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Applicability of UNCITRAL's Sales Convention of 1980 and its Limitation Convention of 1974/1980 via 'Rules of Private International Law': Remarks on Occasion of Czechia's Declaration Withdrawals*

Ulrich G. Schroeter**

The 1980 Sales Convention (CISG) provides for its applicability to international sales contracts *inter alia* 'when the rules of private international law lead to the application of the law of a Contracting State' (Art. 1(1)(b) CISG). The 1974/1980 Limitation Convention and other uniform law conventions contain similar provisions. At the same time, both the Sales Convention and the Limitation Convention authorize Contracting States to declare by way of a reservation that they will not be bound by these provisions (Art. 95 CISG), and a number of States have made such a reservation. On occasion of Czechia's withdrawal of its respective reservations, the present article discusses the applicability of Conventions 'via rules of private international law', the reservations against this applicability and the difficulties raised by such reservations, as well as the effects of their withdrawal.

* The present article is an updated and expanded version of a presentation given at the International Conference on the United Nations Convention on Contracts for the International Sale of Goods and the Convention on the Limitation Period in the International Sale of Goods, held at Charles University Prague on 24 March 2017. The conference was co-organized by the Czech Ministry of Industry and Trade and the United Nations Commission on International Trade Law (UNCITRAL).

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1 Introduction

On 22 November 2017, the Czech Republic formally notified the Secretary-General of the United Nations in his role as depositary of the United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980 (the so-called CISG)[1] and of the United Nations Convention on the Limitation Period in the International Sale of Goods of 14 June 1974 as amended by the Protocol of 11 April 1980[2] that it had decided to withdraw its reservations under Art. 95 of the CISG and under Art. XII of the Protocol amending the Limitation Convention.[3] At this stage, both reservations had been in force for more than 25 years, having initially been made by Czechoslovakia upon ratification of the 1980 Vienna Sales Convention [4] respectively accession to the 1974 UNCITRAL Limitation Convention as amended in 1980.[5]

This step, although it came in the somewhat obscure form of a 'diplomatic' notification, was a positive development for international commerce and for the many companies and individuals engaged in cross-border trade, both in the Czech Republic and in other countries. The reason is that it will broaden the sphere of applicability of both conventions and remove a number of uncertainties that had emerged in the past, as will be explained in more detail below.

The following contribution provides an overview over the two declarations under the Sales Convention and the Limitation Convention, their functions and the effect of their withdrawal. It is structured into five parts: Part 2 commences by describing the applicability of the two UNCITRAL Conventions via 'rules of private international law' and its role within the Conventions' framework. Part 3 then introduces the authorized declarations against this path to the Sales Convention's and the Limitation Convention's applicability, outlining its history as well as the various uncertainties it has caused in practice. In Part 4, the withdrawal of these declarations by Czechia and its effects will be discussed, before Part 5 briefly concludes.

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1 United Nations Convention on Contracts for the International Sale of Goods, Vienna, 11 April 1980, *United Nations Treaty Series* vol. 1489, 3.

2 Convention on the Limitation Period in the International Sale of Goods, as amended by the Protocol of 11 April 1980, New York, 14 June 1974, *United Nations Treaty Series* vol. 1511, 99.

3 United Nations, Depositary notifications C.N.740.2017.TREATIES-X.10 (regarding the 1980 Sales Convention) and C.N.739.2017.TREATIES-X.7.a (regarding the 1974 Limitation Convention as amended in 1980), both of 24 November 2017.

4 United Nations, Depositary notification C.N.55.1990.TREATIES-3 of 30 April 1990 (Ratification: Czechoslovakia).

5 United Nations, Depositary notification C.N.54.1990.TREATIES-1/1 of 30 April 1990 (Accession: Czechoslovakia).

2 Applicability of Sales Convention and Limitation Convention via Rules of Private International Law

2.1 Preliminary remark

The sphere of application of the Vienna Sales Convention on the one hand and of the Limitation Convention as in force in most of its Contracting States on the other hand are very similar, indeed: their design is almost identical. The reason is historical in nature: When the Sales Convention was adopted in Vienna in 1980, it was important for UNCITRAL to align the sphere of application of its slightly older 'first-born'[6] convention – the Limitation Convention that had been adopted in New York in 1974 – with that of the new Sales Convention.[7] This was achieved by way of a Protocol to the Limitation Convention[8] that Contracting States to the original Limitation Convention could ratify. Most (but not all) of them have done so[9] and therefore apply both Conventions under very similar conditions today.

In light of this similarity and for ease of reference, the following remarks primarily refer to the Sales Convention. But all of them similarly apply to the amended Limitation Convention, unless stated otherwise.

2.2 Gates to the Sales Convention: Art. 1(1)(a) and (b) of the CISG

The applicability of the Sales Convention is primarily governed by Art. 1(1) of the CISG, which reads as follows:

> '(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:
>
> (a) when the States are Contracting States; or
>
> (b) when the rules of private international law lead to the application of the law of a Contracting State.'

The applicability question is an important one in practice, because it determines which legal rules apply to a cross-border sales contract: The rules of the Sales Convention, or the non-uniform rules of a domestic law of sale?

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6 See Hans Smit, 'The Convention on the Limitation Period in the International Sale of Goods: UNCITRAL's First-Born' (1975) 23 *American Journal of Comparative Law* 337.

7 The discussions at the Vienna Diplomatic Conference about this point quite were extensive and controversial; see United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March – 11 April 1980, Official Records: Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committees, 1981, United Nations, New York, 465–476.

8 Protocol amending the Convention on the Limitation Period in the International Sale of Goods, Vienna, 11 April 1980, *United Nations Treaty Series* vol. 1511, 77.

9 Seven States remain that are Contracting States to the unamended 1974 Limitation Convention only: Benin, Bosnia and Herzegovina, Burundi, Ghana, Norway, Serbia, and Ukraine.

In order to picture the applicability provisions of the CISG, it may be helpful to imagine the Sales Convention as an impressive, beautiful building. The architects of the building have designed two different doors through which one can get into the building (or, speaking in legal terms: by which to make the Convention applicable): Art. 1(1)(a) resembles the large main gate to the building. It provides access to the building (or the Sales Convention) whenever both parties to a sales contract have their places of business in different States that are both Contracting States to the CISG. This main gate provides easy access to the Convention, because it is a simple exercise to determine whether the conditions of Art. 1(1)(a) are met. In order to stay within the picture, this main gate is a broad gate with a straight, well-paved road leading to it. But: It can only be entered when two parties, both from different CISG Contracting States, walk side by side.

And then there is a second door to the building, namely Art. 1(1)(b) CISG. It provides access to the Sales Convention building also when one or even both parties to a sales contract are not from a CISG Contracting State. In order for the Convention to be nevertheless applicable, Art. 1(1)(b) requires that 'the rules of private international law lead to the application of the law of a Contracting State'. The provision accordingly requires two things: First, it requires the court to consult 'the rules of private international law', meaning: the rules of private international law that are in force in the forum state.[10] These rules are not contained in the Sales Convention itself, but either in the domestic law of the forum, in a private international law convention in force in the forum state, or in EU secondary law.[11] Second, the rules of private international law have to 'lead to the application of the law of a Contracting State' of the CISG in order for the Sales Convention to apply.

2.3 The Convention's applicability 'via rules of private international law' as a source of non-uniformity

It is immediately noticeable that the procedure under Art. 1(1)(b) CISG is somewhat more complicated than that under Art. 1(1)(a), and – more importantly – less uniform, for two reasons: First, it relies on the respective forum's rules of private international law that are as such not internationally uniform, but differ

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10 Tribunale di Vigevano (Italy), 12 July 2000, CISG-online No. 493; Ferrari, F., 'Artikel 1', in Ingeborg Schwenzer (ed), *Kommentar zum Einheitlichen UN-Kaufrecht – CISG –,* (6th ed., 2013, C.H. Beck, Munich) at para. 71; Peter Huber, 'Artikel 1', in *Münchener Kommentar zum Bürgerlichen Gesetzbuch, Vol. 3* (7th ed., 2016, C.H. Beck, Munich) at para. 47; Loukas Mistelis, 'Article 1', in Stefan Kröll, Loukas Mistelis and Pilar Perales Viscasillas (eds), *UN Convention on Contracts for the International Sales of Goods (CISG)*, (2nd ed., 2018, C.H. Beck, Munich) at para. 51; Ingeborg Schwenzer and Pascal Hachem, 'Article 1', in Schwenzer, I. (ed), *Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG)* (4th ed., 2016, Oxford University Press, Oxford) at para. 30; Pan Zhen, 'China's Withdrawal of Article 96 of the CISG: A Roadmap for the United States and China to Reconsider Withdrawing the Article 95 Reservation' (2016–2017) 25 *University of Miami Business Law Review* 141, at p. 153.

11 See eg the EU's Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), *Official Journal of the European Union* of 4 July 2008, L 177/6.

from State to State.[12] And second, Art. 1(1)(b) CISG does not specify why the rules of private international law lead to the application of the law of a Contracting State[13] – either because have chosen a law in their contract, or because an objective connection factor points to the law in the home country of the seller or of the buyer, or because of any other private international law factor. Both of these aspects necessarily result in a certain degree of non-uniformity, and – important for international practice – they invoke domestic conflict of laws rules that typically will be foreign and possibly unknown to at least one of the parties.

When thinking once more of the Sales Convention as an impressive building with Art. 1(1)(a) as its comfortable main gate, Art. 1(1)(b) more resembles a narrow side door, with a rocky path leading to it.

2.4 Authorising an opting-out

It is therefore not entirely surprising that Art. 1(1)(a) of the Sales Convention was uncontroversial during the 1980 Diplomatic Conference in Vienna, but that Art. 1(1)(b) was not.[14] Together with two other historical factors that will be described in more detail below,[15] the critical view of the non-uniformity inherent in Art. 1(1)(b) eventually lead to the creation of Art. 95 of the CISG, the provision that is the focus of the present paper. It reads:

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

2.5 The (amended) Limitation Convention compared

The Limitation Convention (as amended in 1980) largely reproduces Arts. 1(1)(b) and 95 of the Sales Convention, albeit with minor modifications. Article 3(1) of the Limitation Convention, the counterpart of Art. 1(1) CISG, reads:

> '(1) This Convention shall apply only

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12 Mistelis (fn 10) at para. 51.

13 Huber (fn 10) at para. 48; Simon Manner and Moritz Schmitt, 'Artikel 1', in Christoph Brunner (ed), *UN-Kaufrecht – CISG* (2nd ed., 2014, Stämpfli, Berne) at para. 10; Ingo Saenger, 'Art. 1 CISG', in Franco Ferrari et al. (eds), *Internationales Vertragsrecht: Rom I-VO, CISG, CMR, FactÜ – Kommentar* (2nd ed., 2012, C.H. Beck, Munich) at para. 17.

14 Peter Schlechtriem, *Uniform Sales Law – The UN-Convention on Contracts for the International Sale of Goods* (1986, Manz, Vienna) at p. 25: 'The rule [Article 1(1)(b) of the Sales Convention] was very controversial in Vienna …'; László Réczei, 'Area of Operation of the International Sales Conventions' (1981) 29 *American Journal of Comparative Law* 513, at 519; James Edward Joseph, 'Contract Formation Under the United Nations Convention on Contracts for the International Sale of Goods and the Uniform Commercial Code' (1984) 3 *Dickinson Journal of International Law* 107, at 115; Jolanta Kren Kostkiewicz and Ivo Schwander, 'Zum Anwendungsbereich des UN-Kaufrechtsübereinkommens' in *Emptio – Venditio Inter Nationes: Mélanges Karl Heinz Neumayer* (1997, Verlag Recht und Gesellschaft, Basel) 33, at 40.

15 See Parts 3.2.1. and 3.2.2.

(a) if, at the time of the conclusion of the contract, the places of business of the parties to a contract of international sale of goods are in Contracting States; or

(b) if the rules of private international law make the law of a Contracting State applicable to the contract of sale.'

The difference lies in subparagraph (b) of the provision, which requires that the rules of private international law 'make the law of a Contracting State applicable to the contract of sale', while under Art. 1(1)(b) of the Sales Convention they have to 'lead to the application of the law of a Contracting State.' It is nevertheless undisputed that both provisions mean the same:[16] The forum's conflict of laws rules need to point to the law of any State that has ratified the Convention. If they do, the Convention applies – if they instead point to the law of a Non-Contracting State, the Convention does not apply. Despite the similarities in wording between Art. 1(1)(b) of the Sales Convention and Art. 3(1)(b) of the Limitation Convention, it seems that the latter provision has been relatively frequently overlooked in practice[17] and accordingly never had an impact resembling that of Art. 1(1)(b) of the CISG.

The amended Limitation Convention in Art. 36*bis* also contains a counterpart provision to Art. 95 CISG, authorizing Contracting States to 'opt out' of Art. 3(1)(b) of the Limitation Convention. Its wording tracks the crucial part of Art. 95 CISG verbatim ('Any State may declare […] that it will not be bound by […]'),[18] and only the rest of Art. 36*bis* of the amended Limitation Convention deviates slightly from its counterpart in the Sales Convention, due to the technical differences resulting from its addition through the 1980 Protocol.

2.6 Progenies in other conventions

In addition to inspiring Art. 3(1) of UNCITRAL's amended Limitation Convention, Art. 1(1)(b) of the Sales Convention has over the years served as a model for provisions in yet other uniform law conventions. Accordingly, the application of conventions via rules of private international law is a phenomenon that is of relevance well beyond the area of international sales law, and Art. 1(1)(b) of the Sales Convention may therefore be looked to as guidance in the application of its progenies in other conventions.[19]

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16 Markus Müller-Chen, 'Article 3 Limitation Convention 1974', in Ingeborg Schwenzer (ed), *Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG)* (4th ed., 2016, Oxford University Press, Oxford) at para. 2; Fritz Enderlein and Dietrich Maskow, *International Sales Law* (1992, Oceana, Dobbs Ferry) at p. 406.

17 See Luca Castellani, 'An Assessment of the Convention on the Limitation Period in the International Sale of Goods through Case Law' (2014) 58 *Villanova Law Review* 645, at pp. 649–52.

18 Enderlein and Maskow (fn 16), at p. 444.

19 On the 1983 Geneva Agency Convention see Fritz Enderlein, Dietrich Maskow and Heinz Strohbach, *Internationales Kaufrecht* (1991, Haufe, Berlin) at pp. 352 and 356.

Examples of provisions defining the sphere of application of conventions in a manner identical or very similar to Art. 1(1)(b) CISG include mostly those in other conventions developed by UNCITRAL, as Art. 2(1)(c) of the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade of 19 April 1991 or Art. 1(1)(b) of the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit of 11 December 1995. However, other international organisations working on the unification of private law have on occasion also used the Sales Convention's Art. 1(1)(b) as a model, as eg the International Institute for the Unification of Private Law (UNIDROIT) in Art. 2(1)(b) of the Geneva Convention on Agency in the International Sale of Goods of 17 February 1983.[20]

Interestingly, none of the UNCITRAL conventions mentioned above contain a counterpart provision to Art. 95 of the Sales Convention, while such a counterpart exists in Art. 2(1)(b) of the Geneva Agency Convention.

3 The Declaration against the Conventions' Applicability via Rules of Private International Law

In order to look in somewhat more detail Art. 95 of the CISG that authorizes the making of a declaration against the Convention's applicability via rules of private international law, it is appropriate to first briefly summarize the purpose of the provision,[21] before addressing the historical developments that led to the inclusion of this provision into the Sales Convention.[22] We then briefly discuss the sister declaration authorized by Art. 36*bis* of the amended Limitation Convention.[23] Afterwards, we turn to the two declarations' past use by Contracting States to the Sales and Limitation Conventions[24] and to the most difficult aspect, the declarations' effects.[25]

3.1 Purpose of the declaration under Art. 95 of the CISG in a nutshell

By making a declaration in accordance with Art. 95, a Contracting State can put a fence across the side path of Art. 1(1)(b) that blocks this way to the Sales Convention's applicability. As a result, the courts in such a declaring State can only use the 'main gate' in order to determine the Convention's applicability. Accordingly, they can apply the Convention only when the conditions of Art. 1(1)(a) of the CISG are fulfilled because both buyer and seller have their places of business in different Contracting States.

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20 See Malcolm Evans, *Explanatory Report on the Convention on Agency in the International Sale of Goods* (1983, UNIDROIT, Rome) at para. 27: 'this latter provision corresponding to Article 1(1)(b) of the Vienna Convention.'

21 See Part 3.1.

22 See Part 3.2.

23 See Part 3.3.

24 See Part 3.4.

25 See Part 3.5.

3.2 Historical background of the declaration

The general historical background that led to Art. 95 being included into the CISG was its critical assessment by some of the delegates to the 1980 Diplomatic Conference in Vienna. But it was two more specific factors that resulted in a declaration against Art. 1(1)(b) being explicitly authorized by the Sales Convention, despite the reduction in uniformity[26] that this would inevitably bring about:

3.2.1 Preservation of special domestic legislation as a goal

The first was a specific concern of the then CSSR. The reason was that Czechoslovakia at the time had special domestic legislation for contracts of international trade.[27] Similar specific legislation also existed in Eastern Germany and was planned in other Socialist States.[28] Because this domestic legislation applied exclusively to international contracts, Czechoslovakia feared that the introduction of Art. 1(1)(b) CISG would entirely deprive this legislation of its relevance: Where international sales contracts between Czechoslovakian entities and foreign companies in other CISG Contracting States were concerned, Art. 1(1)(a) would lead to the application of the CISG and thereby displace the Czechoslovakian special legislation.[29] If Art. 1(1)(b) were also enacted, this would mean that also where rules of private international law lead to the application of CSSR law, the CISG would apply. In short: There would be almost no scope left for Czechoslovakia's special law for international sales transactions.[30] Insofar, the situation was different from that in the majority of States where general commercial law or general sales law applies to international and domestic contracts alike.

In view of this situation, Czechoslovakia tried hard to include a declaration option like Art. 95 into the new Sales Convention, in order to be able to escape Art. 1(1)(b). In a manner of speaking, Czechoslovakia thereby became the mother of Art. 95 of the CISG. But the birth was a difficult one indeed: In Vienna, Czechoslovakia needed two attempts in order to convince the other delegates to include such a provision.

The Vienna Diplomatic Conference took place from 10 March to 11 April 1980 at the Hofburg, the former imperial residence in Vienna. It lasted a total of 33 days. Czechoslovakia started its first attempt on Day 9 in the Second Committee of the Conference, when it proposed the inclusion of a provision that allowed States to 'opt out' of Art. 1(1)(b) CISG.[31] This proposal was rejected by a substantial

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26 See M G Bridge, *The International Sale of Goods: Law and Practice* (4th ed., 2017, Oxford University Press, Oxford) at para. 10.56: 'a declaration destructive of uniformity'.

27 *Official Records* (fn 7) at p. 237; for more details see Réczei (fn 14) at pp. 520–1.

28 *Official Records* (fn 7) at pp. 237–8; Enderlein and Maskow (fn 16) at p. 380.

29 *Official Records* (fn 7) at p. 237.

30 Réczei,(fn 14) at p. 520.

31 A/CONF.97/C.2/L.7, *Official Records* (fn 7) at p. 145.

majority, with 5 votes in favour and 18 votes against.[32]

The second attempt did not take place until Day 32 of the Conference, its penultimate day and last actual working day. (On Day 33, only the final document was signed in a grand ceremony.[33]) In the late afternoon of Day 32, some time after 5 p.m.,[34] Czechoslovakia again presented a proposal[35] to authorize a declaration against Art. 1(1)(b), this time in the plenary, with a wording that was slightly different from its first attempt. After a brief discussion,[36] it was accepted, probably also because the delegates wanted to save the adoption of the entire Convention from being at risk.[37] Accordingly, Art. 95 was a true last minute addition to the CISG.[38]

3.2.2 Preservation of reciprocity as a goal

Nevertheless, the provision probably would not have been adopted if some other countries had not also viewed Art. 1(1)(b) CISG critically. Although these other States had no special laws for international transactions, they were similarly concerned about Art. 1(1)(b) unduly restricting the scope of their domestic law, but rather criticised this effect from a reciprocity[39] (or 'asymmetry'[40]) perspective. This view was explained in a Legal Analysis submitted by the U.S. Secretary of State to the then U.S. President *Ronald Reagan*, in which the administration recommended the ratification of the CISG, but subject to a declaration under Art. 95. The legal analysis read as follows:

> 'A further reason for excluding applicability based on subparagraph (1)(b) is that this provision would displace our own domestic law more frequently than foreign law. […] Under subparagraph (1)(b), when private international law points to the law of a foreign non-Contracting State the Convention will not displace that foreign law, since subparagraph (1)(b) makes the Convention applicable only when "the rules of private

32 *Official Records* (fn 7) at p. 439.
33 *Official Records* (fn 7) at p. 234.
34 See *Official Records* (fn 7) at p. 228.
35 A/CONF.97/L.4, *Official Records* (fn 7) at p. 170.
36 *Official Records* (fn 7) at pp. 229–30.
37 See Malcolm Evans, 'Article 95', in Cesare Massimo Bianca and Michael Joachim Bonell (eds), *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (1987, Giuffrè, Milan) at note 2.3.
38 Peter Winship, 'The Scope of the Vienna Convention on International Sales Contracts', in Nina Galston and Hans Smit (eds), *International Sales: The United Nations Convention on Contracts for the International Sale of Goods* (1984, Matthew Bender, New York) 1-27 at pp. 1-44; Asa Markel, 'American, English and Japanese Warranty Law Compared: Should the U.S. Reconsider Her Article 95 Declaration to the CISG?' (2009) 21 *Pace International Law Review* 163, at p. 170.
39 See Ferrari (fn 10) at para. 6 (commenting on criticism from the German delegation during the 1980 Vienna Diplomatic Conference).
40 Clayton P. Gillette and Steven D. Walt, *The UN Convention on Contracts for the International Sale of Goods: Theory and Practice* (2nd ed., 2016, Cambridge University Press, New York) at p. 39; Zhen (fn 10) at p. 154.

> international law lead to the application of the law of a Contracting State." Consequently, when those rules point to United States law, subparagraph (1)(b) would normally operate to displace United States law (the Uniform Commercial Code) [but] would not displace the law of foreign non-Contracting States.'[41]

In short, this view primarily disliked Art. 1(1)(b) CISG because it could displace U.S. law more often than the law of certain foreign States.[42] A number of other States represented at the 1980 Vienna Diplomatic Conference held similar views. The shared source of these views has variously been described as a (perceived) asymmetry problem[43] or a concern for reciprocity:[44] In line with the reciprocity principle developed in traditional treaty law,[45] the States concerned regarded the adoption and application of the Sales Convention's provisions as a concession they made towards other States. Such a reciprocity-inspired approach also resounds in *John Honnold*'s description of the CISG as 'the commitment that Contracting States make to each other: We will apply these uniform rules in place of our own domestic law on the assumption that you will do the same.'[46] When viewed against this background, Art. 1(1)(a) of the Sales Convention seems to provide for a *do ut des* application between CISG Contracting States, while Art. 1(1)(b) appears to ask for unilateral gifts to be made to Non-Contracting States.

In my opinion, it is nevertheless doubtful whether such a 'reciprocity-inspired' understanding of the Sales Convention's sphere of application is justified.[47] The approach seems to overlook that both the Sales and the Limitation Convention are not primarily treaties to be operated and performed by and between its Contracting States, but rather law-making treaties designed to govern the relations between private traders.[48] A reciprocity approach, though an understandable reflex in public international law with regard to so-called *traités-contrats*, is therefore not

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41 Appendix B of the Letter of submittal from Secretary of State George P. Shultz, attached to the Message from the President of The United States Transmitting the United Nations Convention on Contracts for the International Sale of Goods, Senate Treaty Doc. No. 98-9, 98th Cong., 1st Sess. V, VI, 1983, U.S. Government Printing Office, Washington D.C.

42 See Gary F. Bell, 'Why Singapore Should Withdraw Its Reservation to the United Nations Convention on Contracts for the International Sale of Goods (CISG)' (2005) 9 *Singapore Year Book of International Law* 55, at 59; Markel (fn 38) at p. 172; Winship (fn 38) at pp. 1-32.

43 Gillette and Walt (fn 40) at p. 38; Zhen (fn 10) at p. 154.

44 Bell (fn 42) at pp. 56 and 60.

45 See Malcolm N. Shaw, *International Law* (5th ed., 2003, Cambridge University Press, Cambridge) at p. 7–8.

46 John O. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (4th ed. edited by Harry M. Flechtner, 2009, Kluwer, Alphen aan den Rijn) at para. 103.2.

47 See generally Ferenc Majoros, 'Le régime de réciprocité de la Convention de Vienne et les réserves dans les Conventions de la Haye' (1974) 101 *Journal du Droit International* 73, at p. 76.

48 Bell (fn 42) at p. 60; Jan Kropholler, *Internationales Einheitsrecht* (1975, Mohr Siebeck, Tübingen) at p. 288.

well suited to capture uniform commercial law conventions that are performed between private individuals who, in addition, may decide to exclude the convention's application if they so desire (see Art. 6 of the Sales Convention).[49]

This particularity of uniform commercial law conventions is also directly reflected in their wording. Article 1(3) of the Sales Convention, Art. 2(e) of the Limitation Convention and also Art. 2(3) of the 1983 Geneva Agency Convention[50] all expressly provide that the nationality of the parties is not to be taken into consideration in determining the application of these conventions. The UNCITRAL Secretariat's official commentary on the draft of Art. 1(3) of the Sales Convention explains the reasoning behind the provision:

> '10. International conventions which affect the rights of individuals are often intended to protect the rights of the nationals of the Contracting States in their dealings in or with the other Contracting State or States. Therefore, it is typical that these conventions apply only to relations between "nationals" of the Contracting States.
>
> 11. However, the question whether this Convention is applicable to a contract of sale of goods is determined primarily by whether the relevant "places of business" of the parties are in different Contracting States. The relevant "place of business" of a party is determined by application of article 9 *(a)* without reference to his nationality, place of incorporation, or place of head office. This paragraph reinforces that rule by making it clear that the nationality of the parties is not to be taken into consideration.'[51]

Further support for the conclusion that uniform private law rules should not be evaluated by States from a 'give and take' perspective can be found in modern private international law (conflict of laws) conventions. The Rome Convention on the Law Applicable to Contractual Obligations of 19 June 1980, adopted in the same year as the Sales Convention, says in its Art. 2:

> Any law specified by this Convention shall be applied whether or not it is the law of a Contracting State.

In conclusion, it is therefore submitted that reciprocity-inspired concerns about the appropriateness of Art. 1(1)(b) of the Sales Convention are unconvincing. They neither provided a substantial reason for the inclusion of Art. 95 into the Sales Convention or the reservation's use by Contracting States,[52] nor do they support a continuing use of this reservation today.

3.3 The declaration under Art. 36*bis* of the Limitation Convention compared

Both the purpose and the historical background of Art. 36*bis* of the amended Limitation Convention resemble that of its somewhat more prominent counterpart

49 Bell (fn 42) at p. 60.
50 See Part 2.6.
51 *Official Records* (fn 7) at p. 15.
52 See Part 3.4.

provision in Art. 95 of the Sales Convention. As the 1974 Limitation Convention had neither contained an applicability rule similar to Art. 1(1)(b) of the CISG nor authorized a declaration similar to Art. 95 of the CISG, the discussions about the desirability of such a declaration arose for the first time when the Protocol to the Limitation Convention was drafted during the 1980 Diplomatic Conference in Vienna, with the aim to *inter alia* include a rule along the lines of Art. 1(1)(b) of the Sales Convention into the amended Limitation Convention.[53] The inclusion of a declaration allowing Contracting States to 'opt out' of the new Art. 3(1)(b) of the amended Limitation Convention was again proposed by Czechoslovakia in the Second Committee that also dealt with the Protocol to the 1974 Limitation Convention.[54] The Second Committee considered the Czechoslovakian proposal at its 9th meeting on 1 April 1980, with the discussions mirroring the discussions about Art. 95 of the Sales Convention:[55] Most of all, the Socialist states supported the proposal in order to protect their special domestic legislation for international contracts,[56] but also the reciprocity argument surfaced, with delegates arguing that particularly the relatively long prescription periods under the Limitation Convention could only be applied on a basis of reciprocity.[57] In response, other delegates pointed out that the identical Czechoslovakian proposal under the Sales Convention had been rejected in the same Committee by a substantial majority[58] less than two weeks earlier. Accordingly, the present proposal was also rejected by 11 votes to 5, with 3 abstentions.[59]

The eventual Art. 36*bis* thus became part of the Protocol and the amended 1980 Limitation Convention only in a second attempt, again mirroring the closely related developments in regard of Art. 95 CISG.[60] After the new Art. 95 had been included into the Sales Convention's text following Czechoslovakia's last minute proposal in the plenary on 10 April 1980 and in spite of the late stage, resistance against the Limitation Convention's applicability 'via rules of private international law' in accordance with its new Art. 3(1)(b)[61] resurfaced in the plenary.[62] It was overcome by a proposal to include a declaration along the lines of Art. 95 CISG also in the Limitation Convention, although this proposal was not formally made by Czechoslovakia, but by delegates on the floor.[63] After some *ad hoc* discussions

53 On the resulting Article 3(1)(b) of the amended Limitation Convention, see *supra* at 2.5.
54 A/CONF.97/C.2/L.7, *Official Records* (fn 7) at p. 152.
55 Part 3.2.
56 *Official Records* (fn 7) at p. 475.
57 See delegate Wagner (German Democratic Republic), *Official Records* (fn 7) at p. 475 No. 8.
58 *Official Records* (fn 7) at p. 475. On the earlier discussions relating to the proposed declaration under the Sales Convention, see Part 3.2.1.
59 *Official Records* (fn 7) at p. 476.
60 Part 3.2.1.
61 See Part at 2.5.
62 *Official Records* (fn 7) at p. 231.
63 See *Official Records* (fn 7) at p. 231, No. 124 (delegate Hartkamp (Netherlands)) and at p. 232, No. 146 (delegate Minami (Japan)).

about drafting issues, the proposal was eventually adopted by 34 votes to none, with 1 abstention.[64] Article 36*bis* of the amended Limitation Convention was born.

3.4 Use of the declarations by CISG and Limitation Convention Contracting States

We turn next to the actual use of the declaration by Contracting States. By including Art. 95 CISG and the similar provision in the Limitation Convention into those conventions' text, the drafters merely gave an option to the Contracting States. The wording of the provisions – 'Any State *may* declare […] that it will not be bound […]'[65] – makes it entirely clear that it remained up to each State that ratified, accepted, approved or acceded to one of the Conventions to choose whether it wanted to use the reservation, or not.

Under both the CISG and the Limitation Convention, the vast majority of States chose to become part of the Convention without making use of the reservation. They therefore also apply the Convention's rules when one or even both parties to a sales contract do not have their place of business in a Contracting State, but their rules of private international law lead to the application of the law of a Contracting State. 92% of the CISG's Contracting States and 93% of the Contracting States of the amended Limitation Convention did not declare the reservation.

However, there are exceptions, and they are practically important. Under the Sales Convention, the first two to be mentioned here are the Slovak Republic and, until recently, the Czech Republic. Both 'inherited' their reservations under the Sales and Limitation Conventions from Czechoslovakia through the mechanisms of state succession,[66] which meant that both reservations remained in force in both territories after Czechoslovakia had peacefully dissolved in 1993.[67] In addition, two of the world's largest trading nations, namely the Peoples' Republic of China and the United States of America, have also made a declaration under Art. 95 CISG. The sheer size of these two Contracting States guarantees their

64 *Official Records* (fn 7) at p. 233.

65 Emphasis added.

66 On state successions and their effects on the Sales Convention's applicability, see Ulrich G. Schroeter, 'Backbone or Backyard of the Convention? The CISG's Final Provisions', in Camilla B. Andersen and Ulrich G. Schroeter (eds), *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday* (2008, Wildy, Simmonds & Hill, London) 425, at pp. 457–464.

67 Ulrich Magnus, 'Artikel 95', in *Staudinger's Kommentar zum Bürgerlichen Gesetzbuch: Wiener UN-Kaufrecht (CISG)* (2018, Sellier – de Gruyter, Berlin) at para. 4; Ulrich G. Schroeter (fn 66) at p. 464; Ingeborg Schwenzer and Pascal Hachem, 'Article 95', in Ingeborg Schwenzer (ed), *Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG)* (4th ed., 2016, Oxford University Press, Oxford) at para. 1. More reluctant Filip De Ly, 'Sources of International Sales Law: An Eclectic Model' (2005) 25 *Journal of Law and Commerce* 1, at p. 10: 'There is some doubt whether the Czechoslovakian reservation survived that country's split.' Arguing that the Article 95 reservation remained without effect for the Czech and the Slovak Republic after the demise of the former CSSR Fritz Enderlein, 'Vienna Convention and Eastern European Lawyers' (1997) *IBA International Sales Quarterly* 12.

declarations a certain practical relevance.[68] The three other current reservation States are smaller: Armenia, Singapore and St. Vincent and the Grenadines. Overall, when taking into account Czechia's recent declaration withdrawal, Art. 95 is today being applied in six of the 89 CISG Contracting States, or 6.7%.

Under the Limitation Convention, the reservation against the Convention's applicability via rules of private international law was used by even fewer States: Only the United States of America, the Slovak Republic and – initially – the Czech Republic availed themselves of Art. 36*bis* of the amended Limitation Convention, the latter two States again by way of state succession.[69] Given the Limitation Convention's much smaller overall number of Contracting States, these merely three reservations nevertheless resulted in a similar ratio of reservation States as under the Sales Convention.

3.5 Effect of the reservations and surrounding uncertainties

Before addressing the declarations withdrawal by Czechia and its effects, it is helpful to briefly look at the legal effects of Art. 95 CISG respectively Art. 36*bis* of the Limitation Convention declarations and how they affect the practical application of the Conventions. Given that this issues has in the past mostly appeared under the Sales Convention, the following remarks will focus primarily on Art. 95 CISG.

And this is where the difficulties start: It is highly disputed among commentators what an Art. 95 declaration actually does,[70] resulting in its characterisation as the 'probably most complex'[71] and '[p]erhaps the most challenging to understand'[72] among the Sales Convention's reservations.[73] Courts in various Contracting States have equally grappled with difficulties in construing the provision. On one end of the spectrum are commentators like myself, who believe that the question is fairly easy when we stick to the wording of the Convention: By authorizing a State to declare that 'it' will not be bound by Art. 1(1)(b) CISG, Art. 95 makes clear that a declaration under this provision is only relevant for courts in a declaring State

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68 CISG Advisory Council Opinion No. 15 'Reservations under Articles 95 and 96 CISG' (Rapporteur: Ulrich G. Schroeter) (2014) *Internationales Handelsrecht* 116, at p. 119.

69 Castellani (fn 17) at p. 656.

70 Stressing the uncertainties surrounding Article 95's interpretation Bell (fn 42) at p. 62; Gillette and Walt, (fn 40) at p. 39; Huber, (fn 10) at para. 53; Kren Kostkiewicz and Schwander, (fn 14) at p. 42; Lajos Vékás, 'Zum persönlichen und räumlichen Anwendungsbereich des UN-Einheitskaufrechts' (1987) *Praxis des Internationalen Privat- und Verfahrensrechts* 342, at p. 344; Marlene Wethmar-Lemmer, 'Applying the CISG via the rules of private international law: Articles 181)(b) and 95 of the CISG – analysing CISG Advisory Council Opinion 15' (2016) *De Jure* 58, at p. 60; Zhen, (fn 10) at pp. 143 and 156.

71 De Ly (fn 67) at p. 10.

72 Michael G. Bridge, 'Uniform and Harmonized Sales Law: Choice of Law Issues', in James J. Fawcett, Jonathan M. Harris and Michael G. Bridge *International Sale of Goods in the Conflict of Laws* (2005, Oxford University Press, Oxford) at paras. 16-128.

73 CISG Advisory Council Opinion No. 15 (fn 68) at p. 121.

('it'), not for courts in any other CISG State that has not made such a declaration.[74] And by providing that it 'will not be bound', Art. 95 also states that a declaring State is under no obligation under treaty law to observe Art. 1(1)(b) CISG, with its courts therefore only being obliged to apply the Sales Convention whenever the requirements of Art. 1(1)(a) are fulfilled.[75]

However, others disagree,[76] and argue that matters are more complicated. They can point out that a case that falls under Ar. 1(1)(b) of the CISG has a connection to up to four different States: (1) The State where the buyer has his place of business, (2) the State where the seller has his place of business, (3) the forum State where the court deciding the dispute is located and (4) the State whose law the 'rules of private international law' mentioned in Art. 1(1)(b) declare applicable. To make things even worse, each of these three States can either be (1) a CISG Contracting State that has made no declaration under Art. 95, or (2) a CISG Contracting State that has made a declaration under Art. 95, or (3) a non-Contracting State.[77]

To the casual observer, it may not be immediately clear what precisely this means for the Sales Convention's applicability, and in which scenarios Art. 1(1)(b) and Art. 95 interact with what result. Already in 1984, *Peter Winship* calculated that there are 54 possible combinations that can result from applying Arts. 1(1)(b) and 95 CISG.[78] One may ask oneself questions as these: Will the Sales Convention apply if the rules of private international law of the forum lead to the application of a Contracting State that has made a declaration under Art 95,[79] or not?[80] Are

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74 Schroeter (fn 66) at p. 462.

75 CISG Advisory Council Opinion No. 15 (fn 68) at p. 116.

76 See eg the authors cited at fn 80.

77 Kren Kostkiewicz and Schwander (fn 14) at p. 42.

78 See Winship (fn 38) at pp. 1-53.

79 CISG Advisory Council Opinion No. 15 (fn 68) at p. 121; Bell (fn 42) at p. 64; Enderlein and Maskow (fn 16) at p. 381; Ferrari (fn 10) at para. 80; Johnny Herre, 'Article 95', in Stefan Kröll, Loukas Mistelis and Pilar Perales Viscasillas (eds), *UN Convention on Contracts for the International Sales of Goods (CISG)* (2nd ed., 2018, C.H. Beck, Munich) at para. 10; Huber (fn 10) at para. 54; Martin Karollus, *UN-Kaufrecht* (1991, Springer, Wien, New York) at pp. 31 and 34; Manner and Schmitt, (fn 13) at para. 14; Peter Mankowski, 'Art. 95 CISG' in Franco Ferrari et al. (eds), *Internationales Vertragsrecht: Rom I-VO, CISG, CMR, FactÜ – Kommentar* (2nd ed., 2012, C.H. Beck, Munich) at para. 5; Schwenzer and Hachem (fn 10) at para. 37.

80 Beate Czerwenka, *Rechtsanwendungsprobleme im internationalen Kaufrecht* (1988, Duncker & Humblot, Berlin) at p. 158; Evans (fn 37) at note 3.4.; Honnold (fn 46) at para. 47.6; Kren Kostkiewicz and Schwander (fn 14) at p. 44; Manuel Lorenz, 'Art. 1' in Wolfgang Witz, Hanns-Christian Salger and Manuel Lorenz, *International Einheitliches Kaufrecht* (2nd ed., 2016, Fachmedien Recht und Wirtschaft, Frankfurt am Main) at para. 13; Ulrich Magnus, 'Artikel 1', in *Staudinger's Kommentar zum Bürgerlichen Gesetzbuch: Wiener UN-Kaufrecht (CISG)* (2018, Sellier – de Gruyter, Berlin) at para. 110; Karl Heinz Neumayer, 'Offene Fragen zur Anwendung des Abkommens der Vereinten Nationen über den internationalen Warenkauf' (1994) *Recht der Internationalen Wirtschaft* 99 at 101; Saenger (fn 13) at para. 20; Vékás (fn 70) at p. 346; Winship (fn 38) at paras. 1-27–8; probably also Wethmar-Lemmer (fn 70) at pp. 69–70.

courts in an Art. 95 reservation State by law forbidden from applying the Sales Convention[81] or are they merely authorized not to apply it but may apply it if they so decide,[82] as eg in case of the parties' explicit choice of the Sales Convention?[83] Does it matter whether or not the forum is located in a non-Contracting State?[84] What if the private international law of the Contracting State referred to refers back to the law of a Contracting State that has not made an Art. 95 declaration *(renvoi)*?[85]

It is no surprise that there is disagreement about almost all of these constellations, and about a number of others, too.[86]

In response, it is submitted that the approach just described is, first, highly confusing, which in itself is a problem under a Convention that aims at creating legal certainty. And second, the approach is misreading Art. 1(1)(b) CISG, because it only focuses on the 'tail end' of the provision in subparagraph (b). In contrast, I am convinced that paragraph (1) must be read in its entirety, and it commences by saying that '*This Convention* applies to contracts for the sale of goods'.[87] The provision therefore has an inverse structure, as it puts the result first

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81 *Prime Start Ltd. v. Maher Forest Prod., Ltd.,* 442 F. Supp. 2d 1113 at 1118 (W.D. Wash. 2006); *Impuls I.D. Internacional, S.L. v. Psion-Teklogix Inc.,* 234 F. Supp.2d 1267 at 1272 (S.D. Fla. 2002); Markel, A., *supra* fn 38, at 164: 'American courts are forbidden to apply the CISG'.

82 CISG Advisory Council Opinion No. 15 (fn 68) at p. 120; Bell (fn 42) at p. 65; Franco Ferrari, 'Short notes on the impact of the Article 95 reservation on the occasion of *Prime Start Ltd. v. Maher Forest Products Ltd. et al.*, 442 F. Supp. 2d 1113, 1118 (W.D. Wash. 2006), 17 July 2006' (2006) *Internationales Handelsrecht* 248, at p. 250; Herre (fn 79) at para. 2; Honnold (fn 46) at para. 47.5; Huber (fn 10) at para. 56; Niklaus Hutzli, 'Artikel 95', in Christoph Brunner (ed), *UN-Kaufrecht – CISG* (2nd ed., 2014, Stämpfli, Berne) at para. 1; Magnus (fn 67) at para. 1; Mankowski (fn 79) at para. 5; Vékás (fn 70) at p. 345; Wolfgang Witz and Manuel Lorenz, 'Art. 95', in Wolfgang Witz, Hanns-Christian Salger and Manuel Lorenz, *International Einheitliches Kaufrecht* (2nd ed., 2016, Fachmedien Recht und Wirtschaft, Frankfurt am Main) at para. 2.

83 See Herre (fn 79) at para. 12.

84 For a court in the (at that time) non-Contracting State Japan applying the Sales Convention when its rules of private international law pointed to the law of California, thereby not giving any relevance to the U.S.'s Article 95 CISG declaration see *Nippon Systemware K.K. v. O.,* 997 Hanrei Taimuzu 286 (D. Tokyo, March, 1998); similarly Ferrari (fn 10) at para. 81; Honnold (fn 46) at para. 47.5; Vékás (fn 70) at p. 344; Winship (fn 38) at pp. 1-30. *Contra* (arguing that an Article 95 declaration should be read as also excluding the Sales Convention's applicability in the courts of foreign non-Contracting States) Lorenz (fn 80) at para. 13. Stressing that this is a matter to be autonomously decided by the law of the non-Contracting State similarly Mankowski (fn 79) at para. 12.

85 Arguing that a renvoi should be taken into account under Article 1(1)(b) of the Sales Convention Czerwenka (fn 80) at pp. 161–2; Ferrari (fn 10) at para. 71; Huber (fn 10) at para. 49; Manner and Schmitt (fn 13) at para. 10; Neumayer (fn 80) at p. 101; *Contra* Magnus (fn 80) at para. 106; Schwenzer and Hachem (fn 10) at para. 34; Winship (fn 38) at paras. 1-28–9.

86 See eg Herre (fn 79) at para. 6; Honnold (fn 46) at para. 47; Karollus (fn 79) at p. 31; Wethmar-Lemmer (fn 70) at pp. 64–6.

87 Emphasis added.

(namely 'This Convention applies […]'), before only then listing the necessary conditions that trigger this result in subparagraphs (a) and (b).[88] Also under Art. 1(1)(b), it is accordingly not 'the law of a Contracting State' that a court applies, but 'this Convention'. It therefore is completely irrelevant whether the respective Contracting State has made a declaration under Art. 95 CISG, or not. When understood correctly, Art. 95 exclusively influences whether the courts in Contracting States that have made an Art. 95 declaration can assess the Convention's applicability only under Art. 1(1)(a) CISG, or also under Art. 1(1)(b).

In summary, the interaction between Art. 1(1)(b) and Art. 95 CISG has given rise to much discussion and quite a bit of confusion.[89] These uncertainties only arose after the Convention had been adopted and were apparently not foreseen by the drafters when they included Art. 95 into the Convention, in the late afternoon of the penultimate day of the 1980 Vienna Diplomatic Conference.

4 The Reservations Withdrawn

Given that the Czech Republic has now withdrawn its Art. 95 declaration as authorized by Art. 97(4) CISG,[90] as well as its parallel Art. 36*bis* declaration as allowed under Art. 40(2) of the Limitation Convention, we turn next to these withdrawals and their effects. In doing so, it may be helpful to first put these withdrawals into the context of similar developments under the Sales Convention.[91] However, the more important matters are arguably the effects that Czechia's withdrawal of its two declarations will have. In this respect, it is helpful to distinguish between three issues, namely the withdrawals' effect in terms of treaty law,[92] in terms of practice[93] and in terms of international policy[94].

4.1 General trend to withdraw declarations under the Sales Convention

First of all, it is appropriate to acknowledge that Czechia is following a general trend in withdrawing its declaration under the Sales and the Limitation Conventions.[95] Although the withdrawal of reservations was until recently a relatively rare event under uniform commercial law conventions, the situation has decidedly changed in the last few years under the Vienna Sales Convention: Since 2011, no less than eight different Contracting States have withdrawn reservations they had initially made under the CISG. Almost all of these withdrawals were

88 Peter Schlechtriem and Ulrich G. Schroeter, *Internationales UN-Kaufrecht* (6th ed., 2016, Mohr Siebeck, Tübingen) at para. 38.
89 Markel (fn 38) at p. 174.
90 See Ulrich G. Schroeter, 'The Withdrawal of Reservations under Uniform Private Law Conventions' (2015) 20 *Uniform Law Review* 1.
91 Part 4.1.
92 Part 4.2.
93 Part 4.3.
94 Part 4.4.
95 Schroeter (fn 90) at p. 3.

made by European States, namely – in chronological order – by Finland, Sweden, Denmark, Latvia, the People's Republic of China (the only non-European State), Lithuania, Norway and Hungary.[96]

When we take this apparent ongoing trend to withdraw reservations and also take into account the increasing number of Contracting States over the last years, the positive effect for uniformity is quite striking: When the Sales Convention entered into force in 1988, the then 14 Contracting States had between them declared 9 reservations, a ratio of 64%.[97] Today, in 89 Contracting States only 22 reservations are still in effect, a much more modest 25%.

In contrast, the Limitation Convention had not seen any reservation withdrawals in the past.[98] Under this Convention, the withdrawal now declared by the Czech Republic is therefore a first.

4.2 The withdrawals' effect in terms of treaty law

My remarks on the effect under treaty law can be very brief. Yes, the Czech Republic and its courts will from now on be under a treaty obligation to also apply the CISG when the conditions of Art. 1(1)(b) are fulfilled, because Czechia is now 'bound' by this provision. In any case, the relevance of this change is purely theoretical, because uniform commercial law conventions like the CISG are not so much applied between States, but primarily to the relationship between private buyers and sellers. The treaty law perspective is therefore of little practical interest, except for academics like myself.

4.3 The withdrawals' effect in terms of practice

More important are the withdrawal's effects for the legal practice of international commerce, to which I turn next. Insofar, we have to distinguish between two different aspects,[99] before making a more general proposal for the future design of reservations against Conventions' applicability via rules of private international law.[100]

4.3.1 Removing uncertainty

The first aspect of the withdrawals' practical effect is the more important one in my opinion, and at the same time the less complicated one. By removing the declarations under Art. 95 of the Sales Convention and Art. 36*bis* of the Limitation Convention, the withdrawals make clear that courts, parties and their attorneys no

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96 On the Hungarian withdrawal, see in more detail Ulrich G. Schroeter, 'The Withdrawal of Hungary's Declarations under the CISG – Law and Policy' (2015) *Internationales Handelsrecht* 210.

97 Ulrich G. Schroeter, 'Reservations and the CISG: The Borderland of Uniform International Sales Law and Treaty Law after Thirty-Five Years' (2015) 41 *Brooklyn Journal of International Law* 203, at p. 255.

98 On the desirability of declaration withdrawals under the Limitation Convention see Castellani (fn 17) at p. 656.

99 Parts 4.3.1. and 4.3.2.

100 Part 4.3.3.

longer have to wonder about the provisions' exact effect. They thereby create certainty where uncertainty existed before, and this is good for both commerce and legal practice.

4.3.2 Increasing the conventions' practical application in the withdrawing state's courts?

The second aspect of the withdrawals' practical effect relates to the number of cases to which the Sales Convention will apply before Czech courts in the future. Will this number significantly increase, now that Art. 1(1)(b) provides an additional basis for the Convention's applicability? The answer is probably 'no': The CISG's practical applicability will increase a little, but not much. The reason is simple and lies in the large number of Contracting States that the Convention has collected today: It has been ratified by 89 States world-wide, and companies from these States conduct more than 80% of the world's cross-border trade.[101] This in turn means that a very large number of international sales contracts that end up in Czech courts will have been concluded between a Czech party and a contracting partner from another CISG Contracting State, so that the Sales Convention applies by virtue of Art. 1(1)(a).

That the Art. 95 'fence' that used to block the 'sideway' to the Convention's applicability has been removed accordingly only has a practical effect for contracts that Czech companies conclude with companies from the United Kingdom, from India or from a number of smaller trading nations. This is an improvement, but its relevance is limited. Or, as *Michael Bridge* has put it: 'The Article 95 problem is a dying one, the victim of the success of the CISG […]. The prospect of both parties not being resident in Convention States is diminishing from day to day.'[102]

4.3.3 A proposal for the future design of reservations against conventions' applicability via rules of private international law

The observation just described furthermore allows us to draw a conclusion of a more general nature about the practical function of provisions like Art. 1(1)(b) of the Sales Convention and Art. 3(1)(b) of the revised Limitation Convention. It starts with the observation that the application of uniform commercial law conventions via rules of private international law is primarily important in the early years after a convention's entry into force, when the number of Contracting States is still relatively low: During this early phase, the applicability requirements of Art. 1(1)(a) of the Sales Convention or Art. 3(1)(a) of the revised Limitation Convention – requiring two contracting parties that both have their place of business in Contracting States – are often not fulfilled. Accordingly, the possibility of applying the fledgling convention via rules of private international law is particularly helpful during this time, not the least because it provides a means to overcome a pending 'catch 22' situation: Typically, many States initially adopt a 'wait and see' approach after a new convention has been adopted and entered into force, trying to see first whether the convention's rules will be applied in practice

101 Schlechtriem and Schroeter (fn 88) at para. 16.
102 Bridge (fn 26) at para. 10.58.

before they decide to ratify. However, a convention's practical application will in turn depend on a sufficient number of States ratifying it, because otherwise Art. 1(1)(a)-style conditions of applicability will usually not be met. Provisions along the lines of Art. 1(1)(b) of the Sales Convention help to overcome this deadlock that exists during a convention's early days.

Against this background, it can be said that the applicability of uniform law conventions via 'rules of private international law', as *inter alia* provided for in Art. 1(1)(b) of the Sales Convention and Art. 3(1)(b) of the amended Limitation Convention, essentially serves as 'training wheels' for the conventions concerned, giving them an additional base for their application until a sufficient number of Contracting States have ratified. As soon as such a number has been reached, provisions like Art. 1(1)(b) CISG lose much of their practical importance. At the same time, those Contracting States that have made a Art. 95-style declaration 'opting out' of such provisions see that the respective convention concerned is a success, and may therefore be inclined to now withdraw their reservation. For purposes of future conventions, it would therefore be worth considering to combine provisions allowing for Art. 95-style declarations with a 'sunset clause', thereby from the outset limiting their effect to the initial phase of the convention's application (for example, until a number of 30 Contracting States has been reached). Such an innovation would make it unnecessary for Contracting States to later withdraw their possible reservations against Art. 1(1)(b)-style provisions, as the provision would *ipso iure* lose its effect once it is no longer needed.

Drawing on the wording of the Sales Convention's Arts. 95, 97(4), (5) and 99(1), future provisions authorizing a declaration against a Convention's application 'via rules of private international law' could therefore read as follows:

> '(1) Any State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph (1)(b) of article 1 of this Convention.
>
> (2) Any declaration made in accordance with the preceding paragraph is rendered inoperative on the first day of the month following the expiration of six months after the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession.'

While paragraph (1) of the above provision reproduces the wording of Art. 95 of the Sales Convention, its paragraph (2) has been modelled on Arts. 97(4), (5) and 99(1) of the same convention. The 'sunset clause' in paragraph (2) has the advantage over the current system of individually declared withdrawals that it makes it unnecessary for each reservation State to regularly revisit the matter of the reservation's continuing desirability, and also makes the convention easier to apply in practice because all Art. 95-style declarations made lose their effect at the same point in time. However, it admittedly remains an open question whether States would be willing to accept such a declaration's novel design.

4.4 The withdrawals' effect in terms of international policy

The last, but certainly not least effect of the Czech withdrawals is their possible effect on the future international policy in this area. In the medium term, it may even be their most important effect. What exactly do I mean?

4.4.1 Czechia as a front-runner

I am referring to the fact that the Czech Republic is the first Contracting State to ever declare the withdrawal of a relevant Art. 95 declaration. I have added the cautionary term 'relevant', because there was in fact one earlier example, but of an Art. 95 declaration that was as such hardly relevant: In the early 1990s, Canada had initially also made a Art. 95 declaration, but only for one of its provinces, namely British Columbia. [103] (This was possible by combining an Art. 95 declaration with a declaration under the 'federal State clause' of Art. 93 CISG.[104]) In addition, Canada withdrew the declaration a mere three months after the CISG had entered into force for Canada.[105] From a general Convention perspective, the British Columbia reservation therefore existed only very briefly and for a small territory. As far as I know, it was never applied by a court, and therefore had no practical effect.[106]

In contrast, Czechia's decision to withdraw its Art. 95 declaration is indeed relevant, because it was in force here for an entire country for more than 25 years. In international policy terms, it furthermore may add to its relevance that it was Czechoslovakia which initially had proposed the inclusion of Art. 95 into the Sales Convention. In a manner of speaking, one could therefore say that the mother of Art. 95 is setting its child free, by no longer restricting the application of Art. 1(1)(b) CISG.

4.4.2 Potential effects on the position of other reservation States

Against this background, it can be expected that other Contracting States that have made an Art. 95 declaration will take notice of Czechia's withdrawal. Is it likely that this will change the international policy towards Art. 95, and will other States follow Czechia's lead by also withdrawing their declarations in the future?[107]

The most obvious question – the proverbial 'elephant in the room' – is what Slovakia will do. Unfortunately, I do not have any information that would enable me to make a reasoned assessment of whether and when Slovakia is likely or unlikely to follow Czechia's lead, a decision that may or may not be influenced by political considerations. So I will not further dwell on this point.

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103 United Nations, Depositary notification C.N.88.1991.TREATIES-2 of 31 May 1991 (Accession: Canada); see also Bell (fn 42) at p. 72 (providing background).

104 Schroeter (fn 90) at p. 2.

105 United Nations, Depositary notification C.N.255.1992.TREATIES-3 of 19 October 1992 (Declarations of Extension by Canada to Territorial Units/Withdrawal of a Declaration made by Canada upon Accession).

106 Schroeter (fn 90) at p. 2.

107 See also CISG Advisory Council Declaration No. 2 'Use of Reservations under the CISG' (Rapporteur: Ulrich G. Schroeter) (2014) *Internationales Handelsrecht* 131, at p. 132.

However, I would like to briefly address three other States where an Art. 95 declaration is currently still in force. If we go on a mental journey in the eastern direction, the first of these three States that we reach is Singapore. Singapore is a small city-state, but one that conducts a lot of trade with neighbouring countries and – maybe even more importantly – is a place where many international contract disputes are settled in front of the local courts or through arbitration. For Singapore, a withdrawal of its Art. 95 declaration would be even more practically relevant than for Czechia, because many of Singapore's neighbouring States are not CISG Contracting States. Accordingly, Art. 1(1)(b) would open an important new path to the CISG's application in Singapore, and commentators have therefore suggested that Singapore should withdraw.[108] In 2007, Singapore's Attorney-General took up this suggestion by conducting a public consultation on a possible withdrawal of the Art. 95 declaration.[109] However, there does seem to not have been any further action on this matter at the government level, as least not to my knowledge.

A bit further east, the Peoples' Republic of China is another Art. 95 declaration State, but obviously a much larger one. China has recently already withdrawn its declaration under Art. 96 CISG,[110] and rumours have been reported that the Chinese government is considering to also withdraw their declaration under Art. 95.[111] Such a withdrawal has been suggested by various authors from China and abroad,[112] including the China Academy of Arbitration Law in its 2015 Annual Report on International Commercial Arbitration in China.[113] And indeed, this would certainly be a welcome move – and maybe the developments in the Czech Republic will provide reassurance to China in this respect.

Finally, if we continue our mental journey even further east and cross the Pacific Ocean, we reach the United States of America. With respect to the U.S., the prospects for a withdrawal of its Art. 95 declaration[114] are currently less positive than they are for Singapore or China[115] – not because of its practical effects, but

108 Bell (fn 42) at pp. 57–73.

109 UN Convention on Contracts for the International Sale of Goods – Review of Article 95 Reservation: Consultation Paper (January 2007), at pp. 16 ff and three annexes.

110 This withdrawal was notified by the Peoples' Republic of China to the Secretary-General of the United Nations on 16 January 2013, see United Nations, Depositary notification C.N.98.2013.TREATIES-X.10 of 17 January 2013 (China: Partial Withdrawal of Declarations made upon Approval).

111 See Camilla Baasch Andersen, 'Recent Removals of Reservations under the International Sales Law – Winds of Change heralding a Greater Unity of the CISG?' (2012) 7 *Journal of Business Law* 698, at pp. 709–10.

112 Andersen, C.B., *supra* fn 111, at 709–10; Zhen, P., *supra* fn 10, at 162: 'imperative'.

113 China Academy of Arbitration Law, Annual Report on International Commercial Arbitration in China, 2015, at pp. 97–100.

114 Arguing in favor of such a withdrawal Markel (fn 38) at pp. 202–4; Zhen (fn 10) at pp. 164–6; providing reasons against such a withdrawal Peter Winship, 'Should the United States Withdraw Its CISG Article 95 Declaration?' (2017) 50 *International Lawyer* 217, at p. 229.

115 Andersen (fn 111) at p. 710.

because of certain domestic factors. The reason is that in recent years, the individual 50 States that make up the U.S. have become more and more critical towards the federal State legislating on matters of contract law (like sales law), because this area of law is generally a matter for the individual States under the U.S. Constitution. Difficult constitutional questions arise when contract law is regulated by way of a treaty (like the CISG), because the conclusion and modification of treaties is a matter for the federal level. In any case, experts from the U.S. have pointed out that it is politically unlikely that the federal government would try to withdraw the current Art. 95 declaration,[116] given that it could result in Art. 1(1)(b) displacing the sales laws of New York, California and 48 other U.S. States more often than the Convention currently does – a step that would be viewed as politically difficult.

After this glimpse into the possible future of Art. 95 declarations, it is time to conclude.

5 Conclusion

In concluding, it is appropriate to reiterate what was said at the beginning of this article: The withdrawal of its two declarations under 1980 Sales Convention and the amended 1974 Limitation Convention by the Czech Republic is without any reservation a positive development, because this step will increase legal certainty where some uncertainty existed before. This is good news for businesses both in the Czech Republic and in 88 other CISG Contracting States, and also for legal advisers advising on the CISG's and the Limitation Convention's sphere of applicability. The Czech government can therefore be congratulated for taking this important step,[117] and one may hope that further reservation States will follow its example in the future.

116 See Flechtner, H.M., Letter of 30 January 2012 to Loken, K., Attorney in the Office of the Legal Advisor, U.S. Department of State (on file with the author); Winship (fn 114) at p. 228.

117 See CISG Advisory Council Declaration No. 2 (fn 107) at p. 132.