

## 6 BRAZIL'S ADHESION TO THE CISG – CONSEQUENCES FOR TRADE IN CHINA AND LATIN-AMERICA

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### 6.1 INTRODUCTION

Given Brazil's current international trade volumes,<sup>1</sup> its adherence to the United Nations Convention on Contracts for the International Sale of Goods of 1980 (CISG) will mean an important step towards the globalization of international sales law. In this atmosphere of expectancy, a couple of questions come up: Is a further step towards globalization in this field something to be celebrated? What are the consequences of Brazil's adherence to the CISG for global and regional trade? Before answering these questions through this chapter, we would like to make an introductory comment on globalization and its relationship with the CISG.

Globalization has been broadly defined as the internationalization of ideas and concepts driven by trade in goods and information exchange.<sup>2</sup> Despite generally being considered as a natural human phenomenon caused by advances in technology, detractors frequently regard it as mere westernization of the world: a hegemonic ideology<sup>3</sup> imposed by some countries of the western hemisphere which destroys pre-existing cultures and local autonomy.<sup>4</sup>

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1 Brazil's 2010 exports amounted to 202 billion, ranking 22 in the world list, while exports amounted to 191 billion ranking 20 in the world list according to World Trade Organization International – Trade Statistics 2011, Table I.8, p. 24, available at <[www.wto.org/english/res\\_e/statis\\_e/its2011\\_e/its11\\_world\\_trade\\_dev\\_e.pdf](http://www.wto.org/english/res_e/statis_e/its2011_e/its11_world_trade_dev_e.pdf)>.

2 See the definition roadmap in J. Scholte, 'What Is Globalization? The Definitional Issue – Again', *CSGR Working Paper No. 109/02*, December 2002, p. 9, available at <[dspace.cigilibrary.org/jspui/bitstream/123456789/9593/1/What%20is%20Globalization%20The%20Definitional%20Issue%20Again.pdf?1](http://dspace.cigilibrary.org/jspui/bitstream/123456789/9593/1/What%20is%20Globalization%20The%20Definitional%20Issue%20Again.pdf?1)>.

3 Ideology which includes social structures such as capitalism, industrialism, rationalism, urbanism, individualism, etc. See the definition roadmap in J. Scholte, *supra* note 2, p. 12.

4 See the definition roadmap in J. Scholte, *supra* note 2, p. 12.

Whether or not these are the real effects of globalization, arguably caused by the interests of few countries, is a question we are not prepared to answer here. This chapter does not intend to define the elusive notion of globalization or verify the accuracy of the criticisms raised against it. Nonetheless, we believe that based on the definition and criticisms above, there are examples of good globalization: The CISG is – as presented by Prof. Dr. Ingeborg Schwenzer, LL.M. – a ‘Story of Worldwide Success’<sup>5</sup> in this respect.

With 79 CISG contracting states to date,<sup>6</sup> the CISG is unquestionably an international legal instrument which is becoming increasingly global every year. Since its preparation through to its adoption as a UN Convention, its drafters never intended to impose a one-sided view or a one-country practice of sales law. CISG provisions were prepared by an UNCITRAL Working Group composed of jurists from fifteen different countries with dissimilar legal systems.<sup>7</sup> The draft convention was subsequently accepted during a Conference of Plenipotentiaries by a majority of delegates from 62 different countries representing various legal systems of the world.<sup>8</sup> There are numerous examples of CISG provisions which reflect a compromise between delegates from countries with different levels of industrial development and legal systems.<sup>9</sup> Moreover, the CISG was not aimed at diminishing pre-existing domestic sales laws. Domestic law provisions on sales remain applicable amongst domestic traders.<sup>10</sup> Although domestic law amendments have often been influenced by the CISG provisions, this enrichment has been voluntary and not imposed.<sup>11</sup>

5 See generally I. Schwenzer & P. Hachem, *The CISG – A Story of Worldwide Success*, in J. Kleinemann (Ed.), *CISG Part. II Conference*, Stockholm 2009, p. 119 *et seq.*, available at <ius.unibas.ch/uploads/publics/9587/20110913164502\_4e6f6c6e5b746.pdf>.

6 See the current [March 2013] number of contracting states at the UNCITRAL official website, available at <www.uncitral.org/uncitral/en/uncitral\_texts/sale\_goods/1980CISG\_status.html>; San Marino is the 78th contracting state to CISG which will enter into force for San Marino on 1 March 2013. Brazil is the 79th country to adopt the CISG, which will enter force there on 1 April 2014.

7 See the ‘Historical Introduction to the Draft Convention on Contracts for the International Sale of Goods, prepared by the Secretariat’, Document A/Conf.97/5, Para. 10, available at <www.uncitral.org/pdf/english/texts/sales/cisg/a-conf-97-19-ocred-e.pdf>: “The Working Group, which was subsequently enlarged to 15 members, held nine sessions. At its first seven sessions it considered the Sales Convention, and at its eighth and ninth sessions it considered the Formation Convention. In both cases the Working Group recommended that the Commission adopt new texts. These texts modified the rules contained in the two uniform laws to make them more acceptable to countries of different legal, economic or social systems.”

8 See I. Schwenzer & P. Hachem, *supra* note 5, p. 122.

9 For example, Art. 16 CISG on revocation of offers; Art. 8 rules of interpretation; Arts. 38 and 39 on the buyer’s duty to examine the goods and give notice of any non-conformity, respectively, etc. See on these provisions J. Lookofsky, *The 1980 United Nations Convention on Contracts for the International Sale of Goods*, in J. Herbots (Ed.) / R. Blanpain (Gen. Ed.), *International Encyclopaedia of Laws – Contracts*, Suppl. 29 (December 2000), Arts. 8 and 16, pp. 1-192, available at <www.cisg.law.pace.edu/cisg/biblio/loo8.html> and <www.cisg.law.pace.edu/cisg/biblio/loo16.html>.

10 Under Article 1 CISG, this applies only to some aspects of sales contracts in which parties have their respective places of business in different states; domestic sales contracts’ provisions govern sales contracts between parties domiciled in the same country.

11 For example, the amendments in the laws of sales contracts of China, Finland, Norway, Sweden, the Baltic States, etc., in I. Schwenzer & P. Hachem, *supra* note 5, pp. 123-125.

The CISG has increased its state memberships gradually. Since its entry into force in 1988, the number of contracting states grew steadily from 10 to 78 in 2012, with an average of three new contracting states per year.<sup>12</sup> This progressive increase in membership can only mean worldwide acceptance of its multilegal design, quality and neutrality of provisions. With the aforementioned membership number, the CISG potentially governs approximately 80% of the world's trade of goods.<sup>13</sup> Nevertheless, some important trading nations from the G20 have not adhered to the CISG, including India, South Africa and the United Kingdom.

In sum, the CISG is part of what we might call a 'multilegal' globalization in the field of sales contracts. The CISG is a good example of global uniformity of concepts and ideas capable of conciliation, while preserving the different perceptions of justice among national laws. From a broader perspective, the CISG is part of an important element of globalization: International trade. Trade is a historic way of living and has extra-economic positive effects at an international level. For example, the notion of interdependency theory – the idea that countries are less likely to go to war with each other if they are trading partners – has proven to be true.<sup>14</sup>

As an instrument of trade, the CISG aims at decreasing transaction costs by being a predictable system that is understood and appreciated by everyone involved in international trade.<sup>15</sup> On the other hand, the CISG aims at minimizing legal risk by facilitating fair international trade or dispute settlement through its provisions. As illustrated below, the task of predicting the rules for contracts involving parties from different legal systems has proven to be a difficult task, due to the varying conflict of laws rules and domestic law provisions. The CISG reduces, to a great extent, the legal risk and transaction cost resulting from the uncertainty of applicable provisions by defining specific default obligations that the parties are expected to fulfil.

In Part 6.2 of this chapter, we address the general compatibility between Brazilian contract law and the CISG. Subsequently, we examine current issues of potential legal risks and transaction costs in trade between China and Brazil's sellers and buyers in Part 6.3 and, Brazil and Latin America's sellers and buyers in Part 6.4. We also discuss possible ways to mitigate these risks and costs through Brazil's adherence to the CISG.

12 See note 6 above *supra*.

13 See P. Schlechtriem & I. Schwenzer, in I. Schwenzer (Ed.), *Schlechtriem & Schwenzer: Commentary on the UN Convention for the International Sale of Goods (CISG)*, 3rd edn., Oxford University Press, Oxford 2010, Introduction, I. See also World Trade Organization International Trade Statistics 2011, Table I.8, p. 24, available at <[www.wto.org/english/res\\_e/statis\\_e/its2011\\_e/its11\\_world\\_trade\\_dev\\_e.pdf](http://www.wto.org/english/res_e/statis_e/its2011_e/its11_world_trade_dev_e.pdf)>; to date, nine of the ten leading trade nations are CISG Contracting States.

14 See S. Burchill, in S. Burchill *et al.*, *Theories of International Relations*, 3rd edn., Palgrave, Basingstoke 2005, p. 55 *et seq.*

15 See in C. Kee & E. Munoz, 'In defence of the CISG', 14 *Deakin Law Review* 1 (2009), p. 102.

## 6.2 BRAZIL AND CISG

On 8 March 2012, Brazil's Chamber of Deputies approved the text of the CISG, as a project of legislative decree.<sup>16</sup> At its plenary session of 16 October 2012 the Brazilian Senate approved the text of the CISG. On 4 March 2013, Brazil's instrument of accession to the CISG was deposited with the Secretary-General of the United Nations.<sup>17</sup>

Despite being involved in the drafting process and represented at the Vienna Plenipotentiary Conference,<sup>18</sup> Brazil's adhesion to the CISG has taken some years. The reasons for this 'disinterest' are not officially known.<sup>19</sup> It has been reported that 'disinterest' comes from the local businesses', lawyers' and judges' idiosyncrasies rather than from legal considerations.<sup>20</sup> Indeed, concerns that CISG's provisions might conflict with the new principle of social function of contract, which inspired the 2002 Brazilian Civil Code,<sup>21</sup> are unjustified. In particular, the core provisions embracing the above principle,<sup>22</sup> which are the basis of the newly enacted rules on adhesion contracts,<sup>23</sup> gross disparity<sup>24</sup> and hardship,<sup>25</sup> do not

16 See 'Projeto de Decreto Legislativo de Acordos, tratados ou atos internacionais', *PDC 222/2011*, available at <[www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=502799&ord=1](http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=502799&ord=1)>.

17 On 8 December 2009, the proposed text of adhesion to the CISG was submitted to the analysis of the Ministry Council of the Brazilian Chamber of Foreign Affairs (CAMEX). On 30 March 2010, the proposed text of adhesion to the CISG was submitted to the President. On 4 November 2010, the official communication of the President was sent to the Chamber of Deputies together with an explanatory memorandum prepared by the Ministry of Foreign Affairs and the text of the CISG. On 18 May 2011, the Chamber of Deputies approved the text of the CISG as a project of legislative decree. On 3 November 2011, the proposed text accompanied by the respective legal opinion was approved before the Constitution, Justice and Citizenship Committee. At its plenary session of 16 October 2012, the Brazilian Senate approved the text of the CISG. This was the final step as far as the Brazilian legislature is concerned. The next step is the promulgation of the text by the Executive Branch (the Brazilian Presidency). Then the instrument of accession must be subsequently deposited with the Secretary-General of the UN. Completion of this process would make Brazil the 79th contracting state to the CISG. See legislative history of Brazil's adhesion to the CISG in <[www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=502799&ord=1](http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=502799&ord=1)>.

18 See the United Nations Conference on Contracts for the International Sale of Goods — Official Records — Vienna, 10 March-11 April 1980. New York, UN, 1991, p. 234, Doc. A/CONF.97/SR.12.

19 See E. Grebler, 'The Convention on International Sale of Goods and Brazilian Law', 25 *Journal of Law and Commerce* (2005-2006), p. 467.

20 See E. Grebler, *supra* note 19, p. 467.

21 See E. Grebler, *supra* note 19, p. 469.

22 Brazil Art. 421 Civil Code: 'freedom of contract shall be based upon and limited by the social function of contract'; Brazil Art. 422 Civil Code: 'at the conclusion and performance of the contract, the parties shall observe the principles of honesty and good faith.'

23 See Brazil Arts. 423, 424 Civil Code; Point 22 (g) of Exposição de Motivos do novo Código Civil de 2002 [Explanatory Memorandum of the Brazilian Civil Code of 2002]; See also E. Muñoz, *Modern Law of Contracts and Sales in Latin-America, Spain and Portugal*, Eleven International Publishing, The Hague 2011, pp. 121, 122.

24 Brazil Art. 157 Civil Code; E. Grebler, *supra* note 19, p. 470.

25 Brazil Art. 478 Civil Code; E. Grebler, *supra* note 19, p. 470.

enter into conflict with the CISG. Regarding adhesion contracts,<sup>26</sup> the nullity of clauses providing an anticipated waiver of any right derived from the nature of the deal<sup>27</sup> raises an issue of contract validity which is not governed by the CISG.<sup>28</sup> On the other hand, despite Article 424 of Brazilian Civil Code<sup>29</sup> being pre-empted by the CISG,<sup>30</sup> this provision concurs with Article 8 of the CISG and its inherent principles of interpretation – in particular the *interpretatio contra proferentem*.<sup>31</sup> In respect to gross disparity, the CISG does not govern this issue. The applicable domestic law has to decide upon the fate of the contract.<sup>32</sup> With regard to hardship, Article 79 CISG establishes the same conditions as Articles 478-480 of the Brazilian Civil Code.

Generally compatible, the CISG has already left a mark in the interpretation and construction of Brazilian domestic law. For instance, Brazilian Restatement of Law No. 169,<sup>33</sup> proposed by Prof. Vera Jacob Fradera has been the basis of Brazilian court decisions invoking Article 77 CISG to the effect that the party who relies on a breach must take measures to reduce damages.<sup>34</sup> Restatement of Law No. 409 – under which parties are bound by any usage to which they have agreed and by any practices established between them – also proposed by Prof. Vera Jacob Fradera, was influenced by Article 9 CISG, and has recently come into force in Brazil.<sup>35</sup>

Another positive sign of the CISG's acceptance in Brazil is the increasing number of Brazilian universities that participate in the Willem C. Vis International Commercial

26 Adhesion contracts are narrowly defined by scholarship: '1) one party, which is economically superior to the other (*de facto* or *de jure* monopoly), has made an offer; and 2) the offer was permanent, general and made to an unlimited and undefined number of people; and 3) the contractual terms are set en bloc by the economically superior party, in such a way that the other party may only either accept such terms as they are, or decline the offer altogether.' L. Toledo das Dores Niess, *Contrato Tipo e Contrato de Adesão*, in G. Tepedino, & L. Fachin (Eds.), *Obrigações e contratos: contratos: princípios e limites*, Editora Revista dos Tribunais, São Paulo 2011, p. 268. Hence, most international sale of goods will not fall into this class of contracts. According to Gomes, 'the fundamental element of an adhesion contract is the fact that the 'adhering party' does not have any other way to achieve its goals, other than to execute the agreement unilaterally imposed by the other party': see O. Gomes, *Contratos*, Editora Forense, Rio de Janeiro 2008, p. 141.

27 Brazil Art. 424 Civil Code.

28 See Art. 4(a) CISG; see also the case law cited in I. Schwenzer & P. Hachem, in I. Schwenzer (Ed.), *supra* note 13, Art. 4, Para. 38, n. 131: 'Whether and to what extent individual clauses and standard terms are subject to judicial control is to be decided by the applicable domestic law.'

29 Brazil Art. 424 Civil Code, which states that ambiguous or contradictory clauses in standard form contracts are to be interpreted in the adhering party's favor.

30 See I. Schwenzer & P. Hachem, in I. Schwenzer (Ed.), *supra* note 13, Art. 4, Para. 12.

31 See M. Schmidt-Kessel, in I. Schwenzer (Ed.), *supra* note 13, Art. 8, Para. 49.

32 I. Schwenzer & P. Hachem, in I. Schwenzer (Ed.), *supra* note 13, Art. 4, Para. 40.

33 See Restatement of Law No. 169, available at <daleth.cjf.jus.br/revista/enunciados/IIIJornada.pdf>.

34 See Rio Grande do Sul State Tribunal, Civil Appeal, No. 70025609579, Relator: U. Guaspari Sudbrack, 20 April 2009, available at [cisgw3.law.pace.edu/cases/090520b5.html](http://cisgw3.law.pace.edu/cases/090520b5.html).

35 Restatement of Law No. 409, available at <[www.jf.jus.br/cjf/cejpubl/Compilacao%20enunciados%20aprovados1.pdf](http://www.jf.jus.br/cjf/cejpubl/Compilacao%20enunciados%20aprovados1.pdf)>; Original text in Portuguese, available at <[cisgw3.law.pace.edu/cisg/text/090520portuguese.pdf](http://cisgw3.law.pace.edu/cisg/text/090520portuguese.pdf)>.

Arbitration Moot,<sup>36</sup> the biggest competition of international commercial law and arbitration in the world, held annually in Vienna and Hong Kong. Each year the Vis Moot confronts Brazilian students with the interpretation of the CISG and its application to an international sales contracts case. This is a real sign of awareness of the need to prepare for its future application by Brazilian lawyers.

### 6.3 BRAZIL'S ADHESION TO THE CISG – CONSEQUENCES FOR CHINA

#### 6.3.1 *Legal Risk Reduction – the Applicable Law in Brazil-China Sales Contracts*

China is Brazil's main trading partner. In 2011, approximately 17.3% of Brazil's exported goods were to China, while 14.5% of Brazil's imported goods came from China.<sup>37</sup> In 2011, exports to China amounted to USD 44,314.5 million while imports from China amounted to USD 32,788.4 million.<sup>38</sup> Both countries have an interestingly well-balanced trade relationship.

As it stands now, the applicable law to sales contracts entered into between traders having their places of business in China and Brazil is difficult to predict and hence a main concern for traders. The CISG is potentially applicable only in rare cases. Let us assume that the standard sales contract between these traders has an average value of USD 10 million.<sup>39</sup> This means that in 2011 there might have been approximately 4,431 sales contracts, in which most likely the seller had place of business in Brazil and the buyer in China and about 3,279 sales contracts where the seller had place of business in China and the buyer in Brazil. Having places of business in these two respective countries alone does not trigger the application of the CISG since only China is a CISG contracting state.<sup>40</sup> Nevertheless, CISG's application might be possible under Article 1(1)(b). This provision states that the Convention applies to sales contracts between parties whose places of business are in different States when the rules of private international law lead to the application of the law of a contracting state.

36 In 2012, thirteen Brazilian universities participated in the Vis Moot of a total of 285 (same number as France), *The Annual Willem C. Vis International Commercial Arbitration Moot*, information available at <[cisgw3.law.pace.edu/vis.html](http://cisgw3.law.pace.edu/vis.html)>.

37 Brazil's trade statistics upon selection country China, data available at <[www.mdic.gov.br/sitio/interna/interna.php?area=5&menu=3385&refr=576](http://www.mdic.gov.br/sitio/interna/interna.php?area=5&menu=3385&refr=576)>; individual files available at <[www.internationalprivatelaw.com/Braziltrade2011.html](http://www.internationalprivatelaw.com/Braziltrade2011.html)>.

38 *Id.*

39 We assume this average since USD 10 million is, for example, the average value of an international contract for the sale of commodities.

40 See Art. 1(1)(a) CISG. The CISG will enter into force on 1 April 2014.

It is generally understood that the rules of private international law include provisions providing the freedom to choose the (foreign) law(s) applicable to the contract.<sup>41</sup> If we take international surveys as a general reference, it is possible that approximately 47%<sup>42</sup> of these contracts included a choice of law clause.<sup>43</sup> Given the fairly equal trade development of Brazilian and Chinese parties, it is unlikely that either Brazilian law or Chinese law will be predominantly imposed at the bargaining table. On the basis of international surveys on preferred laws to governed international contracts, we dare to assume that choice of law clauses in these sales contracts will probably designate 30% Brazilian law, 30% Chinese law and 40% other laws, very possibly 10% Swiss law, 10% Singapore law, 10% English law and 10% US law.<sup>44</sup> Assuming all these choices of law clauses were valid under the relevant *lex fori* or *lex arbitri*, the CISG will potentially apply by virtue of Article 1(1)(b) in few of the above examples. In fact, it only applies where the chosen law is that of a contracting state that has not made a declaration under Article 95,<sup>45</sup> for example

- 41 See I. Schwenzer & P. Hachem, in I. Schwenzer (Ed.), *supra* note 13, Intro to Arts. 1-6, Para. 12. Arbitration – ‘Where the parties make reference to the law of a Contracting State without any further specifications, the CISG as part of this law generally applies to the arbitral proceedings provided that the requirements of Article 1(1) are met’; I. Schwenzer & P. Hachem, in I. Schwenzer (Ed.), *supra* note 13, Ad. Art. 1, Para. 31: State Courts – ‘The conflict of laws rules of the forum may allow a choice of law by the parties referring any dispute to the law of a Contracting State or they may use an objective test such as the closest relationship, the place of the seller’s business, etc., leading to the law of a Contracting State.’
- 42 I. Schwenzer, & C. Kee, ‘Global Sales Law Theory and Practice’, in I. Schwenzer, & L. Spagnolo (Eds.), *Towards Uniformity – The 2nd Annual MAA Schlechtriem CISG Conference*, Eleven International Publishing, The Hague 2011, p. 161.
- 43 In a well-known survey, 51% of the participant international corporation considers that governing law is the first issue decided: see White & Case LLP, *2010 International Arbitration Survey: Choices in International Arbitration*, p. 8, 9, 11, available at <choices.whitecase.com>.
- 44 This assumption is based on the results of an international survey asserting that the most important factor is the perceived neutrality and impartiality of the legal system (66%), followed by the appropriateness of the law for the type of contract (60%) and familiarity with and experience of the particular law (58%). 44% of corporations would choose the law of their home jurisdiction if they are free to do so. Chinese and Brazilian parties will then tend to choose, alternatively, any other neutral law which is familiar or appropriate for the type of contract. Most chosen laws in international trade are English law, New York law and Swiss law: see White & Case LLP, *2010 International Arbitration Survey: Choices in International Arbitration*, pp. 11-13, available at <choices.whitecase.com>.
- 45 I. Schwenzer & P. Hachem, in I. Schwenzer (Ed.), *supra* note 13, Art. 1, Para. 37: ‘If this is not the case but its conflict of laws rules lead to the law of a Contracting State that has not declared a reservation under Article 95, the CISG is nevertheless to be applied if the Convention’s basic requirements are met’; P. Schlechtriem, *Uniform Sales Law – The UN-Convention on Contracts for the International Sale of Goods*, Manz, Vienna 1986, p. 27: ‘If the forum’s conflicts law invokes the law of a Contracting State that has made the reservation, the forum must apply the domestic law of the reservation state and not the Convention’; J. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, Kluwer Law International, Alphen aan den Rijn 1999, pp. 43, 44: ‘Example 1H. The facts are the same as in Example 1G in that State A (the Seller’s State) made an Article 95 declaration that A “is not bound” by Sub (1)(b). However, in this case the forum is State C, a Contracting State that has retained Sub (1)(b). As in Example 1F, the conflicts, (PIL) rules of the forum point to State A. The correct approach follows from the discussion of Example 1F. The forum in State C, having determined that PIL points to State A, should conclude that since State A has

Switzerland.<sup>46</sup> In the examples above, as China, Singapore and the United States have made reservations under Article 95, it means the CISG will not apply by virtue of the rules of private international law, *including* choice of law clauses.<sup>47</sup> The United Kingdom is not a CISG contracting state.

This being said, some scholars would advocate that the reservation under Article 95 only binds the court within the contracting state which made such reservation.<sup>48</sup> This extends the application of the CISG when rules of international private law lead to the law of China, Singapore or the US, and no court in these countries is involved in determining the applicable law.

The instances in which the CISG might apply to Brazilian-Chinese sales contracts are further reduced depending on whether these end up in arbitration or litigation before state courts. International surveys show that approximately 60%<sup>49</sup> of international contracts disputes will go to arbitration. If we take this number as an example, choice of law clauses designating the law of a contracting state, would be upheld as valid under most arbitration laws, including under Brazilian and Chinese law, and lead to the application

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rejected Sub (1)(b) the law of State A for this transaction does not include the Convention; consequently the forum in State C should apply the domestic sales law of State A. This approach respects State A's option to reject applicability of the Convention under Sub (1)(b) when a party in that State contracts with a party in a non-Contracting State and the rules of PIL point to State A. Moreover, this approach would be like the approach of: (1) other States that have rejected Sub (1)(b) (like State A); (2) all non-Contracting States like State N'.

- 46 I. Schwenzer & P. Hachem, *supra* note 13, Art. 1, Para. 30: 'If the relevant rules of private international law (which in this case – in contrast with Article 1(1)(a) – are to be applied by a court before it can apply the CISG) refer to the law of a Contracting State, then the CISG applies also to contracts of sale in which neither, or only one, of the parties to the contract has its place of business in a Contracting State'; I. Schwenzer & P. Hachem, *in* I. Schwenzer (Ed.), *supra* note 13, Art. 1, Para. 32: 'If the forum State itself is a non-Contracting State, the CISG may be applicable on account of Article 1(1)(b) if the law which the court or arbitral tribunal is referred to is that of a CISG Contracting State.'
- 47 See contracting states that made a reservation under Art. 95 in UNCITRAL official website, available at <[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)>.
- 48 I. Schwenzer & P. Hachem, *in* I. Schwenzer (Ed.), *supra* note 13, Art. 1, Para. 38: 'The question arises in the rare case where a State court in a non-reserving Contracting State has to deal with one party coming from a reserving Contracting State and one party from a non-Contracting State. In this case the CISG is not applicable on account of Article 1(1)(a). The court therefore has to apply its conflict of laws rules and may thereby be referred to the law of the party located in the reservation State. As this State is generally a Contracting State, the requirements of Article 1(1)(b) are met. The current majority of authors, however, holds that the court still may not apply the CISG but advocate that the court has to apply the same sales law a court in the reservation State would apply to the case. Germany has supported this view in Art. 2 Vertrags G. The preferable view, however, holds the Convention applicable. Art. 95 only refers to the Contracting State making the declaration ("it") and – contrary to Arts. 92(2), 93(3), and 94(2) – does not indicate any effect on the reserving State's status as Contracting State. Moreover Art. 1(1)(b) obliges the court to apply "this Convention" and not the law of the Contracting State to which it is referred.'
- 49 I. Schwenzer & C. Kee, *in* I. Schwenzer & L. Spagnolo (Eds.), *supra* note 42, p. 157.



of the CISG.<sup>50</sup> Arbitral Tribunals actually recognize the validity of a choice of law clause designating the CISG itself as the applicable law.<sup>51</sup>

However, the remaining 40% can potentially end up in litigation before state courts. In such a scenario, the validity of the choice of law clauses is not always guaranteed.<sup>52</sup> Before Brazilian courts, choice of law clauses would be found invalid when a Brazilian domiciled party is involved or performance takes place within Brazil. Article 9 of the Introductory Act to the Brazilian Civil Code provides that contractual obligations are governed by the law of the country in which they are concluded, thereby excluding any other choice of law possibility.<sup>53</sup>

Absent a valid choice of a foreign competent court or arbitration agreement by the parties, it is probable that, should a dispute arise, contracts either including a choice of law clause or not, are subject to Brazil's conflict of law rules. Brazil's conflict of jurisdictions rules designate the court of the Defendant's domicile; if the Defendant is domiciled outside Brazil, the court at the Claimant's domicile shall also have jurisdiction.<sup>54</sup> This gives any Brazilian party to an international contract the possibility to bring the dispute before its country's courts.

Hence, unless the sales contract is concluded in a CISG contracting state,<sup>55</sup> the Brazilian State Court, under its own conflict of laws rules, will apply the law of the country where the contract was concluded.

Should a dispute over the sales contract be decided by Chinese courts, China's conflict of law rules will recognize the validity of choice of law clauses.<sup>56</sup> Absent a parties' choice,

50 Some scholars argue that this is true provided the law determined is of a Contracting State has not made an Art. 95 reservation, while other scholars argue that arbitral tribunals are not bound by said reservation but only state courts from countries which made an Art. 95 reservation. See scholarship reference, *supra* notes 45, 48.

51 See Stockholm Chamber of Commerce Arbitration Award of 5 April 2007 (*Pressure sensors case*), available at <[cisgw3.law.pace.edu/cases/070405s5.html](http://cisgw3.law.pace.edu/cases/070405s5.html)>.

52 I. Schwenzer & P. Hachem, in I. Schwenzer, *supra* note 13, Art. 1, Para. 33: "If the conflict of laws rules of the forum prohibit or restrict a choice of law by the parties, their choice of the law of a Contracting State may be ineffective and, therefore, may not provide an avenue to the CISG and its Art. 1(1)(b)."

53 E. Munoz, *supra* note 23, pp. 30, 31.

54 See Art. 94 of Brazilian Code of Civil Procedure: Claims founded on personal rights and rights *in rem* over movable assets will be decided, as a rule, in the jurisdiction of the defendant. However, under para. 3, where the defendant is not domiciled or resident in Brazil, the claim will be filed in the domicile of plaintiff. If the plaintiff also resides outside Brazil, the suit can be filed in any court.

55 I. Schwenzer & P. Hachem, in I. Schwenzer (Ed.), *supra* note 13, Art. 1, Para. 31: 'Article 1(1)(b), of course, does not have to be applied by courts in non-Contracting States, nor are arbitral tribunals obliged to apply it. But courts in non-Contracting States and arbitral tribunals may have to apply the Convention as foreign law, if their conflict rules refer to the law of a Contracting State.'

56 PRC Art. 126 CL, stating that the choice of law clause may cover questions of formation of contract, validity and enforcement of contract, liability for breach as well as questions relating to modification, suspension, assignment or avoidance of the contract, see Art. 2 Rules of Supreme People's Court on Issues Concerning the Application of Law in Disputes Involving Foreign related Civil or Commercial Contracts.

the applicable law is that of the country with which the contract has the closest connection.<sup>57</sup> However, it is not granted that Chinese courts would come to the application of the CISG. As an Article 95 reservation contracting state, scholars would suggest that the CISG would not be applied by virtue of Article 1(1)(b) if the conflict of laws rules lead to the application of the law of a contracting state that has also made a reservation under Article 95 CISG.<sup>58</sup>

Against this background, we estimate that there is high unpredictability as to the law applicable to Brazilian-Chinese sales contracts. Firstly, this is obviously due to the fact Brazil's current conflict of laws and jurisdictions rules raise important obstacles for the application of any foreign law or international convention such as the CISG under Article 1(1)(b). Secondly, Brazil is not yet a CISG contracting state, so the CISG cannot apply under Article 1(1)(a), and China's reservation under Article 95 CISG makes the CISG hardly applicable under Article 1(1)(b).

Brazil's adhesion to the CISG will make it the default law applicable in Brazil and China to sales contracts between parties with places of businesses in these countries. As a consequence, legal risk expressed in opportunism by contracting parties who, given the issues of choice of law validity, may race to litigate in Brazil or China, because of uncertainties on the applicable or because the law applied by one court will suit one party's interests in appropriate cases, will be reduced. Such opportunism is not desired. It can arouse 'fear and cause businesses to shy away from potentially profitable contracts, or to factor in additional costs to cover such risks. Assuming opportunism could be significant, eliminating or minimizing legal risk would play a salutary role in promoting contracts across national borders.'<sup>59</sup>

57 PRC Art. 5 Rules of Supreme People's Court on Issues Concerning the Application of Law in Disputes involving Foreign related Civil or Commercial Contracts.

58 I. Schwenzer & P. Hachem, in I. Schwenzer (Ed.), *supra* note 13, Art. 1, Para. 37: 'A court in a reservation State will apply the CISG only if both parties have their places of business in CISG Contracting States, ie if the requirements of Article 1(1)(a) are met. If this is not the case but its conflict of laws rules lead to the law of a Contracting State that has not declared a reservation under Art. 95, the CISG is nevertheless to be applied if the Convention's basic requirements are met'; J. Honnold, *supra* note 45, p. 42: 'In short, the proper approach for the forum in State C is to decide which State's law is indicated by the rules of PIL. Then, when PIL points to the law of a State that retained Sub. (1)(b) (as in Example 1F) the forum should apply the Convention. As we have noted, this approach gives the same result in the fora of all States that have retained Sub (1)(b) and all non-Contracting States, and would eliminate the impossible problems (including forum-shopping) that would arise if fora in States like State C should improperly apply their Art. 95 reservation when no party from an Art. 95 reservation State is before the court'.

59 See S. Gopalan, 'A Demandeur-Centric Approach to Regime Design in Transnational Commercial Law', 39 *Georgetown Journal of International Law* (2008), p. 334, available at <[www.cisg.law.pace.edu/cisg/biblio/gopalan2.html](http://www.cisg.law.pace.edu/cisg/biblio/gopalan2.html)>.

6.3.2 Transaction Cost Reduction – Harmonization of Differences in China-Brazil  
Sales Domestic Laws

Having a unified set of provisions for most aspects of sales contracts will also reduce transaction costs. Current differences in Brazilian and Chinese domestic laws impose transaction costs on contracting parties, including the cost of obtaining information about the other country's law, translations, legal advice while negotiating contracts and the costs of litigating under a totally unfamiliar law. The CISG will unify many aspects of the sales contracts laws, including issues of contract formation and the sellers' and buyers' obligations and remedies, under rules already available in many languages. Hence, the CISG will mean cost reduction which contributes to the celebration of contracts. Parties that have not yet been in commerce with Brazilian parties may regard the Brazil's adhesion to the CISG as an opportunity to trade under a neutral body of law – rather than be subject to unknown Brazilian law.

Some domestic provisions which are the subject of current analysis entailing legal cost, which will be eventually reduced with Brazil's eventual adhesion to the CISG, are discussed below.

On many issues of contract formation, Brazilian and Chinese domestic laws share solutions equal to those proposed by the CISG.<sup>60</sup> The main difference is the time when acceptance becomes effective, *i.e.*, the time of contract conclusion. Brazilian law follows the dispatch rule: Contracts are deemed to be concluded when the offeree dispatches his acceptance to the offeror.<sup>61</sup> Chinese law and the CISG follow the reception rule: The contract is concluded when the acceptance reaches the offeror.<sup>62</sup> The reception rule makes sense for international sales since it aims at ensuring that all parties are aware of the time of contract

60 A valid offer must have all essential elements of the type of contract: goods, price and quantity or a way to determine them. See Brazil Arts. 482, 483 Civil Code; Art. 1 of PRC Supreme People's Court Judicial Interpretation on Several Issues regarding Application to PRC CL (2); H. Shiyuan, *The Law of Contract*, Law China Book, Beijing 2008, p. 68. CISG Arts. 14(1), 55: A valid offer shall reflect the offeror's intention to be bound by its offer. As under Chinese law, Brazilian law and the CISG an offer becomes effective when it reaches the offeree, so that withdrawal of the offer by the offeror is also possible before that moment. See Brazil Art. 428 IV Civil Code; Arts. 16-17 PRC CL; CISG Art. 15(1)(2); Likewise, the possibility and moment to revoke an offer is similar. The revocation is possible before dispatch of acceptance – see Brazil Art. 434 Civil Code: The revocation should be left with no effect at the time of acceptance according to the rules on the time of contract conclusion and Brazil follows the dispatch rule of contract conclusion. See E. Munoz, *supra* note 23, p. 98; Art. 18 PRC CL; CISG Art. 16(1); unless the offeror has obliged himself to uphold its offer, for example, by fixing a period for acceptance. See Brazil Art. 428(III) Civil Code; Art. 19 PRC CL; CISG Art. 16(1)(a). See also generally L. Meira Moser, A formação do contrato de compra e venda entre ausentes: a interlocução entre a Convenção de Viena (CISG) e o direito brasileiro, in V. De Fradera & L. Meira Moser, *A Compra e Venda Internacional de Mercadorias: estudos sobre a Convenção de Viena de 1980*, Editora Atlas, São Paulo 2010, p. 108 *et seq.*

61 Brazil Art. 434 Civil Code.

62 Art. 26 PRC CL; CISG Art. 18(2).

conclusion. This avoids unnecessary performance expenses by an offeree who acts in reliance of an acceptance that has been dispatched but may never reach the offeror.

Regarding possible alterations between the offer and the acceptance, Brazilian law adopts a strict mirror image rule: Any modification or addition to the offer renders the acceptance a new offer or counter-offer,<sup>63</sup> although the discrepancy is secondary.<sup>64</sup> Chinese law and the CISG depart from the strict mirror-image rule by distinguishing between material and immaterial alterations of the offer by the acceptance.<sup>65</sup> The latter's rule seems fit for international sales as it seeks to avoid that minor differences which do not alter the *essentialia negotii* can be raised by one of the parties to refute the existence of an international contract at the stage of performance.<sup>66</sup>

Brazil's adhesion to the CISG will set a clearer and fairer obligation to deliver conforming goods in trade between China and Brazil. Under Brazilian law, this obligation is still based on the Roman law system that distinguishes between goods with defects in title, with hidden and apparent defects and the delivery of different goods. The remedies or actions available, the standards of non-conformity required by the law to avoid the contract, and the statutes of limitation may change depending on the type of non-conformity.<sup>67</sup> For example, hidden and unknown defects in the goods affecting their natural, agreed or intended purpose give right to the redhibitory action, which could lead to the avoidance of the contract and damages under particular circumstances but not to specific performance.<sup>68</sup> Defects in title grant the buyer a right of compensation against eviction, but not right for the avoidance of contract or specific performance.<sup>69</sup> Finally, late delivery, non-delivery or delivery of different goods (*aliud*), gives the buyer a right to specific performance, avoidance of contract (in some instances) and/or compensation for damage.<sup>70</sup>

Chinese law does not separate legal defects from physical defects. However, it is unclear whether Chinese law will treat the delivery of different goods (*aliud*) as an issue of non-delivery or defects. Scholars have assumed that this is an issue of non-delivery.<sup>71</sup>

63 Brazil Art. 431 Civil Code.

64 O. Gomes, *supra* note 26, p. 73.

65 See CISG Art. 19 and Art. 30 PRC CL, both providing that only variations concerning the subjective matter, quantity, quality, price or payment, time of performance, place and manner of performance, liability for breach of contract and dispute resolution is a material discrepancy and may render the acceptance a counter-offer.

66 See U. Schroeter, in I. Schwenzer (Ed.), *supra* note 13, Art. 19, Para. 1.

67 E. Munoz, *supra* note 23, pp. 301-302.

68 E. Munoz, *supra* note 23, pp. 383, 403.

69 E. Munoz, *supra* note 23, pp. 383, 404.

70 E. Munoz, *supra* note 23, pp. 383-384, 403.

71 J. Yang, 'The Modern Sales Contract Law in Asia – From a Comparative Perspective', Dissertation – University of Basel – Law Faculty, 2010, p. 184.

The CISG will bring a modern and unitary approach to the obligation of delivering conforming goods which does not distinguish between defects of title, hidden or apparent physical defects, delay or non-delivery. Absent an express agreement, the CISG will treat any type of discrepancy under the parameters of conformity established under Article 35, and the same list of remedies will be available regardless of the type of non-conformity.<sup>72</sup> Such unitary approach will eliminate the legal cost of characterizing the type of defects in the goods and the risk of opportunistic claims based on grounds solely intended to reduce or extend the remedies available.

These are only a few examples of some CISG provisions which will reduce transaction cost by creating a clearer and fairer approach for all parties when applied to China-Brazil sales contracts.

#### 6.4 CONSEQUENCES FOR TRADE IN LATIN-AMERICA (LATIN-AMERICA)

##### 6.4.1 *Legal Risk Reduction – the Applicable Law in Brazil-Latin-America Sales Contracts*

Taken as a region, Latin-America was Brazil's main trade partner in 2011, making up approximately 41.5% of Brazil's total trade.<sup>73</sup> Argentina alone is Brazil's third-largest trade partner with approximately 8.8% of goods exports and 7.4% of goods imports.<sup>74</sup> Three Latin-American countries alone, *i.e.*, Argentina, Chile and Mexico, represent approximately 28.5% of Brazil's trade.<sup>75</sup>

The CISG plays a very important role in governing sales contracts between Brazil and Latin-American traders. The CISG already counts 12 Latin-American as Contracting States.<sup>76</sup> Brazil's adherence to the CISG will almost completely fill in the map of this

72 I. Schwenzer, in I. Schwenzer (Ed.), *supra* note 13, Art. 35, Paras 4 *et seq.*

73 Brazil's trade statistics upon selection of region Latin-America, data available at <[www.mdic.gov.br/sitio/interna/interna.php?area=5&menu=3385&refr=576](http://www.mdic.gov.br/sitio/interna/interna.php?area=5&menu=3385&refr=576)>; individual files available at <[www.internationalprivatelaw.com/Braziltrade2011.html](http://www.internationalprivatelaw.com/Braziltrade2011.html)>.

74 Brazil's trade statistics upon selection of country Argentina, data available at <[www.mdic.gov.br/sitio/interna/interna.php?area=5&menu=3385&refr=576](http://www.mdic.gov.br/sitio/interna/interna.php?area=5&menu=3385&refr=576)>; individual files available at <[www.internationalprivatelaw.com/Braziltrade2011.html](http://www.internationalprivatelaw.com/Braziltrade2011.html)>.

75 See Brazil's trade statistics upon selection of countries Argentina, Chile and Mexico, data available at <[www.mdic.gov.br/sitio/interna/interna.php?area=5&menu=3385&refr=576](http://www.mdic.gov.br/sitio/interna/interna.php?area=5&menu=3385&refr=576)>; individual files available at <[www.internationalprivatelaw.com/Braziltrade2011.html](http://www.internationalprivatelaw.com/Braziltrade2011.html)>.

76 Argentina on 19 July 1983 with a reservation (a) and the Convention came into force on 1 January 1988; Chile signed the CISG on 11 April 1980 and ratified it on 7 February 1990, with a reservation under (a), and it entered into force on 1 March 1991; Colombia ratified the CISG on 10 July 2001 and it entered into force on 1 August 2002; Cuba did so on 2 November 1994 and the CISG entered into force on 1 December 1995;

region. The share of Brazil's trade outside the CISG will be minimal. There are only a few non-contracting states like Bolivia, Costa Rica, Guatemala, Nicaragua, Panama and Venezuela. In principle, only approximately 4.7% of Brazil's trade in the region would fall out the scope of application of the CISG.<sup>77</sup>

Similar to what currently happens *vis-à-vis* China, unpredictability in terms of the applicable law is also present in Brazil-Latin-America trade, but to a lesser extent. The CISG is already applied by courts and arbitral tribunals in sales contracts involving Brazilian parties. Let us briefly repeat the China-Brazil exercise above, this time with Brazil's main trade partners in the Latin America region: Argentina, Chile and Mexico. As Brazil's adherence to the CISG will not enter into force until 1 April 2014, the CISG cannot be applied by virtue of Article 1(1)(a). Nevertheless, it could apply in some cases under Article 1(1)(b), since none of the Latin-American contracting states have made a reservation under Article 95 CISG.

Let us suppose again that approximately 47%<sup>78</sup> of the sales contracts between Brazilian and Argentinean or Chilean or Mexican parties can include a choice of law clause.<sup>79</sup> As trade statistics also show, there is a fair balance in the value of imports-exports between Brazil and these three countries.<sup>80</sup> Based on international surveys on preferred laws to govern international contracts, we dare again to assume that taken as a whole, such clauses would probably designate 30% Brazilian law, 30% Argentinean or Chilean or Mexican law depending on the counterparty to the contract, and 40% other laws, possibly again any neutral Latin-American law.<sup>81</sup> The CISG could be potentially applied to a good percentage of

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Ecuador also ratified the CISG on 27 January 1992 and it entered into force on 1 February 1993; El Salvador ratified the CISG on 27 November 2006 and it entered into force on 1 December 2007; Honduras ratified the CISG on 10 October 2002 and it came into force on 1 November 2003; Mexico did so on 29 December 1987 and the CISG entered into force on 1 January 1989; Paraguay ratified the CISG on 13 January 2006 and it entered into force in its territory on 1 February 2007; Peru ratified the CISG on 25 March 1999 and it entered into force on 1 April 2000; Uruguay ratified the CISG on 25 January 1999 and it entered into force on 1 February 2000; Venezuela signed the CISG on 28 December 1981; *see* status at <[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)> (accessed on March 2012).

77 Brazil's trade with these countries individually is Bolivia 1.86%, Costa Rica 0.32%, Panama 0.17%, Venezuela 2.35%; data for Brazil's trade statistics upon selection of these countries available at <[www.mdic.gov.br/sitio/interna/interna.php?area=5&menu=3385&refr=576](http://www.mdic.gov.br/sitio/interna/interna.php?area=5&menu=3385&refr=576)>.

78 I. Schwenzer & C. Kee, in I. Schwenzer & L. Spagnolo (Eds.), *supra* note 42, p. 161.

79 In a well-known survey, 51% of the participant international corporation considered that governing law is the first issue decided – *see* White & Case LLP, *2010 International Arbitration Survey: Choices in International Arbitration*, pp. 8, 9, 11, available at <[choices.whitecase.com](http://choices.whitecase.com)>.

80 *See* Brazil's trade statistics upon selection of countries Argentina, Chile and Mexico, data available at <[www.mdic.gov.br/sitio/interna/interna.php?area=5&menu=3385&refr=576](http://www.mdic.gov.br/sitio/interna/interna.php?area=5&menu=3385&refr=576)>; individual files available at <[www.internationalprivatelaw.com/Braziltrade2011.html](http://www.internationalprivatelaw.com/Braziltrade2011.html)>.

81 In the negotiation of a contract involving parties with places of business in the Latin-American region, and with no strong link to Europe, US or other region, for example, due to corporate structure, it is unlikely that parties will choose any American law, European law or from any other regional law. This assumption is based on the results of an international survey: *see supra* note 44.

these contracts, provided the choice of law clause designates the law of any Latin-American contracting state.

These choice of law clauses will be held valid for an estimated 60% of contracts that could end up in an arbitration seated in the region. All Latin-American arbitration laws recognize the principle of freedom of choice of law.<sup>82</sup> Further, these clauses will be valid for sales contracts that may end up in State courts, since most Latin-American conflict of law rules recognise the validity of choice of law clauses under most circumstances.<sup>83</sup>

However, should the same sales contracts end up in litigation before Brazilian courts, the same choice of law clauses will be found invalid.<sup>84</sup>

Similarly, absent a choice of law clause, the percentage of cases governed by the CISG is unclear if the matter ends up before Brazilian courts. The Brazilian judge will apply the law of the country where the contract was concluded or performed. The CISG will apply if such a country is a CISG contracting state. Should a dispute over the sales contract be decided by Argentinean, Chilean or Mexican courts, their conflict of law rules will point to law of the place where the main obligation (namely, the delivery of the goods)<sup>85</sup> shall be

82 Bolivia Art. 54 AL; Brazil Art. 2 AL; Chile Art. 28 AL; Costa Rica Art. 22 Civil Code; El Salvador Art. 78 AL; Guatemala Art. 26 AL; Honduras Art. 88 AL; Mexico Art. 1445 Commercial Code; Nicaragua Art. 54 AL; Panama Art. 43 AL; Paraguay Art. 32 AL; Peru Art. 117 AL; Spain Art. 34 AL. 63 Brazil Art. 2 AL.

83 Chile Art. 113(2) Commercial Code, Art. 1545 Civil Code, Law Decree No. 2349 of 13 October 1978; Costa Rica Art. 18 Civil Code; Cuba Art. 7 Civil Code; Guatemala Art. 31 JOL; Mexico Art. 13(V) Civil Code; Peru Arts. 2095-2096 Civil Code; Venezuela Art. 29 PIL, Art. 116 Commercial Code; *see also* supporting the freedom of choice of law in their respective laws in Argentina: A. Boggiano, *Derecho Internacional Privado*, Vol. 2, LexisNexis Abeledo-Perrot, Buenos Aires 2006, p. 173; in Chile: A. Yrarrázaval & G. Ovalle, in D. Campbell (Ed.), *Remedies for International Sellers of Goods*, Vol. 1, Yorkhill Law Publishing, Salzburg 2008, p. 315; in Chile: M. Ramirez Necochea, *Derecho Internacional Privado*, p. 193 (2005); in Venezuela: O. Dos Santos, *Contratos Internacionales en el Ordenamiento Jurídico Venezolano*, Vadell Hermanos Editores, Caracas 2000, pp. 73-75.

84 Art. 9 of the Introductory Act to the Brazilian Civil Code provides that contractual obligations are governed by the law of the country in which they are concluded, thereby excluding any choice of law possibility.

85 Argentina National Commercial Court of Appeals, *Mayer Alejandro v. Onda Hofferle GmbH & Co.*, 24 April 2000: upholding that in international sales, the main obligation of the contract is the delivery of the goods; the seller's obligation does not involve the payment of money. "[T]he contracting parties have included the clause FOB Buenos Aires, it is clear that the fundamental part of the contract was performed with the delivery of the goods on board the ship in the agreed port (in the same line 'Esposito e Hijos, R.L.C. Jocqueviel de Vieu', 10.10.85, and doctrine cited within, LL, 1986-D-46), which leads to the application of Argentinean law"; Argentina National Commercial Court of Appeals, *Cervecería y Maltería Paysandú S.A. v. Cervecería Argentina S.A.*, 21 July 2002, available at <[cisgw3.law.pace.edu/cases/020721a1.html](http://cisgw3.law.pace.edu/cases/020721a1.html)>: the Court considered that in an international sale of goods, the 'most characteristic performance' is the delivery of the goods rather than the payment of the purchase price. Therefore, since the goods were delivered in Argentina, Argentinean law was applicable.

performed.<sup>86</sup> Therefore, depending on whether or not the delivery of goods takes place in a CISG contracting state, the CISG may apply to the sales contract. Both possibilities are equally likely as case law shows.<sup>87</sup>

Against this background, it is clear that the unreserved adhesion of most Latin-American countries to the CISG increases its potential application to many international sales contracts between traders in the region, including those with places of business in Brazil. Still, an important legal risk will continue to exist until Brazil's adhesion to the CISG enters into force. When this occurs, arguments on the validity of choice of law clauses in Brazil and applicable laws will no longer be raised, at least on matters covered by the CISG. By virtue of Article 1(1)(a), the CISG will apply as default law to sales contracts, unless intentionally excluded. Legal risk will be therefore reduced to a great extent.

#### 6.4.2 *Transaction Costs Reduction – Harmonization of Differences in Brazil-Latin-America Sales Domestic Laws*

Legal cost will be also reduced by having a unified set of provisions for most aspects of sales contracts in the Latin-America region. Although Latin-American domestic laws on contracts share many rules,<sup>88</sup> there are some crucial differences, which entail transaction costs on contracting parties both pre- and post-dispute. Some domestic provisions which will be eventually unified with Brazil's adhesion to CISG are discussed below.

The duty of examining and giving notice of any non-conformity in the goods established by the CISG will bring certainty in trade. None of the Latin-American statutory provisions expressly provides for a similar duty – despite it being acknowledged that examination helps to mitigate the damages that non-conforming goods can cause to both parties.<sup>89</sup>

86 Argentina Arts. 1209-1210 Civil Code; Chile Art. 16(3) Civil Code; Mexico Art. 13(V) Civil Code: regarding the effects of the contracts; ICC Final Award Case No. 13518 *Lex Contractus* Argentinean Law by operation of the Conflict of Laws Rules in Argentina's Civil Code.

87 See, for example, Argentina National Commercial Court of Appeals, 21 July 2002, *Cerveceria y Malteria Paysandú S.A. v. Cerveceria Argentina S.A.*, available at <cisgw3.law.pace.edu/cases/020721a1.html>: “On appeal, the court stated that the CISG applied to the case by virtue of its article 1(1)(b), since the Argentinean rules of private international law pointed to the application of the law of Argentina, the place of performance (delivery of the goods), a contracting state of the CISG. Since Uruguay was not yet a party to the Convention at the time the contract was concluded, the Convention could not be applied by way of Art. 1(1)(a).”

88 See generally E. Munoz, *supra* note 23.

89 Some laws give to the seller the option to expressly require the buyer to immediately examine the quality and quantity of the goods delivered: see Argentina Art. 472 Commercial Code; Chile Art. 146 Commercial Code; Colombia Art. 939 Commercial Code; Spain Art. 336, last Para. Commercial Code; Uruguay Art. 547 Commercial Code; Venezuela Art. 145, Para. 3 Commercial Code. Also the duty has often been interpreted from the principle of good faith. However, the elusive notion of good faith leaves room for too many exceptions – see E. Munoz, “The Good Faith Principle in Ibero-American B2B Contract Law”, in A. Büchler & M. Müller-Chen (Eds.), *Festschrift für Ingeborg Schwenzer zum 60. Geburtstag*, Stämpfli, Bern 2011, pp. 1331-1332.



Article 38 CISG provides for examination within as short a period as is practicable in the circumstances. Such circumstances include cases where the contract involves the carriage of the goods, or these are redirected in transit or re-dispatched by the buyer without a reasonable opportunity for examination, in which case, examination could be deferred after the goods have arrived at their final destination.

As a matter of principle, all Latin-American laws concur that the failure of a buyer to react, complain or give notice in due time about non-conformity in the goods, results in the loss of any right and action to rely upon a lack of conformity.<sup>90</sup> Despite this common ground, the time to give notice is not uniform. The CISG will harmonize Brazil's law with other Latin-American laws' time limits to give notice of any non-conformity in the goods.

As the Latin-American domestic laws stand now, two different time limits for notice are established depending on whether the goods lack apparent quality and quantity, or whether they are affected by internal defects. For apparent non-conformity, generally understood to be discovered once the goods have been released from their package, in Argentina and Chile the buyer is only given three days to denounce any apparent defects.<sup>91</sup> In Mexico, the buyer has five days.<sup>92</sup> As to hidden defects, the time of notice is extended in Mexico to thirty days from the delivery of the goods. In Argentina, the time of notice of hidden defects shall be fixed by courts, but this period should not go beyond six months from the date of delivery.<sup>93</sup> In Brazil, the buyer has thirty days from the effective delivery of the goods to claim redhibitory actions or the reduction of price.<sup>94</sup> However, if the buyer was already in possession of the goods, the limitation period is reduced to fifteen days.<sup>95</sup> Nonetheless, if the defect by its nature could only be discovered later, the limitation period shall start running from the moment the buyer becomes aware of it.<sup>96</sup> Except for Mexican law, which requires the buyer to give notice *in writing*,<sup>97</sup> other laws are silent as to the type or details of the notice.

The CISG will set a neutral and internationally suitable obligation in this respect. Firstly, the notice should specify the nature of the non-conformity.<sup>98</sup> It is not sufficient that the

90 Bolivia Art. 848 Commercial Code; Brazil Art. 446 Civil Code; Chile Art. 158 Commercial Code; Colombia Arts. 931, 939 Commercial Code; Costa Rica Arts. 450, 452 Commercial Code; Ecuador Art. 192 Commercial Code; El Salvador Art. 1019, Para. 1 Commercial Code; Mexico Art. 383 Commercial Code; Paraguay Art. 753 Civil Code; Peru Art. 1523 Civil Code; Uruguay Art. 545 Commercial Code; Venezuela Art. 1526 Civil Code, Art. 144, Para. 2 Commercial Code.

91 Argentina Art. 472 Commercial Code; Chile Art. 159 Commercial Code.

92 Mexico Art. 383 Commercial Code.

93 Argentina Art. 473 Commercial Code.

94 Brazil Art. 445 Civil Code.

95 Brazil Art. 445 Civil Code.

96 Brazil Art. 445(1) Civil Code.

97 Costa Rica Art. 450 Commercial Code Para 2; Mexico Art. 383 Commercial Code.

98 Art. 39(1) CISG.

buyer manifest its existence in a vague or ambiguous way. It must at least describe the type of non-conformity, *e.g.*, *aliud*, defects of quantity or quality.<sup>99</sup> This is not because it is necessary to characterize the type of defect for statutory or contractual remedial purposes, but because such information might allow the seller to take steps to cure the non-conformity or avoid further damages. The amount of the information shall depend on the circumstances of the case. Secondly, the buyer is required to give notice within a reasonable time after he has discovered or ought to have discovered the non-conformity. On this issue, some courts and arbitral tribunals have rightly followed the noble month rule developed by two respected scholars based on comparative law analysis:<sup>100</sup> one month after the buyer has discovered or ought to have discovered the non-conformity is considered a flexible yardstick (and not an absolute time limit) for measuring timeliness of notice.<sup>101</sup>

The CISG's unified rule on examination and notice would avoid the legal risks of opportunistic behaviour of sellers and buyers racing to litigate before a particular court or under a particular domestic law only because this suited their interest in that particular case.

## 6.5 CONCLUSION

The celebration of sales contracts between parties with places of businesses in different countries implies legal risk and transaction costs. Contracting parties often need to analyze important differences in domestic laws and bargain thereon, thereby increasing transaction costs. Moreover, bargaining on the applicable law might not help as Brazilian conflict of laws rules limit the possibility of choice of law clauses. The greater the uncertainty with regard to the applicable law and its particularities, the higher the risk and costs.

For those parties in CISG contracting states, risks and costs are reduced through uniform sales law. The CISG meets two key requirements to reduce costs and avoid legal risks. Firstly, it eliminates the question of the applicable law in international sales contracts between contracting states through Article 1(1)(a) CISG. Secondly, it recognizes the principle of freedom of contract (Art. 6 CISG) while establishing a tailor-made set of provisions accepted by its multi-legal design.

Subsequently and importantly, Brazil's adhesion will likely make the CISG the 'sales law' of Latin-America, including the MERCOSUR.<sup>102</sup>

99 I. Schwenzer, *in* I. Schwenzer (Ed.), *supra* note 13, Art. 38, Para. 8.

100 The two scholars are Ingeborg Schwenzer and Camilla B. Andersen; *see generally* C.B. Andersen, *Noblesse Oblige. . . ? Revisiting the 'Noble Month' and the Expectations and Accomplishments it has prompted*, *in* A. Büchler, & M. Müller-Chen, (Eds.), *Festschrift für Ingeborg Schwenzer zum 60. Geburtstag*, Stämpfli, Bern 2011, p. 33 *et seq.*

101 C. Andersen, *supra* note 100.

102 There is no official endeavour from governments in the region to unify the law of sales contracts in the Latin-American region.