THE VIENNA SALES CONVENTION (CISG) BETWEEN CIVIL AND COMMON LAW–BEST OF ALL WORLDS?

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I dedicate this paper to the memory of Saúl Litvinoff, who passed away in January 2010 at the biblical age of 84. He was in the audience when I presented this paper to the Law Faculty at LSU in February 2009. He took a very active interest in the subject and posed difficult and critical questions that were only too justified.

I. INTRODUCTION

A. Leibniz and a Country at the Crossroads

In many respects Louisiana is a country at the crossroads. Here, the outgoing trade from the Mississippi Valley meets with the incoming trade from South America. Here, French and Spanish culture and lifestyle have met and still meet with what is regarded as the typical American way of life. In particular, Louisiana's legal system combines elements of civil and common law. Not surprisingly, Louisiana as a mixed jurisdiction[1] has been termed a

1. Generally on mixed jurisdictions *see* MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY (Vernon Palmer ed., Cambridge University Press

system "between the worlds"[2] or even "the best of both worlds."[3] Indeed, law-wise the citizens of Louisiana may live in what Leibniz,[4] the great philosopher, lawyer and all-round scientist at the beginning of the Age of Enlightenment, thought we all live in: "the best of all possible worlds."[5] This is not the perfect world without any shortcomings but the best one can expect–with the least weaknesses.

B. A Global Sales Convention

On the global level and for the field of international sales transactions, the United Nations Convention on Contracts for the International Sale of Goods of 1980 (CISG) may come close to the Louisiana model. *In nuce* and confined to sales law, the Convention is–similar to the legal system of a mixed jurisdiction[6]–equally an example of a combination and merger of influences from the major legal systems.[7] The CISG, its roots in different

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2001); id. (ed.), *First Worldwide Congress on Mixed Jurisdiction: Salience and Unity in the Mixed Jurisdiction Experience: Traits, Patterns, Culture, Commonalities: Salience and Unity in the Mixed Jurisdictions: The Papers of the World Congress* , 78 Tul. L. Rev. 1 (2003); MIXED JURISDICTIONS COMPARED: PRIVATE LAW IN LOUISIANA AND SCOTLAND (Vernon Palmer ed., Edinburgh University Press 2009); Jacques Du Plessis, *Comparative Law and the Study of Mixed Legal Systems*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 477 (Mathias Reimann & Reinhard Zimmermann eds., Oxford University Press 2006); MIXED LEGAL SYSTEMS IN COMPARATIVE PERSPECTIVE: PROPERTY AND OBLIGATIONS IN SCOTLAND AND SOUTH AFRICA (Reinhard Zimmermann et al. eds. 2004).

2. Joachim Zekoll, Zwischen den Welten–*Das Privatrecht von Louisiana als europäisch-amerikanische Mischrechtsordnung*, *in* AMERIKANISCHE RECHTSKULTUR UND EUROPÄISCHES PRIVATRECHT 11 et seq. (Reinhard Zimmermann ed. 1995).

3. Joachim Zekoll, *The Louisiana Private-Law System: the Best of Both Worlds*, 10 TUL. EUR. & CIV. L.F. 1 et seq. (1995).

4. Gottfried Wilhelm Freiherr von Leibniz (1646 – 1716).

5. He explained this idea in his work *Essai de théodicée* (1710).

6. *See supra* note 1.

7. *See* also Alejandro M. Garro, *Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods*, 23 INTERNATIONAL LAWYER 443, 452 (1989); for a comprehensive comparison between the CISG and the sales law of Louisiana *see* Alain Levasseur, *The Louisiana Experience*, *in* THE 1980 UNIFORM SALES LAW: OLD ISSUES

legal traditions and the manner in which the Convention has treated the various influences, is the subject of this paper.

C. Questions: Cross-influences, Contamination, Permeability–Synthesis?

Which is the aim of the present paper? It will first trace the divergent sources from which the Convention has borrowed and then pursue the way in which these sources were used and merged. As will be seen the questions of cross-influences, permeability or even contamination (whatever that may mean in regard of law and legal institutions) arise also within the scope of the CISG though in a form somewhat different from the exchanges that comparatists are used to observe between legal systems. And it shall be asked whether the CISG can be regarded as a synthesis that bridges gaps between the civil and the common law.

II. THE CISG AND ITS COMPARATIVE BACKGROUND

A. Aims of the CISG

The essential aims of the CISG are addressed in the Preamble to the Convention. First, the unification of substantive sales law shall remove legal barriers for international trade in order to facilitate trade between merchants from different countries and to promote international trade. Secondly, intensified international trade "on the basis of equality and mutual benefit" is seen as an "important element in promoting friendly relations among States."[8] The unification of substantive trade law is hoped to serve as a means to keep peace among nations. Certainly the first of these aims has been achieved while success of the second aim remains in doubt.

REVISITED IN THE LIGHT OF RECENT EXPERIENCES 73 et seq. (Franco Ferrari ed. 2003).

8. *See* the text of the Preamble.

B. The CISG's Importance

The CISG has acquired undeniable importance in a number of respects. Indeed, the Convention has become the most important legal basis of today's globalised trade. The CISG has been accepted by many states, and what counts more in this respect, by many economically important states. Thus far, 76 States from all continents have ratified it, among them almost all major trading nations. The CISG now governs most of the world's trade (unless the parties have excluded the application of the CISG).[9] It is estimated that at least three-quarters of global trade automatically falls within the scope of the CISG.[10] Also in practice, the CISG has made its way: It is often applied and dealt with by international case law–both by state courts and arbitration tribunals. By now, there are several thousand decisions published in English[11] from all over the world resolving most if not all interpretation problems of the Convention.[12] Furthermore, the CISG has strongly influenced legislation in many states. The Convention has become the most influential source for legislation in the field of private law–both on the national and international level. Particularly those states that reformed their legal systems after the political change in the beginning of the 1990s used the CISG as a model either for their sales law or the general law of obligations.[13] Most amazingly, even the European Directive on Consumer Sales of 1999,[14] which aims at consumer protection, owes a lot to the CISG. Despite the

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9. The United Nations Convention on Contracts for the International Sale of Goods [CISG] article 6 allows the free exclusion of the Convention but requires that this must be done clearly.

10. *See* Ingeborg Schwenzer, *Einleitung*, *in* KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT–CISG 25 (Peter Schlechtriem & Ingeborg Schwenzer eds., 5th ed. 2008).

11. At least in form of English abstracts; *see* in particular the databank CLOUT (Case Law on UNCITRAL Texts), http://www.uncitral.org; and the databank of Pace University, http://www.cisg.law.pace.edu (last visited July 10, 2010).

12. *Id.* The 2010 CISG databank of Pace University counts more than 2,500 published decisions and estimates that double that figure exists.

13. *See* the reports in THE CISG AND ITS IMPACT ON NATIONAL LEGAL SYSTEMS (Franco Ferrari ed. 2008).

14. Directive 1999/44/EC of the European Parliament and of the Council on certain aspects of the sale of consumer goods and associated guarantees of 25 May 1999, O.J. no. L 171 of 7 July 1999, at 12 et seq.

CISG's devotion to international commercial sales and transactions between merchants the drafters of the Directive saw fit to incorporate verbal passages from central provisions of the Convention as well as central structural elements.[15] In addition, the CISG was the model for international sets of principles like the UNIDROIT Principles of International Commercial Contracts,[16] the Principles of European Contract Law[17] or the so-called Draft Common Frame of Reference.[18]

For the science of sales law and generally the law of obligations, the CISG is a constant fountain of inspiration. It further contributes enormously to an international discussion and a basic uniform understanding of contract problems, thereby forming an international community of science and scientists.[19]

The Convention is the tree from which ever new branches grow. Its importance for the practice of international transactions as well as a cornerstone for national and international legislation–both on sales law and the general law of obligations–can hardly be overestimated.

C. Comparison of Legal Systems as Basis of the CISG

The Convention was not created out of the blue. It is the fruit of intensive comparative work and long preparation. That leads back to the origin of the CISG which is coupled with the rise of comparative law as a discipline. The CISG's beginnings date back

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15. In particular the definition of non-conformity of the goods and the essential structure of remedies (except the remedy of damages) was taken from the CISG.

16. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2004 (UNIDROIT ed. 2004).

17. PRINCIPLES OF EUROPEAN CONTRACT LAW I & II (Ole Lando & Hugh Beale eds. 2000); PRINCIPLES OF EUROPEAN CONTRACT LAW III (Ole Lando et al. eds. 2003).

18. PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW: DRAFT COMMON FRAME OF REFERENCE, Outline Edition (Christian von Bar et al. eds. 2009).

19. A clear sign for this was the scientific conferences around the globe on the occasion of the CISG's 25th anniversary in 2005, which was celebrated for instance in Paris, Pittsburgh, Singapore, Vienna and Würzburg. *See* Ulrich Magnus, *25 Jahre UN-Kaufrecht*, ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 96 (2006).

to the late 1920s, when the unification of substantive sales law was put on the agenda of the then just established international research institute, UNIDROIT, in Rome.[20] For this purpose, a small group of most distinguished European comparatists was installed.[21] The "mastermind"[22] behind the project was Ernst Rabel,[23] one of the most influential founders of modern comparative law.[24] He exemplified his functional approach of comparison and the search for the best solution on the sales unification project in a way that set standards still applicable today. The first draft of a uniform sales law in 1935-36 benefited immensely from the thorough and intense comparison of almost all legal systems of the time which Rabel and his collaborators in Berlin had prepared and which was published as "*Das Recht des Warenkaufs*" ("The Law of the Sale of Goods").[25] The draft of 1935-36 already contained the basic structure of the later Convention. Many of the early provisions have survived and form part of the present CISG despite the fact that a "first try" of sales unification in form of the Hague Uniform Sales Law of 1964[26] proved a failure because only few states accepted it.[27]

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20. UNIDROIT (*Institut international pour l'unification du droit privé*) [International Institute for the Unification of Private Law]) was established in 1926 as an institution of the League of Nations, the predecessor of the United Nations. UNIDROIT accepted the sales unification project proposed by Ernst Rabel in 1929.

21. The UNIDROIT Sales Committee consisted of the two English law professors H.C. Gutteridge and Cecil J.B. Hurst, who represented the common law in the Working Group; the two French professors Henry Capitant and Joseph Hamel, representing the Romanic civil law jurisdictions; the two Swedes Algot Bagge and Martin Fehr for the Nordic legal systems; and for the Germanic civil law jurisdictions, the Germans Rabel as General Reporter and Hans Ficker as secretary; *see* Ernst Rabel, *Der Entwurf eines einheitlichen Kaufgesetzes*, RABELSZ 9, at 1 et seq. (1935).

22. Bernhard Grossfeld & Peter Winship, *The Law Professor Refugee*, 18 SYRACUSE J. INT'L L. & COM. 3, 11 (1992).

23. 1874–1955.

24. *See* Ulrich Drobnig, *Die Geburt der modernen Rechtsvergleichung. Zum 50. Todestag von Ernst Rabel*, ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 821 et seq. (2005).

25. Vol. I (1936, Nachdruck 1957), Vol. II (1958).

26. Uniform Law on the International Sale of Goods (ULIS) and Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF).

27. The two Hague Conventions had been ratified by only nine–mostly Western European–states. After entering into force in 1972-1974, the Hague

III. THE CISG'S BASIC STRUCTURE: COMMON LAW HERITAGE

The CISG can be, and often is, regarded as a compromise between different legal systems.[28] Indeed, in many CISG provisions one can still identify certain traces of specific national legal structures, rules or provisions. Nonetheless, it would be wrong to classify the Convention as a mere compromise, let alone one on the lowest common level. It was Rabel's aim and vision to find by comparison the best solution for each sales problem and from these solutions form a body of its own.[29] To a large extent the CISG conforms to that ideal. Even though–unavoidably–most of its provisions have a clear national origin, their inclusion in the Convention and the commandment to interpret the CISG in an autonomous way[30] have freed the Convention from its national backgrounds since long. When the following text traces the most visible of these national influences it is not the aim to 'renationalise' parts of the CISG. On the contrary, the objective is to show how legal institutes of specific national character were merged and often modified to fit the purposes of international sales transactions.

In addition, it has to be borne in mind that the solutions achieved under the CISG correspond to a very high percentage to those which national law would also reach.

A. The CISG's Skeleton: English Common Law

It was already Rabel's conviction that for practical purposes the English common law structure of sales law was best suited for the international unification of this part of the law.[31] The CISG

Sales Law gained practical importance only in Belgium, Germany, Italy and the Netherlands.

28. *See* CESARE MASSIMO BIANCA & JOACHIM MICHAEL BONELL, COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION, Introduction ¶ 2.2.1 (Giuffrè 1987).

29. *See* Rabel, *supra* note 21, at 6: "…(dass) die Eigentümlichkeiten, die in den Landesrechten noch aus verschiedenen überholten Epochen verblieben sind, ohne irgendwelchen Schaden und mit außerordentlichem Vorteil in einer höheren Einheit aufgelöst werden können…"

30. *See* CISG Art. 7.

31. *See* Rabel's comments on the first draft of a uniform sales law: Rabel, *supra* note 21, at 45 et seq..; *see* also the many single solutions of sales problems

follows in essence that structure. Only a few ingredients from other legal systems have been added. In sum and simplified, the structure is as follows: Each party is strictly liable for any breach of the contractual promise it gave (so called unitary approach because there is only one category of breach of contract; by contrast the civilian jurisdictions distinguish between general breach and special breach of warranty).[32] Liability means that the liable party must at least pay damages. The remedy of termination of contract is available only if the breach is severe and fundamental. An exemption from liability is confined to causes outside the control of the party in breach. These main structural elements shall be explained in more detail.

B. Liability for Breach of Contractual Promise

It has been the standpoint of the common law that a party is liable for keeping its contractual promise in principle irrespective of any fault, whereas the civilian tradition held the party liable for a breach of contract only if the party was at fault. In the field of sales law the common law followed its general approach of strict liability but implied as warranties or conditions certain tacit promises as to title, quality, fitness and conformity of the goods sold.[33] On the other hand, civil law, in the Roman tradition,[34] applied a rather high fault threshold: Were the goods defective or non-conforming, only fraud or breach of a special guarantee sufficed for a damages claim.[35] However, like in Roman

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where Rabel states that the common law solution is the most practicable and should be preferred; *see* as examples for many more Rabel, *Das Recht des Warenkaufs* I 326, 329, 378, 452, 524 (1936, Nachdruck 1957).

32. *See* KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 488 et seq. (Tony Weir trans., 3rd ed. 1998,) ; Peter Huber, *Comparative Sales Law*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW, *supra* note 1, at 956.

33. *See* English Sale of Goods Act 1979, sec. 12 et seq.

34. *See* REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION 327 et seq. (Oxford University Press 1996).

35. Compare CODE CIVIL [C. CIV.] art. 1645 (Fr.) (Seller's knowledge of the defects is required for the buyer's claim for damages; the professional seller is, however, irrebuttably presumed to know defects of the goods sold.); § 463 former German Civil Code (BGB, valid until 2002). The European Consumer

law,[36] the buyer of non-conforming goods could always reduce the price or terminate the contract even if the seller was not at fault.

The CISG follows the unitary approach. It has merged the different concepts to a certain extent. Its basis is the common law approach; each breach of contract makes one liable irrespective of fault.[37] Only in extraordinary circumstances can exemption from liability be claimed.[38] The CISG further grants termination of contract under rather restrictive conditions.[39] But in contrast to the common law, it maintains the civil law remedy of price reduction,[40] which is more or less unknown in common law.

C. Main Remedy: Damages

Common law regards damages as the usual and most practical remedy for all kinds of breach of contract,[41] while specific performance is an exceptional remedy that steps in where damages are insufficient to fully compensate the loss flowing from the breach.[42] On the contrary, civil law countries generally grant in the first line a claim for specific performance and, as mentioned, price reduction or termination of contract. As seen, the traditional sales law of civil law countries awards damages very reluctantly.[43] Here, the old adage *caveat emptor* had and partly still has some truth in it.[44]

Sales Directive led to a change and adaptation of the German law of obligations and of sales to the CISG and thus basically to the common law (except for the remedy of damages).

36. Under Roman law the *actio quanti minoris* or *actio estimatoria* and the *actio redhibitoria* were available; *see* MAX KASER & ROLF KNÜTEL, RÖMISCHES PRIVATRECHT 234 et seq. (19th ed. 2008).

37. *See* CISG Art. 45(1)(b) and 61(1)(b).

38. CISG Art. 79.

39. CISG Art. 49 and 64.

40. CISG Art. 50.

41. *See* JOSEPH CHITTY, CHITTY ON CONTRACTS, 2 vols. (Hugh Beale ed., 30th ed. 2008) at ¶ 26-001.

42. *See* English Sale of Goods Act 1979, sec. 52. For a comparative survey on specific performance *see* ZWEIGERT & KÖTZ, *supra* note 32, at 470–85.

43. *See* C. CIV. art. 1645 (Fr.); old BGB § 463 (since 2002 in Germany the hurdle for contractual damages in sales cases has been reduced to simple fault, which is presumed).

44. However, the presumption of the professional seller's knowledge of defects and the seller's consequential liability in damages in French law has

The CISG combines the two remedies: a party can claim specific performance[45] and damages (if there remains any compensable loss after specific performance) or may freely choose between the two remedies.[46] However, as a bow to common law the Convention allows courts, in particular those of common law countries, to deny specific performance if they would decide to do so in comparable cases under their domestic law.[47] Fortunately, this specific common law reservation does not play any significant role in practice.[48]

D. Termination Only in Case of Fundamental Breach

In principle, common law allows a party, but not easily, to terminate a contract. Under the English Sale of Goods Act 1979 with its later amendments, termination is available if the breach of contract is a breach of a condition on whose strict fulfilment the existence of the contract shall depend, or else is serious enough to allow termination.[49] Traditional civil law, on the basis of Roman law, had been more generous with termination (in French, *action redhibitoire*; in German, *Wandlung*) in sales cases. Were the delivered goods defective, the buyer could always terminate the contract.[50]

The CISG follows in essence the common law approach. To allow termination the breach of contract must be fundamental.[51] More or less that means that, from an objective point of view, the

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provided considerable protection to buyers since long. By contrast, under German law the buyer had to beware until 2002, because damages were only due in case of seller's fraud or breach of guarantee.

45. CISG Art. 46 and 62.

46. CISG Art. 45(1)(b) and 61(1)(b).

47. CISG Art. 28.

48. THE UNCITRAL DIGEST OF CASE LAW ON THE UNITED NATIONS CONVENTION ON THE INTERNATIONAL SALE OF GOODS (UNCITRAL ed, 2008, *available at* http://www.uncitral.org/uncitral/en/case_law/digests/cisg.html (last visited July 10, 2010). Eighty-seven reports, only one U.S. decision dealing with CISG Art. 28.

49. *See* in detail J.P BENJAMIN, BENJAMIN'S SALE OF GOODS ¶ 12-017 (7th ed. 2006); MICHAEL BRIDGE, THE SALE OF GOODS 146 et seq. (Oxford University Press 2nd ed. 1997) .

50. *See* C. CIV. art. 1644 (Fr.). German law entitles the buyer to termination only after a fruitless '*Nachfrist*' (BGB § 440).

51. CISG Art. 49 and 64.

innocent party must have lost its interest in the contract and that the other party could foresee such a result.[52] Termination is therefore a remedy of last resort (*ultima ratio*) that is not easily available under the CISG.[53]

It is noteworthy that the European Directive on Consumer Sales adopted the CISG approach and also reserved termination as a remedy of last resort.[54] All E.U. member states implemented this in their law on consumer sales.[55] Germany accepted this solution to a certain extent even as its general law of obligations.[56]

E. Exemption from Contractual Liability

The far-reaching guarantee principle of contract law that is characteristic of the common law requires nonetheless exceptions. Under the rules on frustration a party is relieved from its own obligations if performance became impossible due to circumstances for which this party neither bore the risk nor was at fault.[57] The civil law countries know of similar reasons for exemption.[58] However, here the exemption provision plays a less important role because these countries follow the fault principle, although with many exceptions.[59]

The CISG, having adopted the common law position of generally strict liability, also had to adopt an exemption provision: A party is freed from its own obligation if the failure of performance "was due to an impediment beyond his control" that could be neither foreseen nor avoided.[60] "Impediment beyond

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52. *See* the definition in CISG Art. 25.

53. German Bundesgerichtshof 3 April 1996, CLOUT no. 171; Austrian Oberster Gerichtshof 7 September 2000, CLOUT no. 428.

54. *See* Consumer Sales Directive Art. 3(5) and (6).

55. *See* the survey over all E.U. member states in Ulrich Magnus, *Verbrauchsgüterkaufrichtlinie*, *in* IV DAS RECHT DER EUROPÄISCHEN UNION, (Eberhard Grabitz & Meinhard Hilf eds. 2007) A 15, Anhang at 1 et seq.

56. *See* BGB § 323(5). This provision excludes termination where the breach is "*unerheblich*" (minor).

57. *See* in regard of sales contracts BRIDGE, *supra* note 49, at 131 et seq.

58. *See* C. CIV. art. 1148 (Fr.) (exemption for force majeure and act of a third person); § 275 BGB (exemption for impossibility).

59. For a comparative survey *see* ZWEIGERT & KÖTZ,*supra* note 32 at 486–515.

60. CISG Art. 79.

control" includes *force majeure* in the sense of unavoidable natural events but also acts of third persons and, according to the prevailing view, even extreme economic hardship.[61]

IV. SPECIFIC U.S. TRAITS

A. The American Influence on the CISG

In the early stages of the unification process of sales law, which already laid the grounds for the present structure of the CISG and for its main policy decisions,[62] the United States played no major role.[63] Nor did U.S. law have a significant impact on the preparatory comparison of legal systems;[64] the common law was represented by English law and in the UNIDROIT working group by English lawyers.[65] However, in the further stages there was a considerable U.S.-American influence on the preparation of the CISG, in which the U.S. professors John Honnold and Allan Farnsworth were particularly involved. Honnold had already attended the conference in 1964 on the Hague Uniform Sales Law. He then became the Secretary of UNCITRAL during the phase (1969 – 1974) when the first CISG draft (on the basis of the Hague Sales Law) was elaborated.[66] He further led the U.S. delegation, of which Farnsworth was also a member, at the Vienna Conference that concluded the Convention in 1980. The Conference materials

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61. JOHN O. HONNOLD & HARRY M. FLECHTNER, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION ¶ 432.2, 627–28 (4th ed. 2009); *see* Schwenzer, *Article 79*, *in* KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT–CISG, *supra* note 10, ¶ 30; Ulrich Magnus, *Article 79*, *in* JULIUS VON STAUDINGER, KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH MIT EINFÜHRUNGSGESETZ UND NEBENGESETZEN ¶¶ 22, 24 (2005).

62. *See* the first Draft of a Uniform Sales Law published in RabelsZ 9, 8 (1935).

63. However, Rabel reports that at one or few meetings of the UNIDROIT Sales Committee Llewellyn was present. Rabel, *supra* note 21, at 4.

64. *See* RABEL, *supra* note 31, at 24 (paying throughout attention to the US sales law but characterizing it as a close follower of English common law). By the time Rabel's (and his collaborators') report was finished, the Uniform Commercial Code of 1955 had not yet been prepared. The US Uniform Sales Act of 1896 was mainly a copy of the English Sale of Goods Act of 1893.

65. *See supra* note 21.

66. *See also* HONNOLD & FLECHTNER, *supra* note 61, at VII.

prove that the interventions of both had a considerable impact on the decisions taken by the Conference.[67]

B. Seller's Right to Cure

The most visible sign of the U.S.-American influence on the CISG is the Convention's right to cure:[68] The seller is entitled to put a defective tender right even after the date for performance has lapsed if the cure is possible without delay and unreasonable inconvenience for the buyer.[69] This provision corresponds to some extent to UCC § 2-508, whereas a formal statutory right to cure is generally unknown to civil law countries[70] and even to English common law.[71] This does not mean that these legal systems would never take into account a seller's offer to cure a defect. Under estoppel or good faith considerations the buyer may even be

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67. *See* JOHN HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES (1989) (also containing the minutes of the meetings at the Vienna Conference).

68. *See* UTA GUTKNECHT, DAS NACHERFÜLLUNGSRECHT DES VERKÄUFERS BEI KAUF- UND WERKLIEFERUNGSVERTRÄGEN. RECHTSVERGLEICHENDE UNTERSUCHUNG ZUM CISG, ZUM US-AMERIKANISCHEN UNIFORM COMMERCIAL CODE, ZUM DEUTSCHEN RECHT UND ZU DEM VORSCHLAG DER KOMMISSION ZUR ÜBERARBEITUNG DES DEUTSCHEN SCHULDRECHTS (1997).

69. *See* CISG art. 48. The CISG predecessor, the Hague Uniform Sales Law, contained already a similar provision which was inspired by the UCC. *See* ULIS art. 44 (1964), *available at* http://www.unidroit.org/english/conventions/c-ulis.htm (last visited July 10, 2010).

70. *See* LANDO & BEALE, *supra* note 17, at 369 (containing a survey). However, the Consumer Sales Directive mandates that all EU Member states introduce a rule for consumer sales that the consumer must almost always grant the professional seller who has delivered defective goods an additional period of time ("*Nachfrist*") to remedy performance. Although this is no right of the seller but an obligation of the buyer it comes close to a right of cure. By its reform of the law of obligations in 2002, Germany generalized this rule for all contracts (BGB §§ 281(1), 323(1)). A civil law jurisdiction that had recognized by statute a—rather limited—right to cure is Switzerland (*see* Schweizerisches Obligationenrecht [OR] art. 206(2) (only in case of generic goods which had not to be transported from another place)).

71. The English Sale of Goods Act 1979 does not contain a provision that corresponds with UCC § 2-508. The work of Bridge (*supra* note 49) does not even mention "cure."

obliged to accept such offer.[72] However, that depends on the very circumstances of the individual case and does not give the seller a principal right to cure. Like the UCC, the CISG has introduced a general right of the seller to cure. The details vary, however. The CISG explicitly reserves the buyer's prevailing right to avoidance[73] while the UCC requires that the buyer has rejected the goods.[74] Although the CISG regulation leaves some doubt as to the relation between seller's right to cure and buyer's concurrent right to avoidance, in practice the conflict between the two contradicting rights does not matter very much. Where the improper performance is easily curable the breach will rarely amount to a fundamental breach that allows avoidance.[75]

The CISG has used a statutory invention of U.S. law, however in a modified form. Via the CISG the right to cure made its way into the UNIDROIT Principles,[76] the Principles of European Contract Law[77] and the DCFR.[78]

V. SPECIFIC FRENCH TRAITS

A. The French Influence on the CISG

Since the beginning of the efforts to internationally unify sales law, French law was one of the legal systems whose solutions were particularly taken into account. Equally, French lawyers were always involved in the long legislative history of the present Convention.[79]

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72. *See* LANDO & BEALE, *supra* note 17, at 369 (containing a comparative account).

73. *See* CISG art. 48(1).

74. UCC § 2-508(2).

75. *See* inMarkus Müller-Chen, *Article 48*, *in* KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT–CISG, *supra* note 10, at ¶ 18.

76. *See* UNIDROIT Principles art. 7.1.4.

77. Principles of European Contract Law art. 8:104.

78. DCFR Art. III.-3:201.

79. *See supra* note 21.

B. Claim for Specific Performance

The French *Code civil* is particularly explicit on the general right of a contract party to claim specific performance if the other party does not perform and if performance is possible.[80] But generally the civil law countries grant a claim for specific performance.[81] By contrast, in common law jurisdictions specific performance is rather the exception.[82]

The CISG entitles the aggrieved party generally to request performance.[83] Where the seller has delivered non-conforming goods the specific performance claim is somewhat limited: the buyer can claim repair as far as it is reasonable under the circumstances.[84] According to its choice the buyer may also claim delivery of substitute goods however only if the non-conformity of the delivered goods amounts to a fundamental breach of contract.[85]

The CISG specifies and details the remedy of specific performance generally available in civil law jurisdictions, yet without forcing the common law jurisdictions to accept this solution. This is the only situation where the substantive provisions of the CISG allow a split solution for different legal systems.

C. No Open Price Contract

A certain relic, not only, but mainly, of French law is the CISG provision that an offer, in order to be valid, must fix the contract price or contain at least a method to determine it, be it even impliedly.[86] Until the mid-1990s French law regarded an open

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80. *See* C. CIV. art. 1184(2) (Fr.); Cass. civ., Dalloz 2005, IR 1504.

81. *See* the comparative survey by Lando & Beale, *supra* note 17), at 399 et seq.

82. *See supra* III.C.

83. CISG arts. 46(1) and 62. But note the restriction of CISG article 28 (*see supra* note 45 and the text therein).

84. CISG art. 46(3). In particular, noneconomic repair cannot be claimed. *See* Müller-Chen, *Article 46*, *in* KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT–CISG, *supra* note 10, at ¶ 40; Magnus, *supra* note 61, at ¶ 61.

85. CISG art. 46(2).

86. CISG art. 14(1).

price contract in principle as invalid.[87] But since 1994 this view has changed. French courts now no longer strictly invalidate every open price contract.[88]

The CISG still requires that the offer must allow the determination of the price. It is, however, the clearly prevailing view that the parties can conclude a valid contract without fixing the price because the CISG allows the parties to vary every provision,[89] and certainly also the determinable price provision.[90] It is therefore the parties' full autonomy to validly conclude an open price contract. Then, the current market price is considered as the agreed price.[91]

Here, the CISG has adopted a policy decision that the underlying national law later abandoned. But irrespective of this national development, the CISG's provisions appear flexible enough to guarantee a reasonable solution.

D. Compensation of Foreseeable Loss

The CISG limits damages for breach in a specific way that actually originates from France. Art. 1150 of the French *Code civil* provides that the contractual debtor must compensate only those losses that s/he foresaw or that could be foreseen at the time of conclusion of contract unless the breach was wilful.[92] This provision of the *Code civil* of 1804 had some impact on the famous English case *Hadley v. Baxendale* of 1854,[93] which is the central

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87. C. CIV. art. 1591 (Fr.) (prescribing that the price must be fixed, "Le prix de la vente doit être déterminé et désigné par les parties.").

88. *See* Cass. civ., JCP 1995 II 22371 (with note Ghestin); Cass. (Ass. pl.) JCP 1996 II 22565 (with note Ghestin).

89. *See* CISG art. 6.

90. *See* HONNOLD & FLECHTNER, *supra* note 61), ¶ 137.6, at 211; Ulrich Schroeter, *Article 14*, *in* KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT–CISG, *supra* note 10, at ¶ 21 ; Magnus, *supra* note 61, at ¶ 33.

91. *See* CISG art. 55.

92. It must be noted that the general French rule of article 1150 is almost inapplicable in French sales law because the seller who knows the defects of the sold goods must compensate all losses ("tous les dommages et intérêts"). *See* C. CIV. art. 1645 (Fr.). And since the professional seller is irrebuttably presumed to know the defects (*see supra* notes 35, 44), he or she is always liable even for unforeseeable losses if causation is established.

93. (1854) 9 Ex. 341.

common law decision on contractual damages. It established the rule that the debtor must recompense losses which were either the natural result of a breach or which were or should have been in the contemplation of the parties as a probable result of a breach (so-called foreseeability test).[94] The main purpose of the rule is that the debtor shall not be liable for too remote consequences of a breach of contract but shall be able to oversee and calculate the risk that s/he assumes with the contract.

The CISG has adopted the foreseeability test as a means to reasonably limit damages.[95] The Convention thus follows the general French rule, though in its common law clothing. The interpretation of the damages provisions of the CISG can—and should—take account of this background, in particular to reveal the purpose of the provisions. Nonetheless, the interpretation must be autonomous and independent of the peculiar interpretation of the respective rule in France, England or the U.S.

VI. SPECIFIC GERMAN TRAITS

A. German Influence on the CISG

The German influence on the CISG is essentially tied to the name of Ernst Rabel. *His* first draft of 1935 already included the two legal institutes that evidence a specific German origin: the notice procedure and the "*Nachfrist*".

There is also a certain German influence on the application of the CISG at least for the first decade after the CISG internationally entered into force (1988). For instance, in 2000, one-third of all CISG decisions reported by CLOUT[96] were German decisions. This had the effect that leading German decisions were followed

94. To a certain extent the rules of *Hadley v. Baxendale* were brought into statutory form in the English Sale of Goods Acts of 1893 and 1979. *See* Sale of Goods Acts [SGA] §§ 50(2), 51(2), and 53(2)(1893/1979) and in the US-American UCC (§§ 2-714(1) and 2-715(2)).

95. *See* CISG art. 74; FLORIAN FAUST, DIE VORHERSEHBARKEIT DES SCHADENS GEMÄß ART. 74 SATZ 2 UN-KAUFRECHT (CISG) (1996).

96. CLOUT (Case Law on UNCITRAL Texts) is the databank of UNCITRAL primarily for CISG cases, *available at* http://www.uncitral.org (last visited July 10, 2010).

elsewhere and had, and still have, a considerable influence on the interpretation of the Convention.[97]

B. Notice Procedure

The CISG requires the buyer to notify the seller if the goods are defective and do not conform to the contract.[98] Basically, it is self-understanding and the normal course of dealing that a dissatisfied buyer informs the seller of the ground for the dissatisfaction.

However the CISG makes it incumbent upon the buyer to give notice within a reasonable time because, without notice in correct time and form, the buyer loses all remedies which s/he otherwise could avail of.[99] Furthermore, the reasonable time starts when the buyer could have examined and discovered the defects. That obliges the buyer who will not lose any remedy to examine the goods. The CISG restricts the time for examination to "as short a period as is practicable in the circumstances."[100] In order to maintain his or her rights in respect of non-conforming goods, the buyer must therefore rather promptly and carefully examine them and must also notify the seller of any eventual defect within a little longer time.[101]

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97. A particularly prominent example is the U.S. decision in *Medical Marketing International v. Internazionale Medico Scientifica, S.R.L.*, No.Civ.A. 99-0380, 1999 WL 311945, at *2 (E.D. La., May 17, 1999). The decision concerned the import of Italian mammography devices to the U.S. which did not comply with U.S. safety standards. The U.S. court relied very much on a decision of the German Federal Court (8 March 1995, NJW 1995, 2099) which held that in principle the buyer bears the risk that the goods conform to safety standards or other public law requirements in the buyer's country. However, the German court had also stated several exceptions. The U.S. court applied one of these exceptions.

98. *See* CISG art. 39.

99. There are only two exceptions to that rule: where the seller knew or could not be unaware of the defects (Art. 40 CISG) or where the buyer had a reasonable excuse (CISG art. 44).

100. *See* Art. 38 CISG.

101. As to the time frames under articlesrt. 38 and 39 of CISG and the international case law thereon, *see* the UNCITRAL Digest, *supra* note 48), *available at* http://www.uncitral.org/uncitral/en/case_law/digests/cisg.html (last visited July 10, 2010).

This whole notice procedure stems from German commercial law.[102] There the commercial buyer is obliged to examine and notify immediately and very precisely. Its main purpose is to clear by a simple procedure within a short period whether or not the transaction is completely finished. The CISG adopted the general concept but softened the requirements of immediate reaction to, and very precise description of, the defect. These requirements were regarded as too harsh for international transactions between parties who partly are unfamiliar with such strict practice.

Again, the CISG uses a specific national legal phenomenon but modifies it in a reasonable way that secures fairness in international sales transactions.

C. "Nachfrist"

Another quasi-procedural element of German law adopted by the CISG is the so-called "*Nachfrist.*" Under German contract law, if the debtor has not fully and correctly performed in time, the creditor can set the following procedure in motion: s/he can fix an additional (reasonable) period of time for performance; if even then the debtor does not perform, the creditor is entitled to terminate the contract.[103] If the additional period, the "*Nachfrist*," has lapsed without success, then, in principle, the weight and seriousness of the breach no longer matter except where the breach is minor ("*unerheblich*").[104] Almost always the creditor can thus achieve a right of termination by setting a "*Nachfrist.*" The "*Nachfrist*" procedure avoids the uncertainties that one can encounter if termination exclusively depends on the fundamentality of the breach, because rather often it will be doubtful whether or not a breach is fundamental. To declare the contract terminated is then a high risk for a party because the unjustified termination is itself a fundamental breach of contract entitling the other party to termination. The "*Nachfrist*" is a simple and generally fair mechanism to clear that situation.

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102. *See* German Handelsgesetzbuch [HGB] [Commercial Code], § 377.

103. *See* BGB § 323.

104. BGB § 323(5). In practice a breach is minor if the costs to remedy it are less than 10% of the contract price; *See* Christian Grüneberg, § 323 ¶ 32, *in* BGB (Otto Palandt ed., 69th ed. 2010).

The CISG follows the German "*Nachfrist*" concept partly but not fully. The CISG limits the effect that the unsuccessful lapse of an additional time period has – to transform a non-fundamental breach into a fundamental one – to specific breaches, namely to the total non-performance of the parties' basic obligations. Concerning the seller's duties, it is only in the case of non-delivery of the goods[105] where a "*Nachfrist*" can lead to a right of termination.[106] For all other breaches which the seller commits, the additional time period as such is no means to automatically convert a non-fundamental breach into a fundamental one.[107] Concerning the buyer's duties, the "*Nachfrist*" mechanism applies to the non-performance of the obligation to pay and to take delivery of the goods,[108] but not to other duties.[109] The reason for this elective use of the "*Nachfrist*" procedure is the CISG's underlying decision to preserve the contract as far as possible and reasonable, primarily in order to avoid unnecessary costs for international transportation of the goods. Therefore, a party shall not be entitled to convert a minor, non-fundamental breach into one that justifies termination by mere lapse of additional time unless the other party has done nothing–neither delivered nor paid nor taken the goods.

Again, it can be observed that the CISG did not fully copy a national solution but collected ingredients from a national law as far as regarded useful for international sales transactions.

VII. Rejection of Specific National Traits

So far we have seen how the CISG merged elements from different legal systems. Some of these elements were peculiar, even characteristic, for certain legal systems. It is equally

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105. This generally means total non-delivery. In case of partial non-delivery the right of termination–after the unsuccessful lapse of a *Nachfrist*–covers only the lacking part. *See* CISG art. 51(1).

106. *See* CISG art. 49(1)(b).

107. *See* HONNOLD & FLECHTNER, *supra* note 61, ¶ 305, at 437–38; Müller-Chen, *Article 49*, in KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT–CISG, *supra* note 10, at ¶ 15; Magnus, *supra* note 61, at ¶ 21.

108. CISG art. 64(1)(b).

109. *See* HONNOLD & FLECHTNER, *supra* note 61, ¶ 354, at 503; Günter Hager & Felix Maultzsch, *Article 64*, *in* KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT–CISG, *supra* note 10, at ¶ 8; Magnus, *supra* note 61, at ¶ 22.

interesting to identify which national peculiarities the CISG consciously set aside and excluded from its scope.

A. No Consideration Doctrine

One of the most famous and intriguing characteristics of the common law is the doctrine of consideration.[110] Under this doctrine, one-sided promises for which nothing is given or promised in exchange and which are not made in form of a deed are regularly enforceable.[111] In the field of sales contracts, it is not the sales contract itself that can be unenforceable because of lack of consideration. In a sales contract there are always mutual promises that constitute consideration. Here, problems with consideration can occur with the revocability of one-sided offers and with the parties' agreement on the modification of the contract.[112] The civil law jurisdictions do not require a consideration although they developed some other means[113] to restrict the validity and enforceability of promises to deserving cases.[114]

The CISG has done away with consideration. Two of its provisions make this clear.[115] Although consideration can be regarded as a question of contract validity which is in general outside the scope of the CISG,[116] its Art. 16(2)(a) and Art. 29 explicitly regulate a one-sided offer and modification of the contract and do not require consideration for their binding effect. It was also the intention of the drafters of the CISG to exclude the

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110. *See* Chitty, *supra* note 41, at ¶¶ 3–001 et seq.

111. A deed is a specific form of signed writing with seal or attestation of the signature. The deed must further be delivered to the other party.

112. *See* the leading case *Stilk v. Myrick*, (1809) 170 Eng. Rep. 1168.

113. In French law a valid contract requires a "cause" (*see* C. CIV. arts. 1131–1133 (Fr.)). German law requires notarial form for the validity of certain contracts (in particular the purchase of land and the promise of gifts). *See* BGB §§ 311b, 518.

114. For a comparison, *see* ZWEIGERT & KÖTZ, *supra* note 32, at 388–99; E. Allan Farnsworth, Comparative Contracts Law, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW, *supra* note 1, at 908–10.

115. *See* CISG arts. 16(2)(a) and 29.

116. *See Id.* art. 4(a).

consideration doctrine for the whole Convention.[117] This doctrine therefore has no place under the CISG.[118]

Here, the CISG was bold enough to abolish a time-honoured though disputed legal institution that is part of many national laws.

B. No Parol Evidence Rule

The common law tends to be stricter than the civil law with written contracts. The so-called "parol evidence rule" of the common law prohibits in principle that oral (parol) evidence by witnesses or other extrinsic evidence is adduced to prove content of the contract that is contrary to the written text.[119] Such proof is not admissible although there are rather many exceptions.[120] In civil law jurisdictions a written contract may also raise the presumption of its completeness and correctness; however, this presumption is regularly rebuttable by any means of proof.[121]

Even clearer than with respect to the consideration doctrine, the CISG abolished for its scope of application the parol evidence rule. Article 11, sentence 2 of CISG provides that a contract "may be proved by any means, including witnesses."[122] This formulation applies even if the contract is in writing.[123] The clearly prevailing view is that the formulation excludes the parol evidence rule.[124]

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117. *See* Commentary of the Secretariat to article 27 paragraph 2 (CISG article 27 of the Draft was the later article 29), *available at* http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-29.html (last visited July 10, 2010).

118. *See* Samuel K. Date-Bah, *Article 29*, in COMMENTARY ON THE INTERNATIONAL SALES LAW. THE 1980 VIENNA SALES CONVENTION, *supra* note 28, at ¶¶ 1.3, 2.1; HONNOLD & FLECHTNER, *supra* note 61, ¶ 204.4, at 307; Schroeter, *Article 29*, *in* KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT–CISG, *supra* note 10, at ¶ 4; Magnus, *supra* note 61, at ¶ 6.

119. *See* Kim Lewison, THE INTERPRETATION OF CONTRACTS 85–91 (4th ed. 2007) (for an extensive commentary on the parol evidence rule in England). For the US, *see* UCC § 2-202.

120. *See* Lewison, *supra* note 119, at 85.

121. *See* for Germany BGH NJW 1980, 1680; BGH 2002, 3164.

122. CISG art. 11.

123. *See* Schroeter, *Article 11*, *in* KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT–CISG, *supra* note 10, at ¶ 13; Magnus, *supra* note 61, at ¶ 11.

124. Calzaturificio Claudia s.n. v. Olivieri Footwear Ltd., No. 96 Civ. 8052(HB) (THK), 1998 WL 164824, at *4 (S.D.N.Y, Apr. 7, 1998); MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova d'Agostino, S.p.A., 144 F.3d

Again, the CISG rather boldly sets aside a rule that enjoys widespread application and trusts that greater freedom with respect to the proof of contracts will better serve international sales transactions.

C. No Délai de Grâce

French law allows the judge to fix an additional period of time during which the debtor may perform (*délai de grace* means "period of grace").[125] The CISG explicitly excludes such possibility.[126] The purpose of the exclusion is to secure legal certainty and foreseeability for the contracting parties.

The *délai de grâce* of French law do not fit for commercial transactions between professional people. The CISG therefore rejected them.

D. No Løfte Theory

An internationally rather disputed issue is the question of how binding offers should be.[127] In this respect, the Nordic countries[128] which are deemed to form a separate legal family[129] take a particularly outspoken stance. They generally regard an offer as binding and irrevocable (according to the so-called *løfteteorie*).[130]

1384, 1388–92 (11th Cir. 1998); Mitchell Aircraft Spares, Inc. v. European Aircraft Service, AB, 23 F. Supp. 2d 915, 919–22 (N.D. Ill. 1998); Filanto SpA v. Chilewich International Corp, 789 F. Supp. 1229, 1238 n.7 (S.D.N.Y. 1992). *See also* HONNOLD & FLECHTNER, *supra* note 61, ¶ 110, at 164–65; Martin Schmidt-Kessel, *Article 10*, *in* KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT–CISG, *supra* note 10, at ¶ 13; Magnus, *supra* note 61 ¶ 16; *but see* Beijing Metals & Minerals Import/Export Corp. v. American Business Center, Inc., 993 Fed.2d 1178, 1182–84 (5th Cir. 1993) (interpreting contractual provisions under Texas law).

125. For the termination remedy, *see* C. CIV. art. 1184(3) (Fr.); for payment obligations, which could include the obligation to pay damages, *see* C. CIV. art. 1244–1 (Fr.) (introduced in 1991; however, the former article 1244 contained a similar provision).

126. *See* CISG arts. 45(3) and 61(3).

127. For a comparison *see* ZWEIGERT & KÖTZ, *supra* note 32, at 356–64.

128. They include Denmark, Finland, Iceland, Norway, and Sweden.

129. *See* ZWEIGERT & KÖTZ, *supra* note 32, at 276–85.

130. *See* Nordic Contracts Act §§ 1–3, 7; Joseph Lookofsky, *The Scandinavian Experience*, *in* THE 1980 UNIFORM SALES LAW. OLD ISSUES

Also under German law an offer is generally irrevocable if not otherwise indicated. The offeror is bound for a period within which an offeree could regularly answer.[131] The opposite position is taken by the common law, where an offer without consideration is not binding even if it says that it is irrevocable.[132] However, no matter from which position one starts there is always a problem of time. The free revocability position must nevertheless fix a point of time when the revocability of the offer ends (normally by its acceptance). Likewise, the irrevocability position must fix a point of time when the irrevocability ends because an offeror cannot be bound endlessly.

The CISG starts from the standpoint that an offer is always revocable.[133] But it reduces this position considerably. If the offer indicates explicitly or implicitly that it shall be irrevocable, then it cannot be revoked.[134] The same applies if the offeree was justified to rely on the offer as irrevocable and acted in reliance on it.[135]

The CISG regulation on revocability of offers was one of the reasons for the Scandinavian countries[136] to ratify the CISG only partly, namely without the Convention's Part II on the formation of contracts (Art. 14 – 24).[137] Art. 92 allowed this reservation. Recently the Scandinavian countries have renounced their reservation against Part II.

The CISG produced here more than a mere compromise. It takes a reasonable middle position between the extremes of full

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REVISITED IN THE LIGHT OF RECENT EXPERIENCES. VERONA CONFERENCE 2003, *supra* note 7, at 95, 104; JOSEPH LOOKOFSKY , UNDERSTANDING THE CISG 52–3 (3d ed. 2008).

131. BGB § 145.

132. *See* the comparative survey in ZWEIGERT & KÖTZ, *supra* note 32, at 356–64.

133. CISG arts. 15(2) and 16(1).

134. *Id.* art. 16(2)(a). This is in line with the CISG's disregard of the consideration doctrine.

135. *Id.* art. 16(2)(b).

136. Iceland did not use the reservation possibility of CISG article 92.

137. *See* Ulrich Magnus, *The Scandinavian Reservation Under Art. 92 CISG*, *in* CISG PART II CONFERENCE. STOCKHOLM, 4 – 5 SEPTEMBER 2008 59 et seq. (Jan Kleineman ed. 2009).

irrevocability and full revocability that in practice did not raise problems.[138]

E. No General "Nachfrist" Procedure

It has already been mentioned that the CISG adopted the German "*Nachfrist*" mechanism not as a general concept but only partly where seller or buyer do not at all perform their most basic obligations.[139] The CISG proceeded here in a selective way.

VIII. SHORTCOMINGS?

A survey on the CISG's position between common law and civil law must also ask whether the Convention leaves deplorable gaps or suffers from unacceptable shortcomings.

A. Law of Important Countries Not Taken into Account?

A first critique could be raised that the Uniform Sales Law is the fruit of comparison mainly between the common law, French law and its descendants, and German law and its descendants. It could be said that important contemporary legal systems like the laws of Brazil, China or India have not been taken into account. However, this critique neglects to consider that the laws of the mentioned countries have been strongly influenced by the common law, French and German law, and by the CISG itself.

The most evident example is India, where the English introduced the Indian Sale of Goods Act of 1930, which is a copy of the English Sale of Goods Act 1893. Still today Indian courts refer to English precedents concerning sales law or other issues of law. Brazil's civil code to a considerable extent contains elements of French and German law.[140] Rabel's comparative survey always

138. The UNCITRAL Digest, *supra* note 48, reports three cases concerning Art. 16 CISG, *available at:* http://www.uncitral.org/uncitral/en/case_law/digests/cisg.html (last visited July 10, 2010). All three cases do not focus directly on the revocability issue.

139. *See supra* VI.C.

140. *See* José Maria Othon Sidou, *Brazil*, *in* INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW B-48 et seq. (René David et al. eds. 1972). The new civil code of Brazil of 2002 preserves the influence of the BGB.

included Brazilian law.[141] Finally, China's modern sales law, the Contract Act of 1999, shows a rather close vicinity to the CISG.[142]

It would be thus an ill-founded critique that the CISG's solutions disregard important contemporary legal systems.

B. Not in Line with Modern Sets of Principles?

Another critique that can be raised is that the CISG is not in line with the modern UNIDROIT Principles and Principles of European Contract Law (PECL). Indeed, these sets of principles are of a younger age than the CISG, therefore the CISG could not take into account their solutions. However, although there are differences between the CISG and the two sets of principles,[143] in most respects the solutions do not vary. This is no surprise; the CISG was the most important source of inspiration for these sets of principles.[144] Indirectly this is also largely true for the Draft Common Frame of Reference which in part is based on the PECL[145] and thereby again on the CISG. Today, the principles can

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See, among others, Véra Fradera, *La traduction francais du Code civil brésilien,* REVUE INERNATIONALE DE DROIT COMPARÉ 773, 775 (2010).

141. *See* Rabel, *supra* note 31, at 22 et seq.

142. *See* Bernhard Vetter von der Lilie, DAS CHINESISCHE VERTRAGSRECHT IM RECHTSVERGLEICH MIT DEM UN-KAUFRECHT UND DEN GRUNDREGELN DES EUROPÄISCHEN VERTRAGSRECHTS 63 (2008).

143. *See generally* Harry M. Flechtner, *The CISG's Impact on International Unification Efforts: The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law*, *in* THE 1980 UNIFORM SALES LAW. OLD ISSUES REVISITED IN THE LIGHT OF RECENT EXPERIENCES. VERONA CONFERENCE 2003, *supra* note 7, at 176–87 (containing tables of concordance); Ulrich Magnus, *Die UNIDROIT Principles und die Wiener Kaufrechtskonvention*, *in* THE UNIDROIT PRINCIPLES 2004. THEIR IMPACT ON CONTRACTUAL PRACTICE, JURISPRUDENCE AND CODIFICATION 57 (Eleanor Cashin Ritaine & Eva Lein eds. 2007).

144. *See* MICHAEL JOACHIM BONELL, AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW: THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 305–06 (3d ed. 2005); Flechtner, *supra* note 143; Magnus, *supra* note 143; Stefan Vogenauer, *Introduction*, *in* COMMENTARY ON THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (PICC) ¶ 22 (Stefan Vogenauer & Jan Kleinheisterkamp eds. 2009).

145. *See* PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW: DRAFT COMMON FRAME OF REFERENCE, *supra* note 18, at 30.

serve as an aid for interpretation of the CISG[146] unless the CISG deliberately left gaps that then have to be filled by the applicable national law.[147] There is thus a certain mutual influence between the CISG and the sets of principles that keeps the CISG *à jour*.

C. Loopholes

Theoretically, the CISG leaves no loopholes because any gap has to be filled by the general principles underlying the CISG and, in their absence, by the applicable national law.[148] In practice, it cannot be denied that there are some points of uncertainty for which an explicit solution in the CISG would be preferable. The most deplorable omission is that the CISG does not itself determine the rate of interest for sums due under the Convention.[149] For various reasons this question was deliberately left open. It is unfortunate that only in order to answer this frequent question it is necessary to determine the applicable law for the contract at hand, a procedure that the Convention in all other important and frequently relevant respects avoids. Nonetheless, by redress to national law the CISG provides for a though less comfortable solution.

Further points which could be regarded as loopholes are the lack of specific rules on the incorporation of standard terms, on letters of confirmation and on the well-known battle of forms. But despite this lack, courts have been able to find reasonable solutions for all these problems within the CISG and its underlying general principles. The courts have inferred from CISG Art. 8, 14, 18 that the incorporation of standard terms requires that the terms have been made sufficiently available to the other party, generally by sending them.[150] Likewise, the problem of silence on a letter of confirmation can be, and has been, solved within the CISG.

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146. On few occasions, courts have done that. For a general account of the use of the UNIDROIT Principles in court practice *see* Vogenauer, *supra* note 144, at 37 et seq.

147. *See* CISG art. 7(2).

148. *Id.* art. 7(2).

149. *See id.* arts. 78 and 84(1).

150. *See, e.g.*, German Federal Court 31 October 2001, Internationales Handelsrecht 2002, 14; for an exception *see* Austrian Oberster Gerichtshof 31 August 2005, Internationales Handelsrecht 2005, 31.

Except where there exists a respective practice between the parties or an international trade usage[151] that silence on a letter of confirmation makes the content binding, the Convention does not allow such effect.[152] Finally, the CISG also enables a reasonable solution for the battle of contradicting standard forms. The fairer and more modern solution neutralizes and invalidates the conflicting terms at least if the parties began to perform their contract (knock-out rule). In effect, CISG case law confirms this view.[153]

Though it could appear desirable that the CISG contained more explicit rules in certain respects, it has to be stated that the Convention allows reasonable solutions for the problematic points.

IX. CONCLUSIONS

A. CISG Not Perfect but Best of All Possible Worlds

In law it is particularly naïve to expect that regulations be or even can be perfect. Codifications will always have their shortcomings, be it only due to change of time and convictions since their enactment. But given this fact and in the light of the practice under the CISG, this Convention can be regarded as a relative optimum. It is a codification that allows for reasonable solutions of most sales problems. Its certain vagueness in some respects secures on the other hand the necessary flexibility. In Leibniz's view the CISG probably would be the best possible world of sales law.

151. According to article 9 of CISG such practices and trade usages must be given preference.

152. *See* the decisions cited in the UNCITRAL Digest, *supra* note 48, *available at* http://www.uncitral.org/uncitral/en/case_law/digests/cisg.html (last visited July 10, 2010); *see also* HONNOLD & FLECHTNER, *supra* note 61, ¶ 120.1, at 173–74; Schmidt-Kessel, Article 9, *in* KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT–CISG, *supra* note 10, at ¶ 22; Magnus, *supra* note 61, at ¶ 27.

153. *See, e.g.*, French Cour de cassation, Droit d'affaires 1998, 1694; German Bundesgerichtshof, Internationales Handelsrecht 2002, 16; German Oberlandesgericht Köln, Internationales Handelsrecht 2006, 147; Austrian Oberlandesgericht Linz, Internationales Handelsrecht 2007, 123.

B. Conclusions for Comparative Law

The CISG is an example and probably the best one that by intense comparison of law solutions–and their worldwide understandable expression in a transparently structured codification–can be found that assembles advantages of different legal systems and largely avoids their disadvantages. The CISG proves that contradictions and differences between legal systems, in particular the gap between common law and civil law (how deep this gap may ever be regarded) can be successfully overcome. The CISG evidences further that this bridging of gaps is not only theoretically possible but also that it works in practice. If an international convention witnesses the value and need of comparative law, the CISG is the best witness. The more intense the comparative preparation of international instruments, the better the outcome.

C. Is Global Harmonization Still Utopia?

For some, global harmonization of law is no aim, but a nightmare. However, for international sales transactions the CISG already brings us close to global harmonization of that part of the law. Those concerned with legal problems of transborder sales in reality–attorneys, judges, arbitrators–do not appear to reject this development, just the contrary.[154] In specific fields such as

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154. It has now been documented by the many commentaries, textbooks, articles, etc. on the CISG written by practitioners, that, while in the beginning of the sales unification and even for a certain period after the CISG came into force, legal scholars and theoreticians almost exclusively dominated the discussion. *See, e.g.*, COMMENTARY ON THE INTERNATIONAL SALES LAW. THE 1980 VIENNA SALES CONVENTION, *supra* note 28; the first edition of KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT–CISG (von Caemmerer & Schlechtriem eds, 1990) [now Schlechtriem & Schwenzer eds.] to which only very few practitioners contributed). Only German examples of comprehensive works exclusively written by practitioners are for instance: Wilhelm Albrecht Achilles, *Kommentar zum UN-Kaufrechtsübereinkommen (CISG)*, *in* GEMEINSCHAFTSKOMMENTAR ZUM HANDELSGESETZBUCH MIT UN-KAUFRECHT (Ensthaler ed., 7th ed. 2007); BURGHARD PILTZ, INTERNATIONALES KAUFRECHT. DAS UN-KAUFRECHT IN PRAXISORIENTIERTER DARSTELLUNG (2d ed. 2008); URS VERWEYEN, VICTOR FOERSTER, & OLIVERTOUFAR, HANDBUCH DES INTERNATIONALEN WARENKAUFS. UN-KAUFRECHT (CISG) (2d ed. 2008);

international sales the Utopia of a global law that Rabel envisioned evidently can be realized to a large extent.

WOLFGANG WITZ, HANNS-CHRISTIAN SALGER, & MANUEL LORENZ, INTERNATIONAL EINHEITLICHES KAUFRECHT (2000).