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THE UNITED NATIONS CONVENTION
FOR THE INTERNATIONAL SALE OF GOODS (CISG)
AND RELATED ISSUES OF CONFLICT OF LAWS

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by

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The goal of this thesis is to give a synthesis of the two sided approach towards the governance the international sale of goods. On the one hand, there is the CISG providing uniform substantive rules for international sale contracts. On the other hand, the international conventions are meant to solve conflict of law problems through uniform criteria of choice of law for sale contracts. The two techniques are not incompatible and will apply until nations worldwide adopt the same self-sufficient set of substantive rules. The partial unification of substantive law, as achieved with CISG, reduces the need to apply conflict of laws rules but does not eliminate their usefulness.

The answer to this need for legal predictability in international contracts has been found in the adoption, through international multilateral conventions on the applicable law, of uniform choice of law rules.

The first chapter of this thesis analyzes the articles concerning the sphere of application of the CISG; the main aim of this chapter is to draw the line between the applicability of CISG and the need for the application of another domestic law whenever the Convention does not apply. This domestic law can be chosen either by the will of the parties or can be a result, in case of lack of parties’ choice, of the application of the Conflict of law rules of the forum when the enforcement of the contract is sought. In other words, the first chapter defines the CISG’s scope of application, as interpreted by major legal writers and court decisions guidelines, in order to determine when conflict of law rules come into play.

The discussion in the first chapter will lead to the topic of the second chapter: uniform conflict of law rules which determine when substantive domestic laws apply to
contracts for the sale of goods, and hence the application of international conventions on choice of laws rules. The second chapter, therefore, deals with the attempt of uniformity of choice of law rules in the international sale of goods by international conventions as a way to harmonize the conflict of laws rules at the international level in support of certainty and predictability of legal relations of international trade. International conventions which deal with harmonization of choice of law rules in contracts for international sale of goods are the 1955 Hague Convention on the Law Applicable to the Contracts for the International Sale of Goods, the 1980 EC Rome Convention on the Law Applicable to Contractual Obligations and the 1994 Inter-American Convention on the Law Applicable to International Contracts. These Conventions will be compared and analyzed, and a look will be given to the United States uniform conflict of law rules because they are of relevance to this country in international trade. Special attention will be paid to the comparison between the Rome and Inter-American Conventions because of the enormous number of countries which are or will be members of these conventions in the near future, including the United States and the members of the European Community as major developed countries. There is a threat to a further harmonization due to the use of different criteria to select the applicable law in these conventions.
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CHAPTER I

THE SCOPE OF APPLICATION OF UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) AND CONFLICT OF LAWS RULES

A. INTRODUCTION AND HISTORICAL REMARKS ON CISG

The contract for the sale of goods is the basic tool for the entire system of international trade. Due to the underlining necessity of unifying the substantive law of international sales, it is not surprising that by the end of the 1920's the International Institute for the Unification of Private International Law (UNIDROIT) began with preparatory studies, leading in 1935 to the first draft of a uniform law structured in two parts. The first part contained provisions related to the duties of the contracting parties and the second part contained provisions governing the formation of such contracts. After World War II, The Hague Conference resumed these previous efforts, culminating in the final draft of two conventions, adopted by the Diplomatic Conference at the Hague in 1964. The first Convention concerned Uniform Law on the International Sale of Goods (ULIS) dealing with rights and duties of the parties in international sales contracts, and

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2 UNIDROIT was set up in Rome in 1926 under the aegis of the League of Nations.

3 For the text of this draft is in Projet d'Une Loi Internationale sur La Vente, S.d.N. 1935- U.D.P. Projet I.

the second was on Uniform Law on the Formation of Contracts for International sale of Goods (ULF) governing the formation of international sale contracts.\(^5\) Despite the great effort, these conventions, however, have not had the expected widespread success. They have been enacted in only nine countries, namely Belgium, Great Britain, the Federal Republic of Germany, Gambia, Israel, Italy, The Netherlands and San Marino.\(^6\) The main reason for this defeat was that few states took part in the drafting of these uniform conventions and only twenty-eight states participated in the 1964 final Diplomatic Conference; among them nineteen Western European Countries, three Eastern European countries-U.S.S.R. excluded- and only three countries from Africa, Asia and South America. Therefore, their provisions were criticized by many countries for not taking into account the interests of many socialist and developing countries.\(^7\)

The United Nations Commission on International Trade Law (UNCITRAL) formed in 1966, determined, after a survey of governments, that there was not sufficient agreement on the two Hague Uniform Laws. The Commission decided to revise them, this time with the participation of thirty-six member nations with many other nations maintaining observer status. They put together in a new draft the contents of ULIS and ULF.\(^8\) In 1980, a diplomatic conference authorized by the General Assembly of the United Nations took place in Vienna, attended by delegates from sixty-two nations, where the

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\(^6\) For greater details on the history on these two conventions see Peter Winship, The Scope of Vienna Convention on International Sales Contracts, in THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS §1.01(1)-(3) (N. Glaston & H. Smith ads. 1984).


UNCITRAL final draft of the CISG was approved. This convention, which entered into force on January 1, 1988, today counts fifty-four member states including the U.S., Russia, Ukraine, China, most European countries and countries with all five continents.\(^9\) Interestingly, a confirmation of the convention's international character can be found in the adoption of the official text of CISG in six different languages: English, French, Russian, Spanish, Arabic and Chinese.\(^{10}\) Unfortunately, two important countries, Great Britain and Japan, have not joined CISG and do not seem willing to do so. The former has reasons connected with the widespread traditional use of English Law in international trade as an alternative to domestic laws; other reasons are the Commonwealth and the still recognized professionality of British courts. Japan has a system traditionally closed, and separated from the outside world, adverse to any kind of foreign intrusion in domestic matters.

This chapter is not meant to be a comprehensive commentary on the CISG; its goal is to define the scope of CISG applicability in order to understand when and how the rules of private international law come into play. Included is a detailed analysis of Article 1 (internationality of the sale based on 'the place of business of the parties,' the member state criteria in connection with the reservations of Article 95), Article 6 (parties’ freedom of choice of law including the possibility to opt out of the Convention), and Article 7 (uniform interpretation of the CISG and the use of different law applicable under the conflict of law rules when is not possible to use principles settled by the Convention). Some other articles of the convention are mentioned in connection with this analysis.

\(^9\) See CISG, supra note 1.

\(^{10}\) This choice however has also some negative draws backs because the fact of having six authoritative autotitative texts may consitute a barrier to the uniform interpretation of the CISG.
B. ARTICLE 1 OF CISG: INTERNATIONALITY OF CONTRACTS

1. Introduction

The CISG applies to international contracts for the sale of goods. Article 1 refers to the location of the parties' business to define a transaction as international.\(^\text{11}\) The general criterion set up in Article 1 is that the CISG applies to "contracts of sale of goods between parties whose places of business are in different states," either "when the States are Contracting States" or "when the rules of private international law lead to the application of the law of a contracting state."\(^\text{12}\) The common criterion is that the relevant place of business of the party be in different states without consideration of either the nationality or the commercial character of the parties.\(^\text{13}\) It becomes, therefore, of capital importance to define the location of the parties' place of business. Some legal writers suggest that there is no possibility for a general definition, so the problem should be solved on a case by case approach.\(^\text{14}\) Generally, however, 'place of business' is the location where a party has its permanent business organization, which connects the party to the state where its business is carried on.\(^\text{15}\) Conversely, "a temporary place of sojourn during ad hoc negotiations"\(^\text{16}\) or "conference centers of exhibitions"\(^\text{17}\) or "a hotel room or a rented office

\(^{11}\) CISG, supra note 1, at art.1.

\(^{12}\) Id.


\(^{15}\) Id.


\(^{17}\) Id.
in a city nor engaging in sales transactions on repeated occasions"\(^{18}\) are not places of business under the CISG.

Article 10 defines the relevant place of business when a party has more than one as the one having the "closest relationship to the contract and this performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract."\(^{19}\) Sometimes, however, these circumstances are not helpful in determining which is the place of business at stake. In these situations, "the international character of a sales contract [should] be determined by resorting to the place of business involved by the conclusion of the contract, since these places of business will always be known to both parties."\(^{20}\) When the parties do not have a place of business, Art.10(b) "reference has to be made to his (party) habitual residence."\(^{21}\) In these situations one has to "look at the situation of fact, and, more precisely, the real place of sojourn for a long period of time."\(^{22}\)


Provided that a contract is ‘international’ as defined in the above mentioned paragraph, Art.1(1)(a) provides for the application of CISG when the parties have their places of business in different states where the convention is in force.\(^{23}\) In this situation, a


\(^{19}\) CISG, *supra* note 1, at art.10.


\(^{21}\) CISG, *supra* note 1, at art.10(b).

\(^{22}\) Ferrari, *supra* note 14, at 6.

\(^{23}\) CISG, *supra* note 1, at art.1(1)(a).
conflict of law analysis is not needed because it would be irrelevant.\(^{24}\) Moreover, the CISG has a self-executing character, meaning that once a nation has become a party, no separate implementing legislation is needed for the convention to became applicable as domestic law. Further more, no choice of law by the parties of a contracting state is required. In this way, CISG will apply when this criteria is fulfilled because the Convention is a part of the “law of the land” of the contracting state,\(^ {25}\) unless the parties have excluded its application relying Art. 6 of CISG. Thus, despite a different solution resulting from applying the domestic conflict of law rules,\(^ {26}\) “those who would shop for forum can no longer shop for law.”\(^ {27}\) However, in the situation in which the forum is not a contracting state and its conflict of law rules lead “to the application either of the law of the forum or the law of a non-contracting state, the CISG will not be applicable.”\(^ {28}\) Even in this situation, it seems that a non-contracting state would probably apply the CISG. As a matter of fact, conflict of law rules generally point to “the state with the “most significant relationship” to the transaction, or to the party with the “most characteristic performance,” almost invariably the law of the seller or the buyer.”\(^ {29}\)

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\(^{25}\) See OLG Dusseldorf, 8 January 1993, RIW 1993,325, reported in UNILEX (German courts are consistent on this point).


\(^{29}\) Bell, *supra* note 22, at 247.; see also HONNOLD, *supra* note 12, at 89.
The criteria set up in article 1(1)(a) has already been applied by many courts, and the number of decisions will rapidly increase with the constant growth of the number in contracting states.

3. Article 1(1)(b): Indirect Application of CISG as a Result of Application of Conflict of Law Rules and the Article 95 Reservation on the CISG Applicability

Article 1(1)(b) becomes relevant when the criterion set by Article 1(1)(a) is not met: one of the parties of the transaction does not have its place of business in a contracting state. Subsection (b) provides for the application of the CISG when the conflict of law rules of the forum lead to the application of the law of a single contracting state. This subsection is very important because it expands the scope of application of CISG, even in situations not foreseen by the parties at the moment of the conclusion of their transaction. As a matter of fact, CISG can also be applicable: "[i]n cases [where] both parties do not have their place of business in Contracting States, Article 1(1)(b) leads to the application of CISG not only by the courts of Contracting States but also by the courts of non-Contracting State, provided the private international law of the non-Contracting States makes applicable the law of a Contracting State."

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31 Ferrari, supra note 14, at 34-35.

32 CISG, supra note 1, at art.1(1)(a-b).


Article 1(1)(b) was strongly criticized by many states because of the uncertainty due to applying international private law rules\textsuperscript{35} and also because it was considered, an excessive limitation to the sphere of their domestic law\textsuperscript{36} by many socialist countries and the U.S.\textsuperscript{37} As a consequence, a possibility of reservation was introduced by Article 95, and some states have accepted the convention with the exclusion of subsection (b).\textsuperscript{38}

Judges of states which have exercised the reservation are bound to apply the CISG whenever the parties' places of business are in contracting states, whether or not these states have accepted exercising the reservation of Article 1(1)(b).\textsuperscript{39} However, it can happen that the conflict of laws rules of a state which has made the reservation under Art.95 lead to the application of the law of a contracting state. In this situation, the CISG would be applicable as a part of the domestic law of this contracting state.\textsuperscript{40} On the other hand, it is also true that a judge of a member state which has exercised the Article 95 reservation cannot apply the CISG when conflict of laws rules lead to the application of the \textit{lex fori}, because it would be contrary to the rationale behind the reservation, which is to encourage the application of domestic law.\textsuperscript{41}

Another group of cases involves the situation in which the judge of a contracting state which has not made the reservation as a result of conflict of laws rules has to apply

\begin{itemize}
  \item \textsuperscript{35} Francis A. Gabor, \textit{Emerging Unification of Conflict of law Rules Applicable to the international sale of goods: UNCTRAL and the Hague Conference on Private International Law, 7 NE. J. INT'L L. & BUS. 699 (1986).}
  \item \textsuperscript{36} Riccardo Luzzatto, \textit{Vendita (dir.int. priv.), in ENCICLOPEDIA DEL DIRITTO 502, 510 (Milan 1993).}
  \item \textsuperscript{37} Alan Farnsworth, \textit{Review of Standard Forms or Terms Under the Vienna Convention, 21 CORNELL INT'L L. J. 440 (1988).}
  \item \textsuperscript{38} China, Czech Republic, Slovakia and U.S.
  \item \textsuperscript{39} Richards, \textit{supra} note 13, at 222.
  \item \textsuperscript{40} Ferrari, \textit{supra} note 14, at 38 and fl.
  \item \textsuperscript{41} Pelichet, \textit{supra} note 7, at 43-4; Ferrari, \textit{supra} note 14, at 8; HONNOLD \textit{supra} note 16, at 92.
\end{itemize}
the law of a contracting reservatory state. In this instance, there are two potential conflicting solutions. The first is that the CISG is not applicable because it would not be applicable by the reservatory state.\textsuperscript{42} The second solution, preferred by most legal writers, favors the application of CISG "not only because generally a reservation of the kind at hand made by one State cannot bind another State, but also because, from a point of view of the contracting (forum) State, all the applicability’s preconditions laid down in Article 1(1)(b) are met."\textsuperscript{43}

The last situation in which there are different opinions as to the application of choice of laws is where a judge of a non-contracting state applies conflict of laws rules which lead to the domestic law of a contracting state which has made the reservation. On the one hand, it can be argued that CISG has to be applied because is a part of the applicable law.\textsuperscript{44} On the other hand it can also be asserted that CISG does not apply.


\textsuperscript{43} Ferrari, \textit{supra} note 14, at 46. Some German courts have applied the domestic law rather than the CISG in cases when conflict of laws rules lead to the law of a reservatory state (LG Hamburg 26 September 1990; OLG Frankfurt 13 June 1991; OLG Frankfurt 17 September 1991). However, as Ferrari observes, "these German courts decisions cannot be decisive for the interpreter, since the courts did not have the possibility of deciding differently, a statute having been passed in Germany according to German judges are bound to apply domestic sales law, i.e. not the CISG, when their rules of private international law leads to the applicability of the law of a contracting reservatory state." Many authors are in favor of this opinion, see for instance FERRARI, \textit{VENDITA INTERNAZIONALE DI BENI MOBILI} \textit{ART.1-13. AMBITO DI APPLICAZIONE. DISPOSIZIONI GENERALI} 41 (Bologna 1994); Ole Lando, \textit{The Hague Convention on the Law Applicable to Sales}, RABELS ZEITSCHRIFT FUR AUSLANDISCHES UND INTERNATIONALES PRIVATRECHT 65, 82 (1987); Luzzatto, \textit{supra} note 36, at 510.

\textsuperscript{44} Ferrari, \textit{supra} note 14, at 47-8.
because of the effect of the reservation. In any case, the first solution is generally followed by legal writers and is confirmed by some judicial decisions.

C. ARTICLES 2-5: ISSUES NOT GOVERNED BY CISG

1. Introduction

In addition to the fact that a Contracting State is allowed to declare under Article 92, at the time of its ratification or adoption of CISG, that it will not be bound by Part II (Formation of the Contract) or by Part III (Sale of Goods), Articles 2-5 of CISG limit the application of the convention by a set of different exclusions. Article 6 of CISG allows the parties of a sale transaction to opt out of the Convention totally or partially, thus recognizing the principle of the autonomy of the parties which includes the principle of choice of the applicable law.

2. Article 2: Exclusions

CISG does not clearly define what is a “contract for sale” nor what are “goods.” Instead, Article 2 of CISG expressly excludes several types of contracts: sales by auction, on execution or under authority of law, commercial papers and investment securities and money, ships, aircraft, and electricity. The reason for these exclusions lies in the fact that different legal systems have conflicting notions of goods. Moreover, Article 2 of CISG

45 Dore, supra note 42, at 537-8.

46 See e.g., Pelichet, supra note 7, at 44; Jean Pierre Plantard, Un nouveau droit uniforme de la vente internationale, J. D. Int. 311, 321 (1988); FERRARI, supra note 43, at 42-43.

47 See e.g., LG Hamburg 26 September 1990; OLG Frankfurt 13 June 1991; LG Baden Baden 14 August 1991; Rb Amsterdam 5 October 1994; Rb Amsterdam 7 December 1994 (All in UNILEX).

48 This is a remain of the ULIS-ULF previous subdivision.

49 CISG, supra note 1, art.2-5.

50 Id.

excludes “goods bought for personal, family or household use” (i.e., consumer goods) unless the seller “neither knew nor ought to have known that the goods were bought” for such kind of use. These exclusions were meant to avoid conflicts among different national consumer protection laws which are generally of mandatory character.

These exclusions, in the absence of positive definitions, leave to courts and interpreters findings related to other kinds of transactions. Transactions for the delivery of goods by installments are governed by CISG by virtue of Article 73(1). On the other hand, barter transactions or countertrade in which goods are not exchanged for money, so important for international trade between developing and developed countries, does not fall within the scope of CISG. However, legal writing has tried to include barter transactions under the scope of CISG by asserting that either party can be considered at the same time buyer and seller, “though with regard of different performances- in respect of the obligation to deliver, to hand over the documents, to acquire title in the goods and to take delivery.” These kinds of arguments ignore the fact that Article 53 of CISG “expressly mentions the buyer’s obligation to pay the price, i.e., an element the lack of which characterizes the barter transaction.” The following fall outside CISG: leasing contracts even if subject to a purchase option because its economic function is not the same as a sale; consignments contracts in which a buyer may return goods that cannot be sold “because title to the goods may not be transferred to the consignee and payment is

52 CISG, supra note 1, at art.2.
55 ENDERLEIN & MASKOW, supra note 20, at 28.
56 Ferrari, supra note 14, at 55.
57 ENDERLEIN & MASKOW, supra note 20, at 28.
conditional on sale"; and distribution contracts because they do not in themselves constitute sales of goods.

Moreover, know-how is to be excluded from the CISG application because it is not a movable good, but with respect to software, when the intellectual property right is incorporated in a good which is sold, CISG applies to the related transaction.

3. Article 3 of CISG: Goods to Be Manufactured; Goods Plus Services

Article 3 of CISG deals with contracts which are not the traditional form of sale i.e., exchange between seller’s performance to give (deliver) the goods and the buyer’s counterperformance to pay the price. As a matter of fact, Article 3(1) includes the scope of the CISG contract goods to be manufactured by the buyer, and 3(2) includes contracts in which the seller not only sells goods but also provides for the supply of services. However, there are some limitations: CISG applies in the former situation unless the buyer "undertakes to supply a substantial part of the materials necessary for such manufacture or production," and in the latter situation if the "preponderant part of the obligations of the party [seller] who furnishes the goods consists in the supply of labor or other services" instead of the goods themselves.

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59 However, once the parties have entered into a contract under the distribution agreement CISG applies independently from when the distribution agreement came into force before the CISG entered into force when CISG applies to the contract itself under art.100. See Ferrari, Ferrari supra note 43, at 78.


61 CISG, supra note 1, at art.3(1).

62 Id. at art.3(2); see e.g. HONNOLD, supra note 16, at 104-9.
There is no doubt that here the difficulty is to define "substantial part" and "preponderant part." Some legal writers believe that one has to apply a mere quantitative criterion\(^63\); others believe that one has to combine quantitative and qualitative criteria in a way that "the materials to be provided by the buyer may constitute a substantial part of the goods sold even where their value represents less than 50 per cent of the value of the goods."\(^64\) On defining "preponderant part," legal writers unanimously agree that Article 3 (2) of CISG refers to a qualitative criterion. Therefore, "[t]he sale price of the goods to be delivered must be compared with the fee for labour and services, as if two separate contracts have been made."\(^65\) The issue of whether a mixed contract which supply both goods and services or labor should be governed entirely by CISG or whether the CISG should govern only the part concerning the goods has yet to be solved applying domestic rules by both legal writers\(^66\) and the Official Records of the United Nations Conference.\(^67\)

4. Article 4-5: Some More Issues Excluded by the CISG

Article 4 of CISG states that the "Convention governs only the formation of the contract of sale and the rights and obligations of the seller and buyer arising from such contract." Moreover, unless otherwise expressly provided by CISG, the Convention does

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\(^64\) Ferrari, supra note 14, at 60 (quoting Sergio Carbone and Marco Lopez de Gonzalo, Art. 1, Nuove Leggi Civili Commentate 2, 8 (1989)). In Ferrari’s opinion this does not mean that 15 per cent is sufficient to be considered "substantial" as suggested by Honnold, supra note 16, at 106.

\(^65\) Schletriem, supra note 34, at 31; Ferrari, supra note 43, at 83; Herber and Czerwenka, supra note 63, at 29.

\(^66\) See e.g., Scheltriem, supra note 34, at 32; for an uniform interpretation under art.7(1) of CISG see Ferrari supra note 14, at 12; Enderlein & Maskow, supra note 20, at 38 (stating that domestic law should be applicable only to the extent that CISG is not).

not govern “the validity”\(^{68}\) of the contract and “the effect which the contract may have on the property of the goods sold,”\(^{69}\) hence any effect concerning the title and most third parties’ rights and duties arising from the contract.

Issues regarding the validity of the contract excluded by the Convention are fraud, duress, illegality and mistake. Also, other issues like good faith, unconscionability or rules dealing with contractual terms restricting the liability for defective goods should be ruled by domestic law. Nevertheless, domestic law “may become inapplicable when the contract is interpreted and applied in conformity with...the provision of the Convention”\(^{70}\) under Article 8 of CISG, which deals with the interpretation of the contract (\(i.e.,\) intent of the parties), and Article 7(1) which states that the Convention must be interpreted as having regard “to the need to promote uniformity in its application.”\(^{71}\)

In all the above mentioned situations, domestic law applies together with CISG rules, so that the issue of conflict of law rules leading to an applicable law becomes relevant again. Here, however, it must be stressed that the need for applying domestic law is neither a matter connected with whether a party has its place of business in a contracting state, nor a matter concerning Article 1(1)(b) and Article 95 reservation. It is Article 4 of CISG that calls for the application of domestic substantive law even when the Convention fully applies to a sale transaction. This is an express recognition that a standard CISG sale of goods needs regulatory support for an outside gap filled through domestic law. Therefore, conflict of law rules of the forum are always relevant even when the CISG

\(^{68}\) CISG, \textit{supra} note 1, at art.4(a).

\(^{69}\) \textit{Id.} at art.4(b).


\(^{71}\) CISG, \textit{supra} note 1, at art.7(1).
applies, the CISG is far from being self-sufficient because many fundamental issues are simply not regulated.72

One further limitation on the sphere of application of CISG is provided by Article 5, which states that the “Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any party.” The intention is to avoid conflicts between the Convention and various domestic mandatory rules which usually deal with causes of action against the seller when for “death or personal injury.”73 Article 5 of CISG refers to two specific situations. The first occurs when goods are bought “for personal, family, or household use” and the seller “neither knew nor should have known that the goods were bought for any such use” as provided by Article 2(a) of CISG. The second situation occurs when goods which are not bought “for personal, family, or household use”74 give rise to a claim to recover damages for “death or personal injury,”75 for instance in case of injury, caused by the goods, to an employee of the buyer.76

D. ARTICLE 6 OF CISG: PARTIES’ DEROGATION FROM THE CISG, CHOICE OF LAW CLAUSES, CHOICE OF FORUM CLAUSES, STANDARD CONTRACTS

1. Introduction

For the important purpose of international trade, all countries recognize the freedom of contract of the parties “as the legal form of contracting parties”77 unless

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72 Vincent Heuzé, La vente internationale de marchandises 100 (Paris 1990).

73 HONNOLD, supra note 16, at 119.

74 CISG, supra note 1, at art 2(a).

75 Id.

76 HONNOLD, supra note 16, at 119.

mandatory rules contravene.\textsuperscript{78} Therefore, ‘party autonomy’ is a general criterion on which the CISG is based.\textsuperscript{79} As a matter of fact, CISG is not meant to limit the parties to a uniform sale law, but instead to “play a supporting role, supplying answers to problems that the parties have failed to solve by contract.”\textsuperscript{80} The role played by the parties’ intention in contract formation is of capital importance because Article 6 of CISG gives to all the provisions of the Convention the character of “rules which are supplementary in nature and the parties have virtually unlimited freedom to contract out of some or all of the convention’s rules if they so choose.”\textsuperscript{81}

As a consequence, Article 6 of CISG gives the parties the power to exclude and/or modify totally or partially any of the provisions of the Convention. The major problem is, however, to ascertain if the exclusion may be implied or should be expressed; and the wording of Article 6 of CISG does not help because it can be interpreted either ways.\textsuperscript{82} A final introductory observation on Article 6 of CISG is that in excluding the convention in its entirety, there is no restriction in applying a general principle of private international law, while the derogation from the CISG is limited in cases where at least one of the parties has its place of business in a Contracting State whose legislation requires a contract of sale to be concluded in or evidenced by writing and therefore has made an Article 96 reservation.\textsuperscript{83}

\textsuperscript{78} M. J. Bonell, \textit{Art. 6}, in COMMENTARY ON THE INTERNATIONAL SALES LAW, THE VIENNA SALE CONVENTION 54 (Giuffre Milan 1987).

\textsuperscript{79} Honnold, \textit{supra} note 16, at 105.


\textsuperscript{81} Peter Winship, \textit{Aircraft and International Sales Conventions}, 50 J. AIR L. & COM. 1053, 1060 (1984).

\textsuperscript{82} “The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.” CISG, \textit{supra} note 1, at art.6.

\textsuperscript{83} Ferrari, \textit{supra} note 14, at 86. There is a limitation to parties’ autonomy in article 6 to the extent that the right to exclude is in itself subject to an exclusion. As a matter of fact, article 11\textsuperscript{1}which states that “[a] contract for sale need not to be concluded in or evidenced by writing and is not subject to any other requirement of form...[and]...may be proved by any means, including witnesses”] is subject to a
2. Implied Exclusion of CISG under Article 6

Unlike Article 3 of ULIS which was the predecessor of Article 6 of CISG, the latter does not expressly state that the application of the Convention can be implicitly excluded. 84

For some legal writers, 85 however, this occurrence does not preclude an implied exclusion of CISG under Article 6. In their opinion, the fact that “the majority of delegations was...opposed to the proposal according to which a total or partial exclusion of the Convention could only be made expressly” 86 leads to the conclusion that an implicit exclusion of the Convention is possible even if there is not an express reference to this in Article 6 of CISG. On the contrary the lack of express reference was meant “to discourage reservation under Article 96 of CISG provides that:

[a] Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration in accordance with article 12 [which says that the general rule that any clause in the Convention permitting sales contracts to be made in a form other than written, does not apply when any party has his place of business in a Contracting States that has made a declaration under article 96]...of article 11 [that this provision]... does not apply where any party has a place of business in that state. CISG, supra note 1, at art. 36.

84 “The parties to a contract of sale shall be free to exclude the application thereto of the present Law either entirely or partially. Such exclusion may be express or implied.” ULIS, supra note 4, at art.3.


86 Bonell, supra note 78, at 52.
courts from too easily inferring an ‘implied’ exclusion or derogation,”87 in an non-concealed attempt to favor the application of the Convention. 88

Other legal writers interpret the ULIS exclusion and transcripts from later UNCITRAL conferences89 in an opposite way: Article 6 of CISG requiring express exclusion of the convention.90 The former view, however, should prevail because Article 6 of CISG does not mention the form of the exclusion, stating that it has to be “express,” thus excluding the implied one. Moreover, this view finds general support from the above-mentioned principle of the autonomy of the parties. In addition, many proposals of express exclusion were generally opposed because “it may be perfectly real that the parties do not wish the Convention to apply even though this intention was not stated expressly.”91

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87 Id. at 55.

88 Once recognized that implied choice of law is admissible, article 8 of CISG allows “the applicable law to be determined by the circumstances of the case or from the contract’s terms, so long as the other party knew or should have known the other party’s intent with regards to which law should apply”(Susie A. Malloy, The Inter-American Convention on the Law Applicable to International Contracts: Another Piece of the Puzzle of the Law Applicable to International Contracts, 19 Fordham Int’l L.J. 622, 687 (1995).

89 UNCITRAL X Annex I, paras. 56-58, VIII Yearbook. At the diplomatic conference: Com. I Art.6, para. 3(I), (v)-(vii); SR.3, paras.1-95. See also HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES 322 (1989).

90 Herbert M. Samson III, The Title Passage Rule: Applicable Law Under the CISG, 16 Int’l Tax J. 137, 143 (1990); Dore, supra note 42, at 532 (“Express agreement is required only to exclude the Convention (or any part thereof) under article 6”; “The drafters of the present Convention decided not to provide by exclusion from implication...the policy of the drafters of the Convention therefore appears to be to ensure as wide an application of the Convention as possible” (in note 62)); Dore and DeFranco, supra note 33, at 53.

3. Implied Exclusion by Parties’ Choice of a National Law or by Choice of Forum

Normally there is an implicit exclusion of the Convention by the parties’ choice of law of a country which is not a contracting party of CISG.\textsuperscript{92} Different opinions exist, however, in interpreting the parties’ choice of law of a contracting State in the sense of an implicit exclusion of the Convention. On the one hand it has been argued that a choice of law of this kind implies exclusion of the Convention because otherwise the parties’ choice would prove meaningless.\textsuperscript{93} A better view argues that in this situation both the CISG and the national law apply because CISG is a part of the domestic law of a contracting state,\textsuperscript{94} thus a clear indication of exclusion (expressed or implied) of the CISG is needed for the national law to be applied alone.\textsuperscript{95} As a consequence, national law will govern only the issues not covered by the Convention. The only exception to this view can occur when the parties’ course of contractual conduct implies an exclusion once a domestic law has been chosen.\textsuperscript{96}

\textsuperscript{92} BONELL, \textit{supra} note 78, at 56; CISG, \textit{supra} note 1.

\textsuperscript{93} See Arbitral Award, Florence 19 April 1994, in Dir. Comm. Int. 861 (1994).

\textsuperscript{94} Enderlain, \textit{supra} note 20, at 49.


\textsuperscript{96} It follows from the interpretation of the contract in accordance with the parties’ intent and conducts under article 8 of CISG
Another type of implicit exclusion, as explained by Ferrari, can occur by use of standard contracts when their contents are

so profoundly influenced by the rules and concepts of a specific legal system that their use is incompatible with the rules of the convention and implicitly manifests the parties' intention to have the contract governed by that legal system and... their use tends at the same time to exclude the application of CISG as a whole.97

This is not true when a standard form only deals with limited issues providing for specific rules which differ from those of the Convention. Here, the reasonable meaning should favor only a partial exclusion of the Convention.98

Similar reasoning occurs when the parties derogate from the CISG only for some issues, instead choosing to apply specific provisions of a domestic law. In this situation, CISG does not apply when these domestic provisions concern fundamental provisions of the CISG, and therefore it can be undoubtedly inferred that the parties meant, by implication to exclude the application of the Convention.99

It is interesting to note at this point that an exclusion of the Convention can result not only from the express or implied will of the parties, but also from their choice of forum; when the parties do not choose an applicable law, judges tends to rule that the choice of forum shows the choice for the law of their jurisdiction.100 As explained by Ferrari, this situation occurs provided that two requirements are met:

97 Ferrari, supra note 14, at 91.

98 BONELL, supra note 78, at 56-7; FERRARI, supra note 43, at 118; ENDERLAIN-MASKOW, supra note 20, at 49.


(a) one must be able to infer from parties' choice their clear intention to have the domestic law of the State where the forum or the arbitral tribunal is located govern their contract, and (b) the forum...must not be located in a Contracting State, otherwise the Vienna Convention is applicable.\(^\text{101}\)

4. Express Total or Partial Exclusion of CISG

Nothing is said in Article 6 of CISG about the rules that shall govern the contract when the parties have excluded the Convention totally or partially.\(^\text{102}\)

When the parties not only exclude the application of the Convention but also indicate the applicable law, parties should not encounter any problems related to the applicability of CISG or domestic law. The choice of domestic law can be done either before the contract is concluded or at a later stage even during legal proceedings, “at least where this is admissible by virtue of the applicable rules of civil procedure.”\(^\text{103}\) However, due to the fact that an exclusion or derogation of CISG which occurs after the conclusion of the contract is a modification of the Convention, sometimes a particular form may be required.\(^\text{104}\) In this type of situation, the forum must apply the law chosen by the parties and test the validity of this choice, at least when the conflict of laws provisions are in accordance with the EC Rome Convention on the law applicable to Contractual Obligations (Rome Convention).\(^\text{105}\)

As already discussed, CISG’s sphere of application is limited to certain issues, Article 4 of CISG excludes from the scope of the Convention issues “concerned with...the validity of the contract or of any of its provisions,” so that the Convention cannot provide

\(^{101}\) Ferrari, supra note 14, at 92.

\(^{102}\) CISG, supra note 1, at art.6.

\(^{103}\) Ferrari, supra note 14, at 93.

\(^{104}\) Bonell, supra note 78, at 58.

any help in these matters. Bonell states that “given the special nature of a choice of law clause, it is uncertain whether the validity of the parties’ consent is to be decided according to the proper law as objectively determined, the law chosen by the parties, or the substantive rules of the forum” and suggests looking at Article 10 of the Hague Convention on the Law Applicable to Contracts for the International Sale of Goods (1985), “according to which whenever the parties’ agreement as to the applicable law is either express or clearly demonstrated by the terms of the contract and the conduct of the parties, the existence and validity of that agreement shall be determined by the law chosen.”106 When the choice of law is invalid, for instance, for fraud, mistake or duress, the law of the contract should be determined through the conflict of law rules of the forum and not by the CISG.107

If the parties fail to agree in the choice of a domestic law or to adopt specific contractual terms in order to replace the provisions of CISG, a distinction must be made between the total or the partial exclusion (derogation) of CISG. In the first situation, the forum’s conflict of laws rules determines which is the applicable law.108 In the second situation, one point of view is that the CISG still applies, and this case “is to be treated as if there is a gap in the convention from the outset”; therefore general principles of the

106 BONELL, supra note 78, at 60-1.


108 There is general agreement among legal scholars on this issue BONELL, supra note 78, at 59; Ferrari, supra note 14, at 93; HONNOLD, supra note 16, at 126.
convention apply under the provisions of Article 7 of CISG. A different view is that it is preferable to apply the same rule as the total exclusion of the Convention, hence the forum conflict of law rules avoiding any recourse to the principles of the Convention. Ferrari states that "it would make little sense to substitute specific solutions provided by the Convention and which, therefore, are necessarily in conformity with its general principles, with solutions ‘in conformity with the general principles on which the Convention is based’."  

5. Opting-in the CISG

This situation occurs when the parties decide to apply the uniform rules set up by the CISG even if the contract falls outside the scope of the Convention (i.e., Articles 1, 2 and 3 of CISG). The Convention is silent on this matter; and Article 6 of CISG only provides for the occurrence of an exclusion or derogation by choice of the parties and does not rule on an opting-in situation.

There is general agreement among scholars on the possibility of opting-in. As a matter of fact, the fact that CISG differing from article 4 of ULIS does not expressly provide for opting-in does not prevent such a result. Because in light of the history of the Convention’s formation, it is apparent that an express provision on this matter was

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109 Bonell, supra note 78, at 58-9 (affirming that: The relevant issues have to be settled “in conformity with the general principles on which the convention is based or, in absence of such principles, in conformity with the law applicable by virtue of the rules of private international law” (Art. 7(2)), always taking into account that, “in the interpretation of the Convention, regard is to be had to its international character and to the need to promote uniformity in its application and observance of good faith in international trade” (Art. 7(1)). CISG, supra note 1, at art. 7.


111 Ferrari, supra note 14, at 9 (quoting art.7(2) of CISG).

112 CISG, supra note 1.

113 See Enderlein, supra note 20, at 51; Schlechtriem, supra note 34, at 36; Whinship, supra note 58, at 1.34; Ferrari, supra note 14, at 19; Bonell, supra note 78, at 62-3.
excluded as superfluous, given the already recognized principle of the parties’ autonomy.\textsuperscript{114}

A first kind of opting-in occurs in a transaction involving a goods excluded from the scope of the Convention when the parties made express reference to the CISG application. This exercise of the autonomy of the parties is valid unless it is against the mandatory provisions of the law that governs the contract \textit{(i.e., the one resulting from applying the forum’s conflict of law rules)}.\textsuperscript{115}

A second kind of opting-in occurs when one of the requirements of internationality set forth in Article 1 of CISG is not fulfilled. For instance “when the only international element of contact of sales consists in the fact that the good must be delivered abroad or because the parties have their place of business in different states none of which has ratified the convention.”\textsuperscript{116}

The possibility of a lawful opting-in depends on the conflict of laws rules of the forum; whether parties are allowed to directly select an international Convention as the applicable law does not depend on the extension of the recognition of freedom of choice of law. Direct selection is generally excluded because it relates to an option left to a state within the exercise of its sovereignty.\textsuperscript{117} A private party can, therefore, select an international convention only when a state has already ratified it as applicable domestic law.

\textsuperscript{114} \textit{See United Nations’ Official Records, supra note 1, at 252. See also} for reference to art. 4 of ULIS HONNOLD, \textit{supra note 16, at 129-30.}

\textsuperscript{115} BONELL, supra note 78, at 62.

\textsuperscript{116} \textit{Id.}

\textsuperscript{117} \textit{Id. at 62. (criticizing HONNOLD, supra note 16, at 133 on this matter states that “This agreement would present no difficulties in legal systems that give full effect to the parties choice of law”).}
E. ARTICLE 7 OF CISG UNIFORM INTERPRETATION OF THE CONVENTION AND ITS RELATIONSHIP WITH CONFLICT OF LAWS RULES

1. Introduction

Article 7 sets up general rules for the uniform interpretation of the Convention: "In the interpretation of the Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade" (Article 7(1) of CISG).¹¹⁸ The general consequence of this statement is that a judge interpreting the CISG cannot refer to any single legal system to understand concepts and terminology of the Convention but instead must undertake an independent interpretation which "seek[s] out the common core of opinion among the contracting states."¹¹⁹ Article 7 (2) of CISG states that "[q]uestions concerning matters governed by this convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in absence of these principles, in conformity with the law applicable by virtue of the rules of international private law."¹²⁰ This second part

¹¹⁸ CISG, supra note 1, at art.7.

¹¹⁹ HERBERT BERNSTEIN AND JOSEPH LOOKOFFSKY, UNDERSTANDING THE CISG IN EUROPE, 21 (Kluwer International The Hague-London -Boston 1997)(also saying that "the European court of justice has used this method in interpreting the Brussels Convention").

¹²⁰ This thesis does not study the general principles of the convention and their interpretation. However, the following list can give a rough idea of their importance; for further references see Franco Ferrari, Uniform Interpretation of the 1980 Uniform Sales Law, 24 GA. J. INT’L & COMP. L. 183, 209-215 and 219-226 (1994). The general principles of the convention are: the principle of good faith and parties' autonomy as the general ones of the Convention, informality principle (Articles 11 and 29(1) except for the cases falling under Article 8); the principle according to which well known and widely observed principles must be taken into account (Article 9); the principle that when a party fails to pay the price or any other sum in arrears, the other party is entitled to interest on it (Article 78); the principle according to which any notice or other kind of communication made or given after the conclusion of the contract become effective on dispatch (Article 27); the concept of reasonableness according to which the parties must conduct themselves according to the standard of the reasonable person, the principle of mitigation which provides that parties must take reasonable measures to limit damages resulting from the breach of the contract (Article 77), the principle according to which the parties must not venire contra factum proprium; the principle of favor contractus; the civil law based rule that limits damages to those that are foreseeable; the principle that parties must provide the cooperation needed in carrying out the interlocking steps of an international sale transaction. CISG, supra note 1.
of Article 7 of CISG sets up a rule which tries to identify to what extent the general principle of the convention should be used in a gap-filling interpretation "pre-empting potentially competing rules of domestic law." The task of a judge who follows this second criterion of interpretation is facilitated by the fact that it applies only for matters which are governed by the convention even if they are not expressly settled in it. Therefore, only when the CISG does not provide for a solution on an issue when excluded from the scope of the Convention (i.e., gaps intra legem) do the resulting municipal law rules on the application of the conflict of law rules of the forum have to be followed. Moreover, when an issue falls within the application of the Convention but at the same time the Convention "failed to anticipate and thus provide for the specific solution to...[that] issue [i.e., gaps praeter legem], an analogical extension from the existing provisions to the new situation is then appropriate," thus applying the general principles of the convention.

2. Article 7(1) of CISG

Article 7 provisions result from combining two different opinions on how to interpret international conventions. The first opinion argues that international conventions are transformed into domestic law because of the national proceeding which takes place in enforcing them. As a consequence, their interpretation or integration must

121 Bernstein and Lookofsky, supra note 119, at 23.

122 Id. at 24.


124 See Honnold, supra note 16, at 155-56, where he suggests limiting general principles to where they are "moored to premises that underlie specific provisions of the convention" and that this finding can be used to solve a specific issue only when there is not a specific provision because of express rejection by delegates at the Convention or because of the "failure [of the Convention] to anticipate and solve [the specific] issue."

125 CISG, supra note 1, at art.7.
follow the interpretative techniques of that domestic system in which they are inserted and have to be applied. The second opinion argues that international conventions must be interpreted in an autonomous way; otherwise, the result would inevitably be a general lack of uniformity and "the settlement of disputes would be complicated and litigants would be encouraged to engage in forum shopping if the courts of different countries persist in divergent interpretations of the Convention." 

Article 7(1) of CISG expressly states that as a general rule the Convention has to be autonomously interpreted in pursuing the goal of this uniform application and promoting the observance of good faith in international commerce. At the same time, however, Article 7(1) does not provide for specific techniques or methods to solve the Convention's interpretative problems, but rather stresses the importance of the goal of uniformity due to the international character of the Convention. The international character of the convention should be respected and therefore the interpreter "should not read the convention through the lenses of domestic law, but should project the interpretative problems against the international background." In other words, interpretative techniques as employed under municipal law coming from either statutes or case law cannot be used to interpret the CISG. The neutral wording of the Convention has been used in order to "reach a common understanding," not often corresponding to legal concepts of a particular system; therefore, one has to avoid giving a meaning to a


127 BONELL, supra note 78, at 74.

128 HONNOLD, supra note 16, at 142.

129 BONELL, supra note 78, at 74.


131 BONELL, supra note 78, at 72.
term by looking at a domestic system. Instead, the Convention, for matters falling under its scope, is self-sufficient; the principles for the interpretation of the Convention have to come from the convention itself.

One of the main problems for uniform interpretation is that there is not an international court in charge of the uniform interpretation of the Convention; instead, judges from different countries with various legal traditions interpret the uniform law of the Convention. A possible solution is that the interpreter look at “what others have already done.” A judge can examine decisions taken, both by courts and arbitral tribunals in other Contracting States, and “if there is already a body of international case law, it may be well accepted as a sort of binding precedent,” or at least as having some persuasive value as “existing materials in regard to relevant rulings [which] have to be taken account of when giving the reason for a decision.” A major difficulty, however, is constituted by the language barrier and the difficulties in finding decisions granted abroad. UCITRAL has provided for a means to look at abstracts of foreign court decisions and arbitral awards related to CISG. A system called CLOUT (Case Law on UNCITRAL Texts), based on national correspondents, became operational in 1993 and provides for English and other official language versions of the decisions that are published by the Secretariat.


133 Bonell, supra note 78, at 73.

134 Dieter Maskow, The Convention on the International Sale of Goods from the Perspective of the Socialist Countries, in La Vendita Internazionale supra note 126, at 54. See also Ferrari, supra note 120, at 204-5.

135 Bonell, supra note 78, at 91.

136 Enderlein, supra note 20, at 56.

137 Ferrari, supra note 120, at 205.

Further help in achieving the goal of uniform interpretation can come from the "study of travaux preparatoires." In civil law countries, legislative history is commonly used to solve interpretative problems; the same is not true in common law countries. However, among the latter, this possibility as been admitted by the U.S. Supreme Court, which states that treaties may be "construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty." In England the literal rule still applies for domestic legislation, but as far as international conventions are concerned, the House of Lord made reference to legislative history to interpret the provision of an international convention.

One last resource for the interpretation of a uniform law is recourse to legal writing. In civil law countries this is a usual means used by judges and it "seems to have become more and more common... [in common law countries], such as England and America, where judges have been historically reluctant to make (sic) recourse to scholarly writing."

3. Article 7(2) of CISG and Conflict of Laws

As we have already said, the Convention has the great advantage of being a uniform body of law that is, however, far from exhaustive. As a matter of fact, the Convention only deals with the formation of a contract for the international sale of goods

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139 Ferrari, supra note 120, at 206.

140 HONNOLD, supra note 16, at 138.


and the obligation of the parties related to that contract. Not surprisingly, "this limitation will give rise to problems relating to the necessity of filling gaps in which any type of body of rules will result."\footnote{145}

The purpose of Article 7(2) of CISG is similar to the one of uniformity pursued by Article 7(1).\footnote{146} As Bonell clearly states "[t]he purpose of the provision is quite clear. In accordance with the basic criteria established in paragraph (1), first part, for the interpretation of the Convention in general, not only in case of ambiguities or obscurities in the text but also in case of gaps, courts should to the largest possible extent refrain from resorting to the different domestic law and try to find a solution within the Convention itself."\footnote{147}

The gaps to which Article 7(2) refers, as already pointed out in the introduction, are the gaps \textit{praeter legem}. The solution adopted by the Convention's drafters couples recourse to general principles with a last resort recourse to the conflict of law rules of the forum leading to the application of a specific domestic law.\footnote{148} This solution is different from the one adopted by Articles 2 and 17 of ULIS which provided for a strict application of the principles of the convention in order to fill the gaps in the uniform law, thus negatively implying that judges may not apply the municipal law of a country "whose law would otherwise apply under the rules of private international law."\footnote{149} Therefore, the

\footnote{145}{Ferrari, \textit{supra} note 120, at 216; CISG, \textit{supra} note 1 at Art.7.}

\footnote{146}{\textit{Id.}}

\footnote{147}{\textit{Bonnell, supra} note 78, at 75.}

\footnote{148}{Ferrari, \textit{supra} note 120, at 216; Similarly \textsc{Albert H. Kritzer}, \textsc{Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods} 117 (Kluwer law \& Taxation Publishers, Deventer -Boston 1989)}

\footnote{149}{Peter Whinship, \textsc{Private International law and the U.N. Sales Convention}, 21 \textsc{Cornell Int'L L.J.} 478, 492 (1988). Moreover, Article 2 of ULIS excludes the application of conflict of law rules except for a few instances see Harold J. Berman, \textsc{The uniform Law on International Sale of Goods: A Constructive Critique}, 30 \textsc{Law \& Contemp. Probs.} 354, 359 (1965). Article 2 of ULIS states: "[R]ules of private international law shall be excluded for the purposes of the application of the present law, subject to any provision to the contrary in the said law"; Article 17 of ULIS states: "[Q]uestions concerning matters governed by the present Law which are not expressly settled therein shall be settled in conformity with the
approach of ULIS was one of strict application of the principles of the Convention. CISG has not followed the prior approach because the goal of total independence of the Convention from national municipal law was not considered realistically feasible.\(^{150}\)

In civil law countries, gap filling through general principles is a well known method and is generally provided by statutes.\(^{151}\) A good example, for instance, is Article 12(2) of the Italian Civil Code, which provides that "if a controversy cannot be decided on the ground of a specific provision, one can resort to similar provisions or analogous matters; if the question remain doubtful, it shall be settled in conformity with the general principles of the State."\(^{152}\)

Common law countries also use general principles, but this use is different from that of civil law. As a matter of fact, the main legal source for common law judges is case law, and statutes are conceived as fixing rules for specific situations, not containing any general principle of wide application.\(^{153}\) Therefore, what usually happens is that the gaps in the statutes are filled by the principles of common law, and not vice versa as in civil law.\(^{154}\)

The recourse to gap filling through the use of general principles set up by Article 7(2) does not exclude the use of both extensive and analogical methods of interpretation.\(^{155}\) However, while analogical and extensive interpretations are both based general principles on which the present law is based." ULIS, supra note 4, at arts. 2 and 17..


\(^{152}\) For this translation see Ferrari, *supra* note 120, at 220.

\(^{153}\) Ferrari, *supra* note 120, at 221.

\(^{154}\) BONELL, *supra* note 78, at 77-8.

on specific provisions of the Convention, the use of general principles for the interpretation of the Convention are "rules which because of their general character may be applied on a much wider scale."\textsuperscript{156}

At last, Article 7(2) states that when it is not possible to apply any general principle to solve a gap \textit{praeter legem}, "one not only is allowed to make recourse to the rules of private international law: one is obliged to do so."\textsuperscript{157} However, recourse to conflict of law rules in order to determine the applicable law should be carefully adopted because it "represents under the ...uniform law a last resort to be used only if and to the extent that a solution cannot be found either by analogical application of specific provisions or by application of "general principles" underlying the uniform law as such."\textsuperscript{158}

In practice, however, there can be much of discussion on whether an issue has to be considered as a gap \textit{intra legem} or \textit{praeter legem}. The former calls for the application of general principles of the Convention, while the latter calls for the application of domestic law as a result of application of the forum's conflict of law rules. A good example is the determination of the interest rate on sums in arrears, a typical situation in international trade when the buyer is late with the total payment or with some installments. There is no an unanimous agreement by legal writers and courts because the CISG does not provide for any practical criteria to identify when there is a gap \textit{intra legem} or a gap \textit{praeter legem}.\textsuperscript{159}

\textsuperscript{156} BONELL, supra note 78, at 80.

\textsuperscript{157} Ferrari, supra note 120, at 228.

\textsuperscript{158} BONELL, supra note 78, at 83.

F. FINAL REMARKS

A detailed analysis of the Articles of the Convention shows the Convention’s scope of application to be limited, and in many instances the forum’s conflict of law rules still play a relevant role in the application of the Convention. Article 1(1)(b) provides for the application of the CISG when the forum’s conflict of law rules leads to applying the law of a single contracting state; also, conflict of law rules are recalled in Article 7(2), which fills the gaps präter legem of the Convention, applying a domestic law which emerges from applying the forum’s conflict of law rules.\(^{160}\) In addition, conflict of law rules apply when the parties have excluded or derogated from the Convention (Article 6 of CISG) whenever it is not clear which law should govern the contract. Finally, the Convention’s application is subject to many exclusions (Articles 2, 3, 4 and 5 of CISG) and governs, in any case, only the formation of the contract and the rights and obligations of the parties arising from the contract. It avoids dealing with validity issues and transfer of title, thus calling for the necessary support of a domestic law resulting from the application of conflict of law rules. Therefore, not only is a uniform substantive law necessary for the goals of uniformity and certainty in the legal relationship between parties in international sale transactions, but also a uniform law on conflicts of law provides the same criteria of choice of law applicable in every jurisdiction and helps for uniformity and certainty of legal relations.\(^{161}\)

The two approaches are not technically incompatible,\(^{162}\) the CISG expressly “left the question of conflict of laws open and referred expressly to the application of the rules

\(^{160}\) CISG, _supra_ note 1.


\(^{162}\) Robert R. Wilson, _Standardization of Choice of law rules for international contracts: Should there be a new beginning?_, Am. J. Int’l L. 385, 386-88(1959); Whinship, _supra_ note 149, at 532-33.
of private international law."

On the contrary, a combination of the two can be really quite successful as it happened with the 1980 EC Rome Convention on the Law Applicable to Contractual Obligations. It prevents forum shopping and reduces the risks and costs of an international transaction.

The renewed interest in international conventions dealing with uniform choice of law rules, after the less than really successful 1955 Hague Convention on the Law Applicable to the Contracts for the International Sale of Goods and the 1985 Hague Convention’s failure, is demonstrated by the Inter-American Convention on the Law Applicable to International Contracts of 1994. Therefore, the subject matter of my next chapter appears to be of great relevance and interest today; these conventions are playing a role in arbitral proceedings which more and more are substitutes for judicial proceedings regarding international dispute resolutions.

163 U.N. Doc. A/Conf.97/C.2/SR.2, para.33, reprinted in United Nations Conference on Contracts for the International Sale of Goods, Official Records 440 (1981). Relating to a query on whether the statement-- made after Article 90 was adopted--was made on the assumption that Article 90 covered the 1955 Convention or on the assumption that it did not and consequently a statement had to be read in the record. Article 90 of CISG states that: “This Convention 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.” CISG, supra note 1, at art.90.

164 Rome Convention, supra note 105.

165 Whinship, supra note 134, at 532-3.


CHAPTER II

INTERNATIONAL CONVENTIONS ON THE APPLICABLE LAW RELATED TO THE INTERNATIONAL SALES OF GOODS

A. INTRODUCTION: THE ISSUES FOR PRIVATE INTERNATIONAL LAW RULES

One major issue of international private law is the determination of the law applicable to international transactions. As a matter of fact, certainty regarding rights and duties of buyer and seller belonging to different countries are of capital importance, especially in case of litigation due to the factual complexity and high costs usually related to dispute resolutions.

Most legal systems of private international law are aware of the difficulties related to the determination of the applicable law, and, in order to promote international trade, have given the parties of a transnational contract the freedom to choose the applicable law (i.e., party-autonomy principle) “in accordance with the primary objective of contract law of promoting certainty, predictability, commercial convenience and uniformity of results regardless of the forum.”

To this end, there is also an attempt to reach widespread agreement on international conventions, not only recognizing the party autonomy principle but also providing a set of uniform set rules in order to determine the applicable law in any contracting state.

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In relation to CISG, we have already mentioned the importance and validity of the idea of pursuing uniform substantive law applied as the domestic law of every member country. However, at the same time we stressed that CISG, which provides for substantive law related to sale of goods when applied, does not cover all the issues related to international sale of goods and that, therefore, domestic law is still needed in order to fill CISG gaps.

Several multilateral conventions on the applicable law on contractual obligations which are compatible with the CISG have tried to supply all legal systems with common choice of law rules. Four multilateral Conventions are examined in this Chapter in order to understand the evolution of the different set of criteria applied in trying to reach an a compromise solution acceptable for as many legal systems as possible. The first one was the Hague Convention of 1955,170 the second was the EC’s Rome Convention on Law Applicable to Contractual Obligation of 1980 (Rome Convention),171 the third is the second Hague Convention of 1985,172 and the fourth the Inter-American Convention on the Applicable to International Contracts (Mexico Convention).173 These Conventions will all be considered in this chapter with a particular interest in the Rome Convention, which has been the most successful Convention on this matter and the Inter-American Convention, which seems to follow the latter’s general approach and which is important because it is meant to be a Convention giving the U.S. for the first time a uniform set of rules of international private law.174 The last part of the thesis will be devoted to

173 Mexico Convention, supra note 168.
adiscussion on how it would be possible to combine the two latter Conventions in the perspective of a new Hague Convention open to worldwide ratification.

For a better development of later paragraphs, we prefer to deal in the last part of the introduction with two general issues: the compatibility between CISG and the above mentioned conventions, and the meaning of some general criteria and approaches which are used alone or together in the conventions to provide a set of choice of law rules.

The first issue is addressed briefly because the CISG leaves the question of conflicts of law open and expressly refers to rules of private international law whenever needed. Therefore, CISG does not provide for any conflict of law rules, leaving them all to forum conflict of laws rules or to international conventions on the applicable law.175

The second issue relates to the criteria or methods used in the international conventions which depart from the traditional rule of applying the law of the forum in order to find the applicable law. This issue is the general guideline of the entire Chapter II because the success of past and future agreements lies upon the agreement on common criteria or methods. The general result of applying all these different methods or criteria is that the seller’s law is the applicable law of an international sale of goods. The major

175 Pelichet, supra note 7, at 38-40. Regarding the relationship between the Hague of 1955 and CISG see U.N. Doc. A/Conf.97/C.2/2, para.33 in the sense that there was no need for the parties of the Hague of 1955 to denounce this convention in case they decide to adopt CISG. Regarding the relationship between CISG and the Hague of 1985 Article 23 of the latter expressly provides that "[t]his Convention leaves it open whether or not there is to be an application...of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 11 April 1980)." Regarding the Rome Convention Article 21 states that "[t]his Convention does not prejudice the application of [any] international convention to which a Contracting State is, or becomes a party;" see also Giorgio Conetti, Uniform Substantive Rules on the International Sale of Goods and Their Interaction, in SARCEVIC supra note 77, at 396 ("Such broad wording seems to cover every type of international convention on uniform conflicts-of-laws rules and uniform substantive law having its own rule on the sphere of application"). Regarding the Mexico Convention there is a provision similar to the one of the Rome Convention in Article 20. Due to the complexity of the matters related to cross application of conventions, there can sometime be incompatibilities among specific provisions; however, the topic of this thesis is limited to an overview and comparison of the criteria contained in the different sets of rules which lead to the applicable law in absence of choice of law by the parties of the transaction.
problem is, therefore, how to deal with the exception to the rule leading to the application of the law of the buyer when justice requires.\footnote{Pelichet, \textit{supra} note 7, at 132.}

First of all, there are two different conceptions of the role that conflict of law rules may play in the different legal systems. A first conception looks for a objective connecting factor in order to determine the applicable law in absence of choice of law by the parties. Under this conception, the drafters of a rule have already assessed the importance of a connecting factor as the most relevant for all the transactions of a certain type; therefore, a judge has automatically apply the statutory rule without any further evaluation of the single case.\footnote{This approach clearly belongs to a civil law mentality which attempts to provide for clear rules of law leaving as little room as possible for judicial interpretation, guaranteeing certainty of legal relations by a statute which a judge as \textit{bouche de la loi} is not called to (extensively) interpret.} The \textit{lex loci contractus} was and is still considered in many countries as a unique or alternative connecting factor for the determination of the applicable law.\footnote{See for a list of countries still adopting the \textit{lex loci contractus} as a connecting factor Ole Lando, \textit{International Encyclopedia of Comparative Law}, Vol. III, Private Law,\textit{International Law}, Ch.24 “Contracts” (1976), sess. 54 and fl.}

Today, however, international trade cannot count on this factor anymore because parties from different countries currently conclude contracts wherever it is more convenient and the \textit{lex loci contractus} can be the law of a third country without any particular connections to either with the parties’ obligations or their places of business. Therefore, drafters of international conventions have tried to be more precise and to find a connecting factor close to the actual characteristics of a certain type of contract. Thus, for a sale of goods, the crucial factor has been identified as the place of residence or domicile of the seller.\footnote{Pelichet, \textit{supra} note 7, at 130. For a discussion of the reasons for using the law of the seller see infra pages 44 and fl.} A good example of this approach is Article 3 of the Hague Convention of 1955, which strictly applies the seller’s law because of the connecting factors of place of residence or
the establishment of the seller at the time when it receives the order as the applicable law of the contract, without leaving any room for a more flexible and just criteria in order to apply a different law like the buyer's (i.e., so called principal objective connecting factor). Objective factors (i.e., so called supplementary respect to the residence or domicile of the seller) have also been applied in order to set a group of exceptions to the application of the above mentioned principal factors which lead to the law of the buyer. For instance, Article 8(2) of the Hague Convention of 1985, in order to apply the law of the buyer, refers to the presence of the parties in the buyer's state at the moment of the conclusion of the contract or to the express obligation of the seller to deliver the goods in the buyer's state or to the occurrence in which the buyer has determined most terms of the contract.

On the other hand, another conception, the so called flexible method, leaves the judge to determine, through a case by case approach and the use of more flexible criteria, the applicable law through "closer connection." This method is well known in countries like U.K. and U.S. As a matter of fact in the U.K. the general conflict rule is the search of the proper law of the contract, which has been defined by Dicey and Morris as "the system of law by which the parties intended the contract to be governed, or, where their intention is neither expressed nor to be inferred from the circumstances, the system of law with which the transaction has its closest and most real connection." In this system, the

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180 For a longer explanation of the rational of this general criteria of the law of the buyer II, B, 1.

181 Pelichet, supra note 7, at 141-4. See for details Chapter II.B.3.1.

182 This is the typical approach of England and many other common law countries where the role of the judge is to interpret and create the law while examining single cases; see Stone, supra note 169, at 3; Campbell McLachlan, The New Hague Convention and the Limits of the Choice of Law Process, L.Q.R. 591, 594 (1986).

judge has a greater role than under the previously mentioned first conception. As Pelichet said, a judge has to:

[A]nalyze the different elements of the contract and evaluate the circumstances of the negotiations occurred both to try to discover the hypothetical will of the parties and which is the legal system with whom the transaction has the closer connection or the most reasonable; sometimes, he will ask himself which is the better law to apply to the given situation.\footnote{184}{Pelichet, \textit{supra} note 7, at 52-3.}

Even if in the application of this method the courts are allowed to consider both indication of intention and connecting factors and “follow a more objective method,”\footnote{185}{Lando, \textit{supra} note 178, at 116.} the focus has been mainly on the presumed intention of the parties without taking into account other “social [or policy] considerations.”\footnote{186}{\textit{Id}.}

Similarly looking for more flexibility some US courts departing from the \textit{lex loci contractus}, which was the rule provided by the first Restatement,\footnote{187}{Restatement of Conflict of Laws \textsection 332 (1934).} begun to use the “center of gravity” approach.\footnote{188}{\textit{See} Barber v. Huges, 223 Ind.570, 586, 63 N. E. 2d 417,423 (1945); Rubin v. Irving Trust Co., 305 N.Y. 288, 305,113 N.E. 2d 424,431 (1953); Auten v. Auten, 308 N.Y. 155,124 N E.2d 99 (1954). \textit{See also} Friedrich K. Juenger, \textit{CHOICE OF LAW AND MULTISTATE JUSTICE}, 57 (1993).}

The center of gravity approach departs from the English proper law approach based on the presumed non-existing intent of the parties and focuses instead on the application of the law with whom the contract has the “most real connection.”\footnote{189}{\textit{Id}. (referring to J. Westlake, \textit{A treatise on Private International Law} 10 (N.Bentwwhich 6th ed. 1922)).}

Using this method, inspired by Currie’s governmental interest analysis,\footnote{190}{B. Currie, \textit{Selected Essays on the Conflict of Laws}, Durham, NC, 688 (1963).}
Cavers' "principles of preference," and Leflar's "choice-influencing considerations" and their policy-centered approach, "the courts searched for the state or the country having the closest factual relationship with the subject matter." It has to be noticed, however, that "the decisions did not indicate uniformly whether regard must be paid to the most significant relationship of the contract with the particular state or to the preponderance of interest by a state or country in the individual issue involved."

In Auten v. Auten the N.Y. Court of Appeals expressly used the term of center of gravity also talking of "grouping of contracts" and "most significant contacts," subsequently changed in "the most significant relationship" of the Restatement Second.

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192 Leflar, American Conflict of Law, 370 (1959).

193 Lando, supra note 178, at 70.

194 Id.

195 Restatement (Second) of Conflict of Laws §§188 (contracts), 145 (torts) (1971). In particular for contracts the UCC §1-105 deals with this problem in a similar fashion providing that "when a transaction bears a reasonable relation to the this state and also to another State or nation the parties may agree that the law either of this State or such other State or Nation shall govern the rights and duties. Failing such agreement this Act applies to transactions bearing an appropriate relation to this State." In the latter occurrence it is left to the judge to find the appropriate relation. The judge can find some help in the non-exhaustive list of five factors specified in § 188(2) Restatement Second on Conflicts of Law in connection with § 6: §188 will apply the law that has the most significant relationship to the transaction and parties. These factors are place of contracting, place of negotiations, place of performance, location of the subject matter of the contract, domicile, residence, nationality, place of incorporation, and place of business of the parties. These factors have to be weighted in the light of § 6 seven policy criteria, which are the need of the interstate and international systems, the relevant policies of the forum and of interested states, protect justified expectations, basic policies underlying fields of law, certainty, predictability and uniformity of results, ease in determination and application of the law to be applied. It is interesting to notice a link with the centre of gravity approach which is dealt with later on in this paragraph. See Samuel J. Cohen, The EEC Convention and U.S. Law Governing Choice of Law for Contracts, with Particular emphasis on Restatement Second: A Comparative Study, 13 Md.J.Int'l L. & Trade 223, 233-240 (1989) and Friedrich K. Junger, Choice of Law and Multistate Justice, 56-58, 96-98, 128-31, 186-88 (1993). § 188 provides for a general framework but §191, which deals with the sale of goods, provides for some specific guidance and generally leads to the application of the law of the place of delivery of the goods, which is the place of residence or of establishment of the seller. See Pelichet, supra note 5, at 139.
The center-of-gravity approach gives flexibility to the strict application of connecting factors, such as the place where the negotiations took place, "under which the contract is to be governed by the law of the country in which its centre is located socially and economically."\(^{196}\) The point of departure is that only the connecting factors are taken into account; however, a judge is not obliged to rely on a connecting factor which leads to an already codified rule for a certain kind of contract. Instead the judge "may take various connecting factors into consideration and consider them individually in each case."\(^{197}\) In other words, the focus is on all the connecting factors, not on the type of transaction in itself; the center-of-gravity method is nothing but a technique for weighting connecting factors.

In practice, in judging the connecting factors a court has, in the first instance, to look at "the social policies behind the substantive law rules and from the policies underlying international commercial intercourse."\(^{198}\) A good example of these policies is the one which suggests taking into account the average interest of the parties.\(^{199}\)

These policy considerations lead the judge to give certain weight to one or more connecting factors which are subsequently used to determine the applicable law of the buyer or the seller.\(^{200}\) For instance, in many legal systems there is a favour in sale of goods

\(^{196}\) Ole Lando, *The EEC Convention on the Law Applicable to Contractual Obligations*, 24 COMMON MARKET LAW REVIEW 19, 60 (1987). In many countries like in the U.S., courts have frequently sabotaged the rule either openly or by the use of covert methods *see* Lando, *supra* note 178, at 58.

\(^{197}\) Lando, *supra* note 178, at 61.

\(^{198}\) *Id.* (e.g. "The manufacturer or the merchant who exports goods is subject to more complex duties than the importer. An exporter who sells to importers in a different country has a greater interest than has the importer in calculating the risks and costs on the basis of one law which is his own law").

\(^{199}\) *Id.*

\(^{200}\) There are two variants of the this method as Lando, *supra* note 178, 24-155, points out that "[O]ne will rely always on the costellation of the particular connecting factors of the contract to determine its centre individually. No presumptions. The other variant encourages the establishment of presumptions for the various types of contracts and for some typical constellations of connecting factors.” e.g., the presumption in favour of applying the law of the place of contracting to contracts which are negotiated at the place of business of one of the parties.
for the application of the law of the seller’s place of business whenever a contract is concluded *inter absentes*. On the contrary, the center-of-gravity may shift to the law of the buyer’s country whenever a seller directly seeks buyers in the country of the latter where negotiations occurred and the contract is signed.\(^{201}\) The end result is that this method is generally workable for the sale of goods.

Examples of a direct influence of the flexible method approach in international conventions are Article 4 of the Rome Convention of 1980 and Article 8(3) of the Hague Convention of 1985.\(^{202}\)

The Rome Convention Article 4 applies the “closer connection” approach as a general rule and not as an exception. However, it is coupled by a *prima facie* presumption that the applicable law is of the place of habitual residence or place of business of the party (its agent or branch) who performs the characteristic obligation.\(^{203}\) This presumption has to be, however, “disregarded if appears from the circumstances as a whole that the contract is more closely connected with another [third] country.”\(^{204}\) In an international sale of goods, the characteristic performance is the delivery of the goods\(^{205}\) and not the

\(^{201}\) Lando, *supra* note 196, at 61.


\(^{203}\) Lando, *supra* note 196, at 57.

\(^{204}\) Sauveplanne, *supra* note 202, at 48.

obligation of the buyer which consists in the payment of the money. The criteria of characteristic performance comes from Swiss theory and practice, in an attempt to find a more balanced criteria "between either the application of the lex loci solutionis- which they regarded as too inflexible - or that of the law having the closest - which they regarded as too vague." The characteristic performance/obligation is not in itself a connecting factor; it is rather a set of "operative facts" which identify the core of legal relationship of a certain type of transaction and that subsequently join with the connecting factors like the place of habitual residence, central administration or principal place of business of contracting parties to lead to the applicable law of a certain transaction.

Also Article 8(3) of the Hague Convention of 1985 uses the closer connection in light of all the circumstances of the case as an exception to the rule that the applicable law is of the state where the seller has its place of business at the time of the conclusion of the contract. This exception is interestingly added to series of exceptions simply based on supplementary connecting factors, with unfortunate results, as we will see in the following paragraphs.

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208 Id. at 404.

209 Article 8(3) of the Hague of 1985: "By way of exception, where, in the light of the circumstances as a whole, for instance any business relations between the parties, the contract is manifestly more closely connected with a law which is not the law which would otherwise be applicable to the contract under paragraphs 1 or 2 of this Article, the contract is governed by that other law." CISG, supra note 1.
B. THE 1955 AND 1985 HAGUE CONVENTIONS ON THE LAW APPLICABLE TO THE INTERNATIONAL SALE OF GOODS

1. Introduction

The Convention on the Law applicable to International Sale of Goods, held in The Hague in 1955 (Hague Convention of 1955), was the result of a long formation process which started in 1928 at the sixth Hague Conference and ended in a final draft prepared by a special Commission in June 1931.\textsuperscript{210} This draft Convention, with a few amendments made during the seventh Hague Conference in 1951, became the Hague Convention of 1955.\textsuperscript{211}

This Convention is a product of the agreement of only 17 states represented by an homogeneous group of European countries, plus Japan, of which 16 were civil law and one common law. In fact, although Czechoslovakia, Hungary, Latvia, Poland and Romania attended the sixth Conference they did not participate in the 1951 Conference. Moreover, these 17 countries were, with exception of Yugoslavia, the only capitalist countries.\textsuperscript{212}

The Hague Convention has had limited success because it has been ratified by only eight states, seven European (\textit{i.e.}, Belgium, Denmark, Finland, France, Italy, Norway, Sweden, Switzerland) and by Niger. This Convention’s limited success was “the result of insufficiently differentiated legal thinking deriving from a meeting of states with more or less similar economic systems”\textsuperscript{213} and “similar experiences and doctrines.”\textsuperscript{214}

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\textsuperscript{210} This Draft is reproduced in Doc. La Haye 7. Sess. 4-5, with the accompanying Report of professor Julliot de la Morandiere 5 and fl., who was the chairman of the special Committee.
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\textsuperscript{211} See Actes La Haye 7. Sess. 16-89.
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\textsuperscript{214} Lando, \textit{supra} note 212, \textit{at} 157.
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The draft Convention on the Law Applicable to Contracts for the International Sale of Goods, done at The Hague in 1985, aimed to review the Hague Convention of 1951, enlarging participation to a larger number of states in order to enhance chances for wider adoption. The extraordinary Session of the Hague Conference of 1985 was attended by sixty-four delegations, half of which from developing countries; all European socialist countries except Albania were present. Despite the widespread participation, the Convention of 1985, signed by Czechoslovakia and Holland, and ratified by Argentina, has not entered into force and it is unlikely to in the future.\(^{215}\)

The reasons for this defeat are of two different types. On the one hand, there are were some unfortunate provisions of the Convention which will be discussed in the following paragraphs. On the other hand, there is the great success of CISG and the Convention on the Law applicable to Contractual Obligations (Rome Convention), both of 1980.\(^{216}\) CISG provides for uniform substantive rules for international sale contracts; notwithstanding its limited scope because it covers only the formation of the contract and its effects, it has somehow reduced the necessity of uniformity of conflict of laws rules through a international convention on uniform choice of law rules. The Rome Convention, as we will see later on in this chapter, deals directly with uniform choice of law rules on contracts, therefore including the sale of goods. It has reduced the need for E.U. countries to substitute the rules of the Rome Convention with the ones of the Hague Convention of 1985; also, the differences between the two Conventions are not of such relevance to justify the adoption of the most recent one.\(^{217}\)

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\(^{215}\) *Id.* at 158.

\(^{216}\) Rome Convention, *supra* note 105.

\(^{217}\) Lando, *supra* note 212, at 158. Moreover, Lando observes that Belgium, Denmark, France and Italy, which ratified the Hague Convention of 1955, still apply it to sale of goods -except consumer sales-because Art. 21 of the Rome Convention allows this occurrence. On the contrary, the other E.U. countries fully applied the Rome Convention. *Id.* at art.21.
Despite their lack of success, both the Hague Conventions have attained some goals anyway. The Convention of 1955 constitutes the first attempt at international uniform choice of law rules and to have pursued a clear and simple group of rules easily understandable by businessmen;\textsuperscript{218} at the same time, it abolished the general rule of application of the law of the forum in order to determine the applicable law for a contract, ordinarily used by many European courts. The Convention of 1955’s adoption of the hard and fast rules giving precedence to the law of the habitual residence of the seller removed the practice of forum shopping previously implied in the \textit{lex forism} “homeward trend.”\textsuperscript{219}

In comparison with the Hague Convention of 1955, the merits of the Hague Convention of 1985 are more political than practical in nature. This occurred because the effort to reach a compromise able to satisfy different positions produced a more complex and confusing set of rules for the determination of the applicable law, mixing the 1955 “fast and hard” rules with other more flexible methods, thus creating uncertainty instead of predictability. Nevertheless, having representatives of countries from around the world, with both common law and civil law traditions, capitalist and socialist economies, was itself a success and opened the way to future international agreements. All the countries at the Conference have become aware of the needs and problems connected with choice of law.\textsuperscript{220}

The two Hague Conventions, will be treated together, but focus will be placed mainly on the more recent one for its greater importance in showing the development of the international challenge of finding uniform choice of law rules after the CISG came into existence. The range of criteria for choice of law used in both Conventions will be

\textsuperscript{218} Rapport on the Hague Convention of 1951 made by Julliot de la Morandiere Documents relatifs à La Haye 1952 (short form: Doc. La Haye 7. Sess. 5).

\textsuperscript{219} Lando, \textit{supra} note 212, at 159.

\textsuperscript{220} \textit{Id.} at 174.
analyzed carefully because this closely relates with the goal of predictability which is the aim of all these conventions. Moreover, due importance will be given to two essential elements of the Conventions: recognition of the principle of parties’ autonomy and ascertainment of the scope of the Conventions. CISG will be mentioned whenever relevant.

2. Scope of the Conventions

Articles 1-6 of the Hague Convention of 1985 defines the scope of the Convention. The international character of the sale transaction is based on the parties’ place of business and it is compatible with CISG’s criteria of internationality.\(^{221}\) Article 1 of the Hague Convention of 1985 states that:

This Convention determines the law applicable to contracts of sale of goods (a) between parties having their places of business in different States; (b) in all cases involving a choice of law between the laws of different States, unless such a choice arises solely from a stipulation by the parties as to the applicable law, even if accompanied by a choice of court of arbitration.

As a result of Article 1(b), the transaction need not necessarily be international for the convention to be applied because it also applies when the contract involves a “choice of law between the laws of different states.”

Article 1(b), contrary to Article 1(a) which was approved unanimously, was criticized by many delegations because it produced uncertainty and unreasonably broadened the scope of application of the Convention, departing from the more limited CISG sphere of application. However, the argument in favor of its approval prevailed because it was said to be of vital importance for guaranteeing not only the broad

\(^{221}\) Winship, supra note 58, at 17-20. Moreover, it is interesting to note that in the preamble of the Hague of 1985 “[t]he States Parties to the present Convention, Desiring to unify the choice of law rules relating to contracts for the international sale of goods, Bearing in mind the United Nations Convention on contracts for the international sale of goods, concluded in Vienna on 11 April 1980, have agreed on the following provisions....” CISG, supra note 1.
application of CISG but also the application of the Hague Convention of 1985.222 The situation provided by Article 1(b) occurs when both contracting parties of a sale transaction belong to the same legal system but at the same time “the sale has a significant contact to a foreign country...[like] when during a meeting in S.Francisco, two Norwegian shipowners make a contract for the sale of a vessel which runs and shall continue to run between American ports.”223 In the Hague of 1955, the scope of the Convention is limited to only international contracts in order to prevent artificially created international sales. As a matter of fact, Article 1(3) provided that a mere declaration of the parties to choose a foreign law or a foreign forum or an arbitrator “shall not confer upon the sale the international character” provided by Article 1(1).224

Other key provisions are Article 7 of the Hague Convention of 1985 and Article 2 of the Hague Convention of 1955, which provides the parties unrestricted freedom to select applicable law in connection with the general interest of international trade. Both Hague Conventions espouse the “autonomy of wills theory,”225 placing the emphasis on the parties’ intention and therefore rejecting any limitations sometimes present in domestic legal systems.226

Article 2 of the Hague Convention of 1985, as CISG, provides for some exclusions from the scope of the Convention, namely:

222 Hague Conference Minutes No. 1 of Commission I: Interventions Nos. 13-72. In line of this extension of application of the Convention, art.6 provides that “[t]he law determined under the Convention applies whether or not it is the law of a contracting state.”


224 Id. at 63. Therefore the Hague of 1985 limits the freedom of the parties’ choice granted by Article 2. It has to be noticed that the Hague Convention of 1985 provides for a reservation of Article 1(b) under Article 21(1)(a) which can be made by the states not willing to have the Convention applied to transactions entered by two parties belonging from the same country. Hague Convention of 1985, supra note 167, at art.21.


226 Campbell Mclachlan, supra note 161, at 594.
(a) sales by way of execution or otherwise by authority of law; (b) sales of stocks, shares, investment securities, negotiable instruments or money; it does, however, apply to the sale of goods based on documents; (c) sales of goods bought for personal, family or household use; it does, however, apply if the seller at the time of the conclusion of the contract neither knew nor ought to have known that the goods were bought for any such use."

The latter exclusion particularly stresses the intent to give the revised Hague Convention a scope rationae materiae comparable to CISG, thus delaying the contrary provision of the 1955 Hague convention. In addition, Article 3 of CISG, which includes in the Convention’s scope contracts involving goods to be manufactured by the buyer and contracts in which the seller not only sells goods but also provides for some services, is exactly repeated in Article 4 of Hague Convention of 1985. Unlike Article 2 (e-f) of CISG, however, Article 3 of the Hague Convention of 1985 considers as “goods” ships, vessels, boats, hovercraft, aircraft and electricity.

A law resulting from the application of the Hague Convention of 1985 covers issues left outside the scope of the Vienna Convention: “the validity of the contract or any of its provisions or of any usage [and] the effect which the contract may have on the property of the good sold.”

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227 This provision is different from the Hague Convention of 1955, which was applicable to consumer sales, although subjected to the possibility of reservation by a contracting state.

228 Gabor, supra note 35, at 704-5.

229 Article 12 of the Hague Convention of 1985, supra note 167, states that:
The law applicable to a contract of sale by virtue of Article 7 [parties’ choice], 8 [absence of parties’ choice], 9 [auction] governs in particular: (a) interpretation of the contract; (b) the rights and obligations of the parties and performance of the contract; (c) the time at which the buyer becomes entitled to the products, fruits and income deriving from the goods; (d) the time from which the buyer bears the risk with respect to the goods; (e) the validity and effect as between the parties of clauses reserving titles to the goods; (f) the consequences of non-performance of the contract, including the categories of loss for which compensation may be recovered, but without prejudice to the procedural law of the forum; (g) the various ways of extinguishing obligations, as well as prescription and limitations of actions; (h) the consequences of nullity and invalidity of the contract.
3. Freedom of Choice of Law by the Parties

Both Hague Conventions gave the principle of the autonomy of the parties maximum extension. Therefore, these Conventions left the parties absolute freedom of choice of the applicable law of any legal system, thus excluding other sources of law as lex mercatoria. The parties are allowed to choose any law they believe to be the best one for their agreement; their choice is not to be restricted to one of the laws of the contacting-parties, the one of the place of performance or the one of the habitual residence. None of these connections is required.

Moreover, contrasting with the Hague Convention of 1955, Article 7(1) of the Hague Convention of 1985 allows parties to apply a law only to a limited party of the contract, and Article 7(2) allows the parties to agree anytime to change the applicable law the whole contract or any part of it. Renvoi is excluded in both Hague Conventions.

There are, however, some limits to freedom of choice of law. On the one hand, both the Hague Conventions provide for the application of mandatory rules of the chosen

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230 Article 15 of the Hague of 1985 states that the law applicable is "the law in force in a state other than its choice of law rules." Hague Convention of 1985, supra note 167, at art. 15. In addition, Article 7 allowing parties freedom of choice refers to "the law chosen by the parties." Hague Convention of 1985, supra note 167, at art. 7. Therefore, Article 15 not only excludes renvoi but at the same time clarifies that the law is a law of a state. Among the delegates were opposing opinions; however, one of the reportes, Prof. Von Mehren, asserted that the question of how to interpret Article 15 was left open. That is to say that the answer was left to judges. See Hague Conference on private International Law/Conférence de La Haye sur le droit international privé, Extraordinary Session: Sales/Session extraordinaire: Vente, October 1985, Commission I, Minutes No. 12, para. 70 (short form: Act. Doc. La Hague)and Pelichet, supra note 7, at 178-181.

231 Pelichet, supra note 7, at 52-3.

232 Id. at 199.

233 For the Hague of 1985 there is the specific provision of Article 15, for the Hague of 1955 there was express agreement among delegates as referred by the Rapport of Julliot de la Morandot, Doc. 7, Session 72.
law. On the other hand, judges can disregard the law chosen by the parties whenever it is contrary to the mandatory rules of the forum or against its public policy.

A different approach, however, was followed for the recognition of an implied choice of law made by the parties. Article 2(2) of the Hague Convention of 1955 requires an express choice of law or, alternatively, an implied choice of law as "unambiguously result[ing] from the provisions of the contract." This strict criteria for the recognition of the implied choice of law was meant to support the general rule which provides in absence of parties’ choice of law the application of seller’s law. In order to restrict the court’s application of presumption recognizing implied choice, the Convention’s drafters excluded an implied choice of law when there is a forum choice which would normally imply it. The result is that the Hague Convention of 1955 too heavily restrics a presumed intention of the parties "to those cases in which the choice of law was beyond any doubt."

Article 7(1) of the Hague Convention of 1985 follows a different approach in recognizing implied choice of law when "clearly demonstrated by the terms of the contract

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234 Lando, supra note 212, at 161-2.

235 For the Hague of 1985 Articles 17 (mandatory rules) and 18 (public policy), see also Pelichet, supra note 5, at 181-193; for the Hague of 1955 article 6 (public policy) and the Rapport of 1931 of Julliot de la Morandiere, supra note 197, which affirms that when parties have chosen a law with the purpose to avoid mandatory rules of the forum, a judge can establish fraude a la loi and not apply the chosen law if against ordre publique.

236 See Rapport présenté par Julliot de la Morandière: Doc. La Haye 7. Sess. 5-29 (23f).

237 Hague Convention of 1955, supra note 166, at art.1(3), states that "[t]he mere declaration of the parties, relative to the application of the law or the competence of a judge or arbitrator, shall not be sufficient to confer upon a sale the international character provided for in the first paragraph."


239 Lando, supra note 212, at 165.
and conduct of the parties, viewed in their entirety.” Thus, judges are allowed to ascertain the existence of a genuine implied choice of law by the parties.\textsuperscript{240}

As a result, under Article 7(1) of the Hague Convention of 1985, a choice of law by a forum or by an arbitration tribunal can lead under certain circumstances to the implied choice of law of that forum\textsuperscript{241} Anyway, the law chosen by the parties has to be intended as “the law in force in a State other than its choice of law rules”, thus excluding the possibility of renvoi.\textsuperscript{242} The law chosen by the parties in both conventions governs the contract.

4. Criteria Used to Determine the Applicable Law in the Absence of the Parties’ Choice of Law

\textbf{Introduction and General Framework}

Today, many international contracts contain a choice of law clause, solving the problem of finding the applicable law. However, sometimes a contract does not provide for such a clause. Among the reasons for this occurrence are: the parties simply forget about it; or they consider that the applicable norms available at a relevant forum or international convention will lead to the application of the law which is impliedly wanted; or again the seller sometimes prefers to avoid the issue of the applicable law for fear of risking the failure of the negotiation due to the opposition of the buyer on a certain choice of law.\textsuperscript{243}

\textsuperscript{240} Commission I, Minutes No. 5, paras. 1-76. This solution of compromise seems to be the same adopted by the Rome Convention Article 3(1), even if the wording is different. Under Article 3(1) of the Rome Convention, an implied choice of law is recognized when “demonstrated with reasonable certainty by terms of the contract or the circumstances of the case.” \textit{See also} Lando, \textit{supra} note 212, at 162.


\textsuperscript{242} Hague Convention of 1985, supra note 167, at art.15.

\textsuperscript{243} See Observations d’Allemagne \textit{supra} note 217.
Both Hague Conventions in this situation provide for the same main rule: the law of the seller’s place of business must be applied to the sale of goods transaction.\textsuperscript{244}

The reasons for preferring the law of the seller instead of the law of the buyer are very well summarized by Lando,\textsuperscript{245} explaining that:

The application of the seller’s law rests on the assumption that the law of that party whose obligations are more complex and therefore more extensively regulated by law should be chosen and that the seller’s obligations are more complex than those of the buyer. A reason for applying the seller’s law is that mass bargaining, like mass production, brings down the cost and the price. The seller must calculate expenditures and risks on the basis of a multitude of contracts, and his calculations are made safer if all these are governed by the same law. Moreover, the seller’s place of business is the real place of performance of his contracts; it is here that the most of his contracts are prepared, calculated, decided upon and performed. Some transport clauses, such as “delivered (duty paid)” or “ex ship”, may locate the technical place of performance in another state, but the centre of the real obligations of the seller remains at his principal place of business.

The above mentioned rule is subject to only two exceptions under the 1955 Hague Convention. The first is provided by Article 3(2), which states that “a sale shall be governed by the domestic law of the country in which the purchaser has his habitual residence, or in which he has the establishment that has given the order, if the order has been received in such country, whether by the vendor or by his representative, agent or commercial traveler.” The second is provided by Article 3(3) “[i]n case of a sale at an exchange or at public auction, the sale shall be governed by the domestic law of the

\textsuperscript{244} Hague Convention of 1955, supra note 166, at art 3(1), states that “a sale shall be governed by the domestic law of the country in which the vendor has his habitual residence [or establishment] at the time when he receives the order;” Article 8(1) of the 1985 Hague Convention states likewise that “the contract is governed by the law of the State where the seller has his place of business at the time of the conclusion of the contract.” Hague Convention of 1985, supra note 167, at art 8(1).

\textsuperscript{245} Lando, supra note 241, at 68
country in which the exchange is situated or the auction takes place.” These rules must be strictly applied with no exceptions (i.e., hard and fast rules purpose again).246

The latter exception is reasonably justified by the fact that it is safe and simple for both parties to apply the rules of *lex loci* when auction or commodity exchange occurs. The other exception is certainly reasonable when the *lex loci* is applied because of the strong connection of the seller or his agent with the buyer’s place which underlies the preference/importance of the buyer. In other situations, however, this exception does not seem to be reasonable, when there is no actual contact between seller and buyer at the place of the latter, such as when the buyer answering the seller’s solicitation concludes a sale transaction via mail or fax with an agent of the seller in the buyer’s country.247 In these cases, the Convention shows limits caused by the hard and fast approach.

As to the set of exceptions of the Hague Convention of 1985, one must immediately point out a radical change of approach with respect to the Hague Convention of 1955. As a matter of fact, the exceptions are “so extensive that, for all practical purposes, they nearly dismantle the basic principle of reference to the law of the seller’s state.”248 This has resulted from the so called center-of-gravity approach, which applies the criteria of the closest connection that gives the judge the power to apply the buyer’s law after an evaluation of all the circumstances of the business relation.249 This approach was an attempt to give more flexibility to the strict regime of the Hague of 1955 but has caused unpredictability of results, as will be explained in the next paragraphs.

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246 As already explained, they are referred to as hard and fast rules.


249 This was also the approach of the Rome Convention. However, as we will see in the following paragraphs, the structure of the Rome Convention is less complex and more easy to apply than the one of the Hague. As a matter of fact, it is significant that the Inter-American Convention, which is the most recent Convention on the applicable law, follows the structure of the Rome Convention and not the one of the Hague of 1985.
Article 8(2) of the Hague Convention of 1985 provides for a first set of exceptions:

The contract is governed by the law of the State where the buyer has his place of business at the time of the conclusion of the contract, if -
(a) negotiations were conducted, and the contract concluded by and in presence of the parties, in that state; or
(b) the contract provides expressly that the seller must perform his obligation to deliver the goods in that state; or
(c) the contract was concluded on terms determined mainly by the buyer and in response to an invitation directed by the buyer to persons invited to bid (a call for tender).

These three exceptions, provided by Article 8(2) support the economic interest of the buyers and were supported by many developing countries as a way to reduce the presumed strong bargaining power of developed countries. The rationale of these exceptions is that whenever “the seller enters into the buyer sphere of interest and takes steps in initiations, negotiation, and finalization of the transaction in the buyer’s state, such actions would shift the transaction’s center of gravity to the buyer’s state and would justify the application of the law of the buyer’s state.”

A fourth exception was, therefore, approved to reduce the imbalance on the side of developed countries. As a matter of fact, Article 8(3) of the Hague Convention of 1985 contains a general escape clause which allows a derogation from Articles 8 (1-2). It provides that:

By way of exception, where, in the light of the circumstances as a whole, for instance any business relations between the parties, the contract is manifestly more closely connected with a law which is not the law which would otherwise be applicable to the contract under paragraphs 1 or 2 of this Article, the contract is governed by that other law.

This provision was supported by the United States followed by other common law nations where judges within their discretionary powers are called to balance the circumstances of a case more flexibly than countries of civil law tradition. Moreover, there

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250 Hague Convention minutes No.7: Intervention No. 67.
251 Gabor, supra note 35, at 715.
was a need to balance in some ways the provisions of Articles 8(2) that were felt to be in favor of developing countries.252

Article 8(3), however, does not always apply. It does not apply when “at the time of the conclusion of the contract, the seller and the buyer have their places of business in States having made the reservation under Article 21(1)” to the application of Article 8(3). Moreover, Article 8(3) does not apply “in respect of the issues regulated in the United Nations Convention on Contracts for the international sale of goods...where at the time of the conclusion of the contract, the seller and the buyer have their places of business in different states both of which are parties of the Convention.”253

The following paragraph deals specifically with the problems caused by Article 8(2) and 8(3) exceptions.

Further Analysis of the Different Criteria of Article 8 of the Hague Convention of 1985 and Their Combination

The first exception to the application of the general rule of the law of the seller is Article 8(2)(a), which requires two elements for the law of the buyer to be applicable. The first element is the actual presence of the parties who carried on negotiations in the buyer’s state; at least some of these negotiations have to occur in the state of the buyer, but not all of them.254 The second element requires that the contract be concluded in the buyer’s state; meaning whenever the parties can conclude a transaction in the same state, even from different places and by mail or fax.

In contrast to Article 3(2) of the Hague Convention of 1955, Article 8(2) of the Hague Convention of 1985 requires both the above mentioned elements; therefore, Article 8(2) of the Hague Convention of 1985 is not as quickly applicable as “the order ... received


253 This is the situation provided in Article 1(a) of CISG. CISG, supra note 1, at art.1(a).

254 Commission I, Minutes No.8, paras. 6 and 35-9.
in such country [*i.e., buyer's habitual residence or establishment*]" of Article 3(2) of the Hague Convention of 1955.  

Article 8(2)(a) also applies to nations having a federal structure, in this situation, under Article 19, "any reference to the law of that State is to be construed as referring to the law in force in the territorial unit in question." This provision may, however create interpretative problems when applied in a situation where a foreign seller based in one of the units of a federal states deals with buyers from others units. On the one hand, there is the argument that the law of the seller's foreign country should be applied to contracts not negotiated and concluded in the purchasers' unit. On the other hand, one can argue in favor of applying the law of the buyer's from units when similar to the law of the seller's unit, a situation which happens when there are similar legal systems in a federal state.

Article 8(2)(b), the second exception to the general rule, provides for the application of the buyer's law when there is a specific clause in the contract, such as a transport clause, which expressly binds the seller to perform his obligation to deliver the goods in the buyer's country. This provision has produced much criticism because it makes the buyer's law applicable simply when characteristic performance of the buyer (i.e., the delivery of the goods) occurs in the buyer's country, thus ignoring the general rationale of the center-of-gravity of the transaction which may still lie in the country of the seller. As a matter of fact, despite the seller's obligation to perform in the buyer's country, the seller still bears and performs most of his obligations in his own country and under his law. Moreover, the seller's obligation to bear the costs and the risks of the

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255 Hague Convention of 1955, supra note 166, at art.3(2).


257 Lando, supra note 241, at 70-7. See also Commission I, No.15, para.87 (issue not discussed).

258 Id. at 72-3.
transportation of the goods is not, as shown by general international trade practice, the most relevant part of the seller’s obligations. The impetus for this unfortunate criteria, as already mentioned above, lies with developing countries desire to defend their weak economic position; as a result, interest in the ratification of the Convention by all developed countries has strongly decreased.

The third exception of Article 8(2)(c) refers to the situation in which the buyer, following his own point of view, determines a substantial part of the terms of the contract. It would seem reasonable, therefore, that that the overall contract will be executed and interpreted with the domestic law of the buyer kept in mind. As a consequence, this exception does not pose any interpretative problem and likewise does not negatively affect the ratification of the Convention.

The last and most troublesome is the closer connection exception under Article 8(3) of the Hague Convention of 1985, which is subject to reservation under Article 21(1)(b), and was not present in the Hague Convention of 1955.

As a matter of fact, depending on whether the reservation has been exercised by a state, one of two substantially different regimes applies. When a state has opted for the reservation, a hard and fast set of rules will apply: Article 8(1), which provides for the general criteria of the law of the buyer, and Article 8(2) which provides for easy applicable exceptions. When, on the other hand, a state does not opt for the reservation, judges of these countries will apply the closest connection criteria in addition to the exceptions under Article 8(2). Unfortunately, the Convention, does not provide a list of examples or

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259 Id.; see also Plenary Session, minutes No.5, para. 13 (where most of the delegates of Western countries rejected article 8(2)(b) rule).

260 Gabor, supra note 27, at 716. See also the Algerian proposal, which ended in the provision of Article 8(2)(b), that improperly used the concept of “characteristic performance of the seller” which logically leads, as in the Rome Convention, to the application of the law of the seller’s, in Hague Conventions minutes No. 7: Nos.20-21 and 27.

261 Lando, supra note 241, at 74.
rebuttable presumptions for framing and giving uniformity to the application of this exception.\textsuperscript{262} Therefore, courts' application of the closest connection criteria "in order to avoid inconvenience and injustice...[could likely] lead to the creation of judge made rules more important than those laid down in Article 8(2)" or at least could create anomalies in the interpretations of the exceptions of Article 8(2).\textsuperscript{263}

In this situation, judges have to apply an exception to the exception of the main rule and the reservation causes the application of different regimes among the contracting-states; it clashes with the main goal of the Convention which is predictability and justice in the individual case, and at the same time it has reduced interest in the ratification of the convention.

C. THE ROME AND THE MEXICO CONVENTIONS

\textbf{Introduction}

The Rome Convention, signed on 19 June 1980,\textsuperscript{264} on the applicable law to contractual obligations, applies within the European Union. Its draft proposal was made in 1967 by the representatives of the governments of Belgium, Luxembourg and The Netherlands and was subsequently discussed by the European Community Commission and government experts in February 1969.\textsuperscript{265} The main reason for a Convention was the need for uniform set of rules on the applicable law for all the Member States, thus enhancing the level of certainty of legal relations within the European market. Despite the fact that this rationale is to be found in many provisions of the European Community Treaty\textsuperscript{266} and in particular Articles 100 and 220,\textsuperscript{267} governmental experts and the

\textsuperscript{262} Gabor, supra note 35, at 719.

\textsuperscript{263} Lando, supra note 241, at 74.

\textsuperscript{264} Convention on the Law Applicable to Contractual Obligations, supra note 105.

\textsuperscript{265} Giuliano, supra note 171, at 4-6.

Commission did not formally apply these provisions in order to connect the draft of this Convention with the Treaty.268 However, "it was the unanimous view that the proposed harmonization, without being specifically connected with the provisions...of the EEC Treaty, would be the natural sequel to"269 the EC Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial matters of 27 September 1968.270

The Inter-American Convention on the Law Applicable to International Contracts of 1994 is the result of several years of work promoted by the Organization of the American States (OAS). The purpose of a Convention on choice of law rules for the Americas was initially considered at the Second OAS Specialized Conference on Private International Law (CIDIP-II), held in Montevideo in 1979, but the project was set aside until the Fourth Conference held in 1989 in the same place, where the basic principles for a future draft were prepared. Later, these principles were reviewed, put in a draft Convention by the Inter-American Juridical Committee (IAJC), and finally amended in Tucson, Arizona, at the National Law Center for Inter-American Free Trade in 1993. Finally, at the Fifth Inter-American Specialized Conference on Private International Law (CIDIP-V), held March 14-18, 1994 in Mexico City, the final draft was approved in plenary session by the United States, Canada and seventeen other Latin American States.

267 Article 100 of the EC Treaty provides that: [t]he Council shall, acting on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market. Article 220 of the EC Treaty provides that: member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals: ...- the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards.

268 Lando, supra note 196, at 19.

269 See Giuliano, supra note 171, at 5 (Favourable attitude of Member States to the search for uniform rules of conflict).

The Mexico Convention has been ratified by Mexico and Venezuela and, according to Article 28(1), has now entered into force.\textsuperscript{271}

The Mexico Convention is of major importance because it constitutes the latest development in the matter of Conventions on the applicable law. As we will see, the provisions concerning parties' freedom of choice of the Mexico Convention follow the model of the Rome Convention but other provisions on the law applicable in absence of parties' choice differ greatly, introducing very interesting innovations.\textsuperscript{272}

Both the Rome and the Mexico Conventions\textsuperscript{273} have in common participation in their drafts by delegations coming of both civil and common law countries and the goal of legal certainty in the contexts of a regional integration.\textsuperscript{274} In Europe it is the EEC; in the Americas it is the NAFTA and MERCOSUR, which need to protect international trade and promote market integration through support by international conventions.\textsuperscript{275} All the countries involved in these two Conventions preferred to proceed with unification of choice of law rules because it was more practical and easier than pursuing the goal of substantive uniformity in the international context, which is difficult to achieve and time-consuming. However, this did not mean that these countries had refused to pursue uniformity through uniform substantive law. As a matter of fact, most countries involved in the Rome and in the Mexico Conventions are parties of the CISG: actually, they have

\textsuperscript{271} Mexico Convention, supra note 168, at art. 28(1) provide that "[t]his Convention shall enter into force for the ratifying States on the thirtieth day following the date of deposit of the second instrument of ratification."


\textsuperscript{273} Mexico Convention, \textit{supra} note 168.

\textsuperscript{274} It is interesting to note that the Rome Convention does not recall any provision of the EEC Treaty (i.e., articles 100 and 220), however, it has worked well in connection of the Brussel Convention on jurisdiction and the enforcement of judgements in civil and commercial matters of 27 September of 1968 (O.J.E.C. 90/C 189/02).

\textsuperscript{275} Juenger, \textit{supra} note 202, at 382.
preferred CISG to their domestic laws, even if they are at the same time parties of
Conventions on the applicable law.276

As a matter of fact, we have to bear in mind that, unlike the two Hague
Conventions, both the Rome and the Mexico Conventions deal not only with the law
applicable to the international sale of goods, but with a large range of contractual
obligations. Of course the “mercantile contract par excellence,”277 “the pillar of the entire
system of commercial relations,”278 is part of these conventions which provide for the
applicable law to the international sale of goods.279

276 See Lando, supra note 196, at 20.


279 Article 1(1) of the Rome Convention is the general provision dealing with “The Scope Of the
Convention,” stating that “[t]he rules of the Convention shall apply to all contractual obligations [i.e., despite
the kind of transaction unless expressly excluded or differently ruled] in any situation involving a choice
between the laws of different countries”; the same is provided by art.1(1) of the Mexico Convention stating that
“[t]his Convention shall determine the law applicable to international contracts [i.e., all kinds of contracts].”
There are, therefore, no limits to the application of transactions falling within the scope of CISG in the Rome
Convention and the Mexico Convention. In addition, the scope of the applicable law confirms what we have
just said. Art.1(2) of the Rome Convention sets a series of limitations which does not involve any type of sale
of goods transaction except in letter (c) which excludes the application of the convention to “obligations arising
under bills of exchange, cheques, promissory notes and other negotiable instruments to the extent that the
obligations under such other negotiable instruments arise out of their negotiable character” and (d) “arbitration
agreement and agreements on choice of court” (similarly in the Mexico Convention art.5(e),(d),(e) for
obligations deriving from securities or securities transactions or agreements on the parties concerning
arbitration or selection of the forum), but these exclusions are not in contrast with CISG scope of application.
Moreover art.1(2)(a) of the Rome Convention excludes the application of the Convention for “questions
involving the status or the legal capacity of natural persons, without prejudice of Article 11” (id. art. 5(1)(a) of
the Mexico Article 11) Art.11 of the Rome Convention states that “In a contract concluded between persons
who are in the same country, a natural person who would have the capacity under the law of that country may
invoke his incapacity at the time of the conclusion of the contract or was not aware thereof as a result of
negligence.” The law applicable to the contract by virtue of parties’ choice as a result of the criteria applied in
absence of choice of law by the parties shall govern under art.10(1) of the Rome Convention “(a)
interpretation; (b) performance; (c) within the limits of the powers conferred on the court by its procedural law,
the consequences of breach, including the assessment of damages in so far as it is governed by the rules of law;
(d) the various ways of extinguishing obligations, and prescription and limitation of actions; (e) the
consequences of nullity of the contract.” (id. art.14 of the Mexico Convention which however adds invalidity to
nullity). Also these latter provision are compatible with CISG. See Rome Convention, supra note 105; Mexico
Convention, supra note 168.
In the following paragraphs, we examine the two main issues of the Rome and Mexico Conventions: the parties’ freedom to choose the applicable law and the criteria applied by the two Conventions in order to find the applicable law in absence of the parties’ choice. Similarities and differences between the two conventions will be set forth. In this analysis, only the provisions which are relevant for the international sale of goods will be taken into account.

**Rome Convention Choice of Law**

Article 3 of the Rome Convention recognizes the full freedom of choice of the applicable law for parties to a business transaction. The choice of law does not have to be justified by any kind of link with the contract or the parties. Moreover, the choice can be expressed or implied if “demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case,” which means that it is assumed that a choice of law can be inferred from the choice of forum. In addition, the parties may select different laws for different parts of the same contract and at any time “subject the contract to a law other than the one which previously governed it.”

There are, however, some limitations to the parties’ freedom to select the applicable law of their contract. The first limitation is provided by Article 16, when the applicable law is “manifestly incompatible with the public policy (“ordre public”) of the forum. The second limitation is provided by Article 7(2) when the applicable law is

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280 Rome Convention, supra note 105, at art. 1(1). It can be from the use of a language or concept typical of a certain legal system, or from a forum choice.

281 Lando, supra note 212, at 166. In the 1955 Hague Convention, this issue of implied choice is treated in a restrictive way, in the Hague of 1985, in a way, despite the different wording which seems to be the same as the one in the Rome Convention.

282 Article 1(1) of the Rome Convention. Judges and arbitrator are, therefore, free to find an implied choice.

283 Rome Convention, supra note 105, at art.1(1). For instance even at trial, and notwithstanding the fact that the outcomes of the contracts would lead to a different applicable law. Article 7(2) of the Hague of 1985 as the same provision, on the contrary the Hague of 1955 does not allow it. Hague Convention of 1985, supra note 167, at art.7(2).
contrary to “the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract.” In addition, a judge or an arbitrator may take into account the mandatory rules with which the transaction has a close connection: “[i]n considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.”

A last limitation is provided by Article 3(3), whose purpose is to prevent evasion when the parties coming from the same country have chosen a foreign law in order to contract out mandatory laws of their own country, otherwise applicable because the contract does not have significant foreign elements. As a matter of fact, the Rome Convention is applicable “in any situation involving a choice between the laws of different countries.” Therefore, not only to international contracts but also to internal (“domestic”) contracts, such as when “a party reference to foreign law gives rise to a choice between the law of the contract’s home country and the chosen law,” can be considered as international when there is some foreign element.

A later limitation on parties’ choice of law is provided by Article 1(1), which states that the rules of the Convention shall apply “to any contractual obligation in any situation involving a choice between the laws of different countries,” but limiting the choice of law

284 Also called lois de police or rules of immediate application. See Junger, supra note 167, at 81-82, 181-82, 187-88.

285 Rome Convention, supra note 105, at art.7(1).

286 Lando, supra note 196, at 40.

287 Rome Convention, supra note 105, at art.1(1).

288 Lando, supra note 212, at 162. See also Rep. 18, Column 2, which shows the intent of the drafters to avoid this occurrence. The Hague Convention of 1955, restricts this scope to only international contracts (see articles 1(1), 1(4) and 2; in the Hague of 1985 an intermediate line between the Hague of 1955 and the Rome is followed in art.1 when it states that the convention applies “in all other cases involving a choice between the laws of different States, unless such choice arises solely from the stipulation by the parties as to the applicable law, even if accompanied by a choice of court or arbitration.” Rome Convention, supra note 105, at art.1.
only to the positive law of a state or a nation excluding other sources like UNIDROIT Principles or the lex mercatoria.

Juenger criticizes this limited point of view of the Rome Convention asserting that:

This is a strange positivistic feature, a throwback to an earlier age, is at odds with current commercial and juridical practice. Since the highest courts of several countries have begun to recognize, directly or indirectly, the parties’ power to select rules that are not part of any state or national legal system, such as the general principle of common law, the Rome Convention’s restrictive feature has become an anachronism.

**Rome Convention: Rules Leading to the Applicable Law in Absence of Parties’ Choice**

Article 4 of the EC Convention on the law applicable to contractual obligation (Rome Convention) combines the closer connection criterion with a general presumption based on concept of characteristic performance/obligation. In bilateral contracts the performance of one party consisting in the payment of money is not considered the characteristic obligation of the contract. By contrast, the characteristic performance of the contract is the one for which the payment is due: in a sale of goods transaction the characteristic performance is “the delivery of goods...[which] usually constitutes the center of gravity and the socio-economic function of the contractual transaction.” As a consequence, the law of the buyer is generally the applicable law.

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289 Lando, *supra* note 196, at 23.


293 *See* Chapter II.A. Introduction. The concept of characteristic obligation is used in the contest of an international convention for the first time by Rome Convention.

294 Giuliano, *supra* note 171, at 20. (Depending on the type of contract).
Some commentators have pointed out that choice of law rules of the Rome Convention applying in the absence of valid choice of law by the parties are not as clear and of direct application as the rules concerning the parties’ express choice of law.\footnote{Juenger, supra note 202, at 382.} However, they are less complex than the rules of the Hague Convention of 1985, which sets a general rule of the law of the buyer’s habitual residence, certain exceptions leading to the law of the buyer only in strictly provided circumstances, and finally by a general escape clause as a derogation from rule an exceptions allowing courts and arbitral tribunals to apply the criterion of the “closer connection.”\footnote{Lando, supra note 212, at 174.}

In the Rome Convention Article 4(1) “the European drafters emulated the English proper law approach and its American analogue, the ‘most significant relationship.’”\footnote{Juenger, supra note 202, at 384 and see also Juenger, supra note 167, at 56-58, 96-98, 128-31, 186-188.} In order to determine the applicable law, they used “the closer connection” between the contract and a country with its own domestic law that, therefore, becomes the applicable law.\footnote{Rome Convention, supra note 105, at art.4(1).} In addition, Article 4(2) of the Rome Convention ensures a certain degree of predictability and certainty providing a decisive \textit{prima facie} presumption as a guideline for ordinary non-problematic cases\footnote{Lando, supra note 212, at 57.} identifying the applicable law for business transaction dealing with the international sale of goods with the law of the state of the supplier (\textit{i.e.}, seller), where he has “his habitual residence, or in case of a body corporate or unincorporate, its central administration.”\footnote{Rome Convention, supra note 105, at art.(2). Other presumptions: Article 4(3) of the Rome Convention in matters regarding immovable property provides for a presumption in favor of the lex situs, and art.4(4) of the Rome Convention for carriage of goods provides for a presumption in favour of the carrier place of business if it is at the same time the country of loading or unloading.} In this way, “[t]he submission of the
contract...to the law appropriate to the characteristic performance defines the connecting factor of the contract from the inside, and not from the outside by elements unrelated to the essence of the obligation such as the nationality of the contracting parties or the place where the contract was concluded."301

This reasoning, however, has been criticized by many legal writers because what is called "presumption" by Article 4(2) of the Rome Convention leaves no room for the application of what should be the rule under Article 4(1): "the contract shall be governed by the law of the country with which is most closely connected." A first critique concerns the characteristic performance doctrine which wrongly relies in "the fictional pretension that a [bilateral] contract producing two main obligations of different location has the only one place of performance."302 A second critique concerns the supply of goods, that has been defined as the most characteristic obligation under the official interpretation of Article 4(2) of the Rome Convention, and which "instead of divining a contract true centre of gravity...artificially inflates the weight of a single connecting factor."303 Therefore, the characteristic obligation approach would be against the more flexible asessment of the most closely connected country based on a plurality of connecting factors provided by the general rule of Article 4(1) of the Rome Convention. Moreover, it has been noticed that "the characteristic performance test can be faulted from a policy point of view for capriciously conferring a choice-of-law privilege upon enterprises that engage in a consistent course of conduct to supply goods or services internationally."304 As a matter of fact, these international suppliers are well equipped to ascertain the risk involved in

301 Giuliano, supra note 171, at 20.


304 Juenger, supra note 202, at 385.
international trade, generally more so that their irregular customers. Finally, only whenever the characteristic performance “cannot be determined,” the general rule of the closest connection applies again: critics of the specific performance assert that the presumption is used improperly because it does not leave enough room for a more flexible regime of exception whenever justice requires. This is probably true in the case of sale of goods where there is not much room left for flexibility; the same is not true in cooperation contracts like barters or joint ventures where there is not a characteristic performance, or it is really difficult to find one and the characteristic performance presumption does not apply.

The Mexico Convention: Choice of Law

As for the principle of the autonomy of the parties, the Mexico Convention follows the model of the Rome Convention. As a matter of fact, Article 7(1) of the Mexico Convention provides that “[T]he contract shall be governed by the law chosen by the parties,” and like Article 3(1) of the Rome Convention which allows contractual depecage, Article 7(1) of the Mexico Convention states that a “selection may relate to the entire contract or to a part of the same.” Like, Article 8 of the Mexico Convention, Article 3(2) of the Rome Convention allows the parties to agree at anytime that the contract “shall, in whole or in part, be subject to a law other than that to which was previously subject.” In addition, party autonomy is limited only “when it is manifestly contrary to the public order [i.e., public policy] of the forum or when contrary to the mandatory rules as provided by

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305 Id.; for an argument on the contrary see Lando quoted in II.B.3.1.

306 Art. 4(5) of the Rome Convention which states: “[p]aragraph 2 shall not apply if the characteristic performance cannot be determined, and the presumptions in paragraphs 2, 3 and 4 shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country.” Rome Convention, supra note 105, at art.4(5).

307 Lando, supra note 196, at 23 and 64.
Article 11 of the Mexico Convention.\textsuperscript{308} Lastly, the model of Article 3(1) of the Rome Convention is also followed by Article 7(1) of the Mexico Convention when it recognizes that the choice of law can either be expressed or implied by "the parties’ behavior and...the clauses of the contract, considered as a whole," thus leaving to courts and arbitral tribunals enough discretion to determine the occurrence of the implied choice of law. However, Article 7(2) of the Mexico Convention provides that the choice "of a certain forum by the parties does not necessary entail selection of the applicable law," thus impliedly recognizing what is not implied in the Rome Convention: "[T]ough phrased negatively, this provision incorporates the English presumption \textit{qui elegit judicem elegit jus}, which allows the forum to apply its own law, helpfully obviating the expense and delay that an inquiry into foreign law inevitably entails."\textsuperscript{309}

\textbf{Mexico Convention: Rules Leading to the Applicable Law Absence of the Parties’ Choice}

The European model of the Rome Convention is not followed by the Mexico Convention in matters regarding the applicable law in absence of parties’ choice. As a matter of fact, there are some important differences as compared with all previous choice of law solutions adopted by other international conventions.

Like the Rome Convention the Mexico Convention, adopts the approach of the closest connection as general criterion and in Article 9(1) provides that "[i]f the parties have not selected the applicable law, or if their election proves ineffective, the contract shall be governed by the law of the State which has the closest ties." However, the Mexico Convention, unlike the Rome Convention, does not provide for any presumption, like the

\textsuperscript{308} Article 11 of the Mexico Convention states that "[n]otwithstanding the provisions of the preceding articles, the provisions of the law of the forum shall necessarily be applied when they are mandatory requirements. It shall be up to the forum to decide when it applies the mandatory provisions of the law of another State with which the contract has the closest ties." Mexico Convention, \textit{supra} note 168, at art.11.

\textsuperscript{309} Juenger, \textit{supra} note 202, at 388.
characteristic performance/obligation criteria, leaving to judges and arbitrators extensive power of evaluation of the elements leading to the closest ties.\textsuperscript{310} This is clearly evinced by the provision in Article 9(2) of the Mexico Convention which states that the "Court will take into account all objective and subjective elements of the contract to determine the law of the State with which has the closest ties."\textsuperscript{311} There is, however, also the different opinion of those experts who are certain that even in applying Article 9(2) of the Mexico Convention the "judges of many jurisdictions will take into account the law of the state where is the establishment of the party which has to fulfill the characteristic performance of the contract...following therefore...the route of the Rome Convention."\textsuperscript{312}

The lack of presumptions, considered in itself, frees decision makers in interpreting parties' intentions and other objective elements providing for flexibility, but it also has the negative effect of lack of predictability. On the other hand, the drafters of the Convention found a counterbalance in introducing an innovative novelty, compared to the previous Conventions: the decision makers, in order to find the applicable law, "shall [also] take into account the general principles of international commercial law recognized by international organizations."\textsuperscript{313}

The advantage of this combination is that courts and arbitral tribunals should "dispense with a tedious investigation into subtleties of conflicting laws and to rely instead on rules laid down in the UNIDROIT principles,"\textsuperscript{314} INCOTERMS, and the revised

\textsuperscript{310} Juenger, \textit{supra} note 303, at 304 -5.

\textsuperscript{311} Bruman, \textit{supra} note 272, at 381.

\textsuperscript{312} Antonio Baggiano, \textit{La Convention interamericane sur la loi applicable aux contracts internatinaux et les Principes d'UNIDROIT}, 2 U.L.R 219, 220 (1996) ("il n'est guère douteux qu'aux fins de déterminer la loi applicable au contrat à défaut de choix de parties, les juges ne manqueront pas de prendre en considération le droit de l'Etat de l'établissement du débiteur de la prestation caractéristique du contrat, suivant ainsi le chemin qui mène à Rome, c'est-à-dire la Convention de Rome sur la loi applicable aux obligations contractuelles").

\textsuperscript{313} Mexico Convention, \textit{supra} note 168, at art.9(2).

\textsuperscript{314} Juenger, \textit{supra} note 202, at 391.
Uniform Customs and Practice (UCP 500) of the International Chamber of Commerce.\textsuperscript{315} More significantly, the application of CISG has been considered by many authors as international widespread accepted rules applicable as general principles.\textsuperscript{316}

Moreover, Article 9(2), second sentence, "clarifies] that the parties are free to stipulate to the general principles of international commercial law," a choice that all the other conventions have not authorized.\textsuperscript{317}

This new approach of Article 9(2) of the Mexico Convention is confirmed and enhanced by the provision of Article 10 which endorses "customs and the principle of good faith and fair dealing helpfully under[lying] the importance of substantial justice that informs the UNIDROIT principles."\textsuperscript{318} Article 10 of the Mexico Convention states as follows: In addition to the provisions of the foregoing articles, the guidelines, customs, and principles of international commercial law, as well as commercial usage and generally accepted practices, shall apply in order to discharge the requirement of justice and equity in the particular case.

For the above mentioned reasons it can be said that the Mexico Convention constitutes a step ahead in the field of international conventions which try to provide for uniform rules on the applicable law. As a matter of fact, the Mexico Convention bases the determination of the applicable law on general principles of international commercial law; and in so doing, it moves further from the parochial point of view of the previous Conventions because it refers not only to criteria which come from national legal systems but also directly applies sources that deal with international trade and its evolution.\textsuperscript{319}

\textsuperscript{315} Bruman, supra note 272, at 381.

\textsuperscript{316} Id. (see note 36); Baggiano, supra note 312, at 226.

\textsuperscript{317} Juenger, supra note 202, at 391.

\textsuperscript{318} Id.

\textsuperscript{319} See Quintin Alfonsin, Regimen International de los contactos, 53, 61, 85-86 (1950); as referred by Junger supra note 254, at 390: "[h]e maintained that domestic legislation, conceived for local purposes, is inadequate as applied to extranational contractual relationships. According to Alfonsin, none of the existing
Juenger, as many other authors, supports this opinion affirming that:

The contracting parties are surely better off if their rights and obligations are determined by a modern, well thought out code that is sensitive to commercial practices and needs than by some local law that may fall short of international standards, be outdated and unfair. Entrepreneurs who fail to avail themselves of the opportunity to stipulate the law they wish to govern their agreement can hardly complain about the application of such a modern, functional set of contract rules. Beyond that, it is surely fairer to apply supranational standards than to privilege one party by granting it the benefit of its home state law.\textsuperscript{320}

\textsuperscript{320} Juenger, \textit{supra} note 202, at 392.
CHAPTER III
CONCLUSION

As we saw in great detail in Chapter I, CISG provides for a uniform substantive set of rules for the international sale of goods between parties which have their place of business in different contracting-states or when the forum’s conflict of law rules lead to the application of a contracting-state’s law. The great success of this Convention, already ratified in January 1998 by fifty-three countries from around the world, has clearly proved the need for relying on a common set of substantive rules independently drafted by an international organization, such as UNCITRAL, as the best way to promote international trade providing for certainty of legal relations. However, due to that CISG’s limited scope, there is a need for a different supporting law requiring the application of conflict of law rules of the forum. As a matter of fact, CISG deals only with the formation of the contract and with seller’s and the buyer’s rights and duties; CISG does not cover issues related to the validity of the

321 See CISG, supra note 1, at art.1(1)(a); see supra Chapter I.A.2.
322 See CISG, supra note 1, at art.1(1)(b); see supra Chapter I.A.3.
323 From the United Nations database on treaties, http://www.un.org, these are the CISG member countries: Argentina, Australia, Austria, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, Chile, China, Cuba, Czech Republic, Denmark, Ecuador, Egypt, Estonia, Finland, Georgia, Germany, Ghana, Greece, Guinea, Hungary, Iraq, Italy, Latvia, Lesotho, Lithuania, Luxembourg, Mexico, Mongolia, Netherlands, New Zealand, Norway, Poland, Republic of Moldova, Romania, Russian Federation, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Syrian Arab Republic, Uganda, Ukraine, United States of America, Uzbekistan, Venezuela, Yugoslavia, Zambia.
324 Diamond, supra note 161, at 308.
325 See CISG, supra note 1, at art.4; see supra Chapter I.B.4.
contract and the effect of the contract on the property in the goods.\textsuperscript{326} Not all goods are subject to CISG; some exclusions are commercial paper and investment securities, money, ships, aircraft, electricity, intellectual property rights.\textsuperscript{327} Also, many contracts are not considered as sale contracts under CISG, such as, consumer contracts, auctions, barters and countertrade, and conditional sales.\textsuperscript{328}

In order to avoid forum shopping, to prevent injustice and to prove certainty of results on the applicable law, a number of international conventions on uniform applicable law have been held since before World War II by groups of countries and international organizations.\textsuperscript{329} In this thesis, four international Conventions have been treated: the Hague Conventions of 1955 and 1985, the 1980 Rome Convention, and the 1994 Mexico Convention.

Contemporary use of CISG with these Conventions on the applicable law has proved to be compatible.\textsuperscript{330} As a matter of fact, CISG does not provide for rules on private international law; on the contrary, it refers to them whenever needed. Thus, there are no arguments against compatibility between CISG as a uniform set of substantive law and a Convention which uniformly sets conflict of law rules leading to an applicable supporting law. Of course, it would be better to avoid any problem of conflict of laws and apply a comprehensive set of uniform substantive rules for the international sale of goods;

\begin{flushleft}
\textsuperscript{326} See CISG, \textit{supra} note 1, at art.4(a-b); see \textit{supra} Chapter I.B.4.
\textsuperscript{327} See CISG, \textit{supra} note 1, at art.2; see \textit{supra} Chapter I.B.2.
\textsuperscript{328} \textit{Id.}
\textsuperscript{329} Whinship, \textit{supra} note 134, at 528-9.
\textsuperscript{330} \textit{Id.} at 532-34.
\end{flushleft}
however, the CISG is the best option available today, even if its scope of application is still limited.331

The Conventions on the applicable law treated in Chapter II and CISG have two very interesting relations. A first relation is the recognition of the principle of party autonomy, found in Article 6 of CISG in the parties' freedom to opt out partially or entirely from the Convention, and, in the opinion of some legal scholars, to opt in the Convention.332 Likewise, this principle is recognized by all the conventions on the applicable law, giving parties freedom to choose the applicable law, expressly or implied, for the whole contract or for only parts of it.333 Moreover, the choice of law, which was limited to the domestic law of a legal system in the 1955 and 1985 Hague Conventions,334 and in the 1980 Rome Convention,335 has been broadened in the Mexico Convention, allowing the choice of "the general principles of international commercial law recognized by international organizations."336 This new kind of provision would permit, in the opinion of many scholars, not only the choice of UNIDROIT principles, INCOTERMS, and Uniform Customs and Practice (UCP 500) of the International Chamber of Commerce, but also the direct application of CISG as general principles.337

331 Wilson, supra note 162, at 386.

332 See Chapter I.C.

333 Only in the 1955 Hague Convention are there limitations on the implied choice of law and only an applicable law can be chosen for the whole contract. This restrictive approach has been followed by the Hague of 1985 and the Rome and Mexico Conventions. See Chapter II. B.3, C.2 and 4.

334 See Chapter II.B.3.

335 See Chapter II.C.2.

336 Mexico Convention, supra note 168, at art. 9(2).

337 See for instance Bruman, supra note 272, at 381; Baggiano, supra note 312, at 226; Juenger, supra note 202, at 391.
This innovation of the Mexico Convention is a confirmation of a new trend which began in arbitration tribunals and has, for a long time, recognized the possibility of a choice of law which is not limited to a domestic legal system, but instead is enlarged to principles of commercial practice "freed from state interference."  

The Mexico Convention also contains another interesting relation with CISG. As a matter of fact, the Mexico Convention also applies "the general principles of international commercial law recognized by international organizations" as a criterion to determine the applicable law in absence of the parties' choice of law. Therefore, following the opinion of some legal writers who consider CISG as a set of "general principles of commercial law recognized by international organizations," CISG could be used as a criterion to find the applicable law of the parties. This new approach favors, therefore, the above mentioned idea of providing rules of international private law which try to take advantage of supranational sources and criteria coming directly from the international trade practice, instead of applying methods belonging to national systems.

The second part of this thesis focuses mainly on the results of the application of different criteria leading judges or arbitral tribunals to the determination of the applicable law of an international sale of goods contract. As a result of the excursus, we found that there has been an evolution in the use of criteria from the 1955 Hague Convention until the 1994 Mexico Convention.

In the Hague Convention of 1955, the general rule favored the seller's law, applying the law of the seller's place of business. The rationale for this option was that


339 Mexico Convention, supra note 168, at art.9(2).

340 See e.g. Bruman, supra note 272, at 381; Baggiano, supra note 312, at 226; Juenger, supra note 202, at 391.

341 See Hague Convention of 1955, supra note 166, at art.3(1); see supra Chapter II B.3.1.
the seller was the party with more complex obligations and more risks compared to the ones of the buyer, so that the objective factor of the seller’s place of business was adopted to connect the transaction with the seller’s law.\textsuperscript{342} Therefore, the exceptions leading to the application of the law of the buyer were limited to the situation in which the purchaser’s order was received in the country which is the buyer’s place of business\textsuperscript{343} and to a “sale at an exchange or at public auction”\textsuperscript{344} occurring in the buyer’s place of business. The aim of the drafters of this Convention was to realize a set of “hard and fast rules,” easily understandable by any businessman and with easy and absolutely certain results, setting a rule in favor of the buyer with almost no exceptions.\textsuperscript{345} As a matter of fact, this approach was strongly criticized because of lack of flexibility; for instance, there may be injustice if a sale contract is clearly more connected with the buyer than the seller and a decision maker can rarely apply the law of the buyer’s place of business for lack of available exceptions.\textsuperscript{346}

The Rome Convention, in order to avoid injustice for on the purchaser’s side, applies as a general rule the criterion of “closer connection,”\textsuperscript{347} which allows the decision maker to take into account many connecting factors, in order to determine the applicable law which shall be “the system of law with which the transaction has its closest and more real connection.”\textsuperscript{348} In other words, the Rome Convention does not provide a strict rule in favor of the buyer as in the 1955 Hague Convention. A rebuttable presumption based on

\textsuperscript{342} Lando, \textit{supra} note 241, at 66.

\textsuperscript{343} Hague Convention of 1955, \textit{supra} note 166, at art.3(2).

\textsuperscript{344} Hague Convention of 1955, \textit{supra} note 166, art.3(3).

\textsuperscript{345} See Chapter II.B.3.1.

\textsuperscript{346} \textit{Id}.

\textsuperscript{347} Rome Convention, \textit{supra} note 105, at 4(1).

\textsuperscript{348} Dicey, \textit{supra} note 183, at 474.; see Ch
the “characteristic obligation” of the transaction\(^{349}\) is, however, coupled with the “closer connection” criterion to avoid an excess of flexibility in the application the latter. Consequently, the applicable law is *prima facie* the law of the place of habitual residence or place of business of the party who performs the characteristic obligation.\(^{350}\) In case of the international sale of goods, it is the buyer’s law because the delivery of the goods, rather than the payment of money, is considered the characteristic obligation in a sale contract.\(^{351}\) The final result of the Rome Convention is, therefore, to provide for more flexibility than the 1955 Hague Convention, by providing a certain degree of certainty with the characteristic performance criterion, which sets up a rebuttable presumption applied in ordinary cases in favor of the law of the buyer.\(^{352}\)

The 1985 Hague Convention tries to revise the 1955 Hague Convention by proving a few more exceptions, such as applying the buyer’s law when negotiation and the conclusion of the contact occurred in the state where the buyer has its place of business,\(^{353}\) and when “the contract provides expressly that the seller must perform his obligation to deliver the goods in [the buyer’s state].”\(^{354}\) The closer connection is used not as a general rule (as it is in the Rome Convention), which is the law of the seller’s place of business of the 1955 Hague Convention, but instead as a general escape clause which allows a

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349 Rome Convention, *supra* note 105, at art 4(2); see *supra* Chapter II C.3.

350 Lando, *supra* note 196, at 57.


352 Lando, *supra* note 196, at 57.


derogation from the general rule and the set of strict exceptions. The result of applying all these criteria was a complex set of rules which at the same time went against the goal of predictability, ultimately causing the failure of the Hague Convention of 1985.

The Mexico Convention follows, like the Rome Convention, the closer connection criterion, although calling it "closest ties," thus confirming that this criterion is the best principal/general rule to determine the applicable law in absence of parties' choice and leaving decision makers ample power of discretion in determining the applicable law. However, this general principle, unlike the Rome Convention which provides a set of presumptions of the characteristic performance, is coupled with criteria contained in "the general principles of international commercial law recognized by international organizations." These principles are intended to function as objective general guidelines limiting, to a certain extent, the otherwise too broad discretion of judges, but at the same time avoiding the risk of unpredictability of legal relations referring to non-domestic sources directly connected with international trade, and at the same time avoiding the Rome Convention’s less flexible system of presumptions.

As regards the sale of goods, the general result of applying Mexico Convention 's criteria of the law of the buyer will not be facilitated by any kind of aprioristic rule or presumption, thus, the decision maker is left with the case by case evaluation of the closest

355 Hague Convention of 1985, supra note 167, at art.8(1).

356 Lando, supra note 241, at 75.

357 Mexico Convention, supra note 168, at art 9(1); see supra Chapter II.C.5.

358 See Chapter II.A.

359 Mexico Convention, supra note 168, at art.9(2).

360 See Chapter II.C.5.
connection under the “the general principles of international commercial law recognized by international organizations.”

A most interesting perspective for the near future would be to reconcile and harmonize the Mexico and Rome Conventions, through an interpretation based on the UNIDROIT principles. International regulation of conflict of law rules would be based on sources, principles and criteria coming directly from the practice of international trade and not from the domestic law of one or more legal system.

It perhaps should be the task of a new Hague Convention to combine the domestic approach of the Rome Convention with the Mexico Convention’s criteria of “the general principles of international commercial law recognized by international organizations.” The general rule in both Conventions would be the closer connection/closest ties criterion, and the second criteria could be found in the application of UNIDROIT principles as both “objective” criteria and applicable law, thereby eliminating both the Rome center-of-gravity “domestic” approach based on presumptions (like characteristic performance), and limiting the application international commercial law from the Mexico Convention to the UNIDROIT principles.

Such a Convention would provide for an set of rules applicable by all the countries of the world, with the possibility of being coupled with the widespread application of the CISG; such a Convention might create a actual uniform set of rules for the international sale of goods.

361 Article 9(2) of the Mexico Convention. Probably, here there is also the opinion that international suppliers are well equipped to ascertain the risk involved in the international trade, generally more so that their irregular customers. Mexico Convention, supra note 168, at art.9(2);

362 Baggiano, supra note 312, at 226.

363 Mexico Convention, supra note 168, at art.9(2).