. Sales Convention*, *supra* note 95, 62, 368; Karollus, *supra* note 195, at 307; Neumayer and Ming, *supra* note 176, at 230; Piliounis, *supra* note 196, at 18; Stijns and Van Ransbeeck, *supra* note 195, at 207.

²⁰⁰ Magnus, *supra* note 157, at 272.

²⁰¹ John M. Catalano, *More Fiction than Fact: The Perceived Differences in the Application of Specific Performance Under the United Nations Convention on Contracts for the International Sale of Goods*, 71 *Tulane L. Rev.* 1807, 1820 (1997).

²⁰² Walt, *supra* note 193, at 223.

²⁰³ For an analysis of the concept of “similar contracts of sale,” see Walt, *supra* note 193, at 220–223.

²⁰⁴ Catalano, *supra* note 201, at 1818–1819; Cabanillas Sanchez, *supra* note 192, at 231; Franco Ferrari, *International Sales Law and the Inevitability of Forum Shopping: A Comment on Tribunale di Rimini*, 23 *J. L. & Com.* 169, 189 (2004); Heuzé, *supra* note 198, at 360 note 153; Honnold, *supra* note 64, at 223–224; Karollus, *supra* note 195, at 303; Karollus, *supra* note 170, at 140; Walt, *supra* note 193, at 219.

²⁰⁵ Enderlein et al., *supra* note 35, at 108–109; Heuzé, *supra* note 198, at 360; Amy H. Kastely, *The Right to Require Performance in International Sales: Towards an International Interpretation of the Vienna Convention*, 63 *Wash. L. Rev.* 607, 637 (1988); Christoph Benicke, *Art. 28 CISG*, in 6 *Münchener Kommentar zum HGB*, *supra* note 36, 485, 487; Neumayer and Ming, *supra* note 176, at 230; Rudolph, *supra* note 162, at 199; Witz et al., *supra* note 42, at 225.

²⁰⁶ Saenger, *supra* note 192, at 2804; Garro, *supra* note 199, at 369; Karollus, *supra* note 195, at 303.

²⁰⁷ Walt, *supra* note 193, at 219.

²⁰⁸ See Karollus, *supra* note 195, at 303; Schleichriem, *supra* note 77, at 63.

²⁰⁹ See Catalano, *supra* note 201, at 1830; Piliounis, *supra* note 196, at 17; Jianming Shen, *The Remedy of Requiring Performance under the CISG and the Relevance of Domestic Rules*, *Az. J. Int’l & Comp. L.* 253, 305 (1996); Walt, *supra* note 193, at 230.

11. Conclusion

The preceding remarks intended to show, among others, that the CISG does not govern all international contracts for the sale of goods, even where the forum State is a contracting State: Some contracts are not “international” enough to meet the CISG’s internationality requirement set forth its Article 1(1).²¹⁰ Some other contracts are not governed by the CISG because the drafters of the CISG themselves recognized that their unification effort could not fit all contracts²¹¹ and therefore expressly excluded some contracts from its substantive sphere of application.²¹² Other contracts involve parties that are linked to countries that simply do not want the CISG to apply to certain issues or to contracts with certain parties and therefore have declared reservations that make the CISG either totally or partially inapplicable.²¹³ The preceding remarks also were supposed to show that the CISG constitutes a non-exhaustive body of rules that leaves a lot of issues unresolved.²¹⁴

Ultimately, this as well as the CISG’s non-mandatory nature²¹⁵ and it giving way to certain usages and practices²¹⁶ lead to one conclusion: despite the CISG’s entry into force, recourse to rules other than those of the CISG did not become irrelevant²¹⁷; these rules will necessarily have to be resorted to in order to deal with the variety of international sales contracts and the problems they may raise.²¹⁸ As shown when dealing with Article 28 CISG²¹⁹, resort to external sources is necessary even where the CISG governs the contract and is concerned with the matter in dispute, as it depends on the domestic substantive law of the forum whether the court is required to enter a judgement for specific performance, even though the CISG itself recognizes specific performance as primary remedy.

²¹⁰ For a paper on the CISG’s international sphere of application, see Kurt Siehr, *Der internationale Anwendungsbereich des UN-Kaufrechts*, *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 587 (1988).

²¹¹ See Michael G. Bridge, *Uniformity and Diversity in the Law of International Sale*, 15 *Pace Int’l L. Rev.* 55, 56 (2003), stating in respect of the CISG that “should not however be thought that all international sales are alike and that one single uniform sales law should be provided on a “one size fits all” basis.”

²¹² See *supra* the text accompanying notes 59 *et seq.*

²¹³ For this, see also Winship, *supra* note 31, at 1–45.

²¹⁴ See the decisions cited *supra* in notes 14 and 16.

²¹⁵ See Audit, *supra* note 71, at 37 (stating that “[...] the Convention makes of the parties’ will the primary source of the sales contract”); see also the text accompanying note 144.

²¹⁶ For a very positive assessment of the CISG’s permeability to usages and practices established between the parties, Clayton P. Gillette, *The Law Merchant in the Modern Age: Institutional Design and International Usages under the CISG*, 5 *Chi. J. Int’l L.* 157 (2004); Avery Wiener Katz, *The Relative Costs of Incorporating Trade Usage into Domestic versus International Sales Contracts: Comments on Clayton Gillette, Institutional Design and International Usages under the CISG*, 5 *Chi. J. Int’l L.* 181 (2004).

²¹⁷ Rod N. Andreason, *MCC-Marble Ceramic Center: The Parol Evidence Rule and Other Domestic Law Under the Convention on Contracts for the International Sale of Goods*, 1999 *B. Y. U. L. Rev.* 351, 376 (1999), stating that there are “specific events in which “the tribunal must seek (via the rules of private international law) some rule of domestic law dealing with the issue at hand. Hence, domestic law will sometimes serve an essential function in litigation under the CISG.

²¹⁸ See Bridge, *supra* note 211, at 56.

²¹⁹ See *supra* the text accompanying notes 191 *et seq.*

It is therefore an oversimplification to state that the CISG governs all contracts for the international sale of goods and that it is concerned with all the problems that may arise from these contracts.²²⁰

By creating a (false) sense of certainty as to the rules applicable to a contract for the international sale of goods²²¹, namely those of the CISG, this oversimplification may be more dangerous for one's clients interests, and, ultimately, more costly than the awareness of the CISG merely constituting an incomplete²²² set of default rules, i.e. of the fact that there are other sources one has to take into account when importing and exporting internationally.

Only when there is awareness as to the incompleteness of the CISG and, thus, to its non-autarkic character²²³, and the need to look to other sources can practitioners try to deal with them and create that certainty and predictability every practitioner apparently strives for.²²⁴ This does not mean that the awareness as to the variety of possible applicable sources does not come at a cost: where it does not induce parties to refrain from contracting altogether, it will force their lawyers to address the variety of potentially applicable laws and, thus, to run upon planning costs²²⁵ for addressing this variety of potentially applicable sources. But it must be doubted that these planning costs are higher than the costs arising from an (erroneous) reliance upon the oversimplification referred to above.

What a party (erroneously) relying on that oversimplification exposes itself to becomes apparent if one considers that in all instances where a domestic law is to be resorted to for any one reason referred to above, that domestic law is to be identified by having recourse to the rules of private international law of the forum.²²⁶ Ultimately, this means that by influencing the decision of where court proceedings will have to be initiated, a party will be able to influence the applicable domestic law, generally to the detriment of the other party. This “forum shopping” will obviously be easier the more the other party relies on the oversimplification referred to. The costs this “forum shopping” may generate for the “unwary party” are obvious.

In my opinion, what has been said does not diminish the CISG's success: In respect of the contracts the drafters intended the CISG to govern, as well as the issues they wanted

²²⁰ See also Bridge, *supra* note 211, at 89.

²²¹ It has often been pointed out that the CISG promotes certainty as to the rules applicable to contracts for the international sale of goods; see, e.g. Djakhongir Saidov, *Methods for Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods*, 14 Pace Int'l L. Rev. 307, 308–309 (2002).

²²² See Stephan, *supra* note 7, at 779.

²²³ For this conclusion, see Bridge, *supra* note 211, at 72.

²²⁴ See, e.g. Bejesky, *supra* note 195, at 398; Brière, *supra* note 28, at 19; Sandeep Gopalan, *Transnational Commercial Law: The Way Forward*, 18 Am. U. Int'l L. Rev. 803, 809 (2003); Blake D. Morant, *The Quest For Bargains in an Age of Contractual Formalism: Strategic Initiatives for Small Businesses*, 7 J. Small & Emerging Bus. L. 233, 276 (2003).

²²⁵ For a reference to these planning costs, see Michael van Alstine, *Treaty Law and Legal Transaction Costs*, 77 Chi.-Kent L. Rev. 1303, 1309 (2002).

²²⁶ Torsello, *supra* note 60, at 47–48.

the CISG to deal with, it certainly is a success. The fact that the costly ignorance²²⁷ of the early days, when many lawyers ignored the CISG entirely²²⁸, has been replaced by too much enthusiasm that leads to the oversimplification referred to, cannot be blamed on the CISG.

²²⁷ See William S. Doge, *Teaching the CISG in Contracts*, 50 J. Leg. Ed. 72, 74 (2000) (stating that “[I]gnorance of the can be costly.”)

²²⁸ See McNamara, *supra* note 12, at 11; John E. Murray Jr., *The Neglect of CISG: A Workable Solution*, 17 J. L. & Com. 365, 365 (1998); Peter Winship, *Domesticating International Commercial Law: Revising UCC Article 2 in Light of the UN Sales Convention*, 37 Loyola L. Rev. 43, 44 (1991).