3 Reservations and the CISG: The Borderland of Uniform International Sales Law and Treaty Law after 35 Years*

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3.1 Introduction

A century ago, the goal of the international unification of private and commercial law was famously described by Lord Justice Kennedy as "the security and the peace of mind of the shipowner, the banker, or the merchant",[1] thereby indicating that the primary beneficiaries of uniform law making are private citizens. The most important vehicle in international law unification has nevertheless traditionally been the convention, *i.e.* treaties under public international law concluded between States (although more recently other instruments like model laws or mere 'soft law' texts have gained in importance[2]). The continued use of conventions can partially be explained by a second goal that States pursue through the unification of law and that Lord Justice Kennedy referred to as "the resulting moral gain [...], a neighbourly feeling, a sincere sentiment of human solidarity...",[3] namely the promotion of friendly relations among States.

The 1980 United Nations Convention on Contracts for the International Sale of Goods[4] ranks today as one of the most successful conventions unifying matters of commercial law. With currently over 80 State parties,[5] the Sales Convention's provisions on contract formation and the law of sales potentially[6] apply to more than 80 per cent of all international

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* The present chapter was first published in the *Brooklyn Journal of International Law*, Vol. 41, 2015. All web pages last accessed in June 2015.

1 Lord Justice Kennedy, 'The Unification of Law', *Journal of the Society of Comparative Legislation*, Vol. 10, 1909, p. 212 at pp. 214–215.

2 *See* J.A.E. Faria, 'Future Directions of Legal Harmonisation and Law Reform: Stormy Seas or Prosperous Voyage?', *Uniform Law Review*, Vol. 14, 2009, p. 5 at pp. 8–10; E.A. Farnsworth, 'An International Restatement: The UNIDROIT Principles of International Commercial Contracts', *University of Baltimore Law Review*, Vol. 26, 1997, p. 1.

3 Kennedy, 1909, *supra* note 1, pp. 214–215.

4 United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980, *International Legal Materials*, Vol. 19, 1980, p. 668 (hereinafter Sales Convention, Convention or CISG).

5 As of 1 June 2015, 83 States had become contracting states of the Sales Convention.

6 Notwithstanding the possible exclusion of the Sales Convention's application to a particular sales contract by way of party agreement in accordance with Article 6 CISG.

sales contracts concluded worldwide.[7] And its preamble clearly reflects the two goals, which Lord Justice Kennedy had identified 70 years earlier, stating on one hand "that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade", and on the other "that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States". Thirty-five years after its adoption at a Diplomatic Conference in Vienna on 11 April 1980, the Sales Convention's anniversary in 2015 provides a suitable occasion to consider a topic, which – maybe more than any other – touches upon both the creation of uniform private law and the legal relations between States: Reservations and the CISG.

3.1.1 Introducing Reservations

Within the realm of uniform private law, reservations are unusual creatures residing at the borderline between private law and the law of treaties. Tucked away in the far corner of uniform law conventions like the Sales Convention and others, they are usually placed in the concluding part of the convention's text imaginatively titled 'Final Provisions' and have traditionally been ignored by academics.[8] Only in recent years the CISG's reservations have for the first time attracted more attention, primarily because State practice in this area developed in a surprising direction.[9] At the same time, case law emerging under the Sales Convention has demonstrated the unexpected difficulties that reservations can cause in everyday disputes arising out of ordinary cross-border sales contracts. As will be demonstrated in more detail below, these difficulties are mostly triggered by one and the same factor, namely the dual character of reservations as an institution of both treaty law and internationally unified private law.

In terms of customary public international law as codified in Article 2(1)(d) of the 1969 Vienna Convention on the Law of Treaties,[10] a reservation is

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7 *See* U.G. Schroeter, 'Empirical Evidence of Courts' and Counsels' Approach to the CISG (with Some Remarks on Professional Liability)', *in* L. DiMatteo (Ed.), *International Sales Law: A Global Challenge*, Cambridge University Press, New York, 2014, p. 649.

8 *See* P. Winship, 'Final Provisions of UNCITRAL's International Commercial Law Conventions', *International Lawyer*, Vol. 24, 1990, p. 711: "No commentator – and I barely exaggerate – spends much time examining the 'Final Provisions' of international conventions."

9 *See* in particular *infra* 3.3.2.1.

10 The definition in Article 2(1)(d) of the 1969 Vienna Convention reflects the customary law notion of a reservation; T. Giegerich, 'Treaties, Multilateral, Reservations to', *in* R. Wolfrum (Ed.), *Max Planck Encyclopedia of Public International Law*, Oxford University Press, Oxford, 2010, Para. 1; C. Walter, *in* O. Dörr & K. Schmalenbach (Eds.), *Vienna Convention on the Law of Treaties: A Commentary*, Springer, Heidelberg, Dordrecht, London and New York, 2012, Art. 19, Para. 1.

> a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.

Beyond this commonly accepted definition, the subject of reservations has traditionally raised a host of difficult legal problems, so that a well-known public international law treatise once described it as "a matter of considerable obscurity in the realm of juristic speculation".[11] The CISG authorizes no less than five of such reservations in its Articles 92–96, although already this is a matter of some dispute, as will be shown in a moment.[12]

What is equally disputed is the relative degree to which reservations have actually been used by the CISG Contracting States. General assessments by commentators range from 'reservations have been minimal'[13] to 'have been widely utilized'.[14] If we let numbers speak (and leaving aside the significant differences in effect that the various reservations have upon the Convention's practical application), a count is as follows: On the 1980 UN Sales Convention's 25th birthday on 11 April 2005, the then 65 Contracting States had between them declared a total of 31 reservations,[15] with the reserving States including some of the largest CISG Contracting States (such as the People's Republic of China, Russia and the United States).[16] After that date, only two further States (Paraguay in 2006 and Armenia in 2008[17]) made reservations, and Armenia has since remained the last State to declare a reservation under the Sales Convention.

3.1.2 *Experience with Reservations under the CISG: Taking Stock of the First 35 Years*

Thirty-five years after the adoption of the Sales Convention on 11 April 1980 is an appropriate time to look back and assess the experiences that have been made with reservations under the Convention. From the perspective of international law, the purpose of such an assessment is threefold:

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11 D.P. O'Connell, *International Law*, Vol. 1, 2nd edn, Stevens & Sons, London, 1965, pp. 250–251.

12 *See infra* at 3.2.1.

13 L. Spagnolo, *CISG Exclusion and Legal Efficiency*, Wolters Kluwer, Alphen aan den Rijn, 2014, pp. 70–71.

14 C.P. Gillette & R.E. Scott, 'The Political Economy of International Sales Law', *International Review of Law and Economics*, Vol. 25, 2005, p. 446 at p. 476.

15 Reservations made by a contracting state in accordance with Articles 93 and 94 CISG were counted as one reservation, respectively, even if they related to more than one territorial unit (Article 93 CISG) or to more than one other State with closely related legal rules (Article 94 CISG). For some more recent numbers, *see infra* at 3.6.

16 U.G. Schroeter, 'The Withdrawal of Reservations under Uniform Private Law Conventions', *Uniform Law Review*, Vol. 20, 2015, p. 1 at p. 2.

17 *See* the further remarks on the Armenian reservation *infra* at 3.4.2.1.

First, one of the interpretative goals stipulated in Article 7(1) CISG – that regard is to be had to the need to promote uniformity in the Sales Convention's application – is commonly read as calling for an evaluation of existing case law[18] and of legal writings[19] that have previously addressed provisions in the Sales Convention. As Article 7(1) CISG's guidelines also apply to the interpretation of the CISG's Final Clauses (Articles 89–101 CISG),[20] an overview over the past practice in applying the Sales Convention's reservations may serve as a useful tool in further enhancing their future internationally uniform interpretation.

Second, customary public international rules on treaty interpretation similarly envisage the taking into account of past interpretation practices. In particular, Article 31(3)(b) of the 1969 Vienna Convention on the Law of Treaties provides that in interpreting a treaty, there shall be taken into account 'any subsequent practice in the application of the treaty that establishes the agreement of the parties regarding its interpretation'. When this provision is read in light of the Sales Convention's nature as a uniform private law convention applied by commercial courts to contracts between private parties, its reference to the agreement of 'the parties' regarding the treaty's interpretation should be understood as referring to the agreement among the courts in different CISG Contracting States, *i.e.* the prevailing court practice. If so construed, the approach of Article 31(3)(b) of the 1969 Vienna Convention on the Law of Treaties is arguably in line with the interpretative goals imposed by Article 7(1) CISG.[21] (Where the two provisions deviate, Article 7(1) CISG should prevail, as the rules on treaty interpretation in 1969 Vienna Convention on the Law of Treaties give precedence to interpretation rules in particular treaties.[22])

And third, the experiences that have been made with reservations under the CISG may be helpful for future law unification projects in the area of contract and commercial law,

18 I. Schwenzer & P. Hachem, *in* I. Schwenzer (Ed.), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)*, 3rd edn, Oxford University Press, Oxford, 2010, Art. 7, Paras. 10–13.

19 P. Perales Viscasillas, *in* S. Kröll, L. Mistelis & P. Perales Viscasillas (Eds.), *UN Convention on Contracts for the International Sale of Goods (CISG)*, C.H. Beck Publishing, Munich, 2011, Art. 7, Para. 43; P. Schlechtriem & U.G. Schroeter, *Internationales UN-Kaufrecht*, 5th edn, Mohr Siebeck, Tübingen, 2013, Para. 96.

20 U.G. Schroeter, 'Backbone or Backyard of the Convention? The CISG's Final Provisions', *in* C.B. Andersen & U.G. Schroeter (Eds.), *Sharing International Commercial Law Across National Boundaries: Festschrift for Albert H. Kritzer on Occasion of his Eightieth Birthday*, Wildy, Simmonds & Hill, London, 2008, p. 427 at p. 428.

21 J. Hellner, 'Gap-Filling by Analogy: Art. 7 of the U.N. Sales Convention in Its Historical Context', *in* J. Ramberg (Ed.), *Studies in International Law: Festskrift till Lars Hjerner*, Norstedts, Stockholm, 1990, p. 219; U.G. Schroeter, *UN-Kaufrecht und Europäisches Gemeinschaftsrecht – Verhältnis und Wechselwirkungen*, Sellier European Law Publishers, Munich, 2005, § 8, Para. 18; W. Witz, *in* W. Witz, H.-C. Salger & M. Lorenz, *International Einheitliches Kaufrecht: Praktiker-Kommentar und Vertragsgestaltung zum CISG*, Verlag Recht und Wirtschaft, Heidelberg, 2000, Art. 7, Paras. 20–21. *See also* R. Happ & M. Roth, 'Interpretation of Uniform Law Instruments According to Principles of International Law', *Uniform Law Review*, 1997, pp. 702 *et seq.*

22 Schroeter, 2008, *supra* note 20, p. 428; Schroeter, 2005, *supra* note 21, § 8, Para. 32.

as, *e.g.* a to-be uniform law instrument on general contract law.[23] Should such a future instrument take the form of a convention (*i.e.* a public international law treaty),[24] the subject of the inclusion and application of reservations would almost necessarily come up, and any lessons learned under the Sales Convention would ideally be taken into account in drafting a new sister convention.

3.1.3 *Outline*

In describing the lessons that have been learned, this chapter will not primarily focus on individual CISG reservations and the specific experiences relating to them. (This has already been done by colleagues elsewhere, in particular with respect to the withdrawal of Article 92 CISG reservations in Scandinavia[25] and with respect to the reservations under Articles 95 and 96 CISG.[26]) Instead, it will provide a more general overview of the developments concerning the Sales Convention's reservations, combined with a critical assessment of those developments.

The present chapter will proceed as follows: Its Part 3.2 is dedicated to two basic issues, namely the disputed qualification of some of the CISG's provisions as 'reservations' in the legal sense of the term[27] and the historical background of these provisions.[28] Part 3.3 will then discuss reservations' general usefulness in a uniform private law context and whether reservations decrease uniformity[29] or rather enable a wider uniformity in uniform law making.[30] Part 3.4 subsequently addresses a number of difficulties that have arisen in practice under the Sales Convention, as notably the fact that reservations have often been

23 *See* UNCITRAL, 25 June to 6 July 2012, Possible Future Work in the Area of International Contract Law: Proposal by Switzerland on Possible Future Work by UNCITRAL in the Area of International Contract Law, U.N. Doc. A/CN.9/758 (8 May 2012) (the 'Swiss Proposal'); I. Schwenzer, 'Who Needs a Uniform Contract Law, and Why?', *Villanova Law Review*, Vol. 58, No. 4, 2013, pp. 723–732; O. Meyer, 'The "Swiss Proposal" on Future Work on International Contract Law: Building on Sandy Soil?', *in* I. Schwenzer & L. Spagnolo (Eds.), *Boundaries and Intersections*, Eleven, The Hague, 2014, pp. 57–70; P. Perales Viscasillas, 'Applicable Law, the CISG, and the Future Convention on International Commercial Contracts', *Villanova Law Review*, Vol. 58, No. 4, 2013, pp. 733–759.

24 *See* Perales Viscasillas, 2013, *supra* note 23, p. 738; Schwenzer, 2013, *supra* note 23, pp. 727–728.

25 C.B. Andersen, 'Reservations of the CISG: Regional Trends and Developments', *in* I. Schwenzer & L. Spagnolo (Eds.), *Globalization versus Regionalization*, Eleven, The Hague, 2013, pp. 7–10; T. Neumann, 'The Continued Saga of the CISG in the Nordic Countries: Reservations and Transformation Reconsidered', *Nordic Journal of Commercial Law*, Issue #1, 2013, p. 1.

26 CISG Advisory Council Opinion No. 15, 'Reservations under Articles 95 and 96 CISG, Rapporteur: U.G. Schroeter', *Internationales Handelsrecht*, 2014, p. 116; *see also* U.G. Schroeter, 'The Cross-Border Freedom of Form Principle under Reservation: The Role of Articles 12 and 96 CISG in Theory and Practice', *Journal of Law and Commerce*, Vol. 33, 2014, p. 79.

27 *Infra* at 3.2.1.

28 *Infra* at 3.2.2.

29 *Infra* at 3.3.1.

30 *Infra* at 3.3.2.

overlooked by courts[31] and the significant uncertainty they seem to cause both in the eyes of government officials[32] and – maybe more importantly – of judges and arbitrators deciding cases.[33] Part 3.5 tries to look forward to the next 35 years and discusses the (likely) role of reservations in future CISG practice, including the continuing trend to withdraw reservations,[34] one reservation that may be here to stay[35] and another reservation that may even gain in importance in the future.[36] Part 3.6 briefly concludes.[37]

3.2 BASIC ISSUES

3.2.1 'Reservations' and 'Declarations' under the CISG

It is a first indication of the uncertainties surrounding reservations under the CISG that is not only disputed *how many* different reservations the Convention's text authorizes, but even whether the CISG contains reservations *at all*.

3.2.1.1 Views among Commentators

In legal writings on the Sales Convention, there are insofar three schools of thought:

The majority among CISG commentators assumes that the 1980 Sales Convention allows five reservations, namely those defined in Articles 92, 93, 94, 95 and 96 CISG.[38]

31 *Infra* at 3.4.1.

32 *Infra* at 3.4.2.1.

33 *Infra* at 3.4.2.2.

34 *Infra* at 3.5.1.

35 *Infra* at 3.5.2.

36 *Infra* at 3.5.3.

37 *Infra* at 3.6.

38 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', *Cornell International Law Journal*, Vol. 32, 1999, p. 273 at p. 311; M. Evans, *in* C.M. Bianca & M.J. Bonell, *Commentary on the International Sales Law*, Giuffrè, Milan, 1987, Art. 98, Para. 2.1; F. Ferrari, *in* I. Schwenzer (Ed.), *Schlechtriem/Schwenzer Kommentar zum Einheitlichen UN-Kaufrecht – CISG*, 6th edn, C.H. Beck Publishing, Munich, 2013, Vor Artt. 89–101, Para. 9; H.M. Flechtner, 'The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and Other Challenges to the Uniformity Principle in Article 7(1)', *Journal of Law and Commerce*, Vol. 17, 1998, p. 187 at p. 193; J. Herre, *in* S. Kröll, L. Mistelis & P. Perales Viscasillas (Eds.), *UN Convention on Contracts for the International Sale of Goods (CISG)*, C.H. Beck Publishing, Munich, 2011, Art. 98, Para. 1; J.O. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, 4th edn (edited and updated by H.M. Flechtner), Wolters Kluwer, Aalphen aan den Rijn, 2009, Para. 458; P. Huber, *in Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 6th edn, C.H. Beck Publishing, Munich, 2012, Art. 98 CISG, Para. 1; J. Lookofsky, *Understanding the CISG*, 4th (worldwide) edn, Kluwer Law International, Alphen aan den Rijn, 2012, § 8.3–§ 8.8; U. Magnus, 'Wiener UN-Kaufrecht (CISG)', *in J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen*, Revised edn, de Gruyter, Berlin, 2013, Art. 98, Para. 1; F.G. Mazzotta, 'Final Provisions (Articles 90–101 CISG)', *in* C.B. Andersen, F.G. Mazzotta & B. Zeller (Eds.), *A Practitioner's Guide to the CISG*, Juris, Huntington, 2010, p. 832; I.

Writers of this group rarely give a reason for their position, maybe because its correctness is regarded as obvious. It indeed finds some support in the wording of Article 98 CISG, according to which "[n]o reservations are permitted except those expressly authorized in this Convention", thereby indicating that the Convention must contain more than one reservation ('those'). Furthermore, Articles 92–96 CISG seemingly match the general definition of Article 2(1)(d) of the 1969 Vienna Convention on the Law of Treaties,[39] as they all purport to exclude or to modify the legal effect of certain provisions of the CISG.

The second group of commentators nevertheless believes that the Sales Convention contains no reservations at all, in spite of the reference to 'reservations' in Article 98 CISG. They rather draw a strict distinction between 'declarations' and 'reservations',[40] pointing out that the language of Articles 92–96 CISG exclusively speaks of 'declarations', without ever mentioning the term 'reservation'.[41]

A third group of writers accepts that Articles 92 and 94–96 CISG provide for reservations but doubts whether Article 93 CISG constitutes a reservation *stricto sensu*.[42] This position resounds a long-standing discussion in general treaty law, where the prevailing view today is that "federal state clauses' are *not* reservations in the sense of Article 2(1)(d) of the 1969 Vienna Convention on the Law of Treaties".[43] This view was also expressed during the discussion of Article 93 CISG at the 1980 Vienna Diplomatic Conference by the Deputy Chief of the UN Treaty Session who then served as Assistant Secretary of the Second Committee.[44]

Saenger, *in* H.G. Bamberger & H. Roth (Eds.), *Kommentar zum Bürgerlichen Gesetzbuch*, 3rd edn, C.H. Beck Publishing, Munich, 2012, Art. 98 CISG, Para. 1; Schlechtriem, Schwenzer & Hachem, 2010, *supra* note 18, Intro to Arts. 89–101, Paras. 6–7; M. Torsello, 'Reservations to International Uniform Commercial Law Conventions', *Uniform Law Review*, 2000, p. 85 at p. 91.

39 *Supra* at 3.1.1.

40 *See* L.G. Castellani, 'Reviewing CISG Declarations: Some Lessons Learned', *in Unification of International Trade Rules in the Age of Globalization: China and the World, Conference Papers*, Tsinghua University, Beijing, 2013; P. Mankowski, *in* F. Ferrari, E.-M. Kieninger, P. Mankowski *et al.*, *Internationales Vertragsrecht*, 2nd edn, C.H. Beck Publishing, Munich, 2011, Art. 97 CISG, Para. 1. On the use of the terms 'declaration' and 'reservation' *see also* Mazzotta, 2010, *supra* note 38, pp. 831–832.

41 M.G. Bridge, *The International Sale of Goods*, 3rd edn, Oxford University Press, Oxford, 2013, Para. 10.54; "[...] not reservations as such, but serve the same purpose as reservations"; probably also Castellani, 2013, *supra* note 40.

42 F. Enderlein & D. Maskow, *International Sales Law*, Oceana Publishing, New York, 1992, Art. 98, Para. 2.

43 International Law Commission, 'Guide to Practice on Reservations to treaties, as finalized by the Working Group on Reservations to Treaties from 26 to 29 April, and on 4, 5, 6, 10, 11, 12, 17 and 18 May 2011', U.N. Doc. A/CN.4/L.779 of 19 May 2011, p. 51; A. Aust, *Modern Treaty Law and Practice*, Cambridge University Press, Cambridge, 2000, pp. 170–171; S. Karagiannis, *in* O. Corten & P. Klein (Eds.), *The Vienna Conventions on the Law of Treaties: A Commentary*, Oxford University Press, Oxford, 2011, Art. 29 Convention of 1969, Paras. 19–24.

44 *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*, United Nations, New York, 1991 ('*Official Records*'), p. 459 No. 18.

3.2.1.2 Discussion

3.2.1.2.1 Declarations under Articles 92–96 CISG as Reservations

It is submitted that Articles 92–96 CISG all qualify as reservations and that the majority view summarized earlier[45] is accordingly correct.

This is first of all due to the fact that the language used in Articles 92–96 CISG, notably the lack of the term 'reservation' therein, should be considered as irrelevant when it comes to the legal qualification of these treaty clauses. Article 2(1)(d) of the 1969 Vienna Convention on the Law of Treaties itself makes this clear by defining 'reservation' as "a unilateral statement, *however phrased or named* ...",[46] and the International Law Commission's 'Guide to Practice on Reservations to Treaties'[47] as well as treaty law scholars[48] agree that it is not the phrasing or name of a unilateral statement formulated in respect of a treaty that determines its legal nature, but the legal effect it purports to produce. That declarations made in accordance with Articles 92–96 CISG purport to exclude or to modify the legal effect of certain provisions of the Sales Convention (as required by Article 2(1)(d) of the 1969 Vienna Convention)[49] become immediately obvious when looking at the wording of Article 95 CISG, which authorizes Contracting States to "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", but Articles 92, 93,[50] 94 and 96 CISG similarly fit this description.

Contrary to what has been implied by some authors,[51] the term 'declaration' predominantly employed by the drafters of Articles 89–101 CISG is therefore not being used therein as an alternative to 'reservation', but rather as a wider, more comprehensive term. A declaration made by a Contracting State in relation to the Sales Convention may accordingly qualify as a reservation if it meets the conditions of Article 2(1)(d) of the 1969 Vienna Convention on the Law of Treaties that have just been discussed. It may, however, also be a declaration that is not a reservation,[52] but rather purports to produce a different legal

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On the role of the different committees during the 1980 Diplomatic Conference in Vienna *see* Honnold, 2009, *supra* note 38, Para. 10.

45 *See supra* note 38.

46 Emphasis added.

47 International Law Commission, *supra* note 43, p. 79.

48 Giegerich, 2010, *supra* note 10, Para. 1.

49 *But see* L.G. Castellani, 'The CISG in Context of Complementary Texts', *in* L.A. DiMatteo (Ed.), *International Sales Law: A Global Challenge*, Cambridge University Press, New York, 2014, p. 683 note 4.

50 On Article 93 CISG *see further infra* at 3.2.1.2.2.

51 ***See supra* notes 40–41.**

52 ***But see* M.G. Bridge, 'Uniform and Harmonized Sales Law: Choice of Law Issues', *in* J.J. Fawcett, J.M. Harris & M.G. Bridge, *International Sale of Goods in the Conflict of Laws*, Oxford University Press, Oxford, 2005, Para. 16.121: "From this it may be inferred that what the Vienna [Sales] Convention calls a declaration is a reservation for the purpose of both the Convention itself and the UN Convention on the Law of Treaties."**

effect. Depending on their content, such declarations may *inter alia* be declarations amending prior declarations in accordance with Article 93(1) CISG *in fine*; declarations joining in another State's declaration in accordance with Article 94(3) CISG or denunciations of the Convention in accordance with Article 101 CISG. Apart from these types of declarations that are expressly mentioned in Articles 89–101 CISG, Contracting States may also make other 'declarations in general', which similarly do not have the effect of reservations,[53] as was specifically clarified during the discussions at the 1980 Vienna Diplomatic Conference.[54] Such declarations in general[55] are governed by the rules of general treaty law[56] but must also be compatible with the provisions of the Sales Convention. (As has been argued elsewhere,[57] interpretative declarations relating to matters governed by the Sales Convention must insofar be considered incompatible with Article 7(1) CISG.)

Finally, the interpretation outlined above is supported by the legislative history of Article 98 CISG, the only of the Sales Convention's provision to explicitly mention 'reservations'. The Austrian delegation that had first proposed its inclusion at the Vienna Diplomatic Conference[58] had later suggested an alternative wording, which after further modification by the French delegation read: "No reservation or declaration other than those expressly provided for in this Convention shall be permitted".[59] During the ensuing discussion, there was agreement among the delegates that at least the draft provisions corresponding to today's Articles 92, 94 and 96 CISG constituted reservations, irrespective of whether or not the reference to 'reservation or declaration' would be kept.[60] (Article 93 CISG was regarded as a slightly more complicated case,[61] and Article 95 CISG had at this stage not been (re-) proposed.[62]) Against this historic background, the use of the terms 'reservation' in Article 98 CISG (as eventually adopted) and 'declaration' elsewhere in Articles 89–101 CISG cannot support any challenge of the prevailing and correct view that Articles 92–96 CISG all qualify as reservations.

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53 Evans, 1987, *supra* note 38, Art. 98, Para. 2.3; Magnus, 2013, *supra* note 38, Art. 98, Para. 1; Schlechtriem, Schwenzer & Hachem, 2010, *supra* note 38, Art. 98, Para. 2.

54 *Official Records*, p. 459.

55 On 'political' declarations that occur in treaty practice *see* Aust, 2000, *supra* note 43, p. 103.

56 Evans, 1987, *supra* note 38, Art. 98, Para. 2.3; Ferrari, 2013, *supra* note 38, Art. 98, Para. 2; Herre, 2011, *supra* note 38, Art. 98, Para. 1; Magnus, 2013, *supra* note 38, Art. 98, Para. 1; Schlechtriem, Schwenzer & Hachem, 2010, *supra* note 38, Art. 98, Para. 2.

57 Torsello, 2000, *supra* note 38, p. 117; Schroeter, 2008, *supra* note 20, pp. 455–456; *but see* Mankowski, 2011, *supra* note 40, Art. 98 CISG, Para. 2.

58 *Official Records*, p. 146.

59 *Official Records*, p. 459.

60 *See notably Official Records*, p. 459, Nos. 15–16: "Mr. TARKO (Austria) said that his delegation had proposed that the word 'declaration' be included because the final clauses referred only to declarations and there might be some confusion between declarations proper and declarations containing reservations. [...] If the sense was clear with the use of the word 'reservation' alone, his delegation would agree to the omission of the word 'delegation' ...."

61 *See infra* at 3.2.1.2.2.

62 *See infra* at 3.2.2.2.2.

3.2.1.2.2 Article 93 CISG as a Reservation

The nature of Article 93 CISG as a reservation requires some further discussion, as this qualification has been challenged for the additional reason that federal State clauses are generally not considered to be reservations in treaty law doctrine.[63]

The cornerstone on which the latter position rests is the definition of the term 'reservation' in Article 2(1)(d) of the 1969 Vienna Convention on the Law of Treaties, which speaks of a unilateral statement made by a State whereby it purports to exclude or to modify the legal effect of *certain provisions* of the treaty in their application *to that State*.[64] Federal State clauses, so the reasoning goes, are not covered by this definition because they do not purport to exclude or modify the legal effect of certain provisions of a treaty or the treaty as a whole with respect to certain specific aspects to an entire State, but rather aim at the non-application of an entire treaty to a part of the declaring State's territory. This type of declaration constitutes a deviation from the default rule about the territorial scope of treaties in Article 29 of the 1969 Vienna Convention on the Law of Treaties, pursuant to which a treaty is binding upon each party in respect of its entire territory unless a different intention appears from the treaty or is otherwise established. Federal State clauses are accordingly not reservations, but rather an expression of a 'different intention' in the sense of Article 29 of the Vienna Convention: The State is not excluding the legal effect of the treaty in respect of a particular territory but is identifying 'its territory', in the sense of Article 29, where the treaty is to be applied.[65] (This approach is also reflected in the 1974 United Nations Convention on the Limitation Period in the International Sale of Goods, where the federal State clause in Article 31 – the provision that Article 93 CISG was modelled after – is not contained in the Convention's Part III titled 'Declarations and reservations', but rather in Part II titled 'Implementation'.)

Irrespective of whether the approach just outlined is considered to be convincing,[66] it is submitted that its application does not affect the reservation status of Article 93 CISG, despite the latter's common[67] description as 'federal State clause'. The reason is that an Article 93 CISG declaration not only defines the territory to which the declaring State will apply the 1980 Sales Convention but modifies the application of one provision of the Sales Convention in its application by courts of any Contracting State (*erga omnes*). The provision so modified is Article 1(1) CISG, as indicated by Article 93(3) CISG. (Although Article 93(3) CISG does not contain the arguably clearer terms "is not to be considered a Contract-

63 *See supra* notes 42–44.

64 Emphasis added.

65 International Law Commission, *supra* note 43, p. 50; K. Odendahl, *in* O. Dörr & K. Schmalenbach (Eds.), *Vienna Convention on the Law of Treaties: A Commentary*, Springer, Heidelberg, Dordrecht, London and New York, 2012, Art. 29, Para. 12 (who cites Art. 93 CISG as an example).

66 *Cf.* A. Aust, 'Treaties, Territorial Application', *in* R. Wolfrum (Ed.), *Max Planck Encyclopedia of Public International Law*, Oxford University Press, Oxford, 2006, Paras. 22–23.

67 *See, e.g.* Herre, 2011, *supra* note 38, Art. 93, Para. 1 and many others.

ing State within paragraph (1) of Article 1 of this Convention" that are used in Article 92(2) CISG, the words "is considered not to be in a Contracting State" in Article 93(3) CISG should equally be understood as a reference to Article 1(1) CISG.[68]) Accordingly, Article 93 CISG in fact does meet the 'modification of certain provisions' criterion in Article 2(1)(d) of the 1969 Vienna Convention on the Law of Treaties.[69]

The Sales Convention's federal State clause remains, however, ill at ease with the final requirement contained in Article 2(1)(d) of the 1969 Vienna Convention on the Law of Treaties, namely the modification of treaty provisions "in their application to that [*i.e.* the declaring] State".[70] As the wording of Article 93(3) CISG makes clear, a declaration under Article 93(1) CISG goes much further, as it results in the Sales Convention's non-application to contracts concluded by private parties residing in a certain territory of the federal State and has to be observed by courts in all Contracting States (not only the declaring State),[71] thereby creating the *erga omnes* effect described earlier. This apparent incompatibility is nevertheless not unusual, but rather occurs under almost every treaty creating uniform private law. The definition of Article 2(1)(d) of the 1969 Vienna Convention on the Law of Treaties has therefore long been recognized as hardly appropriate for normative treaties, which do not create a bundle of bilateral treaty relationships but establish generally applicable *erga omnes* rules in the common interest of the treaty community as a whole,[72] with uniform private law conventions being one example. The solution lies in the principle *lex specialis derogat legi generali*, with Article 93(3) CISG insofar containing an (admissible[73]) deviation from general treaty law.

In summary, the Sales Convention's federal State clause in Article 93 CISG accordingly qualifies as a reservation.

3.2.1.3 A Different Question: Applicability of Articles 20–23 of the 1969 Vienna Convention on the Law of Treaties to the CISG's Reservations

At this point, it may be useful to clarify that the conclusions presented earlier do not mean that the rules on reservations contained in general treaty law and codified in Articles 20–23 of the 1969 Vienna Convention on the Law of Treaties necessarily apply to Articles 92–96 CISG.[74] The reason is that the rules laid down in the 1969 Vienna Convention are generally

68 Evans, 1987, *supra* note 38, Art. 93, Para. 2.4. *See also infra* at 3.4.2.2.2.1.

69 In addition, it should be pointed out that otherwise also Article 94 CISG would arguably not qualify as a reservation, as this provision similarly results in a non-application of the entire Sales Convention.

70 *Cf.* Bridge, 2013, *supra* note 41, Para. 10.57 who addresses the same point with respect to the reservation under Article 95 CISG. *But see* Enderlein & Maskow, 1992, *supra* note 42, Art. 98, Para. 1.

71 Bridge, 2005, *supra* note 52, Para. 16.123; Schroeter, 2008, *supra* note 20, p. 444; Torsello, 2000, *supra* note 38, pp. 97–98. *Contra* F. De Ly, 'Sources of International Sales Law: An Eclectic Model', *Journal of Law and Commerce*, Vol. 25, 2005–2006, p. 1 at p. 9 (with respect to the similarly framed Article 92 CISG).

72 Giegerich, 2010, *supra* note 10, Para. 19.

73 *See immediately infra* under 3.2.1.3.

74 *But see* Enderlein & Maskow, 1992, *supra* note 42, Art. 98, Para. 1.

agreed to be merely residuary in nature[75] and are accordingly displaced whenever a given treaty contains different rules on particularities of its reservations. As the 1980 Sales Convention's Final Clauses in Part IV (Articles 89–101 CISG) contain explicit provisions as well as general principles in accordance with Article 7(2) CISG governing the functioning of its reservations, there is hardly any room for recourse to the residuary Articles 20–23 of the 1969 Vienna Convention.[76] (At the same time, there is no need to avoid a qualification of Articles 92–96 CISG as 'reservations' with the primary aim to prevent general treaty law from interfering with uniform private law:[77] The residuary nature of Articles 20–23 of the 1969 Vienna Convention takes sufficiently care of that.)

3.2.2 Historical Background of the CISG's Reservations in a Nutshell

We next turn to the historical background of the Sales Convention's five reservations. Its knowledge is useful for purposes of interpreting the respective provisions, as recourse to the legislative history is recognized as one of the most important interpretative methods under Article 7(1) CISG.[78] In this respect, the Sales Convention deviates from general rules on interpretation under treaty law, as Article 32 of the 1969 Vienna Convention on the Law of Treaties merely allows for a historic interpretation as a supplementary method (where interpretation otherwise 'leaves the meaning ambiguous or obscure' or leads 'to a result which is manifestly absurd or unreasonable'). Again, Article 7(1) CISG must prevail in this context, as its principles also apply to the interpretation of the CISG's reservations[79] and thereby displace the residuary rules of the 1969 Vienna Convention.[80]

3.2.2.1 Effect of Article 98 CISG on the Reservations' Initiation

By way of a preliminary remark, it is helpful to first recall once more Article 98 CISG, which limits reservations under the CISG to those expressly authorized in the Convention.

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75 Giegerich, 2010, *supra* note 10, Para. 7; A. Pellet, *in* O. Corten & P. Klein (Eds.), *The Vienna Conventions on the Law of Treaties: A Commentary*, Oxford University Press, Oxford, 2011, Art. 22 Convention of 1969, Para. 34.

76 *See similarly* Bridge, 2005, *supra* note 52, Para. 16.122; Schroeter, 2008, *supra* note 20, p. 431.

77 This position has more recently been adopted in UNCITRAL, *Explanatory note by the UNCITRAL secretariat on the United Nations Convention on the Use of Electronic Communications in International Contracts*, United Nations, New York, 2007, Para. 317: "This distinction [between reservations and declarations] is important because reservations to international treaties typically trigger a formal system of acceptances and objections, for instance as provided in articles 20 and 21 of the Vienna Convention on the Law of Treaties...."

78 Magnus, 2013, *supra* note 38, Art. 7, Para. 35; Schlechtriem & Schroeter, 2013, *supra* note 19, Para. 105; Schwenzer & Hachem, 2010, *supra* note 18, Art. 7, Para. 22.

79 Schlechtriem, Schwenzer & Hachem, 2010, *supra* note 38, Intro to Arts. 89–101, Para. 2; Schroeter, 2008, *supra* note 20, p. 428. *Contra* Enderlein & Maskow, 1992, *supra* note 42, Art. 7, Para. 2.2; Witz, 2000, *supra* note 21, Para. 6.

80 *Supra* note 22.

This clause, which is based on Article 19(b) of the 1969 Vienna Convention on the Law of Treaties[81] and today constitutes a common feature in uniform international private law conventions,[82] has a further indirect effect upon the manner in which reservations become part of a convention, as it leads to a two-step process:[83] In a first step, the content of each admissible reservation must be agreed upon among the drafters of the convention, before in a second step one or more Contracting States can declare (Article 19 of the 1969 Vienna Convention uses the term 'formulate') such an authorized reservation. Any State interested in using a certain reservation must therefore initiate its authorization already at the convention's drafting stage and cannot wait until it later may contemplate a ratification of the convention. Restricting admissible reservations to those expressly authorized in a convention's text at the same time means that the range of possible reservations is 'frozen in' at the moment the treaty's text is being adopted in accordance with Article 9 of the 1969 Vienna Convention on the Law of Treaties. In case of the CISG, this date was 11 April 1980.

3.2.2.2 Historical 'Sponsors' of Individual Reservations under the CISG

Against this background, it is of interest to briefly look at the way in which the five reservations authorized by the CISG made their way into the Sales Convention's final text. In this regard, three groups of reservations can be distinguished:

The first group comprises reservations that were proposed by particular States already during early stages of the preparations that culminated in the Vienna Diplomatic Conference of 1980. From the outset, the States concerned regarded the inclusion of these reservations as an indispensable condition without which they would not be able to ratify the Convention. The representatives of other States in turn viewed these reservations as a compromise necessary in order to convince those States to accept the Sales Convention's text with the content the majority considered desirable.[84] In view of these interests, the desirability of the reservations of this group was rarely challenged, and the discussions within the United Nations Commission on International Trade Law (UNCITRAL) and later at the Diplomatic Conference in Vienna were limited to drafting issues.

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81 Enderlein & Maskow, 1992, *supra* note 42, Art. 98, Para. 1; Evans, 1987, *supra* note 38, Art. 98, Para. 2.2; Herre, 2011, *supra* note 38, Art. 98, Para. 1.

82 Mankowski, 2011, *supra* note 40, Art. 98 CISG, Para. 1.

83 *See also infra* at 3.3.2.2.

84 *See* on Article 94 CISG P. Schlechtriem, *in* P. Schlechtriem & I. Schwenzer (Eds.), *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 2nd edn, Oxford University Press, Oxford, 2005, Art. 94, Para. 2; "... only in that way could, for example, the Scandinavian states be persuaded to apply the CISG at least in their relations with other countries"; on Article 96 CISG *see* Schroeter, 2014, *supra* note 26, pp. 85–86.

This was true for the Article 94 CISG reservation, which looks back on a particularly long history; already the very first draft for a uniform sales law written by Ernst Rabel[85] in 1935 contained a predecessor provision.[86] Notably, the Scandinavian States had always made clear that they would only be willing to accede to the Sales Convention if they could continue to apply their regionally harmonized sales laws to their intra-Nordic trade.[87] In order to be able to do so, they proposed and throughout supported a reservation like today's Article 94 CISG.

The Article 96 CISG reservation which makes an exception from the freedom-of-form principle under the Sales **Convention**[88] was **included** upon the wish of the Soviet Union (USSR), which also spoke **for other** then-So**cialist cou**ntries with planned economies.[89] It first appeared (with a somewhat different wording) in a proposal made within UNCITRAL in 1971[90] and was subsequently included into the so-called New York draft of the Sales Convention of 1978,[91] from where onwards it formed part and parcel of the general freedom-of-form discussion.

The Article 92 CISG reservation was the last of this group to enter the scene. It was only requested once the decision had been reached within UNCITRAL to include both the provisions on the formation of contracts and the provisions on the sale of goods into one and the same Convention.[92] During the discussion preceding this decision, the Scandinavian States had insisted on a possibility to ratify only the sales law part,[93] which therefore was introduced in form of a reservation that became Article 92 CISG.

The second group covers one boilerplate reservation, namely the 'federal State clause' in Article 93 CISG already addressed earlier.[94] This provision was not included upon suggestion from a State, but rather from the UNCITRAL Secretariat that prepared a draft for the CISG's final clauses[95] for discussion at the Vienna Diplomatic Conference. The reser-

85 On Ernst Rabel *see* M. Rheinstein, 'In Memory of Ernst Rabel', *American Journal of Comparative Law*, Vol. 5, 1956, pp. 185–196; B. Großfeld & P. Winship, 'The Law Professor Refugee', *Syracuse Journal of International Law and Commerce*, Vol. 18, 1992, p. 3 at p. 11.

86 *See* **Schroeter, 2005, *supra* note 21, § 10,** Para. 2.

87 *See* J. **Lookofsky, *Understanding the CISG* in Scandinavia**, DJØF Publishing, Copenhagen, 1996, §§ 2–3 and 3–1; **Schlechtriem, *supra* note 84, Art. 94,** Para. 2. Other states that showed an interest in using Article 94 CISG were the Benelux countries (Belgium, the Netherlands and Luxembourg) as well as Australia and New Zealand; *see Official Records*, p. 436.

88 *See* Schroeter, 2014, *supra* note 26, p. 83.

89 *See* Id, pp. 81–82.

90 *UNCITRAL Yearbook*, Vol. II, 1971, p. 48. *See in more detail* Schroeter, 2014, *supra* note 26, pp. 85–86.

91 *UNCITRAL Yearbook*, Vol. IX, 1978, p. 14 at p. 21.

92 *See in detail* G. Eörsi, 'Problems of Unifying Law on the Formation of Contracts for the International Sale of Goods', *American Journal of Comparative Law*, Vol. 27, 1979, p. 311, who refers to this decision as 'a significant step'.

93 *See Official Records*, p. 74.

94 *See supra* at 3.2.1.2.2.

95 'Draft Convention on Contracts for the International Sale of Goods: Draft Articles Concerning Implementation, Declarations, Reservations and other Final Clauses, prepared by the Secretary-General', U.N. Doc.

vation's purpose is essentially unrelated to the uniform law content of the Sales Convention in that it exclusively responds to the particular territorial structure of some States (federal or other)[96] and their impact on the implementation of uniform law conventions. In Vienna, Article 93's inclusion was notably supported by Australia and Canada.[97]

The third and final group could be assigned the heading 'last-minute additions'. It similarly comprises just one of the CISG's reservations, namely Article 95 CISG.[98] Unusually, this reservation neither had a direct predecessor in the 1964 Hague Uniform Sales Laws[99] nor was it discussed within UNCITRAL or its working groups prior to the 1980 Diplomatic Conference in Vienna. It was not until the Vienna Conference was well under way that the delegation representing Czechoslovakia (CSSR) first proposed today's Article 95 CISG during the second meeting of the Second Committee on 18 March 1980,[100] where it was rejected.[101] On 7 April 1980, a mere 4 days before the Conference's scheduled ending on 11 April 1980, Czechoslovakia re-introduced its proposal in the Plenary, now offering two alternative wordings.[102] The Plenary finally discussed the proposal during the late afternoon of 10 April 1980[103] and accepted one of the proposed wordings by 24 votes to 7, with a comparatively high number of 16 abstentions.[104] The majority decision to accept the reservation at all was clearly driven by the desire not to risk the support of the CSSR and other Socialist countries for the Sales Convention as a whole.[105] The notable price for Article 95's surprising last-minute adoption[106] are uncertainties about its precise meaning that plague the provision's practical application until this very day.[107]

A/CONF.97/6, *in Official Records*, p. 66 at 67. On the discussion about the alternative drafts proposed by the UNCITRAL Secretariat, *see in detail* Evans, 1987, *supra* note 38, Art. 93, Paras. 1.1–1.5.

96 *See in more detail infra* at 3.5.2.

97 *See Official Records*, pp. 82, 434–436, 445–447.

98 On the legislative history of Article 95 CISG, *see* CISG Advisory Council Opinion No. 15, 2014, *supra* note 26, p. 118.

99 Article III of the Conventions relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF) and to a Uniform Law on the International Sale of Goods (ULIS) of 1 July 1964 contained no more than quasi-predecessors, which were functionally equivalent but had a significantly different language and structure; *see* CISG Advisory Council Opinion No. 15, 2014, *supra* note 26, p. 118.

100 U.N. Doc. A/CONF.97/C.2/L.7, *Official Records*, p. 145.

101 *Official Records*, p. 439.

102 Document A/CONF.97/L.4, *Official Records*, p. 170.

103 *Official Records*, p. 229.

104 *Official Records*, p. 230.

105 CISG Advisory Council Opinion No. 15, 2014, *supra* note 26, p. 118; Evans, 1987, *supra* note 38, Art. 93, Para. 2.3; Gillette & Scott, 2005, *supra* note 14, p. 468 note 52: "In the face of the threat of non-adaption by Eastern European States, the Conference ultimately inserted Article 95 …".

106 *See* P. Winship, 'The Scope of the Vienna Convention on International Sales Contracts', *in* N. Galston & H. Smit (Eds.), *International Sales: The United Nations Convention on Contracts for the International Sale of Goods*, Matthew Bender, New York, 1984, p. 1–44.

107 *See in more detail* CISG Advisory Council Opinion No. 15, 2014, *supra* note 26, pp. 120–123.

3.2.2.3 Authorization and Use of the CISG's Reservations

Finally, it is worth noting that all reservations authorized by the CISG have actually been used by one or more Contracting States. In this respect, the CISG differs from many other uniform law conventions whose text authorizes reservations that later turned out to be superfluous, as no State saw the need to declare such a reservation upon accession.[108] The fact that such 'orphan reservations' are relatively common under other conventions proves the good draftsmanship in case of the CISG, where reservations were successfully restricted to the necessary minimum.

3.3 RESERVATIONS: DECREASING UNIFORMITY OR ENABLING A WIDER UNIFORMITY?

In looking back on the role that reservations have played during the first 35 years of the CISG's practical application, it appears helpful to commence with a general, bird's eye assessment, before turning to some more specific questions.[109]

3.3.1 The Critical View: Reservations as a Source of Non-Uniformity

Taking the opinions expressed in legal writings as a starting point, it quickly becomes clear that the prevailing view of the CISG's reservations is a sceptical or even outright critical one. Most of the critique has been directed at one and the same factor, namely the reservations' perceived nature as a source of non-uniformity under the Sales Convention.[110] The impact of such non-uniformity has been viewed as considerable,[111] even undermining the Sales Convention's very goal of creating a uniform law of international sales.[112] Related points of criticism are the increased likelihood of confusion regarding the CISG's practical

108 The 1974 United Nations Convention on the Limitation Period in the International Sale of Goods is one of many examples: Out of the five reservations authorized by the Limitation Convention, only one (Art. 34) was used by a single contracting state (Norway).

109 *See infra* 3.4. and 3.5.

110 C.B. Andersen, 'Recent Removals of Reservations under the International Sales Law: Winds of Change Heralding a Greater Unity of the CISG', *Journal of Business Law*, Vol. 8, 2012, p. 698 at p. 706; Andersen, 2013, *supra* note 25, pp. 1–2; Bailey, 1999, *supra* note 38, p. 311; Ferrari, **2013**, *supra* note 38, Vor Artt. 89–101, Para. 9; Flechtner, 1998, *supra* note 38, p. 193; S.H. Jenkins, 'Construing Laws Governing International and U.S. Domestic Contracts for the Sale of Goods: A Comparative Evaluation of the CISG and UCC Rules of Interpretation', *Temple International and Comparative Law Journal*, Vol. 26, Fall 2012, p. 181 at p. 202; Mazzotta, 2010, *supra* note 38, p. 836; Neumann, 2013, *supra* note 25, p. 2. From a general treaty law perspective, *see* E.T. Swaine, 'Reserving', *Yale Journal of International Law*, Vol. 31, 2006, p. 307 at p. 330.

111 Flechtner, 1998, *supra* note 38, p. 197.

112 Bailey, 1999, *supra* note 38, p. 312.

application[113] and the resulting additional transaction costs.[114] The critical view's essentially thrust, however, remains non-uniformity: The presence of reservations means that the search for a uniform solution has partially failed.

3.3.2 *A More Positive View: Reservations as a Tool Enabling a Wider Uniformity*

On the eve of the Sales Convention's 35th birthday, the present chapter offers an alternative and more positive view of the CISG's reservation regime. It rests on two separate foundations that differ from those used by the prevailing view: On one hand, it takes into account recent developments with regard to the use of reservations by Contracting States[115] (which admittedly could not be taken into account by most earlier writers – in this respect, it may be accused of profiting from the benefit of hindsight.) And on the other hand, it challenges the standard of uniformity implicitly underlying the general criticism of reservations by asking: Reduced uniformity compared to what?[116]

In a nutshell, the result of this combined approach can be described as follows: The use of reservations under uniform private law conventions like the CISG should not be viewed as a source of non-uniformity, but is more fittingly regarded as a tool enabling what may be called a 'wider uniformity'.

3.3.2.1 Taking into Account the Withdrawability of Reservations

A first justification for the present approach emerges when taking into account the possibility of withdrawing reservations, as provided for in the law of treaties in general (Article 22 of the 1969 Vienna Convention on the Law of Treaties) and in Article 97(4) CISG in particular: A reservation, once made, does not need to stay in effect forever but can also result in a merely *temporal* reduction of uniformity. The recent wave of withdrawals of CISG reservations that we have witnessed since 2011, with Finland, Sweden, Denmark, Latvia, the People's Republic of China, Lithuania and Norway all having withdrawn some or all of their reservations,[117] has reminded us of the inherent temporal scope of reservations under uniform private law conventions. While in the past reservation withdrawals had played almost no practical role under such conventions, as reservations usually remained

113 Id, p. 311.

114 R. Knieper, 'Celebrating Success by Accession to CISG', *Journal of Law and Commerce*, Vol. 25, 2005–2006, p. 477 at pp. 478–479; Gillette & Scott 2005, *supra* note 14, p. 469.

115 *Infra* at 3.3.2.1.

116 *Infra* at 3.3.2.2., in particular at 3.3.2.2.1. In a more general context, *see* Gillette & Scott 2005, *supra* note 14, p. 480: 'Criticism of the CISG requires an answer to the question: compared to what?'

117 *See the details in* Schroeter, 2015, *supra* note 16, pp. 2–3.

unmodified until the respective State eventually denounced the Convention,[118] the CISG – once again – has been a ground breaker in this regard.

The withdrawability of reservations serves a useful function in the circumstances in which a State contemplating the ratification of or accession to a uniform private law convention finds certain provisions contained therein objectionable or contestable. (In case of uniform private law conventions, this is most likely to be the case where the convention dramatically departs from the State's domestic law.[119]) A critical approach towards some of the convention's content complicates the respective State's position towards the convention; in that, it renders its decision for or against a consent to be bound (Article 11 of the 1969 Vienna Convention on the Law of Treaties) more difficult.[120] In such a context, the option to ratify a convention in combination with making a withdrawable reservation offers the hesitant State the possibility to 'test drive' the convention: In doing so, it can experience the convention's application in practice, without immediately having to commit to provisions it at first sight finds objectionable. At the same time, an 'opting out' of these provisions by way of a reservation is not necessarily made for eternity, as the reservation may be withdrawn 'at any time' (Article 97(4) CISG).

This option may be more attractive to reluctant States than the obvious alternative, namely to refrain from immediate ratification of the Convention and to observe the development 'from the outside', *i.e.* the position of a non-Contracting State, before potentially ratifying at a later stage. One reason is that an early ratification (despite being accompanied by reservations) still brings the economic advantages that flow from the non-reserved parts of the Convention[121] to the reserving State's citizens and companies, while an abstention deprives them of these advantages. Another reason may lie in a Contracting State's chance to influence the early interpretation of the Convention through its domestic courts, which will have the opportunity to play their part in the proverbial international 'orchestra' made up of courts from all Contracting States.[122] This may be viewed as more advantageous than remaining a non-Contracting State with the prospect of later ratifying the Convention including the interpretation it has already received at that stage and that the new Contracting State will nevertheless need to 'have regard to' in accordance with

118 Schroeter, 2015, *supra* note 16, p. 2. For voices describing reservation withdrawals as 'a rare event' in general treaty practice *see* F. Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, Elsevier, Amsterdam, 1988, p. 226; Walter, 2012, *supra* note 10, Art. 22, Para. 1.

119 Gillette & Scott, 2005, *supra* note 14, p. 467. *See also infra* at 3.3.2.2.2.

120 *See infra* at 3.3.2.2.2.

121 *See in detail* Spagnolo, 2014, *supra* note 13, pp. 47–148.

122 The picture of an 'orchestra without conductor' was employed in the present context by P. Schlechtriem, 'Einheitskaufrecht in der Rechtsprechung des Bundesgerichtshofs', *in* C.-W. Canaris, A. Heldrich *et al.* (Eds.), *50 Jahre Bundesgerichtshof: Festgabe aus der Wissenschaft, Vol. 1: Bürgerliches Recht*, C.H. Beck Publishing, Munich, 2000, p. 407 at p. 408.

Article 7(1) CISG (as well as Article 31(3)(b) of the 1969 Vienna Convention on the Law of Treaties[123]).

As a first intermediate result, we can therefore identify a crucial difference between the treaty law perspective and the uniform private law perspective: From the viewpoint of general treaty law, a reservations expresses a 'no', while from the viewpoint of contemporary uniform private law, it often merely expresses a 'not yet'. This difference is further corroborated by State practice under the Sales Convention where most reservations were declared during the early years (and none since 2008) – a result that stands in contrast to observations under general treaty practice, where latecomers to treaties have been found to make more reservations than early ratifiers.[124]

3.3.2.2 Reservations and Treaty Design: A 'Wider Uniformity' under 'Reservable' Uniform Private Law Conventions

3.3.2.2.1 Measuring Uniformity: Selecting the Appropriate Standard

We next turn to the standard of uniformity that should be used when measuring the effect of reservations. Insofar, the prevailing view that labels reservations a source of non-uniformity[125] implicitly employs a complete uniformity within the scope of the convention as the standard of comparison: As far as a uniform law text has been agreed upon, it should ideally be applied identically in all Contracting States thereto, and reservations are disturbing this uniformity. At the opposite end of the range of possible standards lies another uniformity standard which is equally radical, namely a complete lack of uniformity within the scope of the convention: If we picture a uniform law text that has been adopted with a content that no State is willing to accept unmodified, then all reservations would be a good thing, as they would make the convention more acceptable to States[126] and would therefore be a source of uniformity, because the convention otherwise would attract no Contracting States. (This picture is, of course, somewhat unrealistic, as such a uniform law text would probably not have been adopted in the first place.[127])

It is submitted that both of these 'radical' standards – complete uniformity and complete non-uniformity – are overly simplistic and should be replaced by a standard that is more attuned to the realities of uniform private law making. In this context, the perspective

123 *See supra* at 3.1.2.

124 *See* L.R. Helfer, 'Not Fully Committed? Reservations, Risk, and Treaty Design', *Yale Journal of International Law*, Vol. 31, 2006, p. 367 at p. 370; Swaine, 2006, *supra* note 110, p. 342 note 210.

125 *Supra* at 3.3.1.

126 *See* Knieper, 2005–2006, *supra* note 114, p. 479.

127 There are, however, conventions that were formally adopted and attracted almost no state parties, as, *e.g.* the European Convention providing a Uniform Law on Arbitration adopted in Strasbourg on 20 January 1966 that was only signed by two states (Austria and Belgium) and ratified by a single state (Belgium, subject to reservations). The convention never entered into force.

should also be widened by looking beyond the scope of the adopted uniform law texts: Their scope could have been different had reservations been used when the respective text was drafted, which already indicates that reservations may well enable a 'wider' uniformity.

3.3.2.2.2 *Treaty Design Particularities Affecting Uniform Private Law Conventions*

3.3.2.2.2.1 Reservations and Treaty Negotiations

As a starting point, it is useful to recall a point in which uniform private law making differs from treaty law making in general.[128] In case of other treaties, the adoption of the treaty text in accordance with Article 9 of the 1969 Vienna Convention on the Law of Treaties is followed by a decision-making process in the individual States, during which each State decides whether or not to express its consent to be bound by the treaty (Article 11 of the 1969 Vienna Convention on the Law of Treaties) and – most important in our context – which reservations to make, thereby potentially 'turning a *prix fixe* menu *à la carte*'.[129]

In case of uniform private law conventions, however, the latter freedom is often much more limited, as provisions like Article 98 CISG[130] typically restrict the possible content of reservations to those expressly authorized in the convention.[131] This in turn leads to the discussion about admissible reservations already taking place during the phase preceding the uniform law text's adoption, with reservations forming part and parcel of the general treaty negotiations.[132] The drafting of reservations under uniform private law conventions is therefore intrinsically tied to the drafting of the uniform law text they relate to, and both endeavours closely interact with each other.

3.3.2.2.2.2 Reservations v. Other Design Options

Against this uniform private law making background, reservations do not necessarily appear as an impediment to uniformity, but rather as a tool that provides a sensible design option in addition to those otherwise available.[133] A situation in which these options need to be compared arises every time that no agreement about the content of a uniform law text can be reached, usually because the various domestic laws dealing with the respective topic differ to such an extent that delegates cannot agree on a universally acceptable compromise text.[134] The existence of differences between domestic laws is as such not surprising, as it constitutes the prerequisite for uniform private law making (though not necessarily

128 *Supra* at 3.2.2.1.

129 Swaine, 2006, *supra* note 110, p. 307.

130 *See supra* at 3.2.1.2.1. and 3.2.2.1.

131 Mankowski, 2011, *supra* note 40, Art. 98 CISG, Para. 1. In other types of treaties, provisions of this kind are much less common; *see* G.F. Jacob, 'Without Reservation', *Chicago Journal of International Law*, Vol. 5, 2004, p. 287 at p. 290; Swaine, 2006, *supra* note 110, p. 325.

132 *See supra* at 3.2.2.1.

133 *Cf.* Helfer, *supra* note 124, p. 378.

134 Gillette & Scott, 2005, *supra* note 14, p. 460.

for treaty making in general[135]): Wherever all domestic laws have developed the same solution for a salient problem, there is no need for a uniform law in the first place, as it could do no more than codifying the already uniform solution through a uniform wording, thereby adding uniformity in form to the existing uniformity in substance. Uniform law making efforts therefore necessarily presuppose that local approaches to a certain problem differ and that any uniform law solution (whatever its content) will accordingly require some of the States involved to accept a text that is at least partially 'foreign' to them. In such a situation, a number of different options are at the uniform law makers' disposal:

Many controversies about the desirable uniform law solution may be solved through negotiations that eventually lead to a compromise acceptable to most or all of the drafters. A prominent example from the 1980 Sales Convention's drafting history was the much-discussed regulation of the buyer's notice of non-conformity, which resulted in a compromise solution combining a comparatively strict rule (Articles 39 and 43 CISG) with limited exceptions (Articles 40 and 44 CISG).[136]

It is in situations in which no commonly acceptable compromise text can be agreed upon that a choice must be made between a narrower and a wider controversial text,[137] which amounts to a choice between a 'narrower' or a 'wider' uniformity:

A 'narrower' uniformity results from decisions to exclude the controversial issue(s) from the scope of the uniform text, thereby leaving it non-unified. This type of solution guarantees that no State is repelled from accepting the uniform text because of an unacceptable wording but at the same time restricts the text's scope within which uniformity can develop. When the 1980 Sales Convention was drafted, this approach was used with respect to the (material) 'validity' of the sales contract, as no compromise about an acceptable text could be reached.[138] The resulting 'validity exception' in Article 4 sentence 2(a) CISG accordingly excludes this matter from the Convention's material scope, although the meaning of this provision has in itself created much controversy.[139]

In contrast, a 'wider' uniformity is chosen whenever a controversial issue is covered in the uniform law text but accompanied by an authorized reservation that allows States to 'opt out' of the compromise found. As such reservations may later be withdrawn, this

135 *See* James K. Sebenius, *Negotiating the Law of the Sea*, Harvard University Press, Cambridge and London, 1984, p. 113.

136 *See* CISG Advisory Council Opinion No. 2, 'Examinations of the Goods and Notice of Non-Conformity (Articles 38 and 39), Rapporteur: E.E. Bergsten', *Internationales Handelsrecht*, 2004, p. 163 Comments 1-3.5; Gillette & Scott, 2005, *supra* note 14, p. 460.

137 Helfer, 2006, *supra* note 124, p. 375 stresses the "broad freedom of international contract" in negotiating treaties.

138 *See* H.E. Hartnell, 'Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods', *Yale Journal of International Law*, Vol. 18, No. 1, 1993, p. 1 at pp. 22-45.

139 *See* U.G. Schroeter, 'The Validity of International Sales Contracts: Irrelevance of the "Validity Exception" in Article 4 Vienna Sales Convention and a Novel Approach to Determining the Convention's Scope', *in* I. Schwenzer & L. Spagnolo (Eds.), *Boundaries and Intersections*, Eleven, The Hague, 2014, pp. 95-117.

approach enables a wider uniformity by way of a more comprehensive scope of the convention[140] – proof that reservations may in fact serve the goal of private law unification.

3.3.2.2.3 Further Advantages of Reservations in a Treaty Design Context

In addition, the use of reservations offers a number of further advantages, all of which eventually support the quest for uniformity. First, it allows for a more ambitious ('deeper'[141]) content of the uniform private law text concerned, which in the long term results in a wider uniformity than the alternative exclusion of controversial issues.[142] The freedom-of-form question constitutes an example from the Sales Convention's drafting history: Although the (efficient[143]) freedom-of-form principle was inacceptable as a universally applicable rule to the Socialist planned economies when the Convention was drafted in the 1970s,[144] it was eventually included in Articles 11 and 29 CISG but accompanied by an authorized reservation (Article 96 CISG). The formal validity of sales contracts thereby became a matter governed by the Convention, with the resulting pre-emption of domestic laws.[145] Although the freedom-of-form principle was initially affected by the numerous reservations under Article 96 CISG that were made, a significant number of these reservations have since been withdrawn.[146] Had the drafters of the Convention opted for a narrower scope of the uniform sales law excluding the issue of formal validity, the degree of uniformity would be significantly lower today.

Second, the use of reservations can eventually be advantageous to uniformity if it can solicit additional ratifications through a limited option to reserve. An example: By authorizing the non-application of one provision (Article 1(1)(b) CISG), Article 95 CISG enables the application of the other 87 provisions in Parts I-III of the Sales Convention; a compromise that may well pass for a 'good deal'.

And third, any decision in favour of a 'wider' uniformity accounts for the fact that reservations – because of their withdrawability[147] – are a more flexible component of uniform international law when compared to the convention's text itself: Once it has been adopted and ratified by a relevant number of States, a uniform private law convention

140 *But see* Gillette & Scott, 2005, *supra* note 14, p. 461.

141 Swaine, 2006, *supra* note 110, pp. 311 and 331.

142 For a similar argument in relation to treaties in general, *see* Helfer, 2006, *supra* note 124, pp. 368 and 378; Swaine, 2006, *supra* note 110, pp. 331–333.

143 For an efficiency assessment from a law and economics perspective, *see* M. Cantora, 'The CISG after *Medellin v. Texas*', *Journal of International Business and Law*, Vol. 8, 2009, p. 111 at pp. 125–127; Spagnolo, 2014, *supra* note 13, p. 81.

144 *See in detail* Schroeter, 2014, *supra* note 26, pp. 81–83.

145 *See* Schlechtriem & Schroeter, 2013, *supra* note 19, Paras. 112–113.

146 *See* already *supra* at 3.3.2.1.

147 *Supra* at 3.3.2.1.

cannot realistically be modified.[148] In contrast, the position of an initially hesitant reserving State can be modified, namely through the withdrawal of its reservation.

3.3.2.2.4 *Conclusion*

As a second intermediate result, we can accordingly conclude that a more ambitiously framed uniform private law text in combination with authorized reservations eventually results in a 'wider' uniformity than a narrower uniform private law text without reservations. Insofar, reservations serve as a tool contributing to the international unification of laws.

3.3.2.3 Limits

There are, however, inherent limits to the use of reservations as a tool enabling a wider uniformity. These limits are on the one hand reached whenever an authorized reservation is built 'for eternity' (and will accordingly never be withdrawn), as such reservations do not aim at providing a mere 'test drive'[149] of the new uniform law convention. To a certain extent, Article 93 CISG falls into this category (to be addressed in more detail below[150]). On the other hand, the more positive view proposed here does not apply to reservations that are so far-reaching as amounting to a rejection of the uniform law's content in disguise: Little is gained by adding a Contracting State that has opted out of too much, creating the risk that the entire convention 'may ultimately be perceived as a mere sham, form with no substance'.[151]

A prominent example of the latter type of reservation was Article V of the 1964 Hague Convention relating to a Uniform Law on the International Sale of Goods (ULIS). It read:

> Any State may, at the time of the deposit of its instrument of ratification of or accession to the present Convention declare, by a notification addressed to the Government of the Netherlands, that it will apply the Uniform Law only to contracts in which the parties thereto have, by virtue of Article 4 of the Uniform Law, chosen that Law as the law of the contract.

Under the 1964 Hague Convention, the United Kingdom and the Gambia both made use of this reservation. The effect has been striking: Although the 1964 Convention has been in force for both countries since 1972 and 1974, respectively, and still is in force today, not a single case has ever been reported from the United Kingdom or the Gambia in which the ULIS was applied. The reason is that – according to Article V – the ULIS applies to a contract of sale only if it has been specifically chosen by the parties to the contract as the

148 Schroeter, 2005, *supra* note 21, § 13, Para. 60.
149 *Supra* at 3.3.2.1.
150 *Infra* at 3.5.2.
151 Gillette & Scott, 2005, *supra* note 14, p. 469.

law thereof, and such a positive choice is hardly ever made in practice.[152] The reservation has rendered the 1964 Uniform Sales Law accordingly meaningless in the two reserving States.

At the 1980 Diplomatic Conference in Vienna, proposals were nevertheless made to include in the Sales Convention a reservation similar to the one mentioned above.[153] In their support, the Australian delegate suggested that the reservation would reassure businessmen in some countries and would maximize the number of States which would ratify the Convention.[154] Luckily, the proposals met with overwhelming opposition and were eventually rejected. In support of their rejection, delegates in Vienna pointed out that States using this type of 'opting in' reservation would in consequence have almost no obligations under the Convention[155] and could hardly be counted as Contracting States.[156] And indeed: In view of their extent, reservations of the type described do not qualify as tools enabling a wider uniformity of uniform private law, irrespective of their withdrawability. In fact, they would arguably go beyond being sources of some non-uniformity by "upset[ting] the whole process of progress towards the unification of private law"[157] – a situation that should be avoided.

3.4 DIFFICULTIES IN PRACTICE UNDER THE CONVENTION

Even if reservations are viewed as a merely temporary restriction of the Convention's applicability,[158] reservations that have been made temporarily affect the Convention's practical application until they are withdrawn. (And as the example of the Scandinavian Article 92 reservations[159] demonstrates, 'temporarily' may well mean 22 years or more.) It is therefore of interest to briefly evaluate the practical effects that the CISG's reservations have had in the past 35 years.

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152 Lord Collins of Mapesbury (Ed.), *Dicey, Morris & Collins on The Conflict of Laws*, 15th edn, Sweet & Maxwell, London, 2012, Paras. 33-019. Interestingly, contractual clauses specifically choosing the CISG as the applicable law are nowadays becoming more and more common in practice; *see, e.g. Distributor Z (U.S.) v. Company A (Mexico), Distributor B (U.S.)*, Final Award, ICC Case No. 13184, *Yearbook Commercial Arbitration*, Vol. XXXVI, 2011, p. 96 at p. 101: "This agreement shall be governed and interpreted in accordance with the United Nations Convention on Contracts for the International Sale of Goods and, as to matters not addressed in that Convention, by and in accordance with Mexican law applicable in Mexico City."

153 *Official Records*, p. 144.

154 *Official Records*, p. 437.

155 Remark by delegate Plantard (France), *Official Records*, p. 438 No. 53.

156 Remark by delegate Tarko (Austria), *Official Records*, p. 437 No. 42.

157 Remark by delegate Plantard (France), *Official Records*, p. 438 No. 53; in agreement Winship, 1984, *supra* note 106, pp. 1-49.

158 *See supra* 3.3.2.1.

159 *See* Id; Andersen, 2013, *supra* note 25, pp. 9–10; Andersen, 2012, *supra* note 110, p. 708; Neumann, 2013, *supra* note 25.

In doing so, the focus will once more not be on the way in which each reservation has resulted in the non-application of certain CISG provisions, but rather on general difficulties that have emerged in practice. As will be shown, all of those difficulties can essentially be traced back to one and the same reason, namely the nature of reservations as instruments of treaty law that affect the application of uniform sales law to contracts between private parties.[160]

3.4.1 *Reservations Overlooked by Courts*

In a number of cases, courts simply overlooked CISG reservations they should have taken into account in deciding the cases before them. A reason for these mistakes may have been the position of reservations that are tucked away in the far corners of the Sales Convention, in a Part titled 'Final Clauses' that may seem as if directed at government officers only. In this respect, another prominent convention in the area of international commerce – the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards – is structured somewhat differently, as its drafters positioned two of the reservations authorized thereunder (the 'reciprocity reservation' and the 'commercial reservation') directly in Article I(3) of the New York Convention. This approach made these reservations more difficult to overlook, as they form part and parcel of the Convention's introductory provision. In contrast, courts have to read the Sales Convention's text from beginning to end, because its Article 1 does not explicitly refer to the reservations in Articles 92–95 CISG – a factor which may well affect the Convention's application.[161]

Another factor that appears to affect the relevant court practice is the court's location inside or outside a reserving State. Reservations have been more frequently overlooked by courts in Contracting States that had not themselves made a reservation but were called upon to apply the Sales Convention in constellations in which they had to take a reservation made by another Contracting State[162] into account.[163] This phenomenon is not entirely surprising, as it is in conformity with observations from general treaty practice where

160 *See supra* at 3.1.1.

161 *But see* Article 12 CISG, which largely duplicates the language of Article 96 CISG in order 'to draw attention to the fact that [the freedom-of-form rule in Article 11 CISG] might be affected by a reservation'; Honnold, 2009, *supra* note 38, Para. 129 note 2.

162 Reservations authorized by Articles 92, 93, 94 and 96 CISG (but not the one authorized by Article 95 CISG) must be observed by courts in all contracting states, although this is far from undisputed. *See in detail* Schroeter, 2008, *supra* note 20, pp. 444–447.

163 Examples are Oberlandesgericht Naumburg (Germany), 27 April 1999, CISG-online 512 = *Transportrecht – Beilage Internationales Handelsrecht* (2000), pp. 22–23 (Danish Art. 92 CISG reservation overlooked); Oberlandesgericht Frankfurt am Main (Germany), 4 March 1994, CISG-online 110 (Swedish Art. 92 CISG reservation overlooked); critical assessment of these decisions by M.M. Fogt, 'Rechtzeitige Rüge und Vertragsaufhebung bei Waren mit raschem Wertverlust nach UN-Kaufrecht', *Zeitschrift für Europäisches Privatrecht*, 2002, p. 580 at p. 587 note 22.

reservations made by other States are frequently given less attention than reservations declared by the home State.[164] An explanation in case of uniform law conventions is that a reserving State's government will take better care to provide its domestic courts with information about the reservations it has declared than about foreign reservations – when it comes to reservations of the latter kind, courts are often required to make do with information published by the convention's depositary.

Nevertheless, reservations have occasionally also been overlooked by a reserving State's own domestic courts.[165] And finally, there have been cases in which the court had noticed the possible effect of a foreign reservation but refused to address the matter *ex officio* because the parties had failed to raise the CISG's applicability to the dispute.[166]

3.4.2 *Uncertainty Created by Reservations*

In cases in which reservations were not outright overlooked by courts, the primary difficulty in practice has been a frequent uncertainty about reservations' meaning. Uncertainty of this kind has demonstrated itself both in the context of the making of reservations by States[167] and, maybe even more important, of court and arbitral proceedings applying the Sales Convention to sales contracts.[168]

3.4.2.1 Uncertainty Affecting Contracting States Making a Reservation

The first group among a reservation's addressees that can be affected by uncertainty are government officials in States that are about to ratify, accept, approve or accede to the Sales Convention. In spite of John Honnold's confident statement that "[t]hese matters are handled by government officers who have experience with similar provisions in other conventions",[169] there have been indications that the making of reservations is occasionally a matter of difficulty. The CISG itself provides little guidance in this respect: Article 98

164 Swaine, 2006, *supra* note 110, p. 327.

165 *See* Oberlandesgericht Düsseldorf (Germany), 2 July 1993, *Journal of Law and Commerce*, Vol. 16, 1997, pp. 357–362, where the Court did not address the interpretative declaration regarding the application of Article 95 CISG that has been made by Germany. The wording of this declaration reads: "The Government of the Federal Republic of Germany holds the view that Parties to the Convention that have made a declaration under article 95 of the Convention are not considered Contracting States within the meaning of subparagraph (a) (b) of article 1 of the Convention. Accordingly, there is no obligation to apply – and the Federal Republic of Germany assumes no obligation to apply – this provision when the rules of private international law lead to the application of the law of a Party that has made a declaration to the effect that it will not be bound by subparagraph (1) (b) of article 1 of the Convention. Subject to this observation the Government of the Federal Republic of Germany makes no declaration under article 95 of the Convention."

166 *Standard Bent Glass Corp. v. Glassrobots Oy*, U.S. Court of Appeals for the Third Circuit (United States), 20 June 2003, 333 F.3d 440. *See in more detail* Spagnolo, *supra* note 13, pp. 285–297.

167 *Infra* at 3.4.2.1.

168 *Infra* at 3.4.2.2.

169 Honnold, 2009, *supra* note 38, Para. 458.

CISG limits reservations to those expressly authorized in the Convention, and Article 97 CISG addresses formal aspects[170] of declarations to be made under the Convention's final provisions. The actual wording of reservations, on the contrary, has traditionally been left to the reserving State's officials, and the 1980 Sales Convention continues this tradition by giving them no orientation apart from the language of Articles 92–96 CISG.

Where the language of these provisions contains uncertainties (even if only in the eyes of the government official concerned), these uncertainties may result in the making of unclear reservations.[171] Under the Sales Convention, a much-discussed example was the reservation against oral contracts made by the People's Republic of China in 1986 (but since withdrawn[172]), which deviated from the language of Article 96 CISG, albeit in only minor respects.[173] A both more recent and more intriguing example is the ('second'[174]) Armenian declaration made by the Republic of Armenia upon its accession to the Sales Convention in 2008. It reads:

> Pursuant to Article 95 of the Convention, the Republic of Armenia declares that it will not apply the Article 1, subparagraph (1)(b) of the Convention to the parties that declare not to be bound by the Article 1, subparagraph (1)(b) of the Convention.

The meaning of this declaration is not entirely clear, and its wording is quite obviously not in conformity with Article 95 CISG, despite its express reference to this provision. While one can only speculate about the precise purpose and historical background of the declaration, it can be surmised that its drafters were uncertain about the meaning of Article 95 CISG and therefore attempted to provide a clarification in their declaration. In doing so, they may have overlooked Article 98 CISG. (Note that Armenia on the same occasion also entered a reservation against oral contracts and that the wording of this declaration was framed in perfect conformity with Article 96 CISG.)

It is a somewhat unfortunate effect of the unclear Armenian declaration (as of any other unclear declaration) that the uncertainty that affected government officials is thereby transferred into private practice under the Convention, with courts and arbitral tribunals

170 Id.

171 *See* Schroeter, 2008, *supra* note 20, pp. 449–452.

172 *Infra* at 3.3.2.1.

173 *See* X. Wang & C.B. Andersen, 'The Chinese Declaration against Oral Contracts under the CISG', *Vindobona Journal of International Commercial Law and Arbitration*, Vol. 8, 2004, p. 145 at p. 146; Schroeter, 2008, *supra* note 20, pp. 450–451.

174 The 'first' Armenian declaration was made when Armenia deposited an instrument of accession in 2006, but subsequently withdrew its declaration of accession before the Sales Convention could enter into force for Armenia. Interestingly, this 'first' declaration also had an unclear content; *see in more detail* Schroeter, 2008, *supra* note 20, pp. 449–450.

having to determine the declaration's precise effect.[175] A pragmatic solution would be to simply apply the declaration in full accordance with its wording, as supported by Article 31(1) of the 1969 Vienna Convention on the Law of Treaties. This would probably mean that the Armenian 'Article 95-style' reservation would have no scope in practice, as it must be considered highly unlikely that the parties to any sales contract will ever expressly declare not to be bound by Article 1(1)(b) CISG, as the reservation's wording presupposes. (Arguably, this result would not even be an undesirable outcome.)

3.4.2.2 Uncertainty Affecting Judges and Arbitrators

3.4.2.2.1 General

Throughout practice under the Sales Convention, the more important group to be affected by reservation-induced uncertainty are nevertheless judges, arbitrators and attorneys advising buyers or sellers. While such uncertainty may on occasion arise from individual Contracting States' declarations (as just mentioned[176]), it is more often created by Articles 92–96 CISG themselves. The reason can – again – be traced to the dual character of reservations under uniform private law conventions, being creatures of treaty law and of uniform private law at the same time.[177] It is the resulting need of judges at civil and commercial courts to also handle the treaty law side of reservations that may give rise to difficulties: Even experienced judges are presumably puzzled when faced with provisions that were drawn up against a public international law background, with the obligations of States as sovereign entities in mind.

3.4.2.2.2 Uncertainty under Specific CISG Reservations

The experience of 35 years demonstrates, however, that the risk of uncertainty is not the same under each of the CISG's reservations. It rather depends on the manner in which the reservations were drafted and notably the care that was taken in spelling out their effect upon the Convention's application to individual sales contracts. In this respect, the numerical order of Articles 92–96 CISG happens to correspond to the easiness in which the reservations have been applied by courts and arbitral tribunals, with an imaginary curve commencing with the two easiest-to-apply (Articles 92 and 93 CISG) and making its way downhill via an intermediate degree of easiness (Article 94 CISG) towards the reservations that have caused the most difficulties (Articles 95 and 96 CISG).

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175 *See also* Schroeter, 2008, *supra* note 20, pp. 451–452.
176 *Supra* at 3.4.2.1.
177 *See already supra* at 3.1.1.

3.4.2.2.2.1 Articles 92 and 93 CISG

A prize for excellent drafting goes to Article 92 CISG, which reads:

> 1. A Contracting State may declare at the time of signature, ratification, acceptance, approval or accession that it will not be bound by Part II of this Convention or that it will not be bound by Part III of this Convention.
> 2. A Contracting State which makes a declaration in accordance with the preceding paragraph in respect of Part II or Part III of this Convention is not to be considered a Contracting State within paragraph (1) of article 1 of this Convention in respect of matters governed by the Part to which the declaration applies.

Article 92 CISG is divided into two paragraphs, with Article 92(1) CISG addressing the public international law side of the reservation ("... that it [*i.e.* the reserving State] will not be bound by...") and Article 92(2) CISG clearly stipulating the reservation's effect upon the Convention's application in private court cases (in which the reserving State is not to be considered a Contracting State when the court applies Article 1(1) CISG). Article 92(2) CISG is therefore specifically addressed to courts and arbitral tribunals and prevents them from having to 'translate' a reservation framed in treaty law terminology into a rule that works in the context of the Sales Convention's sphere of application.[178]

Article 93 CISG has a similar, although slightly more complicated structure, within which Article 93(3) CISG fulfils the same function as Article 92(2) CISG.[179] It is worth noting that a comparable paragraph had still be missing from the older federal State clause in Article 31 of the 1974 United Nations Convention on the Limitation Period in the International Sale of Goods, which only addressed the public international law side of the reservation. After this had been noted, today's Article 93(3) CISG was added during the 1980 Vienna Diplomatic Conference with an aim towards "providing a gloss for the term 'Contracting State' in relation to the federal State clause, something that had been omitted in the 1974 Limitation Convention".[180] (On the same occasion, the Limitation Convention was revised by way of a 1980 Protocol, and a similar paragraph was included in its Article 31(4).)

3.4.2.2.2.2 Article 94 CISG

In comparison, Article 94 CISG remained without a clear counterpart to Articles 92(2) and 93(3) CISG. Instead, Article 94(1) and (2) CISG as adopted primarily focus on the

178 *See* Schroeter, 2008, *supra* note 20, p. 431.

179 Schroeter, 2008, *supra* note 20, p. 445. On the slight difference in the language of Article 92(2) CISG and Article 93(3) CISG *see already supra* at 3.2.1.2.2.

180 *Official Records*, p. 445.

reservation's public international law side by providing that Contracting State(s) "may a any time declare that the Convention is not to apply to contracts of sale or to their formatio where ...". The reservation's effect in practice is only addressed indirectly by the word: "that the Convention is not to apply", which has resulted in a heated dispute whether ar Article 94 reservation needs to be observed only by courts in a reserving State[181] or by al courts applying the Convention.[182] A clear provision along the lines of Articles 92(2) anc 93(3) CISG could have prevented this uncertainty from emerging in the first place.

3.4.2.2.2.3 Articles 95 and 96 CISG

Article 95 CISG was drafted even more one-sided when it provides that "[a]ny 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". Couched in classical public international law terms,[183] Article 95 CISG thereby merely excludes the reserving State's duty under public international law to apply Article 1(1)(b) CISG,[184] but entirely fails to specify what this means for the Convention's application by courts and arbitral tribunals. This uncertainty, which can be traced to the provision's last-minute addition[185] and the resulting lack of scrutiny at the drafting stage,[186] has given rise to extensive discussions among CISG commentators.[187]

The same essentially applies to the reservation of Article 96 CISG, albeit in a slightly different way: In Article 12 CISG, Article 96 CISG is even being accompanied by a sister provision placed in Part I of the Sales Convention, which is clearly directed at courts in Contracting States (and maybe also at arbitral tribunals[188]). The language of Article 12 CISG, however, was apparently not drafted sufficiently clearly in that it uses an expression similar to Article 94(1), (2) CISG ("does not apply" in Article 12 CISG, as opposed to "is not to apply" in Article 94(1), (2) CISG)[189] and has in consequence given rise to a similar

181 De Ly, 2005–2006, *supra* note 71, p. 10; Ferrari, 2013, *supra* note 38, Art. 94, Para. 3; R. Herber & B. Czerwenka, *Internationales Kaufrecht*, C.H. Beck Publishing, Munich, 1991, Art. 94, Para. 8; Mankowski, 2011, *supra* note 40, Art. 94 CISG, Para. 14.

182 Flechtner, 1998, *supra* note 38, p. 194; Honnold, 2009, *supra* note 38, Para. 46.1; Magnus, 2013, *supra* note 38, Art. 94, Para. 7; Schlechtriem, Schwenzer & Hachem, 2010, *supra* note 38, Art. 94, Para. 7; Schroeter, 2008, *supra* note 20, pp. 444–445; Torsello, 2000, *supra* note 38, p. 97.

183 Schroeter, 2008, *supra* note 20, p. 440.

184 *See* CISG Advisory Council Opinion No. 15, 2014, *supra* note 26, pp. 120–121 (Opinion 1 and Comments 3.17–3.19).

185 *Supra* at 3.2.2.2.

186 G.F. Bell, 'Why Singapore Should Withdraw Its Reservation to the United Nations Convention on Contracts for the International Sale of Goods (CISG)', *Singapore Year Book of International Law*, Vol. 9, 2005, p. 55 at p. 62; Schroeter, 2008, *supra* note 20, p. 431.

187 CISG Advisory Council Opinion No. 15, 2014, *supra* note 26, p. 116 Comments 3.12–3.17.

188 On the difficult question whether the Sales Convention is (in a technical sense) directly addressed at arbitral tribunals, *see* Schlechtriem & Schroeter 2013, *supra* note 19, Para. 33; N. Schmidt-Ahrendts, 'CISG and Arbitration', *Belgrade Law Review*, 2011, p. 211 at 214.

189 Honnold, 2009, *supra* note 38, Para. 129, admits that the language of Article 12 CISG 'is difficult to parse'.

amount of academic dispute, as well as divergent case law.[190] As a result, Articles 95 and 96 CISG may eventually have caused more uncertainty than the other three CISG reservations combined.[191]

3.4.2.2.3 *Summary*

In summary, it is helpful to recall a remark once made by a delegate during the preparation of the 1988 United Nations Convention on International Bills of Exchange and International Promissory Notes, who pointedly said that

> [t]he provision in question [Article 30 of the 1969 Vienna Convention on the Law of Treaties] was more suitable for Judges of the International Court of Justice at The Hague than for the judges of domestic commercial courts. It was essential to regulate the matter by way of a clear provision, drafted in precise and habitual terms.[192]

In case of the Sales Convention's reservations, this important guideline has not always been sufficiently observed. (The only upside of this neglect may be that it has given certain authors something to write about.)

3.5 Looking Forward to the Next 35 Years: The (Likely) Role of Reservations in Future CISG Practice

When attempting a look into the Sales Convention's future with an aim towards identifying its reservations' role in the years to come, three prognoses come to mind.

3.5.1 *The Continuing Trend to Withdraw Reservations*

3.5.1.1 Reasons for the Trend

The recent trend among CISG Contracting States to withdraw reservations in accordance with Article 97(4) CISG that has been referred to earlier[193] as well as elsewhere[194] is likely to continue in the years to come. This prognosis is supported by three different reasons: First, general policy arguments militate in favour of further withdrawals, as they reduce

190 CISG Advisory Council Opinion No. 15, 2014, *supra* note 26, p. 116 Comments 4.15–4.20.
191 *See in detail* CISG Advisory Council Opinion No. 15, 2014, *supra* note 26.
192 *See* Winship, 1990, *supra* note 8, p. 728.
193 *Supra* at 3.3.2.1.
194 Andersen, 2012, *supra* note 110, pp. 706–709; Schroeter, 2015, *supra* note 16, pp. 2–4.

the potential for confusion in the Convention's practical application.[195] Second, principles of treaty law as embodied in the International Law Commission's 'Guide to Practice on Reservations to Treaties' call upon reserving States to undertake a periodic review of their reservations and consider withdrawing those which no longer serve their purpose.[196] And third, the view proposed here that characterizes reservations as a uniformity-enabling tool[197] implies that States withdraw reservations once the initial reasons against a full accession[198] or the uncertainty about the Convention's application in practice[199] have disappeared – a point that has arguably been reached at least as far as the written form reservation under Article 96 CISG is concerned.[200] (Rumour has it that Hungary will therefore withdraw its Article 96 reservation in the near future.)

3.5.1.2 Potential Withdrawals of Article 95 CISG Reservations

It will be particularly interesting to see when future withdrawals will affect those two reservations that have hitherto remained (almost[201]) untouched by withdrawals, namely the reservations under Articles 94 and 95 CISG.

With respect to Article 95 reservations, discussions about a possible withdrawal have been reported from a number of reserving States: In the United States, the matter was investigated in 2012 at a meeting of the State Department Advisory Committee on Private International Law,[202] but the view among CISG experts from the United States apparently remains divided.[203] Indications for an upcoming withdrawal of its Article 95 reservation have also been reported from the People's Republic of China.[204] In addition, academic commentators have in the past voiced pleas in favour of similar withdrawals to be made

195 *See* CISG Advisory Council Declaration No. 2, *Use of Reservations under the CISG*, Rapporteur: Schroeter, 2014, *supra* note 26, pp. 131–132; Giegerich, 2010, *supra* note 10, Para. 5.

196 International Law Commission, *supra* note 43, Para. 2.5.3.

197 *See supra* at 3.3.2.

198 *Supra* at 3.3.2.2.

199 *Supra* at 3.3.2.1.

200 *See* Schroeter, 2014, *supra* note 26, p. 89.

201 Canada in 1992 withdrew an Article 95 CISG reservation, which it had initially (in combination with a declaration under Article 93 CISG) made only for the province of British Columbia.

202 *See* P. Winship, 'Should the United States withdraw its CISG Article 95 Declaration?', State Department Advisory Committee on Private International Law Annual Meeting, The George Washington University Law School, Washington, DC, 11–12 October 2012.

203 *Cf.* H.M. Flechtner, Letter to K. Loken, Assistant Legal Adviser, Office of Private International Law (30 January 2012); A. *Markel*, 'American, English and Japanese Warranty Law Compared: Should the U.S. Reconsider Her Article 95 Declaration to the CISG?', *Pace International Law Review*, Vol. 21, 2009, p. 163 at pp. 199–203; F.G. Mazzotta, 'Reconsidering the CISG Article 95 Reservation Made by the United States of America', *International Trade and Business Law Review*, Vol. XVII, 2014, pp. 442–446; Winship, 2012, *supra* note 202.

204 Andersen, 2013, *supra* note 25, pp. 11–12; W. Li, 'On China's Withdrawal of Its Reservation to CISG Article 1(b)', *Renmin Chinese Law Review*, Vol. 2, 2024, p. 300 at pp. 313–318; Spagnolo, 2014, *supra* note 13, p. 71.

by other reservation States,[205] as, *e.g.* Singapore.[206] Until today, none of these initiatives has resulted in a declaration of withdrawal being formally notified to the Convention's depositary in accordance with Article 97(2), (4) CISG.

It is submitted that a withdrawal of Article 95 reservations would – of course – be a useful contribution to further uniformity under the Sales Convention, but from a comparative perspective does not rank as a high priority. This is due to the effect of this reservation, which (only[207]) excludes the reserving State's obligation to apply Article 1(1)(b) CISG.[208] This very provision, however, has today lost much of its practical importance, because the Convention now applies in accordance with Article 1(1)(a) CISG in the vast majority of cases, given that the number of CISG Contracting States has reached 83.[209] Any withdrawal of an Article 95 reservation would therefore merely open up a second avenue towards the application of the Convention that, in practice, would rarely come into play anyway.

3.5.1.3 Less Likely Withdrawals of Article 94 CISG Reservations

Compared to Article 95 reservations, a withdrawal of Article 94 reservations would be both more valuable for the uniform application of the Sales Convention and more unlikely to occur in the foreseeable future. The greater value of such a withdrawal arises from the more far-reaching effect of Article 94 reservations, which exclude the application of the entire Convention whenever they apply, even if only to contracts between parties residing in reservation States (currently: the intra-Nordic trade). That the Scandinavian States are nevertheless unlikely to initiate a withdrawal of their Article 94 reservations is indicated by recent developments:

Although Scandinavian commentators have for some time suggested that Denmark, Finland, Iceland, Norway and Sweden should withdraw their respective reservations under Article 94 CISG,[210] they admitted as recently as 2012 that 'there is currently little support among Scandinavian legislators for that proposal'.[211] In fact, there more recently has been a rather clear sign against such a withdrawal, as Denmark, Finland, Norway and Sweden

205 Castellani, 2014, *supra* note 49, p. 685.

206 Bell, 2005, *supra* note 186, p. 55.

207 *See* in a similar sense the observation of delegate Novossiltsev (USSR) during the 1980 Vienna Conference, *Official Records*, p. 439: 'The proposed reservation [Article 95 CISG] would represent a very small departure from the Convention compared with the acceptance of by States of Part II or Part III only' [as allowed under Article 92 CISG].

208 *See* CISG Advisory Council Opinion No. 15, 2014, *supra* note 26, pp. 120–121 (Opinion 1 and Comments 3.17–3.19).

209 Bridge, 2013, *supra* note 41, Para. 10.57; Spagnolo, 2014, *supra* note 13, p. 71.

210 M.M. Fogt, 'The Stipulation and Interpretation of Freight Prepaid Delivery Clauses under the CISG – Preliminary Considerations for Reform of Part II of the CISG and a Limited Withdrawal of Scandinavian Declarations', *European Legal Forum*, 2003, p. 61, at pp. 64–65; J. Lookofsky, 'The CISG in Denmark and Danish Courts', *Nordic Journal of International Law*, Vol. 80, No. 3, 2011, p. 295 at pp. 301–302.

211 Lookofsky, 2012, *supra* note 38, § 8.6.

even extended their Article 94 reservations when they withdrew their Article 92 reservations in 2011–2014:[212] In that context, they declared that

> [i]n addition to the previous declaration made under Article 94 [...] the Convention will not apply to the formation of contracts of sale where the parties have their places of business in Denmark, Iceland, Finland, Sweden or Norway.[213]

They thereby extended the already existing non-application of the Convention between Scandinavian parties in sale of goods matters (resulting from the existing reservations under Article 94 CISG) also to matters of contract formation that had previously been covered by the Article 92 reservations concurrently withdrawn. This combination of Article 92 CISG withdrawals with new Article 94 CISG reservations indicates the Nordic countries' intention to make sure that the application of the Sales Convention to the inter-Scandinavian trade will continue to be excluded.[214]

Against this background, it must seem unlikely that they will in the near future withdraw the very reservations they so recently confirmed.

3.5.2 *A Reservation Here to Stay: The Federal State Clause (Article 93 CISG)*

Another reservation that is here to stay, albeit for a different reason, is Article 93 CISG.[215] It becomes apparent when looking in more detail at the purposes for which the Sales Convention's 'federal State clause' has been used in treaty practice. Two purposes can be distinguished:

The first is the making of an Article 93 reservation in order to allow a federal State to adopt the CISG incrementally as the adopting legislation goes through the separate legislatures of each of the territorial units of that State.[216] Where it is used to this end, the federal State clause works in conformity with the general view described earlier[217] that regards reservations as a uniformity-enabling tool; it thus leads to a merely temporary reduction of uniformity. A practical example was the adoption of the Sales Convention by Canada: Upon accession to the Convention in 1991, the Government of Canada declared, in accordance with Article 93 CISG, that the Convention will extend to the provinces of

212 *See* Schlechtriem & Schroeter, 2013, *supra* note 19, Para. 811.

213 Declaration by Denmark of 2 July 2012. (The other Scandinavian States made declarations that were identical or similar.)

214 Schroeter, 2015, *supra* note 16, pp. 7–8.

215 *See on* Article 93 CISG already *supra* at 3.2.1.2.2.

216 Bridge, 2013, *supra* note 41, Para. 10.54 note 402.

217 *See supra* at 3.3.2.

Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland, Nova Scotia, Ontario, Prince Edward Island and the Northwest Territories. In April 1992, it then declared the Convention to apply also to Quebec and Saskatchewan,[218] before further extending the CISG to the Territory of the Yukon (in June 1992) and – although only a decade later (in 2003) – to the Territory of Nunavut.

It is the second purpose that may give Article 93 CISG an 'eternal' character. Federal State clauses can also be used in deference to local or regional particularities that exist in certain territorial units of a federal State, geographical or otherwise. Where this is the case, the reservation is likely to stay in effect as long as these particularities remain unchanged. Under the Sales Convention, all Article 93 reservations currently in force seem to fall into this category: Australia has declared that the Convention shall not apply to the territories of Christmas Island, the Cocos (Keeling) Islands and the Ashmore and Cartier Islands; Denmark has declared that the Convention shall not apply to the Faroe Islands and Greenland and New Zealand has declared that the Convention shall not apply to the Cook Islands, Niue and Tokelau. In present practice under the Convention, the Article 93 reservation is accordingly a pure 'island reservation'. The special geographical situation of islands, often reflected in their special status under domestic constitutions, means that these reservations are unlikely to be withdrawn. At the same time, the amount of international trade conducted by parties from those islands is very limited. From a practical perspective, the effect of Article 93 CISG upon the Convention's application is therefore close to zero.[219]

(It is another, more difficult question whether the status of the important international trading hub Hong Kong and of Macao is equally covered by Article 93 CISG or not – a question that has been addressed in more detail elsewhere.[220])

218 Canada thereby used the option offered by Article 93(1) CISG *in fine* to 'amend' a declaration under the federal State clause 'at any time', which has to be distinguished from the withdrawal of a reservation as authorized by Article 97(4) CISG. A later amendment through unilateral declaration is not expressly foreseen for any other CISG reservation.

219 For a similar assessment, *see* De Ly, 2005–2006, *supra* note 71, p. 10; Magnus, 2013, *supra* note 38, Art. 93, Para. 8.

220 **M. Buschbaum, 'Anwendbarkeit des** UN-Kaufrechts im **Verhältnis zu Hongkong'**, ***Praxis des Internationalen Privat- und Verfahrensrechts,*** **Vol.** 24, 2004, **p. 546**; U.G. **Schroeter, 'The Status of Hong Kong and Macao under the United Nations Convention** on **Contracts** for the **International Sale of Goods'**, ***Pace International*** *Law Review*, Vol. **16, 2004**, p. 307; F. Yang, 'A Uniform Sales Law for the Mainland China, Hong Kong SAR, Macao SAR and **Taiwan** – the CISG', *Vindobona Journal of International Commercial Law and Arbitration*, Vol. 15, 2011, p. **345.**

3.5.3 *A Reservation Which May Gain in Importance: Article 94 CISG as a Tool to Accommodate a Regionalisation of Uniform Law Making*

Finally, there is one reservation authorized by the Sales Convention, which may potentially gain in importance in the future, namely Article 94 CISG. In addition to the current use of this reservation by the Nordic States that was addressed earlier,[221] Article 94 CISG could also be used in order to give precedence to other uniform law rules shared between certain CISG Contracting States.[222] The existing trend towards a regionalisation of uniform law making that has been much discussed in legal writing[223] may give rise to such rules that then would compete with the CISG. Certain rules, notably those emerging from European Union directives, arguably already do so, albeit only with respect to limited subject matters.[224] Rules made by other regional economic international organisations (REIOs) may follow.

As long as no Contracting State takes any action to the contrary, regionally unified or harmonised laws remain pre-empted by the Sales Convention in accordance with general rules governing the relationship between the Convention and other rules of law.[225] There may, however, be pressure upon Contracting States to give precedence to regional law that may, *e.g.* result from a duty to guarantee the full application of rules issued by regional organisations. A possible source of such a duty is Article 351(2) of the Treaty on the Functioning of the European Union, which obliges EU Member States to "take all appropriate steps to eliminate the incompatibilities established" to the extent that a concurrent international agreement (as, *e.g.* the CISG) is not compatible with EU Treaties or EU secondary law. As an appropriate step of this kind is notably the denunciation of a concurrent treaty,[226] the European Commission could theoretically request EU Member States, which have ratified the Sales Convention to denounce the Convention in accordance with Article 101 CISG.[227] Should a Member State refuse to comply with such a request, the Commission

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221 *Supra* at 3.5.1.3.

222 S. Leible, 'Konflikte zwischen CESL und CISG – Zum Verhältnis zwischen Art. 351 AEUV und Artt. 90, 94 CISG', *in* P. Mankowski & W. Wurmnest (Eds.), *Festschrift für Ulrich Magnus zum 70. Geburtstag*, Sellier European Law Publishers, Munich, 2013, p. 615; Mankowski, 2011, *supra* note 40, Art. 94 CISG, Para. 5; Schroeter, 2005, *supra* note 21, § 10.

223 *See more recently* the chapters in U. Magnus (Ed.), *CISG vs. Regional Sales Law Unification*, Sellier European Law Publishers, Munich, 2012; E.T. Laryea, 'Globalizing International Trade Investment and Commercial Laws Through Regionalism: The Prospects', *in* I. Schwenzer & L. Spagnolo (Eds.), *Globalization versus Regionalization*, Eleven, The Hague, 2013, pp. 57–77; U.G. Schroeter, 'Global Uniform Sales Law – With a European Twist? CISG Interaction with EU Law', *Vindobona Journal of International Commercial Law and Arbitration*, Vol. 13, 2009, pp. 179–180.

224 *See in detail* Schroeter, 2005, *supra* note 21, § 6 and § 15.

225 Schroeter, 2005, *supra* note 21, §§ 7–15; Schroeter, 2009, *supra* note 223, p. 190.

226 *European Commission v. Portugal*, European Court of Justice, 7 July 2000, Case C-84/98; *Budějovický Budvar, národní podnik v. Rudolf Ammersin GmbH*, European Court of Justice, 18 November 2003, Case C-216/01.

227 Schroeter, 2005, *supra* note 21, § 13, Para. 59.

could initiate an action under Article 226 of the Treaty on the Functioning of the European Union before the European Court of Justice against the State for failure to fulfil obligations. (In recent years, the European Commission has increasingly brought such actions for failure to adopt appropriate measures to eliminate incompatibilities with the EC Treaty of Bilateral Investment Treaties (BITs) entered into with third countries prior to the respective Member States' accession to the European Union.[228] It could do the same with respect to the Sales Convention.)

Against this background, a reservation in accordance with Article 94 CISG would constitute a preferable alternative to the complete denunciation of the Sales Convention.[229] The making of such a reservation would grant European Union law precedence over the CISG's rules but would leave the Convention in force. From the perspective of global uniform sales law, this is the lesser of two evils when compared with the all-or-nothing solution offered by Article 101 CISG.[230] And from the perspective of European Union law, the making of an Article 94 CISG reservation would constitute a sufficient elimination of possible incompatibilities between the two legal regimes:[231] In its recent case law, the European Court of Justice has held that provisions reserving the application of EU law that are contained in concurrent international agreements may serve to eliminate incompatibilities.[232] In particular, the ECJ mentioned "a clause which would reserve certain powers to regional organisations" (commonly referred to as 'REIO clause') and expressly acknowledged "that such a clause should, in principle, as the Commission admitted at the hearing, be considered capable of removing the established incompatibility".[233]

Having said this, it should be kept in mind that – as discussed earlier[234] – it is one matter for the Sales Convention to authorize a certain reservation, but quite another whether Contracting States will or should make use of it. Where the choice is between the CISG and regionally unified law, it is submitted that the Sales Convention should preferably be left untouched, as cross-border trade is best served by a globally unified sales law.[235] Article 94 CISG should accordingly offer no more than a last resort in case that political pressure imposes a different choice.

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228 *See, e.g. European Commission v. Austria*, European Court of Justice, 3 March 2009, Case C-205/06.

229 Note that contrary to the CISG's reservations under Articles 92, 93 and 95 CISG and also contrary to the residuary rule in Article 19 of the 1969 Vienna Convention on the Law of Treaties, an Articles 94 CISG reservation may not only be made by a state when signing, ratifying, accepting, approving or acceding to the Convention but also at any time thereafter. On the relationship of reservations and denunciations from a general treaty law perspective *see also* Helfer 2006, *supra* note 124, pp. 379–381.

230 Schroeter, 2005, *supra* note 21, § 13, Para. 59.

231 *Contra* Leible, 2013, *supra* note 222, p. 614.

232 *European Commission v. Austria*, *supra* note 228, Para. 32.

233 Id, Paras. 41–42.

234 *Supra* at 3.2.2.1.

235 Schroeter, 2009, *supra* note 223, p. 189.

3.6 CONCLUSION

The present chapter has tried to provide an overview of the experiences that have been made with the 1980 Sales Convention's reservations during their first 35 years, from 1980 to 2015. In doing so, it has also attempted to challenge the traditionally prevailing notion which views reservations as a 'necessary evil'[236] and to demonstrate that reservations can instead be viewed as a tool enabling a wider uniformity under uniform private law conventions.[237] When considering the widespread withdrawals of CISG reservations that have occurred since 2011,[238] it is therefore one possibility to describe this development as a 'decline of reservations' in accordance with the title of our panel today.[239] Another possibility would be to view these withdrawals as indications of a 'mission accomplished'.

In concluding, it is helpful to once more come back to numbers. When the 1980 Sales Convention entered into force on 1 January 1988, the then 14 Contracting States[240] had between them declared nine reservations, amounting to almost one reservation per Contracting State. As noted in the introduction,[241] by the Convention's 25th birthday, both total numbers had increased to 65 Contracting States and 31 reservations, but the reservation/Contracting State ratio had dropped from almost 1:1 to less than 1:2. This year, as we are celebrating the CISG's 35th birthday, we count 83 Contracting States, but only 23 reservations. (If we furthermore deduct the 'eternal' federal State reservations that probably will remain in effect forever,[242] we arrive at a ratio of 20:83, or almost 1:4.)

In conclusion, this development confirms a personal experience that many people have made: At 35, one may be not be as young and fresh anymore as at 25 but maybe a little wiser. And for a uniform law, that may well be the more important quality.

236 Andersen, 2013, *supra* note 25, p. 5.

237 *Supra* at 3.3.2.

238 *Supra* at 3.3.2.1.

239 Conference '35 Years CISG and Beyond' held at the University of Basel (Switzerland) on 29–30 January 2015, organized by the University of Basel, the Swiss Association of International Law and UNCITRAL.

240 For the purposes of the present calculations, a 'contracting state' is every state that has deposited an instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations in accordance with Article 91(4) CISG, even if the Convention has not yet entered into force for that state due to Article 99(2) CISG; *see* Enderlein & Maskow, 1992, *supra* note 42, Introductory Remarks on Part IV CISG on the Sales Convention's use of the term 'Contracting State'. On 1 January 1988, Lesotho, France, the Syrian Arab Republic, Egypt, Hungary, Argentina, Zambia, the People's Republic of China, Italy, the United States, Finland, Sweden, Austria and Mexico (in chronological order) had become contracting states of the CISG.

241 *Supra* at 3.1.1.

242 *See supra* at 3.5.2.