

INTERNATIONAL AND EUROPEAN COMMERCIAL AND COMPANY LAW

**Interpretation of the United Nations Convention on Contracts for the International Sale of Goods by having regard to foreign case law:
an example from the US**

Dott. Giovanni Bisazza^{**}

I. Facts of case and significance of decision

The plaintiff (Chicago Prime Packers, Inc.), a US company, sold a shipment of frozen pork to the defendant (Northam Food Trading Co.), a Canadian company. The meat was accepted by Northam Food Trading Co. and delivered directly to the buyer (Beacon Premium Meats). About ten days after the first delivery, the American company was informed that there were defects with the way the meat had been preserved, which had spoilt the meat. For this reason, the Canadian company refused the vendor's requests for payment. The vendor in turn claimed that the Canadian company had failed to observe the time limit in which to give notice of lack of conformity and brought a claim for payment of the purchase price.

The case before the US court therefore concerned the lack of conformity of the goods and the legal consequences thereof – two questions which arise frequently in the context of the Convention on Contracts for the International Sale of Goods ("CISG").¹ The main question which the US court had to deal with was whether the buyer had complied with the obligation to give notice of lack of conformity as required by Article 39 CISG. Pursuant to this provision the buyer is requested to give notice to the vendor specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it. After the court had determined that the vendor did receive the notice of lack of conformity within a reasonable time after the buyer had discovered the lack of conformity, the court had to determine whether the notice of lack of conformity was in fact given in due time. In other words, the court had to determine at what point in time the buyer should have informed the vendor of the lack of conformity. This point in time links the obligation of giving notice of lack of conformity contained in Article 39 CISG and

the obligation on the buyer to examine the goods imposed by Article 38 CISG. Pursuant to Article 38 CISG, the "buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances". The point in time from which the buyer should have given notice of lack of conformity coincides with the time limit to be observed by the buyer to examine the goods, or to cause them to be examined. Therefore, the court had to deal with the question of how to interpret the wording "within as short a period as is practicable in the circumstances". In order to determine the time limit, the US court resorted to foreign decisions dealing with the same legal question.

This judgment is not so important due to the answer given by the court in terms of substantive law, but more due to the exemplary application of the rule of interpretation contained in Article 7(1) CISG², i.e. the fact that the court in order to interpret the provisions of the CISG at issue explicitly referred to the answer given by foreign courts.³ The judgment referred to above therefore provides a good opportunity to comment on the need to take into account decisions by foreign courts when interpreting the United Nations Convention on Contracts for the International Sale of Goods, thereby promoting the uniform application of the Convention.

II. Interpretation of the United Nations Convention on Contracts for the International Sale of Goods and making reference to foreign case law

The criteria which are to be observed by national judges, or as the case may be, arbitrators in interpreting and applying the United Nations Convention on Contracts for the International Sale of Goods are laid down in the first part of Article 7(1) CISG.

This provision requires, amongst other things, that in interpreting the CISG regard is to be had to its international character.

¹ *U.S. District Court, Northern District Illinois 21 May 2004 – No. 01 C 4447 – Eastern Division Chicago Prime Packers, Inc. v Northam Food Trading Co., et al.*

^{**} *The author is a Ph.D. student and research assistant at the University of Verona (I), Centro per la Ricerca e l'Insegnamento del Diritto privato europeo (Director Professor A. Zaccaria).*

¹ On this see for example *P. Kindler, Sachmängelhaftung, Aufrechnung und Zinssatzbemessung: Typische Fragen des UN-Kaufrechts in der gerichtlichen Praxis*, IPRax 1996 16, 16; *A. Veneziano, Mancanza di conformità delle merci ed onere della prova nella vendita internazionale: un esempio di interpretazione autonoma del diritto uniforme alla luce dei precedenti stranieri*, Dir. comm. internazionale 2001, 509, 510 note 10.

² Article 7(1) CISG: "In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade".

³ According to note 11 of the judgment commented on in this paper: "In light of the Convention's directive to observe the CISG's international character and the need to promote uniformity in its application, this court has looked to foreign caselaw for guidance in interpreting the relevant provisions of the CISG in this case".

acter and to the need to promote its uniform application.

Therefore, Article 7(1) CISG contains two closely linked rules of interpretation.⁴ Both rules are aimed at guaranteeing that the CISG is in fact applied uniformly. It is not sufficient to just prepare and enforce uniform legal texts to achieve uniform application,⁵ i.e. it is necessary to also interpret and apply their provisions in a uniform manner.⁶

It is generally understood that the reference to the international character of the CISG is to remind those interpreting the Convention that it is not derived from one uniform legal system.⁷ According to case law⁸ as well as legal scholars,⁹ the legal concepts and terms used in the Convention have to be interpreted “autonomously”, i.e. by solely referring to the CISG. As a result it is neither acceptable to refer to certain national terms or concepts¹⁰ nor to resort to national rules of interpretation of certain legal systems.¹¹

However, the autonomous interpretation of the CISG, the publications by legal scholars¹² as well as recent case law¹³ are not sufficient to guarantee that the Convention is applied uni-

formly on an international level. One of the problems is that in some cases there are several possibilities of interpreting the CISG autonomously.¹⁴ In addition, the different legal education of the judges in the individual signatory states poses an obstacle to achieving a uniform approach.¹⁵ This becomes apparent when considering that national judges are more inclined to argue with the legal instruments of their own legal system rather than adapt to the newly emerging dimension of uniform legal rules.

In order to solve this problem several solutions are discussed by legal scholars (with respect to the CISG).¹⁶ Amongst other things, it has been suggested to create an international institution with judicial powers – similar to the European Court of Justice – which should be given the power to issue preliminary decisions on questions concerning the interpretation of the CISG. In addition, it has been discussed whether to create a corresponding institution with advisory functions.¹⁷

However, none of the signatory states have been interested in these proposals. As a result it has been left to the national judges and arbitrators to find a way to achieve maximum uniformity. In this regards, it has repeatedly been emphasised by legal scholars¹⁸ that the most effective method to guarantee uniform application of the CISG is to refer to foreign case law.¹⁹ This also corresponds to the second rule of interpretation contained in Article 7(1) CISG, according to which regard is to be had to the need to promote uniformity in the application of the Convention. From the publications of legal scholars²⁰ as well as from case law²¹ it may be inferred that, under Article 7(1) CISG, there exists an obligation to take into account decisions on the same point of law by judges from other signatory states.

⁴ See *F. Ferrari*, Gap-filling and Interpretation of the CISG: Overview of International Case Law, *Int. Bus. L. J.* 2003, 221, 226.

⁵ See *C. Reifner*, Stillschweigender Ausschluss des UN-Kaufrechts im Prozess?, *IHR* 2002, 52, 58; *D. Martiny*, Autonome und einheitliche Auslegung im Europäischen internationalen Zivilprozessrecht, *RabelsZ* 1981, 427, 427; *L.M. Ryan*, The Convention on Contracts for the International Sale of Goods: Divergent Interpretations, 4 *Tulane J. Int'l & Comp.* 1995, 99, 101.

⁶ See *F. Ferrari*, Brevi considerazioni critiche in materia di interpretazione autonoma ed applicazione uniforme della convenzione di Vienna, *Riv. dir. civ.* 1998, II, 81, 81.

⁷ In detail on subject *M.J. Bonell*, in *C.M. Bianca/M.J. Bonell* (eds), *Commentary on the International Sales Law*, 1978, Article 7 para. 2.2.2.; *F. Ferrari*, Internationales Kaufrecht einheitlich ausgelegt, *IHR* 2001, 56, 57; *W. Melis*, in *H. Honsell* (ed.), *Kommentar zum UN-Kaufrecht*, 1997, Article 7 para. 5.

⁸ For cases on this point see: Upper Regional Court in Frankfurt (*Oberlandesgericht Frankfurt*, “*OLG Frankfurt*”) (D), 20 April 1994, *RIW* 1994, 595; *Trib. Padova* (I), 25 February 2004, *Giur. merito* 2004, 867, 868, *L. Graffi* agrees in his comments; *Trib. Pavia* (I), 29 December 1999, *Corr. giur.* 2000, 932 *et seqq.*, with comments by *Ferrari*; President of the Court *Laufen*, judgment dated 7 May 1993, *UNILEX*.

⁹ See for example *W.-A. Achilles*, *Kommentar zum UN-Kaufrechtsübereinkommen (CISG)*, 2000, Article 7, para. 3; *B. Audit*, La vente internationale de marchandises, *Convention des Nations Unies du 11 avril 1980*, 1990, at 47; *F. Diedrich*, Maintaining Uniformity in International Uniform Law Via Autonomous Interpretation: Software Contracts and the CISG, 8 *Pace Int'l L. Rev.* 1996, 303, 303; *J. Felemegas*, The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation, *Rev. of the CISG* 2000/2001, 115, 235; *F. Ferrari*, *Interpretation uniforme de la Convention de Vienne de 1980 sur la vente internationale*, *Rev. int. dr. com.* 1996, 813, 827; *T. Vazquez Lepinette*, The interpretation of the 1980 Vienna Convention on International Sales, *Dir. comm. int.* 1995, 377, 387 *et seqq.*

¹⁰ See *U. Magnus*, *Wiener UN-Kaufrecht (CISG)*, in *Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einföhrungsgesetz und Nebengesetzen*, 13th edition, 1999, Article 7 CISG para. 12.

¹¹ *M.J. Bonell*, Art. 7 della Convenzione di Vienna, *Nuove leggi civ. comm.* 1989, 20, 20; *F. Ferrari*, *Vendita internazionale di beni mobili*, Artt. 1-13. Ambito di applicazione. Disposizioni generali, 1994, at 134; *B. Frigge*, Externe Lücken und Internationales Privatrecht nach dem UN-Kaufrecht (Article 7(2)), 1994, at 107; *B. Zeller*, The UN Convention on Contracts for the International Sale of Goods (CISG) – a leap forward towards unified international sales laws, 12 *Pace Int'l L. Rev.* 2000, 79, 85.

¹² *Critical F. Ferrari*, in *Schlechtriem/Schwenzer* (eds), *Kommentar zum Einheitlichen UN-Kaufrecht*, 4th edition, 2004, Article 7 para. 11 *et seqq.*

¹³ See *Trib. Padova* (I), 25 February 2004, (*supra* note 8), 869.

¹⁴ On subject see *Ferrari* (*supra* note 7), 58, with further references.

¹⁵ *L. Graffi*, L'interpretazione autonoma della Convenzione di Vienna: rilevanza del precedente straniero e disciplina delle lacune, *Giur. merito* 2004, I, 873, 876.

¹⁶ See in detail *R. Herber*, *CLOUT*, *Unilex* und andere Veröffentlichungen zum internationalen Kaufrecht, *RIW* 1995, 502 *et seqq.*; *A.H. Kritzer*, The Convention on Contracts for the International Sale of Goods: Scope, Interpretation and Resources, *Rev. of the CISG* 1995, 147 *et seqq.*

¹⁷ *M.J. Bonell*, L'interpretazione del diritto uniforme alla luce dell'art. 7 della Convenzione di Vienna sulla vendita internazionale, *Riv. dir. civ.* 1986, II, 221, 226 *et seqq.*

¹⁸ See *Bonell* (*supra* note 17), 228; *Graffi* (*supra* note 15), 876.

¹⁹ *P. Amato*, U.N. Convention on Contracts for the International Sale of Goods – The Open Price Term and Uniform Application: An Early Interpretation by the Hungarian Courts, 13 *J. L. & Com.* 1993, 1, 25; *J.E. Bailey*, Facing the Truth: Seeing the Convention on Contracts for the International Sale of Goods as an Obstacle to a Uniform Law of International Sales, 32 *Cornell Int'l L. J.* 1999, 273, 290; *Bonell* (*supra* note 7), Article 7 para. 3.1.3; *R.A. Brand/H.M. Flechtner*, Arbitration and Contract Formation: First Interpretations of the U.N. Sales Convention, 12 *J. L. & Com.* 1992, 239, 241; *Felemegas* (*supra* note 9), 249; *Ferrari* (*supra* note 4), 222-223; *Zeller* (*supra* note 11), 85.

²⁰ Majority view. For further references see *Ferrari* (*supra* note 12), Article 7 para. 15 *et seqq.*

²¹ See *Trib. Pavia* (I), 29 December 1999, (*supra* note 8) 932 *et seqq.*; *Trib. Vigevano* (I), 12 July 2000, *IHR* 2001, 72 *et seqq.*; with the favourable comments by *Rosati*; *Trib. Padova* (I), 25 February 2004 (*supra* note 8), 867 *et seqq.*; *Trib. Padova* (I), 31 March 2004, *Giur. merito* 2004, 1065 *et seqq.*, *Ferrari* agrees in his comments.

The obligation to take into account foreign case law, however, does not mean that foreign decisions are binding. According to a minority view, a “supranational stare decisis” based on the system of “stare decisis” which is characteristic for the common law system should be created.²² Luckily, this view is only held by a minority and has also been rejected by the courts. It completely disregards the fact that on an international level there does not exist a hierarchical court structure which is characteristic of systems where judicial decisions are binding.²³ Moreover, this approach would be contrary to the wording of Article 7(1) CISG which merely stipulates that regard is to be had to the need to promote the uniform application of the Convention.²⁴ Finally, it has been argued by legal scholars that if foreign case law was binding this would not be compatible with the principle of sovereignty applicable to the signatory states.²⁵

Therefore, foreign case law may be said to be of purely “persuasive value”.²⁶ However, at the same time it has to be acknowledged that a judge who does not wish to follow the majority view held in other states should at least have to give the reasons why he is of a different opinion. This approach should give some room for manoeuvre for new questions regarding the interpretation of the Convention and at the same time prevent that judgments are passed that are ill-founded and contrary to the majority view.²⁷

III. The possibility of having regard to foreign case law in the field of international sale of goods

For the court, which is called upon to apply the CISG, to have regard to foreign case law requires that the court has knowledge of the foreign case law relevant to the case.²⁸ Therefore, numerous projects have been started that are aimed at making the decisions on the CISG issued in the various states more available.²⁹ This way, judges and arbitrators are

supposed to gain access to foreign case law more easily. One of the projects which has to be pointed out in particular is called “CLOUT” (Case Law on UNCITRAL Texts). It consists of a collection of summaries on decisions (judgments and arbitration awards) on UNCITRAL instruments published by UNCITRAL, including decisions on the CISG. In contrast to other projects, which also provide the reader with the information required in order to establish whether it is necessary to read the whole of the decision, these summaries are published in all six official languages of the United Nations. They are now also available on the Internet.³⁰

The database UNILEX³¹ is also of great significance. It is run by the “Centro di studi e ricerche di diritto comparato e straniero” in Rome (I) and is supervised by Professor Bonell.³² In addition to a large number of judgments which are sorted according to date, signatory state, the article number of the CISG and point of law dealt with, the database also offers a collection of arbitration awards which are mainly awards by the International Chamber of Commerce (ICC).

However, the most significant database is the database of the Institute of International Commercial Law of the Pace University White Plains (New York) which is freely available on the Internet.³³ This database contains most of the decisions on the CISG (from the various states; many of the decisions have been translated into English). This database provides the possibility to research a bibliography of 6000 entries according to legal argument, author, the article number of the CISG, etc. In addition, it is possible to click on hyperlinks to get to other web pages on international commercial law in general and to specialist web pages on the CISG.

Finally, there is the project which was proposed by the UNCITRAL at its annual meeting in 2001:³⁴ the publication of a digest (which has since been published in English, Russian and French)³⁵ on the case law on the United Nations Convention on Contracts for the International Sale of Goods where more than 1000 court decisions from the various signatory states have been processed in a way similar to a legal commen-

²² L.A. Dimatteo, An international Contract Law Formula: The informality of International Business Transactions Plus the Internationalization of Contract Law Equals Unexpected Contractual Liability, 23 Syracuse J. Int'l L. & Comm. 1997, 67, 79.

²³ Stated explicitly by F. Ferrari, Applying the CISG in a Truly Uniform Manner: Tribunale di Vigevano, 12 Luglio 2000, Unif. L. Rev. 2001, 203, 209.

²⁴ See E.A. Kramer, Uniforme Interpretation von Einheitsprivatrecht – mit besonderer Berücksichtigung von Art. 7 UNKR, östJBL. 1996, 137, 146.

²⁵ See U. Magnus, Währungsfragen im Einheitlichen Kaufrecht. Zugleich ein Beitrag zu seiner Lückenfüllung und Auslegung, RabelsZ (1989), 116, 123

²⁶ See Amato (*supra* note 19), 25; I. Saenger, in Bamberger/Roth (eds), BGB, Volume 3. 2003, Article 7 para. 5; F. Burkart, Interpretatives Zusammenwirken von CISG und UNIDROIT Principles, 2000, at 152 *et seq*; F. Ferrari, La jurisprudence sur la CVIM: un nouveau défi pour les interprètes?, Int. Bus. L. J. 1998, 495, 503; S.R. Harjani, The Convention on Contracts for the International Sale of Goods in United States Courts, 23 Hous. J. Int'l L. 2000, 49, 65; P. Schlechtriem, Internationales UN-Kaufrecht, 2nd edition, 2003, para. 43; Magnus (*supra* note 10), Article 7, para. 21.

²⁷ See Veneziano, (*supra* note 1), 512.

²⁸ A.H. Kritzer/Ch. Rogers, A Uniform International Sales Law Terminology, in: Schwenzler/Hager (eds), Festschrift für Schlechtriem, 2003, 223, 239.

²⁹ For an overview on the various projects to increase the knowledge on

foreign case law, in addition to the author cited in *supra* note 16, see F. De Ly, Uniform interpretation: What is being done? Official efforts, in: Ferrari (ed.), The 1980 Uniform Sales Law. Old issues revisited in the light of recent experiences. Verona Conference, 2003, 335 *et seqq*; Ferrari (*supra* note 12), Article 7 para. 19 *et seqq*; A. Veneziano, Uniform interpretation: What is being done? Unofficial efforts and their impact, in: Ferrari, The 1980 Uniform Sales Law (this note), 325 *et seqq*.

³⁰ See <http://www.uncitral.org>.

³¹ See <http://www.unilex.info>.

³² On this databank see for example F. Liguori, “UNILEX”: A means to Promote uniformity in the Application of CISG, ZEuP 1996, 600 *et seqq*.

³³ See <http://cisgw3.law.pace.edu>.

³⁴ See the Report of the United Nations Commission on International Trade Law on the Work of its thirty-fourth session, 25 June-13 July 2001, XXXII UNCITRAL Yearbook 2001, 59.

³⁵ The English text of the UNCITRAL Digest is available on the Internet at: http://www.uncitral.org/english/clout/digest_cisg_e.htm; the French one at http://www.uncitral.org/french/clout/digest_cisg_f.htm; the Russian one at http://www.uncitral.org/russian/clout/digest_cisg_r.htm

tary.³⁶ The object of the digest is to provide those judges and arbitrators which have regard to foreign case law with an instrument that allows them to quickly access case law published up to January 2003. This way they are able to gain an overview of questions already dealt with by other courts, which no doubt constitutes the first step to the uniform interpretation and application of the CISG. The draft of the digest which has been edited by five experts³⁷ of the United Nations Convention on Contracts for the International Sale of Goods under the supervision of Professor Franco Ferrari has recently been published and includes comments by distinguished legal scholars.³⁸

However, it is uncertain whether judges and arbitrators make use of all these different resources when deciding a case. A survey of the decisions on the CISG showed that so far only a few decisions have referred to decisions by foreign courts.

In this context, it is mainly decisions by the Italian courts that have done so: in addition to the earlier decisions by the Tribunale di Cuneo in 1996³⁹ and the Tribunale di Pavia in 1999⁴⁰, which were followed by the well-known judgments by the Tribunale di Vigevano in 2000⁴¹ and the Tribunale di Rimini in 2002,⁴² there are now two new judgments by the Tribunale di Padova which have had regard in detail to decisions issued by foreign courts. The first judgment is from 25 February 2004⁴³ and the second one from 31 March 2004.⁴⁴

Foreign case law was also referred to in a Swiss⁴⁵, German⁴⁶

and French⁴⁷ judgment, in which a German judgment⁴⁸ was quoted without being examined in detail.⁴⁹

The fact that the number of decisions listed above is very small clearly demonstrates that having regard to the case law of other jurisdictions only takes place in exceptional cases. However, this does not mean that the reason for not referring to foreign decisions is that they are difficult to obtain. Quite the contrary: the decisions mentioned in the last paragraph and the sources which contain information on foreign case law confirm that judges in fact do have the possibility of having regard to foreign case law in cases involving the CISG.

IV. Advantages and disadvantages of US case law

From the above, it is easy to see why the US judgment commented on in this paper is ground-breaking.⁵⁰

After the US court referred in particular to the rules of interpretation contained in Article 7(1) CISG, it answered all the legal questions at issue by having regard to foreign judgments, which the court had obtained from one of the above mentioned databases.⁵¹ In its reasoning, the court explicitly confirmed that foreign decisions are merely of "persuasive value".

Before this judgment, US judges only had regard to foreign case law on two occasions. In the first case⁵², however, the appellant lodged a complaint based on the erroneous reference made to foreign case law. The appellant had appealed an arbitration award before a district court in Louisiana claiming that the arbitration award was in breach of Article 7(1) CISG. He argued that the arbitrator did not properly have regard to a preceding judgment by the German Federal Supreme Court⁵³ (*Bundesgerichtshof*, "BGH"), which had considered the legal question decided in the arbitration award.⁵⁴

In the second case⁵⁵, the judges did not go further than to

³⁶ For a detailed description on the procedure for drafting the Digest, see *Graffi* (*supra* note 15), 878 *et seq.*

³⁷ The authors of the draft Digest, which was merely reviewed by UNCITRAL in terms of its language and then published, are the following professors: *Franco Ferrari, Harry M. Flechtner, Ulrich Magnus, Claude Witz* and *Peter Winship*.

³⁸ See *Ferrari/Flechtner/Brand* (eds), *The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the U.N. Sales Convention, 2004*, reviewed by *H.A. Friebe*, IHR 2004, 175 *et seq.*

³⁹ See Trib. Cuneo (I), 31 January 1996, UNILEX.

⁴⁰ See Trib. Pavia (I) (*supra* note 8).

⁴¹ Trib. Vigevano (I) (*supra* note 21); on this decision see for example *F. Ferrari*, *Problematiche tipiche della Convenzione di Vienna sui contratti di vendita internazionale di beni mobili risolte in una prospettiva uniforme*, *Giur. it.* 2001, 281 *et seqq.*; the same author, *Tribunale di Vigevano: Specific Aspects of the CISG Uniformly Dealt with*, *J. L. & Com.* 2001, 225 *et seqq.*; *F. Mazzotta*, *The International Character of the UN Convention on Contracts for the International Sale of Goods: An Italian Case Example*, the paper is available on the Internet at: <http://cisgw3.law.pace.edu/cisg/biblio/mazzotta.html>; *F. Rosati*, comments on Trib. Vigevano, IHR 2001, 78 *et seqq.*; *Veneziano* (*supra* note 1), 509 *et seqq.*

⁴² Trib. Rimini (I), 26 November 2002, *Giur. it.* 2003, 896 *et seqq.*; on judgment see *F. Ferrari*, *International Sales Law and the Inevitability of Forum Shopping: A Comment on Tribunale di Rimini*, 8 *Vindobona J. Int'l Comm. L. & Arb.* 2004, 1 *et seqq.*; *L. Graffi*, *Spunti in tema di vendita internazionale e forum shopping*, *Dir. comm. int.* 2003, 807 *et seqq.*

⁴³ Trib. Padova (I), 25 February 2004 (*supra* note 8); on this judgment see *F. Ferrari*, *Nuove e vecchie questioni in materia di vendita internazionale tra interpretazione autonoma e ricorso alla giurisprudenza straniera*. Nota a Trib. Padova, sez. Distaccata di Este, 25 febbraio 2004, *Giur. it.* 2004, 1405 *et seqq.*; *Graffi* (*supra* note 15).

⁴⁴ Trib. Padova (I), 31 March 2004 (*supra* note 21); on this judgment see *F. Ferrari*, *La disciplina sostanziale della vendita internazionale ed il saggio d'interessi*, *Giur. merito* 2004, 1069 *et seqq.*

⁴⁵ See OLG Kanton Aargau (CH), 5 November 2002, available on the Internet at: <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/021105s1.html>.

⁴⁶ See the Upper Regional Court in Cologne (*Oberlandesgericht Köln*, "OLG Köln") (D), 14 October 2002, RIW 2003, 300.

⁴⁷ Cour d'Appel Grenoble (FR), 23 October 1996, *Uniform L. Rev.* 1997, 183.

⁴⁸ Upper Regional Court in Düsseldorf (*Oberlandesgericht Düsseldorf*, "OLG Düsseldorf") (D), 2 July 1993, RIW 1993, 845.

⁴⁹ See *Ferrari* (*supra* note 7), 60.

⁵⁰ For the English text of the decision, see IHR 2004, 156 *et seqq.*

⁵¹ "That decision and the other foreign decisions cited in this opinion have not been translated into English and, as a result, cannot be cited directly by this court. Instead, this court relies upon the detailed abstracts of those decisions provided by UNILEX, an 'intelligent database' of international case law on the CISG. All of the abstracts cited herein are available at <<http://www.unilex.info/>>".

⁵² See U.S. District Court, Eastern District of Louisiana 17 May 1999 – *Medical Marketing International Inc. v Internazionale Medico Scientifica s.r.l.*, the decision is available on the Internet at: <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/990517u1.html>.

⁵³ German Federal Supreme Court (*Bundesgerichtshof*, "BGH") (D) 8 March 1995, NJW 1995, 2099.

⁵⁴ The US district court confirmed the arbitration award which had been appealed by reasoning that the arbitrators did properly have regard to the judgment by the German Federal Supreme Court (*Bundesgerichtshof*, "BGH").

⁵⁵ U.S. Circuit Court of Appeals (11th Circuit) 29 June 1998 – *MCC-Marble Ceramic Center, Inc. v Ceramica Nuova D'Agostino S.p.A.*, the decision is available on the Internet at: <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/980629u1.html>.

mention the rule under which regard is to be had to foreign case law and excluded that there were any foreign judgments that could be relevant to the case before them.

Apart from the judgment discussed in this paper, there unfortunately seems to be a tendency for US courts to only have regard to judgments passed by US courts, independent of whether or not they concern the CISG. In fact, there are various judgments in US case law which initially state that "American case law under the CISG" does not exist. However, they then go on to interpret the provisions of the CISG in view of the similar provision of the Uniform Commercial Code (U.C.C.),⁵⁶ although this approach has long been criticised by legal scholars.⁵⁷

Unfortunately, this tendency which blatantly contradicts Article 7(1) CISG seems to continue, even after the exemplary decision in *Chicago Prime*. An example of this is one of the recent decisions by the US courts (*Raw Materials Inc. v Manfred Forberich GmbH & Co., KG*).⁵⁸ After the court had explicitly referred to the lack of national case law on Article 79 CISG, it pointed out the need to interpret this provision of the CISG in view of earlier US case law which referred to section 2-615 U.C.C., i.e. a provision of the U.C.C. which corresponds to Article 79 CISG.

This is even more surprising when considering that the latter decision was issued by the same district court that had also passed the judgment in *Chicago Prime*.

In the reasoning of the judgment in *Raw Material* it is stated that "[b]ecause there is virtually no American case law under the CISG, courts look to its language and to the general principles upon which it is based". However, this part of the decision is as unfortunate as the rest of the decision as it leads to the (wrong) conclusion that the obligation to have regard to foreign case law on the CISG only exists due to the lack of US decisions on the CISG. However, the obligation exists independent of whether or not there exists any national case law on the CISG. Hopefully, this fact will be understood by the US courts sooner rather than later.

⁵⁶ U.S. Circuit Court of Appeals (2d. Cir.) 6 December 1995 – *V. Delchi Carrier, Sp.A. v Rotorex Corp.*; in this case the judges of the US court refused to acknowledge that "caselaw under the Convention" existed and exclusively referred to earlier US judgments, despite a substantial amount of foreign case law on the CISG. Also see U.S. District Court, Southern District of New York 6 April 1998 – *Calzaturificio Claudia S.n.c. v Olivieri Footwear Ltd.*, available on the Internet at: <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/980406u1.html>.

⁵⁷ See *F. Ferrari*, The Relationship between the UCC and the CISG and the Construction of Uniform Law, 29 Loyola L.A. L. Rev. 1996, 1021 *et seqq.*

⁵⁸ U.S. District Court, Northern District Illinois, Eastern Division 6 July 2004 – *Raw Materials Inc. v Manfred Forberich GmbH & Co., KG*, the decision is available on the Internet at: <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/040706u1.html#cx>.

Cour de Cassation (F) 30 June 2004 – Y 01-15.964 – Société Romay AG v SARL Behr France
CISG¹ Article 7, 8, 61 and 79 – Definition of sales contract – Remedies for breach of contract by the buyer – Observance of good faith

An agreement, in which the parties precisely determine the quality and quantity of the goods, the criteria for fixing and paying the price, identify themselves as the buyer and seller and enter into reciprocal obligations shall be deemed a sales contract within the meaning of the CISG.

A purchaser's refusal to accept the delivery of goods as a result of a change in circumstances may not be exempted under Article 79 CISG if the change ought to be foreseeable. (Editor's Headnotes)

Extract from the Decision: "(...) LA COUR DE CASSATION, PREMIÈRE CHAMBRE CIVILE, a rendu l'arrêt suivant:

Sur le pourvoi formé par la société B... France, société à responsabilité limitée, dont le siège est (...) Rouffach, France

en cassation d'un arrêt rendu le 12 juin 2001 par la cour d'appel de Colmar (1re chambre civile, section A), au profit de la société R... AG, dont le siège est (...), Suisse,

défenderesse à la cassation;

La demanderesse invoque, à l'appui de son pourvoi, les quatre moyens de cassation annexés au présent arrêt; (...)

Sur le rapport de M. Pluyette, conseiller, les observations de Me Foussard, avocat de la société B... France, de la SCP D. et L., avocat de la société R... AG, les conclusions de Mme Petit, avocat général, et après en avoir délibéré conformément à la loi;

Attendu, selon l'arrêt attaqué (Colmar, 12 juin 2001), que la société B... France et la société suisse R... AG, ont conclu le 26 avril 1991, un accord de collaboration concernant la fourniture de carters devant équiper les camions de la société RVI; que la société B... ayant mis fin au contrat le 6 décembre 1993, la société R... l'a assignée devant le tribunal de grande instance en réparation du préjudice en résultant pour elle; que la cour d'appel, infirmant le jugement et appliquant la Convention de Vienne du 11 avril 1980 sur les contrats de vente internationale de marchandises (CVIM), a dit que la société B... avait manqué à ses obligations contractuelles et devait réparer le préjudice conformément aux articles 74 et 77 CVIM sans pouvoir en invoquer l'article 79; (...)

Sur le premier moyen et le deuxième moyen pris en ses deux branches tels qu'énoncés au mémoire en demande et reproduits en annexe:

Attendu que l'arrêt retient, d'une part, que dans le contrat litigieux les parties sont désignées comme « fabricant » et « acheteur » et d'autre part qu'y sont déterminées précisément la marchandise à fournir, les quantités à livrer, la méthode de détermination du prix et les modalités de paiement; qu'interprétant les éléments de preuve qui lui étaient soumis au regard des principes définis à l'article 8 CVIM et notamment de celui selon lequel les contrats doivent s'interpréter de bonne foi, la cour d'appel a pu en déduire que l'accord comportait des obligations réciproques de livrer et d'acheter une marchandise déterminée, à un prix convenu de sorte qu'il constituait une vente soumise à la Convention de Vienne du 11 avril 1980; qu'elle a ainsi, sans avoir à constater expressément l'obligation pour la société R... de transférer la propriété, légalement justifié sa décision au regard des articles 2, 3, 7, 8 et 30 CVIM;

¹ United Nations Convention on Contracts for the International Sale of Goods (1980).