Opting out of the CISG: is the law too complicated for such a popular choice?

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The United Nations Convention on Contracts for the International Sale of Goods (CISG) provides for the possibility to derogate from its provisions. Traders often choose not to apply the convention. This exclusion raises many questions, the first one of these questions simply being "why?". When one takes a closer look at the CISG, one may not contemplate that opting out would cause so many unexpected consequences. Opting out actually seems easy at first glance. However, it brings many practical difficulties. Thus, is the law too complicated for such a popular choice? This paper aims at demonstrating that the CISG's opt-out article is not complicated, but rather, incomplete. Indeed, the many issues raised by the opt-out choice (such as battle over the applicable law or effectiveness of the opt-out clause) may make traders reconsider their willingness to opt out of the CISG. As this paper underlines, this is due to the lack of precision on the opt-out option in the CISG. This paper will firstly show that opting out is a popular choice and give the reasons for such popularity before examining the ways to opt out. Secondly, this paper will draw a conclusion on the so-called complication of the opt-out solution. Finally, it will explain the difficulties that opting out raises and attempt to provide solutions. Such solutions would, for instance, rely on international cooperation or improving the CISG itself.

The United Nations Convention on Contracts for the International Sale of Goods (CISG) was created to facilitate the relationships between traders. The CISG seeks to reach a noble goal: the harmonisation of sale of goods law. As the preamble of the convention states, the unification of this area of law would 'contribute to the removal of legal barriers in international trade and promote the development of international trade'.[86] The CISG has been adopted by 85 countries. In these countries, the CISG has become part of the national law. Thus, provided that the conditions of application are fulfilled, the CISG applies automatically.

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[86] United Nations Convention on Contracts for the International Sale of Goods (adopted 11 April 1980, entered into force 11 January 1988) (CISG) Preamble.

According to Article 1, the CISG applies to contracts of sale of goods between traders whose places of business are in different contracting states or where, due to the rules of international private law, the law of a contracting state is deemed to be applicable.[87]

However, the CISG also provides the possibility for traders to exclude its application.[88] Article 6 constitutes an opt-out opportunity. Therefore, the absence of the opt-out clause is a 'negative applicability requirement'.[89] It seems that this article is often used by traders; several surveys[90] have shown that most transactions are made outside the CISG. This is paradoxical. Since the convention has been adopted by so many countries, its success appears incontestable. Yet, when one takes a closer look at the practice, the CISG is not as often applied as it should be. The popularity of opt-out provisions contrasts with its alleged large scope of application. What looks even more puzzling is that the wording of Article 6 is so concise that no indications on how to opt out are provided. Article 6 provides that '[t]he parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.'[91] Consequently, traders are left with no instructions as how to exclude the application of the CISG. This can lead to unwanted results. The parties may have thought they have opted out of the convention but when a dispute arises and goes before a judge, the court finds that the convention is still applicable due to a defect in the wording of the opt-out clause. As there are few guidelines on the way to opt out, parties can be misled.

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[87] CISG art 1.

[88] CISG art 6.

[89] Franco Ferrari, '"Forum Shopping" despite International Uniform Contract Law Conventions' (2002) 51 ICLQ 701.

[90] Peter L. Fitzgerald, 'The International Contracting Practices Survey Project: an Empirical Study of the Value and Utility of the United Nations' Convention on the International Sale of Goods (CISG) and the Unidroit Principles of International Commercial Contracts to Practitioners, Jurists, and Legal Academics in the United States' (2008) 27 JL&Com 1; Martin F. Koehler and Guo Yujun, 'The Acceptance of the Unified Sales Law (CISG) in Different Legal Systems' (Spring 2008) 20 PaceIntlLRev 45;Ingeborg Schwenzer and Christopher Kee, 'International Sales Law - The Actual Practice' (2011) 29 PennStIntlLRev 425; Luiz Gustavo Meira Moser, 'Parties' Preference in International Sales Contracts: an Empirical Analysis of the Choice of Law' (2015) 20 RevDrUnif 19.

[91] CISG (n 88).

This vagueness of the law begs the question as to whether it is too complicated to opt out of the CISG? There are obvious reasons to support that a problem appears in the words of Article 6. Notwithstanding these reasons, one must not deduce that the law is too complicated. Rather, it is more relevant to conclude a lack of law than a complication within. That is what this paper will try to demonstrate. First, it will underline the popularity of the opt-out choice and explain why it is so well-received. Then, the different possibilities to opt out will be examined in order to find out whether the law requires clarification. Finally, the problems raised by opting out will be explained and their potential solutions will be suggested.

I. Popularity of opting out: A mirror image of the unpopularity of the CISG

The CISG intends to favour international trade by providing for common rules. Thus exchanges between traders would benefit from such harmonised rules: if traders know what to expect from the contracts they enter into, they are likely to be less reluctant to conclude them. Harmonisation would increase trust between contracting parties and consequently develop international commerce. This is the main reason why the convention should be used in the context of international sale of goods. The CISG is also a neutral set of rules. This is another factor which could increase trading opportunities: it is easier to convince a contracting party to have the contract governed by such type of rules than by the home law of a party. However, as the position of the United-Kingdom on the CISG expresses, the convention may sometimes be seen as an inconvenient tool for international transactions. Some consider that the CISG has more drawbacks than advantages, which may add depth to why the parties often decide to opt out.[92] This section will highlight the current trend in the (non-) application of the CISG and

[92] Angelo Forte, 'The United Nations Convention on Contracts for the International Sale of Goods: Reason or Unreason in the United-Kingdom' [1997] UBaltLRev 51; Robert G. Lee, "The UN Convention on Contracts for the International sale of Goods: OK for the UK?" [1993] JBL 131; Sally Moss, "Why the United Kingdom has not ratified the CISG" [2005-06] JL&Com 483.

define the reasons why the convention is so often omitted by traders in their daily transactions.

Several surveys have shed light on the popularity of opting out. Schwenzer and Kee carried out a survey in 2009 in 85 countries.[93] Their results are the following:

> 'Of the lawyers from CISG member states who answered this question, only 13% reported always excluding the CISG, and a further 32% reported they sometimes did so. A considerable 55% answered that they never or rarely excluded the CISG. [...] Amongst [responses from non-contracting states], 19% always excluded the CISG and 36% did so sometimes, while 45% rarely or never excluded it.'[94]

Moser also produced his own survey which was conducted in 2014 in 93 jurisdictions.[95] 33.34% of the respondents indicated that they had already opted-out of the convention. The figures are even higher in Koehler and Yujun's survey. They focused their survey on the USA, Germany and China in 2004, 2005 and 2007. [96] They found out that less than 10% of the respondents never exclude the CISG, while about 65% principally or preponderantly exclude its application. Similar results can be found in Fitzgerald's survey.[97] Fitzgerald studied the value and utility of the CISG. His survey of the practices in the USA between 2006 and 2007 revealed that the majority of the US practitioners opt out of the CISG (55%).[98]

To sum up the results of these surveys, it is safe to say that about half of the contracts involving international sales of goods exclude the CISG. For a convention whose merits have been so often

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[93] Schwenzer and Kee, (n 90).
[94] ibid 434.
[95] Moser (n 90) 19.
[96] Koehler and Yujun (n 90) 45.
[97] Fitzgerald (n 90).
[98] ibid 14.

praised in the literature, it seems a high proportion.[99] Thus, opting out appears to be a popular choice amongst the international trade community. Traders do not seem to believe in harmonisation. As a consequence, the CISG fails to reach its main goal. This clearly indicates a deficiency in the drafting of the law.

Moreover, apart from such surveys, it is worth mentioning that the exclusion of the CISG is a well-known practice in professional organisations. International trade associations such as the Grain and Feed Trade Association, and the Federation of Oils, Seeds and Fats Associations, choose to exclude the convention from their standard terms as it is insufficiently connected with their realm of business. Moreover, some examples of sample contracts facilitate the exclusion of the convention by providing a choice for the choice of law clause (application of the CISG or opt out).[100] Thus the parties simply have to select their favourite position. The troubles are avoided as the exclusion clause is ready to be used. This easiness may be a factor contributing to the exclusion of the CISG.

However, the main interest brought by these surveys consists in potential reasons to explain the popularity of opt-out.

The first element of explanation that comes to mind when the question of the application of the CISG is raised is the content of the convention itself. If the parties think the convention is not in their best interest, then they will exclude it. A balance of the advantages and drawbacks offered by the CISG must be realised before taking a decision. In Koehler's survey, 35% of the respondents said they exclude the convention because they see no advantages in it, and 38% because they have no need to apply it.[101] Thus more than a third of the respondents doubt the utility of the convention. Further, only 7.4% of the respondents of the same

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[99] RM Lavers, 'CISG: To use or not to use?' (1993) 21 IntlBusL10, 13; Susanne Cook, 'CISG: From the Perspective of the Practitioner' (1997-1998) 17 J.L & Com. 349; Filip De Ly, 'The Relevance of the Vienna Convention for International Sales Contracts-Should We Stop Contracting Out?' [2003] BLI 241.

[100] Allison E. Butler, *A Practical Guide to the CISG: Negotiations through Litigation* (Supplement 2, Aspen Publishers 2007).

[101] Martin F. Koehler, 'Survey Regarding the Relevance of the United Nations Convention for the International Sale of Goods (CISG) in Legal Practice and the Exclusion of its Application' (Oct 2006) <http://www.cisg.law.pace.edu/cisg/biblio/koehler.html> accessed 20 March 2016.

survey find legal advantages in the CISG.[102] According to some, it is preferable to exclude the convention because of its uncertainty. As the convention is 'still in process of earning recognition among courts, practitioners and merchants', its rules may be uncertain.[103] Many concepts have no precise definition, such as fundamental breach or good faith. Moreover, the convention does not cover every aspect of the transaction. Questions about property, for example, are excluded from its scope (Article 4).

Thus, the CISG is an incomplete instrument. Additional rules are necessary to fill in the gaps. However, it is not clear which rules would apply. National law or Incoterm, for example, provide rules that could potentially be applied. It would be easier to apply these rules clearly and directly to avoid uncertainty. Many uncertainties arise from the convention. As the parties seek to escape from unpredictable results (e.g. committing a fundamental breach without being aware of it because of the lack of definition in the CISG), they will tend to exclude the application of the convention. The idea of uncertainty is reinforced by the fact that there is no uniformity in its application. Courts from different jurisdiction may reach opposite judgments on the same issue, contributing to the general expansion of uncertainty. Several authors point to the lack of case law[104] as a reason in favour of opting out. Due to the few cases available (although the situation is improving with more and more decisions translated and provided by the CISG database), the outcomes of conflicts between parties are not as predictable as those dealt with under domestic law, which benefits from a larger pool of precedents. Moreover, as Lavers states, many cases do not go before a judge but are settled via arbitration.[105] Therefore, they are not published and cannot constitute reference points for future litigants.

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[102] ibid.

[103] Susanne Cook, 'CISG: From the Perspective of the Practitioner' (1997-1998) 17 JL&Com. 350.

[104] Schwenzer and Kee (n 90) 435; Moser (n 90) 50.

[105] RM Lavers, 'CISG: To Use or Not to Use?' (1993) 21 IntlBusL10, 11.

However, surveys often show that the exclusion of the CISG is 'not necessarily due to material drawbacks'.[106] The unfamiliarity of the actors of international trade with the convention is highlighted in every survey. Spagnolo identified two types of unfamiliarity: a lack of sufficient knowledge of the convention and its mechanisms, and a lack of awareness of the existence of the CISG.[107] It is true that when a party is unsure of the consequences certain provisions of the CISG could bring, it may tend to opt out and choose a law with which it is more familiar.

Continuing with the idea of unfamiliarity, it is argued that costs spent on learning how to use the CISG often lead the parties to exclude the convention. Becoming familiar with international statutes is both costly and time-consuming as traders and lawyers alike must provide an effort to understand something new. This investment may deter traders from applying the convention as it is simply easier to keep on using their usual rules.

Spagnolo also highlights that the exclusion of the application of the CISG may come from the 'bargaining strength'[108] of the parties. When a party has such strength, he can urge the other party to apply his choice of law. Therefore, if the strongest party does not want the CISG to apply, the other party may have to follow that choice. In the same article, a very interesting example of this point is explained. Most lawyers in China use the CISG in international sale of goods contracts as it often seems more acceptable to the other party, the other alternative being Chinese law. Thus, Chinese traders, in order to increase their opportunities to conclude commercial deals with foreign parties, choose to rely on the CISG. As China is nowadays a powerful trading partner on the international commercial scene, it can more and more impose its conditions. Consequently, trading partners of China may have to adapt to Chinese traders' choice and apply the convention.

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[106] Christian Nick, 'The Case for Ireland's Accession to the UN Convention on Contracts for the International Sale of goods' (2010) 32 DublinULJ 349.
[107] Lisa Spagnolo, 'A Glimpse through the Kaleidoscope: Choices of Law and the CISG (Kaleidoscope Part I)' (2009) 1 VindobonaJIntlComL&Arbitration 136.
[108] ibid 149.

Further favouring the non-application of the CISG is an idea which Spagnolo has called 'path dependence'.[109] According to this expression, opt-outs may occasionally occur only as the parties use the same standard contract they have been using for years. By using a contract that is not up to date with the latest legal changes, the parties simply keep ignoring the convention. This may be due to the costs of hiring a legal adviser to draft a new version of the contract, though the behaviour of some lawyers makes the problem even worse: they themselves follow their usual practice habits and forget to take their client's interests into consideration. Instead of taking the CISG into consideration, they simply put it aside.

Then comes the idea of group pressure. Some may be tempted to opt out of the convention because others do. For instance, if the leading company of a certain type of industry systematically opts out, its competitors may want to do the same to become closer to that company. As Spagnolo states, 'they prefer to stick with the party line'.[110] The influence of the network should not be underestimated in those types of situations. Thus, opting out of the CISG is not always a decision that is taken after careful consideration of its advantages and drawbacks, but rather an impulsive and irrational option.

To sum up, opting out is more than common in the trade world and is backed up by more or less logical reasons, as for instance, the lack of precision of the convention or group pressure. If it is such a common practice to opt out, it should not be very difficult to do so. Given the current status of practice, this statement may have to be reconsidered.

[109] Lisa Spagnolo, 'Rats in Kaleidoscope: Rationality, Irrationality, and the Economics and Psychology of opting out of the CISG (Kaleidoscope Part II)' (2009) 1 VindobonaJIntlComL&Arbitration 157.
[110] ibid 166.

II. How to opt out: A guide for traders and their lawyers

Very often, the parties intend to exclude the application of the convention. However, this is more difficult than it seems to make this intention a concrete clause of their contract. The parties may not have legal knowledge or time to think about how to draft the choice of law clause. This is why the various ways to contract out will be explained in this part. After exposing the different techniques, a conclusion on the complicated character of the law will be drawn.

Article 6 is a rather short article:

> "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."[111]

There seems to be three requirements in order to effectively opt out.[112] First, the parties must know that the CISG would apply to their contract. Then, they must make it clear that they want to avoid the application of the convention. Finally, opting out cannot be unilateral and must be consented by both parties. However, these are only suppositions as drafters of the convention were not precise on how to opt out, and thus traders had to make their own interpretation.

It is to be understood from Article 6 that the first means to opt out is by including an express reference to the exclusion of the convention. This is the most common way to opt out as Koehler's survey pointed out, with 77% of the respondents excluding the CISG by express exclusion[113] (and more than 81% in the updated version of the survey including Chinese respondents[114]). For instance, the parties could draft a clause stating that 'pursuant to Article 6 of the

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[111] CISG Art 6.

[112] Morten M. Fogt, 'Private International Law Issues in Opt-out and Opt-in Instruments of Harmonization: the CISG and the Proposal for a Common European Sales Law' (2012-2013) 19 ColumJEurL 90.

[113] Koehler (n 103).

[114] Koehler and Yujun (n 90) 48.

CISG, the parties hereby expressly opt out of the CISG'.[115] This would clearly underline their intent not to have the transaction governed by the convention. The reference to Article 6 in the clause is necessary because the CISG 'governs the manner of exclusion'.[116] Indeed, this is logical as the convention applies as long as the parties have not opted out, provided that the conditions of Article 1 are fulfilled. Thus, the way to exclude its application must be made in accordance with its provisions. This type of clause could contain indications as to the applicable law or not; in the latter case the applicable law will result from the rules of international private law.

There is no time limit to opt out: the parties can decide to opt out at the time of conclusion of the contract or after that time. Thus, it gives them more freedom to conduct their transactions.

The Advisory Council insists that the intention to exclude the convention 'should be clearly manifested'.[117] The requirement of clear intent finds its roots in the general principles of the CISG. It supports good faith and uniformity.[118] The requirement of a clear intent is necessary because the goal of the convention is to harmonise trade transactions around the world and also, as stated above, the CISG automatically applies when its conditions of applicability are fulfilled. If no clear intention was required, it would be too easy for parties to consider that another set of rules governs their transaction and no harmonisation would take place. Besides, the automatic application requires a clear willingness to exclude it as silence does not constitute a sufficient expression of intent. This intention can be expressed in the contract itself or in general conditions as long as these conditions have been incorporated in the agreement[119] and both parties are aware of them. Moreover, the Advisory Council added that the intention can be drawn from words

[115] Allison E. Butler, *A Practical Guide to the CISG: Negotiations through Litigation* (Supplement 2, Aspen Publishers 2007) Form B-1.
[116] CISG-Advisory Council, 'Opinion No. 16 Exclusion of the CISG under Article 6' [2014] <http://www.cisg.law.pace.edu/cisg/CISG-AC-op16.html> accessed 21 March 2016 para 2.
[117] ibid para 3.
[118] Allison E. Butler, *A Practical Guide to the CISG: Negotiations through Litigation* (Supplement 2, Aspen Publishers 2007) ch 2.
[119] Appellate Court Jura 3 November 2004 <http://cisgw3.law.pace.edu/cases/041103s1.html> accessed 21 March 2016.

and/or conduct of the parties.[120] The advisory council also envisaged the case of doubt as to the intention of the parties.[121] In such circumstances, judges must not infer exclusion. Therefore, if there is no clear intention to opt out, the convention will not be excluded.

Implied exclusions have brought discrepancies among courts' decisions and drafters of the convention.[122] Article 6 does not contain any mention of such a type of opt-out although the text on which the convention is based (Article 3 ULIS) provides that the parties could impliedly opt out. Schlechtriem and Butler explain in 'UN Law on International Sales: The UN Convention on the International Sale of Goods'[123] that this is to impose barriers on judges so that they do not arrive at implied exclusions too easily. However, that does not mean that implied opt-outs are impossible. For example, a way to exclude the application of the convention would be not to fulfill the requirements for its application like in case of a sale of goods for personal use. The Advisory Council declared that the requirement of a clear intent to opt out is also to be applied for implied exclusions[124] and is even more important in these cases as courts have been reluctant to find opt-outs when a clear intent to exclude is lacking. To support that point, one can refer to several decisions from various jurisdictions. Courts in Austria, Switzerland, Italy, or Greece,[125] have recognised implied exclusions. In 2001, Austrian judges held that a choice of law without explicit declaration that the CISG is excluded does not constitute an implicit exclusion (because, in that particular case, the CISG was part of the chosen law). An implicit exclusion is only

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[120] CISG-AC (n116) para 3.6.
[121] CISG-AC (n 118) para 3.7.
[122] United Nations Conference on Contracts for the International Sale of Goods (A/CONF.97/19 - Official Records, 1980).
[123] Petra Butler and Peter Schlechtriem, *UN Law on International Sales* (Springer-Verlag Berlin Heidelberg 2009) 19.
[124] CISG-AC (n 118) para 3.1.
[125] Supreme Court 2 April 2009 <http://cisgw3.law.pace.edu/cases/090402a3.html> accessed 21 March 2016; Canton Appellate Court Vaud 11 April 2002 <http://cisgw3.law.pace.edu/cases/020411s1.html> accessed 21 March 2016; Tribunale di Forli 11 December 2008 <http://cisgw3.law.pace.edu/cases/081211i3.html> accessed 21 March 2016; Decision 4505/2009 of the Multi-Member Court of First Instance of Athens 2009 <http://cisgw3.law.pace.edu/cases/094505gr.html> accessed 21 March 2016.

assumed if the corresponding intent of the parties is sufficiently clear.[126] The same outcome was reached in Switzerland in 2004, in a case where there was no exclusion of the convention because the parties had not stated their position.[127] The clear intent is also a requirement on the other side of the Atlantic. US courts appear to deny the possibility of implied opt-outs.[128] They construe Article 6 by comparison with Article 3 ULIS and therefore reject implicit exclusions as Article 6 has not retained the express wording of Article 3. In *Asante technologies v PMC Sierra,*[129] an American court applied the CISG because the clause ('the validity and performance of this order shall be governed by laws of the state shown on the buyer's address on this order'[130]) was not considered clear enough to mean exclusion.

Apart from the express exclusion explained above, a clear intention can consist in choosing the law of a non-contracting state. As the CISG would not be part of the set of laws of this country, it is obvious that none of its provisions would be referred to. This is often accepted as an implied exclusion.

A further way to opt out impliedly would be to rely on usages which exclude the CISG. According to Article 9, if the parties decide that the usages of their particular trade will govern their contract or they know usages that are widely used in their trade and these usages consist in applying a certain set of rules that has no link with the CISG (English law for example), then the CISG will be excluded.

Yet courts are more often divided on what does and does not constitute an exclusion of the convention than they agree on when opt-outs are valid. A first glance at this problem was underlined earlier (with the *Asante* case). These divergences are important in practice because a choice-of-law clause held to be invalid could have dramatic consequences for the parties. Despite

[126] Supreme Court 22 October 2001 <http://www.cisg.law.pace.edu/cases/011022a3.html> accessed 21 March 2016.
[127] Appellate Court Jura (n 119).
[128] Franco Ferrari, 'Homeward Trend and Lex Forism in International Sales Law' [2009] IBLJ 337.
[129] Federal District Court [California] 27 July 2001 <http://cisgw3.law.pace.edu/cases/010727u1.html> accessed 21 March 2016.
[130] ibid.

this importance, this is the area that raises most uncertainties as courts disagree, and different reasoning can be found around the globe. This problem is evidenced in cases where the parties choose the law of a contracting state. For some judges, such a choice allows an inference of exclusion of the convention if the parties state that the chosen law will apply exclusively.[131] However, in most cases, a reference to the law of a contracting state is not enough to opt out, even though the parties would not be aware of the existence of the convention, as the CISG is part of the law in such countries. The reason is simple: the standard of a clear intent to exclude the CISG is required because the convention is an opt-out system and not an opt-in one. Therefore, the question to be asked is whether the parties have sought to exclude the application of the convention and not whether they wanted to apply it to their contract.[132] When the parties identify the law of a contracting state as the law governing their commercial relationship, it is not necessarily useless. Though the convention will apply, domestic law will still be relevant for matters not dealt with by the CISG. Thus, such a choice still makes sense. The diversity of cases offers numerous hypothesis of implied exclusion. For instance, an Australian court held that the convention was excluded where the contract contained the following clause: 'Australian law applicable under exclusion of UNCITRAL law'.[133] The same conclusion is reached when the clause selects 'the law of a contracting state insofar as it differs from the law of the national law of another Contracting State'.[134] In those decisions, the intent of the parties is clear enough to presume that they wished to rely on another law than the CISG. But the problem is that it is a matter of interpretation. Some courts may find that the intent is unequivocal while others would still apply the CISG. For example, it was held

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[131] Supreme Court 17 December 1996 (*Ceramique Culinaire v. Musgrave*) <http://cisgw3.law.pace.edu/cases/961217f1.html> accessed 21 March 2016; Bundesgerichtshof 11 May 2010 <http://cisgw3.law.pace.edu/cases/100511g1.html> accessed 21 March 2016.

[132] Claude Witz, 'L'Exclusion de la Convention des Nations Unies sur les Contrats de Vente Internationale de Marchandises par la Volonté des parties' [1990] D 108.

[133] Federal Court of Australia 20 May 2009 (*Olivaylle Pty Ltd v. Flottweg GmbH & Co KGAA*) <http://cisgw3.law.pace.edu/cases/090520a2.html> accessed 21 March 2016.

[134] Oberlandesgericht [Appellate Court] Linz 23 January 2006 <http://cisgw3.law.pace.edu/cases/060123a3.html> accessed 21 March 2016; Austria (n 43).

that the incorporation of Incoterms does not amount to an exclusion of the CISG.[135] But another court found that it is an exclusion if provisions of Incoterms conflict with provisions of the convention.[136] In addition, the uncertainty is even higher when the parties are more precise. They can decide to choose the law of a contracting state but only a particular portion of it, such as a domestic statute regulating sales. The advisory council declared that '[a] reference to a Code containing the purely domestic sales law should be sufficient, provided the Code does not also enact the CISG'.[137] As a consequence, identifying a particular statute as the applicable law is a valid way to opt out. But it seems that the statute in question must be identified. It is not sufficient to refer to 'domestic law' in general according to a Belgian case,[138] though an Italian court has decided against this opinion and held that in such a case, the CISG was excluded.[139] One can see that implicit opt-outs may be understood differently depending on the jurisdiction.

Given the multiple ways to opt out, it is not surprising that traders are tempted to exclude the CISG. Moreover, the implied opt out favours the exclusion of the applicability of the CISG. Thus, the apparent simplicity of Article 6 conceals more problems. The CISG itself contains the very tools to lead to its destruction. Opting out is thus eased by the convention itself and this has for impact to penalise harmonisation of trade contract law.

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[135] District Court Kortrijk 19 April 2001(*CE v. CD and AR*) <http://cisgw3.law.pace.edu/cases/010419b1.html> accessed 21 March 2016.

[136] Cour suprême du canton [Appellate Court] Berne 19 May 2008 <http://cisgw3.law.pace.edu/cases/080519s1.html> accessed 21 March 2016.

[137] CISG-AC (n 116) para 4.5.

[138] Appellate Court Gent 20 October 2004 (*NV Van Heygen Staal v. GmbH Stahl- und Metalhandel Klockner*) <http://cisgw3.law.pace.edu/cases/041020b1.html> accessed 21 March 2016.

[139] Tribunale di Forli 26 March 2009 <http://www.globalsaleslaw.org/content/api/cisg/display.cfm?test=2336> accessed 21 March 2016.

Then, another issue is the arguments used by the parties during litigation. Some litigants invoke only pure domestic provisions although the CISG would apply to their contracts. Several courts have held that it is not enough to opt out of the CISG.[140] Some courts went even further and adopted the same point of view even though the parties did not know that the CISG applied to their contract.[141] But there remains a certain doubt on this issue as opposite decisions can be found. For example, the French Supreme Court held twice that the convention applied when parties based their arguments only on domestic law.[142] This issue illustrates the complexity that can arise from a simple two-line article.

To conclude, as the name of the article[143] written by Drago and Zoccolillo suggests, parties should be explicit when it comes to the choice of law. The authors of this article declared that this will 'ensure that the law intended by the parties is solidly established and not second guessed by courts'.[144]

So, careful traders and conscientious lawyers should be sure that the mutual agreement to exclude the application of the CISG is expressly set out in the contract in order to avoid difficulties.

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140 District Court Saarbrücken 2 July 2002 <http://cisgw3.law.pace.edu/cases/020702g1.html> accessed 21 March 2016.

141 Appellate Court Zweibrücken 2 February 2004 <http://cisgw3.law.pace.edu/cases/040202g1.html> accessed 21 March 2016.

142 Supreme Court 25 October 2005 <http://cisgw3.law.pace.edu/cases/051025f1.html> accessed 21 March 2016; Supreme Court 26 June 2001 (*Anton Huber v. Polyspace*) <http://cisgw3.law.pace.edu/cases/010626f1.html> accessed 21 March 2016.

143 Thomas J. Drago and Alan F. Zoccolillo, 'Be Explicit: Drafting Choice of Law Clauses in International Sale of Goods Contracts' (May 2002) 9 The Metropolitan Corporate Counsel.

144 ibid.

If the possibility to opt out of the CISG is expressly contained in the convention, the ways to do that are not. The CISG offers no guidance as to the means to opt out. As Grave said in 'Article 6 and issues of formation':

> "It was decided to address the issue of excluding [...] in a single sentence, leaving a simple and elegant statutory provision but one that does not clearly and unequivocally answer the question at hand."[145]

This statement underlines the fact that Article 6 is rather general. This may be explained by the desire to respect the party autonomy but also by the fact that the convention is a compromise between several legal systems, such as common law or civil law. Consequently, Article 6 is vague. It expresses the possibility to opt out but the ways to do so remain unexplained. Yet, that does not mean that it is complicated to opt out. If, as shown in the first part, opting out is so often applied, then it should not be difficult to do so as so many traders exclude the convention. A priori, it is relatively easy to opt out: one just has to say that the CISG is excluded and it is actually excluded. But one more time, this is not said in Article 6. So, the problem is not that the law is too complicated, because to be complicated it should at least provide some guidelines; but rather that the law is almost lacking. Nevertheless, if the wording of Article 6 is as it is, this is not without reasons. It may be seen as an attempt to give a choice to the parties. Opting out means to make the choice to withdraw from the effect of the provisions of the convention. This choice would not be complete without a free choice as to the ways to opt out. Moreover, it is impossible, for the sake of clarity, to list all the manners that exist to opt out. Giving the parties an open option to opt out as they wish is more consistent with the principle of party autonomy that emerges from the CISG. It is worth mentioning that this article is compliant with the principle of contractual freedom. Thus, it is consistent with the need for flexibility felt in international trade. However, more problems arise

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[145] Jack Graves, 'CISG Article 6 and Issues of Formation: the Problem of Circularity' [2011] Annals FacLBelgradeIntlEd 127.

from this broad article than solutions. As seen above, there are many uncertainties in the field of opt-outs.

To make the problem even thicker, if the law is not complicated, case law is. As there is no harmonisation of the decisions, traders and their lawyers are always in doubt as to the validity of the clause of choice-of-law. Each state (and even each court within a state sometimes) can have their own view on issues as there is no "international supreme court" to give uniform guidelines. The goal of harmonisation aimed at by the CISG seems to fade away.

Thus, small businesses (and even larger ones to some extent) which are not used to reading the law and do not have access to sharp and professional legal advice are left clueless as to how to opt out of the CISG. Many other problems are brought by opting out. They will be examined in the third part.

III. Difficulties in opting out: A plea for effective solutions

As seen earlier, there can be many reasons to exclude the CISG from international sale of goods contracts and many ways to do it. But there are also many difficulties brought by this choice. The consequences can be dramatic for parties and therefore opting out should be considered carefully. This part will study the problems raised by opting out, and then will focus on ways to improve Article 6 and defeat its complications.

The presence of Article 6 in the CISG has indisputable advantages. First of all, it respects freedom of contract. The parties are not compelled to be subjected to its rules. Following from that, the parties can choose a law they understand better or a law which is more favourable to them. Thus, opting out can decrease some costs. The costs of becoming familiar with the CISG may be an example: there will be no need to invest in knowledge if there is nothing new to learn. Opting out of the convention may also bring unification as to the rules applied to the contract. As the CISG does not cover every aspect of a contract, another law is required to fill in its gaps. If the parties choose to apply this law to the whole contract (and not a mix of national law and CISG), there will not be any inconsistencies in the resolution of the disputes. The rules will

come from the same source. In addition, opting out may give greater certainty about future conflicts. As the applicable law chosen by the parties is often a domestic law, the parties can benefit from a wide range of cases and interpretations of the provisions already well settled. They can have a better idea of how the dispute will end.

If some parties believe that opting out is the easiest way to avoid any trouble with the CISG, they may be surprised to see how many more problems they can attract by opting out. First, if the parties decide to opt out, they may have to agree on another applicable law. This may be complicated as hours of negotiation may be required to reach an agreement, which additionally means further costs. In most cases, each party will try to impose the law of his country. As a result, an agreement is often difficult to find. On the contrary, the CISG is ready to get picked up and offers a compromise that would decrease the time and costs linked to negotiation.[146] Besides, this agreement may consist in a compromise that does not fully satisfy both parties. To conclude with the issue of agreement, opting out may become problematic in case of a battle of the forms. This situation arises for instance when a seller sends an offer to sell goods; the offer including his own terms and the buyer accepts to buy the goods, but when sending his acceptance, he also addresses different contractual clauses. It might happen that a party does not read the other party's clauses and thus believes that the contract has been concluded on its terms. Yet, if a conflict arises later in their contractual relationship, there will be a problem: according to which forms should the dispute be dealt with? This is how a battle of the forms appears. For example, a party may choose the law of a particular contracting state and expressly excludes the CISG in his terms, but the other party, in his own terms, may make reference to the law of another contracting state. For the Advisory Council, it is not a case of opt out.[147] The Advisory Council calls upon the Draft Hague Principles on Choice of Law to bring light on the question. The solution would be that:

[146] Butler (n 100) ch 2.
[147] CISG-AC (n 116) 4.14.

> "one should compare the battle of the forms rules under the CISG (either last shot or knock out) with the rule under [the law of the state chosen by the party who excluded the CISG] (excluding the CISG). If [the latter law] operates under a knock out rule, then both choices of law are knocked out, leaving no choice of law, and thus CISG applies."[148]

With this example, it is clear that playing with opt-out clauses may be a dangerous game. But this is not over. What if the opt-out clause is contained in general conditions which the other party has not read? Or what if the opt-out clause conflicts with standard terms? As Lavers pointed out, '[t]he choice of law that prevails will depend on which form prevails and, in turn, which form prevails may depend directly on whether you apply the rules of the CISG or the [domestic law]'.[149] Two problems emerge from that statement. First, it seems paradoxical to invoke the rules of a certain convention to enforce its exclusion. Article 19 would apply and may lead to the exclusion of the CISG. Secondly, it brings a question of circularity. To determine the applicable law, one needs to know which form has priority, but to know that, one must establish what is the applicable law. Even where the terms exchanged both express the intention of the parties to opt out of the CISG, it does not mean that the convention is excluded. The Advisory Council gives a relevant example:

> "One party may indicate a choice of Danish law excluding the CISG, and the other might indicate Spanish law excluding the CISG. Neither Danish nor Spanish law will be applicable pursuant to the knock out method of dealing with conflicting standard terms expressed in CISG Advisory Council Opinion No 13, Rule 10."[150]

[148] ibid.
[149] Lavers (n 99) 12.
[150] CISG-AC (n 116) 4.14.

So, opting out may eventually have a reverse effect and lead to the application of the convention.

Then, if a choice of law clause is finally included in the contract, more problems may appear. The clause may be considered ineffective.[151] As seen above, courts are divided as to how to construe opt-out clauses. As a consequence, even in cases where the parties have taken a common decision on the applicable law, it may not be enough to exclude the CISG.

Nevertheless, the main drawback of the popularity of opt-outs is that it makes the uniformity of cross-border business a utopia: often dreamt of but never reached. As opting out is so popular, there is no harmonisation of the laws of international trade transactions. Harmonisation is the main reason why the CISG is so important: it provides for a tool every trader, regardless of their nationality, can understand and use. The convention thus constitutes a common basis for international exchanges and should be used in order to facilitate these exchanges. However, this point of view does not seem to be shared by most traders.

The situation is indeed even less simple than it seems. Opting out too often creates a vicious cycle. If the culture of opting out expands, then there is no uniformity. If there is no uniformity, there is no certainty. Consequently, the parties prefer to opt out to avoid this uncertainty. And the cycle goes on and on again. Therefore, the familiarity with the rules of the convention develops and the CISG remains almost unknown. As Spagnolo said, 'opt-out contributes to unfamiliarity through a lack of exposure to CISG dispute work'.[152] Besides, Article 6 encourages forum shopping[153] whereas a unified contract law would avoid this problem. But this problem cannot be erased from the CISG otherwise it would deny the parties the right to freely choose how to draft their contract.

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[151] Butler (n 100) ch 2.

[152] Lisa Spagnolo, 'The Last Outpost: Automatic CISG Opt Outs, Misapplications and the Costs of Ignoring the Vienna Sales Convention For Australian Lawyers' (2009) 10 MelbJlIntLaw 141 pt IV.

[153] Ferrari, 'Forum Shopping' (n 89).

With so many drawbacks and a law that is so vague that it makes it complicated to opt out, it is high time to find effective solutions. Potential solutions can be suggested to improve Article 6 and ease opt-outs.

Firstly, it is worth underlining that case law gives increasing guidelines for opting out. The first thing to do to have more details about Article 6 and the way opt out is applied in practice is to read decisions. As the CISG has been used for almost 30 years, judges have come across cases where the CISG had to be implemented. Therefore, they gave practical examples which can be read as a guide. They explain what to do and what not to do to effectively opt out. Nevertheless, judgments differ from one country to another. If they can give indications, they are not to be entirely trusted. A French seller could be aware of a decision from an American court about a certain interpretation of an opt-out clause but could not completely rely on it as French judges may have a different opinion. Ferrari stressed the fact that 'courts seem to resort to nationalistic interpretations'.[154] Thus the many decisions dealing with the CISG and easily available in databases should only be regarded as guidelines and not as pure laws. Nonetheless, case law could become a real cornerstone of the application of the CISG. Ziegel suggested establishing an international tribunal with authority for interpretation.[155] Functioning on the model of the CJEU, judges from all states could refer to that tribunal when they are unsure of how to tackle the issue at stake. The decisions of the tribunal would be binding on all contracting states, creating a unified sphere of common interpretations. Bonell had a similar idea. He proposed to create a board with representatives of each contracting state.[156] Based on analysis of these representatives, the board would draw a comparative study and the UN could revise the convention in accordance with this study.

[154] Ferrari, 'Homeward trend' (n 128) 334.
[155] Jacob S. Ziegel, 'The Future of the International Sames Convention from the Common Law Perspective' (November 2000) 6 NZBLQ 345.
[156] John E. Murray, 'The Neglect of CISG: a Workable Solution' (1998) 17 JLC 365.

But what if the solution to the vagueness of Article 6 was already in the convention? Perhaps one has to read between the lines to explain how opt-outs work. Article 6 has to be understood in the context of the CISG, as a part of the whole convention. Therefore, its interpretation should be examined under the lights of the spirit that emerges from the entire text. It should be guided by the general principles of the convention. For instance, when two parties have included an unclear opt-out clause in their contract, the judge in charge of the matter could use the principle of party autonomy as a justification for his decision. As party autonomy is one of the general principles, it could be used to support the choice of the parties to contract out even though their intention was not very clear. So to some extent general principles might be helpful. General principles have been discussed at length and some authors have given them some weight to interpret the CISG. Bailey developed an interesting reasoning. He said that one should start from the language of the CISG, then go to case law, and finally move to unstated principles.[157] Thus good faith or fair trading could help to interpret Article 6 in a given context. Bailey also stated that to understand the CISG, the secretariat commentary should be adopted as official commentary.[158] The commentary could constitute the guidelines the business world has been looking for.

Then, if it is not enough to look at decisions and principles, the CISG could be changed into an opt-in instrument. This would have the advantage of facilitating the interpretation of intention of parties in cases where the choice of law clause is unclear. However, it would not favour harmonisation of transactions rules across the world. Yet, as the CISG is often excluded, one may think that this handicap is of little weight and that it would be more useful for traders to have the possibility to opt in instead of opt out.

[157] James E. Bailey, ‘Facing the Truth: Seeing the Convention on Contracts for the International Sale of Goods as an Obstacle to a Uniform Law of International Sales’ (1999) 32 CornellIntlLJ 297.

[158] ibid 299.

In conclusion, whether the law ought to be changed or not is a matter of policy. If one supports the CISG, then it is obvious that the convention must not become an opt-in legislation. If one disagrees with this point of view, the convention should be turned into an opt-in instrument. However, in both cases, it is important to at least create effective guidelines on Article 6 for courts of the world.

Nonetheless, it seems impossible to suppress all the areas of doubt surrounding Article 6. Thus, the ultimate solution would not be one to facilitate opt-outs but to reduce their popularity. By promoting the CISG, traders and legal professionals would become more familiar with the convention and would be less reluctant to apply it. Thus, they may give up implementing opt-out clauses. Education plays an important role here. The more traders know about the CISG, the more they are able to understand when it is better for them to apply it or not. Explanations of the mechanisms of the convention and precisions on how to opt out in an efficient way could be provided by chambers of commerce, for example, as long as they give a uniform interpretation. In addition, traders should not be the only ones to receive an education about the CISG. Lawyers should also be more aware of the convention. As they advise clients, they have a duty to know the relevant legislation in order to develop a strategy that protects the best interests of clients, and accordingly the CISG is amongst legislation they should be aware of. But this is the theory. In practice, many lawyers know little about the convention. They may know that it exists but have no idea as to how it works.[159] Schwenzer and Kee underlined that 'there are many degrees of familiarity, and it would appear unwise to equate familiarity with a genuine understanding of how the CISG operates and can operate in international trade'.[160] Several solutions could increase the awareness of lawyers. First, the CISG could be taught more in law schools. In a survey realised in the USA, Fitzgerald showed that most respondents agreed that the CISG should be taught more.[161] The same survey brings hope because it estimates that 78%

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[159] Schwenzer and Kee (n 90) 433.
[160] ibid 438.
[161] Fitzgerald (n 90) 10.

of professors address the CISG in contract courses and that 100% of them teach it in sales law courses.[162] Thus, there seems to be a good cover of the CISG in law schools. Dodge makes the reverse observation and claims that the CISG is neglected by casebooks.[163] This indicates there may be some greater effort needed. Secondly, the CISG could be made mandatory at the bar exam. Future lawyers would thus be aware of the mechanisms of the CISG and would be able to implement it once they become practitioners. However, for the picture to be complete, judges have also a few lessons to take. As judges may not deal with the convention on a daily basis, it is arguable that when a case comes into their hands they may not be as confident to apply the convention as they are with domestic law. So, they can make mistakes in interpreting the CISG. In addition, judges are always lacking time to analyse cases.[164] Sometimes they cannot afford to spend hours reading cases in order to interpret a single clause of a contract, and they have even less time to read CISG cases from outside their jurisdiction.[165] The solution would thus be to make judges more familiar with the CISG from the very beginning, so that they would not have to spend that extra time in research. They could be more efficient and find a fair answer faster. Consequently, education is a key element to promote the CISG but also to prevent difficulties in opting out.

Another way to limit the problems linked to opt-outs would be to improve the CISG so that traders would want to apply it rather than exclude it. In order to do so, Ziegel suggested making amendments to the original text of the convention to enable its adjustments to the current need of traders.[166] If the CISG stays up to date with the latest practices, then traders would see the convention could benefit them. Thus, they would save themselves the trouble of opting out by having their transactions governed by the convention. This solution does not provide an answer to the difficulties brought by Article 6, but may be able to reduce the number of cases where these problems arise.

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[162] ibid.
[163] William S. Dodge, 'Teaching the CISG in Contracts' (2000) 50 JLegalEduc 76.
[164] Schwenzer and Kee (n 90) 445.
[165] ibid.
[166] Ziegel (n 155) 445.

Thus, the solution which consists in improving the CISG to decrease the proportion of opt-outs may be more in line with the goal of the CISG. To harmonise international trade transactions, it seems more logical to make the CISG more attractive and easier to understand. Consequently, it would finally be up to the parties to decide whether the CISG suits their interests or not. Article 6 will always enable them to opt out. And, through a better education, they will know how to do that.

To conclude, one cannot say that the law is too complex. It is true that traders do not like complicated legal vocabulary. They rather prefer straightforward provisions so they can secure their transactions. They also like having the choice: the choice to choose the applicable law, the choice to include their own conditions, the choice to change ineffective clauses, and so on. Article 6 gives them this freedom but does not give them the clarity they long for. Article 6 enables them to opt out of the CISG but does not say how to do so. What is unique with Article 6 is that many surveys pointed out that opting out is rather popular in practice despite the lack of clarity of the convention. It seems that traders prefer to challenge the obscurity of the law than putting their contract under the lights of the convention. Thus, several methods to opt out were given birth. From express choice of law clauses to implied choices, the imagination of traders (and their lawyers) has been prolific. However, this imagination has also driven them to unsettled paths. Through unclear clauses, traders expose themselves to a potential invalidity of opt-out clauses. And this is because the law is vague. Article 6 is too concise to explain what is considered a good opt-out and what is not. Therefore, the law is not too complicated but rather almost empty. It should not remain so. Because opting out may bring problems, a better understanding of Article 6 is required. Several solutions may be envisaged but will only be achieved through an international cooperation. This would be beneficial for the different actors of the international business world but would also have a greater impact: this could develop cross-border exchanges thanks to a more uniform legal context and could stimulate the worldwide economy. However, the best solution would be to be patient. As more and more cases apply the CISG and the current trend reflects

a decrease in opt-outs, a 'change has begun'.[167] One can hope this will lead to a clearer understanding of Article 6 without requiring a complex amendment of the text.

[167] Harry M. Flechtner, 'Changing the Opt-out Tradition in the United States' (Congress to celebrate the fortieth annual session of UNCITRAL, Vienna 9-12 July 2007).