MYKOLAS ROMERIS UNIVERSITY

FACULTY OF LAW

DEPARTMENT OF BUSINESS LAW

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«FEASIBILITY AND DESIRABILITY FOR THE MODERNIZATION OF THE 1980 UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) »

Master Thesis

Supervisor

Dr. Paulius Zapolskis

VILNIUS, 2013

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ABBREVIATIONS

BGB- German Civil Code

CESL- Regulation of the European Parliament and of the Council on a Common European Sales Law

CISG-AC-CISG Advisory Council

CISG- The United Convention on Contract for the International Sale of Goods

DCFR- Draft Common Frame of Reference

EDI- Electronic data interchange

EP- European Parliament

EU- European Union

FOSFA- Association for international trading in oils, fats and oilseeds

GAFTA- The Grain and Feed Trade Association

ICC- International Chamber of Commerce

INCOTERMS- International Commercial Terms

OHADA- Organization for the Harmonization of Business Law in Africa

PICC- The UNIDROIT Principles of International Commercial Contracts

UCC- Uniform Commercial Code

UNCITRAL- The United Nations Commission on International Trade Law

UNIDROIT- The Institute for the Unification of Private Law

ULFIS- The Uniform Law on the Formation of Contracts for the International Sale of Goods

ULIS- The Uniform Law on the International Sales of Goods

WTO- World Trade Organization

INTRODUCTION

Scope of the thesis. The thesis represents legal analyses on the desirability and feasibility for the modernization on 1980 United Nations Convention on the Contracts for the International Sale of Goods (further-CISG). The CISG is considered as one of the prime conventions in the field of international trade law, the universal adoption of which is highly desirable. Thirty-three years have passed since it was created. Legal scholars are burdened with the task of making historical analysis on questions, which arose during application of the Convention and define the provisions of CISG that became old or that do not regulate modern relations that became an internal part of life nowadays. Quite a lot of lawyers took into account the questions of whether the provisions of the CISG required modernization and whether it is possible to change the Convention. Despite the fact of general practical advantages of the Convention, public criticism on the application of the CISG to international commercial transactions remained and caused strong adverse views on it. In this master thesis, two questions will be raised: whether it is desirable and whether it is feasible to modernize the CISG. These waves of issues and criticism directly have negative influence on the Convention in certain legal systems. This shows legal practice of exclusion of the CISG by its contracting parties. According to the world importance of sales law, I truly believe, that a fresh analysis of problems and case law are needed. This thesis will define main problems in application of Uniform law, deficient provisions of CISG, and reasons for exclusion of the Convention by contracting parties. The conclusion on desirability for the modernization of 1980 United Nations Convention on the Contracts for the International Sale of Goods will come from the analyses of the highlighted problems. Besides, a new Swiss global initiative for modernization of the CISG, its desirability and feasibility will be analyzed in this thesis. And on the base of it, the feasibility for the modernization will be evaluated.

The value of the thesis.

Theoretical: the thesis provides an analysis on desirability and feasibility for the modernization of the CISG on the basis of the problems defined by the author. Therefore, the problematic and deficient provisions, experience of exclusion of the Convention are raised. Moreover, in order to evaluate feasibility of changes in the Convention, new ways and directions of new global initiative are taken into account.

Practical: nowadays, a deep analysis on the desirability for modernization is highly important in order to understand whether the old CISG needs changes, and an analysis on feasibilities that create a fresh look on how and in what direction such changes can be made.

Research problems. Two problems are distinguished within this work. **The first** one is exclusion of the CISG by contracting parties. **The second** one relates to problematic provisions of

the CISG, which consists of general problems in the application of Uniform Law and deficient provisions.

Research objects. There are three objects within this thesis: the **first** one includes the main reasons that may justify the need for the modernization of the CISG, dealing with problematic and deficient provisions of the Vienna Convention, the **second** one is the desirability for the modernization of the CISG from the point of conclusions on the main problems and practice of exclusion of the Convention, and the **third** one is the feasibility for the modernization of the CISG, regarding the new Swiss proposal, report of UNCITRAL and scholars views.

Research subject matters. With regard to the first object, the following subject matters are primarily discussed in this thesis: exclusion of the CISG by contracting parties and general overview of the CISG problems presented in the literature.

As the second subject matter is concerned, the focus will be on the following issues: general problems in the application of Uniform law (issues of uniform interpretation, concurrent remedies and battle of forms), deficient provisions of the CISG (validity, hardship and electronic commerce).

Relating to the third object further subject matters will be discussed: Swiss proposal on possible future work by UNCITRAL in the area of international contract law, desirability of UNCITRAL to assess operation of CISG and desirability of further harmonization and unification of related issues of general contract law, position of the UNCITRAL on possible future work in the area of international contract law, and analyses on desirability of the new global initiative.

Aims and tasks of the thesis. There are two main aims raised in this thesis. **The first** one is to determine and analyze input problems of the CISG provisions and issues, which the Convention does not cover or does not directly mention in its provisions, but which are desired to be covered by it. **The second** one is to analyze and evaluate whether it is desirable and feasible to modernize the 1980 United Nations Convention on the Contracts for the International Sale of Goods.

In order to achieve the goal of the research these objectives were defined:

1. to identify existing problems in the 1980 United Nations Convention on the Contracts for the International Sale of Goods and analyze practice for exclusion of the Convention by Contracting Parties.
2. to define and analyze main problems in the CISG, and make a general conclusion on desirability for the modernization of the 1980 United Nations Convention on the Contracts for the International Sale of Goods.
3. to evaluate the feasibility for modernization of the 1980 United Nations Convention on the Contracts for the International Sale of Goods on the basis of the new Swiss Proposal.

Accordingly, the **hypothesis** is raised in this thesis to analyze whether the CISG needs modernization of its provisions and what are the feasibilities to realize it.

It is desirable and feasible to modernize the 1980 United Nations Convention on Contracts for the International Sale of Goods.

Scope of the previous research and bibliography. The problems of the CISG are discussed in the writings of qualified scholars. This thesis mostly makes reference to legal writings of: DiMatteo L.A, Honnold J.O, Eiselen S., Ferrari F., Lookofsky J., Schwenzer I. and Kofod F. Legal studies and reviews of different organizations are also used pursuant to the research, for instance, Journal of Law and Commerce, Pace International Law Review, Vindobona Journal of International Commercial Law and Arbitration, Villanova Law Review, Yale Journal of International Law. The basic legal source used in this thesis is CISG and its provisions, which are also viewed as the main object of this research. Other international treaties of supplementary nature to the CISG were also used in the process of analyses, namely the UNIDROIT Principles, UNCITRAL Model Law on Electronic Commerce (1996), UNCITRAL Model Law on Electronic Signatures (2001) etc. In order to make conclusions on desirability and feasibility the Yearbook and Report of UNCITRAL in the area of International Contract Law, Decisions of CISG Advisory Council and Swiss Proposal were analyzed. Besides, national legal instruments – Uniform Commercial Code (UCC), German Civil Code (BGB), Italian Civil Code, were used while comparing different approaches in domestic laws. Moreover, the official web page of the Pace Law School, comprising many articles, researches and case law regarding the CISG were used as a source of analytical material when writing this thesis. A considerable number of court decisions were analyzed too.

Methods of the research. In order to provide an exhaustive analysis of the problems raised within this research and to achieve the aims and tasks of this research, the methods used are as follows: theoretical (systematic analysis, comparative, analogy) and empirical (analysis of international and domestic legal sources).

Organization of the thesis. The thesis is divided into three parts. The first part deals with exclusion of the CISG by contracting parties and general overview of the CISG problems presented in the literature. The second part defines main issues that may lead to modernization of the 1980 United Nations Convention on the Contracts for the International Sale of Goods. Therefore, six main problems are defined, analyzed and divided into two groups. The first group discusses problems related to the general problems in the application (uniform interpretation, concurrent remedies, battle of forms), while the second one – to deficient problems of the CISG (validity, hardship and electronic commerce). On the basis of mentioned analyses, desirability for the modernization is concluded. The third part is appointed to determine the feasibility to modernize the CISG. Thus, the Swiss Proposal of new global initiative analyzed and the opinions of scholars and official organizations are compared.

CHAPTER I. GENERAL OVERVIEW OF CISG PROBLEMS.

Contract of international sale is the framework of international trade in all countries without reference to their legal traditions and level of economic development.[1] The 1980 United Nations Convention on Contracts for the International Sale of Goods (further - CISG) is the result of legislative efforts that began in early XX century. The purpose of the CISG is to ensure a modern, uniform and equitable treatment of contracts for the international sale of goods.[2] At the date of 1st January 2014, Convention is ratified by 79 countries. Recently Brazil became 79th State Party to the Convention, which shows its importance and wide applicability in world's trade market.[3] The CISG is one of the major conventions in the field of international trade law, the universal adoption of which is highly desirable. Seventy to eighty percent of all international sales transactions potentially are governed by the CISG.[4]

On this date, thirty three years from creating the CISG have passed and law scientists and scholars stuck with the need to make some historical analysis on questions, which arise during application of Convention, pay attention on provisions of Convention that became old or that do not regulate modern relations, which became an internal part of life nowadays. Quite a lot of lawyers took into account question whether provisions of the CISG need modernization and whether it is possible to change the Convention.[5] Despite the fact of general practical advantages of the Convention, public criticism on application of the CISG to international commercial transactions remains and puts strongly adverse view on it. In this master thesis, I will raise two main questions, whether it is desirable to modernize the CISG and analyze whether it is feasible.

Common advantages of the CISG in regulating international sale of goods relations are undisputable. To this conclusion came UNCITRAL, speaking about CISG`s anniversary as a success.[6] But still, there is a space for criticism regarding the application of the CISG to international commercial transactions. Despite the history of thirty three years, judicial and arbitral decisions are

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[1] United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG)/ [interactive]. Text - Explanatory note. [accessed 2013-10-03] <http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html>

[2] *Ibid.*CISG. Explanatory note

[3] Brazil accedes to United Nations Convention on Contracts for the International Sale of Goods (CISG)/ [interactive]. Press realizes, UNIS/L/182, 5 March 2013 . [accessed 2013-10-06] <http://www.unis.unvienna.org/unis/pressrels/2013/unisl182.html>

[4] Schwenzer I., Hachem P., *The CISG – A Story of Worldwide Success*/ University of Basel, 5 February, 2009, p. 119

[5] Huber P., Gutenberg J. *European Private International Law, Uniform Law and the Optional Instrument/* Academy of European Law (ERA), Trier, Germany, April 2003., p. 2

[6] *Ibid.* Schwenzer, p.129

still stuck on a regular basis, which show a lack of understanding of the fundamental purpose of the CISG.[7] Such a negative wave of views directly influences on the Convention in certain legal systems. According to the world importance of sales law, I truly believe, that fresh analysis of involving problems and case law is needed.

Thus, in order to evaluate whether the problems in the CISG indeed exist, in Chapter I of this thesis I would like to analyze the exclusion of the CISG by contracting parties and make short overview of issues highlighted in the literature.

1.1. Exclusion of the CISG by contracting parties

One of the issues raised by the courts relates to the possibility of the parties to exclude the CISG, which led some scholars to label the CISG as a "dispositive" convention.[8] The most valued idea of the CISG is its non-mandatory nature. Therefore, parties who want not to submit their commercial relationships on the base of its provisions are permitted by one of its Articles to so-called "opt out" the Convention. This autonomy is contained in Article 6 of the Convention which states that "the parties may exclude the application of Convention or, subject to Article 12, derogate from or vary the effects of any of its provisions." [9] The simplest way to exclude the application of the CISG or "opt out" is by implanting a choice of law provision in the international sale contract. However, choice of law clauses must explicitly provide that the Convention is inapplicable to the international sale of goods transaction in order to ensure that it will not be applied.[10]

A majority of arbitral tribunals and national courts have held that a choice of law clause in an international sale of goods contract which chooses the laws of a Contracting State means that the Convention shall apply to the contract, but not the domestic commercial laws of such Contracting State. This position is taken, generally, because the Contracting States have incorporated

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[7] Zeller B., *The challenge of a uniform application of the CISG- common problems and their solutions*/ MqJBL (2006) Vol. 3, p. 309

[8] Franco Ferrari, *Tribunale di Vigevano: Specific Aspects of the CISG Uniformly Dealt with*/ Journal of Law and Commerce (Spring 2001) p. 225

[9] United Nations Convention on Contracts for the International Sale of Goods (1980) [interactive]/ the UN-certified English text is published in 52 Federal Register 6262, 6264-6280 (March 2, 1987); United States Code Annotated, Title 15, Appendix (Supp. 1987) [accessed 2013.11.27] <http://www.cisg.law.pace.edu/cisg/text/treaty.html >

[10] Hartnell H.E., *Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods* [interactive]/ Yale Journal of International Law (1993), [accessed 2013.10.14] <http://www.cisg.law.pace.edu/cisg/biblio/hartnell.html>

the Convention into the laws of their country, and the law of such Contracting State which governs international commercial contracts for the sale of goods is the CISG.[11]

Professors Martin Koehler and Guo Yujun in 2008 made statistical analysis on exclusion of the CISG and its reasons on reviews of USA, Germany and China. It was concluded that only 10 of 108 respondents (9.3%) answered that they never excluded the application of the CISG. In contrast, 64.8% excluded the CISG principally or preponderantly (USA: 70.8%, Germany: 72.7%, China 44.4%).[12]

Such experience of an exclusion of the Vienna Convention gives the ground to search for its main reasons. The "opting out" of the CISG raises doubts of whether its provisions, nowadays, are able to adequately cover relations between the parties, especially, if contracting parties that ratified the CISG have exclude it in their legal practice.

So, why contracting parties excludes the Vienna Convention? Professor Filip De Ly in his researches came to the conclusion and defined three objectives excluding the CISG by parties:

1) More favorable position under national law than by the CISG. Meaning that if the domestic sales law of the party of the contract is more favorable to it than the CISG, such party, logically, may consider that exclusion will play for him an advantage.

To prove this idea, scholar uses his own legal practice that almost all general conditions in sale contracts of Dutch subsidiaries of German parent companies included in the sample had expressed opting out provisions. One more statement is used to support mentioned point of view. Dr. Y. Strothman, in his presentation on the Conference in Liege indicated that German domestic law is more favorable for seller than the CISG.[13] A similar observation was made by the scholar to the French law. French law is consider to be more favorable to the buyer, especially in issues of invalidity of warranty disclaimers in relation to sales to buyers in branches of trade other than the seller`s and long periods of limitation for warranties for hidden defects. Accordingly, the buyer with strong bargaining position may have an advantage while excluding the CISG and choosing to regulate his contract by French sales law.[14]

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[11] Drago T.J., Zoccolillo A.F., *Be Explicit: Drafting Choice of Law Clauses in International Sale of Goods Contracts* [interactive]/ The Metropolitan Corporate Counsel (May 2002), [accessed 2013.10.22] <http://www.cisg.law.pace.edu/cisg/biblio/zoccolillo1.html >

[12] Koehler M.F., Yujun G., *The Acceptance of the Unified Sales Law (CISG) in Different Legal Systems*/20 Pace Int'l L. Rev. 45 (2008), p. 48

[13] De Ly F., *The relevance of the Vienna Convention for the International Sales Contracts- Should we stop contracting it out?*/B.L.I. Issue 3: International Bar Association, 2003, p. 244

[14] *Ibid*. De Ly, p. 244

In contrast scholar Brödermann states that, from an academic and sometimes also practical viewpoint, there may be deficiencies: some things need to be regulated differently in a given set of circumstances and some rules in the CISG are the result of a compromise. In addition, some States like Denmark have made reservations to parts of the CISG, as for example Part II (Contract Formation). However, this is again detail.[15]

Looking on the United States experience, the extensive case law interpreting the UCC may lead American businesses to feel that there is a greater degree of legal certainly under the UCC rather than under the CISG. In this regard, to have the UCC apply, specific reference to, and exclusion of the CISG must be make in all international contracts for the sale of goods.[16] To such conclusion came American scholars.

Statistical analysis of Professors Martin Koehler and Guo Yujun shows that only a few respondents (8.3%) stated that, in their opinion, the CISG is legally advantageous. In this regard, the American, German and Chinese respondents were largely common (Germany 6.1%, USA 8.3%, and China 11.1%).[17] On the other hand, number of respondents in the USA who consider the national law an advantage is 35.4%, which is almost the same as the number of those who see an advantage in neither the one law nor in the other (39.6%). In China, 37% of the respondents consider the national law as an advantage, while 44.4% of the respondents view neither of the legal systems as legally favorable. It was approximately the same as the number in the USA. In Germany, however, only 21.2% consider the national law advantageous, while the significant majority (72.7%) views neither of the legal systems as legally favorable.[18]

The following may say that there is, indeed, a problem, if main players of the sales market see the reason to exclude the CISG from their contract relations. I think that it puts the main purpose of Vienna Convention, namely, uniform application, under a big question.

2) Conflict with extensive self-regulation in a certain branch of trade.

As it was reported by Bonell, London based commodity associations, such as GAFTA and FOSFA, have specifically excluded the application of the CISG from 1982 till 1988.[19] This may be a reason

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[15] Brödermann E., *The practice of excluding the CISG: time for change? Comment on the limited use of the CISG in private practice (and on why this will increasingly change)* /Modern Law for Global Commerce Congress to celebrate the fortieth annual session of UNCITRAL, Vienna, 9-12 July 2007, p. 23

[16] Auslander W., Druckman K., *The CISG: tool or trap for contracts for the sale of goods?* / Lexlogy, USA, December 12 2011, p. 3

[17] Koehler M.F., Yujun G., *The Acceptance of the Unified Sales Law (CISG) in Different Legal Systems* /20 Pace Int'l L. Rev. 45 (2008), p. 53

[18] *Ibid*. Koehler, p. 53

[19] Ibid. De Ly, *The relevance of the Vienna Convention for the International Sales Contracts- Should we stop contracting it out,* p. 245

of some cautious, but may be related to the specificity for the branch of trade. In point view of some authors, the CISG by its nature of general sales understands as dealing inadequate with some specific needs and problems. In this regard, the common view is that the Convention is not suited for commodity sales, where multiple transactions take place between trading houses, but not between the producer and end-user.[20]

3) Existence of controversy regarding the issue whether the CISG is applicable or not.

This objective was concluded by author on his experience in Dutch software companies. There is a debate whether the CISG can be applicable to software and whether the sale of software can be treated as a sale of goods, while the concept of "goods" has to be interpreted under Articles 1, 2 of the Convention. This may be the question not only related to the software, but also to any other commodity that does not fall under the CISG concept of goods.[21]

In statistical research of Koehler and Yujun, the most often selected practical reason for the exclusion was because the CISG is generally not widely known (47.2% of all respondents). Second submitted reason for the exclusion was that there is no need to make use of the unified law as long as business partners continue to apply national law (41.7%). Near one-third of all respondents mentioned as a reason for excluding the CISG that their business partners, or the business partners of their respective clients, could not be dissuaded from the application of national law (33.3%) or that no advantage was seen in the application of the uniform law (31.5%). Approximately every fourth respondent answered that their firms still have unsatisfactory experience with the application of the CISG (25.9%), or that there is still insufficient case law related to the CISG (24.1%). Among other reasons were defined: company`s or client`s market position enables retention of national law, due to foreign branch lawsuits are pursued domestically, insufficient literature on the CISG, negative experience with the ULIS or other unified law and others.[22]

Other reasons were concluded by Ackert Brödermann. In his opinion, exclusion of the CISG relates to the three reasons: ignorance, fear and reluctance to change existing patterns.

1) Ignorance.

Scholar believes that some lawyers or businessmen simply do not know about such legal instruments as the CISG or the UNIDROIT Principles. As an example, he uses real Dutch-Russian case from his legal practice, which had not any exact choice of law. When the arbitration tribunal advised on the applicability of the CISG in their relations both parties were surprised. This is counting the fact that

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[20] De Ly, *The relevance of the Vienna Convention for the International Sales Contracts- Should we stop contracting it out, p. 246*

[21] *Ibid.* De Ly, p. 247

[22] Koehler M.F., Yujun G., *The Acceptance of the Unified Sales Law (CISG) in Different Legal Systems*/20 Pace Int'l L. Rev. 45 (2008), p. 49,50

both- Netherlands and Russian Federation are contracting parties of the United Vienna Convention. Another reason, in this regard, author sees in "old generation" on lawyers. As the CISG was concluded in 1980, and came into force around 1990 or even later- after ratification in the 1980s, generation of lawyers, which had left school at that time, had never been aware with the CISG in their education. Without continued legal education in this area of law, they do not know about the CISG and its advantages.[23] Statistical analysis of professors shows that the most often selected practical reason for exclusion was because the CISG is not widely known (47.2%).[24]

2) Fear.

This reason author relates to undesirability of lawyers to take the risk while giving an advice on a set of law, where they cannot evaluate the consequences. Lawyers prefer to choose the national law which they have studied and know and never took the time to concentrate on the CISG. Not looking on that the CISG is part of the international sales law of their native country. In the result, they stay aware from it, in order to avoid the risk and becoming liable for it. The pity thing, concerning this question, is that in most of cases where the CISG is even better for their clients, they may do not even realize that they are not acting in favor of their client, but to another party.[25]

3) Reluctance to change existing patterns.

Scholar believes that companies have made a choice to "opt out" the CISG earlier, as a matter of standard. Such decision was taken many years ago when there was no case law on the new Sales Convention. In some countries, like Germany, the old national law was even better for the seller than the CISG. Accordingly, a seller`s companies were well advised to exclude the CISG. Since then, companies may have adopted its standard terms and conditions. Unfortunately, re-evaluation of the exclusion of the CISG was not part of the agenda since 2002.[26]

Looking on the case law, the Tribunale di Vigevano decision deals with the issue of whether the CISG must be considered as having been excluded where the parties pleaded on the sole basis of a particular domestic law (in this case- Italian law), not counting the fact that all of the CISG`s criteria of applicability were met. The court stated that the mere fact that the parties argue on the sole basis of a domestic law must not necessarily be taken to mean that they have excluded the CISG. Indeed, in order to have the effect of excluding the CISG, the parties must have been aware of

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[23] Brödermann E., *The practice of excluding the CISG: time for change? Comment on the limited use of the CISG in private practice (and on why this will increasingly change)*/Modern Law for Global Commerce Congress to celebrate the fortieth annual session of UNCITRAL, Vienna, 9-12 July 2007, p. 24

[24] Koehler M.F., Yujun G., *The Acceptance of the Unified Sales Law (CISG) in Different Legal Systems*/20 Pace Int'l L. Rev. 45 (2008), p.49

[25] *Ibid*. Brödermann, p. 25

[26] *Ibid.* Brödermann, p.25

its applicability in the first place. If they were not aware of the CISG`s applicability, the courts will have to apply the CISG. Nowadays, this considers as the prevailing view in legal writing, as well as in case law. For example, German court,[27] adopted this view when it stated that the parties arguing on the sole basis of a domestic law may be regarded as having excluded the CISG when "it results that their pleadings correspond to an agreement of the parties to exclude the Convention."[28] If the behavior during the proceedings is not based upon a conscious choice of a domestic sales law, but rather on the erroneous opinion that this law would anyway be applicable, the CISG would have to be applied by virtue of the principle *iura novit curia*, as expressly stated by the Tribunale di Vigevano.[29]

In opposition to mentioned views, professor Smits does not see any problem in opting out the CISG by the parties. He states that special characteristic of the Convention is that it creates a uniform regime that does not replace existing national regimes on sale of goods, but only adds an extra option for parties that feel their interests are served better by the uniform sales regime than by some national law. However, this does not mean that it is wrong if parties decide to opt out of this regime. To the contrary: in every case in which a party is aware of the existence of the CISG and its potential applicability to the contract, there is an empirical test of its usefulness. The recurrent theme is apparently that we should not confuse the need for uniformity with the interests of parties or the wish to promote international trade: the one does not follow from the other.[30]

According to the analysis, which was presented above, comes the conclusion that the main reasons for an exclusion of the Convention can be divided into legal and practical ones. To the legal reasons for exclusion are put: more favorable position under national law rather than by the CISG, conflict with extensive self-regulation in a certain branch of trade and existence of controversy regarding the issue whether the CISG is applicable or not. Practical reasons are: the lack of familiarity with the uniform law, as a primary reason for its exclusion, lies in old generation of lawyers which are practicing nowadays, client`s market position enables retention of national law, insufficient literature and case law on the CISG, lack of lawyer`s knowledge in advantages of the Convention and ability to evaluate what legal instrument would be more favorable in particular case, negative experience with the ULIS or other unified laws, the use of exclusion provisions as a standard or as "usage". Thus, practical reasons prevail. The reason of it, mostly, hides not in the

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[27] *Window elements case*, 1995 // <http://cisgw3.law.pace.edu/cases/950609g1.html>

[28] *Ibid. Window elements case*

[29] Franco Ferrari, *Tribunale di Vigevano: Specific Aspects of the CISG Uniformly Dealt With*/ Journal of Law and Commerce (Spring 2001), p. 226

[30] Smits J. M., *Problems on Uniform Sales law: why the CISG may not promote international trade*/ Maastricht European Private Law Institute Working Paper No. 2013/1, p. 11

CISG as a legal instrument and its inability to cover relations of the parties, but with lawyers and law companies, which stay aware from the Convention. However, legal reasons also take place in common exclusion of the CISG, but their value is not as much as practical ones.

1.2. Overview of CISG problems presented in the literature

Despite worldwide success, the CISG is merely a sales law convention that nevertheless covers core areas of general contract law. In addition to the obligations of the parties and typical sales law issues (in instance conformity of the goods, passing of risk etc.), it contains provisions on the formation of contracts and remedies for breach of contract. Still it remains a piecemeal work, leaving important areas to the applicable domestic law.[31]

Firstly, lack of the CISG relates to the areas not at all covered by the Convention. Secondly, many issues that were still highly debated in the 1970s had to be left open in the CISG (in instance: issues of battle of the forms, specific performance and applicable interest rate). Thirdly, some areas covered by the CISG have in the meantime proven to need more detailed attention, such as the rules on unwinding of contracts. Finally, conventions meant to supplement the CISG, such as the 1974 United Nations Convention on the Limitation Period in the International Sale of Goods and the 2005 United Nations Convention on the Use of Electronic Communications in International Contracts, have not attracted as many members as the CISG, in that way diminishing their unifying effect.[32]

Schwenzer and Hachem defined the CISG problems into three groups. First one relates to the general problems in application of uniform law. Within this group are presented the issues of uniform application and concurrent remedies.[33]

Uniform interpretation of the CISG has been one of the main problems and still considers as such.[34] Its ambitious goal is hard by the fact that each Contracting State of the Convention has its own legal system, influenced historically and economically.[35] A group of critics claim the CISG on inaccuracy and vague terms. Courts sometimes use domestic law to interpret provisions of the CISG.

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[31] UNCITRAL, Possible Future Work in the Area of International Contract Law: Proposal by Switzerland on Possible Future Work by UNCITRAL in the Area of International Contract Law, U.N. Doc. A/CN.9/758 (May 8, 2012) [hereinafter Swiss Proposal], p.3

[32] *Ibid.* Swiss Proposal, p. 6,7

[33] Schwenzer I., Hachem P., *The CISG – A Story of Worldwide Success*/ University of Basel, 5 February 2009, p.129

[34] *Ibid.* Schwenzer I., Hachem, p. 129

[35] Andersen C.B. *Furthering the Uniform Application of the CISG: Sources of Law on Internet*/ 10 Pace Int`l L. Rev., 199, p. 403, 404

These lead to different judgments in similar cases and, accordingly, to the exclusion of the Convention as it cannot guarantee the parties protection of their interests.[36]

Another important problem, relates to concurrent remedies. The CISG deals with the contractual relationship between the buyer and the seller. However, in other legal systems it is not prohibited to relay on other legal remedies, for example, such as tort remedies. Raises the question: whether the parties of the CISG sale contract can maintain the concurrent remedies according to their native law, even if in the result it entails opposition to remedies provided in CISG provisions?[37]

Second group of issues correspond to content provisions of the CISG. First issue is the lack of neutrality between the parties. There are various opinions in literature that Convention gives too much care to the sellers, other state that it patronizes the buyer. The idea that the CISG provisions give more privileges to the seller is represented, mostly, by the developing countries. Such opinion justified by obligation of the buyer to check the goods and notice about its non-conformity. If to go deep into history, while drafting the CISG in Vienna Conference, the proposition to add this provision was supported by delegates of countries that do not have provisions of requiring notices of non-conformity of commodities. Opposite view have German lawyers, which think that more care provisions of the CISG provide to the buyer. As background they use the concept of co-called "strict liability" relating to the requirement of notice.[38]

Second content question connects to the necessities of trade. There is point of view that the CISG does not satisfy the need of trade. This critical idea bases on two points: relationship between provisions on risk of loss in the CISG and INCOTERMS, and also regarding special need of commodity trading. Regarding the risk of loss, scholars were claiming that it is problematic to understand delivery terms and not to mix them with INCOTERMS ones. That was one of the main reasons why Great Britain and some other countries did not ratify the Convention. Some authors think that such critical opinion is based on general misunderstanding of the relation of INCOTERMS terms and the default system of the CISG. As a principle, the default system of the CISG comes into force only when parties made provision for specific question in their contract. It would be obvious not to give default system enough space to drift the contract according to parties needs.[39] British authors also stay in the opinion that the CISG cannot satisfy the needs of commodity trade.[40]

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[36] Schwenzer I., Hachem P., *The CISG – A Story of Worldwide Success*, p. 130

[37] *Ibid.* Schwenzer I., Hachem P., p. 132

[38] *Ibid.* Schwenzer I., Hachem P., p. 137

[39] *Ibid.* Schwenzer I., Hachem P., p. 138

[40] De Ly, *The relevance of the Vienna Convention for the International Sales Contracts- Should we stop contracting it out?*, p. 246

The third group consists of issues of hardship and validity. The most discussable issue belongs to the direct implementing provisions of hardship in the CISG.[41] Its purpose is to solve problems of fundamentally changed circumstances by adapting the contract to the new situation. Some authors have complained about non-existence of rules, which can regulate change of circumstances in contact relations. Article 79 of the CISG, which primary deals with exceptions in cases of force majeure and change of circumstances, can make impediment in the sense of this provisions.[42] But, do not directly mention such opportunity in Article 79 of the CISG.

Second important question relates to the validity of contract in the CISG. The scope of application of the CISG covers only the formation of sale contact and rights and obligations of the seller and the buyer. It does not touch questions about validity of sale contract and its provisions. An unclearness of the term "validity" gives wave of criticism from one group of authors, as from such perspective it leads to contradictory application of the Convention.[43]

Ulrich Magnus mentions that the most deplorable omission is that the CISG does not itself determine the rate of interest for sums due under the Convention. For various reasons this question was deliberately left open.[44]

Additional points which could be regarded as loopholes, in his opinion, are the lack of specific rules on the incorporation of standard terms, on letters of confirmation and on the well-known battle of forms. [45]

CISG also enables a reasonable solution for the battle of contradicting standard forms.[46] "Battles of the forms" is one of the most controversial questions under the Convention. In this regard, the questions that need an answer: when there is a battle of the forms, is the contract concluded? And, if the answer is positive, what are the terms of the agreement?[47]

Professor Scheaffer identified follows reasons for the failure of the CISG as a uniform code:

1) Language Problems

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[41]Schwenzer I., Hachem P., *The CISG – A Story of Worldwide Success*, p. 136

[42] Zeller, Bruno, *Challenge of a Uniform Application of the CISG - Common Problems and Their Solutions* / Macquarie Journal of Business Law, Vol. 3, p. 313

[43] *Ibid.* Schwenzer I., Hachem P., p. 134

[44] Magnus U., *The Vienna Sales Convention(CISG) between civil and common law law-best of all worlds?*/ Journal of Civil Law studies, Vol.3, 2010, p. 94

[45] *Ibid.* p. 94

[46] *Ibid.* p. 94

[47] Viscasillas P.P., *Cross-references and editorial analysis of Article 19* [interactive]/ Pace Law School Institute of International Commercial Law, December 1996 [accessed 2013.11.06] <http://www.cisg.law.pace.edu/cisg/text/cross/cross-19.html>

The CISG suffers language difficulties. For example, Article 16 of the CISG distinguishes between concepts "withdrawal" and "revocation". This leads to linguistic misunderstanding. Other problem relates to different understanding of general contract conditions. Finally, some translations are inaccurate or there is a lack of translation as it happens with case law.[48]

Professor Schlechtriem observes that the CISG was written and certified in the following official languages: Arabic, Chinese, English, French, Russian and Spanish. The discussions were all conducted in one of these languages and then translated simultaneously into the other five. Simultaneous translations are not a complete solution but they certainly serve to diminish the problem.[49]

2) The opportunity for "opting out" of the CISG.[50] (this issue was discussed in the first subchapter)
3) Misapplication of the CISG by courts.

Many domestic courts have taken a "homeward trend" approach. It means that the CISG has been interpreted through the prism of domestic law. In other words courts have interpreted the CISG as though it were the same as their respective domestic laws.[51]

4) Internal contradictions.

Scheaffer makes briefly mentions the alleged internal contradictions in the CISG. He identifies Articles 14(1) and 55 of CISG as an example of such contradiction.[52]

Also in the literature the issue of penalty clauses can be met. Eiselen, in this regard, has pointed out that the CISG consciously does not deal with so called liquidated damages and penalty clauses. [53]

Discussable in the literature was electronic revolution of 20th century that took new means of communication and technologies. As the CISG was adopted in 1980, before the development of the Internet and other electronic communication, it is not familiar with them. Article 13 of the CISG in the concept of "writing" includes only telegram and telex.[54] Thus raise the set of questions: how in this case, the contracts of sales are formed? Can contract of sale be concluded by electronic means etc.?

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[48] Kee C., Munoz E., *In the defense of the CISG*/ Deakin Law Review, Vol. 14 No 1, 2009, p. 105

[49] *Ibid.* p. 106

[50] *Ibid.* p. 108

[51] *Ibid*. p. 110

[52] *Ibid*. p.110

[53] Eiselen S., *Adopting the Vienna Convention: reflections eight years down the line*/ 19 SA Mers LJ, 2007, pp.14-25

[54] Martin C.H., The Electronic Contracts Convention, the CISG, and New Sources of E-Commerce Law/ *TULANEJ OFINT'L & COMP. LAW.*, Vol. 16, 2008, p. 473

CHAPER II. MAIN REASONS THAT MAY JUSTIFY THE NEED FOR THE MODERNISATION OF CISG

Analyses in the Chapter I show that, indeed, the CISG has some problems. Among the vague issues highlighted in the literature I defined six problems, which are the most valuable, in my point of view. In Chapter II, I would like to analyze two particular groups of questions. First group relates to the general problems in the application, namely issue of uniform interpretation, concurrent remedies and battle of forms. Second one raises deficient problems of the CISG, specifically issues of validity, hardship and electronic commerce.

2.1. General Problems in the Application of Uniform Law

2.1.1. Uniform Interpretation

First of all, I decided to raise a problem of uniform interpretation, which became the first critical signs right after coming the CISG into force. As it leads to the exclusion of the CISG by Contracting Parties of the Convention and puts its ability to adequately cover sales relations under the question, it was chosen to deeply analyze this issue.

Even from the beginning, uniform interpretation of the CISG has been one of the main problems and till this time is considers as such.[55] The Preamble of the CISG states that its aim is to exclude "legal barriers in international trade" [56] and to achieve this goal, uniform application of its provisions is necessary. This ambitious goal is hard by the fact that each Contracting State of the Vienna United Convention has its own legal system, influenced historically and economically, as well as by the drafting period when the CISG was negotiated.[57] A group of critics claim the CISG on inaccuracy and vague terms. Mostly, this position is held by common law lawyers, which could be explained by perennial accustomed detailed statutes and delicate relation between judicial and legislative branches of power. In this regard, the CISG, indeed, had chosen the way of continental law tradition and also used great continental experience of the interpretation of legal acts.[58] Nowadays, it is customary that uniform law should be interpreted autonomously. It is important to understand, that the CISG was written in the form of convention and not as a uniform or model act.

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[55] Schwenzer I., Hachem P., *The CISG – A Story of Worldwide Success*, p. 129

[56] United Nations Conventions on Contracts for International Sale of Goods [interactive] [accessed 2013-10-06] <http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf>

[57] Andersen C.B. *Furthering the Uniform Application of the CISG: Sources of Law on Internet*/ 10 Pace Int`l L.Rev., 199, p. 403, 404

[58] *Ibid.* Schwenzer, p.131

Thus, flow its international character, which means common aim of standardization of law at the level above national law.[59] According to international character of uniform legal acts, they should have some imprecision, while to be flexible enough to solve raising questions of, different by their nature, State Parties and be used for long period of time. It was impossible to merger 79 State Parties by one, strict rules of the game, taking into account deference of legislative system and economic development. That was the main reason why creators lived the space for interpretation of certain provisions of the CISG.[60]

Huge variety of theories attempt to solve interpretation issues. Usually in the literature two main theories are presented. First one considers that convention is upon ratification part of national legal system, thus the rules of that legal system shall be used while interpreting the convention. The second one is suggesting "autonomous" interpretation, and excludes the connection of the convention with any particular national legal system in the issue for interpretation.[61]

Second theory is more preferable, on the views of academic Honnold, who states that "the settlement of disputes would be complicated and litigants would be encouraged to engage in forum shopping if the courts of different countries persist in divergent interpretations of the Convention".[62] An opposite view is presented by Ferrari who points out that it would prevent the goal of uniformity which the CISG aims to achieve.[63]

Against the first theory, raises the problem of "*faux amis*", which attributes to a possibility that the same legal terms have various definitions across contracting countries of the Convention, therefore no uniformity in application.[64] Professor Honnold adds that such interpretative theory would be clear infringement of the Article 7 of the Convention.[65] The main purpose of the CISG is to create global rules for international sales, according to the point of view of Bonell, it would be endanger if the recourse to national law would be taken on the regular basis. It is designed to

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[59] DiMatteo L. A., *International sales law: a critical analysis of CISG jurisprudence*/ Cambridge: Cambridge University Press, 2005, p 10,11

[60] Schwenzer I., Hachem P., *The CISG – A Story of Worldwide Success*, p. 139

[61] Perzelova M, *Interpretation of the CISG: How to interpret and fill the gaps in the CISG so as to maintain requirements of uniformity, good faith and internationality as emphasized in the Article 7 of the CISG*/ Dissertation, University of Bristol, International Law in the Faculty of Social Sciences and Law, p. 9

[62] Honnold J.O., *Uniform Law for International Sales under the 1980 United Nations Convention*/ 2nd edn, Kluwer, 1991., p. 142

[63] Ferrari F., *Uniform Interpretation of the 1980 United Sales Convention*,/ 24 Ga J. Int`l & Comp. L. 183 (1994)

[64] Kastely A.M., *Unification and Community: A Rhetorical Analysis of the UN Sales Convention* / Nw. J. Int'l L. & Bus., 1988, p. 574

[65] Honnold J.O., *Uniform Law for International Sales under the 1980 United Nations Convention*/ (3rd edn, Kluwer 1999) p. 89

regulate a certain area of law to which not national, but international rules apply and so even the terms and definitions in the convention shall be interpreted independently from national ones, even though they might deal with the same subject. International conventions are drafted on the international level when often compromise is a golden middle way to go in order to accommodate views and legal systems of many different countries.[66]

According to the following, the CISG is a legal instrument created on the supranational level and, thus, should consider as a separate set of legal rules, that is independent from the national ones, which needs the international application. This idea should be interpreted in the same way in all of the contracting jurisdictions, with no direct reference to any national law.

Vienna Convention on the Law of Treaties can suggest one more option, which may help to achieve international interpretative uniformity. Article 32 of mentioned legal act states:

"Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to Article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable." [67]

By the meaning of this article, a broad scope of help may be found in order to find out the true meaning or intention of particular provision of the CISG. Hence, a permissive interpretative instrument appears to be the analysis of *"travaux preparatiores"* or, in other words, legislative history which can help to establish what was intended by each provision of the Convention. This method is commonly used in international law. Nevertheless, even here there is pitfall, as civil law systems apply legislative history in solving the interpretative issues without any problems, but most courts of common law system (except USA) have some doubts on such application.[68] For example, the Supreme Court of the United States held that interpretation of international treaties does not have to be narrow and recognized "*travaux preparatoires*" as an interpretative tool.[69]

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[66] Perzelova M., *Interpretation of the CISG: How to interpret and fill the gaps in the CISG so as to maintain requirements of uniformity, good faith and internationality as emphasized in the Article 7 of the CISG*./ Dissertation, University of Bristol, International Law in the Faculty of Social Sciences and Law, year, p. 1-53 [Bonell M.J. "Introduction to the Convention", Art. 7, in C. M. Bianca, M. J. Bonell (eds.), / Commentary on the International Sales Law, Giuffre, Milan, (1987) p. 72, 73

[67] 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations [interactive]. [accessed 2013-10-10] <http://cil.nus.edu.sg/1986/1986-vienna-clt-between-states-and-international-organizations-or-between-international-organizations/> Art. 32

[68] Perzelova M., *Interpretation of the CISG: How to interpret and fill the gaps in the CISG*, p. 44

[69] *Air France v. Saks*, 470 U.S. 392, 396 (1985) <http://supreme.justia.com/cases/federal/us/470/392/case.html >

To sum up, Article 7(1) puts the duty to respect the purpose of the CISG to unify international sales law. While achieving this aim, uncertainties, that arise, should be resolved by taking into account "*travaux preparatoires*", foreign case law and scholarly writings.

In order to find a solution of this problem, the overriding principles of the Article 7 should be taken into account, namely- internationally, uniformity and principle of good faith. As the wording of this provisions mentions in the imperative style, it should put a legal duty on judges to comply with them. This approach was the most successful till this time. It pays attention in foreign court and arbitral decisions, which start to have huge international value nowadays. Of course, such decisions do not have mandatory force, but still, their authority is taken into account and has big importance. Such approach by its nature needs availability to use foreign legal materials. On this day, there are plenty of foreign legal materials- international databases, translated programs of foreign court and arbitral decisions, materials of UNCITRAL, and opinions of the CISG Advisory Council, which provide guidelines on uniform interpretation.

2.1.2. Concurrent Remedies

Another important problem, that I would like to discuss relates to the concurrent remedies. CISG deals with the contractual relationship between the buyer and the seller. However, in other legal systems it is not prohibited to relay on other legal remedies, for example, such as tort remedies. Raises the question: whether the parties of the CISG sale contract can maintain the concurrent remedies according to their native law, even if in the result it entails opposition to remedies provided in the CISG provisions? This problem mostly traced in regard of remedies for non-conformity of the goods. In this field we encounter whether the buyer can rely on native notion as mistake, negligent misrepresentation, and fault in conclusion of a contract (known as *culpa in contrahendo*). Or whether the buyer can, in legal systems, which recognize tort claims for damage, recover his economic loss, which was caused by defective product or damage to the property? Can the buyer rely on these claims, if there is prevention from relying on the non-conformity of the goods under the CISG? Can the buyer do it if the damages were not within the contemplation of the parties or if avoidance under the CISG is not possible, because the breach does not amount to a fundamental one?[70] The answers on these questions are disputable, according to chosen by civil lawyers Convention's approach. On the other hand, English scholars have their own view. They

[70] Schwenzer I., Hachem P., *The CISG – A Story of Worldwide Success*, p. 132

believe that if the CISG aimed to be understanding uniformity to each State Party, it cannot be given to each State the right to apply their native law neither for contractual, nor for tort? [71]

Looking through case law, author would like to analyze controversial issue of whether courts should interpret the CISG so as to allow using "concurrent remedies" on an example of the case *Pamesa v. Mendelson.*[72] Moreover, whether Mendelson should be allowed to proceed a tort cause of action against Pamesa under domestic tort law, even if Mendelson`s CISG (contract-based) claim against Pamesa was held to be time-barred.[73] The Court in this case summarized that the Convention does not apply to obligations in tort law, since these apparently do not "arise from a contract of sale."[74] On the question whether it is possible to file a claim in tort when the sale contract between parties is governed by the Vienna Convention, the Supreme Court of Israel observes, there are two main approaches in international academic literature:[75]

1. According to the first of these approaches of the CISG interpretation, presented by John Honnold, domestic rules that turn on "substantially the same facts" as the rules of the Convention must be displaced by the Convention.[76] According to this view, Mendelson cannot come over the Convention obligation to notify by defining its claim, as a tortuous claim based on a departure from what is expected of a reasonable seller.[77]
2. The second approach is more tolerant to concurrent tort claims. Among the proponents of this position, the Court cites Professor Schlechtriem,[78] who presents an analytical distinction between a claim that is intended to protect contractual interests that were created by the parties within the framework of the sale agreement that they, and a claim based on tortuous causes of action that are intended to protect interests that are not dependent on the existence of a contract.[79]

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[71] Schwenzer I., Hachem P., *The CISG – A Story of Worldwide Success*, p.132

[72] *Pamesa v. Mendelson*, 2009// http://cisgw3.law.pace.edu/cases/090317i5.html

[73] Lookofsky J., *CISG Case Commentary on Concurrent Remedies in Pamesa v. Mendelson* [interactive],/ February 2010, [accessed 2013. 11.01] <http://www.cisg.law.pace.edu/cisg/biblio/lookofsky19.html>

[74] United Nations Convention on Contracts for the International Sale of Goods

[75] *Pamesa v. Mendelson*, 2009/ <http://cisgw3.law.pace.edu/cases/090317i5.html>

[76] Honnold, J., *Uniform Law for International Sales under the 1980 United Nations Convention* /(Second Edition, 1991), p.143

[77] *Ibid.* Lookofsky, p. 3

[78] Schlechtriem, P., *The Borderland of Tort and Contract - Opening a New Frontie*r?/ Cornell International Law Journal 21 (1988), p. 470, <http://www.cisg.law.pace.edu/cisg/biblio/sclechtriem.html>

[79] Schlechtriem P., *Requirements of Application and Sphere of Applicability of the CISG*/ Victoria U. Wellington L. Rev., 2005, p.781

Ultimately, the Court tells, that it deals with a complex issue, both because of the protected interests, and because of the desire to protect the international uniformity underlying the Convention. This creates what the Court describes as a spectrum of possible balancing points. The choice between the possible balancing points is affected to a large extent by the question of the approach of applicable domestic law on the distinction between tort claims and contract claims.[80]

The Supreme Court of Israel told that European case law on this question is relatively poor. In one case, a Court of Appeal in Germany held that a buyer of fish who did not give prompt notice (under Article 39 of the Vienna Convention) of an infection from which the fish suffered could not sue the seller for negligent carriage that, how the buyer states, caused the infection, even though the fish that were supplied caused serious damage to the buyer`s stock of fish.[81] The Supreme Court of Israel cited a decision of a Court of Appeal in Belgium where notice was not given promptly under Article 39, holding that the seller could only be heard in a tort action if the alleged fault relates to a breach of a general duty of care and not to a duty that the parties created in the contract.[82]

By contrast, the Court noted, extensive and consistent American case law has, since the beginning of the twenty-first century, adopted a liberal line that permits claims based on extra-contractual causes of actions.[83] There is similar case law in Canada,[84] and in Australia.[85]

On such difficult analysis court held "that the trial court was correct when it agreed to consider the claim that Pamesa was negligent in manufacturing the tiles in a manner that caused the various serious damage building contractors that used its products, even though it did not comply with the provisions of the Convention." [86]

As Mendelson failed to comply with the requirement of notice in Article 39 (to do notice of the defects at the proper time) of the Convention, it could not prevent him from suing Pamesa for negligence. But the alleged negligence was not proven in the Supreme Court of Israel, which reversed the ruling of the District Court on this point. Thus, Mendelson must suffer the disadvantages. Justice Rubenstein noted "that is perhaps unsatisfactory, since the defective products

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[80] Lookofsky J., *Loose Ends and Contorts in International Sales: Problems in the Harmonization of Private Law Rules* [interactive] / American Journal of Comparative Law, № 39, 1991, p. 409 [accesses 2013. 10.14] <http://www.cisg.law.pace.edu/cisg/biblio/lookofsky6.html>

[81] Thüringen [Jena] Provincial Court of Appeal, 26 May 1998, 8 U 1667/97 <http://cisgw3.law.pace.edu/cases/980526g1.html>

[82] *ING Insurance v. BVBA HVA Koeling*, < http://cisgw3.law.pace.edu/cases/040414b1.html>

[83] *Ibid*. Lookofsky, p. 410

[84] *Shane v. JCB Belgium* [2003] <http://cisgw3.law.pace.edu/cases/031114c4.html>

[85] *Ibid.* Lookofsky, p.410

[86] *Ibid. Pamesa v. Mendelson*

were manufactured by Pamesa, but we are dealing with law, and anyone who does not comply with the terms of the law must suffer the consequences." [87]

So in some respects, Article 4 of the CISG is a controversial rule. One point which has created a good deal of debate is the extent to which the rules of the Convention governing contractual liability (damages for breach of obligations arising from the sales contract) serve to displace domestic law rules of tortuous liability, inter alia, those product liability rules which are grounded in tort.[88]

To sum up, according to Article 4, the Convention governs only the rights and obligations of the seller and buyer arising from the contract. On the other hand, the Convention does not deal with rights and obligations of the parties, or with third parties, that may arise by virtue of the applicable domestic law of tort obligations (such as the law of tort, principles of liability for negligence and others). The first point in this regard, is that national courts have no choice how only to use domestic rules of liability in order to resolve tort matters, which clearly are not governed by the CISG. This is especially clear in claims of third parties. For example, on the presented analysis of case *Pamesa v. Mendelson*, the right of a third-party consumer to hold a CISG`s seller liable for injuries to that consumer`s person or property caused by a defective product (which happens to have been the subject matter of a CISG sale). But the same necessity for recourse to domestic law arises, in instance, in respect of a seller`s claim for damages against his buyer for bad-faith termination of contractual negotiations. To make things clear, if no CISG contract has been made, the situation cannot be described as involving rights and obligations arising from the contract.[89]

Beyond this, since domestic rules of tort liability (for example, the duty to exercise due care and thus avoid injury to others) are sometimes permitted to "compete" with rules of contractual liability under domestic law, it has been argued that the tort rules (otherwise applicable in a given international context)[90] should sometimes be permitted to compete with the CISG contractual regime.

In this regard, in cases with product liability, misrepresentation and other similar torts, the domestic solutions can and should sometimes serve to supplement to the CISG solution.

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[87]Lookofsky J., *CISG Case Commentary on Concurrent Remedies in Pamesa v. Mendelson*,[interactive]/ February 2010, p. 411 [accessed 2013.11.24] <http://www.cisg.law.pace.edu/cisg/biblio/lookofsky19.html>

[88] Lookofsky J., *Article 4: Issues Excluded from Convention Scope: Validity, Property and Delict* /J. Herbots editor / R. Blanpain general editor, International Encyclopaedia of Laws - Contracts, Suppl. 29 (December 2000) p. 4

[89] Lookofsky J., *The 1980 United Nations Convention on Contracts for the International Sale of Goods*/ J. Herbots editor / R. Blanpain general editor, International Encyclopedia of Laws - Contracts, Suppl. 29 (December 2000) p. 11. http://www.cisg.law.pace.edu/cisg/biblio/lookofsky.html

[90] Joseph Lookofsky, *Article 4:Issues Excluded from Convention Scope: Validity, Property and Delict*/ J. Herbots editor / R. Blanpain general editor, International Encyclopaedia of Laws - Contracts, Suppl. 29 (December 2000) p. 5

2.1.3. Battle of forms

The "battle of the forms" is the phrase used to describe the exchange of differing written proposals which form a contract between two parties.[91] The drafters of the CISG chose not to adopt the approach of the UCC to varied acceptances. Instead of this, they have put an approach close to the common law mirror image rule. Under the Vienna Sales Convention, a varied acceptance in which the variance is material will not conclude a contract. This was intention of drafters to stimulate parties to negotiate and both of the parties to agree on all of the material terms of a contract before the beginning performance.[92] Article 19(1) of the Convention states that:

"...a reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer." [93]

As the acceptance should not use the same wording as an offer, the new wording cannot change the obligations of the parties. The acceptance will conclude the contract only when the acceptance varies from the terms of the offer is when it contains additional or different terms "which do not materially alter the terms of the offer"[94] and the offeror does not promptly object to the adjustment. That is why, even if the additional or different terms do not alter the offer materially, if the offeror objects to those terms, no contract will be formed.[95]

List of those items which would be considered material is non-exclusive and quite broad. The list provides that additional or different terms relating "among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party`s liability to the other or the settlement of disputes,"[96] should all considered to be items which alter the terms of the offer materially. By the reason that the scope of the list is so broad, an item of importance usually will be considered a material alteration and rejection of the offer. Thus, contracts will be formed less often under the Convention than, for example, in accordance the UCC in a battle of forms situation.[97]

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[91] Blodgett P.C., *The U.N. Convention on the Sale of Goods and the "Battle of the Forms* [interactive]/ Colorado Lawyer. Reprinted with permission of 18 Colorado Lawyer (March 1989) p. 426 [accessed 2013.10.04] <http://www.cisg.law.pace.edu/cisg/biblio/blodgett.html>

[92] Eiselen S., *Adopting the Vienna Convention: reflections eight years down the line*/ 19 SA Mers. LJ, 2007, p.16

[93] United Nations Convention on Contracts for the International Sale of Goods (1980) [CISG]/ the UN-certified English text is published in 52 Federal Register 6262, 6264-6280 (March 2, 1987); United States Code Annotated, Title 15, Appendix (Supp. 1987). <http://www.cisg.law.pace.edu/cisg/text/treaty.html> Art. 19(1)

[94] *Ibid.* United Nations Convention on Contracts for the International Sale of Goods (1980), Art. 19(2)

[95] *Ibid.* Blodgett, p. 427

[96] *Ibid*. United Nations Convention on Contracts for the International Sale of Goods. (1980), Art.19(3)

[97] Blodgett, *The U.N. Convention on the Sale of Goods and the "Battle of the Forms*, p. 428

Nevertheless, there is no one view among commentators and courts as how to apply Article 19, especially in case where the standard contract terms of the offeree counter in a material way those of the offeror. In the opposite situation, where the standard contract terms of the offeree do not materially modify the standard terms contained in the offer does not create any problems. Commentators and courts agree that in such a situation the contract is in any case concluded, [98] and that the terms of the contract are the terms of the offer with the modifications contained in the acceptance. But problems arise when the standard terms of the offeree substantially change those given by the offeror.[99]

The solution dealing with this situation has not been provided by the drafters of the CISG. On the point of view of some scholars and courts, in this case the terms of the contract should solely be the terms that do not conflict.[100] This solution is a result of the application of "knock-out rule". Meaning that the contract contains the basic terms agreed upon by the parties and those standard contract terms on which there is no disagreement. The conflicting terms, according to this approach, are automatically thrown out and are replaced by the provisions of the CISG or any other applicable law. Such solution expressly adopted by the PECL, UNIDROIT Principles, and in some domestic legal systems, such as the German one.[101] Only standard contract terms of the parties which contain common clauses, will be binding for both parties. Those clauses that conflict knock each other out. Nevertheless, another group of scholars and courts dismiss the approach mentioned above and, favor the so-called "last-shot rule", the starting point of which is a literal interpretation of Article 19 of the CISG, pursuant to which the reply of the offeree constitutes a counter offer.[102] According to the provision, one has to give effect to the standard terms of the last person to make an offer accepted by subsequent performance of the other party. This approach is helpful when the parties have begun performing the contract. Actually, the beginning of the contract's performance may compare to an acceptance by the original offeror of the offeree`s counteroffer, which contains the

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[98] Magnus, *Last Shot vs. Knock Out-Still Battle over the Battle of Forms Under the CISG*/ Commercial Law Challenges in the 21th Century-Jan Hellner in memoriam, (Stockholm, 2007)

[99] Sambugaro G., *Incorporation of standard contract terms and the "Battle of forms" under The 1980 Vienna United Convention (CISG)/* Regional Business Law/ Thomson Reuters (Legal) Limited and Contributors, 2009, p. 76

[100] Magnus, *Last Shot vs. Knock Out-Still Battle over the Battle of Forms Under the CISG* [interactive]/ Commercial Law Challenges in the 21th Century-Jan Hellner in memoriam, (Stockholm, 2007),] , [Germany 9 January 2002 Supreme Court (Powdered milk case) [accessed 2013.11.25] <http://cisgw3.law.pace.edu/cases/020109g1.html>

[101] *Powdered milk case*, [2002] <http://cisgw3.law.pace.edu/cases/020109g1.html>

[102] Viscasillas P., *The Formation of Contracts and the Principles of European Contract Law*/ Pace International Law Review (2001), p. 391.

material modifications and additions to the original offer. The "last-shot rule", together with the "mirror image rule" putted in Article 19 of the CISG, creates certainty.[103]

The resolution of "battles of the forms" is one of the most controversial questions under the Convention. There are deep differences among scholars as how such issues are to be resolved. The main questions that need an answer: when there is a battle of the forms, is the contract concluded? And, if the answer is positive, what are the terms of the agreement?[104]

In this regard, there are two main schools of thought, as it was mentioned above:

1. One group of scholars states that the battle of the forms falls outside the scope of the Convention and that, because it is a question of validity. The solution must be found under the relevant domestic law in accordance with Article 4(a) of the CISG.[105]
2. Another group of scholars believes that the problem should be solved under the provisions of the Convention, but there is no total agreement as to what provisions apply.[106] They believe that the solution should be found according Article 7 and that priority must be given to the general principles of the CISG in order to regulate a question that is not expressly settled by the Convention. According to this approach, applying a good faith principle can lead to a solution similar to the United States "*knock out rule"* of section 2-207(3) of the Uniform Commercial Code (UCC), the German *"partiell dissens" rule* of Articles 154 and 155 of the German Civil Code (BGB), or Article 2.22 of the UNIDROIT Principles. This point of view holds that the terms of the contract are those with which the parties substantially agree, the rest cancel each other out and, basically, the norms of Part III of the Convention will replace them.[107]

To sum up, no compromise could be reached in respect of battle of forms issue, as it was left open by the drafters to protect main goals of uniformity in the CISG. It seems that drafters opted to deal with the problem of battle of forms by using means of traditional mirror-image or last-shot approach. According to mentioned approaches, the acceptance must be a mirror image of an offer. However, Article 19 of CISG leaves room to minor adjustments to the offer in the acceptance.

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[103] Sambugaro G., *Incorporation of standard contract terms and the "Battle of forms" under The 1980 Vienna United Convention (CISG)*/ Regional Business Law/ Thomson Reuters (Legal) Limited and Contributors, p. 77, 2009

[104] Viscasillas P.P., *Cross-references and editorial analysis of Article 19/* Pace Law School Institute of International Commercial Law, December 1996, p. 4 < http://www.cisg.law.pace.edu/cisg/text/cross/cross-19.html>

[105] Hartnell H.E., *Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods*/ Yale Journal of International Law (1993), p. 49 <http://www.cisg.law.pace.edu/cisg/biblio/hartnell.html>

[106] Nguyen Trung Nam, *Future of Harmonisation and Unification in Contract Law Regarding "Battle of Forms*/ Pace Law School Institute of International Commercial Law, 2009 < http://www.cisg.law.pace.edu/cisg/biblio/nam.html>

[107] *Ibid.* Viscasillas P.P., p.5

Any material adjustment will be considered as a counter-offer. In cases of the establishment of standard terms, only some provisions are not material adjustments, which leaves both parties in the situation that the party who gets in the last shot with its standard terms, before the conclusion of the agreement, will include its standard terms into that agreement.[108] Practically, Articles 19 and 18(3) mean that party who fires the last shot wins.[109]

There is another approach, known as modified consensus or knock-out approach. It was adopted by American and German law practice, in their American Uniform Commercial Code and the German Civil Code, respectively. Also it is commonly used in French and American law practice. According to it, the terms embodied in conflicting sets of standard terms do not show the real, true coherence of the parties. That is why, in this case, standard terms are ignored at all (if we use consensual approach), or applied only in that part where both parties are agreed with (if we use knock-out approach).[110]

2.2. Deficient provisions of the CISG

In this subchapter I will analyze group of questions related to the incompleteness of CISG, or in other words, issues which the Convention directly not mentions or about which it is silent.

2.2.1. Issues of Validity

The scope of application of CISG covers the formation of sale contract and rights and obligations of the seller and the buyer. However, it does not deal with questions of validity of sale contract and its provisions. An unclearness of the term "validity" gives wave of criticism from one group of authors, as from such perspective it leads to contradictory application of the Convention.[111]

Another group of authors deflect such thoughts and say that term "validity" has to be determined autonomously, meaning that any question, which relates to the CISG or general principles that lay down in its provisions, can no longer be defined as being a validity issue.[112]

Looking on the drafting history of Article 4(a) of the Vienna Convention, it is evident that the validity exception was included with the aim to protect the differing interests that are secured by different domestic laws. The history shows that the drafters designed Article 4(a) to serve as a gap

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[108] Eiselen S., *Adopting the Vienna Convention: reflections eight years down the line*/ 19 SA Mers LJ, 2007, p. 20

[109] Lavers R.M., *CISG: To Use, or Not to Use?*/ International Business Lawyer, Vol. 21, Issue 1 (January, 1993), p. 13

[110] *Ibid.* Eiselen, p. 20

[111] Hartnell, *Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods*/ Yale Journal of International Law (1993), p. 51
<http://www.cisg.law.pace.edu/cisg/biblio/hartnell.html>

[112] Schwenzer I., Hachem P., *The CISG - Successes and Pitfalls*, p. 136

which could stretch to fit the needs of each domestic legal system. However, the article which was supposed to provide flexibility to an otherwise strict set of rules in order to allow for international differences has given room to further complications. As Article 4 does not define validity, the task of determining when a cause of invalidity exists and what its consequences are left to the various domestic legal systems. As far as these legal systems have no common idea how to rely on the very reason for excluding issues of validity- the differing and strongly felt national traditions- suggests that judges and arbitrators will be tempted to enforce domestic rules of validity. For example, one national law may allow the use of parole evidence, while another may not. In regard of the CISG`s stated goals of achieving uniform rules to promote international trade, the issue becomes: to what extent applying non-uniform domestic rules of validity to contracts for the international sale of goods seriously the CISG`s potential for achieving its goals?[113]

Another important problem is relating to validity of general conditions or standard business terms. While the inclusion of standard terms is governed by the CISG, the question of whether the terms thus included are valid is generally considered to fall within the scope of Article 4(a), and therefore to be governed by the applicable national law.[114]

The Austrian Supreme Court made clear that autonomous of the general rule in Article 4(a), the CISG may play a role in determining the validity of a standard term. That case arose out of a contract for the sale of gravestones between a German seller and an Austrian buyer. The seller`s standard conditions limited the buyer`s rights for defective goods and provided inter alia that even in case of defective goods, the buyer had no right to withhold payment. The Court held that the question of whether such an exclusion of the right to withhold payment is valid is in general regulated by the applicable national law and not by the CISG.[115] In that case, it was German law that allowed such exclusion in commercial contracts. The Court also examined whether the German rule that covered the issue was compatible with the basic principles underlying the CISG. It held that one such principle was the right to terminate the contract in extreme cases, which could only be excluded if the buyer had a right to damages. However, in the case itself the Austrian Supreme Court considered the principle not to have been violated, the Court`s general understanding of the interaction between the CISG and the national law, governing the validity of a contract or contract terms, is interesting. According to the view of the Austrian Supreme Court, while leaving the

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[113] Nir Bar, Attorney, Natanella Har-Sinay, *Contract Validity and the CISG: Closing the Loophole,* [interactive] [accessed 2013.12.05] <http://www.articlesbase.com/law-articles/contract-validity-and-the-cisg-international-treaty-closing-the-loophole-315561.html>

[114] Kröll S., *Selected Problems concerning the CISG's Scope of Application* / Journal of Law and Commerce, Vol. 25, Issue 1 (Fall 2005), p. 41

[115] Amtsgericht Nordhorn (Lower Court), Germany, 14 June 1994, <http://cisgw3.law.pace.edu/cases/940614g1.html>

question of validity of terms to a national law CISG, though, imposes certain limits on the applicable law. Within these limits it is the applicable national law that determines whether a provision is valid or not. If the national law, goes outside those limits and permits standard terms that derogate from basic principles of the CISG, those terms would be invalid on the basis of the CISG.[116]

In analyzing the exclusion of validity under Article 4 of the CISG, the first problem that arises is that the CISG does not exclude validity *per se* from its scope, but only "except as otherwise expressly provided".[117] Consequently, the CISG is concerned with some validity issues. Examples are the non-requirement of a particular form for a contract (Article 11 CISG) and Article 29 which provides that a contract may be modified by mere agreement. Thus, if one comes to the conclusion that a matter is a "validity" issue, then one has to evolve first if the matter is not expressly dealt with in the Convention. Only if it is not, the matter is excluded according to Article 4(a).[118]

Another issue is that although the CISG, generally, excludes matters of validity from its scope, the CISG does not define the term of "validity", as it was mentioned. It is therefore, unclear and controversial what the term actually comprises. The approach of an autonomous interpretation requires not simply basing the definition on domestic law. The lack of a definition of validity is hence a gap in the Convention itself and needs to be filled in accordance of the principles in Article 7(2) CISG.[119] In so doing, regard has to be made to not define it in a too expansive way in order to not counter the Convention's purpose of uniform sales law. However, it must be noted, that even with the help of Article 7(2) of CISG it remains very difficult to define "validity" as its exclusion of the Convention under Article 4 of CISG entails that there is no textual assistance in the Convention.

It must be pointed out that some commentators have argued for an "autonomous" interpretation of Article 4(a), that is, they have argued that the term "validity" should not be determined by reference to domestic law. In accordance with this view, the validity of a contract otherwise governed by the CISG should be decided by reference to domestic law only where all, or a significant majority of stats, regard the issue as a question of domestic law.[120]

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[116] Kröll S., *Selected Problems concerning the CISG's Scope of Application* / Journal of Law and Commerce, Vol. 25, Issue 1 (Fall 2005), p. 42

[117] Felemegas, *The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation*/ Pace Review of the Convention on Contracts for the International Sale of Goods (CISG), Kluwer Law International (2000-2001), p. 120

[118] Issues Expressly Regulated by CISG [interactive] [accessed 2013.12.03] <http://www.lawteacher.net/commercial-law/essays/issues-expressly-regulated-by-cisg-law-essays.php>

[119] *Ibid*. Issues Expressly Regulated by CISG

[120] *Ibid*. Issues Expressly Regulated by CISG

On the other hand, as Helen Hartnell argues, such a construction of Article 4(a) would be at odds with its intended purpose.[121] The exact purpose of Article 4(a) is to allow applicable domestic law to determine the politically sensitive issue of when a contract may be voidable. By including Article 4(a) in the CISG, the drafters recognized that the issue of contract validity can raise conflicting public policy concerns in the countries that negotiated and drafted the Convention. Thus, applicability of the Convention to this issue should be assessed, not only by taking into consideration comparative practice, but also by balancing it against domestic public policy considerations. Therefore, in practice such political compromise is an example of the means of harmonization of international sale of goods.[122]

Article 4 of the CISG states that the convention governs only with the formation of the contract and that question of validity of the contract or any of its provisions are left to domestic laws. If there is a question of validity, then the matter - that is the gap in the CISG must be governed by domestic law. Only if there is a question in relation to the validity of the penalty clause domestic law may be consulted. If there is no gap the CISG will supply the applicable rule to the exclusion of domestic law.[123]

In fulfillment of the Article 7(1), about the international character of the CISG, case law needs to be taken into account. In the judgment of an ICC *arbitration case No 9978 (May 1999)* court stated:

"As to the merits, the Arbitral Tribunal dismisses the buyer's claim concerning damages. Stating the inclusion of a penalty clause for non-delivery prevented the buyer from invoking the provisions on damages laid down in Article 74 of the CISG. In order to ascertain the validity of the penalty clause, since it is a matter excluded from the CISG in accordance with its Article 4, the Arbitral Tribunal referring to the domestic law otherwise applicable to the contract (in this case- German Law)."[124]

Meaning that the tribunal did not invoke Article 6, instead it used Article 4, which was applicable only because the validity of a contractual term was at issue. This may not be so in all cases and therefore Article 74 is applicable.[125] This position is supported by *Diepeveen-Dirkson BV*

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[121] Hartnell H. E., *Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods* [interactive] /18 Yale. J. Int. Law, p 51, (1993), [accessed 2013. 11.02] <http://cisgw3.law.pace.edu/cisg/biblio/hartnell.html>

[122] *Issues Expressly Regulated by CISG* < http://www.lawteacher.net/commercial-law/essays/issues-expressly-regulated-by-cisg-law-essays.php>

[123] Zeller, Bruno, *Challenge of a Uniform Application of the CISG - Common Problems and Their Solutions*, p. 312

[124] *ICC Arbitration Case No. 9978* of March 1999 <http://cisgw3.law.pace.edu/cases/999978i1.html>

[125] *Ibid*. Zeller, p. 312

v Niewenhoven Veehandel GmbH case.[126] The contract contained a penalty clause in case of late payment. The court awarded damages pursuant to the penalty clause and also invoked Article 78 of the CISG, the right to interest on overdue amounts. The buyer appealed to this decision on the basis that the penalty was disproportionate to the harm suffered by the seller. The court correctly dismissed that claim, as pursuant to Article 6, parties are entitled to include clauses into the contract that will be enforced by courts.[127]

The drafters of the CISG set out to create a uniform law. Their stated purpose was to promote the development of international trade while keeping in mind the varying world legal, social, and economic systems. While many issues were addressed and resolved in creating the CISG, the issue of validity has remained a seriously debated and enigmatic one.[128]

Most of the issues that are excluded from the scope of the Convention by Article 4(a) can safely be left out of the international legal order without endangering the Convention`s primary purpose of achieving certainty and predictability through uniformity. However, the exclusion of issues that have an important effect on the exercise of the party's autonomy, such as the validity of exculpatory clauses, weakens the international order. Further study is needed to ascertain the feasibility of unifying the standards that govern the validity of exculpatory clauses. For the moment, tribunals should balance public policy with the needs of international commerce. In addition, tribunals should not allow the language of "mandatory law" to entice them into thinking that the task of interpreting Article 4(a) is nothing more than a conflict of laws problem. Determining which validity issues are preserved to domestic law requires a careful balancing between the international character of the Convention and the public policies which forced the political compromise embodied in Article 4(a).[129]

2.2.2. Hardship

The most discussable issue belongs to the direct implementing provisions of hardship, or in other words known as- *rebus sic stantibus* or *Wegfall der Geschäftsgrundlage.* Some authors have complained about non-existence of rules, which can regulate change of circumstances in

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[126] 22 August 1995. Hof Arnhem, Netherlands, <http://cisgw3.law.pace.edu/cases/950822n1.html>

[127] Zeller, Bruno, *Challenge of a Uniform Application of the CISG - Common Problems and Their Solutions,* p. 312

[128] Nir Bar, Natanella Har-Sinay, *Contract Validity and the CISG: Closing the Loophole*, [interactive] [accessed 2013.11.24] <http://www.israelbar.org.il/uploadFiles/Contract_Validity_and_the_CISG.pdf >

[129] Hartnell H.E., *Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods* [interactive]/ Yale Journal of International Law, 1993, [accessed 2013.11.04] <http://www.cisg.law.pace.edu/cisg/biblio/hartnell.html>

contact relations. As an example they took other uniform laws and native laws that have already such provisions, and note that it is possible to use them in case of CISG.[130]

Some authors' mentions that the CISG is even better suited to solve practical problems in changing of circumstances. Taking into account Article 79 of the CISG, which primary deals with exceptions in cases of force majeure and change of circumstances it can make impediment in the sense of this provisions.[131] However, there is no directly mentioned provision of hardship in the CISG, and, accordingly, there is no descriptive definition of it. We can find it in Article 6.2.2 of UNIDROIT Principles:

"There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and

(a) the events occur or become known to the disadvantaged party after the conclusion of the contract;

(b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;

(c) the events are beyond the control of the disadvantaged party; and

(d) the risk of the events was not assumed by the disadvantaged party." [132]

The circumstances in which hardship exists generally should meet three elements. First, the circumstances must have arisen beyond the control of either party. Second, they must be of fundamental character. Third, they must be entirely uncontemplated and unforeseeable. The concept of hardship itself, purpose to solve problems of such fundamentally changed circumstances by adapting the contract to the new situation.[133]

Article 79 of the CISG exempts the party from liability for damages if that party had failed to perform any of its obligations. A change of circumstances that could not reasonably be expected to have been taken into account while concluding the contract, rendering performance excessively onerous, might be qualify as an "impediment" under Article 79(1). Mentioned article does not expressly equate the term "impediment" with an event, which makes performance of obligations

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[130] DiMatteo L.A., *International sales law: a critical analysis of CISG jurisprudence/* Cambridge: Cambridge University Press, 2005, p. 13

[131] Schwenzer, Hachem, *The CISG – A Story of Worldwide Success*, p. 137

[132] UNIDROIT Principles of International Commercial Contracts 2004//, Art. 6.2.2.

<http://www.cisg.law.pace.edu/cisg/principles.html>

[133] Rimke J., *Force majeure and hardship: Application in international trade practice with specific regard to the CISG and the UNIDROIT Principles of International Commercial Contracts*/ Pace Review of the Convention on Contracts for the International Sale of Goods, Kluwer (1999-2000), p. 201

absolutely impossible. So a party that seems to be in situation of hardship may use this reason as an exemption of its liability under Article 79 of the CISG.[134]

Various opinions exist on whether the situation of hardship is governed by Article 79 or not. One group of authors states that the wording of Article 79 is quite flexible by itself to include non-typical situation of unexpected hardship within the meaning of "impediment", mentioned in article above.[135] Another, opposing group, argue that there is no place in the CISG for economic hardship. Both opinions have their right to exist and their supporting background.[136]

If to look through the drafting history of the provision of Article 79, some discussions and comments of delegates can lead to the conclusion that there was some type of consensus among the members of the Working Group against the doctrine of "hardship". Facts says that word "impediment" was made to adopt a unitary conception of exemption with the purpose to put aside the theory of *rebus sic stantibus*, or hardship theories based on "changed circumstances". Such evidence is used by those legal commentators, which do not see provisions of hardship in scope of Article 79 of the CISG. [137]

Opposing group, for its defense use rejection of Norwegian group proposal connected to a passage, that later became Article 79(3) of the CISG. The aim of this was to reject the position that discussed article can extend its application to a situation of true hardship. While working on this article Norwegian group made proposition to add an additional provision the effect that temporally exemption from performing the contract can change into permanent one, thus when the impediment stops to exist, arisen circumstances changed hugely, so that the performance of contract became obviously unreasonable. Such a proposal got great support among working group, but adding of such a provision into the article would seemed that the drafters accepted the doctrines of *imprevision* and others, that they did not wanted to do. This notice put into the end Norwegian proposal, which did not solve the question of hardship. It was even not properly discussed.[138] However, legislation and drafting history of Article 79 cannot give us conclusion that problem of hardship was planned to be or excluded or included in its scope.

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[134] CISG-AC Opinion No. 7, *Exemption of Liability for Damages under Article 79 of the CISG*, Rapporteur: Professor Alejandro M. Garro, Columbia University School of Law, New York, N.Y., USA. Adopted by the CISG-AC at its 11th meeting in Wuhan, People's Republic of China, on 12 October 2007,

[135] Chengwei, Liu, *Remedies for Non-performance: Perspectives from CISG, UNIDROIT Principles & PECL*, [interactive] , [accessed 2013.10.05] <http://www.cisg.law.pace.edu/cisg/biblio/chengwei.html>

[136] Ibid. CISG-AC Opinion No. 7, *Exemption of Liability for Damages under Article 79 of the CISG*

[137] *Ibid.*

[138] *Ibid.*

Very little case law exists on the Article 79. In case between Egyptian buyer and a Yugoslavian seller, an ICC Arbitral tribunal, ruled that a 13% rise in the world market price of steel was neither sudden, substantial, nor unforeseeable, and would not exempt the seller from his obligation to perform his obligations under Article 79.[139] In a Russian Arbitral tribunal case, a seller claimed that he should be exempted from the liability because the manufacturer of the contracted for goods refused to supply them. The tribunal held that the seller should bear liability for failure to fulfill his obligation because he was unable to establish that he could not have been expected to take that obstacle into account, or to avoid or overcome the obstacle or its consequences.[140] There is only one case that expressly deals with the question of whether instances of hardship fall within the scope of Article 79. This is the decision of the Italian Tribunale Civile di Monza in the case *Nuova Fucinati S.p.A. v. Fondmetall International A.B.*[141]An Italian seller of metal (Nuova Fucinati) sought to be excused from his sales contract with a Swedish buyer (Fondmetall Int'l) on the grounds of hardship. In terms of the February 3, 1988 contract, the seller had obligation to deliver 1,000 tons of iron chrome. The contract permitted the buyer to choose a delivery date between March 20, 1988 and April 10, 1988. Between the date the contract was entered into and the date selected by the buyer for delivery, the price of the iron chrome increased by almost 30%. Obviously, the contract did not contain a clause specifically providing for excuse of performance in cases of force majeure. At a hearing before the court, the seller argued that the contract should be avoided because of supervening excessive onerousness caused by the market price increase.[142]

The court voided the contract because of the seller`s non-performance, and rejected the seller`s request for dissolution on the basis of supervening excessive onerousness. The court held that the CISG did not apply in this case. The court concluded that even if Article 79 had applied, it only provided release from a duty made impossible by a supervening impediment, similar to the rule in Article 1463 of the Italian Civil Code. According to the court, Article 79 - in contrast to Article 1467 of the Civil Code - does not seem to contemplate the remedy of dissolution of contract for supervening excessive onerousness. The distinction between "impossible" and "excessively onerous" performance is a crucial one in the court's reasoning because it highlights the important role of the structure of the Italian Civil Code in the outcome of the case. From the court's first

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[139] *Egypt v. Yugo*, 1989// <http://cisgw3.law.pace.edu>

[140] Rimke, *Force majeure and hardship: Application in international trade practice with specific regard to the CISG and the UNIDROIT Principles of International Commercial Contracts* /Pace Review of the Convention on Contracts for the International Sale of Goods, Kluwer (1999-2000) p. 203

[141] Trib. Civile di Monza, 14 Jan. 1993 n.R.G. 4267/88, <http://cisgw3.law.pace.edu>

[142] DiMatteo, Dhooge, Greene, Maurer, Pagnattaro, *The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence*/ Northwestern Journal of International Law and Business (Winter 2004), p. 235

mentioning of Article 79 CISG, Italian domestic law was used as a frame of reference for deciding the meaning of an "impediment" to performance. Even if the court had found that the CISG did apply to the dispute at hand, it would have read the "impediment" term as meaning "impossible" - which is suggested by the Civil Code. This case, which excludes situations of hardship from the scope of application of Article 79, illustrates the aforementioned danger that judges interpreting Article 79 would refer to similar concepts in their own law.[143]

Significant in history of "hardship" issue was the case *Scafom International v. Lorrain Tubes*. Belgian Supreme Court in 19 of June 2009 held that Article 79 of the CISG can govern hardship. It stated that changed circumstances which were not reasonably foreseeable at the time of the conclusion of the agreement and which increased the burden of the agreement disproportionately, can, in some circumstances, form an impediment in the sense of Article 79 of the CISG. However, the court noted that the CISG gives no guides as how hardship issues should be resolved. With the aim to solve this gap, using Articles 7(1) and 7(2) of the CISG, Belgium Supreme Court referred to the general principles of international trade- The UNIDROIT Principles for International Commercial Contracts, which state that the party who invokes changed circumstances that fundamentally disturb the contractual balance is entitled to claim the renegotiation of the contract. This case, internationally, became significant precedent, because, first of all, it accepted hardship under Article 79 of CISG and secondly, firstly in the history referred to the UNIDROIT Principles of International Commercial Contracts to solve a dispute.[144]

According to the following analyses, I can make conclusion that, notwithstanding various theoretical discussions, practical side allows to say, that changed circumstances, which were not reasonably foreseeable at the time of the conclusion of the agreement between parties and which increased the burden of the agreement disproportionately, can, in some circumstances, form an impediment in the sense of Article 79 of the CISG. And respectively, hardship provisions may be used under mentioned article of Vienna Convention on Contracts for the International Sales of Goods by "injured" party to protect its interests.

Furthermore, CISG Advisory Council in its opinion concluded that theoretical possibility to use meaning of "impediment" to the hardship situation under Article 79 of United Vienna Convention exists, but only in some radical and unexpected changes. It states, that such market

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[143] Rimke, *Force majeure and hardship: Application in international trade practice with specific regard to the CISG and the UNIDROIT Principles of International Commercial Contracts*, p.204

[144] Hardship accepted under the CISG/ International Law Office's (ILO) Company & Commercial Newsletter on 29 March 2010 [interactive], [accessed 2013.10.01] <http://www.altius.com/en/knowledge-base/recent-publications/2010/03/29/hardship-accepted-under-the-cisg/>

frustrations in the market of goods and currency should be wild and totally unexpected and not be a normal risk of commercial transactions, which parties entering into relations generally do.[145]

As CISG provisions give no guides how the hardship issue should be resolved, according to Articles 7(1) and 7 (2) of the Convention general principles governing the law of international trade should be used. Thus, UNIDROIT Principles for International Commercial Contracts says that the party who invokes changed circumstances that fundamentally disturb the contractual balance is entitled to claim the renegotiation of the contract. Thus, UNIDROIT Principles can be utilized as interpretative aid to the CISG in hardship issue.[146]

In my opinion, issue of hardship in Vienna International Convention could be solved on the example of *Scafom International v. Lorrain Tubes* case. Thus, I do not see the direct need to make changes in CISG on this particular issue. As from 2009 legal practice gave us world important precedent as how to solve the gap, connected to hardship.[147]

2.2.3. E-commerce.

The CISG is legal instrument drafted in 1980. From that time have passed 33 years and the world changed hugely. The reason to rise "oldness problem" of the CISG is electronic revolution, which took place at the end of twenties century. This revolution brought to the society new means of communication and technologies, which, logically, influenced on trade relations and ways of doing business. Among them are fax, electronic data interchange and mainly Internet that are commonly used in the field of international trade law.[148] It provided good ground to test the flexibility of the CISG through the years and to check whether it can deal with new coming relations.

By drafting the Convention it was impossible to guess future progress and some provisions of Convention, as for example Article 13 of the CISG refers only to telegram and telex. Since the adoption of the CISG in 1980, there were produced two Model Laws dealing with electronic commerce, namely the UNCITRAL Model Electronic Commerce Law of 1996 (Model

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[145] CISG-AC Opinion No. 7, *Exemption of Liability for Damages under Article 79 of the CISG,* Rapporteur: Professor Alejandro M. Garro, Columbia University School of Law, New York, N.Y., USA. Adopted by the CISG-AC at its 11th meeting in Wuhan, People's Republic of China, on 12 October 2007

[146] *Hardship accepted under the CISG*/ International Law Office's (ILO) Company & Commercial Newsletter on 29 March 2010 http://www.altius.com/en/knowledge-base/recent-publications/2010/03/29/hardship-accepted-under-the-cisg/

[147] Kofod F., *Hardship in International Sales, CISG and the UNIDROIT Principles* [interactive]/Thesis, University of Copenhagen-Faculty of Law (2011), p.4 [accessed 2013.10.14] <http://www.cisg.law.pace.edu/cisg/biblio/kofod.html >

[148] Sieg Eiselen, *E-Commerce and the CISG: Formation, Formalities and Validity,* /Vindobona Journal of International Commercial Law & Arbitration" (2002) p. 311

Law 1996) and the UNCITRAL Model Electronic Signature Law of 2001 (Model Law 2001).[149] The purpose of the first one, as explained UNCITRAL, "was to enable and facilitate commerce conducted using electronic means by providing national legislators with a set of internationally acceptable rules aimed at removing legal obstacles and increasing legal predictability for electronic commerce. In particular, it is intended to overcome obstacles arising from statutory provisions that may not be varied contractually by providing equal treatment to paper-based and electronic information. Such equal treatment is essential for enabling the use of paperless communication, thus fostering efficiency in international trade."[150]

Great job was made by the CISG Advisory Council to maximally cover over provisions of the Convention and make them functional to the new types of communications. In its Opinion No. 1 "Electronic Communications under CISG" Advisory Council made a notice that:

"A contract may be concluded or evidenced by electronic communications." And added that "the purpose of CISG Article 11 is to ensure that there is no form requirements of writing connected to the formation of contracts. The issue of electronic communications beyond telegram and telex was not considered during the drafting of the CISG in the 1970s. By not prescribing any form in this article, CISG enables the parties to conclude contracts electronically."[151]

In this respect, I would like to stop on some main points in e-commerce, which the CISG faces with during pre-contractual and contractual communications. Its questions, related to formation of contracts, formalities in e-commerce under the CISG.

Firstly, let's focus on pre-contractual communications and define what issues are in this sphere and how UNCITRAL Model Law on Electronic Commerce (1996) works with the CISG provisions.

Article 24 of the CISG, speaking about pre-contractual communications states the following:

"For the purposes of this Part of the Convention, an offer, declaration of acceptance or any other indication of intention "reaches" the addressee when it is made orally to him or delivered by any other means to him personally, to his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence." [152]

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[149] Sieg Eiselen, *E-Commerce and the CISG: Formation, Formalities and Validity*, p. 312

[150] UNCITRAL Model Law on Electronic Commerce (1996) with additional article 5bis as adopted in 1998, Text - Guide to enactment/ United Nations Commission on International Trade Law <http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model.html>

[151] CISG-AC Opinion no 1, Electronic Communications under CISG, 15 August 2003. Rapporteur: Professor Christina Ramberg, Gothenburg, Sweden. <http://cisgw3.law.pace.edu/cisg/CISG-AC-opl.html>

[152] *Ibid.* CISG, Art. 24

This means that the CISG does not contain provisions on electronic communications. From this perspective there could be two situations:[153]

1) There is a gap in the Convention and we should decide whether this situation falls into the expected field covered by the CISG. And such a gap should be filled through interpretational methods. Art. 7 of the CISG provide guidelines for interpretation of its provisions and states that "Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law." [154]
2) Or such situation falls out of scope of Convention and accordingly, there is no gap in law. Meaning that we can resolve such situation by reference to the applicable private international rules.[155]

We can only presume that the gap in this provision exists, as there is reference to telex, but not to other forms of communication. On the other hand, we do not see the intention in the CISG to exclude other known form of communication. Its purpose is seems, to be even all inclusive. This presumption can be confirmed by the fact that at the time of acceptance of the Convention discussed forms of communication were unknown.

Main idea of the Article 24 is that any communications, if they are direct forms of communication, should be received personally by recipient or be effectively placed at its disposal at place where he usually receives such communications, or where he, by the normal course of business, expects to find them. According to the following, message sent to recipient's e-mail box, fax number, web address should meet the requirements for the validity stated in the CISG. Confirmation of such ideas cam be found in provisions of Model Law 1996, namely in Article 15, that reads that the message is considered to be sent at the time when it leaved the informational system of the sender and considered to be received at time when it enters into the information system of the recipient. This means, that when it enters into that system, the message considers being at the disposal of the recipient, and is count as a received one.[156]

Moreover, regarding the definition of "reaches" in CISG Article 24, the Advisory Council opined that the term "reaches" corresponds to the point in time when an electronic communication

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[153] Sieg Eiselen, *E-Commerce and the CISG: Formation, Formalities and Validity* p. 312

[154] *Ibid.* CISG, Art. 7

[155] *Ibid.* Eiselen, p.313

[156] *Ibid*. Eiselen,, p.314

has entered the addressee's server, provided that the addressee expressly or impliedly has consented to receiving electronic communications of that type, in that format, and to that address.[157]

By concluding the contracts there are some formalities that usually are required by laws. In most of cases, these are- writing, signature of both parties of the contract and third party authentication or involvement (for example notarization). As in the international sales contracts we deal with movable property, only two of three requirements are related to our topic- about writing and signature. In most of cases, such formalities are mandatory, because the standard clause of written contracts states that the provisions of such contracts are not binding and valid till the time when contract will be in writing and signed by both parties.[158]

Despite this fact, international sales contract can be concluded in any form that is suitable to the parties. However, in such case, parties should agree on provisions that electronic communications will be confirmed as writing and that alternative prescribed authentication procedures will be recognized as signature of the parties. Both parties have to be careful with exception in Art. 12 of the CISG, which contains that any provisions of Articles 11, 29 and Part II of the Convention that gives the opportunity to made contract of sale or it`s modification of termination by agreement or any offer, acceptance or other indication of intention in any other form than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under Article 96 of this Convention.[159] The parties may not derogate from or vary the effect of this article. This means that some countries still may require formality as writing, but not signature.

Let`s discuss on the formality as writing. Traditionally, requirements of writing were usually associated with paper-based file, where words are written, typed or printed on paper with the use of different technologies. In some legal systems there is still issue whether the words created on the computer will be considered as writing. The problem with electronic writing is that unlike writing on permanent media like paper, which is transfixed on the diskette, CD Rom, hard disk or other memory medium is not treat as writing without being processed. Even though, professor Eiselen believes that cyber-writing does constitute writing in law and ought to be accepted as such.[160] According to the Art.13 of CISG telegrams and telexes are included under the term "writing". CISG Article 7(2) provides that questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general

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[157] CISG-AC Opinion no 1, *Electronic Communications under CISG*, 15 August 2003. Rapporteur: Professor Christina Ramberg, Gothenburg, Sweden. [accessed 2013.10.29] <http://cisgw3.law.pace.edu/cisg/CISG-AC-opl.html>

[158] Sieg Eiselen, p. 315

[159] *Ibid*.CISG, Art. 96

[160] *Ibid.* Eiselen, p. 317

principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.[161]

A general principle of freedom of contract form is stated in CISG Article 11: "A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form." [162] Therefore, commentators have suggested that Article 13 "must be read to include all electronic forms of communication as well."[163] The use of Article 13 of the nonexclusive term "includes" supports this interpretation. Furthermore, if the underlying reasons for the requirement of "writing" are the future accessibility and readability of the communication, if an electronic communication may be stored and later reproduced in electronic or paper form, it should satisfy these functional reasons for a "writing" requirement and should be considered the equivalent of paper "writing."[164]

Second formality which should be discussed is electronic signature. Identification, assent, attribution and authentication by signature consider another big problem in electronic trade. It seemed that requirements of signature could be met only in a way of physical signature signed on paper document, as in most of jurisdictions specific legislation, govern electronic signature, were not adopted. That was the reason why electronic signatures were not recognized unless specific provision for electronic authentication has been made. [165]

According to the Article 2(a) of the UNCITRAL Model Law on Electronic Signatures 2001 "Electronic signature means data in electronic form in, affixed to or logically associated with, a data message, which may be used to identify the signatory in relation to the data message and to indicate the signatory's approval of the information contained in the data message."[166]

The CISG does not require signature in any case and no country is entitled to make an exception as Arts. 12 and 96 only apply to the formality of writing. Thus, the requirement of an electronic signature will only be relevant if the parties themselves have stipulated the mandatory authentication by signature. As this requirement often appears in standard terms and conditions it may prove problematic in such circumstances.[167]

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[161] CISG, Art.7(2)

[162] *Ibid*. CISG. Art. 11

[163] Eiselen, p. 317

[164] Hill J.E., *The Future of Electronic Contracts in International Sales: Gaps and Natural Remedies under the United Nations Convention on Contacts for the International Sales of Goods*/2 Nw. J. TECH. & INTELL. PROP.(2003), p. 5

[165] Sieg Eiselen, p. 317

[166] UNCITRAL Model Law on Electronic Signatures with Guide to Enactment 2001/ United Nations Publication, Sales No. E.02.V.8, ISBN 92-1-133653-8/ <http://www.uncitral.org/pdf/english/texts/electcom/ml-elecsig-e.pdf>

[167] Eiselen, p. 318

The UNCITRAL Model Law on Electronic Commerce (1996) makes provisions for the recognition and use of e-signatures in the Article 7:

"Where the law requires a signature of a person, that requirement is met in relation to a data message if:

(a) a method is used to identify that person and to indicate that person's approval of the information contained in the data message; and

(b) that method is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.

(2) Paragraph (1) applies whether the requirement therein is in the form of an obligation or whether the law simply provides consequences for the absence of a signature."[168]

Time showed that provisions of the Model Law 1996 could not deal with all the issues concerning electronic signatures. Thus, UNCITRAL developed a specific model law, namely the Model Law 2001 to solve raised problems. There are also various other legal instruments that deal with electronic signatures such as the European Union Parliament`s Directive on a Community Framework for Electronic Signatures (1999/93/EC) and the provisions contained in various pieces of legislation such as the Irish Electronic Commerce Act 2000.[169]

The USA, the European Union and UNCITRAL advocate their own standards (since the Conference, on June 8, 2000, the European Council has adopted a Directive on certain legal aspects of electronic commerce in the internal market). This variety risks to hinder the introduction of universal standards to regulate cyberspace worldwide. However, in the meantime the CISG already offers a proper platform to regulate the e-transactions themselves.[170] On the basis of mentioned facts the conclusion can be made that UNCITRAL and CISG Advisory Council created enough legal instruments to cover lack of provisions about electronic commerce. The adoption of the Model Laws, Opinions of CISG Advisory Council and the upcoming United Nations Convention on the Use of Electronic Communications in International Contracts is positively providing a set of supplementary rules, establishing non-mandatory provisions with regard to new means of communication and further increasing adaptability of the CISG for future changes.[171] Even through thirty three years old, the CISG with its fundamental principles are sufficiently flexible to deal with

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[168] UNCITRAL Model Law on Electronic Commerce (1996) with additional article 5bis as adopted in 1998, Text - Guide to enactment/ United Nations Commission on International Trade Law <http://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf>

[169] *Ibid*. Eiselen, p.318

[170] Van Houtte H., *Convention on the International Sale of Goods (1980) - 20 Years - A Convention for New Times/* Business Law International, Vol. 2000, Issue 3 (September 2000), p. 358

[171] Hahnkamper, Wolfgang, *Acceptance of an Offer in Light of Electronic Communications*/ Journal of Law and Commerce, Vol. 25, Issue 1 (Fall 2005), p. 148

world changes and the challenges posed by these new forms of communication and that virtually no changes need to be made to the Convention in this issue.

Analysis shows that the Convention, while thirty three years old, with its underlying principles are appropriately flexible to deal with world changes and the challenges posed by new forms of communication and that virtually no changes need to be made to the Convention. The CISG itself provides a flexible framework of provisions for the conclusion of contracts by any form of communication and can be interpreted, without resorting to wiredrawn explanations, to include classic forms of communication as well as electronic media.

The areas where the approach or solution followed in the CISG has been shown to be problematic, stem not from the use of more modern forms of communication, but rather are structural or conceptual deficiencies that existed from the outset and are applicable to all forms of communication. The analysis clearly shows that the CISG is a coherent and logical body of law able to survive and grow in the modern world. The adoption of the Model Laws, Opinion of the CISG Advisory Council and the upcoming United Nations Convention on the Use of Electronic Communications in International Contracts are positively provide a set of supplementary rules, establishing mandatory provisions with regard to new means of communication and further increasing the adaptability of the CISG for future changes in business reality.

2.3. Conclusion on the desirability for modernization

The United Nations Convention on Contracts for the International Sale of Goods (CISG) is the prime example of unification of private law at the global level. With over 79 contracting States of the world's largest economies, the CISG is usually seen as a big success.

However, throughout the thirty two years since the CISG was adopted, many scholars have identified a vast range of problems that may show inadequacy to solve some issues. To this end, three persistent groups of problems regarding the CISG were identified: its problematic uniform application by national and arbitral courts, its incompleteness and regular exclusion by parties. Some of these issues will not find the solution, as they were intentionally opened by the drafters to achieve, planed at that time, harmonization among a lot of countries. These are the questions of uniform interpretation, battle of forms, validity etc. For example, battle of forms issue, as it was left open by the drafters to protect main goals of uniformity in the CISG. It seems that drafters opted to deal with the problem of battle of forms by using means of traditional mirror-image or last-shot approach. Concerning validity issue, the validity exception was included with the aim to protect the differing interests that are secured by different domestic laws. The history shows

that the drafters designed Article 4(a) of CISG to serve as a gap which could stretch to fit the needs of each domestic legal system.

In order to find a solution of uniformity problem, CISG need to be seen in context of its overriding principles, mentioned in Article 7, namely- internationally, uniformity and principle of good faith. As the wording of this provisions mentions in the imperative style, it should put a legal duty on judges to comply with them. In cases when the principle is not clearly settled in the provisions of the Convention, the suggestion is to find the solution in the Convention itself with the help of the most appropriate international cases and opinions, so that reasoning in this matter can develop and assist in achieving uniformity. Usage of international case law, opinions of scholars and *"travaux preparatoires"* is important to achieve the aim of the CISG to create uniform sales law. I truly believe, the uniformity may be achieved only by analyzing decisions of courts in different countries and academic opinions.

By analysis of issue of concurrent remedies in cases with product liability, misrepresentation and other similar torts, the domestic solutions can and should sometimes serve to supplement to the CISG solution, but not contradicting its main principles.

Some of problems were solved or are solving by legal practice and work of official organizations such as UNCITRAL or CISG Advisory Council. In this regard, notwithstanding various theoretical discussions, practical side in issue of hardship under Vienna International Sales Convention allows to say, that changed circumstances, which were not reasonably foreseeable at the time of the conclusion of the agreement between parties and which increased the burden of the agreement disproportionately, can, in some circumstances, form an impediment in the sense of Article 79 of the CISG. And respectively, hardship provisions may be used under mentioned article of Vienna Convention on Contract for the International Sales of Goods by "injured" party to protect its interests. If relevant, issue of hardship could be solved on the example of *Scafom International v. Lorrain Tubes* case. As it legal practice gave the world important precedent as how to solve the gap, connected to hardship. Thus, I do not see the direct need to make changes in CISG on this particular issue.

Analysis on issue of electronic commerce also showed that the CISG with its underlying principles are properly flexible to deal with raised new forms of communication. The CISG itself provides a flexible framework of provisions for the conclusion of contracts by any form of communication and can be interpreted, without resorting to wiredrawn explanations, to include classic forms of communication as well as electronic media. CISG is a clear and logical legal instrument, able to survive and grow in the changing world. The adoption of the Model Laws, Opinions of CISG Advisory Council and the upcoming United Nations Convention on the Use of Electronic Communications in International Contracts positively provide a set of supplementary

rules, establishing mandatory provisions with regard to new means of communication and further increasing the adaptability of CISG for future changes in business reality. Thus, in this regard no changes need to be made to the Convention.

Nevertheless, there is no doubts that the CISG in not perfect legal instrument and cannot give answers on all questions.

Experience of an exclusion of Vienna Convention gives the ground to doubts of whether its provisions, nowadays, are able to adequately cover relations between the parties, especially, if contracting parties that ratified the CISG are excluding it in their legal practice. This is only one of the reasons why CISG is susceptible to being ignored by the American legal community.[172] By provided analysis two main groups of reasons for an exclusion of the Convention were defined: legal and practical. The first group includes: more favorable position under national law rather than by CISG, conflict with extensive self-regulation in a certain branch of trade and existence of controversy regarding the issue whether the CISG is applicable or not. Second group: the lack of familiarity with the uniform law as a primary reason for its exclusion lays in old generation of lawyers which are practicing nowadays, client's market position enables retention of national law, insufficient literature, case law on the CISG, lack of lawyer's knowledge in advantages of the Convention and ability to evaluate what legal instrument would me more favorable in particular case, negative experience with the ULIS or other unified law, the use of exclusion provisions as a standard or as "usage". Practical reasons prevail. The reason of it, mostly, hides not in the CISG as a legal instrument and its inability to cover relations of the parties, but with lawyers, law companies and other professionals, which stay aware from the Convention. Despite this fact, legal reasons also take place in common exclusion of CISG, but not as much as practical ones. Here means more favorable position under domestic law than by CISG, which it is impossible to change or modify. As comparing different legal act some of them still will be more favorable some of them will not.

In regard the conflict with extensive CISG self-regulation in a certain branch of trade, we need to look on CISG through its nature. The Convention governs general sales contract. If to look on the content of the CISG it regulates only the issues concerning formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. CISG does not regulate specific types of contracts. Thus, we cannot conclude that by this reason the CISG is inadequate convention. I think, in questions of its scope it is a quite good legal instrument.

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[172] Grbic K., *Putting the CISG Where It Belongs: In the Uniform Commercial Code/* Touro Law Review: Vol. 29: No. 1, Article 13, 2013 <http://digitalcommons.tourolaw.edu/lawreview/vol29/iss1/13>

Thus, according to the analyses laid in this Chapter, I came to the conclusion that it is desirable to modernize the 1980 United Nations Convention on Contracts for the International Sales of Goods. However, there is no need to change or modify it. As years showed, defined in this master thesis problems will not be solved, because they were intentionally putted by drafters to overcome with future problems or to maximally provide the uniform application and harmonization. Another group of defined problems were solved or are solving with help of created legal instruments. Concerning experience of exclusion of CISG by the parties, analysis showed that main problem for this is practical problem, not legal one. Means that exclusion is not connecting to CISG as inadequate legal instrument and its inability to cover relations of the parties, but with lawyers and law companies, which stay aware from Convention.

CHAPTER III. FEASIBILITY FOR THE MODERNIZATION OF THE CISG

One well known international trade law commentator Rosett defined that the problem with any international convention harmonizing international trade law is that as more and more parties ratify the convention, it becomes incredibly difficult to implement any changes that might be needed to keep legal mechanism alive. As an example author speaks about Warsaw Convention on international air carriages. It was introduced in 1929 and saw a number of small changes since that time. A lot of proposes and suggestions were taken into account in 1975 Montreal draft amendment, but that draft is still waiting for ratification.[173] According to conclusion on desirability to modernize Vienna Convention in the second chapter of this thesis, in this chapter I would like to analyze and evaluate the latest proposal to UNCITRAL, which came from Switzerland and known among the scholars as Swiss proposal. Some scholars calls this period of changes new global initiative, others prefer- era of CISG 2.0.[174]

3. 1. New global initiative

3.1.1. Proposal by Switzerland on possible future work by UNCITRAL in the area of international contract law.

Less than ten weeks before the opening of the forty-fifth session of the Commission in 2012, the Government of Switzerland submitted to the Secretariat a proposal in support of future work in the area of international contract law. Colleagues mentioned that the volume of trade of goods worldwide had hugely increased within these years. No one can argue, that such legal instruments as 1980 United Nations Convention on Contracts for the international Sale of Goods (CISG) has influenced a lot in issue of certainty to all its contracting parties. Nevertheless, CISG gives big room to apply domestic law.[175]

Within the last 33 years of existence of United Vienna Convention, a lot of developments were tried to make a sets of uniform contract laws in regional area. Despite its success, such effort made the international contracting even more complex and raised new issues on their amount.

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[173] Eiselen S., *Adopting the Vienna Convention: reflections eight years down the line*/ 19 SA Mers LJ, 2007, p.15

[174]Kawakami M., "It's a Bird. It's a Plane. It's CISG 2.0?"/ Maastricht European Private Law Blog, July 14, 2012 <http://www.mepli.eu/2012/07/its-a-bird-its-a-plane-its-cisg-2-0/>

[175] *Ibid.* Kawakami

While saying this in report, Switzerland government sees the evidence in need for modernization and states that, in their opinion, have grounds for such thoughts.[176]

To come closer to main idea of Swish proposal, I would like to cite its introduction with two main aims which Swiss government proposes:

"Today, Switzerland believes that time has come for UNCITRAL:

1) to undertake an assessment of the operation of the 1980 Convention on Contracts for the international Sale of Goods and related UNCITRAL instruments in light of practical needs of international business parties today and tomorrow, and
2) to discuss whether further work both in these areas and in the broader context of general contract law is desirable and feasible on a global level to meet those needs" [177]

As a background to such positions, Swish government uses the statistics of World Trade Organization (WTO). It shows that in 2008 the sum of worldwide export trade counted to USD 15.717 billion and worldwide import- USD 16.127 billion. These statistic`s sums are in 100 times more than the same rates 50 years ago and in 10 times the level at the time of signing up the United Sales Convention. Understandable, that different domestic law does not make a problem for international trade, as far as they increase transactions costs for participants in the market.[178]

Last year's researches have made a conclusion that traders themselves create differences in contract law, which made difficulties to cross-border transactions. They include the difficulty in setting the content of an applicable contract law, negotiating the applicable law and adaptation of standard terms to different domestic laws. Not wired that exactly the trade area was the motor for unification and harmonization process starting in 19th century in a domestic level and was madding it till 21st century, but on the international level now. Practical side of the coin shows, that today parties choose to govern their relations by domestic law, going aside created international legal instruments, which, in most of situations, are even better suitable to solve issues of international contracts.[179]

In the opinion of Swish colleagues, these shows that UNCITRAL need to discuss and evaluate today`s and tomorrow`s practical needs of the international business relations and propose

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[176] UNCITRAL, Possible Future Work in the Area of International Contract Law: Proposal by Switzerland on Possible Future Work by UNCITRAL in the Area of International Contract Law, U.N. Doc. A/CN.9/758 (May 8, 2012) [hereinafter Swiss Proposal], p. 2

[177] *Ibid*. Swiss proposal, p.2

[178] Viscasillas, *Applicable law, the CISG, and the future convention on international commercial* contracts /Villanova Law Review, 2013, p. 743

[179] Ibid. Swiss proposal, p. 3

to think about a new legal instrument, which could cover the full variety of legal questions, with which stuck contractual business to business relations.[180]

Coming to the issue of United Nations Convention on International Sales of Goods, Swiss government mentioned that CISG proved to be most successful international private law convention in the history. WTO`s trade analyses shows that nine of the ten largest export and import nations are contracting parties of the Convention. Eighty per cent of international sales contracts are potentially covered by the CISG`s provisions. Also, it was mentioned that CISG had a big influence on important domestic and international legal acts, which were created after Convention had entered into force. As an example, here we can count known Uniform Act on General Commercial Law, created by the Organization for the Harmonization of Business Law in Africa (OHADA). Sales part of which is practically a transcript of the CISG. Also modeled on the base of CISG were the UNIDROIT Principles of International Commercial Contracts, the Principles of European Contract Law, the Draft Common Frame of Reference and now the Draft Common European Sales Law. From domestic law side, in Nordic countries the Sale of Goods Act was built on the base of United Sales Convention, the same as the modernized German Law of Obligations, the Contract Law of the People's Republic of China and other East Asian Codifications. Also it influenced on codifications in post-Soviet, Central Asian and Baltic countries.[181]

Despite mentioned above positive sides, the CISG is convention, which covers general areas of contract law. It covers typical provisions, such as formation of the contracts, obligations of the parties, remedies for the beach of the contract etc. But still, it leaves room in important areas to the applicable domestic law.[182] Professor Loken supports mentioned ideas and adds that negotiations relating to the CISG demonstrate the difficulty of the task. The drafters were confronted with widely different legal traditions as well as different approaches to international business transactions and different policy approaches between developing and industrialized countries. Topics such as validity, including mistake, and agency were left out of the CISG because they were not at that time considered suitable for harmonization. Though a few states may have done so, we are not aware of, in the years since those negotiations, states reaching a broad consensus on the many very challenging issues deliberately left out of the CISG or insufficiently addressed by the CISG, or that such a consensus is likely to be found in a new global negotiation.[183]

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[180] Swiss proposal, p.3

[181] *Ibid.* Swiss proposal, p.4

[182] *Ibid*. Swiss Proposal, p.4

[183] Loken K., *A new global initiative on the contract law in Unicitral: right project, right forum*? [interactive]/ Villanova Law Review, 2013, p. 511 [accessed 2013.11.24] <http://lawweb2009.law.villanova.edu/lawreview/wp-content/uploads/2013/07/VLR403.pdf>

3.1.2. Desirability: UNCITRAL to assess operation of CISG and desirability of further harmonization and unification of related issues of general contract law.

Switzerland underlines CISG`s role in raising the level of unification of sales law, but point out that the CISG cannot satisfy all the needs of the international commercial community in relation to contract law. The lack of the CISG first of all relates to some issues which are at all not covered by the CISG. Moreover, a lot of issues, which were discussed while drafting in the 1970s are still open. These are known issues of battle of forms, applicable interest rate, specific performance and others. Also it was mentioned that some areas covered by the Convention, need more detailed attention (as the rules on unwinding of contracts). In the end, line of the conventions, that acts to supplement the Vienna United Sales Convention such as the 1974 United Nations Convention on the Limitation Period in the International Sale of Goods and the 2005 United Nations Convention on the Use of Electronic Communications in International Contracts, have not reached so many member-parties as the CISG. And this reason reduces their unifying effect.[184]

In the opinion of Switzerland, the time has come for UNCITRAL to think over these issues of general contract law in the context of international sales, and maybe, even about the possibilities of other types of transactions from a global perspective.[185]

Regional tries to harmonize and unify general contract law cannot satisfy the needs of international trade. More likely, various legal regimes in different regions drives to fragmentation.[186]

Counting the statements and analyses above, the government of Switzerland concludes that UNCITRAL seems to be the most appropriate organ for such a project. Moreover, according to General Assembly Resolution 2205 (XXI), para. 8:

"The Commission shall further the progressive harmonization and unification of the law of international trade by: (c) Preparing or promoting the adoption of new international conventions, model laws and uniform laws..." [187]

In regard of feasibility of further work in the area of international contracts, Swish colleagues say that such work may cover a considerable array of questions. In their opinion, work should start with the identification of those areas where a practical need is felt, which would be complementary to already existing instruments. In parallel, UNCITRAL should discuss what

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[184] Swiss Proposal, p. 5

[185] *Ibid.* Swiss Proposal, p.5

[186] Goode R., *Rule, Practice, and Pragmatism in Transnational Commercial Law*/Cambridge University Press, Vol.54, No. 3, (Jul., 2005), p. 552

[187] UN - General Assembly resolution 2205 (XXI) of 17 December 1966 Establishing - United Nations Commission on International Trade Law - United Nations Commission on International Trade Law

particular forms of future work it might take on general contract law. And to indicate what delegations are able and ready to agree to on substance is often closely linked to the question of the possible form of an instrument.[188]

3.1.3. Position of the UNICITRAL: Possible future work by UNCITRAL in the area of international contract law

Commission in Report of the UNCITRAL 2012 about possible future work by UNCITRAL in the area of international contract law answered on Swiss Proposal. It took into account described in the proposal problems, namely that:

- many areas relating to contracts for sale of goods, as well as to general contract law, were still left to domestic law and that created an obstacle to international trade by multiplying the number of potentially applicable legal regimes and associated transaction costs;
- the need to access legal materials on foreign laws in different languages or to get expert advice from a foreign jurisdiction created additional challenges and expenses. Those expenses, as stated Swiss colleagues, were particularly onerous on small and medium-sized enterprises.[189]

For mentioned reasons, it was suggested by UNCITRAL that, with a view to allowing the Commission to make an informed decision on possible future work for further harmonization of contract law, the Secretariat could organize colloquiums and other meetings, as appropriate and within available resources, and report on the desirability and feasibility of such possible future work at a future session of the Commission. It was emphasized that such exploratory activities should not only take into account but also build on existing instruments, such as the United Nations Sales Convention and the UNIDROIT Principles of International Commercial Contracts. It was further indicated that such work could usefully complement ongoing efforts with respect to contract law modernization at the regional and national levels. Commission mentioned that it was not evident that existing instruments were inadequate in actual legal practice. Swiss proposal seemed to them unclear and too ambitious and that it could potentially cover with existing texts, for example- the UNIDROIT Principles of International Commercial Contracts. It was added that gaps in existing texts, such as the United Nations Sales Convention, were a result of the impossibility of finding an agreed compromise solution and UNCITRAL has significant doubts whether this problems could be overcome in the near future. Also, as a reason, was expressed a lack of human and financial

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[188] Swiss proposal, p.6

[189] Report of the United Nations Commission on International Trade Law, # A/67/17 - forty-fifth session (25 June-6 July 2012), p. 31 [interactive] [accessed 2013.12.04] 31 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V12/551/54/PDF/V1255154.pdf?OpenElement>

resources available to the Commission and to States for such vast project. Mentioned reasons, made choice that the proposed work should not be undertaken, at least not at the present time. It was added that the Commission might reconsider the matter at a future date in the light of possible developments.[190]

As a last point, was a prevailing view in support of requesting the Secretariat to organize symposiums and other meetings, including at the regional level and within available resources, maintaining close cooperation with UNIDROIT, with a view to compiling further information to assist the Commission in the assessment of the desirability and feasibility of future work in the field of general contract law at a future session.[191]

3.2. Against or for the new global initiative?

In 2013 was organized Symposium which dealt with issue of the future of uniform law in the field of international contracts. After it various scholars started to stay on one of the sides, whether it is or not the time come for a new global initiative to harmonize and unify international trade. This subchapter is willing to analyze such opinions and proposals.

It seems for professor Viscasillas that some part of the criticism against Swiss proposal comes from a misunderstanding on the scope of the proposal that it may be treat as an intention to create a new instrument that will modify the CISG. Indeed, there is no need to touch the CISG, or to modify it. A different issue is where a new instrument would be able to complement the CISG by either covering areas outside the scope of the CISG, or filling internal gaps in the CISG. At the same time, and because of the intended general nature of the future instrument, it will be applicable to other international commercial contracts as well. It seems to us that this is the correct approach to assess the viability of a new instrument on the area of contract law as a project to be undertaken by UNCITRAL. One might say that UNIDROIT Principles already do so. Yet, that is the case only if parties choose to have the UNIDROIT Principles govern their contract. There is no legitimacy behind the UNIDROIT Principles to be considered in all and any case as the general principles on which the CISG is based. The Principles, although a very useful text, are not an international treaty accepted worldwide.[192]

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[190] Report of the United Nations Commission on International Trade Law, # A/67/17 - forty-fifth session (25 June-6 July 2012), p. 30 [interactive] [accessed 2013.11.07] <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V12/551/54/PDF/V1255154.pdf?OpenElement>

[191] *Ibid*., p.31

[192] Viscasillas P.P., *Applicable law, the CISG, and the future convention on International commercial contracts*/ Villanova Law Review, 2013, p. 745

Not long time ago CISG Advisory Council supported Swiss proposal by its Declaration No. 1: "The CISG and Regional Harmonization", where it considers some of the shortfalls of regional unification as opposed to global unification. The present author, who supported that declaration as a member of the CISG-AC, did recently consider the idea of UNCITRAL undertaking a leading role in the area of international commercial contracts.[193]

The idea of drafting a legislative instrument at a global level for international commercial transactions in general has already been authoritatively suggested in the past.[194] The idea was to raise the effectiveness of existing uniform law and to overcome the more obvious disadvantages of an opt-in uniform regulation such as the PICC. This view was radically opposed on the grounds that contract law is essentially ruled by party autonomy and legislation should only intervene in those sectors where mandatory provisions or debated policy choices are concerned.[195]

Michael Joachim Bonell followed up on this idea of a Code to apply to cross border transactions between business people and between individuals. Leaving open the question of its applicability to so-called consumer contracts, he suggests that the Global Commercial Code should avoid interfering with existing or future domestic rules for the protection of consumers.[196] It should not be a strict commercial code conceived as a special set of rules conceived for merchants distinct from the general civil code because no such civil code exists at the international level and also because of the difficulties of distinguishing between "civil" and commercial parties and transactions. Unlike Hermann, he felt that the existing instruments would have to be coordinated, rather than just transplanted into the Code, and should include the general contract law. He agreed that the Global Commercial Code should be model law like the UCC but should be different than the UCC in that its scope should be limited to cross-border transactions. This Global Code would be binding among nations that adopted it. He stressed that it should not be a comprehensive code that purports to provide answers to all legal disputes. Additionally, he advised that the Global Commercial Code should not be mandatory and nations should not be prevented from modifying it. Nations should be free to adopt it as proposed or modify it to account for the varying legal traditions

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[193] CISG-AC Declaration No. 1, *The CISG and Regional Harmonization*/ Rapporteur: Professor Michael Bridge, London School of Economics, London, United Kingdom. Adopted by the CISG-AC following its 16th meeting, in Wellington, New Zealand, on Friday, 3 August 2012

[194] Ole Lando., *CISG and Its Followers: A Proposal to Adopt Some International Principles of Contract Law*/American Journal of Comparative Law (Spring 2005) p. 391

[195] Veneziano A., *The soft law approach to unification of international commercial contract law: future perspectives in light of UNIDROIT`s experience*/ Villanova Law Review, Vol. 58, 2013, p. 525

[196] Bonell M. J, *Do We Need a Global Commercial Code?"*/106 Dick .L Rev. 87, 87 (2001), p.113

and already adopted regional or universal laws dealing with identical areas.[197] Something such as the UNIDROIT Principles of International Contracts 2004 (UPICC) would remain as soft law separate from the Global Code. These features would prevent such a Code from being overly ambitious.

Ole Lando supports Bonell's ideas that the existing instruments will need to incorporate the general law of contracts in order to achieve the uniformity that is the underlying goal of the Code.[198] However, Lando seems to envision a less flexible version of the code and insists that if uniformity is to be achieved it would be necessary to make existing rules like the UNIDROIT Principles part of the Code and binding on the courts. Lando suggests in detail the scope, substance and content, interpretation, mandatory rules, and other specific topics of the Code. He argued that the Code should be limited to private law and analyzed the way the international law should interact with the laws of different countries. He proposes that some of the rules of the CISG be adopted along with rules now contained in UNIDROIT Principles of International Contracts 2004 (UPICC) and the Principles of European Contract Law (PECL) to become part of the Code.[199]

However, it is a costly and burdensome procedure, which is further complicated by the possibility of introducing reservations in order to reach consensus, and by the need to obtain ratifications afterwards. I suspect that if governments are involved, the resistance to depart from domestic law will be even greater for a project regarding the veritable "core" of domestic private law concepts such as the general law of contracts. Even if limited to cross border transactions, it would still involve a dramatic change in national legal systems.[200]

Professor Veneziano is not against the idea to prepare a so-called "Global Commercial Code" which was discussed by Secretary of UNCITRAL- Gerold Herrmann some years ago.[201] The PICC could well constitute the "general part" of such a compilation of existing uniform law instruments and be used as a point of reference to develop binding rules regarding international contracts not yet covered by an international convention.[202] However, on her opinion, the best way

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[197] Bonell, *A Further Step towards Global Contract Law*: From UNIDROIT Principles 1994 to UNIDROIT Principles 2001, 37 UCC L.J., (2004), p.49

[198] Ole Lando, *A Vision of A Future World of Contract Law – Impact of European and UNIDROIT Contract Principles*, 37 UCC L.J. (2004), p. 3

[199] Del Duca., *Developing Global Transnational Harmonization Procedures for the Twenty- First Century: The Accelerating Pace of Common and Civil Law Convergence*/ Texas International Law Journal, Vol. 42, 2007, p. 625

[200] Veneziano A., *The soft law approach to unification of international commercial contract law: future perspectives in light of UNIDROIT`s experience*/ Villanova Law Review, Vol. 58, 2013, p. 521

[201] *Ibid*. Del Duca, p. 626

[202] Goode R., *Rule, Practice, and Pragmatism in Transnational Commercial Law* [interactive] /Cambridge University Press, Vol. 54, No. 3 (Jul., 2005), p. 552 [accessed 2013.12.04] <http://www.jstor.org/stable/3663449 >

would be to enhance the future development of uniform law for international trade through a better understanding and coordination of the existing instruments. In this regard, the efforts of scholars in introducing international instruments in their teaching materials, in disseminating information, and in offering authoritative interpretation cannot but continue to play a central role. An equally important element is the furthering of the cooperation among international organizations in order to promote a coherent and rational employment of the (unfortunately increasingly scarce) resources devoted to the development of uniform law. To further this aim, UNIDROIT will continue to be open to cooperation with UNCITRAL and other international organizations.[203]

Similar opinion provides by professor Loken. She believes that the time is not right for undertaking a global initiative. Among the reasons for such conclusion she sees:

"1. The need for an initiative of the scale proposed has not been demonstrated (taking into account, inter alia, the availability of the UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles) and the ability of parties to designate those Principles as the law governing their contract).

2. We are not aware of demand for such a major initiative from U.S. parties to international commercial contracts.

3. Even if the international legal system would be better if a broad instrument of the sort advocated by the proponents were successfully drafted and adopted, it is likely that the attempt to draft and adopt such an instrument would expend considerable institutional resources of UNCITRAL and its member states, detracting from UNCITRAL's continuing efforts to achieve broader adoption of the CISG as well as other projects of UNCITRAL. Moreover, we conclude that such an initiative would have little chance of coming to a successful conclusion at this time."[204]

Professor supports her opinion on the basis annual meeting of the State Department's Advisory Committee on Private International Law (which includes academicians, practitioners, and representatives of business interests) in October 2012. At that meeting, the proposal made to UNCITRAL was not supported. The Executive Committee of the Uniform Law Commission (ULC)- the organization that co-developed, with the American Law Institute, the Uniform Commercial Code in the United States-recently adopted a resolution stating that the ULC opposes the proposal made in UNCITRAL because the project is very unlikely to be successful and because an attempt to develop the type of instrument proposed would not be a prudent use of resources.

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[203] Veneziano A., *The soft law approach to unification of international commercial contract law: future perspectives in light of UNIDROIT`s experience*/ Villanova Law Review, Vol. 58, 2013, p. 523

[204] Loken K., *A new global initiative on contract law in UNCITRAL: right project, right forum? /* 58 Vill. Rev. (forthcoming April 2013), p. 9

Professor Loken proposes to maximize productive use of UNCITRAL`s resources. She believes, it is important to recognize that UNCITRAL is already doing a good work in that regard in line with its primary mandate to promote coordination and cooperation in the development of international trade law, namely promotion more widespread ratification of or accession to the CISG,[205] developing and maintaining the CISG Digest and CLOUT in the six official languages of the United Nations, thus raising the uniform interpretation and application of the CISG, promoting the UNIDROIT Principles as complementary to the CISG, including most recently the 2010 edition, promoting the ICC`s Incoterms.[206]

Analyses and mainly opinions of scholars show that it is feasible to identify what areas has a practical need, which would be complementary to already existing instruments of contract law. UNCITRAL should discuss what particular forms of future work it might take on general contract law, but the time is not right for a global initiative, mainly because the desired results simply cannot be achieved at this time. Moreover, we already heard the opinion of UNCITRAL on this issue. Lack of human and financial resources cannot make such changes possible now. Positive thing is that after Swiss proposal UNCITRAL knows about the propositions to work in the field of international contract law and is ready to make research to understand whether there is desirable and feasible to begin such huge project.

Some authors believe that if such a major "project" will be pursue at the present time, they envisage a contentious, multi-year negotiation that would not bring significant results, and at great expense to UNCITRAL and its members. There is also the risk that it could detract from existing efforts to secure widespread adoption of the CISG. The government of USA believes that there are less ambitious but more practical alternatives for achieving progress in this area, and that UNCITRAL should continue to focus on such alternatives.[207]

Regarding modernization of CISG, an intention to create a new instrument that will modify the CISG is not needed. There is no need to do something with the CISG, or to modify it. Vienna Convention played and plays significant role in area of trade law. However, thirty-three years showed, that problems, which were intentionally left open by drafters (uniformity, battle of forms, validity), cannot be solved, thus any new legal instrument will improve the situation. Hence, the second hypothesis raised within the thesis is partly accepted.

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[205] Report of 45th Session, paras. 159-160

[206] Loken K., *A new global initiative on contract law in UNCITRAL: right project, right forum*? / 58 VILL. L. REV. (forthcoming April 2013), p. 10

[207] *Ibid*. Loken

CONCLUSIONS

1. While analyzing Chapter I, two main groups of reasons for an exclusion of the Convention were defined: legal (more favorable position under national law rather than by CISG, conflict with extensive self-regulation in a certain branch of trade and existence of controversy regarding the issue whether the CISG is applicable or not) and practical (the lack of familiarity with the uniform law as a primary reason for its exclusion lays in old generation of lawyers which are practicing nowadays, client's market position enables retention of national law, insufficient literature, case law on CISG, lack of lawyer's knowledge of advantages of the Convention and ability to evaluate what legal instrument would me more favorable in particular case, negative experience with the ULIS or other unified law, the use of exclusion provisions as a standard or as "usage").
2. The reason of exclusion is mostly practical. It hides not in the CISG as a legal instrument and its inability to cover relations of the parties, but in lawyers, law companies and other professionals, which stay aware and unknowledgeable about the Convention. Defined legal reasons of exclusion cannot be solved as they contradict to the nature of the Convention and its scope.
3. Based on analyses in Chapter II, main reasons for the modernization of 1980 United Nations Convention on the Contracts for the International Sale of Goods were defined: uniform interpretation, concurrent remedies, battle of forms, validity, hardship and electronic commerce. Thirty-three years since the CISG was adopted, showed inadequacy of the Convention to solve some issues. In this regard, three persistent groups of problems of the CISG were identified: its problematic uniform application, its regular exclusion by parties, and its incompleteness. CISG is not a perfect legal instrument and has problems with its application.
4. Thus, according to the analyses laid in Chapters I and II, the first hypothesis was accepted: it is desirable to modernize 1980 United Nations Convention on Contracts for the International Sales of Goods.
5. However, there is no need to change or modify the CISG. Years showed that the problems defined in this master thesis, namely issue of uniform interpretation, battle of forms, validity, will not be solved, because they were intentionally put by drafters to overcome future problems or to maximally provide the uniformity of application and harmonization. Another group of defined problems, specifically hardship, electronic commerce were solved with the help of created legal instruments.

6. Regarding feasibility for the modernization of CISG, an intention to create a new instrument that will modify the CISG is not needed. Vienna Convention played and plays significant role in area of trade law. But thirty three years showed that problems which were intentionally left open by drafters (uniform interpretation, battle of forms, validity) cannot be solved, thus any new legal instrument will not improve the situation. Hence, the second hypothesis raised within the thesis is accepted partly: it is feasible to modernize CISG, but, in regard of the Swiss proposal, the time is no right for such initiative.
7. Swiss proposal that raised the question on possible future work by UNCITRAL in the area of international contract law shows that it is feasible to identify what areas have a practical need, which would be complementary to already existing instruments of contract law. UNCITRAL should discuss what particular forms of future work it might take on general contract law, but the time is not right for a global initiative, because the desired results simply cannot be achieved at this time. As the reason UNCITRAL sees lack of human and financial resources, and not readiness of UNCITRAL to take on it.
8. In my opinion, the best solution at this moment is to maximize productive use of UNCITRAL`s resources, namely promotion of more widespread ratification of or accession to the CISG, developing and maintaining the CISG Digest and CLOUT in the six official languages of the United Nations, thus raising the uniform interpretation and application of the CISG, promoting the UNIDROIT Principles as complementary to the CISG, including most recently the 2010 edition, promoting the ICC`s Incoterms.

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SUMMARY

Krushevska K. Feasibility and desirability for the modernization of the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG) / Master thesis of European Business Law program. Supervisor Paulius Zapolskis, - Vilnius: Mykolas Romeris University, Faculty of Law, Business Law Department, 2013. - 68 p.

The thesis represents a legal analysis on desirability and feasibility for the modernization of the 1980 United Nations Convention on the Contracts for the International Sale of Goods. Therefore, the desirability for the modernization is evaluating though the analyses of issues related to general problems in the application (uniform interpretation, concurrent remedies, battle of forms), deficient problems of the CISG (validity, hardship and electronic commerce), and analyses of exclusion of the CISG by contracting parties. Moreover, in order to evaluate feasibility for the modernization of the Convention new ways and directions of new global perspectives, are taken into account, namely it is made through the glance of Swiss Proposal of new global initiative and the latest opinions of scholars, official organizations, such as UNCITRAL, State Department`s Advisory Committee on Private International Law, and Executive Committee of the Uniform Law Commission (ULC). From practical side, this thesis provides analysis on the desirability for modernization, which is highly important in order to understand whether the old CISG needs changes, and an analysis on feasibilities that create a fresh look on how and in what direction such changes can be made.

During the analyses first part of hypothesis was accepted: it is desirable to modernize the CISG. However, there is no need to change or modify the Convention. Years showed that defined in this master thesis problems, namely uniform interpretation, battle of forms, validity, will not be solved, because they were intentionally putted by drafters to overcome with future problems or to maximally provide the uniformity of application and harmonization. Another group of defined problems were solved with help of created legal instruments. Analyzed Swiss proposal which raised the question on possible future work by UNCITRAL in the area of international contract law shows the time is not right for a global initiative, because the desired results simply cannot be achieved at this time. Regarding modernization of the CISG, an intention to create a new instrument that will modify the CISG is not needed. Hence, the second part of hypothesis raised within the thesis accepted partly: it is feasible to modernize the CISG, but, in regard of the Swiss proposal, the time is no right for such initiative.

Key words: CISG, modernization, main problems, desirability for modernization, feasibility for modernization