Application and the Interpretation of the CISG in Finnish Case Law 1997–2005

by

Sanna Tohka

Nordic Journal of Commercial Law
issue 2010#2

1. Introduction

The United Nations Convention for the International Sale of Goods (hereinafter the CISG or the Convention) was unanimously approved by a Diplomatic Conference of sixty-two States in Vienna, Austria on 11 April 1980. As of 15 August 2010, the United Nations Commission on International Trade Law (UNCITRAL) reports that 76 States have adopted the CISG, including the Nordic Countries, Russia, USA and China.[1] The purpose of the CISG is to promote uniformity in the sphere of international commerce. Private international law and the conflict of law rules do not always provide the predictability and certainty needed in the international trade concerned.

Finland ratified the CISG on 20 March 1987[2] and the CISG came into force on 1 January 1989[3]. The purpose of this article is to introduce the main findings and conclusions of the English language licentiate thesis 'The application and the interpretation of the CISG in the Finnish case law 1997-2005'. The core of the thesis covers nine cases tried in public courts in Finland between the years 1997 and 2005:

1. *Turku Court of Appeal, S 95/1023 (18 February 1997)*;
2. *District Court of Kuopio, 95/3214 (5 November 1996)*[4];
3. *Turku Court of Appeal, S 97/324 (12 November 1997)*;
4. *Helsinki Court of Appeal, S 96/1129 (29 January 1998)*;
5. *Helsinki Court of Appeal, S 96/1215 (30 June 1998)*;
6. *Helsinki Court of Appeal, S 00/82 (26 October 2000)*;
7. *Turku Court of Appeal, S 00/855 (12 April 2002)*;
8. *Helsinki Court of Appeal, S 01/269 (31 May 2004)*;
9. *Turku Court of Appeal, S 04/1600 (24 May 2005).*

[1] As of 15 August, 2010, the Contracting States are: Albania, Argentina, Armenia, Australia, Austria, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Burundi, Canada, Chile, China, Colombia, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Estonia, Finland, France, Gabon, Georgia, Germany, Guinea, Honduras, Hungary, Iceland, Iraq, Israel, Italy, Japan, Kyrgyzstan, Latvia, Lebanon, Lesotho, Liberia, Lithuania, Luxembourg, Mauritania, Mexico, Moldova, Mongolia, Montenegro, Netherlands, New Zealand, Norway, Paraguay, Peru, Poland, Republic of Korea, Romania, Russian Federation, Saint Vincent and the Grenadines, Serbia, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Syrian Arab Republic, The former Yugoslav Republic of Macedonia, Turkey, Uganda, Ukraine, United States of America, Uruguay, Uzbekistan, Zambia. United Nations Commission on International Trade Law (UNCITRAL), http://www.uncitral.org/uncitral/en/index.html – UNCITRAL Texts and Status – International Sale of Goods (CISG) – 1980-United Nations Convention on Contracts for the International Sale of Goods (CISG) – Status).

[2] Act concerning the acceptance of some of the provisions of the Convention on Contracts for the International Sale of Goods 20.3.1987, 795/1988.

[3] Degree 16.9.1988/796.

[4] *Itä Suomen HO (the Court of Appeal of Eastern Finland), S 96/605 (27 March 1997)* tried the case only in the relation to the joint liability of the Seller and the Seller's CEO. The CISG issues were not appealed

All these decisions have become final after the proceedings in the Court of Appeal. The analyses of the cases were restricted to the issues relating to the CISG. The Decision by the *Supreme Court on 14 October 2005* (*KKO:2005:114, S 2004/50*) that returned the matter to the District Court to be retried on the merits relating to the CISG has been left to lighter scrutiny. From both the academic and practical point of view, the main issues of the case relate to matters of jurisdiction. The CISG Database maintained by the Institute of International Commercial Law at the Pace University was essential in writing the thesis.[5]

The CISG is an international convention and it is essential that internationality is promoted in its application. The analyses of the cases rendered in the Finnish legal system increases the understanding of the CISG by scholars, business practitioners, lawyers and judges alike and promotes uniform application in the future. Furthermore, for a truly international instrument of law, it is important that the case law from even a small legal community is incorporated and discussed in the sphere of the larger community. From a practical point of view, it is not sufficient to know the black letter law to be well prepared for unanticipated incidents in advance. One must understand the meaning of the black letter law.

2. Applicable law

2.1. Applicable Law to the Issue at Hand

The CISG has now been in force in Finland more than 20 years. Yet the decisions by the Court of Appeal are rare pleasure for those operating in the field on international sales law, professionally or academically. Unfortunately this means that also the courts decide issues relating to the CISG only rarely.

Especially, since rulings relating to the CISG by public courts are not that common in Finland, a thorough discussion of the issue of applicable law is necessary. Further, not all issues that are dealt with in international sales are covered by the CISG; which raises the importance of the determination of the applicable law relating to those issues that are covered. In addition, the Finnish declaration exempting Part II of the Convention becomes significant when determining applicable law.

In general, the basic rules on applicability have been applied correctly. Article 1(1)(a) provides that the CISG applies directly, if the parties to contract of sale of goods have their places of business in different Contracting States, independent of whether a different solution is provided for by the rules of private international law. Even if the rules of private international law of the forum would lead to non-contracting state, the CISG applies, if the parties are from

[5] http://www.cisg.law.pace.edu/. The thesIs is availeble from the said database: http://www.cisg.law.pace.edu/cisg/biblio/kuoppala2.html

Contracting States. Only if the CISG is not applicable by virtue of Article 1(1)(a), the rules of private international law are considered. By virtue of Article 1(1)(b) the CISG is applicable when the rules of private international law lead to the application of the law of the Contracting State.

Even when the other party's place of business was in a non-contracting State (i.e. the United Kingdom), the Court correctly applied the CISG by virtue of conflict of law rules and Article 1(1)(b) (*District Court of Kuopio, 95/3214 (5 November 1996)*). From the nine decisions under scrutiny, only once did the District Court make a classical error and applied the Finnish Sale of Goods Act rather than the CISG (*District Court of Helsinki, Judgment 17450 (18 July 1995)*). The error was corrected by the Court of Appeal (*Helsinki Court of Appeal, S96/1129, (29 January 1998)*).

However, a more detailed and thorough analysis of the basic rules on applicability would have been in order in many cases. *Helsinki Court of Appeal, S 96/1215 (30 June 1998)* illustrates well the prevailing approach in the Finnish courts. The case involved a sale of skincare products delivered from a Swiss Seller to a Finnish Buyer. The Seller stated that due to the fact that the place of business of the Seller who accepted the order was in Switzerland, Swiss law was applicable to the contract – making a indirect reference to the Finnish conflict of law rules[6]. There was no agreement between the parties on the applicable law. The Buyer stated, as did the Seller, that the CISG was applicable to the case. The Court made no reference to the applicable law as there was no dispute on the issue. However, the correct approach would have been to apply the CISG by virtue of Article 1(1)(a). Both countries, Finland and Switzerland, were Contracting States at the time of the conclusion of the contract, thus the CISG applied as such by virtue of Article 1(1)(a).

2.2. Applicable Law in Relation to Secondary Issues of the Case

2.2.1. Need for Discussion?

The basic rules on applicability are mastered moderately, but the reasoning of the Finnish courts on applicable law relating to the issues not covered by the CISG, contain weaknesess. It seems that the secondary issues are not seen as important as the main dispute naturally involves

[6] In Finland, the Act on Law Applicable to Sale of Goods of International Character (26.6.1964/387, as amended by the Act 27.5.1988/468), provides that in the absence of a choice of law under Section 3, the sale shall be governed by the law of the State where the seller had his place of habitual residence when he received the order. If the order was received by a business owned by the seller, the sale shall be governed by the law of the State where the business is situated (Section 4, subsection 1). Only if the buyer places the order in the State where the buyer has his habitual residence or where he owns a business and the seller or his agent receives the order in said State, the sale shall be governed by the law of the buyer's State (Section 4, subsection 2).

the actual sale of goods, such as delay in delivery or non-conformity of the goods. The determination of the applicable law is however important in relation to all issues of the case.

2.2.2. Rate of Interest According to the CISG

In some cases the Court did refer to the conflict of law rules in relation to some aspects of the case, while ignoring the issue in other respects; e.g. in *Turku Court of Appeal, S 95/1023 (18 February 1997)* the Court analysed the applicable law in relation to the partial payment to be credited, but not in relation to the rate of interest.

The discussion in relation to the law applicable to the rate of interest would add to the interesting dialogue relating to the sphere of application of the CISG. Some of the provisions of the CISG are vague and lack precise definition. The most evident example is Article 78 of the CISG: "If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74." Thus, Article 78 provides that the CISG awards interest on sums in arrears but does not state the amount or percentage of the interest to be applied, nor does it provide a specific formula for calculating the interest. As CISG Article 78 does not provide the definite rate of interest, if the parties have not agreed on rate of interest to be applied, one must look at the Convention to find an answer to the question. The applicable rate of interest was, however, one of the issues not successfully agreed upon when drafting the Convention.[7] The solutions offered by scholars to solve the issue on the rate of interest vary from a restitutionary approach to applying the applicable national law by virtue of the rules of private international law.

Professor Honnold suggests that the solution on the rate of interest should be derived by analogy to the CISG rules on compensation for breach of contract (CISG Article 74, 75 and 76), in accordance with CISG Article 7(2). According to Article 7(2), questions concerning matters governed by the Convention, but not expressly settled in it, are to be settled in conformity with the general principles on which the Convention is based on. Only if such general principles can not be identified, can one turn to the applicable national law. CISG Article 74 provides that "damages ... consist of a sum equal to the loss ... suffered ... as a consequence of the breach". If the aggrieved party has made a reasonable substitute transaction that can be identified, CISG Article 75 provides that "the party claiming damages may recover the difference between the

[7] On the legislative history briefly, see Bacher in Schlechtriem, Peter; Schwenzer, Ingeborg (2005): Commentary on the UN Convention on the International Sale of Goods (CISG). Second (English) edition. Edited by Peter Schlechtriem, Ingeborg Schwenzer. Great Britain. Oxford University Press. [cited as author in Schlechtriem & Schwenzer 2005, p. .]. P. 795. Honnold, John O. (1999): Uniform law for international sales under the 1980 United Nations convention/by John O. Honnold. – 3rd ed. The Hague, the Netherlands. Kluwer Law International. P. 465-466. Mazzotta gives a more detail but yet a brief history of Article 78 in Mazzotta, Francesco G.(2004): CISG Article 78: Endless disagreement among commentators, much less among the courts. Available from the WWW: <URL: http://cisgw3.law.pace.edu/cisg/biblio/mazzotta78.html>

contract price and the price in the substitute transaction". If a substitute transaction can not be identified or such transaction has not been made, under CISG Article 76, the aggrieved party can base the damages on the current price: "the party claiming damages may ... recover the difference between the price fixed by the contract and the current price". If the other party fails to pay the price or any other sum that is in arrears, the aggrieved party can replace those funds by borrowing. If the "substitute transaction" can be identified, the loss suffered by the aggrieved party could be measured as the cost of this substitute transaction. If a substitute loan cannot be pinpointed, the aggrieved party's loss could be measured by the "current price" of credit. The rate of interest is based on the aggrieved party's cost of borrowing. [8]

Professor Bacher [9] is more sceptical in reaching an international, uniform rule in relation to the rate of interest by reference to general principles. The main concern opposing the adoption of the uniform rule is that the Diplomatic Conference was not able to reach a solution on the issue. The different solutions proposed by legal writers and courts should also be looked at with caution. Bacher further points out that even if the uniform approach is accepted instead of the approach to applying domestic laws, in both cases there is no agreement on the rate of interest. Bacher suggests that the solution is to connect the rate of interest with the currency in which the sum is to be paid and further, to the prime rate of the currency involved.[10]

There is extensive case law on the issue of the rate of interest. *Professor Mazzotta* has surveyed an extensive amount of cases relating to the rate of interest.[11] He concludes that the majority of authors and courts have clearly stated that the rate of interest is to be governed by the law of the relevant country as determined by the rules of conflict of laws of the forum state. Mazzotta is of the opinion that the interest rate is within the sphere of application of the CISG as the CISG does establish a general entitlement to interest, although the actual figure is not to be determined through the Convention or its general principles, but by resorting to the applicable domestic law. Mazzotta stresses that even if the general principles may give some guidance in determining the actual interest rate, they are not helpful in terms of assuring either certainty or uniformity. During the life of the CISG neither commentators nor courts have been able to settle the issue. Mazzotta recognises that resorting to domestic rules of private international law is not the best solution, but it is still better than resorting to any other method that is expressly outside the scheme of the Convention. He stresses however that the domestic rules of private international law should be subject to the 'good faith' and 'international character' requirements set forth by Article 7(1) of the Convention. According to Article 7(1) 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

[8] Honnold 1999, *supra* note 8, p. 467-471.

[9] Bacher in Schlechtriem & Schwenzer 2005, *supra* note 8, p. 800-803.

[10] Bacher in Schlechtriem & Schwenzer 2005, *supra* note 8, p. 800-803.

[11] Mazzotta 2004, *supra* note 8.

trade. Excessive unforeseeable interest resulting in unjust enrichment of one party over the other, may not be awarded.[12]

Mazzotta also notes that interest as described under Article 78 is different from interest under Article 84(1), where the right to interest is also mentioned. According to Article 84(1), if the seller is bound to refund the price, he must also pay interest on it, from the date on which the price was paid. Under Article 84(1) interest is intended to compensate the creditor (buyer) for the fruits (interest) of not having benefited the money owed by the debtor (seller) due to the avoidance of the contract. In other words, interest under Article 84(1) is based on the principle that money produces fruits, but is owed only when, as a result of the avoidance of the contract, the price must be refunded to the buyer. Moreover, interest under Article 84(1), as opposed to Article 78, must be paid from the date on which the price was paid and there is no reference to any "arrears" requirement.[13] The parties can naturally agree on the rate of interest even prior to the conflict. The primacy of the parties' contract is the dominant theme of the Convention. According to 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.[14]

2.3. Applicable law in Relation to the Formation of the Contract

2.3.1. Exemption of Part II of the Convention

In addition to the problems relating to the applicable law as such and in relation to secondary issues, the meaning and purpose of the declaration not to be bound by Part II of the CISG remains obscure, since not even the Courts applying the CISG, consider the issue important. Finland has ratified the CISG subject to a declaration under CISG Article 92 not to be bound by Part II of the Convention: Formation of the Contract. As far as Part II of the Convention, Finland is not a contracting state as provided in CISG Article 1(1)(a). If the conflict of law rules as provided for in CISG Article 1(1)(b) point to the law of a country that has not made a similar declaration Part II of the Convention, nevertheless applies. Part II of the Convention naturally also applies, if the parties to a contract have agreed that the CISG is to be applied.

[12] Mazzotta 2004, *supra* note 8.

[13] Mazzotta 2004, *supra* note 8.

[14] Article 12 provides that the parties freedom of contract is limited by a reservation provided for in Article 96. Article 12 states that any provision of article 11, article 29 or Part II of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article 96 of this Convention. Under Article 96 a Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration in accordance with article 12 that any provision of article 11, article 29, or Part II of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in that State.

In the above mentioned case *Helsinki Court of Appeal, S 96/1215 (30 June 1998)*[15], since Switzerland had not made any reservation to the CISG and the conflict of law rules pointed to Swiss law, also Part II of the Convention applied to the case. As noted above, the District Court did not discuss the issue of the applicable law. The applicable law to the formation of the contract was nevertheless in any case the Swiss law, i.e. the CISG.

2.3.2. Formation of the Contract versus Its Interpretation

In *Helsinki Court of Appeal, S 01/269 (31 May 2004)*, the Court had a chance to evaluate the relationship between the rules on interpretation and rules on the formation of the contract. Unfortunately, neither the District Court nor the Court of Appeal took this challenge. The case involved a sale of phenol from the Finnish seller to a Swiss buyer. The questions in dispute included among other things what had been agreed upon regarding the quality of the phenol. There was no dispute on the applicable law. As the parties had their places of business in different contracting states, the CISG was the applicable law (Article 1(1)(a)). In relation to the formation of the contract the Finnish Contracts Act was the applicable law even though no reference to the conflict of law rules was made.

After this solution on applicable law, when determining the contents of the contract the court based its decision on the evidence presented and the testimonies of witnesses heard. No reference was made to the CISG rules on interpretation of the statements and conduct of the parties as provided for in Article 8. Despite of the reservation under Article 92, Article 8 is binding on the Nordic Countries as well. Finland has not made a reservation in relation to Article 8, not that it could have.[16]

Article 8 applies equally to the interpretation of the unilateral acts of each party, i.e., communications in respect of the proposed contract, the offer, the acceptance, notices, as well as of the contract itself, when the contract is embodied in a single document.[17] Thus, the rules

[15] Chapter 2.2. Applicable law as a matter of course, above.

[16] Ämmälä in Saarnilehto, Ari; Hemmo, Mika; Kartio, Leena (2001): Varallisuusoikeus. Juva. WSOY. Lakitieto. [cited as author in Saarnilehto et a. 2001, p.]. P. 896; Routamo, Eero; Ramberg Jan (1997): Kauppalain kommentaari. Helsinki. Lakimiesliiton Kustannus. P. 30-31.

[17] Text of Secretariat Commentary on article 7 of the 1978 Draft (draft counterpart of CISG Article 8). Commentary on the Draft Convention on Contracts for the International Sale of Goods, prepared by the Secretariat. Document A/CONF.95/7, O.R.14-66. Available from the WWW: For Article-by-Article commentaries, go to Annotated Text of the CISG; click on the Article of interest: <URL: http://cisgw3.law.pace.edu/cisg/text/cisg-toc.html>; [cited as Text of the Secretariat commentary on article X of the 1987 Draft (draft counterpart of CISG Article Y)]. Lookofsky, Joseph (2000): The 1980 United Nations Convention on Contracts for the International Sale of Goods in: J. Herbots ed. / R. Blanplain general ed., International Encyclopaedia of Laws - Contracts, Suppl. 29, Kluwer Law International (December 2000) 1-192. Kluwer Law International. The Hague. P.55. Farnsworth in Bianca, C. Massimo; Bonell, Michael Joachim (1987): Commentary on the international sales law: the 1980 Vienna sales convention/edited by C.M. Bianca, M.J. Bonell. Milan Giuffrè. P. 95-96, 97-98.

on interpretation of the offer and acceptance are also extended to the subsequent statements after the formation of the contract.[18] In effect Article 8 excludes recourse to domestic rules of interpretation.[19]

According to Article 8(1), for the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was. Interpretation according to the actual intent of the party requires that the party to whom the statement or the other conduct is addressed, has knowledge of the intent of the other party, or could not have been unaware of such intent.[20] As the standard under Article 8(1) is subjective and raises problems as to proof, the objective approach under Article 8(2) is said to be the principal standard of interpretation in the sphere of the Convention.[21] Article 8(2) provides that if the approch provided for in Article 8(1) is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances. Under the objective approach, the statements and the conduct of a party is interpreted according to a hypothetical reasonable person of the same kind as the other party.[22]

In determining the intent of the party or the understanding a reasonable person would have had, Article 8(3) provides that due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices that the parties have established between themselves, usages and any subsequent conduct of the parties. Article 9(1) further provides that the parties are bound by any agreed usage or by any practices, which they have established between themselves. Article 9(1) in effect affirms the rule provided for in Article 8.[23] According to Article 9(2) a widely known and regularly observed usage in international trade can be applicable even impliedly.

What is the relationship between the domestic rules of interpretation and the rules of interpretation provided in the CISG? In the international sphere of the CISG there ought to be no recourse to the domestic rules of interpretation that would endanger the uniformity of the application of the CISG. The Court specifically stated that the rules on formation of the contract as provided for in the CISG were not applicable in this particular case, but did not specifically state whether it applied the domestic rules of interpretation or the rules provided for in the CISG when determining the parties' intent and understanding of the offer and

[18] Honnold 1999, *supra* note 8, :p. 115-116, specifically footnote number 1.

[19] Schmidt-Kessel in Schlechtriem & Schwenzer 2005, *supra* note 8, p. 112.

[20] Schmidt-Kessel in Schlechtriem & Schwenzer 2005, *supra* note 8, p. 118.

[21] Honnold 1999, *supra* note 8, p. 118; Schmidt-Kessel in Schlechtriem & Schwenzer 2005, *supra* note 8, p. 119.

[22] See further Schmidt-Kessel in Schlechtriem & Schwenzer 2005, *supra* note 8, p. 120.

[23] Schmidt-Kessel in Schlechtriem & Schwenzer 2005, *supra* note 8, p. 141-142.

acceptance. There are no written rules on interpretation in Finnish law, but the rules on interpretation are drawn from legal practice and from legal doctrine. The legal principles on interpretation applicable in Finland do not differ from the rules of interpretation provided for in CISG Article 8.[24] Nevertheless, the Court ought to have given some consideration to the applicable rules in respect of interpretation.

When determining the contents of the contract due consideration was given to the statements and conduct of the parties during the negotiations and the previous contracts between the parties. The emphasis seemed to have been on the Buyer's understanding what had been agreed upon. The Buyer ought not to have understood to assume the risk of change of colour in the phenol nor ought the Buyer have had such information that would have alerted him to the risk. Further, the Seller had in any case become aware of the Buyer's intention to buy colourless phenol. If the Court's reasoning is compared to the wording of CISG Article 8, it is seems that the Court considered the evidence to be sufficient and applied the interpretation according to the intent of the party (Article 8(1)).

The Buyer had in his reply to the District Court noted that the contract between the parties was not an oral contract. It was customary that the Buyer always sent a written confirmation of the contract. The parties had concluded several written contracts before the sale in question. The Buyer further stated that if CISG Article 9 was applicable when evaluating the contract between the parties, it must be concluded that the parties had followed a practise, which they had established between themselves. Second paragraph of Article 9 - according to which a widely known and regularly observed usage in international trade can be applicable even implicitly - applies only if the first paragraph cannot be applied. There is no such usage that is widely known and regularly observed by according to which the contracts should be oral.

As noted above the court made no reference to Article 8. Neither was Article 9 discussed in the reasoning, i.e. what effect the practices established between the parties had on the formation of the contract. The silence or inactivity of the party cannot itself constitute an acceptance of an offer neither under CISG Article 18(1) nor under Finnish Contracts Act Section 8[25]. However the circumstances may be such that the other party is alerted, which raises the duty to inquire.[26] The Buyer stressed that it was an established practice between the parties that the contract was confirmed by a written confirmation, thus the contract could not have been based only on the oral negotiations held between the parties. Like Article 8, which is applicable to the contents of

[24] Ämmälä in Saarnilehto et al. 2001, supra note 16, p. 896, 898.

[25] CISG Article 18 (1) provides: "A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance." Section 8 of Finnish Contracts Act provides: "If the offeror has stated that an express acceptance is not required or if the circumstances indicate that he/she does not expect one, the offeree shall, nevertheless, upon request, let the offeror know whether he/she accepts the offer; otherwise the offer shall be deemed to have expired."

[26] In relation to the CISG see further Schmidt-Kessel in Schlechtriem & Schwenzer 2005, *supra* note 8, p. 127-128.

the contract as well as to the conduct or statement of the parties, Article 9 is not limited to the content of the contract, but also applies to the contract formation. Practices from earlier contracts can also apply to contract formation.[27] There may also be an applicable usage according to which a contract can be based on an implied acceptance.[28] The Buyers had sent a confirmation of the contract to the Seller to which the Seller had not objected to. The Court stated that had the Seller opposed to the confirmation he should had given a notice of the alleged inconsistencies. This was supported by the Finnish Contracts Act[29] and by the prevailing usage in trade concerned. As no reference to CISG Articles were made in this respect in the reasoning of the Court it is not clear whether the Court even paid attention the Buyer's reference to Article 9.

The effect of the confirmation of the contract should have been analysed in more detail. The silence as a response to confirmation may range from setting the contract terms to treating the writing as a mere means of proof or aid of interpretation, especially if the binding usage is drawn on the bases of Article 9(2).[30] In the case in question the confirmation had a contract forming effect. Further more, the definition of a binding usage differs in the Finnish Sale of Goods Act and the CISG. According to Section 3 of the Finnish Sale of Goods Act, the Act is subject to the terms of the contract between the parties, to any practice which has been established between them and to any other usage which is to be considered binding on the parties. Thus, the applicable usage becomes binding whether of not the parties acting in a certain field of commerce were familiar with the usage.[31] Under CISG Article 9 the mere existence of a usage does not make it applicable to the contract. The actual knowledge of usage is neither required under the CISG, but the usage must be widely known to and regularly observed by, parties to contacts of the type involved in the particular trade concerned.[32]

[27] Schmidt-Kessel in Schlechtriem & Schwenzer 2005, *supra* note 8, p. 142.

[28] Hemmo, Mika (2003): Sopimusoikeus I. Talemtum Media Oy. Jyväskylä. Gummerus Kirjapaino Oy, p. 565.

[29] Finnish Contracts Act Section 6, paragraph 2. Section 6 provides: "A reply that purports to be an acceptance but which, due to an addition, restriction or condition, does not correspond to the offer, shall be deemed a rejection constituting a new offer.

However, the provision in paragraph (1) shall not apply if the offeree has considered the reply to correspond to the offer and the offeror must have understood the same. If the offeror in that case does not wish to accept the reply, he/she shall, without undue delay, notify the offeree thereof; otherwise a contract shall be deemed concluded on the terms contained in the reply."

[30] Schmidt-Kessel in Schlechtriem & Schwenzer 2005, *supra* note 8, p. 151.

[31] Routamo-Ramberg 1997, *supra* note 16, p. 36. Ämmälä in Saarnilehto et al. 2001,supra note 16, p. 846.

[32] Professors Routamo and Professor Ramberg criticize the requirement that the usage ought to widely known to and regularly observed by in international trade. These requirements influence the determination whether the parties ought to have known about the usage, but if the parties in fact knew about the existence of the usage and were familiar with it, the usage should nevertheless be applicable even if not widely observed by. See further Routamo-Ramberg 1997, *supra* note 16, p. 37.

There has been understandable criticism towards the adoption of the reservation under Article 92.[33] Since then the Ministry of Justice has commenced a project to cancel the declaration not to be bound by Part II of the Convention (OM 2/42/2009) in co-operation with Norway, Sweden and Denmark, also bound by the same reservation. All major special-interest groups have given their opinion on the memorandum relating to the issue. Further steps shall be determined later. The aim of the project is to clarify the legal state and to reaffirm the contract parties' possibilities to anticipate what are the legal provions to be applied in the formation of the contract of international sale of goods.

2.4. Summary on Applicable Law

The applicable law is the starting point in any dispute if the contract itself does not provide answers. International collaboration is part of the current legal realm. In order to be acquainted with and adapt to this new framework it is important to start from the basics and then more forward to the substance of the case. The sphere of application of the CISG must be clear in order to promote the uniformity in its application. Too haste recourse to the domestic rules reflects the Courts' unfamiliarity with the CISG. The CISG needs to be read and applied in the international vacuum, free from any preconceptions based on the national sales law.

3. Uniformity in the Application of the CISG

3.1. The Independent Nature of the CISG

The literal meaning of the CISG provision relating to the very core and basic questions of substance of international trade, such as conformity of the goods or examination of the goods, had been understood by the courts - with the reservation of whether the courts had sincerely taken into account the international nature of CISG. However, as the problems arose, no special attention was given.

The Convention provides its own rules on interpretation of the Convention.[34] According Article 7 (1) in the intrepretation of the Convention, regard is to be had to its international character and to the need to promote uniformity in its application. The preparatory works of the Convention are of course essential. International scholarly writings and case law are also now readily available and play an ever important role. Article 7(1) also stresses the need to promote the observance of good faith in international trade. The most important thing in the

[33] Lookofsky, Joseph (1996): Understanding the CISG in Scandinavia. A Compact Guide to the 1980 United Nations Convention on Contracts for the International Sale of Goods by Joseph Lookofsky. Copenhagen. DJØF Publishing Copenhagen. P. 128.

[34] See also discussion in chapter 2.3.2. Rate of interest according to the CISG, above.

interpretation of the Convention is to avoid reading and applying the Convention in the light of domestic legal traditions and giving meaning to the Convention through meanings of domestic legal terms.

Article 7(2) provides that the unsolved questions concerning matters governed by the Convention are to be settled in the first hand in conformity with general principles on which the Convention is based. In the absence of such general principles the answers must be sought from the applicable law by virtue of the rules of private international law. It is important to value the restrains Article 7 sets for the gap-filling. The reference to the applicable domestic law should not be used too hastily. If the Convention lacks specific provisions on the issue it governs, the question should be solved by analogical application of the general principles when possible. The uniformity of the Convention's application is endangered if tribunals invoke domestic law too easily.[35] The possible application of the general principles may be tested against applicable trade usages and against contract practices and modern rules of law specially designed for international transactions.[36]

Recourse to the Finnish rules on procedure should not be used too hastily. Uniform application of an international instrument – whether relating to questions of substance or questions of proof - is essential in order to protect the confidence and reliance upon it. When applying the CISG the national courts should avoid recourse to the local concepts used in the legal system of the country of the forum. Each Article and each concept embodied in the CISG must be construed in uniformity within the international legal community, irrespective of the legal traditions and framework of the country where the court is situated.[37]

Uniformity is however hard to acquire as the courts do not pay attention to comprehensive case law now readily available.[38] Whether the general carefullness of Finnish courts in referring to existing case law in their reasoning influences the decisions now under scrutiny is pure guess

[35] Honnold 1999, *supra* note 8, p. 109-110.

[36] Honnold 1999, *supra* note 8, p. 110.

[37] Text of the Secretariat commentary on article 6 of the 1978 Draft (draft counterpart of CISG Article 7(1)), *supra* note 17.

[38] Concurring Baasch Andersen, Camilla (1998): Reasonable Time in Article 39(1) of the CISG – Is Article 39(1) Truly a Uniform Provision? Pace essay (1998) Pace ed., Review of the Convention on Contracts for the International Sale of Goods (CISG) 1998, Kluwer Law International (1999), p. 63-176 [cited as Baasch Andersen 1998, section no, paragraph no] Available from the WWW (revised edition of her text; processed for entry in the database): <URL: http://cisgw3.law.pace.edu/cisg/biblio/andersen.html>. P. 161-162.

work. However, the conclusions of international case law need not be taken as binding, but can be seen as a guide when interpreting the CISG.[39]

In addition to the international case law there are international scholarly writings readily available in written form and through the internet. Scholars are not omniscient, but their detailed and comparative analyses could be used as an aid in determining the uniform application of the CISG.[40] Out of the nine decisions under detailed scrutiny in this theses, only once did the Court refer to international scholarly work (*District Court of Helsinki, judgment 28966, 97/20514* affirmed in relation to the reasoning by the *Helsinki Court of Appeal, S 00/82 (26 October 2000)*), however not by author and not specifically to the writing relating to the CISG.

3.2. Uniformity in Relation to the Burden of Proof

In relation to the burden of proof the courts seemed to have overlooked the plain meaning of the CISG. Even though the burden of proof is not specifically settled in the CISG, it is a matter governed by the CISG. This is supported by a scholarly writings and by international case law.[41]

[39] Franco Ferrari (2000-2001): Applying the CISG in a Truly Uniform Manner, p. 203-215 in Uniform Law Review / Revue de Droit Uniforme (2000-1) Available from the WWW: <URL: http://cisgw3.law.pace.edu/cisg/biblio/ferrari4.html>[cited as Ferrari 2000-2001, Tribunale di Vigevano, p.], p.209; Enderlein, Fritz; Maskow, Dietrich (1992): International sales law: United Nations Convention on Contracts for the International Sale of Goods: Convention on the Limitation Period in the International Sale of Goods: commentary / by Fritz Enderlein, Dietrich Maskow. Oceana Publications, New York, London, Rome.

p. 55; Baasch Andersen 2005, *supra* note 38, p. 167.

[40] Baasch Andersen 2005, supra note 38, p. 172.

[41] Ferrari 2000-2001, *supra* note 39, p. 1-8. Saidov, Djakhongir (2001): Methods of Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods. Available from the WWW:

<URL: http://cisgw3.law.pace.edu/cisg/biblio/saidov.html> [cited as Saidov 2001, section no, paragraph no]. Section II, paragraph 7. See also Knapp in Bianca & Bonell 1987, *supra* note 17, p. 541. In *Tribunale di Vigevano, 405 (12 July 2000)* the Italian Court examined the question of the burden of proving the lack of conformity of the goods. The Court rejected the opinion that the burden of proof is a question excluded from CISG and governed by the applicable domestic law (Art. 4, first sentence, CISG). On the contrary, it held that the burden of proof is a matter governed but not expressly settled by CISG, and which therefore has to be settled in conformity with the general principles underlying CISG (Art. 7(2) CISG). In the Court's view, it is a general principle underlying the CISG that the plaintiff should bring evidence in favour of its cause of action. Such principle may be derived inter alia from Art. 79(1) CISG which expressly states that the non performing party must prove the circumstances exempting it from liability for its failure to perform, thereby implicitly confirming that it is up to the other party to prove the fact of the failure to perform as such. Therefore, it is up to the buyer to prove the existence of a lack of conformity and the damage ensuing from it. See further Editorial remarks by Charles Sant'Elia in http://cisgw3.law.pace.edu/cases/000712i3.html, and Ferrari, Franco (2001): Tribunale di Vigevano: Specific Aspects of the CISG Uniformly Dealt With, p. 225-239 in 20 Journal of Law and Commerce (Spring 2001). Available also from the WWW:

Any party who wants to derive beneficial legal consequences from a legal provision has to prove the existence of the factual prerequisites of that provision, e.g. the party wishing to avoid the contract must prove that there indeed has been a fundamental breach of the contract.[42] On the other hand, any party claiming an exception has to prove the existence of the factual prerequisites of that exception, e.g. the party in breach does not escape liability merely by proving that he did not in fact foresee the result. He must also prove that he had no reason to foresee it.[43] Those facts that are exclusively in a party's sphere of responsibility and which therefore are, at least theoretically, better known to that party, have to be proven by that party since it is that party who exercises the control over that sphere.[44]

In relation to damages, the burden of proof lies on the party who is claiming damages. According to Artilce 74 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 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. The damaged buyer has the burden of proving the objective prerequisites of his claim for damages, i.e. the damage, the causal link between the breach of contract and the damage, as well as the foreseeability of the loss.[45] It has also been argued that in order to discharge the burden of proof the party in breach has to substantiate the amount of loss he suffered. However, in *Helsinki Court of Appeal, S 00/82 (26 October 2000), Helsinki Court of Appeal, S 01/269 (31 May 2004)* and *Turku Court of Appeal, S 04/1600 (24 May 2005)* the Courts took the approach that the burden of proof as to the amount of damages was a question of a procedural nature.

<URL: http://cisgw3.law.pace.edu/cisg/biblio/ferrari6.html>.Professor Ferrari praises the decision. The Court took account the foreign case law in a way no court had done before in order to promote uniformity. Ferrari 2001, p. 231-232. In *Handelsgericht Zürich, HG 920670 (26 April 1995)* a Swiss Court held that the buyer had lost its right to declare the contract avoided under article 49 CISG since the buyer had failed to notify the seller about the lack of conformity of the goods in a timely fashion (articles 39 and 49(2)(b)(i) CISG). The court also mentioned that the seller's failure to perform its obligation was probably not a fundamental breach as the damage concerned was easily repairable. However, since the buyer had lost its right under article 49(2)(b)(i) CISG, the court did not address this question fully. As regards damages, the court found that the buyer had lost its rights for failure to claim damages for the leak of the delivered containers within a reasonable time. Compensation for damages caused by the transport of the container was denied by the court because the buyer failed to prove them sufficiently (article 74 CISG).

[42] Ferrari 2000-2001, *supra* note 39 p. 2. This rule is also specifically embodied in Article 79 according to which the party relying on the impediment must prove its existence and further, that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

[43] Ferrari 2000-2001, *supra* note 39, p. 2; Text of the Secretariat commentary on article 23 of the 1978 Draft (draft counterpart of CISG Article 25), *supra* note 17, Honnold 1999, *supra* note 8, p. 209.

[44] Ferrari 2000-2001, *supra* note 39 p. 2-3.

[45] Ferrari 2000-2001, *supra* note 39, p. 2-3. Saidov 2001, *supra* note 41, section II, paragraph 7. See also Knapp in Bianca & Bonell 1987, *supra* note 17, p. 541; Stoll-Gruber in Schlechtriem & Schwenzer 2005, *supra* note 8, p.771-772.

For example, in *Turku Court of Appeal, S 04/1600 (24 May 2005)* as to the proof in relation to the amount of damages suffered by the Buyer was hard to acquire, the Court estimated reasonable damages as provided for the Finnish procedural law.[46] In the reasoning the Court of Appeal stated that the starting point in relation to the damages is that the injured party is placed in the same position he would have been had the contract been fulfilled properly. Thus, the amount of damages may exceed the contract value of the sales contract. The Court of Appeal also acknowledged that the Seller had been aware of the fact that the Buyer had acted as an intermediate, i.e. the Buyer had sold the products delivered by the Seller further to his own customers. In these circumstances the Seller ought to have understood, already at the time of the conclusion of the contract that if the goods delivered to the Buyer did not confirm with the contract the Buyer might not be able to fulfil his contractual duties towards his own customers and this might cause damages to the Buyer. All the damages claimed by the Buyer were of such nature that could be compensated under CISG Article 74. In relation to Article 77 and the mitigation of the damages, the Court of Appeal confirmed the decision of the District Court: the Buyer had not acted contrary to the requirements set out in Article 77. The Court of Appeal however stated that as the proof in relation to the amount of damages suffered by the Buyer was hard to acquire, the Court had a right to estimate reasonable damages as provided for in Finnish Code of Judicial Procedure Chapter 17, Section 6: The Finnish Code of Judicial Procedure, Chapter 17, Section 6 (571/1948) provides: "If the issue relates to the quantum of damages and no evidence is available or if evidence can only be presented with difficulty, the court shall have the power to assess the quantum, within reason." Purely domestic rules which allow the abstract calculation of damages or presume that a loss has occurred should not be considered, when applying the CISG.[47]

3.3. Uniformity in Relation to the Rules on Conciliation

There is no specific provision in the CISG on conciliation. If the parties have made no indication to the conciliation can the court supplement the contract or have recourse to the rules of domestic law on conciliation by way of the rules of international law?

Article 7 provides that in the interpretation of this Convention regard is to be had among other things to the observance of goods faith in international trade. In addition Article 7(2) provides that the questions concerning matters governed by this Convention that are not expressly settled in it, are to be settled in conformity with the general principles on which it is based on. The notion of good faith was however specifically left to concern only the interpretation of the

[46] The case involved a sale of powdered paprika from the Spanish Seller to a Finnish Buyer. The questions in dispute included whether the delivered paprika confirmed with the contract and was there a lack of conformity in the goods, had the Buyer given notice of the non-conformity in time and was the Seller liable for damages caused to the Buyer because of the defect.

[47] Stoll-Gruber in Schlechtriem & Schwenzer 2005, *supra* note 8, p. 772.

Convention and it cannot be applied directly to individual contracts.[48] Further, even if a standard of good faith in international trade could be established in relation to conciliation, this does not mean that it would override clear decisions embodied in provisions of the CISG.[49] Article 74 embodies the principle of full compensation.[50] No domestic rules on conciliation are allowed to be applied.[51]

Reference should also be made to Article 8 of the CISG. According to Article 8 on interpretation, the determination of contract content is based on the actual, common intent of the parties.[52] If only one party's intent is determinable, the other must be aware what he intent was. If no such intent is determinable, the objective approach is adopted and the contract is interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.[53] Article 8 also has a function in supplementing contacts.[54] Also in this respect it has been held that the Convention does not permit to strike out unfair contract terms based on good faith and Article 8. Nor can the reduction of contractual penalty on grounds of equitableness be supported by Article 8[55]

The solution of full compensation adopted in the CISG is in itself limited by the foreseeability required by Article 74 and further by the mitigation requirements set out in Article 77.[56] The party in breach is only liable for damages he 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. The basic approach is that the foreseeablity of the damages is judged objectively by way of referring to a reasonable person in the same circumstances. However, if at the time of the conclusion of the contract the

[48] Schlechtriem in Schlechtriem & Schwenzer 2005, *supra* note 8, p. 94-95.

[49] Schlechtriem in Schlechtriem & Schwenzer 2005, *supra* note 8, p. 100.

[50] CISG-AC Opinion no 6, Calculation of Damages under CISG Article 74, Spring 2006. Rapporteur: Professor John Y. Gotanda, Villanova University School of Law, Villanova, Pennsylvania, USA.

[51] Stoll-Gruber in Schlechtriem & Schwenzer 2005, *supra* note 8, p. 746; Lookofsky 2000, *supra* note 17, p. 154.

[52] See also discussion in chapter 2.4.2 Formation of the contract versus interpretation, above

[53] Schmidt-Kessel in Schlechtriem & Schwenzer 2005, *supra* note 8, p. 120-121.

[54] Schmidt-Kessel in Schlechtriem & Schwenzer 2005, *supra* note 8, p. 117.

[55] Schmidt-Kessel in Schlechtriem & Schwenzer 2005, *supra* note 8, p 124.

[56] According to Article 77 a party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated. And even further, the damages are limited by the exemption available to the party in breach as provided for in Article 79. Article 79(1) provides that a party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

party that eventually is liable for the breach of contract has some special knowledge of the unusual risk, the liability may be extended.[57]

Professor Lookofsky has raised a controversial question whether the foreseeability limitation in Article 74 would function as a sufficient surrogate for other domestic law standards designed to prevent compensation for "disproportionate" loss.[58] Like Lookofsky has stressed that the courts ought to be cautious in taking into consideration the conceptions of the domestic law.[59] Article 7 itself requires that in interpretation of the Convention regard is be had to its international character and to the need to promote uniformity in its application. Further, it can be argued that the duty to mitigate and the reference to a reasonableness lead to the conclusion that conciliation of excessive damages is an issue governed by the CISG but not expressly settled in it and thus must be settled with the general principles on which it is based on.

According to the Finnish Sale of Goods Act Section 70 paragraph (1) the injured party must take reasonable measures to mitigate his loss. If he fails to do so, he must bear the corresponding part of the loss himself. Paragraph (2) provides for adjustment of damages: the amount of damages payable to the injured party may be adjusted if the amount is unreasonable taking into account the possibilities of the breaching party to foresee and prevent the loss as well as other circumstances. In conciliating the damages all the relevant circumstances of the individual case must be taken into consideration, including the nature of the sale, the reason for the breach of contract, the extent of the damages and who the parties to the contract were. Conciliation is clear departure from the principle of full compensation of damages and it should be applied exceptionally.[60]. Most importantly the CISG does not include a similar provision on conciliation.[61]

In *Turku Court of Appeal, S 00/855 (12 April 2002)*, the Court stated specifically that in relation to evaluating the reasonableness of the contract or the interest rate, the CISG was not applicable. The reasoning for the statement was that the CISG did not have an article enhancing reasonableness of the contract and no other relevant articles relating to the interest

[57] Stoll-Gruber in Schlechtriem & Schwenzer 2005, *supra* note 8, p. 765.

[58] Lookofsky 2000, *supra* note 17, p. 154.

[59] Lookofsky 2000, *supra* note 17, p.49-50, 154.

[60] Ämmälä in Saarnilehto et al. 2001, *supra* note 16, p. 878-879.

[61] Ämmälä in Saarnilehto et al. 2001, *supra* note 16, p. 879; Routamo-Ramberg 1997, *supra* note 16, p. 534-536.

other than Article 78. [62] The case involved a sale of components to be attached to forestry equipments between a German Buyer and a Finnish Seller. In relation to the Buyer's claim that the warranty terms had been severe and surprising, the Court applied the Finnish Contarcts Act. The freedom of contract is fairly strong in the commercial setting, but a reference has to be made to the notion of fairness and reasonableness provided for in Section 36 of the Finnish Contracts Act. The Finnish Contracts Act (13.6.1929/228) Section 36 subsection 1 states: "If a contract term is unfair or its application would lead to an unfair result, the term may be adjusted or set aside. In determining what is unfair, regard shall be had to the entire contents of the contract, the positions of the parties, the circumstances prevailing at and after the conclusion of the contract, and to other factors..".In a case where a contractual term is unreasonable, conciliatory measures aim at rectifying the imbalance of the duties of the contractual parties. Taking relevant factors into account, as a conclusion the Court held that the warranty terms had not been unreasonable, even though they had strongly limited the Seller's liability for non-conformities and thus, there was no need for conciliating the contractual terms.

Also in *Turku Court of Appeal, S 04/1600 (24 May 2005)*, the Court of Appeal held that in relation to the conciliation of the damages the CISG did not include any provisions according to which the damages could be conciliated or amended for reasons of equity.[63] The District Court had on the other hand applied the domestic law in conciliation without a blink of an eye even though the CISG was applicable.

3.4. A New Approach

A change is under way. In *Supreme Court 2005:114, S 2004/50 (14 October 2005)*[64] the Court took a detailed and well reasoned approach in relation to the main issue: whether the Court

[62] Similarly in *Gerechtshof's (HOF) Arnhem, 94/305 (22 August 1995)* the Court held that the CISG was not applicable in relation to conciliation. The case involved a sale of live lambs. The buyer alleged that the penalty required by the penalty clause contained in the contract should be diminished in accordance with articles 7, 8(3), and 77 of the CISG. The penalty was inequitable, for it was not proportional to the loss incurred. The Court of Appeals held that neither article 8(3) concerning the interpretation of the declarations of the parties, nor article 77 relative to the obligation to mitigate losses resulting from the infraction of the contract, nor any other clause of the Convention can serve as a foundation for the reduction of the penalty amount. This question must therefore be settled according to the applicable law of the contract, in this case German law for which the reduction is not possible in commercial matters (§ 348, c. com. German).

[63] Discussed above in relation to the burden of proof, Chapter 3.2 Uniformity in ralation to the burden of proof.

[64] The case had firstly been tried by the District Court of Heinola as early as in January 2003. The case had then been dismissed on the grounds of jurisdiction. The Court of Appeal of Kouvola confirmed the decision in November 2003. The plaintiff petitioned for and was granted leave to appeal by the Supreme Court. The Supreme Court returned the matter to the District Court to be retried on the matters relating to the CISG. Decision by the Distrcit Court of Heinola given in April 2006 was again appealed for. The decision the Court of Appeal of Kouvola in March 2007 had become final.

had jurisdiction at all. The Supreme Court concentrated on the issue whether the court had jurisdiction on the basis of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 (from herein The Brussels Convention).[65] The case involved a sale of a log house kit in connection with a contract of agency. A Finnish company had sold a log house kit to a German buyer to be used as his and his family's home, but also as a model house in connection with the agency.

In relation to the jurisdiction the Supreme Court had first to resolve the issue whether the buyer was a consumer. The sale of a log house kit had been concluded on the same day than the contract for agency. The negotiations for both contracts had been held simultaneously and the contracts had been singed concurrently. By referring to a similar judgement of the European Court of Justice (among the others mentioned *C-269/95, Benincasa, Judgment 3 July 1997 and C-464/01, Gruber, Judgement 20 January 2005*) the Supreme Court concluded - contrary to the District Court and the Court of Appeal - that the sale of log house kit was closely connected with the Buyer's business operations and that the connection between the sale and the business operations could not be held insignificant taking into account the agreement as a whole. The Buyer could not be considered a consumer within the meaning of the Brussels Convention.

The next question related to the place of performance. According to Article 5 Paragraph 1 Subparagraph 1 of the Brussels Convention, in matters relating to a contract, the action must be brought in the courts for the place of performance of the obligation in question. In relation to this matter the District Court had applied the 1980 Rome Convention. The reference in the agency agreement to the Finnish law did not suffice; as the parties have not made an explicit choice on applicable law, according to Article 4 of the 1980 Rome Convention, the contract is governed by the law of the country with which it is most closely connected. More specifically Article 4(2) of the 1980 Rome Convention provides that it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration. The Official Report on the 1980 Rome Convention provides some examples in identifying the characteristic performance of a contract. Usually in the modern contract the other party's obligation takes the form of money and the other party's obligation the form of delivery of goods, the provision of a service, transport, security etc., depending on the type of the contract. It is the performance for which the payment is due which usually constitutes the characteristic

[65] The Brussels Convention has since been replaced by 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 I Regulation).

performance of the contract[66]. Thus, the applicable law was the Finnish law, according to which a debt of money must be paid at the debtor's place, and the claim in question could be tried in Finland. However, as note above, the District Court dismissed the case on the grounds that it considered the Buyer to be a consumer, thus the contents of the Finnish law was not discussed further. The Court of Appeal had confirmed the District's Court's decision on the status of the Buyer.

The Supreme Court noted that according to Article 21 of the 1980 Rome Convention, the application of the said Convention does not prejudice the application of international conventions to which a Contracting State is, or becomes, a party. Both Finland and Germany were contracting parties to the CISG and thus the CISG was the applicable law. The Supreme Court took into account the CISG Article 2(a) that states that the Convention does not apply to sales of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use. The Supreme Court held that taking into account to the legislative history of the Convention, Article 2(a) must be interpreted to mean that the CISG is also applicable in relations to the sales of goods where the goods are bought only partly for business purposes and partly for personal use. When drafting the Article it was considered whether the principal purpose of use ought to be given any significance in determining the scope of the convention but this proposal was dismissed. The meaning of Article 2(a) must be interpreted restrictively so that it applies only to sales of goods for exclusively personal use.

Progressively the Supreme Court specifically referred to Professor Schlechtriem's Commentary on the UN Convention on the International Sale of Goods (CISG), 1998, p. 32 and other commentary by Jan Ramberg and Johnny Herre, Internationella Köplagen (CISG) 2004, p. 93. Even though the immediate and principal purpose of the log house was to function as a home for the buyer and his family the sale had a connection to the agency business to be commenced at a later stage. In relation to the scope of application, the intended purpose of goods was decisive not the actual use (the agency had not been commenced at all due to the disagreements between the parties). Thus, the place of performance was to be determined by the rules of the CISG. According to Article 57(1)(a) if the buyer is not bound to pay the price at any other particular place, he must pay it to the seller at the seller's place of business. Similarly, the purchase price referred to in the claim must be paid for at the Seller's place of business, in Finland. The Court has jurisdiction to examine the claim and therefore the matter was returned to the District Court.

The adopted approach ought to be promoted and recommended. The fact that the case involved an EU-connection may have influenced the more liberal use of the international

[66] Giuliano, Mario – Lagarde, Paul (1980): Report on the Convention on the law applicable to contractual obligations by Mario Giuliano, Professor, University of Milan, and Paul Lagarde, Professor, University of Paris I. Official Journal of the European Union C 282, 31/10/1980 p. 0001-0050. P. 20-21.

sources of law. Unfortunately, the lower Courts did not fully follow the lead. However, the core of the case in relation to the contract itself and the issues covered by the CISG lied in evidentiary issues where CISG in the essence surely sets the legal boundaries and consequences for the certain acts but does not of course determine as such what has actually happened between the parties[67]. Nevertheless, the criticism presented earlier applies also here: in order to fully appreciate and honour the international nature of the Convention those who apply it and interpret it ought to emphasize also international sources of law – academic literature as well as case law – more thoroughly and openly.

4. Conclusion

From the academic point of view the CISG is captivating and raises endless questions. From a practical point of view the problems I have raised do not squarely relate to every day business life. However, in going through every case step by step and comparing to international scholarly writings and case law the resulting analysis benefits not only the court clerks, judges and justices struggling with cases dealing with the CISG, but also the business partners, in-house lawyers and others dealing with international trade on an every day basis. The CISG is a truly uniform law readily available to all business partners, regardless of background and prejudice. It therefore should be utilized more readily.

[67] The questions in dispute relating to the actual contract and the CISG involved among the others the dispute on the contents of the contract, the dispute on the conformity of the goods, whether the reclamation was given within a reasonable time and whether reasonable measures where taken to mitigate the losses.