

IX. Praktische Bedeutung der Minderung

Dadurch, dass das UN-Kaufrecht von der verschuldensunabhängigen Schadensersatzhaftung ausgeht, ist der praktische Anwendungsbereich des Art. 50 im internationalen Warenkauf relativ gering.¹³⁴ Der Grund hierfür ist, dass der Minderwert der Ware zugleich ein Schaden ist und ein Schadensersatzanspruch in der Regel weiter geht als die Minderung.¹³⁵

Ebenfalls ist die Schadenshöhe in der Praxis einfacher zu berechnen. Der Käufer kann eine absolute Berechnung vornehmen, indem er die Wertdifferenz zwischen Kaufpreis und Wert der mangelhaften Sache oder den Reparaturaufwand bestimmt.¹³⁶

Der Hauptanwendungsbereich der Minderung liegt in den Fällen, in denen ein Schadensersatzanspruch des Käufers nach Art. 79 ausgeschlossen ist, der Käufer Schwierigkeiten mit dem Nachweis eines Schadens hat oder zwischen Vertragsschluss und Lieferung der Preis der verkauften Ware gefallen ist.¹³⁷ In dem zuletzt genannten Fall ist der Minderungsbetrag höher als die absolute Differenz zwischen vertragsgemäßer und nicht vertragsgemäßer Ware zur Zeit der Lieferung, so dass der Minderungsbetrag den Schadensbetrag übersteigt und die Ausübung des Minderungsrechtes daher wirtschaftlich sinnvoller ist.

X. Schlussbetrachtung

Das Minderungsrecht des Art. 50 wirft trotz des eigentlich selbsterklärenden Wortlauts einige Probleme in seiner Auslegung und in seinem Anwendungsbereich auf. Das Ziel, den Artikel so selbsterklärend wie möglich zu gestalten und dadurch Auslegungsprobleme zu vermeiden,¹³⁸ wurde somit

nicht erreicht. Dagegen wird das Minderungsrecht in den Common Law-Ländern allgemein akzeptiert, auch wenn der Anwendungsbereich des Art. 50 durch den verschuldensunabhängigen Schadensersatzanspruch der Artt. 45 I lit. b, 74 eher gering ist.

Die oben genannten Fälle des Hauptanwendungsbereiches zeigen aber, dass im Einzelfall für den Käufer die Ausübung des Minderungsrechtes vorteilhafter sein kann als die Geltendmachung eines Schadensersatzanspruches. Daher sollte immer geprüft werden, welches Recht geltend gemacht wird.

This article shall describe the buyer's remedy of reduction of price for the delivery of non conforming goods. Art. 50 CISG should be as self-explanatory and understandable as possible, to avoid problems in interpretation and acceptance. It will be examined in the following, if this purpose is reached. The article explains Art. 50's intention, conditions and the legal consequences. The relation and combination to the other remedies of the CISG is demonstrated afterwards. At the end there are some comments to the importance of Art. 50 in practise.

¹³⁴ Die eher geringe praktische Bedeutung wird schon dadurch deutlich, dass 2005 zwei und 2006 lediglich eine Entscheidung zu Art. 50 in CISG-Online veröffentlicht wurden.

¹³⁵ Schlechtriem, *Huber* Art. 50 Rnr. 3; Staudinger, *Magnus* Art. 50 Rnr. 30.

¹³⁶ MK, *Huber* Art. 50 Rnr. 31; Schlechtriem, *Huber* Art. 50 Rnr. 3.

¹³⁷ Liu, a.a.O., 3.2.; Tunon, a.a.O., 4.3.2.; Shin, JoLC 2005-06, 349; Piliounis, a.a.O., 6) a) ii); Piché, 28 N.C.J. Int'l L. & Com. Reg. 2003, 519, 559-561; Honsell, *Schnyder / Straub* Art. 50. Rnr. 5; Staudinger, *Magnus* Art. 50 Rnr. 30; MK, *Huber* Art. 50 Rnr. 31; Schlechtriem, *Huber* Art. 50 Rnr. 3; Piltz § 5 Rnr. 298.

¹³⁸ Bergsten / Miller Seite 272.

Exclusion of the 1980 Vienna Convention: Does recent US case law open the door to *forum shopping*?

Giulia Sambugaro, Verona

In the last few years, the number of decisions applying the 1980 United Nations Convention on Contracts for the International Sale of Goods (hereinafter: CISG)¹ rendered by U.S. courts has drastically increased. Among the most recent ones, there is one rendered by the District Court of Minnesota² and one rendered by the Court for the Southern District of New York.³ Both decisions concern contracts for the international sale of goods concluded between parties that had their place of business in different contracting States to the CISG; in both cases, the U.S. plaintiff sued the foreign company for breach of contract, alleging that the goods sold were defective.⁴

¹ For the English text of the United Nations Convention on Contracts for the International Sale of Goods, see 19 I.L.M. 668 (1980).

² *Travelers Property Casualty Company of America v. Saint-Gobain Technical Fabrics Canada Limited*, U.S. District Court (Minn.), 31 January 2007.

³ *Cedar Petrochemicals, Inc. v. Donghu Hannong Chemical Co., Ltd.*, U.S. District Court (S.D.N.Y.), 19 July 2007.

⁴ The Minnesota District Court was faced with a dispute between a U.S. corporation and a Canadian one, while the case decided by the New York District Court involved a U.S. corporation and a Korean one.

The main issue to be analyzed in this short case comment relates to the parties' possibility to exclude the CISG pursuant to its article 6 which establishes that the parties to a contract governed by the CISG "may exclude the application of [the] Convention or, subject to article 12, derogate from or vary the effect of any of its provisions"⁵ and its impact on *forum shopping*. From the text of article 6 of the CISG one can easily gather that party autonomy is "the primary source of the rules governing international sales contracts",⁶ *i.e.*, how important party autonomy is under the CISG – but this was true under the 1964 Hague Uniform Sales Laws as well.⁷ Also, it is this provision that lays down the dispositive nature of the CISG.⁸

Even though the possibility to exclude the CISG has been analyzed rather often, it is worth looking into it once again, more so, since the aforementioned U.S. decisions took a view different from that of the most commentators⁹ and courts.¹⁰ In

⁵ For some examples of clauses excluding the CISG, see *Butler*, Knowing When, Why, and How to "Opt Out" of the United Nations Convention on Contracts for the International Sale of Goods, *May Florida Bar Journal* (2002) 24, 30.

⁶ *F. Ferrari*, CISG rules on exclusion and derogation: Article 6, in *The Draft UNCITRAL Digest and Beyond*, edited by F. Ferrari, H. Flechtner, R. A. Brand (2004), 116. For a similar statement, see *Audit*, *La vente internationale de marchandises* (1990), 37: "[...] la convention fait de la volonté la source première du contrat de vente"; *Bell*, *The Sphere of Application of the Vienna Convention on Contracts for the International Sale of Goods*, *Pace International Law Review* (1996) 237, 253; *Dokter*, Interpretation of Exclusion-Clauses of the Vienna Sales Convention, *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (2004) 430, 432; *Enderlein*, Die Verpflichtung des Verkäufers zur Einhaltung des Lieferzeitraums und die Rechte des Käufers bei dessen Nichteinhaltung nach dem UN-Übereinkommen über Verträge über den Internationalen Warenkauf, *Praxis des internationalen Privat- und Verfahrensrechts* (1991) 313, 314; *Hoyer*, Der Anwendungsbereich des Einheitlichen Wiener Kaufrechts, *Das Einheitliche Wiener Kaufrecht*, edited by H. Hoyer and W. Posch (1992), 41; *Magnus*, Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, *Wiener UN-Kaufrecht (CISG)* (1999), 133.

This opinion was reaffirmed several times in some courts decisions (see *Tribunale di Rimini*, 26.11.2002, published on the Internet at <http://www.unilex.info/case.cfm?pid=1&do=case&id=823&step=FullText>; *Hof Beroep Gent*, 17.5.2002, published on the Internet at <http://www.law.kuleuven.ac.be/int/tradelaw/WK/2002-05-17.htm>; *Rechtbank Koophandel Ieper*, 29.1.2001, published on the Internet at <http://www.law.kuleuven.ac.be/int/tradelaw/WK/2001-01-29.htm>; *Landgericht Stendal*, 12.10.2000, *Internationales Handelsrecht* 32 (2001)).

⁷ See, e.g., article 3 of the ULIS: "The parties to a contract of sale shall be free to exclude the application of the present Law either entirely or partially. Such an exclusion may be express or implied".

⁸ For commentators referring to the CISG's provisions having merely dispositive nature, see *Achilles*, *Kommentar zum UN-Kaufrechts-übereinkommen (CISG)* (2000), 25; *Bonell*, *Commento all'art. 6*, *Nuove leggi civili commentate* (1989) 16, 16; *Borisova*, *Art. 6 CISG-UP*, in *An International Approach to the Interpretation of*

the United Nation Convention on Contract for the International Sales of Goods (1980) as *Uniform Sales Law* (2007), 40; *Brunner*, *Art. 6*, in *UN-Kaufrecht – CISG. Kommentar zum Übereinkommen der vereinten Nationen über den internationalen Warenkauf von 1980* (2004), 8; *Carbone*, *Art. 6 CISG-UP*, in *An International Approach*, *cit.*, at 78; *Carbone / Luzzatto*, *Art. 6 CISG-UP*, in *An International Approach*, *cit.*, at 131; *Diéz-Picazo / Calvo Caravaca*, *Art. 6* in *La compraventa internacional de mercaderías* (1998), 92; *Dokter*, *supra* note 4, at 430; *F. Ferrari*, *La vendita internazionale. Applicabilità ed applicazioni della Convenzione delle Nazioni Unite sui contratti di vendita internazionale di beni mobili* (2006), 201; *id.*, *Gap-filling and Interpretation of the CISG: Overview of International Case Law*, *International Business Law Journal* (2003) 221, 227; *Lancioti*, *Norme uniformi di conflitto e materiali nella disciplina convenzionale della compravendita* (1992), 146; *Lohmann*, *Parteiautonomie und UN-Kaufrecht* (2005), 193; *Sacerdoti*, *I criteri di applicazione della convenzione di Vienna sulla vendita internazionale: diritto uniforme, diritto internazionale privato e autonomia dei contraenti*, *Rivista trimestrale di diritto processuale civile* (1990) 733, 744; *Sannini*, *L'applicazione della Convenzione di Vienna sulla vendita internazionale negli Stati Uniti* (2006), 79; *Schäfer*, *Der Vertragsschluss nach UN-Kaufrecht: ein Vergleich russischen und deutschen Recht* (2006), 2; *Witz*, *L'exclusion de la Convention des Nations Unies sur les contrats de vente internationale de marchandises par la volonté des parties* (1990) *Chron.* 107, 107.

Some authors consider the CISG's provisions as non-mandatory rules; thus, they entail that the CISG could also be applicable *ex officio*. See, e.g., *Simay-Cytermann*, *L'application d'office de la Convention de Vienne relative à la vente internationale de marchandises et le respect du principe du contradictoire (a propos de Cass. Civ. 1er, 2 octobre 2001)*, *Gazette du Palais* (2003) 234, 234; *Witz*, *L'interprétation de la CVIM: Divergences dans l'interprétation de la Convention de Vienne*, in *1980 Uniform Sales Law. Old issues revisited in the light of recent experiences*, edited by F. Ferrari (2003), 289; for a similar opinion see, also, *Cuniberti*, *Is the CISG Benefiting Anybody?*, *Vanderbilt Journal of Transnational Law* (November 2006) 1511, 1515; *Fountoulakis*, *The Parties Choice of "Neutral Law" in International Sales Contracts*, *European Journal of Law Reform* (2005) 303, 314: "It is a Convention applying automatically"; *Niemann*, *Einheitliche Anwendung des UN-Kaufrechts in Italienischer und deutscher Rechtsprechung und Lehre: Eine Untersuchung zur einheitlichen Auslegung unbestimmter Rechtsbegriffe und interner Lückenfüllung im CISG* (2006), 26.

For some courts decisions stating the non-mandatory nature of the rules of the Convention, see *Cass. civ.*, 19.6.2000, *Corr. giur.* 2002, 369, 371; *OGH*, 21.3.2000, *CISG-online* n. 641; *OGH*, 27.8.1999, *CISG-online* n. 485; *OGH*, 15.10.1998, *CISG-online* n. 380.

⁹ *Achilles*, *supra* note 8, at 2; *Audit*, *supra* note 6, at 38; *Bell*, *supra* note 6, at 255; *Borisova*, *supra* note 8, at 41; *Brunner*, *supra* note 8, at 1; *Cappuccio*, *La deroga implicita nella Convenzione di Vienna del 1980, Diritto del commercio internazionale* (1994) 867, 868 f.; *Carbone / Luzzatto*, *supra* note 8, at 132; *Chiomenti*, *Does the Choice of a-national Rules Entail an Implicit Exclusion of the CISG?*, *The European Legal Forum* (2005) 141, 143; *Czerwenka*, *Rechtsanwendungsprobleme im internationalen Kaufrecht. Das Kollisionsrecht bei grenzüberschreitenden Kaufverträgen und der Anwendungsbereich der internationalen Kaufrechtsübereinkommen* (1988), 170;

effect, the courts stated that the CISG applies “unless the parties have excluded its application”,¹¹ which is to say that “exclusion must be explicit”.¹²

The conclusion reached by the courts, as mentioned above, contradicts the view held by most Italian, French, German and even U.S. commentators,¹³ pursuant to which the parties do not have to exclude the CISG expressly, but can do so even implicitly.

In support of the prevailing view, it may be useful to refer to the history of article 6 which, unlike article 3 of the ULIS,¹⁴ does not expressly state in what way the parties may exclude the Convention: in effect, the second sentence of the article 3 of the ULIS, explicitly stating that the ULIS could be excluded either expressly or implicitly, was deleted.¹⁵ The reason why the Working Group opted for the deletion of that sentence is to be found in the fact that a special reference to the possibility to exclude the Convention implicitly “might have encouraged courts to conclude, on insufficient grounds, that the Convention had been wholly excluded”.¹⁶

The fact that the drafters omitted in article 6 any reference as to how the parties can exclude the Convention does not mean that its exclusion has always to occur expressly. This conclusion is strengthened by the fact that, during the Vienna Conference, the majority of delegations rejected not only the proposal to reintroduce the express reference to the possibility of an implied exclusion of the CISG, stating that there was not need for this, but also the proposal according to which a total or partial exclusion of the CISG could only be made expressly.

Thus, the rationale behind the omission of an express reference to the possibility to exclude the CISG implicitly is not

Date-Bah, The United Nations Convention on Contracts for the International Sale of Goods, 1980: Overview and Selective Commentary, *Ghana Law Review* (1979) 50, 54; *Diéz-Picazo / Calvo Caravaca*, *supra* note 8, at 94; *F. Ferrari*, Zum vertraglichen Ausschluss des UN-Kaufrechts, *Zeitschrift für Europäisches Privatrecht* (2002) 737, 741 f.; *id.*, Specific Topics of the CISG in the Light of Doctrinal Writings and Judicial Applications, *Preadvizen uitgebracht voor de Vereniging voor Burgerlijk Recht* (1995) 81, 145; *Garro / Zuppi*, *Compraventa internacional de mercaderías* (1990), 98; *Graffi*, L'applicazione della Convenzione di Vienna alcune recenti sentenze italiane, *The European Legal Forum* (2000/2001) 240, 241; *Hager*, Zur Auslegung des UN-Kaufrechts: Grundsätze und Methode, in *Festschrift für Ulrich Huber zum siebzigsten Geburtstag*, edited by T. Baums and J. Wertenbruch (2006), 325; *Hofmann*, Die Koordination des Vertrags- und Deliktsrechts in Europa: eine rechtsvergleichende Untersuchung zum Kollisionsrecht, *Sachrecht und zum UN-Kaufrecht* (2006), 272; *Muir Watt*, Case comment: Cour de Cassation 8 January 2002, *Revue critique de droit international privé* (2002) 94, 98; *Kennedy*, Recent Developments: Nonconforming Goods Under the CISG – What's a Buyer to Do?, *Dickinson Journal of International Law* (1998) 319, 321 f.; *Lacasse*, Le champ d'application de la Convention des Nations Unies sur les contrats de vente internationale de marchandises (1989), 37; *Liguori*, La Convenzione di Vienna sulla vendita internazionale di beni mobili nella pratica: un'analisi critica delle prime cento decisioni, *Il foro italiano* (1996) 145, 158; *id.*, Il diritto uniforme della

vendita internazionale: prassi e tendenze applicative della Convenzione di Vienna del 1980, *Rivista di diritto civile* (1999) 143, 154; *Lohmann*, *supra* note 8, at 248; *Nicholas*, The Vienna Convention on International Sales Law, *The Law Quarterly Review* (1989) 201, 208; *Niemann*, *supra* note 8, at 79; *Veneziano*, Mancanza di conformità delle merci ed onere della prova nella vendita internazionale: un esempio di interpretazione autonoma del diritto uniforme alla luce dei precedenti stranieri, *Diritto del commercio internazionale* (2001) 509, 514.

¹⁰ See, for example, LG Bamberg, 23.10.2006, CISG-online n. 1400; OLG Linz, 23.1.2006, CISG-online n. 1377; Civ., 25.10.2005, CISG-online n. 1226; OLG Linz, 8.8.2005, CISG-online n. 1087; RB Koophandel Tongeren, 25.1.2005, CISG-online n. 1106; Tribunal Cantonal Jura, 3.11.2004, CISG-online n. 965; Tribunale di Padova, 25.2.2004, CISG-online n. 819; OGH, 17.12.2003, CISG-online n. 828; ICC, 11849/2003, CISG-online n. 1421; HG Kanton St. Gallen, 3.12.2002, CISG-online n. 727; ICC, 11333/2002, CISG-online n. 1420; OGH, 22.10.2001, CISG-online n. 614; Civ., 26.6.2001, CISG-online n. 598; Tribunale di Vigevano, 12.7.2000, CISG-online n. 493; OLG Dresden, 27.12.1999, CISG-online n. 511; OLG München, 9.7.1997, CISG-online n. 282; LG München, 29.5.1995, CISG-online n. 235; OLG Celle, 24.5.1995, CISG-online n. 152.

¹¹ *Travelers Property Casualty Company of America v. Saint-Gobain Technical Fabrics Canada Limited*, cit.

¹² *Cedar Petrochemicals, Inc. v. Donghu Hamnong Chemical Co., Ltd.*, cit. See, for other decisions stating the same *TeeVee Tunes, Inc. et al v. Gerhard Schubert GmbH*, U.S. Dist. Ct. (S.D.N.Y.), 23.8.2006, CISG-online n. 1272; *Ajax Tool Works, Inc. v. Can-Eng Manufacturing Ltd.*, U.S. Dist. Ct. (N.D. Ill.), 29.1.2003, CISG-online n. 772; *St. Paul Insurance Company et al. v. Neuromed Medical Systems & Support et al.*, U.S. Dist. Ct. (S.D.N.Y.), 26.3.2002, CISG-online n. 615; RB Hasselt, 4.10.1999, CISG-online n. 763; *Helen Kaminski PTY, Ltd. v. Marketing Australian Products, Inc.*, U.S. Dist. Ct. (S.D.N.Y.), 23.7.1997, CISG-online n. 297; *Delchi Carrier, SpA v. Rotorex Corp.*, U.S. Ct. App., 6.12.1995, CISG-online n. 140; LG Landshut, 5.4.1995, CISG-online n. 193; *Orbisphere Corp. v. United States*, Ct. Int'l Trade, 24.10.1989, CISG-online n. 7.

There are also several legal writers affirming that the CISG can be excluded only explicitly (see *Dore*, Choice of Law under the International Sales Convention: A U.S. Perspective, *American Journal of International Law* (1983), 521, 532; *Dore / DeFranco*, A Comparison of the Non-Substantive Provisions of the UNCITRAL Convention on the International Sale of Goods and the Uniform Commercial Code, *Harvard International Law Journal* (1982), 49, 53 f.; *Dutton*, Risky Business: The Impact of the CISG on the International Sale of Goods, *Guide for Merchants to Limit Liability and Increase Certainty Inside and Outside of the CISG European Journal of Law Reform* (2005) 239, 246; *Ostendorf / Neumann / Ventsch*, Möglichkeiten und Grenzen von Haftungsbeschränkungen in internationalen Lieferverträgen zwischen Unternehmern, *Internationales Handelsrecht* (2006) 21, 22).

¹³ See *supra* note 9.

¹⁴ See *supra* note 7.

¹⁵ See 1 UNCITRAL Yearbook 168 (1968-1970).

¹⁶ *Bonell*, Article 6, in *Bianca-Bonell Commentary on the International Sales Law* (1987) 51, pointing out what have been stated during the Vienna Conference (see the Official Records of the United Nations Conference, 17).

to exclude such possibility, but rather to discourage courts from too easily inferring an implied exclusion of the CISG. Consequently, an implicit exclusion must be considered possible. Of course, such an exclusion has not to be based upon a mere hypothetical, theoretical or fictitious intent of the parties, but must be based upon a “real intent of the parties” to exclude the applicability of the CISG.¹⁷

As can easily be derived from the two U.S. decisions referred to earlier, the U.S. courts did not at all refer to any of the aforementioned courts decisions or scholarly opinions, thus violating the mandate set forth in article 7¹⁸ of the CISG to interpret the Convention itself by taking into account the need to promote uniformity in its interpretation and application. In effect, this latter provision¹⁹ imposes on courts to consider foreign case law²⁰ and academic writing²¹ when interpreting the Convention in order to reach its ultimate goal, *i. e.* the creation of a uniform sales law.

While the decision issued by the Court for the Southern District of New York merely referred to the need for an explicit exclusion, the District Court of Minnesota went further, as it discussed whether the parties could derogate from the CISG by choosing the law applicable to their contract. For the purposes of this comment this issue is paramount, as, according to various commentators, a typical way to exclude the CISG implicitly is to choose a specific State law as the applicable law.²²

It is generally held that the parties intended to implicitly exclude the CISG where they have chosen the law of a non-Contracting State as the law applicable to their contract.²³ What, however, if the law chosen is that of a Contracting State? In this case, it does not automatically follow that the parties had really wanted to exclude the CISG.²⁴ Thus, it does not come as a surprise that commentators and courts have different views as to the answer to that question. It is held, for instance, both by commentators²⁵ and courts²⁶ that they must have intended to exclude the CISG in order to apply only the domestic law of the particular Contracting State

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”.

¹⁷ See stating that the intent of the parties must be real, KG Berlin, 24.1.1994, CISG-online n. 130: “Zum Ausschluss der Anwendung des Einheitlichen UN-Kaufrechts ist es notwendig, dass das im wirklichen Willen der Parteien und nicht in deren hypothetischen Parteiwillen zum Ausdruck kommt”. See, also, OLG Linz, 23.1.2006, CISG-online n. 1377: “es [kommt] auf den wirklichen und nicht auf den hypothetischen Parteiwillen an”; see holding the same Tribunal Cantonal Jura, 3.11.2004, CISG-online n. 965.

See for some legal writers stating the same Bonell, Article 6, *supra* note 16, at 55; Dokter, *supra* note 6, at 430-431; F. Ferrari, Exclusion et inclusion de la Cvim, *Revue de Droit des Affaires Internationales* (2001) 401, 403; *id.*, *Vendita internazionale di beni mobili. Artt. 1-13. Ambito di applicazione. Disposizioni generali*, in *Commentario del Codice Civile Scialoja-Bianca* (1994), 114; Magnus, *supra* note 6, at 20 referring to “der konkrete, hinreichend zum Ausdruck gekommene Parteiwille”.

¹⁸ Art. 7 CISG: “In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade. Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in

¹⁹ See Huber, *Some Introductory Remarks on the CISG*, *Internationales Handelsrecht* (2006) 228, 230. For a detailed analysis of article 7, see Bonell, Article 7, in Bianca-Bonell *Commentary on the International Sales Law* (1987), 65; F. Ferrari, *Interpretation of the Convention and gap-filling: Article 7*, in *The Draft UNCITRAL Digest and Beyond*, *supra* note 6, at 138 f.; Flechtner, *The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and Other Challenges to the Uniformity Principle in Article 7(1)*, *Journal of Law and Commerce* (1998) 187, 187 f.

²⁰ See underlying this need Cook, *The Need for Uniform Interpretation of the 1980 United Nations Convention on Contracts for the International Sale of Goods*, *University of Pittsburgh Law Review* (1988) 197, 199: “[T]he Convention, by its terms and history, directs courts to seek guidance from foreign interpretations”; F. Ferrari, *Applicabilità ed Applicazioni*, *supra* note 8, at 18; Maskow, *The Convention on the International Sale of Goods from the Perspective of Socialist Countries*, in *La vendita internazionale. La convenzione di Vienna dell'11 aprile 1980* (1981), 54; Winship, *Changing Contract Practices in the Light of the United Nations Sales Convention: A Guide for Practitioners*, *International Lawyer* (1995) 525, 528; Zeller, *The UN Convention on Contracts for the International Sale of Goods (CISG) – a leap forward towards unified international sales laws*, *Pace International Law Review* (2000) 79, 85.

²¹ F. Ferrari, *La vendita internazionale. Applicabilità ed Applicazioni*, *supra* note 8, at 24; *id.*, *La vendita internazionale*, *supra* note 17, at 143 f.

²² Chiomenti, *supra* note 9, at 144; F. Ferrari, *La vendita internazionale. Applicabilità e applicazioni*, *supra* note 8, at 215.

²³ Achilles, *supra* note 8, at 3; Audit, *supra* note 6, at 39; Carbone, *supra* note 8, at 527; Bonell, *Commento all'art. 6*, *supra* note 8, at 55; Chiomenti, *supra* note 9, at 144; F. Ferrari, *Zum vertraglichen Ausschluss des UN-Kaufrechts*, *supra* note 9, at 743; *id.*, *La vendita internazionale*, *supra* note 17, at 116; Hofmann, *supra* note 9, at 273; Liguori, *supra* note 9, at 158; Sacerdoti, *supra* note 8, at 746; Sannini, *supra* note 8, at 83; Winship, *The Scope of the Vienna Convention on International Sales Contracts*, in *International Sales*, edited by Galston/Smit (1984), 35; see also Borisova, *supra* note 8, at 42; Niemann, *supra* note 9, at 80.

See for some courts decisions stating the same OLG Düsseldorf, 2.7.1993, CISG-online n. 74; Tribunale di Padova, 11.1.2005, CISG-online n. 967; OLG Linz, 23.1.2006, CISG-online n. 1377.

²⁴ See Bonell, *Commento all'art. 6*, *supra* note 8, at 55; F. Ferrari, *La vendita internazionale. Applicabilità e applicazioni*, *supra* note 8, at 216-217; *id.*, *Zum vertraglichen Ausschluss des UN-Kaufrechts*, *supra* note 9, at 743; *id.*, *La vendita internazionale*, *supra* note 17, at 116.

²⁵ Karollus, *Der Anwendungsbereich des UN-Kaufrechts im Überblick*, *Juristische Schulung* (1993), 381; Vékas, *Zum persönlichen und räumlichen Anwendungsbereich des UN-Einheitskaufrechts*, *Recht der internationalen Wirtschaft*, (1987) 346, 346 f.

²⁶ See, for example, Cour d'Appel Colmar, France, 26.9.1995, available at <http://wiz.jura.uni-sb.de/cisg/decisions/260995.htm>; KG Zug, 16.3.1995, *Internationales Handelsrecht* 44 (2000); Ad Hoc Arbitral Tribunal Florence, 19.4.1994, *Diritto del Commercio Internazionale* 861 (1994); Tribunale di Monza, 14.1.1993, *Il foro italiano*, 916 (1994/I).

whose law they have opted for, because any other reading of that choice would lack any practical meaning.

The prevailing view, however, is the opposite one: the choice of the law of a Contracting State does not *per se* constitute an implied exclusion of the CISG.²⁷ Thus, if the parties have merely chosen the law of a Contracting State as the law applicable to their contract, without any particular reference to the domestic law of that State, that choice does not amount to an implied exclusion of the CISG.²⁸ This view has been justified on the grounds that where a State has ratified the CISG, the CISG becomes part of its law (albeit merely in relation to international sales). Therefore, a choice-of-law clause simply referring to the national law of a Contracting State, such as “this contract is governed by Italian law”, necessarily includes the uniform law set forth by the CISG and, thus, makes this latter law applicable to the contract (provided that all the applicability requirements are met).

What has just been said means that for the choice of the law of a Contracting State to amount to an implicit exclusion something else is required.²⁹ In effect, the choice of the law of a Contracting State can be considered as an exclusion of the CISG only if one can gather from the circumstances that the parties, in making that choice, really meant to derogate from the CISG. As mentioned, where parties have simply designated the law of a Contracting State as regulating their contract, they have designated the entire law of that legal system and such a choice-of-law clause does not show a clear intent to opt out of the CISG. Thus, only where the choice falls on the internal or purely domestic law of that Contracting State can the CISG be considered as having been implicitly excluded.³⁰

This solution is corroborated by the history of the CISG itself, since the proposal to consider a choice-of-law clause in favour of the law of a Contracting State a way to implicitly exclude the CISG was rejected at the Vienna Conference.³¹

However, it is appropriate to highlight that the application of the CISG does not make the national law irrelevant, because where the parties had merely chosen the law of a Contracting State that law will be the law regulating the issues not governed by the CISG.³²

The aforementioned decision of the District Court of Minnesota is relevant here insofar as it reached the same conclusion as the majority of other courts on the matter. The Court found that the CISG governed the case at hand, on the grounds that “absent an express statement that the CISG does not apply, merely referring to a particular state’s law does not opt out of the CISG”. In effect, the Court referred to the fact that the parties had opted for the application of Minnesota law, without any particular reference to that State’s internal or purely domestic law. In light of the Supremacy Clause of the U.S. Constitution,³³ according to which the Constitution, Federal Sta-

Hof Leeuwarden, 31.8.2005, CISG-online n. 1100; OLG Linz, 8.8.2005, CISG-online n. 1087; OLG Linz, 23.3.2005, CISG-online n. 1376; KG Zug, 11.12.2003, CISG-online n. 958; HG Kanton St. Gallen, 3.12.2002, CISG-online n. 727; OLG Zweibrücken, 26.7.2002, CISG-online n. 688; CA Paris, 6.11.2001, CISG-online n. 677; OGH, 22.10.2001, CISG-online n. 614; OLG Rostock, 10.10.2001, CISG-online n. 671; *Asante Technologies v. PMC-Sierra*, U.S. Dist. Ct. (N.D. Cal.), 27.7.2001, CISG-online n. 616; OLG Frankfurt a.M., 30.8.2000, CISG-online n. 594; Int. Ct. Russian CCI, 24.1.2000, CISG-online n. 1042; RB Hasselt, 4.10.1999, CISG-online n. 763; BGH, 25.11.1998, CISG-online n. 353; OGH, 12.2.1998, CISG-online n. 349; OLG Karlsruhe, 25.6.1997, CISG-online n. 263; ICC, 8324/1995, CISG-online n. 569; LG Kassel, 15.2.1996, CISG-online n. 191; CA Grenoble, 13.9.1995, CISG-online n. 157; OLG Hamm, 9.6.1995, CISG-online n. 146; RB ‘s-Gravenhage, 7.6.1995, CISG-online n. 369; OLG Celle, 24.5.1995, CISG-online n. 152; OLG Köln, 22.2.1994, CISG-online n. 127; OLG Koblenz, 17.9.1993, CISG-online n. 91; OLG Düsseldorf, 8.1.1993, CISG-online n. 76. There are many arbitral tribunals that held the same conclusion; see, for example, ICC, 11333/2002, CISG-online n. 1420; ICC, 9187/1999, CISG-online n. 705; Schiedsgericht der Börse für Landwirtschaftliche Produkte – Wien, 10.12.1997, CISG-online n. 351; Schiedsgericht der Handelskammer Hamburg, 21.3.1996, CISG-online n. 187; Schiedsgericht der Ungarischen Industrie- und Handelskammer, 17.11.1995, CISG-online n. 250; ICC, 8324/1995, CISG-online n. 569; ICC, 7844/1994, CISG-online n. 567; ICC, 7660/JK, CISG-online n. 129; ICC, 7565/1994, CISG-online n. 566; Schiedssprüche des Internationalen Schiedsgericht der gewerblichen Wirtschaft in Österreich, 15.6.1994, SCH-4366 und 4318, CISG-online n. 121 und n. 120; ICC, 6653/1993, CISG-online n. 71.

²⁹ See *Chiomenti*, *supra* note 9, at 144.

³⁰ *Achilles*, *supra* note 8, at 4; *Bell*, *supra* note 6, at 255; *Bonell*, Commento all’art. 6, *supra* note 8, at 55; *Boggiano*, La Convención de las Naciones Unidas sobre los contratos de compraventa internacional de mercaderías: En el ámbito del derecho internacional privado argentino, *Revista del Derecho Comercial y de las Obligaciones* (1980) 355, 357; *F. Ferrari*, Remarks, *supra* note 28, at 25; *Imberg*, The Economic Impact of International Trade on San Diego and the Application of the United Nations Convention on the International Sale of Goods to San Diego/Tijuana Commercial Transactions, *San Diego Law Review* (1998) 769, 777; *Kritzer*, Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods, *Kluwer Law International* (1989-1994), 100 f.; *Mazzacano*, *Brown & Root Services v. Aerotech Herman Nelson: The Continuing Plight of the U.N. Sales Convention in Canada* (January 2005), *Review of the Convention on Contracts for the International Sale of Goods (CISG) (2005-2006)* 85, 124 f.; *Sannini*, *supra* note 8, at 84 f.; *Winship*, *supra* note 24, at 35.

³¹ See *Bonell*, Commento all’art. 6, *supra* note 8, at 55.

³² *F. Ferrari*, La vendita internazionale. Applicabilità e applicazioni, *supra* note 8, at 219; *id.*, Remarks, *supra* note 28, at 27.

³³ The Supremacy Clause is the common name given to Article VI, Clause 2 of the U.S. Constitution, which reads: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any

²⁷ See, for all, *F. Ferrari*, Remarks on the UNCITRAL Digest’s Comments on Article 6 CISG, *Journal of Law and Commerce* (2005-2006) 13, 25 f.

²⁸ See for some State courts decisions stating the same RB Arnhem, 28.6.2006, CISG-online n. 1265; Hof Beroep Antwerpen, 24.4.2006, CISG-online n. 1258; RB Koophandel Hasselt, 15.2.2006, CISG-online n. 1257; OLG Linz, 23.1.2006, CISG-online n. 1377;

tutes and U.S. Treaties are the supreme law of the land, this cannot surprise. What surprises, however, is the fact that the Court did at all refer to this issue since, even if the parties had referred to purely internal Minnesota law, the Court could not have reached a result different from the one reached, as it had stated that for the CISG to be excluded the exclusion has to be made expressly. The choice even of purely internal law does, however, not constitute an express exclusion.

As I have already mentioned, the U.S. Courts that have issued the decisions commented on here have violated the mandate set forth in article 7 of the CISG.

An indirect consequence of such a violation is the fact that the cases at hand have opened the door to the so-called *forum shopping*. This common practice has been defined as a litigant's attempt "to have his action tried in a particular court or jurisdiction where he feels he will receive the most favorable judgment or verdict".³⁴ Even though in the U.S. *forum shopping* is more often than not considered to be unethical and inefficient, *forum shopping* remains popular, so much that it has been defined as "a national legal pastime".³⁵ The *raison d'être* of this phenomenon, generally, lies in lack of uniformity of the world's legal systems; therefore, one of the main objective of any Convention of substantive law is to forestall *forum shopping* and to create an ideal uniform substantive law.³⁶ This is true as regards the CISG as well,³⁷ which is one of the reasons why the drafters of the CISG introduced article 7:³⁸ paying due attention to foreign case law and scholarly opinions is a way to deal with *forum shopping*.³⁹

However, the goal of unification and harmonization of domestic laws remains an impossible goal,⁴⁰ because the entry into force of international uniform contract law conventions, such as CISG or the Geneva Convention on Contracts for the International Carriage of Goods by Road,⁴¹ cannot eliminate *forum shopping*, rather, it can only reduce the possibility to forum shop.⁴² In effect, uniform rules remain susceptible to differing judicial interpretation due to the different legal backgrounds and frames of reference of the judges called upon to decide the disputes.⁴³

At this point, it may be worth mentioning why it is that the cases commented on here promote *forum shopping*.

Where a contract has been concluded without express exclusion of the CISG and a party wants to avoid the risk that the counterpart alleges the implicit exclusion of the Convention, that party may want to start proceedings in a U.S. court, where courts do not allow the parties to implicitly exclude the CISG.

On the contrary, if a party wants to avoid the application of the CISG without drawing opposing party's attention to its exclusion, that party would have to start court proceedings before courts that allow for an implicit exclusion of the CISG. As regards this case, the plaintiff may want to sue the defendant for instance in France, where the Supreme Court held, on several occasions,⁴⁴ that the CISG could be excluded implicitly. It appears that on those occasions the French Supreme Court went even a little too far, as it stated that the intent of the parties to opt out of the CISG can be derived from the sole fact that they had invoked "without any reservation, the warranty of goods sold as specified by Article 1641 and the subsequent articles of the Civil Code". In other words, according

to the French Supreme Court, the sole fact that the pleadings were exclusively based on the French Civil Code led to the (implicit) exclusion of the CISG.⁴⁵ The view conveyed by the French Supreme Court is too wide, if compared to that expressed both by legal writers⁴⁶ and courts of the States.⁴⁷

The proliferation of the phenomenon of *forum shopping* contrasts with the main objective of the CISG, *i.e.* the creation of a

Thing in the Constitution or Laws of any State to the Contrary notwithstanding".

³⁴ *Black's Law Dictionary*, 655 (6th ed. 1990). For a more recent definition see Tribunale di Rimini, 26.11.2002, available at <http://cisgw3.law.pace.edu/cases/021126i3.html>, where the court stated that forum shopping is the practice to find the jurisdiction more favorable for the claimant's interests ("[L]attività tendente alla ricerca della giurisdizione più favorevole agli interessi dell'istante").

³⁵ Wright, *The Federal Courts and the Nature and Quality of State Law*, *Wayne Law Review* (1967) 317, 333.

³⁶ Dore, *Choice of Law Under the International Sales Convention: A U.S. Perspective*, *The American Journal of International Law* (1983) 521, 532.

³⁷ Because forum shopping is a common practice, it can not be removed merely "as an evil to be avoided" (see Note, *Forum Shopping Reconsidered*, *Harvard Law Review* (1989-1990) 1677, 1678-1679).

³⁸ See for an analysis of the need to interpret the Uniform Law Convention autonomously *Bariatti*, *L'interpretazione delle convenzioni internazionali di diritto uniforme* (1986); *Trompenaars*, *Pluriforme Unificatie en uniforme interpretatie. In het bijzonder de bijdrage van UNCITRAL aan de internationale unificatie van het privaatrecht*, (1989)).

³⁹ I used the term "parties" because forum shopping is not only a practice of the plaintiffs; also the defendant could take advantages by using the practice of forum shopping (see, e.g., *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, n. 19 (1981), where Justice Marshall referred to the defendant's forum shopping practice as a way to "reverse [plaintiff's] forum shopping").

⁴⁰ See stating that uniformity is something illusory *Whitten*, *U.S. Conflict-of-Laws Doctrine and Forum Shopping, International and Domestic (Revisited)*, *Texas International Law Journal* (2002) 559, 587; *Juenger*, *Forum Shopping, Domestic and International*, *Tulane Law Review* (1989) 553, 574.

⁴¹ This Convention is known with name of CMR and it was signed on 19th May, 1959 in Geneva.

⁴² See analyzing this aspect *F. Ferrari*, "Forum Shopping" Despite International Uniform Contract Law Conventions, *International and Comparative Law Quarterly* (2002) 689, 705 f.

⁴³ For this consideration see *Bell*, *Forum Shopping and Venue in Transnational Litigation* (2003), 25 f.

⁴⁴ Cour de Cassation, 25.10.05 (Weed killer case), CISG-online n. 1064; Cour de Cassation, 26.06.01, CISG-online n. 717.

⁴⁵ Cour de Cassation, 25.10.05, cit.

⁴⁶ *F. Ferrari*, *Vendita internazionale. Applicabilità e applicazioni*, *supra* note 8, at 228-229; *Graffi*, *supra* note 9, at 242; *Reifner*, *Stillschweigender Ausschluss des UN-Kaufrechts in Prozess?*, *Internationales Handelsrecht* (2002) 52, 57.

⁴⁷ Tribunale di Padova, 25.2.04, CISG-online n. 819; Tribunale di Vigevano, 12.7.2000, CISG-online n. 493; OLG Dresden, 27.12.1999; OLG Celle, 24.05.1995.

uniform sales law. Since, however, it is impossible to completely eliminate this common practice even where the substantive law is that of a uniform law convention such as the CISG, it is more useful to understand why forum shopping exists and why it is considered a negative tool, rather than complaining of its existence and finding a way to eliminate it.⁴⁸

Die Autorin untersucht, ausgehend von den Entscheidungen des District Court of Minnesota⁴⁹ und des Court for the Southern District of New York,⁵⁰ die Voraussetzungen unter denen Gerichte in den Mitgliedsstaaten der CISG deren Ausschluß annehmen.

Diese weichen in ihrem Ergebnis von denen der europäischen Gerichte ab. Sie argumentiert, daß die unterschiedlichen Herangehensweisen dem Forum Shopping Vorschub leisten.⁵¹

⁴⁸ F. Ferrari, "Forum Shopping", *supra* note 48, at 707; *id.*, "Forum shopping" e diritto contrattuale uniforme, *Rivista trimestrale di diritto e procedura civile* (2002) 575, 603 f.

⁴⁹ IHR 2007, 240 (in this issue).

⁵⁰ IHR 2007, 243 (in this issue).

⁵¹ See q.v. below OGH, Urteil vom 4.7.2007 – 2Ob95/06v, IHR 2007, 237 (in this issue).

Entscheidungen

UN Kaufrecht (CISG)

Art. 6 CISG

Die Parteien können die Anwendbarkeit des CISG auch durch schlüssiges Verhalten ausschließen. Dies kann, auch in AGB, durch die Vereinbarung unvereinheitlichten nationalen Rechts geschehen.

[Leitsätze der Redaktion]

The parties may abrogate the applicability of the CISG by tacit agreement. Such agreement may be reached by agreeing, also by way of general terms and conditions, on non-harmonised national law.

Österreich: OGH, Urteil vom 4.7.2007 – 2Ob95/06v

(Vorinstanzen: OLG Linz, Teilurteil und Beschluss vom 23.1.2006 – 6 R 160/05z-43, LG Linz, Urteil vom 26.4.2005 – 30 Cg 115/03w-36)

Entscheidungsgründe

Der Kläger (ein Kfz-Sachverständiger mit Wohnsitz in Deutschland) hat mit Kaufvertrag vom 12.3.2002 bei der Beklagten (einer Fahrzeughandel und -reparatur GmbH, die ihren Sitz in Österreich hat) einen fabriksneuen PKW der Marke Citroën Type C 5 HDI 100, Modell BK 8X mit diverser Zusatzausstattung zum Preis von EUR 22.353 (exclusive USt und NOVA) gekauft und im Mai 2002 ausgeliefert erhalten. [...]

Mit der am 14.5.2003 eingelangten Klage begehrte der Kläger von der Beklagten EUR 27.353 sA infolge „Wandlung und Aufhebung“ dieses Kaufvertrages. [...]

Im zweiten Rechtsgang brachte der Kläger vor, auf den Kaufvertrag sei österreichisches Recht anzuwenden (ABGB, HGB). Das UN-K sei ausgeschlossen worden. Punkt XI. des Vertrages bestimme, dass das

HGB anzuwenden sei. Auch wenn das UN-K anwendbar sein sollte, habe der Kläger rechtswirksam die Aufhebung des Vertrages erklärt und sei berechtigt, gemäß Art. 81 Abs. 2 UN-K die Rückgabe des von ihm Geleisteten zu verlangen. Er sei bereit, das Fahrzeug Zug um Zug gegen Rückzahlung des Kaufpreises herauszugeben. Da die Beklagte ihrer vertraglichen Verpflichtung zur Lieferung eines mangelfreien Fahrzeuges bis heute nicht nachgekommen sei und die zahlreich aufgetretenen groben Mängel eine wesentliche Vertragsverletzung darstellten, sei der Kläger gemäß Art. 49 UN-K berechtigt, die Aufhebung des Vertrages zu erklären. Hilfsweise sei er gemäß Abschnitt II UN-K auch berechtigt, die geltend gemachten Ansprüche als Schadenersatz zu begehren: Das Fahrzeug sei derart mangelhaft, dass es für den Kläger keinen Wert darstelle. Es sei für ihn unverkäuflich. Er habe daher Anspruch auf Ersatz des gesamten Kaufpreises, weil die Beklagte, indem sie ein mangelhaftes Fahrzeug verkauft und die groben Mängel nicht behoben habe, ihre Vertragspflichten verletzt habe. Die Beklagte habe sich von Anfang an geweigert, das Fahrzeug zurückzunehmen oder gegen ein mangelfreies auszutauschen. Hilfsweise stütze der Kläger das Klagebegehren auch auf Preisminderung. Das Fahrzeug sei aufgrund der vorliegenden Mängel bereits zum Auslieferungszeitpunkt für den Kläger wertlos gewesen.

Die Mängel seien unbehebbar und stellten ein gravierendes Sicherheitsrisiko dar.

Die Beklagte beantragte Klagsabweisung. [...]

Das Erstgericht verpflichtete die Beklagte (auch) im zweiten Rechtsgang, der Klägerin EUR 26.323 sA zu zahlen, davon EUR 22.353 sA Zug um Zug gegen Herausgabe des PKW. Das Mehrbegehren auf Zahlung von EUR 1.000 sA und das Zinsenmehrbegehren aus dem zuerkannten Betrag für den Zeitraum 8.3. bis 20.5.2003 wies es ab. Es ging dabei von folgenden Feststellungen aus: [...]

Der Kläger akzeptierte bei Unterfertigung des Kaufvertrages die Liefer- und Verkaufsbedingungen der Beklagten, wie sie in deren Kaufvertragsformular enthalten sind. Über die Anwendung eines bestimmten Rechtes sprachen die Streitparteien nicht. „Insofern“ haben sie die Anwendung einer bestimmten Rechtsordnung und die Anwendung des UN-K auch nicht ausdrücklich ausgeschlossen.