



An “Unconventional Truth”: Conflict of Laws Issues Arising under the CISG

by Antonin I. Pribetic\*

\* B.A. Hons. (York), LL.B. (Osgoode), LL.M. (Osgoode), MCI Arb., Litigation Counsel, Steinberg Morton Hope & Israel LLP, Toronto, Ontario, Canada. Email: apribetic@smhilaw.com.

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## I. INTRODUCTION

The *United Nations Convention on Contracts for the International Sale of Goods, 1980* (CISG)<sup>1</sup> is the uniform international sales law of countries that account for two-thirds of all world trade. After ten years of preparatory work by UNCITRAL, the CISG was adopted in April 1980 at the United Nations Diplomatic Conference attended by sixty-two states. It later entered into force in January 1988. **From a contractual perspective, the CISG is generally regarded as the most widely adopted international convention dealing with international business transactions.** All Canadian provinces have adopted and enacted the CISG, including Ontario under the International Sale of Goods Act. Currently, 73 countries are parties to the CISG, with the notable exceptions of the United Kingdom, Brazil and India.<sup>2</sup> The number of international court and arbitration decisions is increasing exponentially.<sup>3</sup> Yet, Canadian jurisprudence is lagging far behind.

Some possible reasons are:

1. Lack of familiarity with the CISG among contracting parties, primarily due to simplistic contracts, invoices and purchase orders which do not contain a choice of law clause, opting in or out of the CISG;
2. The “Fear Factor”: Commercial lawyers drafting international contracts may be unfamiliar with the CISG’s benefits and prefer provincial sale of goods legislation or other domestic sales legislation. Oftentimes, the choice of law and choice of forum clauses are the last to be considered or negotiated;<sup>4</sup>

<sup>1</sup> UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, April 11, 1980, S. Treaty Doc. No. 98-9 (1984), U.N. Doc. No. A/CONF.97/19, 1489 U.N.T.S. 3, incorporated by, International Sale of Goods Act, R.S.O., ch. I-10 (1990) (Can.), available online at: [www.e-laws.gov.on.ca/DBlaws/statutes/English/90i10\\_e.htm](http://www.e-laws.gov.on.ca/DBlaws/statutes/English/90i10_e.htm). Although sometimes also referred to as the Vienna Convention”, “CISG” is the generally accepted acronym and is used throughout this article. The CISG has been adopted in Canada federally on May 1, 1992 by the *International Sale of Goods Contracts Convention Act*, S.C. 1991, c. 13 and subsequently by all constituent provinces and territories, including the province of Quebec: see *An Act Respecting the United Nations Convention on Contracts for the International Sale of Goods*, R.S.Q., c. C-67.01. See, CISG Canada website, (hosted by Osgoode Hall Law School, York University and edited by Peter J. Mazzacano), available online at <http://www.cisg.ca>; <http://www.yorku.ca/osgoode/cisg>.

<sup>2</sup> See United Nations Commission on International Trade Law (UNCITRAL) website, available at: [http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html).

<sup>3</sup> See Pace database on the CISG and International Commercial Law, Pace University School of Law (Pace Law School Institute of International Commercial Law), available at <http://cisgw3.law.pace.edu>, which currently contains links to 2,180 case presentations.

<sup>4</sup> See, Luke Nottage, “Who’s Afraid of the Vienna Sales Convention (CISG)? A New Zealander’s View from Australia and Japan” Sydney Law School Research Paper No. 06/21; (2005) 36 *Victoria University of Wellington L. Rev.* 815, available at SSRN: <http://ssrn.com/abstract=880372>.

3. Canadian litigators have yet to embrace the CISG's default applicability when drafting pleadings; and,
4. Canadian judges are not yet as familiar with the CISG as their international counterparts, particularly European judges, who benefit from a wealth of CISG caselaw, the Principles of European Contract Law (PECL),<sup>5</sup> UNIDROIT Principles <sup>6</sup> and other international legal instruments. <sup>7</sup>

<sup>5</sup> Although limited in application to the European Union membership, the impact of The Principles of European Contract Law (PECL) on the CISG should not be overlooked. According to the Commission on European Contract Law:

The Principles have been drawn up by an independent body of experts from each Member State of the European Union under a project supported by the European Commission and many other organisations. The principles are stated in the form of articles with a detailed commentary explaining the purpose and operation of each article. In the comments there are illustrations, ultra short cases which show how the rules are to operate in practice. Each article also has comparative notes surveying the national laws and other international provisions on the topic.

The Principles of European Contract Law Parts I and II (hereinafter referred to as PECL I and II.) cover the core rules of contract, formation, authority of agents, validity, interpretation, contents, performance, non-performance (breach) and remedies. The Principles previously published in Part I (1995) are included in a revised and re-ordered form. Part III covers plurality of parties, assignment of claims, substitution of new debt, transfer of contract, set-off, prescription, illegality, conditions and capitalisation of interest.

<sup>6</sup> The Preamble to the UNIDROIT PRINCIPLES provides:

Preamble  
(Purpose of the Principles)

These Principles set forth general rules for international commercial contracts. They shall be applied when the parties have agreed that their contract be governed by them. They may be applied when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like.

They may provide a solution to an issue raised when it proves impossible to establish the relevant rule of the applicable law.

They may be used to interpret or supplement international uniform law instruments. They may serve as a model for national and international legislators.

According to the Preamble Official Comment:

Recourse to the Principles as a substitute for the domestic law otherwise applicable is of course to be seen as a last resort; on the other hand it may be justified not only in the event of the absolute impossibility of establishing the relevant rule of the applicable law, but also whenever the research involved would entail disproportionate efforts and/or costs. The current practice of courts in such situations is that of applying the *lex fori*. Recourse to the Principles would have the advantage of avoiding the application of a law which will in most cases be more familiar to one of the parties.

This article will discuss the applicability of the CISG from a Canadian conflict of laws perspective—both in terms of jurisdiction and choice of law. A detailed review of the CISG or choice of law doctrine is beyond the scope of this article.<sup>8</sup> The objectives are more modest. The analysis is framed by providing an outline of the key jurisdictional and choice of law principles developed within Canadian jurisprudence. Following a brief contextual overview of the CISG, Articles 1(1) (a) and 1(1) (b) and Article 6 of the CISG are highlighted, with specific reference to recent Canadian and foreign judicial decisions and foreign arbitral awards involving Canadian parties. The article concludes with a clarion call to justice stakeholders, particularly, Canadian commercial lawyers and judges, to better understand and apply the CISG in the future.

## II. JURISDICTION AND CHOICE OF LAW

Since the early 1990's, Canadian conflict of laws jurisprudence has developed along two parallel, albeit uneven, lines. The first line—jurisdiction—predominates the juridical landscape; producing three separate (arguably inter-related) judicial tests:

UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS, Preamble, at <http://www.unidroit.org/english/principles/contracts/principles2004/blackletter2004.pdf>. See UNILEX ON CONVENTION & UNIDROIT PRINCIPLES, Centre for Comparative and Foreign Law Studies, at <http://www.unilex.info>; The International Institute for the Unification of Private Law (UNIDROIT), at <http://www.unidroit.org>; Secretariat of the United Nations Commission on International Trade Law (UNCITRAL), Vienna International Centre, at <http://www.uncitral.org>.

<sup>7</sup> See, CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS (Brussels Convention) [available at: <http://curia.europa.eu/common/recdoc/convention/en/c-textes/brux-idx.htm>]; CONVENTION OF 16 SEPTEMBER 1988 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS (Lugano Convention) [available at: <http://curia.europa.eu/common/recdoc/convention/en/c-textes/lug-textes.htm>]; and the COUNCIL REGULATION (EC) NO 44/2001 OF 22 DECEMBER 2000 ON JURISDICTION AND THE RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS (Brussels Regulation) [Available at: [http://ec.europa.eu/justice\\_home/doc\\_centre/civil/acquis/doc\\_civil\\_acquis\\_en.htm](http://ec.europa.eu/justice_home/doc_centre/civil/acquis/doc_civil_acquis_en.htm)]. See also, CONVENTION ON THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS opened for signature in Rome on 19 June 1980 (80/934/EEC)(Rome Convention) [available at: [http://www.rome-convention.org/instruments/i\\_conv\\_orig\\_en.htm](http://www.rome-convention.org/instruments/i_conv_orig_en.htm)] and REGULATION (EC) No 864/2007 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [available at: [http://eur-lex.europa.eu/LexUriServ/site/en/oj/2007/l\\_199/l\\_19920070731en00400049.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/oj/2007/l_199/l_19920070731en00400049.pdf)].

<sup>8</sup> See Henry Mather, “Choice of Law for International Sales Issues Not Resolved by the Convention”, (2001) 20 *J.L. & Com.* 155, 170. For a Canadian conflict of laws perspective on choice-of-law in torts, see Joost Blom, Choice-of-law Methodology, in PRIVATE INTERNATIONAL LAW IN COMMON LAW CANADA: CASES, TEXT, AND MATERIALS 475-508 (2d ed. 2003); Janet Walker, “Are We There Yet?” Towards a New Rule for Choice of Law in Tort, (2000) 38 *Osgoode Hall L.J.* 331; Robin M. Junger, A Proposed Choice of Law Methodology for Tort in Canada: Comparative Evaluation of British and American Approaches 1994) 26 *Ottawa L. Rev.* 75.

- (i) The concept of jurisdiction *simpliciter*: whether a Canadian court can assume adjudicatory or judicial jurisdiction based upon a “real and substantial connection”<sup>9</sup> between the subject-matter of the dispute and the non-resident (and non-attorning) defendant;<sup>10</sup>
- (ii) Even where jurisdiction *simpliciter* is established (whether by personal jurisdiction, consent-based jurisdiction or assumed jurisdiction),<sup>11</sup> a Canadian court may still decline jurisdiction based upon the discretionary “forum non conveniens” test;<sup>12</sup> and
- (iii) The “strong cause” test which has also gained currency in cases involving forum selection clauses.<sup>13</sup>

The second jurisprudential line—choice of law—is often relegated to ancillary status; either as only one of a multitude of enumerated factors within a court’s discretionary analysis, or simply deferred to later determination by a trial judge.<sup>14</sup> For example, the factors for a court to decline to assume jurisdiction on *forum non conveniens* grounds is set out by the Ontario Court of Appeal in *Muscutt*:

<sup>9</sup> See, Janet Walker, “Beyond a Real and Substantial Connection: The *Muscutt* Quintet” in THE ANNUAL REVIEW OF CIVIL LITIGATION, 2002, The Honourable Mr. Justice Todd L. Archibald & Michael Cochrane, Eds. (Toronto: Thomson Carswell, 2003). For an excellent critique of the “real and substantial connection” test, see Tanya J. Monestier, “A ‘Real and Substantial’ Mess: The Law of Jurisdiction in Canada” (2007), 33 *Queen’s L.J.* 179 and Jean-Gabriel Castel, “The Uncertainty Factor in Canadian Private International Law”, (2007), 52 *McGill L.J.* 555.

<sup>10</sup> *Morguard Investments Ltd. v. De Savoye* [1990] 3 S.C.R. 1077, (1990) 76 D.L.R. (4th) 256, (1990) 122 N.R. 81, [1991] 2 W.W.R. 217, (1990) J.E. 91-123, (1990) 52 B.C.L.R. (2d) 160, (1990) 46 C.P.C. (2d) 1, (1990) 15 R.P.R. (2d) 1, (1990) 24 A.C.W.S. (3d) 478 (S.C.C.); *Beals v. Saldanha* [2003] 3 S.C.R. 416, (2003) 234 D.L.R. (4th) 1, (2003) 314 N.R. 209, (2003) J.E. 2004-127, (2003) 182 O.A.C. 201, (2003) 39 B.L.R. (3d) 1, (2003) 39 C.P.C. (5th) 1, (2003) 113 C.R.R. (2d) 189, (2003) 127 A.C.W.S. (3d) 648 (S.C.C.).

<sup>11</sup> *Muscutt v. Courcelles*, (2002) 60 O.R. (3d) 20 at 35, 213 D.L.R. (4th) 577 (Ont. C.A.) [hereinafter “*Muscutt*”-cited to O.R.]; See also the companion cases: *Gajraj v. DeBernardo*, [2002] 213 D.L.R. (4th) 651 (Ont. C.A.); *Leufkens v. Alba Tours Int’l Inc.*, [2002] 213 D.L.R. (4th) 614 (Ont. C.A.); *Lemmex v. Sunflight Holidays Inc.*, [2002] 213 D.L.R. (4th) 627 (Ont. C.A.); *Sinclair v. Cracker Barrel Old Country Store Inc.*, [2002] 213 D.L.R. (4th) 643 (Ont. C.A.).

<sup>12</sup> For a discussion of the *forum non conveniens* doctrine in Canada from a contractual perspective, see Antonin I. Pribetic, “Strangers in a Strange Land”: Transnational Litigation, Foreign Judgment Recognition, and Enforcement in Ontario, (2004), 13 *J. Transnat’l L. & Pol’y*, Vol. 2, 347-391.

<sup>13</sup> *Z.I. Pompey Industrie v. ECU-Line N.V.*, [2003] 1 S.C.R. 450, 2003 SCC 27, 224 D.L.R. (4th) 577, at ¶ 19 (SCC) per Bastarache J. (McLachlin C.J. and Gonthier, Iacobucci, Major, Binnie and LeBel JJ. concurring) [hereinafter “*Z.I. Pompey*”]. See also, *Red Seal Tours Inc. v. Occidental Hotels Management B.V.*, 2007 ONCA 620 (CanLII), 2007 ONCA 620 (Ont. C.A.) at ¶ 13, per Sharpe, J.A. (Cronk and Lang JJ.A. concurring).

<sup>14</sup> See, Dean Edgell, *PRODUCT LIABILITY LAW IN CANADA* at 279 (Toronto: Butterworths, 2000) wherein the author notes, “The issue of choice of law, unlike jurisdiction, is not one that need be decided early in a law suit.” (and cases cited therein).

- (1) The location of the majority of the parties;
- (2) Where each party carries on business;
- (3) Where the cause of action arose;
- (4) Where the loss or damage occurred;
- (5) Any juridical advantage for the plaintiff in this jurisdiction;
- (6) Any juridical disadvantage for the defendant in this jurisdiction;
- (7) Convenience or inconvenience to potential witnesses;
- (8) The cost of conducting the litigation in this jurisdiction;
- (9) *Applicable substantive law; and*
- (10) *Difficulty in proving foreign law, if necessary.* <sup>15</sup> <sup>16</sup>[Emphasis added]

The key difference between the *forum non conveniens* and “strong cause” tests is that “the presence of a forum selection clause ... is sufficiently important to warrant a different test, one where the starting point is that the parties should be held to their bargain.”<sup>17</sup> As Labrosse, J.A. has observed “[w]here the parties have not included a forum selection clause in their contract, a forum will have jurisdiction where it has a real and substantial connection to the contract.”<sup>18</sup> In any event, the issue is one of consent-based jurisdiction, not assumed jurisdiction under the “real and substantial connection” test for establishing jurisdiction simpliciter (*i.e.* assumed jurisdiction).<sup>19</sup> Justice La Forest, in *Hunt v. T & N plc*,<sup>20</sup> emphasized the principles of order and

<sup>15</sup> *Muscutt*, *supra* note 11 at pp.34-5.

<sup>16</sup> In *Schreiber v. Mulroney*, 2007 CanLII 56529 (ON S.C.), Justice Cullity appears to conclude that the eight-factor *Muscutt* formulation is focused on tort claims, and that further factors are necessary in respect of contract claims (para. 37). The factors he suggests: *i.e.* the place where the contract was made, performed and breached and where any damage was sustained, are those factors referenced in the discretionary *forum non conveniens* test, which allows a court to stay an action, following the preliminary inquiry into jurisdiction simpliciter over the parties and the dispute.

<sup>17</sup> *Id.*, at ¶ 21.

<sup>18</sup> *Crown Resources Corp. S.A. v. National Iranian Drilling Co.*, (2006) 273 D.L.R. (4th) 65 at para.65 (Ont. C.A.), per Labrosse, Laskin and Armstrong JJ.A. also citing Janet Walker, Castel & Walker CANADIAN CONFLICT OF LAWS, Vol. 2 (Markham: Butterworth, 2005, at §11.5); varying (2005) 142 A.C.W.S. (3d) 421 (Ont. S.C.J.) (Ont. C.A.) Application for leave to appeal dismissed without reasons on March 8, 2007 [2006] S.C.C.A. No. 412 (S.C.C.)

<sup>19</sup> *Muscutt*, *supra* note 11 at 586.

<sup>20</sup> *Hunt v. T & N plc*, [1993] 109 D.L.R.4th 16 (S.C.C.) [hereinafter “Hunt”]; see also, *United States of America v. Ivey* (1995), 26 O.R. (3d) 533, [1995] O.J. No. 3579 (Gen. Div.), *aff'd* (1996), 30 O.R. (3d) 370, [1996] O.J. No. 3360 (C.A.)

fairness” which underscore the “real and substantial connection” test.<sup>21</sup> In *Tolofson v. Jensen*,<sup>22</sup> Justice La Forest further observed that:

While, no doubt, as was observed in *Morguard*, the underlying principles of private international law are order and fairness, order comes first. Order is a precondition to justice.<sup>23</sup>

On the international level, the increasing importance of exclusive jurisdiction clauses (also referred to as “forum selection” or “choice of forum” clauses) in the private international law arena has culminated in the recent signing of The *Hague Choice of Court Convention*<sup>24</sup> <sup>25</sup> In addition to order and fairness, the “real and substantial connection” test must also be considered in view of prevailing customary international law <sup>26</sup> principles of uniformity, harmonization of international rules, comity and reciprocity.<sup>27</sup>

<sup>21</sup> *Id.* at 42.

<sup>22</sup> *Tolofson v. Jensen* [1994] 3 S.C.R. 1022 (S.C.C.)

<sup>23</sup> *Id.* at 1058 (emphasis added).

<sup>24</sup> CONVENTION OF 30 JUNE 2005 ON CHOICE OF COURT AGREEMENTS, NO. 37, concluded on June 30th, 2005 at the Twentieth Session of the Hague Conference on Private International Law [the “Hague Choice of Court Convention”]. To date, only Mexico has acceded to the Hague Choice of Court Convention: (See the HCCH website: [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=98](http://www.hcch.net/index_en.php?act=conventions.status&cid=98)). However, both the European Union and the United States are poised to ratify the Convention. See, [Proposal for a Council Decision on the signing by the European Community of the Convention on Choice-of-Court Agreements](#) of 2005 (COM(2008) 538, COMMISSION OF THE EUROPEAN COMMUNITIES presented dated 5 September 2008 and *International Law Prof Blog* “U.S. to Sign Hague Conference Choice of Courts Convention” [http://lawprofessors.typepad.com/international\\_law/2008/11/us-to-sign-hagu.html](http://lawprofessors.typepad.com/international_law/2008/11/us-to-sign-hagu.html).

<sup>25</sup> With respect to parallel proceedings (*lis alibi pendens*), the *forum non conveniens* test still requires that choice of forum be determined on the basis of factors designed to ensure that the action is tried in the jurisdiction that has the closest connection with the action and the parties and not to secure a juridical advantage to one of the litigants at the expense of others in a jurisdiction that is otherwise inappropriate. The existence of a more appropriate forum must be clearly established to displace the forum selected by the plaintiff. See, *Spiladia Maritime Corp v Cansulex Ltd.*, [1987] A.C. 460 (H.L.); *Amchem Products Inc. v British Columbia (Workers Compensation Board)* [1993] 1 S.C.R. 897 (S.C.C.); *S.N.I. Aerospatiale v. Le Kui Jak* [1987] 3 All E.R. 510 (H.L.). See also, Janet Walker “A Tale of Two Fora: Fresh Challenges in Defending Multijurisdictional Claims” (1996) 33 *Osgoode Hall L J* 549.

<sup>26</sup> See *R. v. Hape*, [2007] 2 S.C.R. 292, (2007), 280 D.L.R. (4th) 385, (2007), 220 C.C.C. (3d) 161, (2007), 160 C.R.R. (2d) 1, (2007), 47 C.R. (6th) 96, (2007), 227 O.A.C. 191 (S.C.C.) vis-à-vis the majority’s approval of the doctrine of adoption *qua* reception of customary international law into Canadian domestic law. In the United States, Customary International Law is traditionally defined as the “general and consistent practice of states followed by them from a sense of legal obligation.” See, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987); see also STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, Jun. 26, 1945, art. 38, 59 Stat. 1055, 1060, (available online at: <http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm>) which reads:

Article 38

Applying the private international law principles to jurisdictional analysis may also reduce transactional costs and potentially foster settlement opportunities, especially if both litigants are obliged to retain foreign legal experts to prove foreign law.<sup>28</sup> However, while the foregoing jurisdictional tests provide guidance on *how* a Canadian court should assume or decline jurisdiction, they do not explain *why* or *when* the applicable law applies (or will apply) to the resolution of the dispute. The answers to these questions are not trifling. From a choice of law perspective, a Canadian court's determination of the applicable law (the "*lex causae*") will often be dispositive, particularly since it is the substantive law and not procedural law, which determines issues of liability, causation and damages.<sup>29</sup> Yet, it is surprising how often the CISG is ignored or misapplied by domestic courts.<sup>30</sup>

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
  - a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
  - b. international custom, as evidence of a general practice accepted as law;
  - c. the general principles of law recognized by civilized nations;
  - d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto. [emphasis added]

<sup>27</sup> See Theodor Schilling, "On the Constitutionalization of General International Law", Jean Monnet Working Paper 06/05, THE JEAN MONNET PROGRAM, Professor J.H.H. Weiler European Union Jean Monnet Chair, (available online at: <http://www.nyulawglobal.org/workingpapers/documents/GLWP0505Schilling.pdf>)

<sup>28</sup> In Canada, judicial notice is not taken of foreign law, and evidence rules require experts to be qualified by the court to be permitted to prove the law of a foreign jurisdiction. See John Sopinka & Sidney N. Lederman, THE LAW OF EVIDENCE IN CIVIL CASES, 311-12 (1974).

<sup>29</sup> See generally, J.G. Castel and Janet Walker, CANADIAN CONFLICT OF LAWS, 6th ed. (Markham: LexisNexis Butterworths, 2005) Vol. 1, Chap. 3 "Characterization and the Incidental Question" and Chapter 6 "Substance and Procedure", §6.2, p. 6-2, where Prof. Walker notes that "[t]he distinction between substance and procedure, or right and remedy, is an important subject of characterization...The characterization of a particular rule, whether foreign or domestic, as substantive or procedural, cannot be done in the abstract because substance and procedure are not clear-cut or unalterable categories."

<sup>30</sup> A number of articles have been written, mostly by American and Canadian scholars, commenting on the failure by domestic courts to either recognize or correctly apply the CISG: See, John E. Murray, "The Neglect of CISG: A Workable Solution" (1998) 17 J. L. & Comm. 365-379 (available online at: <http://cisgw3.law.pace.edu/cisg/biblio/murray1.html>); Jacob Ziegel, The Future of the International Sales Convention from a Common Law Perspective: *New Zealand Bus. L.Q.* 6 (2000) 336 (available online at: <http://cisgw3.law.pace.edu/cisg/biblio/ziegel3.html>); Marlyse McQuillen, "The Development of a Federal CISG Common Law in U.S. Courts: Patterns of Interpretation and Citation" (2007) 61 *U. Miami L. Rev.* 509-537 (available online at: <http://cisgw3.law.pace.edu/cisg/biblio/mcquillen.html>); Monica Kilian, CISG and the Problem with Common Law Jurisdictions, (2001) 10 *J. Transnat'l L. & Pol'y* 217 (available online at: <http://www.law.fsu.edu/journals/transnational/vol102/kilian.pdf>); Joseph Lookofsky and Harry Flechtner, "Nominating Manfred Forberich: The Worst CISG Decision in 25 Years?" (2005) 9(1) *Vindobona J. of Int'l Comm. Law and Arb.* 199-208 (available online at: <http://cisgw3.law.pace.edu/cisg/biblio/lookofsky13.html>); Rajeev Sharma, "The United Nations Convention on Contracts for the International Sale of Goods: The Canadian Experience" (2005) 36 *VUWLR* 847-858; Peter J. Mazzacano, "Brown & Root Services v. Aerotech Herman



### III. APPLICABILITY OF THE CISG BY DEFAULT

#### i. A Brief Overview of the CISG

The CISG aims to promote uniformity of international sales law based upon the recognition that international sales and domestic sales contracts differ in significant ways. The CISG is essentially a codification of uniform rules which are intended to promote harmonization among different common law and civil law systems. In this sense, the CISG is considered superior to national or provincial sales laws, which do not necessarily reflect the emergent issues of globalization, cross-border transactions and international trade, generally. The CISG Preamble reads in part:

Considering that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,

Being of the opinion that the adoption of the uniform laws which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barrier in international trade and promote the development of international trade,...

The CISG governs two aspects of an international sales transaction: formation of an international sale of goods contract and the right and obligations of parties to these sales contracts. The scope of the CISG is limited in four important ways: 1) it governs only international sales; 2) it applies only to the commercial sale of goods; 3) it does not apply to specified types of contract issues (e.g. validity); and, 4) the parties are free to exclude the application of the CISG, or vary its effect or derogate from some of its provisions.

Nelson: The Continuing Plight of the U.N. Sales Convention in Canada” in REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) 2004-2005, Pace International Law Review, ed., (Munich: Sellier European Law Publishers, 2006), 169-178 (available online at: <http://cisgw3.law.pace.edu/cisg/biblio/mazzacano.html>); Antonin I. Pribetic, “The (CISG) Road Less Travelled”: *GreCon Dimter Inc. v. J.R. Normand Inc.*,” (2006) 44 *Can. Bus. L. J.* 92-114 (pre-print available online at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=861944](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=861944)); Mathias Reimann, “The CISG in the United States: Why It Has Been Neglected and Why Europeans Should Care” (2007) 71 *Rebels Zeitschrift für ausländisches und internationales Privatrecht* 115-129 (available online at: <http://cisgw3.law.pace.edu/cisg/biblio/reimann.html>); Christopher Sheaffer, “The Failure of the United Nations Convention on Contracts for the International Sale of Goods and a Proposal for a New Uniform Global Code in International Sales Law” (2007) 15 *Cardozo J. of Int’l and Comp. L.* 461-495 (available online at: <http://cisgw3.law.pace.edu/cisg/biblio/sheaffer.html>); Geneviève Saumier, “International Sale Of Goods Law In Canada: Are We Missing The Boat?” (2007) 7 *Can. Int’l Lawyer* 1-8, James M. Klotz, Peter J. Mazzacano and Antonin I. Pribetic “All Quiet on the CISG Front - *Guiliani v. Invar Manufacturing* the Battle of the Forms, and the Elusive Concept of *Terminus Fixus*” (2008) 46 *Can. Bus. L. J.* 430 (available online at SSRN: <http://ssrn.com/abstract=1127850>).

The CISG forms part of the modern *lex mercatoria*, or law merchant (including custom, trade usages, etc.),<sup>31</sup> which is continued under various provincial sale of goods legislation. In Ontario, Section 57 (1) of the Sale of Goods Act defines its scope of applicability as follows:

The rules of the common law, including the law merchant, except in so far as they are inconsistent with the express provisions of this Act, and in particular the rules relating to the law of principal and agent and the effect of fraud, misrepresentation, duress or coercion, mistake or other invalidating cause, continue to apply to contracts for the sale of goods.

Canadian courts generally apply the *lex loci contractus* in lieu of an *ex ante* agreement on choice-of-law.<sup>32</sup> Article 7 of the CISG reads:

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 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.<sup>33</sup>

The three main principles underlying Article 7(1) of the CISG are its “international character,” “uniformity” and “good faith.” Gap filling is dealt with under Article 7(2), which, although not expressly addressed, is based upon the premise that courts should first apply the CISG’s general principles and policies and, if a gap exists, then resort should be made to the principles of “private international law.”<sup>34</sup> Professor Hillman has identified four main policies underlying the rules of the CISG: (1) freedom of contract; (2) co-operation and reasonableness; (3) successful completion of exchanges and (4) compensating injured parties for breach.<sup>35</sup> Since the

<sup>31</sup> See, Peter J. Mazzacano, “The Lex Mercatoria as Autonomous Law” CLEA 2008 Meetings Paper CLPE Research Paper No. 29/2008 (Available at SSRN: <http://ssrn.com/abstract=1137629>).

<sup>32</sup> J.G. Castel and Janet Walker, CANADIAN CONFLICT OF LAWS, 6th ed. (Markham: LexisNexis Butterworths, 2008) vol. 2 at 31-5 to 31-7.

<sup>33</sup> CISG, Article 7 (emphasis added).

<sup>34</sup> Id., Art. 7(2).

<sup>35</sup> Robert A. Hillman, Cross-reference and Editorial Analysis of Convention Article 7, at <http://cisgw3.law.pace.edu/cisg/text/hillman.html>, 1-10 (emphasis added, citations omitted). Peter J. Mazzacano comments:

CISG is an international convention which has been adopted into the Canadian federation generally, and within each of Canada's constituent provinces, it is self-evident that the foregoing principles and policies must inform any judicial analysis of contractual choice-of-law for claims governed by the CISG brought within the domestic forum. The validity of a choice of forum clause, the issue of whether a court has jurisdiction, and, generally, any other issue of procedural law are some of the issues considered outside of the scope of the CISG.<sup>36</sup> Thus, Article 4 excludes issues such as fraud,<sup>37</sup> lack of capacity, misrepresentation, duress, mistake<sup>38</sup>, unconscionability, and contracts contrary to public policy.<sup>39</sup> Article 1(1) limits the applicability of the CISG to "contracts for sale of goods", a term undefined by the CISG, albeit better understood within the

"Hopefully, guidance will be given to lower courts to utilize the interpretive methodology embodied within the CISG. Regard must be had to its international character and the need to promote uniformity in its application at the international level. This dictates that the CISG be interpreted by courts in an autonomous manner, and not through the lens of domestic law. However, as the *Brown & Root* case illustrates, this is where errors most often seem to arise. To echo the words of Ziegel, unless legal practitioners develop a better understanding of this autonomous interpretive methodology—or unless the Supreme Court puts them straight—the future of the Convention in Canadian law will continue to languish."

Peter J. Mazzacano, "Brown & Root Services v. Aerotech Herman Nelson: The Continuing Plight of the U.N. Sales Convention in Canada", *PACE REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (2004-2005)*, (München: Sellier European Law Publishers, 2006) .

<sup>36</sup> See UNCITRAL Digest of Case Law on the United Nations Convention on the International Sales of Goods .Report of the United Nations Commission on International Trade Law on the work of its twenty first session, New York, 11-20 April 1988, United Nations document A/43/17, ¶s 98-109. CLOUT reports are published as United Nations documents A/CN.9/SER.C/ABSTRACTS/1to A/CN.9/SER.C/ABSTRACTS/42. The forty-two CLOUT reports are also available online on UNCITRAL's website at <http://www.uncitral.org/>. In particular, see CLOUT Article 4 - A/CN.9/SER.C/DIGEST/CISG/4 at p. 5-6, fn.'s 33, 41 and 42 and cases cited therein. See also, "CISG Applicability Flowchart", *infra* at p. 40.

<sup>37</sup> See Peter Schlechtriem, "The Borderland of Tort and Contract - Opening a New Frontier?" (1988), 21 *Cornell Int'l L.J.* 467 473-74 (1988), stating that the CISG does not preempt claims for "misrepresentation, fraud, betrayal and intentional harm to economic interests", available online at <http://ciscg.law.pace.edu/ciscg/biblio/schlechtriem.html#ps1> and *Sonox Sia v. Albury Grain Sales Inc.*, [2005] Q.J. No. 9998 (Que. S.C.), *affd* [2005] Q.J. No. 17960, 2005 QCCA 1193 (Que. C.A.), District of Montreal (*per* Otis, Rayle and Hilton JJ.A.).

<sup>38</sup> Prof. Kritzer notes:

"There are also issues which may or may not be regarded as within the purview of the Convention, "mistake" for example. When there is a mistake, some commentators believe that contract rights and remedies are in many cases governed solely by the Convention, except in the case of fraud. Others regard mistake as a validity doctrine that is reserved unto domestic law."

"Checklist on the CISG" Adapted excerpt from Albert H. Kritzer ed., *Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods* (The Hague, Kluwer Law International, 1994). available online at: <http://www.ciscg.law.pace.edu/ciscg/biblio/kritzer2.html>. See also, Patrick C. Leyens, "CISG and Mistake: Uniform Law vs. Domestic Law-The Interpretative Challenge of Mistake and the Validity Loophole" *Pace International Law Review* (ed.), *Review of the Convention on Contracts for the International Sale of Goods (2003-2004)* (München, Sellier European Law Publishers, 2005) pp.3-51, also available online at <http://www.ciscg.law.pace.edu/ciscg/biblio/leyens.html>.

<sup>39</sup> See Jacob S. Ziegel and Claude Samson, Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods, Article 4 Commentary, available online at <http://www.ciscg.law.pace.edu/ciscg/text/ziegel4.html>.

context of Articles 2-5. Article 1(1) generally defines the scope of the CISG in terms of territoriality and internationality (“between parties whose places of business are in different States”). The parties may also have chosen to expressly exclude the CISG by choosing one of the parties’ domestic law, or mandatory arbitration. The availability and effectiveness of partially or completely opting out under Article 6 will accordingly be considered.

There are, in fact, three key features which underscore the CISG’s autonomous interpretation. Firstly, Article 7 (Interpretation of the CISG) calls for an approach to interpretation that is consistent with its character and purpose since the CISG has a very special function, i.e. to replace diverse domestic rules with uniform international law. This purpose includes the observance of good faith in international trade. Secondly, under article 8 (Interpretation of Statements or Other Conducts of a Party), which applies in several situations to determine whether or not the parties have made a contract, raise significant problems of legal effect and interpretation. Finally, Article 9 (Usages and Practices Applicable to Contract) is regarded as one the most important features of the CISG, as it gives legal effect to commercial usages and practice by providing for their application in contracts governed by the CISG. However, the CISG text is not accompanied by any official comments. The "Secretariat Commentaries" (The Detailed Analysis accesses the Commentaries prepared by the Secretariat of the United Nations pursuant to UN General Assembly Resolution 33/93) are the closest available counterpart to an Official CISG Commentary.

As discussed in Article 1(1)(b) *infra*, for international sales contracts, the applicable law is to be determined by the rules of private international law (conflict of laws), or on the basis of international treaties, or, alternatively, on the basis of a law chosen by the parties (choice of law).<sup>40</sup> Professor Mather further notes:

If an issue is expressly excluded from the scope of the CISG, it is not "governed" by the CISG, article 7(2) does not apply, CISG general principles do not come into play, and the court must apply its choice-of-law rules leading to substantive rules that are external to the CISG regime.<sup>41</sup>

<sup>40</sup> In the Swiss CISG case, Regional Tribunal (Tribunal Cantonal) of Jura 3 November 2004 [Ap 91/04], the Appellate Court panel held:

In the case of a sale of an international nature, the applicable law can be determined on the basis of internal laws of international private law which resolve conflicts of laws, that is to say, on the basis of the Swiss Federal Law on International Private Law of 18 December 1987 (LDIP), or on the basis of international treaties or alternatively on the basis of a law chosen by the parties (choice of law).

Available online at: <http://cisgw3.law.pace.edu/cases/041103s1.html> (Translation by Julia Hoffmann). See also, CLOUT Case No. 196 [Handelsgericht des Kantons Zürich, Switzerland, 26 April 1995]

<sup>41</sup> Mather, “Choice of Law for International Sales Issues Not Resolved by the Convention” *supra* note 8 at 170.

A more detailed discussion of conflict of laws is beyond the scope of this article.<sup>42</sup> However, it is important to keep in mind that the issues of jurisdiction *simpliciter* (whether the Canadian court may assume jurisdiction)<sup>43</sup> and the doctrine of *forum non conveniens* (whether the Canadian court should decline jurisdiction in favour of another more convenient forum) are often intertwined with the enforceability of forum selection and arbitration clauses, all of which may involve, directly or indirectly, the CISG as the governing law. The Supreme Court of Canada's own recognition of the primacy of 'party autonomy' and 'freedom of contract'<sup>44</sup> (cf. Article 6, *infra*) and the fundamental principles of 'comity'<sup>45</sup> and 'order and fairness'<sup>46</sup> may also be found in the CISG's principles of autonomous interpretation (cf. "international character," "uniformity" and "good faith" discussed under Article 7(1), *supra*).

## ii. The Basic Rules and Principles of the CISG

### CISG Article 1- Basic Rules of Applicability; Internationality; Territoriality

(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:

(a) when the States are Contracting States; or

(b) when the rules of private international law lead to the application of the law of a Contracting State.

(2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any

<sup>42</sup> See J.G. Castel & Janet Walker, *Canadian Conflict of Laws*, Vol. 2, 31-5 – 31-7 (6th ed.) , Markham: Lexis Nexis-Butterworths, 2005); Antonin I. Pribetic, "Bringing Locus into Focus": A Choice-of-Law Methodology for CISG-based Concurrent Contract and Product Liability Claims, *Pace Review of the Convention on Contracts for the International Sale of Goods (2004-2005)* 179-223 (München: Sellier European Law Publishers, 2006); Joost Blom, *Choice-of-law Methodology*, in *Private International Law In Common Law Canada: Cases, Text, And Materials* 475-508 (2d ed. 2003).

<sup>43</sup> *Beals v. Saldanha* [2003] 3 S.C.R. 416 at 453 (S.C.C.) Per Major, J. (McLachlin C.J., Gonthier, Bastarache, Arbour And Deschamps JJ. concurring).

<sup>44</sup> *GreCon Dimter Inc. v. J.R. Normand Inc. et al.*, 2005 SCC 46, (2005) 255 D.L.R. (4th) 257 at 271, (2005) 336 N.R. 347, (2005) J.E. 2005-1369 (S.C.C.) [cited to D.L.R.][hereinafter "*Grecon Dimter v. Normand*"].

<sup>45</sup> Comity was defined by the Supreme Court of Canada as "the deference and respect due by other states to the actions of a state legitimately taken within its territory", needed to be contemporized "in light of a changing world order." *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 at 1095, 1097 (S.C.C.)

<sup>46</sup> Justice La Forest, in *Hunt v. T & N plc*, noted at p. 42 that the assessment of the "reasonableness" of a foreign court's assumption of jurisdiction was not a mechanical accounting of connections between a case and a territory, but a decision "guided by the requirements of order and fairness."

dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.

(3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.

While the CISG does not contain an objective definition of a “contract of sale”, the generally understood meaning may be inferred from Articles 30 and Article 53, which impose co-extensive obligations between seller and buyer to conclude an international sales contract.<sup>47</sup> Furthermore, Article 30 imposes on the seller an obligation to deliver the goods and relevant documents and to transfer property in the goods.<sup>48</sup> The official English text of the CISG refers to “goods” while the official French version refers to “marchandises”.<sup>49</sup> The prevailing view, is for an expansive definition which includes all moveable, tangible objects relating to commercial sales contracts.<sup>50</sup> Types of contracts governed by the CISG<sup>51</sup> are the delivery of goods by

<sup>47</sup> Peter Schlechtriem & Ingeborg Schwenzer, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) Pt.1 Chap. I- Sphere of Application-Article 1 at p. 26, §14 (2d ed) (New York: Oxford University Press, 2005) [hereinafter referred to as “SCHLECHTRIEM/SCHWENZER” with attribution to the contributing author] See also [UNCITRAL Digest of Case Law on the United Nations Convention on the International Sales of Goods](#). Report of the United Nations Commission on International Trade Law on the work of its twenty first session, New York, 11-20 April 1988, United Nations document A/43/17, [hereinafter “CLOUT DIGEST”]. The CLOUT DIGEST contains authoritative commentary and case law reports which are published as United Nations documents: A/CN.9/SER.C/ABSTRACTS/1 to A/CN.9/SER.C/ABSTRACTS/42. The forty-two CLOUT DIGEST reports are also available online on UNCITRAL’s website at: <http://www.uncitral.org/> In particular, see CLOUT DIGEST Article 1 - A/CN.9/SER.C/DIGEST/CISG/1 at p. 2, ¶3.

<sup>48</sup> CISG, Articles 30-34-Seller’s Obligations.

<sup>49</sup> The new *Consumer Protection Act*, 2002, S.O. 2002, c. 30, Sched. A [“CPA 2002”] came into force in Ontario on July 30, 2005. The CPA 2002 repeals, *inter alia*, the existing Consumer Protection Act, the Business Practices Act and Motor Vehicle Repair Act, consolidating them into one consumer protection statute. It also extends the definition of “goods” to “any type of property” (“marchandises”):

"goods" means all chattels personal, other than things in action and money, and includes emblements, industrial growing crops, and things attached to or forming part of the land that are agreed to be severed before sale or under the contract of sale; (“objets”).

In Québec, see Book Five of the Civil Code of Québec.

<sup>50</sup> Schlechtriem: SCHLECHTRIEM/SCHWENZER, Art. 1, at p. 28, §20; Sonja A. Kruisinga, (NON-) CONFORMITY IN THE 1980 UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS: A UNIFORM CONCEPT? at p. 8 (Antwerp/Oxford/NewYork:Intersentia, 2004 [hereinafter “Kruisinga”]; John O. Honnold, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION, 3rd ed. The Hague: Kluwer Law International, 1999, at p. 50, §56 [hereinafter “HONNOLD-UNIFORM LAW”].

<sup>51</sup> In particular, see CLOUT DIGEST Article 1 - A/CN.9/SER.C/DIGEST/CISG/1 at p. 4, §§8-10 and cases cited therein.

installment;<sup>52</sup> sales involving a carriage of goods;<sup>53</sup> delivery of goods sold directly from the supplier to the seller's customer;<sup>54</sup> and an agreement to modify or rescind a sales contract.<sup>55</sup>

Article 53 obliges the buyer to pay the agreed upon price and to facilitate completion of the transaction based upon the terms of the contract.<sup>56</sup> <sup>57</sup> For example, in the *Lacquer handicraft case*, a CIETAC Arbitration decision,<sup>58</sup> the Canadian buyer and the Chinese seller concluded a contract for the sale of lacquer handicraft on May 2, 1994. The price of the goods was US \$27,986 CIF (Toronto) to be shipped prior to May 30, 1994 and paid via telegraphic transfer (T/T). The Chinese seller shipped the goods but upon arrival in Toronto, the Canadian buyer claimed serious defects in the goods and refused to make payment. Although the parties negotiated a reduction in the price to US \$22,897.45, the Canadian buyer still failed to make payment, resulting in the Chinese seller applying to CIETAC for arbitration.

The Canadian buyer failed to respond to the arbitration notice sent by the CIETAC Secretariat, which led to the unilateral appointment of an arbitrator pursuant to the CIETAC Arbitration Rules. The Chinese seller's attorney attended the Arbitration hearing held in Beijing on July 8, 1996, but the Canadian buyer did not, resulting in a default hearing relying solely upon the attorney for the Chinese seller's oral and written submissions. On the issue of applicable law, the Arbitration Tribunal noted that:

“...no applicable law was agreed on in the Contract. Since both China and Ontario, Canada, which Toronto is subordinate to have cited the United Nations Convention on Contracts for the International Sale of Goods (hereinafter referred to as the "CISG"), CISG shall be applied to the settlement of the dispute under the case.”

<sup>52</sup> See CISG, Article 73(1). For example, see Schiedsgericht der Hamburger freundlichen Arbitrage, Germany, 29 December 1998, Internationales Handelsrecht, 2001, 337; CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998]; cf. Schlechtriem: SCHLECHTRIEM/SCHWENZER, Art. 1 at p.26, fn.25.

<sup>53</sup> See CISG, Article 67 generally and Schlechtriem: SCHLECHTRIEM/SCHWENZER, Art.1, at p. 26, fn. 23. See also CLOUT DIGEST Article 1- A/CN.9/SER.C/DIGEST/CISG/1 at p. 2, ¶4 and citations therein.

<sup>54</sup> Id., CLOUT DIGEST Article 1 - A/CN.9/SER.C/DIGEST/CISG/1 .

<sup>55</sup> But only where the CISG governs the contract. See CISG, Article 29-contract modification.

<sup>56</sup> CISG, Articles 53-60 - Buyer's Obligations.

<sup>57</sup> Schlechtriem: SCHLECHTRIEM/SCHWENZER, Art. 1, at p. 26, §14 citing Herber/Czerwenka, Internationales Kaufrecht, Kommentar zu dem Übereinkommen der Vereinten Nationen vom 11. April 1980 über Verträge über den internationalen Warenkauf, München: Beck (1991).

<sup>58</sup> China 6 August 1996 China International Economic & Trade Arbitration Commission [CIETAC] Arbitration proceeding (Lacquer handicraft case) (translation by CHEN Gang and edited by JIANG Chi) available online at: <http://cisgw3.law.pace.edu/cases/960806c1.html> [hereinafter “CIETAC-Lacquer handicraft case”]

Thus, the Arbitration Tribunal found that the Chinese seller had fulfilled its delivery obligation under Article 30, while the Canadian buyer (in absentia) was found to have breached its obligation to pay for the goods under Article 53, thereby entitling the Chinese seller to damages pursuant to Article 74 and interest on the amount owed at the rate of 9% (USD) or 12% (Chinese Yuan) under Article 78. The Arbitration Tribunal also awarded the Chinese seller its costs, including legal fees, enforcement fees of property preservation and arbitration fees throughout.<sup>59</sup>

### iii) Article 1(1)(a) on Contracting States

Article 1(1)(a) denotes that the parties must be from different States. **For parties with places of business in different Contracting States, where the contract is within the scope of the CISG, the contract is governed by the CISG by default, unless the parties indicate otherwise.**<sup>60</sup> Article 1(2) may come into play in cases where one of the parties acts as an agent for an undisclosed foreign principal. Essentially, Article 1(2) restricts applicability of the CISG in circumstances where one of the parties was unaware of the “internationality” component of the commercial sales contract. Thus, the CISG will not apply if the fact of the buyer’s or seller’s foreign place of business is not apparent either on the face of the contract, or from any prior dealings between the parties, or from any information disclosed by the parties prior to conclusion of the contract. In most commercial sales transactions, the parties’ place of business should be easily discernable from correspondence, invoices, purchase orders, etc. While “place of business” is not defined, reference should be made to Article 10, sub-paragraph (a) which deals with the issue of multiple places of business.<sup>62</sup>

The importance of properly identifying the CISG’s applicability under Article 1(1)(a) was highlighted in a French court decision involving a *Québécois* company. In *Lombard and Cofranca*

<sup>59</sup> *Id.*, CIETAC-Lacquer handicraft case, Part IV: Opinion of the Arbitration Tribunal and Part V: The Award.

<sup>60</sup> For example, see Russia 13 May 1997 Arbitration proceeding 3/1996, Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, [ICAC] also available online at: <http://cisgw3.law.pace.edu/cases/970513r1.html> (Translation by Mykhaylo Danylko; Translation edited by Djakhongir Saidov) [hereinafter “ICAC Case 3/1996”]. ICAC Case 3/1996 involved a contract of sale between a Russian buyer and Canadian seller. The Russian Arbitration Tribunal held that the CISG applied pursuant to Article 1(1)(a): “Since the contract was concluded between the parties whose commercial companies are located in States that are Contracting States to the CISG, the CISG is to be applied to the relations between the parties by virtue of Article 1(1)(a) CISG”.

<sup>61</sup> See also, *Denmark 3 May 2006 Hojesteret [Supreme Court]* which involved a dispute between a Danish seller and a Canadian buyer of a machine designed to mass-produce concrete slats for pig sties, available at <http://cisgw3.law.pace.edu/cases/060503d1.html>.

<sup>62</sup> See CISG, Article 10 and Articles 92(2) and 93(3) (to determine when a state is a “Contracting State”).



*v. Boucherie Debeaux, Ets. Barbaud et al.*, the co-defendant, Cofranca Import Export Inc., a Quebec company (subsequently bankrupt), sold horsemeat to two other co-defendant French companies, Boucherie Debeaux, the distributor, and Etablissements Barbaud, the supplier, for importation and distribution of the horsemeat in France. The horsemeat was contaminated and an outbreak of trichinosis occurred. The victims of the trichinosis epidemic sued both the Canadian exporter and French importers for damages. At second instance, the French Appellate Court found that the CISG applied to the sales contract between the French companies and the Quebec seller under Art. 1(1)(a), and ordered all three defendants to indemnify the victims, including the Canadian supplier pursuant to Article 35(1). On appeal, the Cour de Cassation [French Supreme Court] reversed and remanded, stating that while the French Appellate Court had properly found that the sales contract was governed by CISG, it had violated Art. 16 of the French Code of Civil Procedure, since it applied the CISG, *sua sponte*, without giving the parties an opportunity to make submissions on the issue of the CISG's applicability under Articles 1(1)(a) and 2(a).<sup>63</sup>

Alternatively, if a party does not have a place of business, then the party's "habitual residence" is relevant (Article 10(b)). Internationality ("the parties have places of business in different States") is to be disregarded if the fact is not disclosed by the contract or any pre-contractual dealings (Article 1(2).) Thus, in the case of an agent acting for an undisclosed foreign principal, if the facts relating to the foreign place of business are not readily apparent "from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract", then the CISG would not apply. Take for example a Nova Scotia agent who buys scaffolding equipment on behalf of an Ontario company from the manufacturer whose principal place of business is in the state of Washington, USA. If the agent does not disclose the identity of his or her Ontario principal, then the contract for the sale of goods would not meet the "internationality" requirement, given that the terms of the third party agency agreement (i.e. the agency contract, dealings or background information) would not likely be known by the American seller/manufacturer.<sup>64</sup>

The interplay between Articles 1(2) and 10(b) arose in *Easom Automation Systems, Inc. v. Thyssenkrupp Fabco, Corp.*,<sup>65</sup> which involved a dispute between the plaintiff, Easom Automation

<sup>63</sup> *Lombard and Cofranca v. Boucherie Debeaux, Ets. Barbaud et al.*, France 2 October 2001 Cour de Cassation [Supreme Court] Case No. B 99-13.461, Arrêt no. 1436 F-P available online at <http://cisgw3.law.pace.edu/cases/011002f1.html> [hereinafter "Lombard and Cofranca v. Boucherie"]

<sup>64</sup> The CISG applies only to buyers and sellers, not to third parties, CISG art. 4. See also *Usinor Industeel v. Leeco Steel Prods., Inc.*, 209 F.Supp.2d 880, 884 at 885 (N.D.Ill.2002), stating that the text of the CISG and analysis by commentators suggests that the CISG does not apply to third parties. [hereinafter "*Usinor Industeel v. Leeco Steel*"]

<sup>65</sup> *Easom Automation Systems, Inc. v. Thyssenkrupp Fabco, Corp.* 2007 WL 2875256 (E.D.Mich.) (U.S. District Court, E.D. Mich.), also available at: <http://cisgw3.law.pace.edu/cases/070928u1.html>.

Systems, Inc. ("Easom"), a Michigan corporation which designs, builds, integrates and installs automation equipment and systems for the auto industry and the defendant, Thyssenkrupp Fabco, Corp. ("Thyssenkrupp"), a Nova Scotia corporation headquartered in Ontario, which supplies medium and heavy metal stampings and systems to automotive customers. The parties entered into an agreement where Easom was to design, fabricate and install a Sport Bar Assembly System (SBA)--a special machine used to fabricate roll bars for DaimlerChrysler Corporation's JK Platform, the 2007 Jeep Wrangler--for Thyssenkrupp. Eason alleged that on July 19, 2005, Thyssenkrupp orally instructed Easom to commence work on the SBA for which Easom issued a Quote to Thyssenkrupp for a price of \$5,400,000.00 and a delivery date of March 30, 2006. Easom asserted that Thyssenkrupp issued a written purchase order on August 30, 2005, which included the following choice of law/forum selection clause:

"25. *Jurisdiction/Governing law.* The contract created by Seller's acceptance of Buyer's offer as set out in Paragraph 3 hereof shall be deemed in all respects to be a contract made under, and shall for all purposes be governed by and construed in accordance, with, the laws of the Province where the registered head office of Buyer is located and the laws of Canada applicable therein. Any legal action or proceeding with respect to such contract may be brought in the courts of the Province where the registered head office of buyer is located and the parties hereto attorn to the non-exclusive jurisdiction of the aforesaid courts."

The court denied Easom's motion for immediate possession and held that:

"Under either the Plaintiff's quote or Defendant's purchase orders, the CISG applies as neither the quote nor the purchase orders expressly indicated that the CISG did not apply. Further, stating that the law of Canada applied to the agreement indicates that the CISG applied as well, as the Convention is the law of Canada.

The CISG governs only the formation of the contract of sale, and the rights and obligations of the seller and the buyer arising from such a contract. As such, if the Plaintiff's quote constitutes the contract in this case, as opposed to Defendant's purchase orders, the Michigan Special Tools Lien Act may apply to the parties' agreement.

...

At this juncture, there remain issues of fact as to which document constitutes the contract in this case--the quotes prepared by Plaintiff or the purchase orders prepared by Defendant. Until this issue is resolved, the Court is unable to determine whether Michigan law applies and whether the Michigan's Special Tools Lien Act applies."

Conversely, in *Novelis Corp. v. Anheuser-Busch*, although the plaintiff's predecessor, Alcan Aluminum Corporation, was a Canadian corporation, the court concluded that the CISG did not apply, stating:

" 4. The parties have agreed, and the Court finds, that New York law applies... If Alcan Aluminum Corporation's place of business was in Canada in 2004, such that the contract at issue was between a Canadian company (Novelis's predecessor) and an American company (A-B), it would be governed by the United Nations Convention on Contracts for the International Sale of Goods ("CISG"), not New York law. *See BP Oil*

*Int'l Ltd. v. Empresa Estatal Petroleos de Ecuador*, 332 F.3d 333, 336 (5th Cir. 2003) ("Where parties seek to apply a signatory's domestic law in lieu of the CISG, they must affirmatively opt-out of the CISG."). However, having examined the supplement the Court ordered Novelis to file, the Court is satisfied that Novelis's predecessor was a Texas corporation whose principal place of business was in Ohio as of the Agreement's date of execution in 2004. Because the two contracting parties both were companies whose places of business were in the United States, the CISG does not apply and the parties' choice of New York law will be given force."<sup>66</sup>

The importance of identifying the CISG's applicability before the court is highlighted in a two American cases involving Canadian parties. In the first case, *Sky Cast, Inc. v. Global Direct Distribution LLC*,<sup>67</sup> the plaintiff, Sky Cast, Inc. ("Sky Cast"), a Canadian corporation based in Guelph, Ontario brought an action against the defendants Global Direct Distribution, LLC ("Global"), a limited liability company with its principal place of business in Lexington, Kentucky; David J. Dixon ("Dixon"), a managing member of Global; and Raymond A. Sjogren ("Sjogren"), a managing member of Global, for breach of contract, alleging that Global was indebted to it in the principal amount of \$83,203.78 for concrete light poles that Sky Cast manufactured and delivered to Global's customer in Florida in 2006. Sky Cast also asserted claims against the defendants for unjust enrichment and fraud. Sky Cast sought judgment in the amount it was owed under its contract with Global, prejudgment interest, post judgment interest, and its costs and attorney's fees.

In response, Global counterclaimed alleging that Sky Cast breached their contract by failing to deliver the concrete light poles on agreed terms and that Global sustained damages by Sky Cast's failure to perform the contract in a timely manner. Global also asserted claims for negligent misrepresentation and fraud and concealment. Global sought unspecified compensatory damages, postjudgment interest, its costs and attorney's fees. The parties brought several motions before the court. With respect to the CISG, the court granted Skycast's motion for partial summary judgment on its breach of contract claim, stating:

"Since this contract concerns the sale of goods between parties in different countries (Canada and the United States of America), since these two countries are signatories to the CISG, and since there is no indication that the parties opted out of the CISG, the court concludes that the CISG governs this contract and that it preempts the applicability of Article 2 of the UCC to this transaction for the sale of goods that ordinarily would be controlled by Article 2 of the UCC. *However, even though the CISG,*

<sup>66</sup> *Novelis Corp. v. Anheuser-Busch*, 2008 U.S. Dist. LEXIS 49201 (U.S. District Court, N.D. Ohio, E. D.), also available at: <http://cisgw3.law.pace.edu/cases/080522u1.html>.

<sup>67</sup> *Sky Cast, Inc. v. Global Direct Distribution LLC* 2008 WL 754734 (E.D.Ky.) (U.S. District Court, E.D.Ky.) also available at: <http://cisgw3.law.pace.edu/cases/080318u1.html>.

rather than Article 2 of the UCC, controls this contract, the court also concludes that fact does not operate to defeat Sky Cast's motion for summary judgment on its breach of contract claim, and the court further concludes that based on the undisputed facts of this case, at least as to liability, Sky Cast is entitled to summary judgment on its breach of contract claim. This conclusion is based on the fact that Sky Cast supplied the goods that were purchased by Global in the various Purchase Orders, that Global accepted these goods and made no efforts to reject these goods, that these goods were used in the construction project, and that Global failed to pay Sky Cast in full for the total amount of the invoices Sky Cast sent to Global concerning these goods. Therefore, liability on Sky Cast's breach of contract claim against Global is no longer an issue. The only remaining aspect of Sky Cast's claim for breach of contract is the amount of damages to which Sky Cast is entitled." [emphasis added]

In the second case, *Norfolk Southern Railway Company v. Power Source Supply*,<sup>68</sup> the plaintiff, Norfolk Southern Railway Company ("Norfolk") a Virginia-based corporation operating a locomotive repair facility in Altoona, Pennsylvania, commenced an action the defendant, Power Source Supply, Inc. ("Power Source"), an Alberta corporation which supplies used and rebuilt equipment to the railroad, oil, and gas industries, for breach of contract and in the alternative unjust enrichment and seeking recovery of the remainder of the agreed-upon price for the sale of locomotives. After Norfolk moved for summary judgment, Power Source failed to respond. In granting summary judgment, Judge Kim R. Gibson noted since the parties' documents were silent as to choice of law and both were from Contracting States (namely the U.S. and Canada), the CISG applied under Article 1(1)(a).

In contrast, Canadian decisions have overlooked the CISG's applicability, with inconsistent results. In *NRF Distributors Inc. v. Starwood Manufacturing Inc.*,<sup>69</sup> the plaintiff, NRF, a Maine-based distributor of wood and other flooring, paid to Starwood, an Ontario-based manufacturer of wood flooring, the sum of US \$112,056 in advance for the delivery of hardwood flooring. Starwood took the money but did not deliver the product. Instead, it applied the money to debts that were owed to Starwood by another company called Korca (no longer in business), a Wisconsin-based milling company that manufactured and sold wood products. Starwood claimed that Korca was NRF's agent and this justified the set-off. According to Belobaba, J.:

"3 The only question on this motion is whether Starwood's claim that Korca was NRF's agent and the set-off was therefore justified is a genuinely triable issue. Is there a genuine

<sup>68</sup> *Norfolk Southern Railway Company v. Power Source Supply* 2008 U.S. Dist. LEXIS 56942 (U.S. District Court, W.D. Penn.) also available at: <http://cisgw3.law.pace.edu/cases/080725u1.html> . [hereinafter "*Norfolk v. Power Supply*"].

<sup>69</sup> *NRF Distributors Inc. v. Starwood Manufacturing Inc.*, 2009 CarswellOnt 520, 2009 CanLII 3786 (Ont. S.C.J.) [hereinafter "*NRF Distributors*"].

dispute or a genuine issue of credibility that requires a trial? Does Starwood's agency claim have a real chance success? In my view, the answer to these questions is 'no.'

4 Having taken a good, hard look at the evidence, I am satisfied that there is absolutely no merit to Starwood's claim that Korca was NRF's agent. Korca's debts to Starwood are its own. There is no basis for Starwood's claim for set-off and no genuine issue for trial. NRF is entitled to summary judgment.”<sup>70</sup>

However, in the *NRF Distributors* case, Starwood claimed that Korca was NRF's agent and that NRF was responsible for Korca's debts to Starwood, an allegation which NRF denied, taking the position that its relationship with Korca was always that of “buyer” and “seller”. There is no reference to choice of law or choice of forum in the invoices referenced throughout the reasons for decision. Arguably, the CISG applied by default under Article 1(1)(a) (both parties in the main action were from Contracting States: *i.e.* USA and Canada) and the CISG was not expressly excluded under Article 6. If so, then there may have been an interesting question as to whether the issues of agency and set-off--both traditionally excluded under Article 4(a) as external gaps--were governed by Ontario law or Maine law. Although it appears as though the defendant, Starwood, attorned or otherwise did not challenge the Ontario court's jurisdiction, there is no indication as to whether they pleaded foreign law on the excluded issues. The defence of set-off is excluded under the CISG, primarily due to the difficulty in developing gap-filling rules within the contours of the principles of autonomous interpretation established under Article 7(2). In any event, the conflict rules of the forum apply to determine the scope or quantum of the set-off, and whether it is contractual, or equitable, in nature.<sup>71</sup>

In another recent Canadian case, *Unique Labeling Inc. (International Private Beverage) v. Gerling Canada Insurance Company*,<sup>72</sup> the plaintiff attempted to enforce in Ontario a \$1.5 Million jury award obtained against the Defendants in Oregon for damages arising from the negligent supply of bottled water. The plaintiff sought to recover in Ontario, pursuant to s. 132(1) of the *Insurance Act*, against the defendants' commercial liability insurers. Section 132(1) reads:

132. (1) Where a person incurs a liability for *injury or damage to the person or property of another*, and is insured against such liability, and fails to satisfy a judgment awarding damages against the person in respect of the person's liability, and an execution against the person in respect thereof is returned unsatisfied, the person entitled to the damages

<sup>70</sup> Id. at ¶'s 3-4.

<sup>71</sup> Cf. the parties' respective rights to withhold performance under Article 58 and Article 71, *et seq.* and Stefan Kröll, “Selected Problems Concerning The CISG's Scope of Application” (2005) 25 *J. L. Com.* 39 at 42-43 (Agency) and 50-53 (Set-off).

<sup>72</sup> *Unique Labeling Inc. (International Private Beverage) v. Gerling Canada Insurance Company*, 2008 CanLII 53846 (Ont. S.C.J.) [hereinafter “*Unique Labeling*”].

may recover by action against the insurer the amount of the judgment up to the face value of the policy, but subject to the same equities as the insurer would have if the judgment had been satisfied.<sup>73</sup> [emphasis added]

The defendant insurers denied liability on the basis that the Oregon judgment did not impose liability for damage to “injury or damage to the person or property of another”, as required by s. 132(1), but rather the jury awarded damages for pure economic loss. The plaintiff argued that the requirement in s. 132(1) of “injury or damage to property” creates a much lower threshold than “physical injury to tangible property”, the latter term applying to the wording of the CGL policies. It further argued that the property damage at issue included both tangible and intangible property, such that it was indisputable that its property was damaged when the defendants supplied contaminated bottled water which later had to be destroyed.

In a case of first instance, the parties were unable to cite any judicial precedents where a judgment creditor successfully relied upon the provisions of s. 132(1).<sup>74</sup> However, **Justice Moore obliquely refers to the CISG in his reasons at para. 17, stating:**

“...Similarly, each defendant was found by the jury to have breached express and implied warranties and the *convention on contracts for the international sale of goods*, thereby causing damage to Unique.” [emphasis added]

Unsurprisingly, given that the parties’ counsel neither pleaded nor argued the CISG’s applicability, the Court concluded that the Oregon jury award related strictly to pure economic loss and not property damage:

[188] What input, if any, Unique may have had in drafting the form and content of the jury questions in Oregon is not at all clear. I suspect that if Unique’s counsel in Oregon had been aware of the provisions of s. 132(1) and had anticipated Unique’s interest in pursuing recovery under the section in this case, a concerted effort to reword questions to the jury may have followed.

[189] The jury was not asked to clarify whether its award of damages was intended to include a component for destruction of labels and/or flavorings, for example. Unique asserts that those components of the finished water products were owned by Unique and became damaged property by virtue of the withdrawal and destruction processes initiated by Kroger.

[190] I agree with the defendants, however, that the Triumbari Defendants did not, by virtue of the jury findings and judgment in Oregon, incur a liability for damage to the property of another within the meaning of s. 132(1).

<sup>73</sup> Insurance Act, R.S.O. 1990, c. I.8, § 132(1) (as am.).

<sup>74</sup> *Unique Labeling*, *supra* note 72, at ¶ 71.

[191] I accept the opinion of Mr. Peterson, that for purposes of Oregon law, the liability of the defendants is a liability to pay purely economic losses and a liability that does not arise from property damage.

[192] In addition, I agree with the analysis and conclusion reached by Goodearle J. in *G.B. Catering*, . [*G.B. Catering Services Ltd. v. Beckley* 1994 CanLII 7252 (ON S.C.), (1994), 18 O.R. (3d) 135 (Ont. Ct. Gen. Div.)] where the distinction is drawn between damages awarded for property damage and those for economic loss [193] The parties agree and I concur that a finding solely of economic loss cannot support access to judgment under s. 132(1)... The jury awarded Unique damages for loss of profit and expenses. Without more in the way of clarity in the jury questions, I find that the jury awarded damages solely for economic losses.

[194] As to the requirement that the property damage contemplated by s. 132(1) be occasioned to property of another, I am persuaded that the section must be read to contain a temporal connection between the damage to the property in question and the time that the damage occurs.”<sup>75</sup>

Assuming *arguendo* that the CISG applied at first instance, the trial judge’s instructions to the jury would necessarily have implicated Article 5 of the CISG.<sup>76</sup> If so, Article 74 of the CISG, which reflects the general principle of full compensation, should have entitled the plaintiffs to compensatory damages, including loss of profit. Article 74 reads:

#### Article 74 CISG

Damages for breach of contract by one party consist of a sum equal to the loss, *including loss of profit*, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.<sup>77</sup>

The solution for Canadian courts to apply the CISG is relatively simple; both counsel and judges must become familiarized with the CISG in order to identify its applicability. Canadian litigators must know when the CISG is included or excluded when drafting pleadings and to bring forth CISG caselaw, arbitral decisions and scholarly commentary to the court’s attention. Equally important, Canadian judges must also become well-versed in the CISG to avoid misapplying domestic sales law and caselaw when rendering a decision.

<sup>75</sup> *Id.*, at ¶’s 188-194 [citations omitted].

<sup>76</sup> See, Pribetic, "Bringing Locus into Focus": A Choice-of-Law Methodology for CISG-based Concurrent Contract and Product Liability Claims, *supra* note 42.

<sup>77</sup> See also CISG-AC Opinion No. 6, Calculation of Damages under CISG Article 74 (available online at: <http://cisgw3.law.pace.edu/cisg/CISG-AC-op6.html#>)

#### iv) Article 1(1)(b)- Applying National Law

The reference in Article 1(1)(b) to the rules of private international law (PIL) directs the domestic court to apply its own conflicts of law analysis to determine CISG applicability. In this sense, Article 1(1)(b) is not a choice of law rule *per se*, but rather an interpretative tool.<sup>78</sup> Generally, if one of the parties is from a non-Contracting State, then the CISG will not apply, unless the contract specifies that the CISG applies (a choice of law provision) or where the rules of private international law (conflicts of law) lead to the CISG's application. If the proper law of contract (the "lex loci contractus") is in a Contracting State, then the CISG will apply by default, subject to a limited number of reservations available.<sup>79</sup>

For example, if a contract between an Ontario company and an English company (a non-Contracting State) specifies that the "laws of Ontario shall apply", then the CISG will apply, unless it is expressly excluded.<sup>80</sup> Conversely, if the contract specifies that "English law shall apply" then the English Sale of Goods Act, 1979 would apply.<sup>81</sup> This is, of course, subject to Article 95, which allows a Contracting State to make a Declaration that it will not be bound by Article 1(1)(b).<sup>82</sup> Canada initially filed an Article 95 Declaration to the effect that the province

<sup>78</sup> As Prof. Schlechtriem remarks:

"States declaring a reservation under Article 95 are, however, (unlike states declaring reservations under Articles 92(2) and 93(3)) [footnote omitted] 'Contracting States' in the meaning of Article 1(1)(a). If the parties to the contract...have their places of business in the US, a Contracting (reservation) State, and in Germany, a Contracting (non-reservation) State, a court in Canada has to apply the CISG, if its conflict rules refer either to German or US law."

Slechtriem: SCHLECHTRIEM/SCHWENZER, Art.1, at p. 37, §44. Some commentators argue that the forum (Contracting) State is indirectly bound by Article 95 and applicable declared reservations. Cf. Albert Kritzer, GUIDE TO PRACTICAL APPLICATIONS OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, Deventer: Kluwer Law and Taxation (1989) at p.78 [hereinafter "KRITZER-GUIDE TO PRACTICAL APPLICATIONS"] and HONNOLD-UNIFORM LAW, *supra* note 50, at ¶ 47.5.

<sup>79</sup> CISG, Part IV-Final Provisions: Articles 91-98-Declarations and Reservations.

<sup>80</sup> For a discussion of the difficulties posed by the text of the various provincial legislations for opting out of the CISG, see discussion under Article 6, *infra*.

<sup>81</sup> *Sale of Goods Act 1979*, c. 54, as amended by: *Sale of Goods (Amendment) Act 1994*, c.32; *Sale and Supply of Goods Act 1994*, c.35, *Sale of Goods (Amendment) Act 1995*,c.28, and *The Sale and Supply of Goods to Consumers Regulations 2002*, 2002 No. 3045.

<sup>82</sup> CISG, Article 95 reads:

"Any State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph (1)(b) or article 1 of this Convention."

To date, Article 95 Declarations have been made by China (PRC), Czech Republic, Singapore, Slovakia and the United States.



of British Columbia would not be bound by Article 1(1)(b) of the CISG, however, this Declaration was subsequently withdrawn.<sup>83 84</sup>

In *Impuls I.D. Internacional, S.L., et al v. Psion-Teklogix Inc.*,<sup>85</sup> the Florida District Court considered the applicability of the CISG in the context of an international contract of sale involving multiple parties from both Contracting and Non-Contracting States. On June 21, 2000, the plaintiffs - a Spanish computer products company ("Impuls-Spain"), its U.S. distributor ("Impuls-US") and an Argentine distributor ("Psiar") - concluded an oral contract in London, England with representatives of Psion Enterprise Computing, Ltd., a division of Psion LLC ("Psion"), for the purchase and distribution of Psion's computer merchandise throughout Latin America.<sup>86</sup> From July to December 2000, Psion followed the terms of the oral contract and shipped its computer merchandise to Impuls-US. However, in September 2000, Psion merged with Teklogix Inc. to form the Ontario-based Canadian corporation, Psion-Teklogix, Inc. ("Psion-Telogix").<sup>87</sup> Following the merger, the President of the newly formed Psion-Teklogix sent an email notifying the plaintiffs that the contract would be terminated in ninety days as it was in the process of reorganizing its distribution plans.<sup>88</sup> The plaintiff buyers objected, stating that Canadian defendant's strategy would effectively destroy their original business plan. The Canadian defendant then offered the plaintiffs the option of continuing as a reseller, which the plaintiffs rejected, opting instead to commence an action for breach of the original agreement.<sup>89</sup> The Psion companies were not named as defendants in the action.<sup>90</sup>

<sup>83</sup> The official UN text of Canada's Article 95 Declaration withdrawal reads:

10. On 31 July 1992, the Government of Canada, by virtue of article 97 (4) of the Convention, notified the Secretary-General of its decision to withdraw the following declaration made upon accession by virtue of article 95, which read as follows:

"The Government of Canada also declares, in accordance with article 95 of the Convention, that, with respect to British Columbia, it will not be bound by article 1.1 b) of the Convention."

Excerpted from the Official UNITED NATIONS TREATY COLLECTION, MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL: available online at: <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterX/treaty20.asp#Declarations>

<sup>84</sup> For a discussion of the debate whether the CISG is to be applied where the forum's conflict of rules lead to the law of a reservation State, see Schlechtriem: SCHLECHTRIEM/SCHWENZER, Art. 1, at pp. 36-37, §§ 42-44.

<sup>85</sup> *Impuls I.D. Internacional, S.L., et al v. Psion-Teklogix Inc.*, 234 F.Supp. 2d 1267; 2002 U.S. Dist. LEXIS 22977; 2002 WL 3168146; 16 Florida Law Weekly Fed. D 34 (S.D.Fla.), available online at: <http://cisgw3.law.pace.edu/cases/021122u1.html> [hereinafter "*Impuls v. Psion-Teklogix*"]

<sup>86</sup> Id.

<sup>87</sup> Id.

<sup>88</sup> Id.

<sup>89</sup> Id.

The Court held that the CISG was inapplicable on various grounds. First, it noted that some of the parties to the concluded contract were from a non-Contracting State, namely, the United Kingdom, which, to date, has yet to become a signatory to the CISG. Thus, under Art.1(1)(a) and Art. 100(1), the internationality requirement was not met. Secondly, pursuant to Article 1(2), Zloch, C.D.J. disregarded the fact that the defendant, Psion-Teklogix was from a Contracting State (namely Canada), since this fact did not appear either from the contract or from any dealings between, or from information disclosed by Psion, the British seller, before or at the conclusion of the contract. Third, the Florida District Court considered the history of negotiation or the practical interpretation of the CISG concluding that the 'universalist' approach adopted by the 1964 Hague Conventions had been expressly rejected during the Vienna Conference as reflected in the final text of Art. 1(1)(a). Fourth, the Chief District Court judge recognized that the United States had made a Declaration under Art. 95 that it would not be bound by Art.1(1)(b), thereby proscribing application of the rules of private international law to determine whether the CISG governed the contract. Finally, the court was unable to cite any precedent or authority for the applicability of the CISG to a merged or successor corporation, in circumstances where the original party to the contract was from a non-Contracting State.<sup>91</sup>

In *ICC Arbitration Case No. 7197 of 1992*, the arbitral tribunal held that where the parties failed to specify any applicable law, both Austrian and Bulgarian rules of private international law led to the application of Austrian law. Given that the CISG was incorporated into the Austrian legal system, the tribunal applied the CISG to the dispute in accordance with Article 1(1)(b) of the CISG. Given that the applicable rules of private international law led to the application of the law of the seller's place of business, the fact that Bulgaria - where the buyer had its place of business - was not a party to the CISG was irrelevant at the time the contract was concluded.<sup>92</sup>

<sup>90</sup> Id. Notwithstanding the merger into Psion-Teklogix, it appears that Psion PLC remains a going concern (see <http://www.hoovers.com/free/co/factsheet.xhtml?COID=47010>), such that the plaintiffs could have added either British company as a party defendant. Quere whether this would have affected the outcome with respect to the court's subject matter jurisdiction, personal jurisdiction or forum non-conveniens analysis and conclusions?

<sup>91</sup> CISG, Article 4. The court's reference to the history of negotiation and practical interpretation of the CISG is more commonly referred to as the "travaux preparatoires" or legislative history. See, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG\\_travaux.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_travaux.html).

<sup>92</sup> CLOUT Case No. 104 [ICC Arbitration Case No. 7197 of 1992, Court of Arbitration of the ICC International Chamber of Commerce] available online at <http://cisgw3.law.pace.edu/cases/927197i1.html> [hereinafter "*ICC Arbitration Case No. 7197 of 1992*"]

## IV. OPTING-OUT

### i) Article 6- Exclusion, Variation or Derogation

#### Article 6

The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.

Article 6 enshrines two of the CISG's key principles—party autonomy and contractual primacy. Thus, the parties are free to exclude or “opt-out” of the CISG altogether. Alternatively, subject to Article 12,<sup>93</sup> the parties may derogate from or vary the CISG's provisions, or partially “opt-in” to the CISG. The ability of parties to exclude, vary or derogate from the CISG's provisions reflects the realities of 21<sup>st</sup> century international trade and commerce or the modern *Lex Mercatoria*.<sup>94</sup> In fact, the Supreme Court of Canada has itself recently reaffirmed “the precedence to the principle of the autonomy of the parties”<sup>95</sup> in the context of international sales transactions. Whether or not the parties should exclude the CISG is largely a normative issue, albeit the Preamble to the CISG firmly entrenches the CISG's goals of uniformity and certainty, which are clearly superior to any parochial and inconsistent domestic sales laws.<sup>96</sup> Prof. Honnold observes:

When the places of business of the seller and buyer are in different Contracting States, the applicability of the Convention mandated by Article 1(1)(a) is not undercut when rules of private international law point to a non-Contracting State. The Convention may be excluded by the parties, but only by an express agreement or an agreement that is clearly implied in fact.<sup>97</sup>

<sup>93</sup> Where one of the parties is from an Article 96 reservation state and thus domestic rules as to form prevail over Articles 11, 12, 20 and Part II of the CISG.

<sup>94</sup> For an excellent discussion of the historical antecedents of the CISG evolving from the traditional and modern *lex mercatoria* (also known as the “law merchant”), see Peter J. Mazzacano, “Canadian Jurisprudence and the Uniform Application of the UN Convention on Contracts for the International Sale of Goods,” *Pace International Law Review*, Vol. 18, No. 1 (Spring 2006), Chap. 2 “The Background to the CISG” [also available online at: <http://www.cisg.law.pace.edu/cisg/biblio/mazzacano1.html>].

<sup>95</sup> *Grecon Dimter v. Normand*, *supra* note 44.

<sup>96</sup> The Preamble to the CISG states in part that the “development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States” and “the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade”. See also CISG, Art. 7, *supra* note 33.

<sup>97</sup> HONNOLD-UNIFORM LAW, *supra* note 50 at p. 80, and generally, §§75-77.

However, while there is no doubt the parties may exclude the CISG, the effectiveness of partially or completely opting out under Article 6 must be considered in light of Article 4 validity issues, as well as the choice of law rules of the domestic forum which govern conflict of laws.<sup>98 99</sup>

## ii) **Opting-Out: Explicit Exclusion**

Where the CISG otherwise applies under Article 1(1)(a) or 1(1)(b) and is not excluded under Articles 2-5, the parties may mutually exclude<sup>100</sup> the CISG by (1) expressly stating that the CISG

<sup>98</sup> Prof. Farnsworth adds:

"Article 6 purports to give the parties an unqualified power to vary the effect of the Convention by agreement. On the other hand, article 4 makes it clear that, absent a contrary provision, the Convention does not affect any rule of domestic law dealing with the "validity" of a contract provision. Taken together, articles 6 and 4 create a tripartite hierarchy, with domestic law on validity at the top, the agreement of the parties in the middle, and the Convention at the bottom. The domestic law on validity continues to control the agreement of the parties, and both control the Convention. This subordination of the Convention to both the domestic law on validity and the agreement of the parties was part of the price paid by the Convention's sponsors for its acceptance by adopting nations."

E. Allan Farnsworth, "Review of Standard Forms or Terms Under the Vienna Convention" 21 Cornell International Law Journal (1988) 439-447, also available online at: <http://www.cisg.law.pace.edu/cisg/biblio/farns1.html>.

<sup>99</sup> Prof. Schlechtriem further notes:

"The autonomy of the parties operates on two levels, which often are not clearly distinguished. First, it may allow a choice of law at the level of conflict of law rules: even if, by virtue of Article 1, the CISG is applicable to a contract in the forum of a Contracting State, the parties may nevertheless choose the law of a non-contracting state and thereby derogate from the forum state's law including the CISG. This is a conflict of laws matters governed not by Article 6 but by the rules of private international law of the forum, which in a number of Contracting States are enacted pursuant to international treaties such as the Rome Convention on the Law Applicable to Contractual Obligations of 1980 or the Hague Convention on the Law Applicable to International Sale of Goods...The second level of the parties' autonomy is governed by Article 6. It is the freedom of contract, i.e. autonomy to vary the content of a contract by deviating from or modifying the provision of the CISG applicable on account of Articles 1 et seq. Article 6 states that the CISG is not mandatory law of a Contracting State. In other words, on the level of the substantive law of international sales enacted by the Convention, parties are making use of freedom of contract and their autonomy to shape the contents and terms of their contracts governed by the CISG. Their freedom of contract may be restricted and limited only on the basis of sentence 2(a) of Article 4 by rules and provision of the domestic law applicable to the contract in addition, but subordinate, to the CISG that render certain contractual terms invalid."

Schlechtriem: SCHLECHTRIEM/SCHWENZER, Art. 6, pp.83-4, §§ 3-4, et seq.

<sup>100</sup> Schlechtriem: SCHLECTRIEM/SCHWENZER, Art. 6, p. 85, §6.

does not apply and (2) choosing an alternate governing law.<sup>101</sup> Compare the following two examples:

*Example A*<sup>102</sup>

15. (b) This Agreement and its application and interpretation will be governed exclusively by the laws prevailing in the Province of British Columbia, Canada which will be deemed to be the proper law hereof. The parties irrevocably attorn to the jurisdiction of the courts of British Columbia, Canada in the event of any proceedings regarding this Agreement. The **International Sale of Goods Act R.S.B.C. 1996, c. 236** and the **United Nations Convention on Contracts for the International Sale of Goods** set out in the schedule thereto shall not apply to the governance or any interpretation of this Agreement.

*Example B*<sup>103</sup>

26. APPLICABLE LAW AND ARBITRATION

a) A Purchase Order shall be governed by the law of Buyer's principal place of business without regard to conflict of laws provisions thereof, and litigation on contractual causes arising from a Purchase Order shall be brought only in that jurisdiction. For Ford Motor Company, a Delaware corporation and any U.S. subsidiary, joint venture or other operation located in the U.S., the principal place of business will be deemed to be Michigan. The UN Convention for the International Sale of Goods is expressly excluded.

In each of the above examples, the Canadian courts held that the governing law clauses were effective in excluding the CISG's application. However, such clauses must be drafted with the utmost care, since terms such as referring to the "law of the seller's place of business" or "the laws of Germany" may lead to ambiguity and unintentional application of the CISG by default under Article 1(1)(b).<sup>104</sup> In *Grecon Dimter v. Normand*, the Supreme Court of Canada considered the following choice of forum and choice of law clauses:

<sup>101</sup> "A complete disapplication of the CISG can be achieved by a choice of law clause, either nominating the law of a non-contracting state (positive choice of law) or simply by excluding the law of the Contracting State that would otherwise have applied (negative choice of law clause)."Schlechtriem: SCHLECTRIEM/SCHWENZER, Art. 6, p. 85, §7.

<sup>102</sup> See *Multiactive Software Inc. v. Advanced Service Solutions Inc.*[2003] B.C.J. No. 945 , 2003 BCSC 643 (2003) 48 C.P.C. (5th) 125 (BCSC) [hereinafter "*Multiactive Software*"]

<sup>103</sup> See *Ford Aquitaine Industries SAS c. Canmar Pride (The)* [2004] A.C.F. no 1743 , 2004 CF 1437 , (2004) 267 F.T.R. 115 ,(F.C.) aff'd [2005] F.C.J. No. 535 , 2005 FC 431 (F.C.) [hereinafter "*The Canmar Pride*"]

<sup>104</sup> As Prof. Schlechtriem observes:

### Choice of Forum

It is agreed, by and between the seller and buyer, that all disputes and matters whatsoever arising under, in connexion with, or instant to this contract (whether arising under contract, tort, other legal theories, or specific statutes) shall be litigated, if at all, in and before a court located in Alfeld (Leine), Germany to the exclusion of the courts of any other state or country.

### Choice of Law

This agreement is governed by and construed under the laws of Germany to the exclusion of all other laws of any other state or country (without regard to the principles of conflicts of law).

Regrettably, the Supreme Court of Canada's decision failed to apply the CISG, which was applicable, *inter alia*, under Article 1(1)(a) as the parties were all from Contracting States.<sup>105 106</sup>

"If the law of a Contracting State is chosen without other qualifying terms specifying which rules are meant, as for instance the mere reference to "German law," it is long established ~ and such was already the case with respect to the Hague Convention on International Sales [ULIS] ~ that such a reference includes the application of CISG as part of the chosen law.[citations omitted] Regard for the choice of law of a Contracting State as a selection of the CISG, to the extent the scope of the CISG fits the transaction, is also the prevailing international practice." [citations omitted].

Peter Schlechtriem, "Uniform Sales Law in the Decisions of the Bundesgerichtshof" in 50 Years of the Bundesgerichtshof [Federal Supreme Court of Germany] A Celebration Anthology from the Academic Community, (English Translation by Todd J. Fox): available at: <http://cisgw3.law.pace.edu/cisg/biblio/slechtriem3.html> [hereinafter "SCHLECHTRIEM-BUNDESGERICHTSHOF"].

<sup>105</sup> *Grecon Dimter v. Normand*, *supra* note 44. In *Grecon Dimter v. Normand*, the Plaintiff, Scierie Thomas-Louis Tremblay Inc. ("Tremblay") operated a saw mill in the Province of Québec. The Defendant, J.R. Normand Inc. ("Normand"), also a Québec company, serviced and sold industrial wood working machinery. The Co-Defendant, GreCon Dimter, Inc. ["GreCon"] is a German manufacturer that manufactured and sold specialized equipment used in processing plants and sawmills, but had no place of business or assets in Québec. For an analysis of the *Grecon Dimter v. Normand* decision from a CISG perspective, see Antonin I. Pribetic, "The (CISG) Road Less Travelled: *Grecon Dimter, Inc. v. J.R. Normand Inc.*" (2006) 44 *Can. Bus. L. J.* 92-114, pre-print available online at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=869784](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=869784). Two other recent Ontario cases which similarly failed to refer to the CISG are: *Hershey Canada, Inc. v. Solae, LLC*, 2007 CanLII 34847 (ON S.C.) available on CANLII at: <http://www.canlii.org/en/on/onsc/doc/2007/2007canlii34847/2007canlii34847.html>; (*cf. Solae, LLC v. Hershey Canada, Inc.* 557 F. Supp. 2d 452 (U.S. Dist. Ct-Delaware) which involved parallel proceedings brought by Solae, LLC for a declaratory judgment and breach of contract action against Hershey Canada. Hershey Canada brought a motion to dismiss which was granted through the U.S. Federal Court's application of the contract formation rules under the CISG). See also, *Guiliani v. Invar Manufacturing (sub nom. Linamar Holdings Inc. v. IGM U.S.A. Inc.)* 2007 WL 2758802, 2007 CarswellOnt 5922 (Ont. Sup. Ct. J.); *aff'd* 2008 ONCA 256 (Ont. C.A.). See also, Klotz, Mazzacano and Pribetic, "All Quiet on the CISG Front - *Guiliani v. Invar Manufacturing the Battle of the Forms, and the Elusive Concept of Terminus Fixus*", *supra* note 30.

<sup>106</sup> As Prof. Schlechtriem notes:

"...since the CISG in the court of a Contracting State is applicable ipso jure, i.e. as law it need not be invoked by the parties, at least in legal systems that adhere to the rule of *jura novit curia*, i.e. the court has to know the law. If the parties and a lower court have overlooked the CISG, the decision should be cancelled or reversed by the higher court, unless the parties clearly alter their contract in order to make the domestic law applicable. [citations omitted].

By contrast, international arbitrators do not appear to have any difficulties in identifying and applying the CISG. For example, in *ICC Arbitration Case No. 11333 of 2002 (Machine case)*,<sup>107</sup> a Canadian company in 1991 entered into an Equipment Purchase Agreement (the Agreement) to purchase two machines from an Italian manufacturer/seller. The Agreement also provided that the Italian seller would supply engineering, supervision and additional accessories. The Italian seller further warranted the delivered equipment against defects in material and workmanship for a period of one year from the final date of commissioning, but in no event exceeding eighteen months from the date of delivery. The Agreement also contained a one-year guarantee against defects for a starting from the date of order. The parties agreed that the contract would be governed by French law and that any disputes would be settled in accordance with the ICC Rules of Arbitration. The machines were delivered in 1992. In 1998, the buyer and an insurer entered into a machinery insurance policy assigning to the insurer a right of subrogation to recover any sum paid to the buyer under the insurance policy. After compensating the Canadian buyer for damage suffered due to the failure of one of the machines, the Insurer filed a request for arbitral proceedings against the Italian seller.

The Arbitral Tribunal first held that pursuant to Art. 100(2), since the contract was concluded before Canada had ratified or acceded to the CISG, Art. 1(1)(a) had no application. However, the Arbitral Tribunal held that CISG could be applied pursuant to Art. 1(1)(b) if the rules of private international law led to the application of the law of a Contracting State. Given that arbitrators are not bound by domestic conflict of laws rules, but rather by the parties' choice of law made in conformity with the principle of party autonomy; such a principle was read in as a rule of private international law referred to in Art. 1(1)(b) CISG (as well as according to Art. 17(1) of the ICC Rules of Arbitration and Art. 1496 of the French Code of Civil Procedure). Accordingly, unless the parties, by choosing French law, intended to exclude the application of CISG, it was to be applied as it forms part of French law.

### iii) Drafting Anomalies in Canadian CISG Implementing Legislation

A number of Canadian legal commentators have identified drafting inconsistencies in the CISG federal implementing legislation<sup>108</sup>, as well as in most of the provincial implementing statutes;

Schlechtriem: SCHLECHTRIEM/SCHWENZER, Art. 6, p. 92, §14.

<sup>107</sup>I CC Arbitration Case No. 11333 of 2002 (Machine case) available at: <http://cisgw3.law.pace.edu/cases/021333i1.html>; see also, 31 Yearbook Commercial Arbitration (2006) 117-126 and Unilex database <http://www.unilex.info/case.cfm?pid=1&do=case&id=1163&step=FullText>.

<sup>108</sup> *International Sale of Goods Contracts Convention Act*, S.C., ch. 13(1991) (Can.), an Act to implement the United Nations Convention on Contracts for the International Sale of Goods [Assented to 1st February, 1991], available at <http://www.cisg.ca>. Section 5(2) reads:

Exclusion of Convention

namely: Alberta, New Brunswick, Newfoundland, Nova Scotia, Ontario, Prince Edward Island and Saskatchewan.<sup>109</sup> There are two significant drafting anomalies in the provincial implementing statutes. For example, the Ontario *International Sale of Goods Act* reads in part:

Exclusion of Convention

6. Parties to a contract to which the Convention would otherwise apply may exclude its application by expressly providing in the contract that the *local domestic law of Ontario or another jurisdiction applies to it or that the Convention does not apply to it*. R.S.O. 1990, c. I.10, s. 6. [emphasis added]

Firstly, the reference to the “local domestic law of Ontario” is ambiguous; if the drafters meant the “local domestic sales law of Ontario” then they should have stipulated the “Ontario Sale of Goods Act, as amended”. Further, the phrase “or another jurisdiction applies to it” is bound to lead to confusion, particularly since it may refer to the domestic law of a non-unified state or a non-Contracting State. If the contractual choice of law clause does not provide that “the parties agree that the CISG is expressly excluded and that the Sale of Goods Act, Ontario applies”, but rather “the parties agree that the law of Ontario applies”, this may lead a foreign court to apply its conflict of laws analysis and conclude that the parties’ mutual intention was not to exclude the CISG under Article 1(1)(b). Secondly, express derogation or exclusion of the CISG under Article 6 requires the parties’ mutual affirmative intent to exclude the CISG and the choice of an alternative domestic or foreign sales law. Hence, the use of the disjunctive “or” rather than the conjunctive “and” is both confusing and problematic.<sup>110</sup>

The point is simply this: if the CISG otherwise applies (*i.e.* internationality requirement met under Art. 1(1) (a)), then the parties may nevertheless expressly derogate from the CISG under Article 6 of the CISG. It is respectfully submitted that the “Exclusion of Convention” section

(2) Parties to a contract to which the Convention would otherwise apply pursuant to subsection (1) may exclude its application *in accordance with the terms of the Convention and, in particular, by providing in the contract that other law applies in respect of the contract*. [emphasis added]

<sup>109</sup> Alberta: see Section 2(1) of the *International Conventions Implementation Act*, S.A. 1990, c. I-6.8; New Brunswick: see Section 6 of the *International Sale of Goods Act*, S.N.B. 1989, c. I-12.21; Newfoundland: see Section 7 of the *International Sale of Goods Act*, R.S.N. 1990, c. I-16; Nova Scotia: see Section 8 of the *International Sale of Goods Act*, S.N.S. 1988, c. 13; Ontario: see Section 6 of the *International Sale of Goods Act*, R.S.O. 1990, c. I.10; Prince Edward Island: see Section 6 of the *International Sale of Goods Act*, S.P.E.I. 1988, c. 33; Saskatchewan: see Section 6 of *The International Sale of Goods Act*, S.S. 1990-91, c. I-10.3

<sup>110</sup> Professor Ziegel's assessment is: "All this is . . . bound to lead to much confusion...[the legislative wording] may prevail before an Ontario Court but it would cut little ice outside Canada. This is because a foreign tribunal or arbitrator would probably hold that Ontario cannot unilaterally change the meaning of Article 6 of the Convention." Jacob Ziegel, "Canada Prepares to Adopt the International Sales Convention", (1991) 18 C.B.L.J. 3 at 9-11." See also, James M. Klotz, *INTERNATIONAL SALES AGREEMENTS. AN ANNOTATED DRAFTING AND NEGOTIATING GUIDE* (2<sup>nd</sup> Rev. Ed.) (The Hague: Kluwer Law International, 2008) Chap. 1-Preliminary Matters pp. 20-21 and Chios C. Carmody, "The Harmonization of International Commercial Contracting: Canadian Experience with the CISG" (October 12, 2007), available at SSRN: <http://ssrn.com/abstract=1273258>.



should be entirely deleted altogether. Alternatively, the section wording should be amended to read as follows:

Exclusion of Convention

6. Parties to a contract to which the Convention would otherwise apply may exclude its application by expressly providing in the contract that the local domestic *[sales]* law of Ontario or *[the local domestic sales law of]* another jurisdiction applies to it *[and]* that the Convention does not apply to it.

Professor Ferrari states:

“In my opinion, the mere fact that the parties argue on the sole basis of a domestic law does not per se lead to the exclusion of the CISG, a view recently confirmed by several courts, unless the parties are aware of the CISG’s applicability or the intent to exclude the CISG can otherwise be inferred with certainty. If the parties are not aware of the CISG’s applicability and argue on the basis of a domestic law merely because they believe that this law is applicable, the judges will nevertheless have to apply the CISG on the grounds of the principle *iura novit curia*, provided that this principle is part of the *lex fori*. “[citations omitted]”<sup>111</sup>

The problem, of course, is that the principle of *iura novit curia* is a civil law concept, and does not apply to common law procedural rules of pleading and proof.

Notwithstanding the aforementioned drafting anomalies, it is submitted that express exclusion or derogation is required to effectively opt-out of the CISG, where both parties are from Contracting States. Since the CISG is both uniform international sales law and has been implemented federally and provincially throughout Canada; the CISG is Canadian law (or provincial law as the case may be), not foreign law. Party autonomy and contractual freedom presumes *consensus ad idem* on all material terms, including governing law. A foreign court or arbitral tribunal analyzing a choice of law clause such as “*the laws of Ontario shall apply*” , would likely conclude that the parties’ intention to exclude the CISG was ineffective, unless the court under Article 8 determined the parties’ objective intention to choose domestic, rather than, uniform sales law adopted by the parties’ respective jurisdictions. Conversely, a choice of law clause such as: “*the CISG is expressly excluded and the parties agree that the Ontario Sale of Goods Act shall apply*” constitutes, in this author’s view, an effective opt-out.

<sup>111</sup> Franco Ferrari, “[Remarks on the UNCITRAL digest's comments on Article 6 CISG](#) from the Proceedings of the UNCITRAL - VIAC Joint Conference, 15-16 March 2005, Vienna: Celebrating Success: 25 years United Nation Convention on Contracts for the International Sale of Goods (CISG) (published in the *Journal of Law and Commerce*, Volume 25, Issue 1, Fall 2005) at pp. 30-31.

If the section remains in effect, then it is likely to create a conflict of laws conundrum in a future CISG case; particularly, if the law of another jurisdiction chosen by the parties is within another Contracting State which has not made an CISG Article 95 reservation. In this author's view, the American "explicit derogation" approach, which is reinforced by the Preamble, travaux préparatoires (i.e. the legislative history of the 1980 Vienna Diplomatic Conference), and the interpretative methodologies of CISG Article 7(1) and 7(2), is to be preferred. Clearly, if the CISG is incorporated into Canadian law by implementing provincial legislation, then it is neither "foreign law"; nor "customary international law", but "Canadian law". A *fortiori*, it has international treaty status and represents a primary layer of commercial sales legislation which trumps the secondary layer of domestic sales law, unless the parties have expressly excluded it by mutual assent or *consensus ad idem* (subject to a court's analysis of objective intent under CISG Article 8).

The Uniform Law Conference of Canada (ULCC) has recently tabled its Annual Report which lists the *Convention on the Limitation Period in the International Sale of Goods and Protocol (UNCITRAL)* [the "*Limitation Period Convention*"] as a "high priority" for federal and provincial implementation.<sup>112</sup> Hopefully, legislative action to remedy the drafting anomalies in the provincial CISG implementing legislation is imminent, particularly in light of the pending accession to the *Limitation Period Convention* which requires harmonization (if not uniformity) between both international legal instruments.

In any event, the wording of Article 3 of the *Limitation Period Convention* is sufficient and reads:

*Article 3*

(1) This Convention shall apply only if, at the time of the conclusion of the contract, the places of business of the parties to a contract of international sale of goods are in Contracting States.

<sup>112</sup> See, *United Nations Convention On The Limitation Period In The International Sale Of Goods 1980* (New York, 14 June 1974) (including Amending Protocol-Vienna, 11 April 1980) Art. 8 which imposes a four-year limitation period; available at: <http://www.uncitral.org/pdf/english/texts/sales/limit/limit-conv.pdf> See, UNIFORM LAW CONFERENCE OF CANADA- CIVIL SECTION "Activities and Priorities of the Department Of Justice in International Private Law- Report of the Department Of Justice Canada 2008", at 13-14. According to the DOJ:

"e. *Conventions on the Limitation Period in the International Sale of Goods and Protocol (UNCITRAL)*

[1] These Conventions, which entered into force August 1, 1988, grew out of the work of UNCITRAL to unify international sales law. There are 26 States party to the *Limitation Convention* of 1974, and 19 States party to the *Amended Limitation Convention*, including, in both cases, our North-American trade partners, the United States and Mexico.

[2] The Conventions dovetail with the *United Nations Convention on Contracts for the International Sale of Goods* (Vienna, 1980), which is in force for all of Canada. *There is substantial similarity between the three Conventions, in particular the articles setting out the sphere of application, declarations and reservations, the federal State clause, and the final clauses.* [emphasis added]."

(2) Unless this Convention provides otherwise, it shall apply irrespective of the law which would otherwise be applicable by virtue of the rules of private international law.

(3) *This Convention shall not apply when the parties have expressly excluded its application.*[emphasis added]

#### iv) **Opting-Out-Implicit Exclusion**

Some commentators are of the view that the CISG allows for implicit derogation.<sup>113</sup> However, a number of CISG decisions have held to the contrary.

In *Asante Technologies v. PMC-Sierra*, the court held that where parties seek to apply a signatory's domestic law in lieu of the CISG, they must affirmatively opt-out of the CISG.<sup>114</sup>

In *Valero Marketing & Supply Company v. Greeni Oy & Greeni Trading Oy*, where an agreement to include a provision that New York law governed failed to specifically exclude application of the CISG, the court held that the CISG remained applicable.<sup>115</sup> In *BP Oil v. Empresa* the court held that "if the parties decide to exclude the [CISG], it should be expressly excluded by language which states that it does not apply."<sup>116</sup>

<sup>113</sup> SCHLECHTRIEM- BUNDESGERICHTSHOF, *supra* note 104; Schlechtriem: SCHLECHTRIEM/SCHWENZER, Art. 6 pp. 82-92; Michael Joachim Bonell & Fabio Liguori [Italy], excerpt from "The UN Convention on the International Sale of Goods: A Critical Analysis of Current International Case Law - 1997 (Part 1)", *Uniform Law Review* (1997) 385-395, available online at: <http://www.cisg.law.pace.edu/cisg/text/libo6.html>; Peter Winship [U.S.], excerpt from *Changing Contract Practices in the Light of the United Nations Sales Convention: A Guide for Practitioners*, 29 *International Lawyer* (1995) 525-554 available online at: <http://www.cisg.law.pace.edu/cisg/text/winship6.html>.

<sup>114</sup> *Asante Technologies v. PMC-Sierra* 164 F. Supp. 2d 1142; 2001 U.S. Dist. Lexis 16000 and 2001 WL 1182401 (N.D. Cal) which held that where parties seek to apply a signatory's domestic law in lieu of the CISG, they must affirmatively opt-out of the CISG: available at: <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/010727u1.html>.

<sup>115</sup> *Valero Marketing & Supply Company v. Greeni Oy & Greeni Trading Oy*, 373 F.Supp.2d 475 at 482 (D.N.J.2005) available online at: <http://cisgw3.law.pace.edu/cases/050615u1.html> [hereinafter "Valero Marketing v. Greeni Oy"]; rev'd and remanded on other grounds: 2007 WL 2064219 (C.A.3 (N.J.) available on line at: <http://cisgw3.law.pace.edu/cases/070719u2.html> "We do not perceive a conflict between the CISG and New York law on the issue of whether the September 14 Agreement is valid and binding." (at fn. 7 per Barry, Fuentes and Jordan, Circuit Judges).

<sup>116</sup> *BP Oil International, Ltd. v. Empresa Estatal Petroleos de Ecuador* 332 F.3d 333 (5th Cir. 2003) (Court File No. M 02-20166) per Jerry E. Smith, Circuit Judge; Barksdale, Circuit Judge, Fitzwater, District Judge, holding that "if the parties decide to exclude the [CISG], it should be expressly excluded by language which states that it does not apply": available at: <http://www.ca5.uscourts.gov/opinions%5Cpub%5C02/02-20166.cv0.wpd.pdf>; also available at: <http://cisgw3.law.pace.edu/cases/030611u1.html>; 5th Circuit petition for rehearing denied 7 July 2003, available at: <http://www.ca5.uscourts.gov/opinions%5Cpub%5C02/02-20166.CV1.wpd.pdf>;

In *Ajax Tool Works, Inc. v. Can-Eng Manufacturing Ltd.*, the court concluded that a contract stating the agreement shall be governed by the laws of Canada did not exclude the CISG.<sup>117</sup>

In the ICC Arbitration Case No. 11333 of 2002 (*Machine case*) cited above, the Arbitral Tribunal rejected the insurer's argument for implicit derogation based upon the parties' choice of French law; particularly so since "the parties have not shown any element enabling this Tribunal to ascertain a common intention to exclude the application of the CISG." The Arbitral Tribunal similarly declined the insurer's argument that the contractual derogation concerning the warranty period implied a mutual intention to exclude the CISG's application, stating: "[w]hen a contractual clause governing a particular matter is in contradiction with the CISG, the presumption is that the parties intended to derogate from the CISG on that particular question. It does not affect the applicability of the CISG in general."<sup>118</sup>

In *American Mint LLC v. GOSoftware, Inc.*, the Federal District Court of Pennsylvania held:

"The alleged contract in this case contains a provision selecting Georgia law as the law governing disputes under the contract. However, the contract fails to expressly exclude the CISG by language which affirmatively states it does not apply. BP Oil, 332 F.3d at 337. Thus, if the facts are proven as alleged, then the CISG would pre-empt domestic sales laws that otherwise would govern the contract. Accordingly, the Court rejects

<sup>117</sup> *Ajax Tool Works, Inc. v. Can-Eng Manufacturing Ltd.*, No. 01-5938, 2003 WL 223187, at \*8 (N.D.Ill. Jan.30, 2003) available online at: <http://cisgw3.law.pace.edu/cases/030129u1.html> [hereinafter "Ajax Tool v. Can-Eng."].

<sup>118</sup> The Arbitral Tribunal also concluded that although the Canadian buyer *qua* insurer had failed to give notice of lack of conformity within the two-year limit time provided for in Art. 39 CISG, pursuant to Art. 40, the Italian seller was not entitled to rely on Arts. 38 and 39 if it knew or ought to have known the defects. The Tribunal found that such an issue could only be settled if the applicable limitation period had elapsed and, since the issue of limitation periods is an external gap in the CISG, the matter had to be determined in conformity with the applicable domestic law (i.e. French law). In the Arbitral Tribunal's view:

[22] "However, the application of different limitation periods to the rights provided for by the CISG amounts to artificially re-creating distinctions existing under the applicable national law and from which the CISG was detached with a view to international uniformity. This objective of uniformity would be defeated if each national law were to supply the judge or arbitrators with numerous time limits. Limitation periods provided for by the national laws have been adopted to apply specifically to particular actions of the national laws, and not to actions provided for a heterogeneous source of law such as the CISG. [page 125]

[23] "The Arbitral Tribunal is of the view that it is thus fit to apply the general 10-year limitation period, provided for by Art. 189 *bis* of the French Code of Commerce, independently of the specific cause of action.

[24] "Consequently, the Arbitral Tribunal finds that claimant's claim is not time-barred by the 10-year statute of limitation applicable to it as less than 10 years have elapsed between the conclusion of the Agreement in 1991 and claimant's filing of its *Demande d'Arbitrage* with the ICC in December 2000.

[25] "This finding is without prejudice to the obligation on claimant (in Art. 40 CISG) to demonstrate that [seller] knew or could not have been unaware of the alleged lack of conformity. This issue has not been 'bifurcated', and neither the Parties' submissions nor this award did address it." [citations omitted]

Defendant's choice of law argument as a basis for finding that the Court lacks jurisdiction over this dispute.”<sup>119</sup>

Prof. Kritzer remarks:

“Subject to an overstatement ('if the parties decide to exclude the [CISG], it should be expressly excluded by language which states that it does not apply' [emphasis added]), this is consistent with the holding of courts of other jurisdictions. See [UNCITRAL Digest of Article 6 case law](#); and [UNCITRAL Digest cases plus added cases](#).

It is clear that, to be effective, the exclusion should clearly express the intent of the parties, with the standards for determining intent as set forth in CISG Article 8. However, there is nothing in either the language of the CISG or its legislative history to require that such an exclusion must be express. The rule is as the Chairman of the First Committee of the Vienna Diplomatic Conference at which the CISG was promulgated advised the delegates to this Conference: ‘exclusions of the application of the Convention could be either express or implied.’ He advised that this “was also the conclusion which had emerged from the preparatory work.”\*

\* OFFICIAL RECORDS, 248, para. 4. The conclusion that emerged from the preparatory work, which is as the Chairman [Mr. Loewe of Austria] describes it, may be found at UNCITRAL Yearbook VII, A.CN.9.SER.A/1976, p. 29.”<sup>120</sup>

In contrast, the court in *McDowell Valley Vineyards, Inc. v. Sabaté USA Inc. et al.* found that the majority of the representations about the product came from California, hence, under the CISG, the parties' places of business were held to be in the same state and the CISG was, therefore, determined to be inapplicable to the sale and consequently the Court lacked jurisdiction over the case.<sup>121</sup>

<sup>119</sup> *American Mint LLC v. GOSoftware, Inc.* 2006 WL 42090 (M.D.Pa.); 2006 U.S. Dist. LEXIS 1569 (U.S. District Court, M.D. Pa.) available online at: <http://cisgw3.law.pace.edu/cases/060106u1.html> [hereinafter “American Mint”].

<sup>120</sup> Albert H. Kritzer, “Editorial Remarks”, *American Mint LLC v. GOSoftware, Inc.*, available online at: <http://cisgw3.law.pace.edu/cases/060106u1.html>.

<sup>121</sup> *McDowell Valley Vineyards, Inc. v. Sabaté USA Inc. et al.* 2005 WL 2893848 (N.D.Cal.) Federal District Court [California] available online at: <http://cisgw3.law.pace.edu/cases/051102u1.html>. See also, *Chateau des Charmes Wines v. Sabate*, 2003 WL 2012551 (USCA, 9th Cir. Cal.) (Per Curiam: Betty B. Fletcher, Alex Kozinski, Stephen S. Trott, Circuit Judges) also available online at: <http://cisgw3.law.pace.edu/cases/030505u1.html> and *Chateau Des Charmes Wines Ltd. v. Sabate, USA, Inc.* [2005] O.J. No. 4604 Court File No. 03-CV-261424CM 3 (Ont. S.C.J.) .See also, CISG, Article 8.

However, Canadian courts are not alone in misinterpreting the CISG's applicability. In *American Biophysics v. Dubois Marine*,<sup>122</sup> the Rhode Island based manufacturer, American Biophysics Corporation ("ABC") and the Manitoba distributor, Dubois Marine Specialties ("Dubois") entered into a "Non-Exclusive Distributorship Agreement" (the "Distributorship Agreement") whereby Dubois was to purchase and resell "Mosquito Magnets" designed to attract and kill mosquitoes, manufactured by ABC. Pursuant to the Distributorship Agreement, Dubois was to make payment within thirty days after receiving ABC's invoice and it provided for interest on overdue amounts "at the greater of (a) eighteen percent (18%) per annum or (ii) the highest rate of interest allowed by the laws of the State of Rhode Island." Subsection 11(h) of the Distributorship Agreement contained the following provision:

"This Agreement shall be construed and enforced in accordance with the laws of Rhode Island. The parties agree that the courts of the State of Rhode Island, and the Federal Courts located therein, shall have exclusive jurisdiction over all matters arising from this Agreement."<sup>123</sup>

ABC sued for breach of contract or, alternatively, to recover on book account or for goods sold and delivered in the amount of \$513,985.94, plus \$96,512.75 in interest accrued through July 22, 2005, the date the claim was commenced. Dubois moved to dismiss on the grounds of forum non conveniens and lack of personal jurisdiction, relying on, *inter alia*, "...an excerpt from the United Nations Convention on Contracts For The International Sale of Goods, 1980 ("CISG"); and copies of Manitoba statutes that deal with excluding the CISG from contracts to which it might otherwise apply."<sup>124</sup> <sup>125</sup> The court held that a choice of law clause specifying "the laws of Rhode Island" was sufficient to exclude application of the CISG, stating:

"In any event, it appears that the CISG is inapplicable. The CISG governs 'contracts for the sale of goods where the parties have places of business in different nations, the nations are CISG signatories, and the contract does not contain a choice of law provision.' *Amco Ukrservice v. Am. Meter Co.*, 312 F.Supp.2d 681, 686 (E.D.Pa.2004) (emphasis added); see 15 U.S.C.App. at Art. 1(1)(a). More specifically, Chapter I, Article 6 of the CISG provides that: 'The parties may exclude the application of this

<sup>122</sup> *American Biophysics v. Dubois Marine Specialties, a/k/a Dubois Motor Sports*, 2006 WL 225778 (U.S. Dist. Ct. D.R.I.) per Torres, C.J. available online at: <http://cisgw3.law.pace.edu/cases/060130u1.html> [hereinafter "*American Biophysics v. Dubois Marine*"].

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> Section 6 of the *International Sale of Goods Act*, C.C.S.M., c. S11 (as am.) reads:

Excluding application of Convention

6. The parties to a contract to which the Convention would otherwise apply may exclude its application by *expressly providing in the contract that the Convention does not apply*. [emphasis added]

Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions.”<sup>126</sup>

In denying DMS’s motion to dismiss, the court held in part:

“Dubois argues that subsection 11(h) does not ‘expressly’ exclude the application of CISG as required under Manitoba law. However, Manitoba law does not apply. Furthermore, even if Manitoba law did apply and even if the CISG called for a different forum, the forum selection clause does ‘expressly’ vest jurisdiction in this Court. See *Summit Packaging Sys., Inc. v. Kenyon & Kenyon*, 273 F.3d 9, 13 (1st Cir.2001) ([W]hen parties agree that they ‘will submit’ their dispute to a specified forum, they do so to the exclusion of all other forums.); see also *Lambert v. Kysar*, 983 F.2d 1110, 1116 (1st Cir.1993) (forum selection clause will be enforced ‘ ‘where venue is specified with mandatory language.’) (quoting *Docksider, Ltd. v. Sea Tech., Ltd.*, 875 F.2d 762, 764 (9th Cir.1989)).”<sup>127</sup>

The court’s analysis in *American Biophysics v. Dubois Marine* raises a number of difficulties. First, it appears as though the court confused the issues of choice of forum and choice of law, insofar as the parties’ choice of forum is immaterial to the applicable law. Both parties were from Contracting States ~ the plaintiff manufacturer/seller was from Rhode Island, U.S.A. and the defendant buyer (reseller/distributor) was from Manitoba, Canada ~ thus, the international sales contract met the internationality requirement under Article 1(1)(a) of the CISG. Second, the fact that the parties entered into a distributorship agreement is not, in and of itself, determinative. ABC manufactured and delivered the goods in question to Dubois and rendered an invoice specifying goods which Dubois allegedly refused or neglected to pay. Thus, the dispute was not breach of the distributorship agreement per se, but rather a breach of a contract for goods sold and delivered under the distributorship agreement, the latter of which is clearly within the scope of the CISG.<sup>128</sup> Third, the court misapprehended the ratio of the U.S. CISG decisions cited in support of the nature and effect of the parties’ choice of law in excluding the

<sup>126</sup> *American Biophysics v. Dubois Marine*, *supra* note 122.

<sup>127</sup> *Id.*

<sup>128</sup> *Cf. Helen Kaminski Pty. Ltd. v. Marketing Australian Products, Inc.*, No. 97-8072A, 1997 WL 414137, at \*2 (S.D.N.Y. July 23, 1997) [hereinafter “*Helen Kaminski*”] where the court states:

“The Distributor Agreement requires MAP to purchase a minimum quantity of total goods, but does not identify the goods to be sold by type, date or price. In contrast, the CISG requires an enforceable contract to have definite terms regarding quantity and price.” (*Cf. CISG*, Article 14).

For a critique of the *Helen Kaminski* decision, see Victoria M. Genys, “Blazing a Trail in the ‘New Frontier’ of the CISG: *Helen Kaminski v. Marketing Australian Products, Pty. Ltd. Inc.*” 17 *Journal of Law and Commerce* (1998) 415-426, available online (along with the *Helen Kaminski* decision) at: <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/970721u1.html>.

CISG's applicability. Most notably, *Amco Ukrservice v. American Meter Company*<sup>129</sup> was cited as authority for the view that any alternative choice of law provision implies exclusion of the CISG under Article 6. However, the court in *Amco Ukrservice* did not exclude the CISG based upon the parties' alternative choice of law under Article 6. Rather, citing both American and German CISG jurisprudence which held that distributorship agreements (in German, referred to as "framework agreements") were excluded under Article 4, the court concludes:

"...although the CISG may have governed discrete contracts for the sale of goods that the parties had entered pursuant to the joint venture agreements, it does not apply to the agreements themselves."<sup>130</sup>

Finally, the line of authority followed by *Amco Ukrservice* traces back to decisions where choice of law was inapplicable: *Fercus, S.r.l. v. Palazzo*,<sup>131</sup> was a New York Federal District Court decision relating to an oral agreement arising from an exclusive distributorship agreement, which originally cited the U.S. Court of Appeals (2<sup>nd</sup> Circuit) decision in *Delchi Carrier v. Rotorex*,<sup>132</sup> where the contract was silent on choice of law.<sup>133</sup>

<sup>129</sup> *Amco Ukrservice et al. v. American Meter Company* 312 F. Supp. 2d 661; 2004 U.S. Dist. LEXIS 5301; 2004 WL 692233 (U.S. Dist.Ct. E.D.Pa.) available online at: <http://cisgw3.law.pace.edu/cases/040329u1.html> [hereinafter "*Amco Ukrservice*"]

<sup>130</sup> Id. Dalzell, J. notes:

"In the few cases examining this issue, courts both here and in Germany have concluded that the CISG does not apply to such contracts. In *Helen Kaminski Pty. Ltd. v. Marketing Australian Products, Inc.*, 1997 WL 414137 (S.D.N.Y. July 23, 1997), the court held that the CISG did not govern the parties' distributorship agreement, but it suggested in dictum that the CISG would apply to a term in the contract that addressed specified goods. Id. at \*3. Three years later, Judge DuBois of this Court followed *Helen Kaminski* and held that the CISG did not govern an exclusive distributorship agreement, an agreement granting the plaintiff a 25% interest in the defendant, or a sales commission agreement. *Viva Vino Import Corp. v. Farnese Vini S.r.l.*, No. 99- 6384, 2000 WL 1224903, at \*1-2 (E.D.Pa. Aug. 29, 2000) (DuBois, J.). Two German appellate cases have similarly concluded that the CISG does not apply to distributorship agreements, which they termed "framework agreements," but does govern sales contracts that the parties enter pursuant to those agreements. See *OLG Düsseldorf, UNILEX*, No. 6 U 152/95 (July 11, 1996), abstract available at <http://cisgw3.law.pace.edu/cases/960711g1.html>; *OLG Koblenz, UNILEX*, No. 2 U 1230/91 (Sept. 17, 1993), text available at <http://cisgw3.law.pace.edu/cases/930917g1.html>."

<sup>131</sup> *Fercus, S.r.l. v. Palazzo* 2000 WL 1118925, at \*3 (S.D.N.Y. Aug. 8, 2000) available online at: <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/000808u1.html>.

<sup>132</sup> *Delchi Carrier S.p.A. v. Rotorex Corp* 71 F 3d 1024 (1995) available online at: <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/951206u1.html>.



The importance of drafting clear and unambiguous choice of law clauses is highlighted in another international arbitral decision. In *ICC Arbitration Case No. 9117 of March 1998*,<sup>134</sup> a Russian seller and Canadian buyer entered into a contract for delivery of goods. A portion of the goods was delivered before expiry of US import licenses; the remainder was delivered after the deadline. The Canadian buyer refused to pay the full price alleging the Russian seller's failure to ship all the goods before expiry of the U.S. import licenses. The Canadian buyer also alleged that the Russian seller violated the Canadian buyer's exclusive U.S. import rights. The Russian seller then commenced arbitration in accordance with the arbitration agreement in the contract, directing arbitration pursuant to the ICC Rules of Arbitration and Reconciliation. Although the contract did not contain a choice of law clause, the Arbitral Tribunal held that the relevant usages<sup>135</sup> and the CISG applied pursuant to both Art. 13 (3) and (5) of the ICC Rules for Reconciliation and Arbitration, and the contractual provisions agreed upon by the parties. The law of the Russian Federation governed any other issues.

In another Russian CISG decision, this time involving a Canadian seller and Russian buyer,<sup>136</sup> the ICAC Arbitral Tribunal reached a different result, primarily due to an interpretative ambiguity arising from two equally authoritative, but contradictory, arbitration clauses. In ICAC Case 217/2001, a Russian company [the "Russian Buyer"] commenced arbitration proceedings against a Canadian company [the "Canadian Seller"] for breach of contract in connection with the Canadian Seller's failure to deliver equipment and materials. Pursuant to the terms of the contract dated October 1, 1998, the Russian Buyer made a 100% advance payment for the goods. Under the terms of the contract, the goods were to be delivered by the Canadian Seller within 180 days following the advance payment. In the event of non-delivery, the Canadian Seller was obliged to refund the advance payment within the same time-frame. During the term of the contract, the Canadian Seller short-changed the Russian buyer by delivering goods valued at less than 5% of the advance payment and failed to refund the advance payment. The Canadian Seller then demanded an additional payment of

<sup>133</sup> Cf. *Beltappo Inc. v. Rich Xiberta*, S.A. 2006 WL 314338 (W.D.Wash.) (U.S. District Court, Western District, Wash. Feb. 7, 2006, per Zilly, J.) where the court denied the defendant's motion to dismiss for lack of personal jurisdiction or, in the alternative, for forum non conveniens, and for costs and attorneys' fees, on the basis of, inter alia, the defendant's concession that "there will be no conflict with a sovereign state because of the choice-of-law provision and the fact that both Spain and the United States are signatories to the CISG. This factor is neutral." Also available online at: <http://cisgw3.law.pace.edu/cases/060207u2.html>.

<sup>134</sup> *ICC Arbitration Case No. 9117 of March 1998*, CC International Court of Arbitration Bulletin [ICAB], Vol. 10/No.2 (Fall 1999) 96-101; Vol. 11/No. 2 (Fall 2000) 83-92; <http://www.unilex.info/case.cfm?pid=1&do=case&id=399&step=FullText> (Unilex) also available online at: <http://cisgw3.law.pace.edu/cases/989117i1.html>. [hereinafter "ICC Case No. 9117/1998"]

<sup>135</sup> See also UNIDROIT Principles, Art. 8, and contract modification or termination, under CISG Art. 29(2).

<sup>136</sup> *Russian Federation arbitration proceeding 217/2001 of 6 September 2002*, ICAC (Translation by Yelena Kalika; Translation edited by Mykhaylo Danylko) available online at: <http://cisgw3.law.pace.edu/cases/020906r1.html> [hereinafter "ICAC Case 217/2001"]

approximately 10% of the amount already paid, claiming additional expenses incurred. The Canadian Seller stopped the shipment of goods in transit, which were to be delivered FCA Calgary under INCOTERMS-90, until the Russian Buyer made the requested additional payment. After the Russian Buyer commenced arbitration proceedings, the Canadian Seller brought a preliminary motion contesting the ICAC Arbitral Tribunal's jurisdiction, relying on its own interpretation of the arbitration clause.

The ICAC Arbitral Tribunal analyzed Clause 4.5 of the contract (arbitration clause) and found that it was contradictory. The Russian version stipulated that disputes be arbitrated at the "Arbitration Court at the Russian Federation Chamber of Commerce and Industry." The English version provided that disputes be submitted "to the Arbitration court of Russia". The ICAC Arbitral Tribunal rejected the Canadian Seller's position that the English version governed, and held it the Canadian Seller's interpretation that disputes had to be brought within a Russian State arbitration court was unreasonable.

According to the ICAC Arbitral Tribunal:

"It is well known that the English expression "Arbitration court" is the equivalent to the Russian expression "treteiskiy sud". Such conclusion clearly follows both from the relevant international treaties, the rules of international arbitral tribunals and from other publications. For example, the Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), to which both Russia and Canada are Contracting States, applies only to awards rendered by foreign arbitral tribunals ("arbitral awards"). It does not apply to decisions of foreign State courts (whose decisions are not arbitral). The same approach is followed by the UNCITRAL Arbitration Rules (adopted by the UN General Assembly on 15 December 1976) and the UNCITRAL Model Law on International Commercial Arbitration (1985). The laws of many States on international commercial arbitration are based on the said Model Law. Such States include English speaking States. In particular, they include Canada (both on the federal level and in all the provinces and territories), Australia, four U.S. states (California, Connecticut, Oregon and Texas) and Scotland. The relevant law in Russia (1993) is also based on the Model Law.

The English name for the arbitral tribunal at the International Chamber of Commerce in Paris is the "International Court of Arbitration of the ICC". The terminology used by the international arbitral court in London is similar."<sup>137</sup>

The ICAC Arbitral Tribunal interpreted the arbitration clause based on Article 431 of the Russian Federation Civil Code taking into consideration that, pursuant to the agreement of the parties, disputes were to be resolved in accordance with Russian Federation laws. Thus, the

<sup>137</sup> ICAC Case 217/2001, "Tribunal's Reasoning", §3.1.

ICAC Arbitral Tribunal's conflicts of law analysis and application of trade usages (including UNIDROIT Principles) favoured the wording of the Russian version of the contract, including the arbitration clause. Since it was established that the contract was originally drafted in Russian and then translated into English, given the discrepancies between the texts in different languages, when interpreting the contract, the Russian text of the contract was to be preferred. This was particularly so, given that several words were clearly omitted in the English texts (referring to the arbitral tribunal in which the parties intended to arbitrate their disputes.). Finally although the parties' respective places of business were within Contracting States, (i.e. The Russian Federation and Canada), the parties' agreement to apply Russian law precluded the application of the CISG in resolving the dispute, including the interpretation of any conflicting contractual terms.

In *Travelers Property Casualty Company of America et al. v. Saint-Gobain Technical Fabrics Canada Limited*<sup>138</sup> the U.S. Federal District Court in Minnesota held that the CISG applied to litigation involving both American and Canadian parties. In *Saint-Gobain*, the initial dispute arose after Kroenke Arena Company, LLC, a Colorado-based company hired various contractors to design and construct the Pepsi Centre Arena in Denver, Colorado. TEC Specialty Products, Inc. ("TEC"), a Minnesota corporation (now known as Specialty Construction Brands, Inc.) provided components used in the Pepsi Center exterior insulation and finish system ("EIFS"). TEC issued a Purchase Order dated September 28, 1998 to Saint-Gobain Technical Fabrics Canada Limited, formerly known as Bay Mills ("Saint-Gobain") an Ontario sub-division of a French-based global manufacturer and distributor of construction reinforcing products, which included the reinforcing mesh used in the Pepsi Center's exterior walls. The back of the TEC Purchase Order contained TEC's general terms and conditions of purchase. On October 21, 1998, Saint-Gobain shipped mesh in response to TEC's Purchase Order. Later that day, Saint-Gobain prepared and sent an invoice that included Saint-Gobain's general terms and conditions of sale. Following construction, portions of the Pepsi Center's delaminated, necessitating repairs to the exterior walls.<sup>139</sup> Litigation ensued. The Colorado court initially dismissed third party claims made against Saint-Gobain based on a forum selection clause in favour of Minnesota. The Colorado litigation eventually settled. The plaintiffs qua assignees and subrogees, then sued Saint-Gobain in the Federal District Court in Minnesota for: contribution under either the Colorado or Minnesota statutes; common law or

<sup>138</sup> *Travelers Property Casualty Company of America et al. v. Saint-Gobain Technical Fabrics Canada Limited* 2007 WL 313591 (D. Minn.) (January 31, 2007) per Anne D. Montgomery U.S. District Judge, also available online at: <http://cisgw3.law.pace.edu/cases/070131u1.html> [hereinafter "*Saint-Gobain*"]

<sup>139</sup> "The Pepsi Center EIFS is a multi-layered, multi-component exterior cladding consisting of, inter alia, a base coat applied to the face of the expanded polystyrene ("EPS") insulation board, a glass fiber reinforcing mesh embedded into the base coat, and a textured decorative finish coat consisting of synthetic polymers, pigments, and filler materials. *Id.* at 2. The base coat, mesh, and finish coat are collectively referred to as 'lamina.'" *Saint-Gobain*, *id.*, per Montgomery, Dist. Ct. J.

contractual indemnification; breach of contract/warranty; negligence; breach of implied warranty of merchantability and/or fitness for a particular purpose (either common law and statutory). The parties then each brought interlocutory motions for various forms of relief, including summary judgment and pleadings-related motions.

The Minnesota court agreed with the plaintiffs' assertion that the CISG applied and governed contract formation issues in the case.<sup>140</sup> The plaintiffs had argued that under the CISG, the terms of the contract between TEC and Saint-Gobain were the terms set forth in TEC's Purchase Order, including TEC's indemnity and warranties clauses, because the CISG follows the last shot rule under Articles 18 and 19 of the CISG. However, the Minnesota court disagreed that the indemnity and warranties clauses contained in the TEC purchase order were dispositive, noting:

“This Court finds that material factual issues exist regarding formation of the parties' contract which preclude partial summary judgment for Plaintiffs. The parties seem to assume that only their writings could have formed a contract; the CISG, however, explicitly states that ‘[a] contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.’ CISG art. 11. Under the CISG, a proposal for concluding a contract is sufficiently definite to constitute an offer ‘if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and price.’ CISG art. 14(1). Thus, oral discussions between the parties agreeing to the goods, quantity, and price may have formed a contract before any purchase orders and invoices were exchanged...The record contains no evidence of discussions TEC and Saint-Gobain personnel may have had before TEC sent purchase orders, and the parties have not briefed whether an oral contract could have been formed.

Assuming arguendo that no oral discussions occurred, purchase orders and invoices were exchanged for each of TEC's mesh orders. However, only TEC's September 1998 Purchase Order is in the record. The lack of evidence in the record as to the timing of the exchange of the parties' forms prevents this Court from finding as a matter of law that the terms of TEC's purchase orders were part of a contract formed between TEC and Saint-Gobain...

Given this holding, it is unnecessary at this time to address arguments regarding the interpretation of TEC's indemnification and express warranties clauses. Such arguments will be properly addressed only if the Court determines that the clauses are part of the contract between TEC and Saint-Gobain.” [citations omitted]

<sup>140</sup> “The Court adopts the majority position on applicability of the CISG. Therefore, the CISG governs “the formation of the contract of sale and the rights and obligations of the seller [Saint-Gobain] and the buyer [TEC] arising from such a contract.” CISG art. 4(a).” *Saint-Gobain, id.*, per Montgomery, Dist. Ct. J.

Accordingly, the plaintiffs' motion for partial summary judgment was denied.

#### v) **Opting-Out-Partial Exclusion**

The parties may also partially derogate from the CISG's provisions, by either referring to domestic sales law of the Contracting State or by modification of the CISG in the terms and conditions of the contract. Thus, the parties may modify or supplement the contract formation provisions of Part II by incorporating domestic sales law or UNIDROIT Principles or the PECL (CISG, Articles 14-24).<sup>141</sup> The parties may also extend or abridge notice periods under CISG Article 39(1).<sup>142</sup>

In *Romania 6 June 2003 High Court of Cassation and Justice (Terracotta stoves case)*<sup>143</sup> a dispute arose between the Canadian plaintiff (respondent) buyer (SC M.R. SA Canada) and the Romanian defendant (appellant) seller (SC M.N. SA Deva) relating to a contract for the delivery of 12 pieces of terracotta stoves (type L) and 15 pieces of terracotta stoves (type D). The Canadian buyer paid for the goods which the Romanian seller delivered; however, following a visual inspection by the Canadian buyer's experts, the terracotta stoves showed visible cracks. The Canadian buyer then sued and obtained judgment for damages and recovery of the purchase price paid and incidental expenses based upon on the non-conformity under CISG Article 36(1).

On appeal, the Romanian High Court of Cassation and Justice reversed and dismissed the action. Citing CISG Art. 38(2), the Romanian appeal court held that the Canadian buyer had failed to "prove that the quality control was done when the products were picked up from the company in charge with the transport" and also failed to notify the Romanian seller of the non-conformity in a timely fashion pursuant to CISG Art. 39(1). The Romanian appeal concluded that:

"...regarding the fulfillment of the [Romanian] seller's obligations, the claim with regard to the contract resolution is without foundation, and there is no evidence (it cannot be proved) that the [Romanian] seller was at fault."

<sup>141</sup> Schlechtriem: SCHLECHTRIEM/SCHWENZER, Art. 6, p. 88, §12. See CISG, Arts. 7 and 8.

<sup>142</sup> See CISG, Arts. 38-40.

<sup>143</sup> *Romania 6 June 2003 High Court of Cassation and Justice (Terracotta stoves case)* [Inalta Curte de Casatie si Justitie- (High Court of Cassation and Justice)] Case No. 2957/2003; Docket no. 945/2002; rev'g 1st instance Hunedoara Tribunal 23 January 2001; 2d instance Court of Appeal of Alba Iulia 16 November 2001 available at: <http://cisgw3.law.pace.edu/cases/030606ro.html>. The author wishes to thank Mr. Sorin Aslau for his able English translation of the case.

The parties may also limit or cap the amount of damages recoverable under CISG Articles 74-76 via limitation of liability or disclaimer clauses, or change the passing of risk provisions (e.g. by selecting INCOTERMS).<sup>144</sup> However, the parties cannot derogate from or modify the provisions of CISG Part IV-Final Provisions, which relate to public international law and treaty obligations of the Contracting States and not to the parties themselves.<sup>145</sup>

vi) **Opting-In**

Given that the CISG is not truly mandatory law by virtue of party autonomy rights under Article 6, the parties may also opt-in to the CISG in cases where the subject-matter of the international sales transaction is otherwise excluded under Articles 2-5, inclusive. In situations where the parties are from non-Contracting States and have mutually agreed to have the CISG apply, they may do so, subject to the applicable conflict of laws rules of the domestic forum and any domestic statutes or consumer protection legislation which retains subject-matter jurisdiction.<sup>146</sup>

<sup>144</sup> Schlechtriem: SCHLECHTRIEM/SCHWENZER, Art. 6, p. 88, §12. See also CISG, Arts. 8, 14-24 and 29.

<sup>145</sup> Schlechtriem: SCHLECHTRIEM/SCHWENZER, Art. 6, p. 84, §3.

<sup>146</sup> Schlechtriem: SCHLECHTRIEM/SCHWENZER, Art. 6, p. 88, §11 and pp.89-90, §13.

## CONCLUSION

The CISG took root within Canadian law over fifteen years ago. Yet, the growth of Canadian CISG jurisprudence remains sparse and uneven. Canadian commercial practitioners and judges need to start understanding and applying the CISG for it to flourish. More importantly, all justice stakeholders in the Canadian legal system have a vested interest in promoting a better understanding of the CISG for the following reasons:

- 1) To maintain Canada's reputation in the international law field;<sup>147</sup>
- 2) To contribute to the global *jurisconsultorium*;<sup>148</sup>
- 3) To avoid potential professional negligence (errors & omissions) claims as a consequence of the failure to plead or rely upon the CISG<sup>149</sup> and
- 4) To avoid dubious legal precedents based upon the application of the wrong law, which represents a potential misuse of judicial resources and diminishes access to justice.<sup>150</sup>

Hope springs eternal.

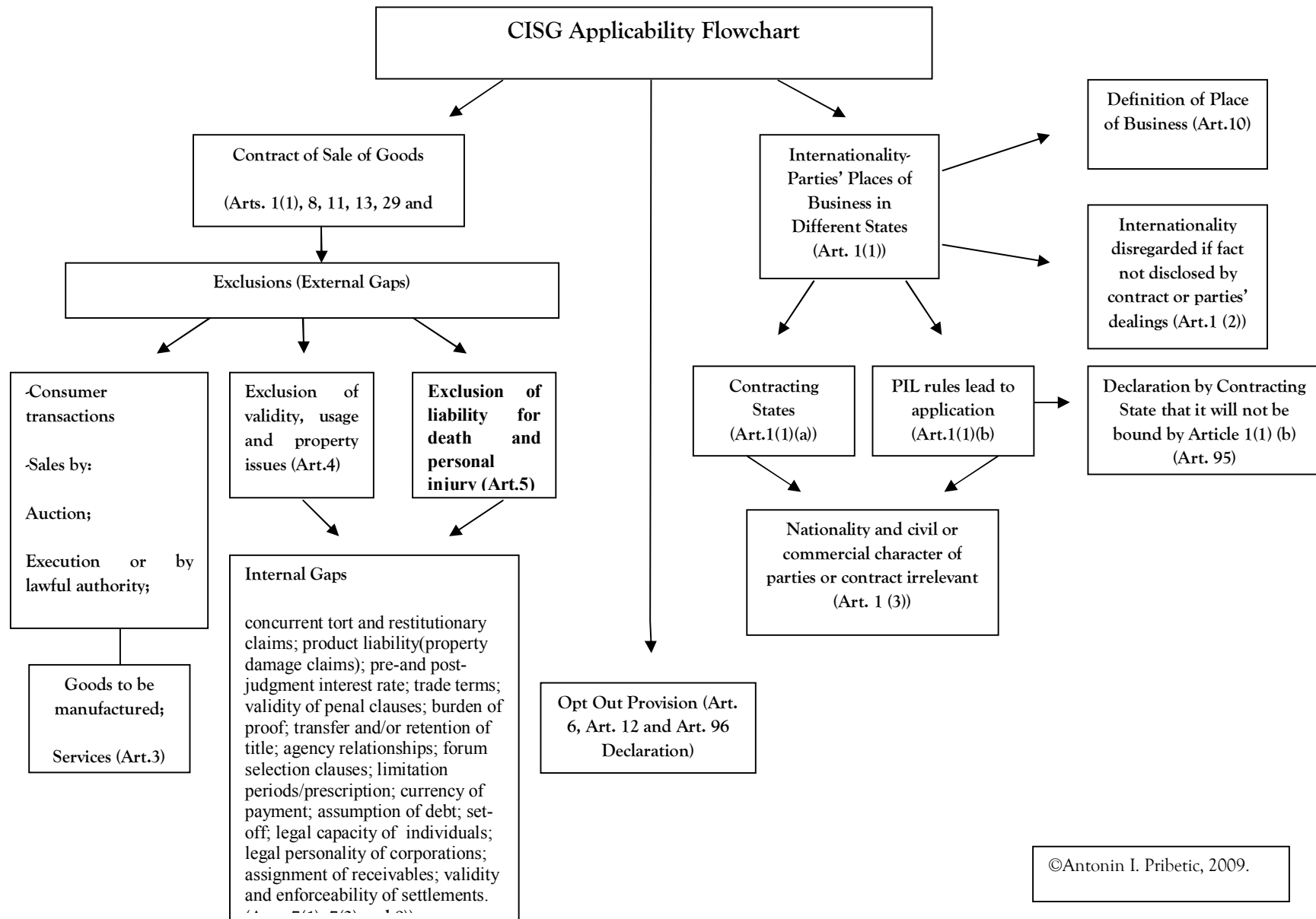
<sup>147</sup> Whether or not Canada's "State reputation" has diminished in the context of multilateral or bilateral trade is another matter. See, Colin B. Picker, "Reputational Fallacies in International Law: A Comparative Review of United States and Canadian Trade Actions", (2004), 30 *Brooklyn J. Int'l L.* 68.

<sup>148</sup> "A global *jurisconsultorium* on uniform international sales law is the proper setting for the analysis of foreign jurisprudence." Vikki Rogers and Albert Kritzer, in "A *Uniform International Sales Law Terminology*", in Schwenger, I. / Hager, G. eds., *Festschrift für Peter Schlechtriem zum 70. Geburtstag*, Tübingen: J.B.C. Mohr / Paul Siebeck (2003) 223-253, available online at: <http://cisgw3.law.pace.edu/cisg/biblio/rogers2.html>. See also, Camilla Baasch Andersen, "The *Uniform International Sales Law and the Global Jurisconsultorium*" 24 *Journal of Law and Commerce* Vol. 2 (2005), available online at <http://www.cisg.law.pace.edu/cisg/biblio/andersen3.html> where the author suggests that the concept of a global *jurisconsultorium*:

"...denote[s] the need for cross-border consultation in deciding issues of uniform law. It is an excellent descriptive term for the phenomenon of meeting of minds across jurisdictions in the shaping of international law. However, the term *jurisconsultorium* also lends itself well to the formation of such law in a scholarly *jurisconsultorium*. In essence, this article will examine the genesis of the CISG and the scholarly *jurisconsultorium* from which it sprang, and the need for practitioners (i.e. judges, arbitrators and legal counsel) to extend the *jurisconsultorium* in practice to ensure uniformity."

<sup>149</sup> See William Dodge "Teaching the CISG in Contracts" (2000) 50 *J Legal Educ.* 72 ("Failing to determine the law that governs a contract (particularly when it is the law of the United States) is probably malpractice." See also, Ronald A. Brand, *Professional Responsibility in a Transnational Transactions Practice*, (1998) 17 *J.L. & Com.* 301, 336-37 and Reimann, "The CISG in the United States: Why It Has Been Neglected and Why Europeans Should Care", *supra* note 30 at 121.

<sup>150</sup> Peter L. Fitzgerald, "The International Contracting Practices Survey Project: An Empirical Study of the Value and Utility of the United Nation's Convention on the International Sale of Goods (CISG) and the UNIDROIT Principles of International Commercial Contracts to Practitioners, Jurists, and Legal Academics in the United States" *J. L. & Com.* Vol. 27, 2008 (forthcoming) at 14, available at SSRN: <http://ssrn.com/abstract=1127382>.





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