PIL AND CISG: FRIENDS OR FOES?

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

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

* This paper was first published in INTERNATIONALES HANDELSRECHT 89 (2012).
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1 For the text of the Convention, see 19 I.L.M. 668 (1980).
4 Robert E. Scott, The Uniformity Norm in Commercial Law: A Comparative Analysis of Common Law and Code Methodologies, in THE JURISPRUDENTIAL FOUNDATIONS OF CORPORATE AND COMMERCIAL LAW 149, 176 n.3 (Jody S. Kraus & Steven D. Walt eds., 2000); see also Joshua D.H. Karton & Lorraine de Germiny, Has the CISG Advisory Council Come of Age?, 27 BERKELEY J. INT’L L. 448, 448–49 (2009) (“A well-functioning commercial system requires a high degree of legal certainty; businesses will hesitate to enter into contractual relationships if they are unable to forecast the risks associated with breakdowns in those relationships.”).
As far as the drafters of the CISG were concerned, they tried to achieve certainty and predictability by creating a uniform set of substantive rules, with the intention of overcoming the economic players’ supposedly worst enemy, i.e., national borders and the differences between national legal systems, which constituted (and still constitute) “an obstacle to economic relationships which constantly increase among citizens of different countries; an obstacle above all for the enterprises that are involved in international commerce and that acquire primary resources or distribute goods in different countries which all have different law.”

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


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


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

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


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


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

16 Winship, supra note 11, at 487.

17 Id.; see also Ferrari, supra note 15, at 377.
grounds that uniform substantive law rules are “of a higher level”\textsuperscript{18} or “superior”\textsuperscript{19} vis-à-vis uniform private international law rules.\textsuperscript{20} From a practical point of view, this means, \textit{inter alia}, that whenever the court of a contracting State to a given uniform substantive law convention has to determine the substantive rules to apply to an international contract \textit{prima facie} governed by that convention, it must resort to that convention rather than to its private international law rules. This result has been justified on two grounds: first, that the rules of a uniform substantive law convention, like the CISG, are more specific insofar as their sphere of application is more limited; and further, that they lead directly to a substantive solution, while resort to private international law requires a two-step approach, that is, the identification of the applicable law and the application thereof.\textsuperscript{21}

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


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


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

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

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

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

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

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


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

\textsuperscript{27} For a paper examining in depth why the private international law was not irrelevant under the 1964 Hague Uniform Sales Laws, see Jan Krophöller, Der “Ausschluß” des Internationalen Privatrechts imEinhheitlichen Kaufgesetz, in RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 372 (1974).
[e]ven the adoption of the [1964 Hague] Uniform Law[s] everywhere in the world would not exclude the need for conflicts rules [. . .]: the Uniform Law[s] do not regulate all questions in the sales field [. . .]. In the end, the blackballed rules of private international law will have to be rediscovered and resorted to.28

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

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

30 Henry Mather, Choice of Law for International Sales Issues Not Resolved by the CISG, 20 J.L. & COM. 155, 155 (2001). It should be pointed out that the author later makes a statement that is in contrast with the one cited in the text: “difficult choice-of-law problems will arise when the CISG applies to a transaction but does not resolve all the legal issues before the tribunal.” Id. at 156.
according to which one of the Convention’s three principal goals is to “reduce the necessity of resorting to rules of private international law.”32

Even a superficial reading of the CISG shows that these statements are misleading insofar as they make one believe that the CISG’s uniform substantive rules preclude resort to private international law: the CISG itself expressly refers in two places (namely in Articles 1(1)(b) and 7(2)) to private international law.33 Moreover, given the contexts in which reference to private international law is made, the importance of private international law for CISG-related transactions and problems becomes evident. In effect, Article 1(1)(b) lets even the applicability of the CISG itself to depend (where the CISG is not “directly”34 or “autonomously”35...
applicable due to the parties having their relevant places of business in different Contracting States to the CISG (Article 1(1)(a)) on a private international law analysis;\textsuperscript{36} Article 1(1) indeed states that the CISG “applies to contracts of sale of goods between parties whose places of business are in different States: [. . .] (b) when the rules of private international law lead to the application of the law of a Contracting State,”\textsuperscript{37} thus unambiguously making resort to private international law necessary even for the purpose of the CISG’s own applicability (where the Article 1(1)(a) requirements are not met).

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


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

III. THE CONCEPT OF PRIVATE INTERNATIONAL LAW UNDER THE CISG

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

The importance of the answer to this question becomes evident if one considers the differences that exist between the rules of private international law of different countries. While, for instance, the parties' freedom to
choose the law applicable to their contract has long been accepted in many countries, as in all Member States of the European Union, a similar choice does not necessarily produce any effect in other countries. Although this may appear to be the most significant difference, it is certainly not the only one. As far as private international law rules relating to contracts are concerned, many countries have, as have many international conventions as well as the recent Rome I Regulation, rejected the doctrine of renvoi; nevertheless, there are a few countries which still accept that doctrine.

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

46 For a reference to countries that do not acknowledge party autonomy as connecting factor, see Basedow, supra note 45, at 34; see also Jochen Schröder & Christian Wenner, Internationales Vertragsrecht: Das Kollisionsrecht der Transnationalen Wirtschaftsverträge 9 (2d ed. 1998).
47 In this respect, see, e.g., Convention on the Law Applicable to Contractual Obligations, art. 15, June 19, 1980, 19 I.L.M. 1492, 1496 (“The application of the law of any country specified by this convention means the application of the rules in force in that country other than its rules of private international law.”).
49 See Commission Regulation 593/08, art. 20, 2008 O.J. (L 177) 6 (EC) (“The application of the law of any country of this Regulation means the application of the rules of law in force in that country other than its rules of private international law, unless provided otherwise in this Regulation.”).
51 Ferrari, supra note 43, at 245, 252–53.
“merely” constitutes a substantive law convention and does not set forth any private international law rules. This leads one to conclude that where the CISG itself refers to “private international law,” it refers to a domestic concept of “private international law”; more specifically, it refers to the private international law of the forum, as confirmed by various courts. This is why it is, for instance, incorrect to criticize, as some commentators do, an Austrian court’s decision for employing the doctrine of renvoi on the grounds that the CISG rejects the renvoi doctrine. As the CISG does not set forth any rule of private international law, it does not deal with the issue of renvoi either. Furthermore, at the time the Austrian decision was rendered, renvoi was a doctrine recognized by Austrian private international law, thus requiring the court to take into account the private international law, thus requiring the court to take into account the private international law of the forum.

52 Most recently, see Tribunale di Padova, Feb. 25, 2004, supra note 21 (expressly stating that the CISG is a uniform convention on substantive law and not one on private international law as sometimes erroneously stated); see also Tribunale di Rimini, Nov. 26, 2002, available at http://cisgw3.law.pace.edu/cisg/wais/db/cases2/021126i3.html (stating that the CISG is a “uniform substantive law convention”); Oberster Gerichtshof [OGH] [Supreme Court] June 29, 1999, docket No. 1 Ob 74/99k (Austria), available at http://cisgw3.law.pace.edu/cisg/wais/db/cases2/990629a3.html (stating the same).
53 Enderlein & Maskow, supra note 8, at 370.
54 Ferrari, supra note 35, at 78; Ferrari, supra note 45, at 76.
55 Ferrari, supra note 35, at 78; Arnd Lohmann, Parteiautonomie und UN-Kaufrecht 139 (2005); Christopf Niemann, Einheitliche Anwendung des UN-Kaufrechts in italienischer und deutscher Rechtssprechung und Lehre 73 (2006); Helga Rudolph, Kaufrecht der Export- und Importverträge—Kommentierung des UN-Übereinkommens über internationale Warenkaufverträge mit Hinweisen für die Vertragspraxis 105 (1996); Schlechtriem & Witz, supra note 35, at 16; Schmid, supra note 41, at 54.
58 According to some commentators, the CISG’s legislative history clearly shows that the CISG rejected the renvoi doctrine. Indeed, according to the OFFICIAL RECORDS OF THE UNITED NATIONS CONFERENCE, supra note 32, at 15, it appears that the “law” to which the rules of private international law have to refer in order to make the CISG applicable by virtue of Article 1(1)(b) is the “substantive law” of a Contracting State. See also Peter Winship, The Scope of the Vienna Convention on International Sale Contracts, in INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 28–29 (Nina Galston & Hans Smit eds., 1984) (stating that the “law” referred to in Article 1(1)(b) is “substantive law” on the grounds that “there is a general reluctance to inquire into the conflict of laws rules recognized by another jurisdiction, as suggested, for example, by the general disapproval of the doctrine of renvoi.”).
law rules of the country to which the Austrian private international law lead.

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

IV. THE CISG’S LIMITED INTERNATIONAL SPHERE OF APPLICATION

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

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

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

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59 See infra note 82.
60 For a paper on the CISG’s international sphere of application, see Kurt Siehr, Der Internationale Anwendungsbereich des UN-Kaufrechts, in RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 587 (1988).
61 See Saenger, supra note 34, at 401; SCHLECHTRIEM & WITZ, supra note 35, at 12; but see Peter Jen-Huong Wang, Das Wiener Übereinkommen über internationale Warenkaufverträge vom 11. April 1980, Zeitschrift für Vergleichende Rechtswissenschaft 184, 187 (1988) (the CISG should be applicable, not unlike the 1964 Hague Conventions, only where the sales contract is also characterized by an objective element such as those provided for by the ULIS and ULF).
business, their habitual residence)—at the time of the conclusion of the contract—in different States.

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

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


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

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


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

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

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

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

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

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


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

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


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

76 See also OFFICIAL RECORDS OF THE UNITED NATIONS CONFERENCE, supra note 32, at 15.
both in legal writing and in case law, unlike most other expressions used in the CISG, the concept of party is not one that has to be interpreted “autonomously,” i.e., without having regard to concepts of a particular domestic law. Rather, the question of who is a “party” to a contract is “to be solved on the basis of the law applicable by virtue of the rules of private international law of the forum.” This is in line with the view held both in legal writing and case law stipulating that agency is a matter with which the CISG is not concerned.

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

V. THE CISG’S LIMITED SUBSTANTIVE SPHERE OF APPLICATION

Like all other uniform substantive law conventions, the CISG’s sphere of application ratione materiae is limited, too. This, of course,
means that where a given international contract falls outside that—limited—substantive sphere of application, one has to determine which law applies by resorting to the private international law rules (of the forum).

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

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


86 Commentators have often been pointed out that the list of contracts for the sale of goods excluded from the CISG’s sphere of application is exhaustive; see, e.g., Achilles, supra note 41, at 10; Beate Czerwenka, Rechtsanwendungsp­robleme im internationalen Kaufrecht. Das Kollisionsrecht bei grenzüberschreitenden Kaufverträgen und der Anwendungsbe­reich der Internationalen Kaufrechtsübereinkommen 155 (1988); Ferrari, supra note 45, at 129; Magnus, supra note 35, at 96.

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

divided into three categories\textsuperscript{88} based on the reasons for the exclusions from the CISG’s sphere of application.\textsuperscript{89} In effect, the exclusions are based on either (1) the purpose of the acquisition of the goods (Article 2(a)), (2) the type of sales contract (Article 2(b) and (c)), or (3) the kind of goods sold (Article 2(d), (e) and (f)).\textsuperscript{90}

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

\begin{footnotes}

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

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


\textsuperscript{92} Even though auction sales are not subject to the CISG, this does not mean that sales at commodity exchanges are excluded from the CISG’s sphere of application. Indeed, the sales at
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In addition to this type of sale, Article 2 also excludes from the CISG’s substantive sphere of application the sale of goods bought for personal use, so as to avoid a conflict between the CISG rules and domestic laws aimed at consumer protection.\textsuperscript{94} Unfortunately, as pointed out by the German Supreme Court in a recent decision, there is still potential for conflict,\textsuperscript{95} since domestic law may, and often does, define “consumer sales” differently, creating cases of potential overlap.\textsuperscript{96} Indeed, for a contract to be a “consumer sale” under the CISG and, thus, to fall outside the CISG’s sphere of application under Article 2(a), the contract must be one for the sale of goods bought exclusively for a non-commercial purpose,\textsuperscript{97} i.e., for “personal” use,\textsuperscript{98} as, for example, when the buyer purchases a car\textsuperscript{99} or a

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\item[I] \textsuperscript{94} See also, CARBONE & DE GONZALO, supra note 85, at 7; AUSTRIAN SUPREME COURT, Feb. 11, 1997, available at http://www.cisg.at/10_150694.htm; KG Nidwalden, Jan. 5, 1996, TRANSPORTRECHT-INTERNATIONALES HANDELSRECHT 10 (1999).
\item[I] \textsuperscript{96} See also an argument of the Article 2(a) exclusion, see, e.g., ONNOLD, supra note 9, at 47; Maureen T. Murphy, Note, United Nations Convention on Contracts for the International Sale of Goods: Creating Uniformity on International Sales Law, 12 FORDHAM INT’L L.J. 727, 746 (1989); OFFICIAL RECORDS OF THE UNITED NATIONS CONFERENCE, supra note 32, at 16.
\item[I] \textsuperscript{97} It has often been stated that the exclusion of auction sales constitutes one of the innovative characteristics of the CISG; see, e.g., CARBONE & DE GONZALO, supra note 85, at 7; KHOO, supra note 90, at 36.
\item[I] \textsuperscript{98} For a similar justification of the Article 2(a) exclusion, see, e.g., ONNOLD, supra note 92, at 47; Maureen T. Murphy, Note, United Nations Convention on Contracts for the International Sale of Goods: Creating Uniformity on International Sales Law, 12 FORDHAM INT’L L.J. 727, 746 (1989); OFFICIAL RECORDS OF THE UNITED NATIONS CONFERENCE, supra note 32, at 16.
\item[I] \textsuperscript{99} Id. (“[t]o the extent that the appeal argues that a ‘consumer purchase’ under Art. 2(a) CISG is excluded from the application of the Convention, this argument cannot be followed. The purchase referred to in Art. 2(a) CISG requires that the seller know or should have known the purpose before or at the time of the conclusion of the contract, whereas, if the buyer is a consumer within the meaning of § 13 BGB, it does not require such knowledge of the seller. This can, therefore, lead to an overlap, where sales contracts are subject to binding national consumer protection laws and, at the same time, to the CISG.”).
\item[I] \textsuperscript{100}various commentators have stressed the fact that the commercial nature of the goods is irrelevant, what matters is the commercial purpose of the sale contract; see CARBONE & DE GONZALO, supra note 85, at 7; ALBERT H. KREITZER, GUIDE TO PRACTICAL APPLICATIONS OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 71 (1989).
\end{itemize}
\end{footnotesize}
caravan to use it for himself, and not for his business or profession. The fact that the goods are consumer goods is, generally speaking, irrelevant for the purposes of the Article 2(a) exclusion. Furthermore, Article 2(a) requires that the “consumer” purpose of the purchase be known (or ought to have been known) to the seller at the time of the conclusion of the contract. Consequently, it is irrelevant whether the seller in effect knows of the non-commercial purpose of the purchase after the conclusion of the contract.

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

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

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

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


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

103 See, e.g., Enderlein & Maskow, supra note 8, at 34; Herber & Czerwenka, supra note 68, at 25; see also OFFICIAL RECORDS OF THE UNITED NATIONS CONFERENCE, supra note 32, at 16.

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

105 See Memmo, supra note 102, at 196.

106 See text accompanying supra note 88.

107 See Alejandro Garro & Alberto Zuppi, COMPRAVENTA INTERNACIONAL DE MERCADERÍAS 79 (1990) (expressly stating that the exclusion of some sales is based upon the goods sold).
application, in order to avoid a conflict between CISG rules and domestic rules that often are mandatory.

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

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

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108 See PILTZ, supra note 101, at 31.
109 For this rationale of the Article 2(d) exclusion, see also SCHLECHTRIEM, supra note 85, at 30 (exclusion de quo “[. . .] takes into consideration that international securities and currency transactions are governed by their own rules and laws which are often compulsory.”).
See also ENDERLEIN ET AL., supra note 88, at 47 (Article 2(d) exclusion “[. . .] can be explained by the existence of mandatory domestic rules.”).
112 See also VINCENT HEUZE, LA VENTE INTERNATIONALE DE MERCHANDISES. DROIT UNIFORME 76–77 (1992).
113 See KRITZER, supra note 98, at 72.
114 This exclusion could be found in ULIS art. V.
115 For a similar justification of the exclusion of sales of electricity from the Convention’s sphere of application, see, e.g., HEUZE, supra note 112, at 77 (stating that the exclusion of sales of electricity can be explained on the ground of its nature); OFFICIAL RECORDS OF THE UNITED NATIONS CONFERENCE, supra note 32, at 16 (stating that the exclusion of electricity is justified because its sale presents unique problems that are different from those presented by the usual international sale of goods).
116 OFFICIAL RECORDS OF THE UNITED NATIONS CONFERENCE, supra note 32, at 16; for a similar justification of the Article 2(f) exclusion, see Samson, supra note 88, at 928.
117 For a detailed summary of the different justifications suggested for the exclusion at hand, compare N.R. Merchor, La regulacion internacional de las operaciones mercantiles enfrentada a un caso extremo: el trafico transfronterizo de energia electrica, DERECHO DE LOS NEGOCIOS 9 (1995).
fact that there are other goods, such as gas and crude oil, whose sale presents “unique” problems, but which are governed by the CISG, as are the sales of other sources of energy. The latter justification is not convincing either, “[. . .] because the Convention may create its own definition of good.” Indeed, the exclusion of electricity sales from the CISG’s sphere of application cannot be justified.

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

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

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

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118 See also HONNOLD, supra note 92, at 51 (arguing that the sale of gas is within the Convention); Huber, supra note 104, at 419 (stating the same and criticizing the exclusion of the sale of electricity).
119 See also Herber, supra note 91, at 64; see James W. Skelton, CISG and Crude Oil Traders, 9 Hous. L. Rev. 95 (1986) (detailed discussion of the problems of oil trade and the CISG).
120 See also Winship, supra note 58, at 1–25 (“[. . .] any suggestion that the problems raised by the excluded items are ‘unique’ overlooks other items, such as oil and gas supply contracts of livestock transactions, which also raise unique problems.”).
123 Enderlein & Maskow, supra note 8, at 35.
between the contract, the parties, or the places relevant with respect to a specific kind of contract (such as the place of taking over the goods, or the place designated for delivery, relevant for contracts for the carriage of goods) and a contracting State or the law of such a State.

As a consequence, a contract falling within both the international and the substantive spheres of application of an international uniform substantive law convention is generally not governed by that convention, unless the aforementioned connection with a contracting State or the law of a contracting State also exists.

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

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lead to the law of a contracting State\textsuperscript{132} (which leads to the “indirect application”\textsuperscript{133} by virtue of Article 1(1)(b)).

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

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

\textsuperscript{132} For papers on the criterion of applicability referred to in the text, see Christophe Bernasconi, The Personal and Territorial Scope of the Vienna Convention on Contracts for the International Sale of Goods (Article 1), 46 NETH. INT’L. L. REV. 137 (1999); Franco Ferrari, CISG Article 1(1)(b) and Related Matters: Brief Remarks on Occasion of a Recent Dutch Court Decision, NEDERLANDS INTERNATIONAAL PRIVAATRECHT 317 (1995); Franco Ferrari, Diritto uniforme della Vendita Internazionale: Questioni di applicabilità e diritto internazionale privato, in RIVISTA DI DIRITTO CIVILE 669 (1995/II); Winship, supra note 11, at 487.
\textsuperscript{133} FERRARI, supra note 45, at 72.
\textsuperscript{134} Paul Volken, Das Wiener Übereinkommen über den internationalen Warenkauf; Anwendungsvoraussetzungen und Anwendungsbereich, EINHEITLICHES KAUFRECHT UND NATIONALES OBLIGATIONENRECHT 81, 93 (Peter Schlechtriem ed., 1987).
\textsuperscript{135} See SCHLECHTRIEM, supra note 85, at 45, where the author asserts that the CISG can be applicable even if both parties do not have their place of business in Contracting States:

In cases where both parties do not have their places of business in Contracting States, Article 1(1)(b) leads to the application of CISG not only by the courts of Contracting States but also by the courts of non-Contracting States, provided the private international
In practice, this means, for instance, that where a dispute is brought before the court of a Contracting State in which the relevant rules of private international law are either those of the 1980 EEC Convention on the Law Applicable to Contractual Obligations (the “Rome Convention”) or those of the Rome I Regulation, the CISG will generally be applicable when the law chosen by the parties or, absent a choice of law, the law having the closest connection with the contract (Art. 4(1) of the Rome Convention) or the law of the seller (Art. 4(1)(a) of the Rome I Regulation), is the law of a Contracting State.

As far as party autonomy under the Rome Convention is concerned—and the same holds true for the Rome I Regulation—that law of the non-Contracting State makes applicable the sales law of a Contracting State [. . .].

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


See Ferrari, supra note 45, at 76 f.

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


143 See FERRARI, supra note 45, at 78.

144 But see Tribunale Civile di Monza, Jan. 14, 1993, available at http://cisgw3.law.pace.edu/cases/9301143.html (Italy) (stating that the rules of private international law to which Article 1(1)(b) refers cannot be applied when the parties have expressly chosen the law applicable to their contractual relationship); see Franco Ferrari, *Diritto uniforme della vendita internazionale: questioni di applicabilità e diritto internazionale privato, RIVISTA DI DIRITTO CIVILE* 669 (1995); Franco Ferrari, *Uniform Law of International Sales: Issues of Applicability and Private International Law, 15 J.L. & COM. 159 (1995); see also Giorgio De Nova, *Risoluzione per eccessiva oneroità e Convenzione di Vienna, CONTRATTI 580 (1993) (criticizing the foregoing decision, albeit for reasons that do not relate to the interpretation of Article 1(1)(b)).

145 See Hoven van Beroep [HvB] May 17, 2002, No. 2001/AR/0180 (Belg.), http://cisgw3.law.pace.edu/cases/040517b1.html (applying the CISG due to the choice of French law as the applicable law); Cour de cassation [Cass.] Dec. 17, 1996 (Fr.), http://cisgw3.law.pace.edu/cases/961217f1.html (annulling the appellate court’s decision not to apply the CISG to a contract
have already relied upon the parties’ designation of the applicable law to make the CISG applicable under Article 1(1)(b).

Absent a choice of law, the Rome Convention makes applicable the law of the country with which the contract is most closely connected, as also pointed out by several court decisions rendered under the CISG.\textsuperscript{146} Since it is presumed that the contract is most closely connected with the country where the party who is to effect the contract’s characteristic performance has its place of business—\textsuperscript{147}and since the monetary obligation is generally not the characteristic one, as expressly stated by a German

See EC Convention, supra note 47, art. 4(2).
court\textsuperscript{148}—the law applicable to international sales contracts generally, where the presumption is not rebutted,\textsuperscript{149} the law of the seller,\textsuperscript{150} since it is the seller who has to execute the characteristic performance\textsuperscript{151} consisting of the transfer of ownership and the delivery of the goods,\textsuperscript{152} as confirmed by both state courts\textsuperscript{153} and arbitral tribunals.\textsuperscript{154}

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

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


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

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

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

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

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

While Article 1(1)(b) expressly requires resort to private international law to lead to the CISG’s applicability, according to both courts and commentators Article 1(1)(a) leads to the CISG’s “direct” applicability without the need for any such resort, as Article 1(1)(a) “merely” requires that the parties have, at the time of the conclusion of the contract, their agreements in writing.
relevant place of business in different contracting States. This, however, is not necessarily correct. There are instances where even the CISG’s “direct” applicability will depend on the outcome of a private international law analysis. This is true, for example, in respect of those instances where an agent is involved in the conclusion of the sales contract and the agent’s place of business is located in a country other than that in which the principal’s place of business is located. In these instances, the CISG’s “direct” applicability, will depend on whether it is the agent or the principal who is party to the contract with the opposing party. Since, however, the CISG does not deal with the issue of agency, as often stated both by courts and commentators, resort to private international law is necessary to determine the law applicable to the principal-agency relationship, as it is on the basis of that applicable law that the issue of who is party to the contract will need to be decided. Most domestic laws will decide the issue on the basis of whether the agent disclosed the


159 See also supra text accompanying note 75.


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


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

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

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

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165 See Ferrari, supra note 35, at 68.
166 See OFFICIAL RECORDS OF THE UNITED NATIONS CONFERENCE, supra note 32, at 436.
167 See the updated list of contracting States that also includes the reservations declared by those States, http://www.uncitral.org.
parties have their relevant place of business in contracting States that made an Article 94 declaration, making it necessary to resort to the private international law rules of the forum to determine the applicable law. If the applicable law is that of a contracting State (independently of whether it declared a reservation or not), the CISG will not apply; rather the applicable domestic law will apply. This view appears to be shared by most authors, with respect to a line of cases in which the court is located in a State that made an Article 94 declaration. However, there is a dispute as to whether or not the court of non-reservation contracting States have to take into consideration Article 94 declarations, i.e., whether judges from non-reservation contracting States will have to apply domestic law rather than the CISG to a contract concluded between two parties having their places of business in reservation contracting States. According to the preferable view, the courts of non-reservation contracting State will not have to take into consideration that reservation, and, consequently, will have to apply the CISG pursuant to Article 1(1)(a). This approach is taken because Article 94 does not have an impact on the status of contracting State of any contracting State declaring such reservation. Of course, if one were to adopt the opposing view, then recourse to a private international law analysis would be necessary in similar cases to determine the applicable (domestic) law.

VIII. THE CISG’S ARTICLES 92 AND 93 RESERVATIONS AS REASONS FOR THE NEED FOR RE COURSE TO PRIVATE INTERNATIONAL LAW

Article 94 CISG is not the only CISG provision to have an impact on the CISG’s direct applicability and, thus, to impose a private international law...
law analysis. Article 92 also does this; actually, the very purpose behind the introduction of this provision was to allow some countries, namely Denmark, Finland, Norway and Sweden, to rely on a set of rules other than those of the CISG, specifically their (regionally unified) own rules.\textsuperscript{171} These countries proposed to allow contracting States to make a declaration pursuant to which they would not be bound by either Part II or Part III of the CISG, dealing with the “Formation of Contract” and “the Rights and Obligations of the Parties” respectively. In doing so, they intended to make sure that their rules on formation of contract would not be replaced by the CISG’s rules on formation.\textsuperscript{172} This is why all the aforementioned Scandinavian countries made a declaration according to which they would not be bound by Part II of the CISG (on “Formation of Contract”). Whether these countries were fully aware of the consequences of a similar declaration is doubtful. Given the rationale behind their proposal to introduce the possibility of declaring that reservation, it appears that these countries were convinced that a simple declaration would ensure the applicability of their own domestic law. This view is not tenable. The effect of an Article 92 declaration is much more limited, as well as much more complicated. It is more limited insofar as there will be instances where the CISG will still prevail over the law of the reservation State;\textsuperscript{173} it is more complicated insofar as the declaration of an Article 92 reservation obliges courts of contracting States to resort to a private international law analysis, thus showing once again that the CISG cannot do away with resort to private international law, even where both parties to the contract have their relevant place of business in a contracting State to the CISG.

\textsuperscript{171} See also Winship, supra note 58, at 1–45.

\textsuperscript{172} It should be noted that no domestic rule is \textit{per se} replaced by the CISG, as the CISG solely applies to “international” contract for the sale of goods. Thus, the CISG does not impact domestic law, in the sense that it does not \textit{per se} modify the domestic rules which already exist. In effect, due only to its persuasiveness, the CISG has constituted the model of recent revisions of domestic law. See, e.g., EVELYN NAU, \textit{Das Gewährleistungsrecht im BGB, UN-Kaufrecht und den Reformvorschlägen der Schuldrechtskommission: ein Vergleich unter besonderer Berücksichtigung der Richtlinie (1999/44/Eg) über den Verbrauchergüterkauf} (2003); Peter Schlechtriem, \textit{10 Jahr CISG—Der Einfluß des UN-Kaufrechts auf die Entwicklung des deutschen und des internationalen Schuldrechts, INTERNATIONALES HANDELSRECHT} 12 (2001); Peter Schlechtriem, \textit{International Einheitliches Kaufrecht und neues Schuldrecht, in DAS NEUE SCHULDRECHT IN DER PRAXIS} 71 (Karsten Schmidt et al. eds., 2003); Karin Sein & Irene Kull, \textit{Die Bedeutung des UN-Kaufrechts im estnischen Recht, INTERNATIONALES HANDELSRECHT} 138 (2005).

\textsuperscript{173} See the text accompanying notes 177 ff.
The effect of this reservation is set forth in Article 92 CISG itself: a party that has its relevant place of business in an Article 92 reservation State is considered to have its place of business in a non-contracting State for the purposes of the Part excluded.\(^{174}\) Thus, where one party has its place of business in such a State, the CISG can never be applicable in its entirety by virtue of Article 1(1)(a) CISG in its entirety.\(^{175}\) Article 1(1)(a) will merely lead to the application of the Part by which both States in which the parties have their places of business are bound.\(^{176}\) This does not necessarily mean that the Part to which the reservation relates does not apply;\(^{177}\) rather, that Part’s applicability will depend on whether the rules of private international law of the forum lead to the law of a Contracting State that did

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


\(^{175}\) See Lookofsky, supra note 168, at 292; Peter Mankowski, Art. 92 CISG, in INTERNATIONALES VERTRAGSRECHT, supra note 34, at 953, 955; Torsello, supra note 170, at 98.

\(^{176}\) See also FERRARI, supra note 45, at 68.

In light of what has just been said, the decision in CLOUT Case No. 362, Oberlandesgericht Naumburg [OLG Naumburg] [Provincial Court of Appeal] Ger., Apr. 27, 1999, available at http://cisgw3.law.pace.edu/cases/990427g1.html, is incorrect (It makes applicable the CISG in its entirety by virtue of Article 1(1)(a), even though one of the parties to the contract had its place of business in Denmark, one of the Contracting States that declared an Article 92 reservation.): contra CLOUT Case No. 121, Oberlandesgericht Frankfurt [OLG Frankfurt] [Provincial Court of Appeal] Mar. 4, 1994, available at http://cisgw3.law.pace.edu/cases/940304f1.html (applying the CISG pursuant to its Article 1(1)(a), even though at the moment of the conclusion of the contract one of the parties had its place of business in Sweden, a Contracting State that had declared an Article 92 reservation).

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

\(^{177}\) See also HERBER & CZERWENKA, supra note 68, at 393; Lookofsky, supra note 168, at 294–95; contra PILTZ, supra note 101, at 51 f.
not make such a declaration.\textsuperscript{178} If they do, the Part excluded will apply by virtue of Article 1(1)(b),\textsuperscript{179} as also stated in case law.\textsuperscript{180}

It should be noted, however, that according to both commentators\textsuperscript{181} and courts,\textsuperscript{182} the foregoing solution applies not only if a dispute is brought before the courts of a Contracting State that did not declare an Article 92 reservation, but also where the forum is located in a State that did declare such a reservation.

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

\textsuperscript{178} See Achilles, supra note 41, at 264; Enderlein et al., supra note 88, at 290; Flechtner, supra note 170, at 193; Joseph Lookofsky, The Scandinavian Experience, in The 1980 Uniform Sales Law, supra note 127, at 95, 107.

\textsuperscript{179} See Magnus, supra note 35, at 441; Mankowski, supra note 175, at 955; Witz et al., supra note 130, at 576.

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

\textsuperscript{181} See Achilles, supra note 41, at 264; Herber & Czerwenka, supra note 68, at 394; Lookofsky, supra note 168, at 297.


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

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

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

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

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

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184 CISG art. 92(2).
185 See Alfonso-Luis Calvo Caravaca, Art. 93, in LA COMPRAVENTA INTERNACIONAL DE MERCADERIAS, supra note 89, at 713, 715; Malcolm Evans, Art. 93, in COMMENTARY ON THE INTERNATIONAL SALES LAW, supra note 90, at 645, 648; Franco Ferrari, Art. 93, in KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT—CISG, supra note 33, at 999, 1000; Herber & Czerwenka, supra note 68, at 396.
186 See MAGNUS, supra note 35, at 861; Piltz, supra note 101, at 51.
187 If the rules of private international law were to lead to the law of a contracting State that declared an Article 92 reservation, the CISG would not be applicable to the contract but for the Part of the CISG that that State had decided to be bound by.
Recourse to a private international law analysis may be necessary even where the CISG is applicable. This can easily be derived from the CISG itself which, as mentioned earlier, expressly refers to the need for resort to private international in relation to the issue of gap-filling.

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

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

188 See the text accompanying note 38.
189 Overby, supra note 6, at 606; see also Michael Bradley et al., The Purposes and Accountability of the Corporation in Contemporary Society: Corporate Governance at a Crossroads, 62 LAW & CONTEMP. PROB. 9, 82 (2000) (stating that the CISG “presents a comprehensive code governing contracts for the international sale of goods”).
191 See, e.g., Tom McNamara, U.N. Sale of Goods Convention: Finally Coming of Age?, 32 FEB. COLO. LAW. 11, 16 (2003), stating that “the Convention presumptively and automatically governs all international trade transactions within the CISG’s scope (an international sales contract)”;
196 See supra text accompanying note 38.
are not expressly settled in it," i.e., for filling the gaps praeter legem,196 or “internal”197 or “hidden”198 gaps, and those which cannot be filled by resorting to the general principles the CISG is based on.199 Thus, in relation to these matters the CISG expressly provides for resort to private international law to determine the applicable law, but solely as “ultima ratio.”200 This means that pursuant to Article 7(2) CISG, once it has been


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


200 See Klaus Bachér, Landesspezifische Auslegung von Einheitsrecht?, in FESTSCHRIFT FÜR PETER SCHLECHT RiEM zu 70 GEBurtstag 155, 162 (Ingeborg Schwenzer & Günther Hager eds., 2002); Bonell, supra note 41, at 25; BRUNNER, supra note 35, at 77; FABIAN BURKART, INTERPRETATIVES ZUSAMMENWIRKEN VON CISG UND UNIDROIT PRINZIPLEN 202 (2000); Ferrari,
established that a matter is governed by the CISG, albeit not expressly settled by it, one has to first determine whether a general principle can be identified upon which the CISG is based and which allows one to settle the matter. To the extent that recourse to a general principle underlying the CISG cannot settle the matter, Article 7(2) does not just allow resort to the rules of private international law, it imposes such resort. This does not mean that recourse to the rules of private international law should be abused. Rather, one has to always keep in mind that the drafters of the CISG wanted to close the types of gaps at hand as much as possible from


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

The danger of an abuse of the recourse to the rules of private international law is considerable: “It is enough to state that no general principles can be found and therefore the only way out it to resort to private international law.” Gyula Eorsi, General Provisions, in INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, ch. 2, at 1, 12 (Nina M. Galston & Hans Smit eds., 1984).
within the CISG itself, so as to promote the uniformity aimed at by the CISG. It is, however, worth pointing out that recourse to general principles constitutes merely one method of filling gaps from within. One has to wonder whether Article 7(2) of the CISG also covers other methods of legal reasoning, such as analogical application. In this respect, this author shares the opinion of those commentators who assert not only that the CISG permits resort to analogy as a means to fill gaps, but also that “[i]n the case of a gap [praeter legem] in the Convention the first attempt to be made is to settle the unsolved question by means of an analogical application of specific provisions.” However, when the matters settled in the CISG and the issue the internal gaps refers to are not so closely related that it would be justified to adopt a different solution. One must resort to the general principles as contemplated in Article 7(2) CISG. This procedure differs from the analogical application in that it does not resolve the specific case solely by extending specific provisions dealing with analogous matters,

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

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

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

207 Bonell, supra note 41, at 78. The analogical application as a method of gap-filling has been admitted by other authors as well; see ENDERLEIN & MASKOW, supra note 8, at 58, where the authors state that gap-filling can be done, as we believe, by applying such interpretation methods as extensive interpretation and analogy. The admissibility of analogy is directly addressed in the wording contained in the CISG because it is aimed at obtaining, from several comparable rules, one rule for a not expressly covered fact and/or a general rule under which the fact can be subsumed. See also Felemegas, supra note 41, at 280; FRIGGE, supra note 38, at 292; Hackney, supra note 196, at 478; HERRER & ZCERWENKA, supra note 68, at 50; ROLAND LOEWE, INTERNATIONALES KAUFRECHT 33 (1989); Paal, supra note 197, at 88; Schwenger & Hachem, supra note 170, at 136; contra Harm Peter Westermann, Art. 7 CISG, in 3 MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH 2038, 2044 (6th ed. 2012).

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

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

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

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

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

209 Bonell, supra note 41, at 80.
210 Id. at 83.
212 For the use of this expression, see, e.g., Basedow, supra note 197, at 135; FRIGGE, supra note 38, passim; ALDO FRIGNANI & MARCO TORSELLO, IL CONTRATTO INTERNAZIONALE 444 (2d ed. 2010); André Janssen & Sören Claas Kiene, The CISG and Its General Principles, in CISG METHODOLOGY, at 261, 264 (André Janssen & Olaf Meyer eds., 2009); Viscasillas, supra note 41, at 112; Paal, supra note 197, at 80; Schwenzer & Hachem, supra note 170, at 134; see Amtsgericht Sursee [AG Sursee] [District Court] Switz., Sept. 12, 2008, available at http://cisgw3.law.pace.edu/cases/080912s1.html; for remarks criticizing the use of the expression mentioned in the text, see Ernst A. Kramer, Uniforme Interpretation von Einheitsprivatrecht—mit besonderer Berücksichtigung von Art. 7 UNKR, ÖSTERREICHISCHE JURISTISCHEBLÄTTER 137, 147 n.90 (1996).
213 Colligan, supra note 196, at 48; DEJACO, supra note 41, at 43; Felemegas, supra note 41, at 277; Graffi, supra note 41, at 879; Hackney, supra note 196, at 478; McMahon, supra note 41, at 1002;
effect, directly be solved in conformity with the law applicable by virtue of the rules of private international law \(^2\) (or, where applicable, with other uniform substantive law conventions), \(^3\) as also pointed out in case law. \(^4\)

This approach is completely different from the one relating to the one to be adopted in respect of the internal gaps. From this, one can easily derive not only how important the exact distinction between the aforementioned types of gaps is, but also how the attitude towards resort to private international law may shape how certain matters are dealt with. In effect, whereas some commentators will have resort to private international law only rarely, because they are convinced that the CISG displaces the need for such resort and feel more comfortable with recourse to general principles, and, therefore, will have no problem interpreting the CISG’s scope broadly, other commentators will be inclined to favor the private international law approach. \(^5\)

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

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


\(^4\) The missing criteria on the base of which the rate of interest is to be determined has generated a dispute in doctrine among those who sustain that the question is dealt with by the Convention, even if not expressly (internal gap), and those who, on the other hand, believe that the determination of the rate of interest is a subject excluded from the scope of application of the Convention (external gap). In the first hypothesis, it is possible to make reference to the general principles of the Convention; meanwhile, in the second, it is necessary to make reference to the rules of private international law, in order to identify the applicable substantive law.

\(^5\) One must wonder however, whether it is true, as stated by Winship, supra note 11, at 529, that “[a] reader trained in the civil law will feel more comfortable with this [general principles] approach than a common lawyer.”
determination of the place of performance of monetary obligations other than that of the payment of price.\textsuperscript{218}

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

Whereas all the foregoing decisions assume that the matter is governed by, albeit not expressly settled in, the CISG, there is one decision which, in this author’s opinion correctly, denies the existence of a general principle under the CISG to be used to determine the place of performance for all monetary obligations\textsuperscript{223} and determines the place of performance more

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

\textsuperscript{219} See the text of Article 57 CISG: “(1) If the buyer is not bound to pay the price at any other particular place, he must pay it to the seller:
(a) at the seller’s place of business; or
(b) if the payment is to be made against the handing over of the goods or of documents, at the place where the handing over takes place.
(2) The seller must bear any increase in the expenses incidental to payment which is caused by a change in his place of business subsequent to the conclusion of the contract.”


correctly by resorting to the law applicable by virtue of its private international law rules.\textsuperscript{224}

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

From the foregoing, it becomes apparent how important the distinction between the various types of gaps and their identification really are. Unfortunately, however, the CISG does not set forth specific criteria on how to make the distinction. Article 4 CISG provides, however, some help, as it contains a (non-exhaustive\textsuperscript{225}) list of matters the CISG is not concerned with, namely the validity of the contract or of any of its provisions or of any usage as well as the effect which the contract may have on the property in the goods sold.

At first sight, the aforementioned part of Article 4 does not seem to cause any problems (one author even stated that the provision at hand was superfluous since it only stated the obvious\textsuperscript{226}). Quite the contrary is true. The insertion, for instance, of the introductory wording to Article 4(a) and (b) “except as otherwise expressly provided in this Convention,” leads to the conclusion that even where a dispute concerns a matter listed either in Article 4(a) or Article 4(b) and, thus, apparently excluded from the CISG’s scope of application and therefore left (mostly) to the applicable law to be determined by resorting to the rules of private international law of the forum, one cannot simply disregard the CISG. Rather, one has to first examine whether the CISG provides a solution for the specific problem.\textsuperscript{227}

With reference to the validity, for instance, which according to Article 4(a) is a matter excluded from the CISG’s scope of application,\textsuperscript{228} this means

\textsuperscript{224} See Ferrari, supra note 38, at 228.

\textsuperscript{225} Peter Huber, Some Introductory Remarks on the CISG, INTERNATIONALES HANDELSRECHT 228, 231 (2006); ANNE-KATHRIN SCHLUCHTER, DIE GÜLTIGKEIT VON KAU弗VERTRÄGEN UNTER DEM UN-KAUFRECHT: WIE GESTALTET SICH DIE ERFÄNGNUNG DES EINHEITSRECHTS MIT DEUTSCHEN UND FRANZÖSISCHEN NICHTEIGENRECHTNORMEN? 26 (1996).

\textsuperscript{226} Khoo, supra note 90, at 45.

\textsuperscript{227} See Franco Ferrari, Jurisprudence concernant les questions non abordées par la CVIM, INT’L BUS. L.J. 835, 836 (1998).

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

The aforementioned problem is not the only one that arises from the exclusion of validity from the CISG’s scope of application. Another (rather important) one is that of defining “validity” for the purposes of the CISG. The importance of that definition becomes evident when one considers how different the definitions found in the various legal systems actually are.

Various attempts at defining the concept were made by U.S. courts; according to those courts’ decisions, a validity issue is “any issue by which the domestic law would render the contract void, voidable, or unenforceable.” Whether this definition will prevail remains to be seen.


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

For a comparative overview of the existing concepts of validity, see Ernst A. Kramer, DER Irrtum beim Vertragsschluss: Eine weltweit rechtsvergleichende Bestandsaufnahme (1998).


The definition cited in the decision referred to in the text was borrowed from Hartnell, supra note 29, at 45, to which the courts expressly refer.
What can be said, however, is that even in applying that definition the outcome of those decisions that had to deal, for instance, with the issue of whether a contract was validly concluded by a third person acting on behalf of one of the parties would not have been different: that issue would still be considered one left to the applicable national law to be determined on the basis of the rules of private international law, since agency, as mentioned on several occasions already, is not governed by the CISG; neither is the validity of standard contract terms, as correctly pointed out in case law.\(^{233}\) that issue is also left to the law applicable by virtue of the rules of private international law.

However, Article 4(a) does not only exclude from its scope the validity of the contract or of its provisions, such as the retention of title clauses inserted into the contract,\(^ {234}\) but also the validity of usages, which is why this issue as well is left to the domestic law to be identified by means of the relevant private international law rules.\(^ {235}\) This validity issue must, however, be distinguished from that of how usages are to be defined, under which circumstances they are binding for the parties and what their relationship is with the rules set forth in the CISG, as these issues are dealt with in Article 9.\(^ {236}\)


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

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

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

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\(^{240}\) KUHLEN, supra note 239, at 61; see also AUDIT, supra note 41, at 36; MAGNUS, supra note 35, at 143; Jean-Pierre Plantard, Un nouveau droit uniforme de la vente internationale: La Convention des Nations Unies du 11 avril 1980, J. DU DROIT INT’L 311, 327 (1988); Reinhart, supra note 34, at 25.
any person” being excluded from the CISG’s scope of application, the buyer’s claims for pecuniary loss resulting from a claim against the buyer itself for personal injury caused by the goods the buyer sold in a sub-sale is also excluded from the CISG’s scope of application and, therefore, has to be decided in conformity with the domestic law to be identified by means of the relevant rules of private international law.

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


243 See Ferrari, supra note 33, at 132, 135.

244 For this view, see, however, KUHLEN, supra note 239, at 114; Otto, supra note 239, at 537; GRIanzi RYFFEL, DIE SCHADENERSATZHAFTUNG DES VERKÄUFErs NACH DEM WIENER ÜBEREINKOMMEN ÜBER INTERNATIONALEWARENKaUFVERTRÄGE VOM 11. APRIL 1980 136 (1992).

245 See Herber, supra note 239, at 105.

246 CZERWENKA, supra note 86, at 168; Ulrich Magnus, Aktuelle Fragen des UN-Kaufrechts, ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 79, 95 (1993); Plantard, supra note 240, at 327; Mauro Tescaro, Il concorso tra i rimedi contrattuali di cui alla Convenzione di Vienna sulla vendita internazionale di beni mobile (CISG) e i rimedi domestico, CONTRATTO E IMPRESA/EUROPA 319, 329.
If the goods are defective—non-conforming to the contract or not—and cause bodily injury, we are outside the scope of the CISG, Article 5. But even if only property damages were caused, [...], we are outside the principal domain of interests created by contracts and protected by contractual remedies, and would have entered the field of genuinely extra-contractual remedies. Therefore, a tort action for property damages caused by defective and non-conforming goods should not be barred by an omission to give notice within reasonable time under Article 30 of CISG.²⁴⁹

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

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

²⁴⁹ Schlechtriem, supra note 242, at 473–74.
²⁵⁰ For an overview, see apart from the paper quoted in note 227, Claude Witz, C_T_I_M: interprétation et questions non couvertes, 1 Intl’l Bus. L.J. 253 (2001).
a settlement agreement,\textsuperscript{253} the assignment of receivables,\textsuperscript{254} the assignment of contract,\textsuperscript{255} statute of limitations,\textsuperscript{256} the issue of whether a court has


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

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

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

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

XIII. CISG AND PARTY AUTONOMY

Even where all of the CISG’s positive applicability requirements (the international one, the substantive one, the temporal one, the personal/territorial one) are met and the issues to be dealt with by the court are governed by the CISG, resorting to private international law may be necessary. The most obvious reason for this is Article 6 of the CISG, which allows the parties to “exclude the application of this Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions.” By providing for this possibility, which business apparently takes advantage of rather often\(^{266}\) for fear of the unknown,\(^{267}\) the drafters of the CISG reaffirmed, despite some reservations,\(^{268}\) one of the general principles already embodied in the 1964 Hague Uniform Sales Laws,\(^{269}\) that is, the principle according to which the primary source of the rules governing


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

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

\(^{269}\) Despite some textual differences, Article 6 CISG is based upon Article 3 ULIS, as has often been pointed out; see, e.g., Bonell, supra note 41, at 51; Rolf Herber, Art. 6, in KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT, supra note 91.
international sales contracts is party autonomy. By stating that the CISG can be excluded, the drafters clearly acknowledged the dispositive nature of the CISG—emphasized also in case law—and the “central

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

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


role which party autonomy plays in international commerce and, particularly, in international sales.\footnote{274}

As far as party autonomy is concerned, it must be pointed out that Article 6 CISG refers to two different lines of cases:\footnote{275} one where the CISG’s application is excluded, the other where the parties derogate from—or modify the effects of—the provisions of the CISG on a substantive level.\footnote{276} These two situations differ from each other in that the former does,
according to the CISG, *per se* not encounter any restrictions, whereas the latter is limited, since there are provisions the parties are not allowed to derogate from.

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

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

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


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

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

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


283 For court decisions expressly stating that the Unidroit Principles are not binding, see, e.g., Tribunale di Padova [District Court] It., Jan. 10, 2006, available at http://cisgw3.law.pace.edu/cases/060110i3.html.
least in those countries the rules of private international law of which are laid down by either the Rome Convention or the Rome I Regulation.

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

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

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

Resort to private international may, however, be necessary even where all applicability requirements are met, the issue to be dealt with falls into the CISG’s scope of application and the parties have not excluded the CISG or derogated from its provisions. This is true regarding the issue of formal validity of contracts governed by Article 11 of the CISG which, according to both commentators\textsuperscript{284} and courts,\textsuperscript{285} sets forth the principle of freedom

\textsuperscript{284} \textit{See} \textit{Achilles}, supra note 41, at 30; \textit{Goddard}, supra note 206, at 73; \textit{Bammarny}, supra note 197, at 167; Bonell, supra note 41, at 80; \textit{DeJacco}, supra note 41, at 44; \textit{Felemegas}, supra note 41, at 285; \textit{Herber & Czerwenka}, supra note 68, at 50; \textit{Huber & Mullis}, supra note 41, at 34; Janssen & Kien, supra note 212, at 276 f.; \textit{Karl Neumayer & Catherine Ming}, \textit{CONVENTION DE VIENNE SUR LES CONTRATS DE VENTE INTERNATIONALE DE MARCHANDISES. COMMENTAIRE} 126 (1993); \textit{Mather}, supra note 30, at 158; \textit{Posch & Terfitzu}, supra note 35, at 50; Reinhart, supra note 34, at 32; Schwenzer & Hachem, supra note 170, at 136; Christian Thiele, \textit{Erfüllungsort bei der Rückabwicklung von Vertragspflichten nach Art. 81 UN-Kaufrecht—ein Plädoyer gegen die herrschende Meinung, RECHT DER INTERNATIONALEN WIRTSCHAFT} 892, 894 (2000); \textit{contra} Greiner, supra note 41, at 46 f.

from form requirements. Thus, a contract for the international sale of goods does generally not need to be concluded in writing and is not subject to any other specific requirement as to form.\textsuperscript{286} This means, \textit{inter alia},\textsuperscript{287} that a contract can, as already confirmed by various court decisions, also be concluded orally\textsuperscript{288} as well as through the conduct of the parties.\textsuperscript{289}

Still, pursuant to Article 12 of the CISG, which the parties are not allowed to derogate from,\textsuperscript{290} the foregoing principle does not necessarily apply where at least one of the parties to the contract governed by the CISG has its place of business in a State that has declared a reservation under Article 96 of the CISG.\textsuperscript{291}


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


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

\textsuperscript{291} See CISG art. 96.

A Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration in accordance with article 12 that any provision of article 11, article 29, or Part II of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in that State.
offer, acceptance or other indication of intention to be made in any form other than in writing does not apply.”\(^{292}\) This means, that Article 12 leads to the principle of freedom from writing requirements set forth in Article 11 CISG not being applicable \emph{per se} when one party has its relevant place of business in a State that declared an Article 96 reservation.\(^{293}\) What consequences this has on the applicable writing requirements is subject to dispute. According to one view, the sole fact that one party has its place of business in a State that declared an Article 96 reservation does not necessarily mean that the writing requirements of that State will apply.\(^{294}\) In this author’s opinion, this view is to be preferred over the view that where one party has its relevant place of business in a State that declared an Article 96 reservation, the contract must necessarily be concluded or evidenced or modified in writing.\(^{295}\) The law to be applied (and, thus, whether a given writing requirement must be met) will depend on the law to which the rules of private international of the forum lead.\(^{296}\) Thus, where the private international law of the forum leads to the law of a Contracting State that has declared an Article 96 reservation, that State’s writing requirements will have to be applied. Where, however, the rules of private international law lead to the law of a Contracting State that has not declared an Article 96 reservation, the contract will not need to meet any writing requirement, a view also held in case law.\(^{297}\)

\(^{292}\) CISG art. 12.


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

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

XV. CONCLUSION

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

298 See supra text accompanying notes 59 ff.
299 See Michael G. Bridge, Uniformity and Diversity in the Law of International Sale, 15 PACE INT’L L. REV. 55, 56 (2003), stating in respect of the CISG that it “should not however be thought that all international sales are alike and that one single uniform sales law should be provided on a ‘one size fits all’ basis.”
300 See supra text accompanying notes 82 ff.
301 See supra text accompanying notes 166 ff.
302 See supra text accompanying notes 189 ff.
303 See supra text accompanying notes 266 ff.
304 See supra text accompanying notes 284 ff.
From this it clearly follows that it is an oversimplification to state that the CISG makes resorting to private international law superfluous. By creating a (false) sense of certainty as to the rules applicable to a contract for the international sale of goods, namely those of the CISG, this oversimplification may be more dangerous for one’s interests, and, ultimately, more costly than the awareness of the CISG constituting an incomplete set of default rules with a limited applicability.

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

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


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