

THE CISG ADVISORY COUNCIL

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1 INTRODUCTION

On a global scale, the United Nations Convention on Contracts for the International Sale of Goods – the CISG – is by far the most successful convention in the field of private law. The CISG currently has 85 Member States. Nine out of the ten leading trade nations are Member States, the United Kingdom being the sole exception.¹ Already today, the CISG potentially covers more than 80% of the world trade.² Each month we are receiving good news concerning the CISG, be it that countries are withdrawing reservations, be it that more and more smaller countries are joining, such as most recently Viet Nam and Azerbaijan.³

Beyond the global unification of sales law, it is a well-known fact that the CISG has exerted influence on both the international as well as the domestic levels.⁴ Thus, when the first set of the UNIDROIT Principles of International Commercial Contracts (PICC) was launched in 1994, they closely followed the CISG not only in its systematic approach but also with respect to the remedy mechanism.⁵ The same holds true for the Principles of European Contract Law (PECL) issued in 1999.⁶ The EC Directive on certain aspects of

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1 Cf. <https://www.wto.org/english/res_e/statis_e/wts2016_e/WTO_Chapter_09_tables.pdf>, p. 94.

2 Including inter alia China, the USA, Germany, Japan, The Netherlands, the Republic of Korea, France, Italy, Canada, Belgium, Mexico, Singapore and others, cf. *ibid.*

3 Cf. <http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html>.

4 See P. Schlechtriem, '25 Years of the CISG: An International lingua franca for Drafting Uniform Laws, Legal Principles, Domestic Legislation and Transnational Contracts', in H. Flechtner/R. Brand/M. Walter (eds.), *Drafting Contracts under the CISG* (New York: Oxford University Press, 2008), 167-187, 174 et seq. (hereinafter cited as '25 Years'); P. Schlechtriem, 'Basic Structures and General Concepts of the CISG as Models for a Harmonisation of the Law of Obligations', *Juridica International* 10 (2005), 27, 27 et seq. (hereinafter cited as 'Basic Structures').

5 See UNIDROIT International Institute for the Unification of Private Law, UNIDROIT Principles of International Commercial Contracts (PICC) (2010), available at <<http://www.unidroit.org/english/principles/contracts/principles2010/blackletter2010-english.pdf>>. See also M.J. Bonell, 'The CISG, European Contract Law and the Development of a World Contract Law', *Am. J. Comp. L.* 56 (2008), 1, 16; I. Schwenzer/P. Hachem/C. Kee, *Global Sales and Contract Law* (Oxford: Oxford University Press, 2012), 3.47 et seq. (hereinafter cited as 'Global Sales and Contract Law').

6 See Principles of European Contract Law (PECL) (1999) available at <<http://www.jus.uio.no/lm/eu-contract.principles.parts.1.to.3.2002/>>. See also O. Lando, 'CISG and Its Followers: A Proposal to Adopt Some

the sale of consumer goods can also be mentioned in this context.⁷ OHADA based its *Acte uniforme sur le droit commercial général* (AUDCG) primarily on the CISG.⁸ Finally, the Draft Common Frame of Reference published in 2009 and, based thereupon, the Draft Common European Sales Law published in October 2011 (although never entering into force) were not much more than a continuation of all these different unification efforts based on the CISG.⁹ Unification endeavours in South East Asia also follow this trend.

Over the last two decades, the CISG has also proven to be a decisive role model for domestic legislators and not just on an international level.¹⁰ Finland, Norway and Sweden took the coming into force of the CISG in their countries on 1 January 1989 as an opportunity to enact new domestic sale of goods acts, thereby heavily relying on the CISG.¹¹ With the end of the cold war and the collapse of the former Soviet Union, the young Eastern European states looked to the CISG when facing the task of formulating their new civil codes.¹² This holds true, on the one hand, with regard to the Commonwealth of Independent States (CIS)¹³ as well as, on the other hand, the Baltic states, amongst which Estonia is the most prominent exponent. Nowadays, China is of utmost importance for international trade. The contract law of the People's Republic of China dated 15 March 1999 also closely follows the CISG.¹⁴ Also, the modernisation of the German Law of Obli-

International Principles of Contract Law', *Am. J. Comp. L.* 53 (2005), 378, 381; I. Schwenger/P. Hachem/C. Kee, *Global Sales and Contract Law*, *supra* note 5, 3.56 et seq.

7 Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees, L 171/12.

8 See U.G. Schroeter, 'Das einheitliche Kaufrecht der afrikanischen OHADA-Staaten im Vergleich zum UN-Kaufrecht', *Recht in Afrika* (2001), 163, 166 et seq.

9 See C. von Bar et al., *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR)* (Munich: Sellier European Law Publishers, 2009). See furthermore P. Schlechtriem, 'Basic Structures', *supra* note 4, 175 et seq.; C. von Bar, 'Working Together Toward a Common Frame of Reference', *Juridica International* 10 (2005), 17, 22; I. Schwenger/P. Hachem/C. Kee, *Global Sales and Contract Law*, *supra* note 5, 3.60 et seq.

10 The same had already been true, albeit to a lesser extent, of The Hague conventions on the sale of goods ULF and ULIS, which in turn served as a basis for the drafting of the CISG. For example, the Dutch *Burgerlijk Wetboek* of 1992 was drafted to closely follow the provisions of ULIS; see S.A. Kruisinga, 'The Impact of Uniform Law on National Law: Limits and Possibilities – CISG and Its Incidence in Dutch Law', *Electronic Journal of Comparative Law* 13(2) (2009), 1, 2 et seq.

11 Of course, the method of implementation of the CISG differed. While Finland and Sweden introduced the CISG alongside their domestic sales laws, Norway enacted one single sales law for international and domestic sales contracts. See for criticism V. Hagström, 'CISG – Implementation in Norway, an Approach Not Advisable', *Internationales Handelsrecht* 6 (2006), 246, 246 et seq. In 2007, a new Danish Sale of Goods Act was drafted. An English translation is available at <<http://www.sprog.asb.dk/SN/Danish%20Sale%20of%20Goods%20Act.pdf>>.

12 See P. Schlechtriem, '25 Years', *supra* note 4, 177 et seq.

13 See R. Knieper, 'Celebrating Success by Accession to CISG', *J. L. & Com.* 25 (2005), 477, 477 et seq. The Commonwealth of Independent States is a supranational organization between states of the former Soviet Union, see <http://www.cisstat.com/eng/frame_cis.htm> for further details.

14 See only A.E. Butler, 'Contracts for the International Sale of Goods in China', *International Litigation Quarterly* 21 (2006), 3, 4 et seq.

gations, which began in the 1980s, was, from the very beginning, strongly influenced by the CISG.¹⁵ Finally, recent examples are the legal reforms in Hungary and Poland,¹⁶ as well as in Japan, South Korea, Argentina, and Spain.

2 UNIFORM INTERPRETATION OF THE CISG

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

However, despite all its merits and successes, the state of uniformity that has been achieved throughout the world by the CISG is still a rather fragile one. In many countries, especially in Germany, but also in the United States, it is still advocated that parties should opt out from the CISG as the outcome of litigation or arbitration under the CISG allegedly being unpredictable.¹⁷ Courts in almost all countries are criticized for following a homeward trend, i.e. for interpreting the CISG against their familiar domestic background instead of seeking a truly uniform application and interpretation.¹⁸ As recently as in 2011, the district court for the Southern District of New York¹⁹ relied upon the UCC to clarify the CISG. The court claimed in 2008 – by reference to a statement in a 1995 decision²⁰ – that there was virtually no American case law on the CISG and thereby ignored the already abundant US case law on the CISG from outside the Districts of New York.²¹

The crucial question is: how can we achieve a uniform application and interpretation of the CISG around the globe, among civil law and common law jurisdictions, among developed, developing and transition countries, across language and cultural barriers?

Unlike the European Communities or OHADA, the CISG has no single supreme court guarding the uniform interpretation of uniform or harmonized law and this may be regarded as a severe deficit. However, there are other means to safeguard uniformity.

15 See P. Schlechtriem, 'International Einheitliches Kaufrecht und neues Schuldrecht', in B. Dauner-Lieb/H. Konzen/K. Schmidt (eds.), *Das neue Schuldrecht in der Praxis* (Cologne: Heymanns, 2002), 71-86, 71 et seq.

16 A. Fuglanszky, 'The Reform of Contractual Liability in the New Hungarian Civil Code', *RabelsZ* 79 (2015), 72-116; F. Zoll, 'The Impact of the Vienna Convention on the International Sale of Goods on Polish Law, With some References to Other Central and Eastern European Countries', *RabelsZ* 71 (2007), 81-98.

17 For criticism see R. Koch, 'Wider den formularmässigen Ausschluss des UN-Kaufrechts', *NJW* 53 (2000), 910, 915.

18 See I. Schwenzer, 'The Application of CISG in Light of National Law', *Internationales Handelsrecht* 10 (2010), 45, 46 et seq.; for a recent example from Switzerland see Trib 1er Instance Geneve, 30.03.2015, CISG-online 2713, 14 et seq.

19 *Hanwha Corporation v. Cedar Petrochemicals, Inc.* 760 F. Supp. 2d 426 (S.D. N.Y. 2011), CISG-online 2178; see also *Hilaturas Miel, S.L. v. Republic of Iraq* 573 F. Supp. 2d 781 (S.D. N.Y. 2008), CISG-online 1777.

20 *Delchi Carrier, SpA v. Rotorex Corp.* 10 F. 3d 1024 (2nd Cir. 1995), CISG-online 140.

21 *Hilaturas Miel, S.L. v. Republic of Iraq* 573 F. Supp. 2d 781 (S.D. N.Y. 2008), CISG-online 1777.

Only a few of them should briefly be mentioned.²² First of all, in 1988 already, UNCITRAL established the information system 'CLOUT' (Case Law on UNCITRAL Texts) which aims to enable the exchange of decisions concerning UNCITRAL Conventions. Reporting offices in the Member States collect all decisions on the CISG and transmit them to the Commission's Secretariat in Vienna, which in turn makes the original decisions available and subsequently publishes a translated abstract of each decision in all six UN working languages. Numerous other databases further alleviate the task of researching court decisions and arbitral awards.²³ Finally, the UNCITRAL Digest on the CISG offers compilations of selected cases on Articles of the CISG.²⁴ Since UNCITRAL is an administrative agency of the UN, however, it must refrain from any critical comments on domestic developments in Member States and thus is not able to give any valuable guidance on the future development of the CISG, especially in cases of divergent interpretation. Hence, no authority interpreting the CISG existed prior to the establishment of the CISG Advisory Council.

3 THE CISG ADVISORY COUNCIL

3.1 *Inception and Members*

It is against this background that the CISG Advisory Council was established in 2001. The initiator was the late Professor Albert H. Kritzer who, from his retirement as General Counsel of a multinational company until his death in 2010, devoted not only his whole energy but also personally provided significant funding to promote the worldwide propagation and recognition of the CISG, as well as its uniform interpretation and application. Besides initiating the CISG Advisory Council, Albert H. Kritzer was one of the co-founders of the Institute of International Commercial Law at Pace University, New York, where he most notably established the Pace database on the CISG and International Commercial Law,²⁵ which now features more than 3100 CISG-related court decisions and arbitral awards

22 See I. Schwenzer/P. Hachem, in I. Schwenzer (ed.), *Schlechtriem & Schwenzer, Commentary on the UN Convention on the International Sale of Goods (CISG)*, 4th ed. (Oxford: Oxford University Press, 2016), Art. 7 CISG para. 11 et seq. (hereinafter cited as '*CISG Commentary*').

23 For example CISG Database by Pace Law School, available at <<http://iicl.law.pace.edu/cisg/cisg>>; CISG-online, available at <<http://www.cisg-online.ch/index.cfm?pageID=29>>; CISG France, available at <<http://www.cisg.fr/decision.html?lang=fr>>; CISG Spanish, available at <<http://www.cisgspanish.com/>>; CISG Nordic, available at <<http://www.cisgnordic.net/>>.

24 The latest edition is from 2012, available at <<http://www.uncitral.org/pdf/english/clout/CISG-digest-2012-e.pdf>>.

25 The database is available at <<http://www.cisg.law.pace.edu/>>.

from around the world as well as an electronic library of around 1700 scholarly articles on the CISG.

The CISG Advisory Council is a private initiative chartered in the United Kingdom. Its members do not represent countries or international institutions but are scholars specializing in comparative contract law and international commercial law with a strong emphasis on international sales law and the CISG. This guarantees that the Council is independent and able to criticize developments in certain Member States. The founding members of the CISG Advisory Council were: Eric Bergsten, formerly Secretary General of UNCITRAL, Vienna, Michael Joachim Bonell, University of Rome La Sapienza, the late Allan Farnsworth, Columbia University, New York, Alejandro Garro, likewise Columbia University, Sir Roy Goode, University of Oxford, the late Sergej Lebedev, Moscow Institute of International Relations, Jan Ramberg, University of Stockholm, the late Peter Schlechtriem, University of Freiburg, Hiroo Sono, Hokkaido University, Sapporo, and Claude Witz, Universities of Strasbourg and Saarbrücken. Quite a few of the founding members had not only attended the Vienna Conference on the CISG but were heavily involved in the drafting of the CISG itself. Shortly after its formation, Pilar Perales Viscasilas, now University Carlos III, Madrid, and I joined the Advisory Council. Later on, John Gotanda, Villanova University, Philadelphia, and Michael Bridge, London School of Economics and National University of Singapore, Shiyuan Han, Tsinghua University, Beijing, Yesim Atamer, Bilgi University, Istanbul, and Ulrich Schroeter, University of Basel, became members, and most recently we welcomed Lauro Gama, Pontifical Catholic University, Rio de Janeiro. During its first years, the group was chaired by Peter Schlechtriem, then by Jan Ramberg, Eric Bergsten, and since 2012 by me. We are supported by our Secretary, Sieg Eiselen, University of South Africa.²⁶

3.2 *The Work of the CISG Advisory Council*

The primary purpose of the CISG Advisory Council is to publish Opinions on questions relating to the interpretation and application of the CISG. Their use is to facilitate the work of adjudicators, scholars, organizations and others. Besides Opinions, Declarations aim at giving guidance primarily to legislators implementing the CISG, or acts that might in turn have any impact on the application of the CISG. Topics are either chosen by the CISG Advisory Council itself, when it comes to the conclusion that developments in different Member States endanger uniformity, or by request from international organizations, professional associations or adjudication bodies. In the past, such requests have been made, among others, by the International Chamber of Commerce, and the Association of the Bar of the City of New York Committee on Foreign and Comparative Law. After deciding

²⁶ For detailed CVs see <<http://www.cisgac.com/council-members/>>.

upon a topic for an Opinion, a rapporteur is nominated, either from among the Council itself, or a distinguished scholar who is an expert in the respective field. The rapporteur prepares the Opinion which is then usually discussed in three to four sessions before the final version is approved by the Council members. The CISG Advisory Council meets about once or twice a year in different places around the globe. Usually, its meeting is combined with an international conference on the CISG, very often at a point in time when a country is about to become or has just become a Member State of the CISG. Prominent examples in the past have been Tokyo, Japan, in 2008 and Sao Paulo, Brazil, in 2011.

The working language of the CISG Advisory Council naturally is English; all Opinions are drafted and finalized in English. The Opinions are first of all published on the website of the CISG Advisory Council with links from many domestic websites dealing with the CISG.²⁷ Most importantly, however, the Opinions are translated not only into the other working languages of the UN but also into many other languages, in particular by young scholars who themselves are devoted to the CISG and dedicated to the idea of a global unification and harmonization of commercial law. On the domestic level, the Opinions are then regularly published in journals on international and/or domestic commercial law, thus ensuring their wide dissemination among all interested circles. Whereas already a book covering the first fifteen Opinions in Spanish was published in 2015, this is for the very first time that the original versions of the first seventeen Opinions and two Declarations can be found in one handy volume.

The CISG Advisory Council works on a truly comparative basis. Although the starting point for any discussions is the wording of the CISG, court and arbitral decisions as well as scholarly writings on the CISG from all Member States are considered. Finally, also the solutions found in the respective domestic legal systems are considered. As the most important legal systems are represented by members of the CISG Advisory Council and, furthermore, many members are genuine comparatists, knowledgeable in other legal systems, these discussions prove to be extremely prolific.

3.3 *Topics Covered by CISG Advisory Council's Opinions*

Up to now, the CISG Advisory Council has published seventeen Opinions as well as two Declarations. I will briefly describe their backgrounds and solutions.

The first Opinion, published in 2003, dealt with 'Electronic Communications under CISG',²⁸ Professor Christina Ramberg, at the time from Goteborg University, being the

²⁷ The CISG Advisory Council's website is available at <<http://www.cisgac.com/>>.

²⁸ CISG-AC Opinion No. 1 (C. Ramberg), 'Electronic Communications under CISG', available at <<http://www.cisgac.com/cisgac-opinion-no1/>> and in this volume at p. xx.

rapporteur. When the CISG was drafted in the 1970s, nobody thought about electronic communication. Telegram and facsimile were the only modern media discussed under the topic ‘writing’.²⁹ Notwithstanding any endeavours that have been made to unify and harmonize questions on electronic communications on a global scale,³⁰ it seems indispensable that these questions be settled under the CISG itself. Thus, the Opinion makes it clear that electronic communications qualify as ‘writing’ wherever this term is used by the Convention or by the parties in their contract. It furthermore provides clarification on when a declaration made by electronic means is dispatched and reaches the other person.

The second Opinion – issued in 2004 with Council member Eric Bergsten as rapporteur – concerned ‘Examination of the Goods and Notice of Non-Conformity – Articles 38 and 39’.³¹ The background for this Opinion was the well-known fact that the duty to examine the goods and give notice of any lack of conformity is only known to some but not all of the Member States of the CISG. This has prompted disparate case law concerning the interpretation of Articles 38 and 39 CISG, ranging from allowing the buyer only a few days to inform the seller of any non-conformity³² to not discussing this prerequisite at all if there is no sign of the buyer having acted fraudulently.³³ The Opinion offers guidelines on how to interpret Articles 38 and 39 CISG. Specifically, it emphasizes that the two periods in Article 38 CISG (examination) and Article 39 CISG (notice) must be kept strictly separate and develops relevant criteria to be taken into account when assessing the periods of time under these provisions.

The third Opinion – also issued in 2004 – addressed a problem which typically poses difficulties to Common Law lawyers under the CISG, namely ‘Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG’; the rapporteur was Professor

29 See Legislative History 1980 Vienna Diplomatic Conference, Summary Records of Meetings of the First Committee, 7th meeting, 14 March 1980, para. 71 et seq., available at <<http://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting7.html>>.

30 UNCITRAL Model Law on Electronic Commerce dated 12 June 1996, available at <http://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf>; UN Convention on the Use Of Electronic Communications in International Contracts dated 23 November 2005, available at <http://www.uncitral.org/pdf/english/texts/electcom/06-57452_Ebook.pdf>; ICC eTerms 2004, available at <<http://www.iccwbo.org/policy/law/id3668/index.html>>; Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, L 178/1. See further I. Schwenzer/P. Hachem/C. Kee, *Global Sales and Contract Law*, *supra* note 5, 11.01 et seq.; U.G. Schroeter, in I. Schwenzer (ed.), *CISG Commentary*, *supra* note 22, Intro to Arts. 14-24 CISG para. 41 et seq.; P. Perales Viscasillas, ‘CISG Articles 14 Through 24’, in H. Flechtner/R. Brand/M. Walter (eds.), *Drafting Contracts under the CISG* (New York: Oxford University Press, 2008), 295-327, 320 et seq.

31 CISG-AC Opinion No. 2 (E. Bergsten), ‘Examination of the Goods and Notice of Non-Conformity – Articles 38 and 39’, available at <<http://www.cisgac.com/cisgac-opinion-no2/>> and in this volume at p. xx.

32 OGH, 27 August 1999, CISG-online 485; Cour d’appel Paris, 6 November 2001, CISG-online 677.

33 For more background see I. Schwenzer, ‘Divergent Interpretations: Reasons and Solutions’, in L. DiMatteo (ed.), *International Sales Law* (New York: Cambridge University Press, 2014), 102-119, 108 et seq.

Richard Hyland, Rutgers Law School, Camden, NJ, USA.³⁴ The Opinion made it clear that domestic concepts such as the parol evidence rule or the plain meaning rule that play a significant role in the interpretation of contracts under Common Law do not apply under the CISG. Instead, interpretation of the contract is exclusively dealt with by the relevant provisions of the CISG which also govern the interpretation of merger clauses.

In its fourth Opinion – also of 2004, the rapporteur being Council member Pilar Perales Viscasillas – the CISG Advisory Council discussed the issue of ‘Contracts for the Sale of Goods to Be Manufactured or Produced and Mixed Contracts (Article 3 CISG)’.³⁵ This question is of utmost practical importance especially as many complex contracts – sale of machinery or factory facilities – nowadays involve both the manufacture of the goods as well as numerous elements of service obligations. By focussing on the economic value of the respective parts of the contract, the Opinion tried to make the delimitation of contracts falling under the CISG and those still subject to domestic law more predictable.

‘The Buyer’s Right to Avoid the Contract in Case of Non-Conforming Goods or Documents’ was addressed in the fifth Opinion in 2005, which was prepared by me.³⁶ First of all, the background for this Opinion was, here again, disparate interpretations of what amounts to a fundamental breach of contract – thus giving the right to avoid the contract – in case of non-conforming goods or documents. Second, this Opinion aimed to appease common law lawyers who argue that the CISG does not fit the necessities of commodity trade because it does not acknowledge the perfect tender rule. Indeed, practice shows that the CISG yields satisfying results in commodity trading³⁷ – at least outside of London.³⁸

Core issues of the law of damages were treated in Opinion No. 6, in 2006, and Opinion No. 8, in 2008, both prepared by Council member John Gotanda, dealing with ‘Calculation of Damages under Article 74’³⁹ and ‘Calculation of Damages under Article 75 and 76’⁴⁰ respectively. Due to divergent views in domestic legal systems, major imponderables exist

34 CISG-AC Opinion No. 3 (R. Hyland), ‘Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG’, available at <<http://www.cisgac.com/cisgac-opinion-no3/>> and in this volume at p. xx.

35 CISG-AC Opinion No. 4 (P. Perales Viscasillas), ‘Contracts for the Sale of Goods to Be Manufactured or Produced and Mixed Contracts (Article 3 CISG)’, available at <<http://www.cisgac.com/cisgac-opinion-no4/>> and in this volume at p. xx.

36 CISG-AC Opinion No. 5 (I. Schwenger), ‘The buyer’s right to avoid the contract in case of non-conforming goods or documents’, available at <<http://www.cisgac.com/cisgac-opinion-no5/>> and in this volume at p. xx.

37 F. Mohs, ‘The CISG and the Commodities Trade’, in A. Büchler/M. Müller-Chen (eds.), *Private Law, National – Global – Comparative, Festschrift für Ingeborg Schwenger zum 60. Geburtstag* (Bern: Stämpfli, 2011), 1285-1302, 1289 et seq.

38 Still doubtful M. Bridge, *The International Sale of Goods, 3rd ed.* (Oxford: Oxford University Press, 2013), 1.03.

39 CISG-AC Opinion No. 6 (J. Gotanda), ‘Calculation of Damages under Article 74’, available at <<http://www.cisgac.com/cisgac-opinion-no6/>> and in this volume at p. xx.

40 CISG-AC Opinion No. 8 (J. Gotanda), ‘Calculation of Damages under CISG Articles 75 and 76’, available at <<http://www.cisgac.com/cisgac-opinion-no8/>> and in this volume at p. xx.

on the questions of which losses are recoverable under the CISG, how the damages are measured, who bears the burden of proof, whether the standard of proof for loss incurred is also a matter covered by the CISG and if so, which standard should be applied. On all of these matters, the Opinions take a clear stance having regard not only to the needs of international trade but also to the latest developments in different domestic legal systems.

The seventh Opinion, which was drafted by Council member Alejandro Garro and issued in 2007, dealt with 'Exemption of Liability for Damages under Article 79 CISG'.⁴¹ This Opinion first of all seeks to clarify the difficult relationship between Article 79 para. 1 and para. 2 CISG which gives rise to dispute mainly between common law lawyers on the one side and civil law lawyers with a Germanic background on the other side. It furthermore answers the question whether cases of hardship are covered by Article 79 CISG in the affirmative⁴² and outlines the possible remedies under the CISG in such cases.

The ninth Opinion, that was published in 2008, concerns 'Consequences of Avoidance of the Contract'; its rapporteur was Council member Michael Bridge.⁴³ The avoidance of the contract raises difficult questions, as in domestic laws these issues are dealt with under various topics, such as rules on property law, unjust enrichment or a contractual regime. Unfortunately, the CISG itself has not covered these issues extensively, thus, leaving much room for interpretation and following insecurity and unpredictability. The Opinion tries to fill these gaps. It offers solutions as to the contractual nature of the consequences of avoidance, as to the modalities of the restitution of performance as well as to the restitution of benefits derived by either party from the performance before avoidance.

The tenth Opinion addressed 'Agreed Sums Payable upon Breach of an Obligation in CISG Contracts' by rapporteur Dr. Pascal Hachem, Attorney from Zurich, Switzerland, and was published in 2012.⁴⁴ Agreed sums, or penalty or liquidated damages clauses, can be found in almost every international sales contract. According to Article 4 sent. 2(a) CISG, the validity of these clauses is not covered by the CISG. However, the Opinion strives in reaching a basic uniform understanding as regards the incorporation and interpretation of such clauses, as well as their relationship to the CISG, such as exemption under Articles 79 and 80 CISG, breach of the duty to mitigate loss under Article 77 CISG, as well as the default remedy regime of the CISG.

41 CISG-AC Opinion No. 7 (A. Garro), 'Exemption of Liability for Damages under Article 79 of the CISG', available at <<http://www.cisgac.com/cisgac-opinion-no7/>> and in this volume at p. xx.

42 For the now almost undisputed view, according to which hardship is covered by Art. 79 CISG, see I. Schwenzer, 'Force Majeure and Hardship in International Sales Contracts', *V.U.W.L.R.* 39 (2008), 709, 713 with further references; for the minority view, arguing that cases of hardship are not covered by the Convention, see H. Stoll, in P. Schlechtriem (ed.), *Commentary on the UN Convention on the International Sale of Goods*, 1st ed. (Oxford: Clarendon Press, 1998), Art. 79 CISG para. 39.

43 CISG-AC Opinion No. 9 (M. Bridge), 'Consequences of Avoidance of the Contract', available at <<http://www.cisgac.com/cisgac-opinion-no9/>> and in this volume at p. xx.

44 CISG-AC Opinion No. 10 (P. Hachem), 'Agreed Sums Payable upon Breach of an Obligation in CISG Contracts', available at <<http://www.cisgac.com/cisgac-opinion-no10/>> and in this volume at p. xx.

Also in 2012, the CISG Advisory Council published Opinion No. 11 on 'Issues Raised by Documents under the CISG Focusing on the Buyer's Payment Duty', by rapporteur Professor Martin Davies, Tulane University Law School, New Orleans, USA.⁴⁵ This Opinion was prompted by the Rotterdam Rules and aimed at clarifying which transport documents qualify as documentary performance under Article 30 CISG.

'Liability of the Seller for Damages Arising Out of Personal Injuries and Property Damage Caused by Goods and Services under the CISG', was discussed in Opinion No. 12 drafted by Council member Hiroo Sono, in 2013.⁴⁶ According to Article 5 CISG the seller's liability for personal injury resulting from non-conforming goods is not governed by the CISG. The Opinion, however, offers guidance as regards indemnity claims by the buyer against the seller, as well as for the difficult borderland between contract and tort law with relation to property damage, where concurring domestic tort remedies may well undermine uniformity reached by the CISG.

Opinion No. 13 on 'Inclusion of Standard Terms under the CISG' was drafted by Council Secretary Sieg Eiselen and also adopted in 2013.⁴⁷ The CISG does not expressly deal with requirements for the inclusion of standard terms and courts must therefore rely on the interpretation of the articles dealing with the formation and interpretation of the contract in general. There had been divergent case law on these questions, and guidance for courts and tribunals was very urgently needed. Opinion No. 13 clarifies under which circumstances standard terms are incorporated into the contract, how they are to be interpreted, and also addresses the hotly debated issue of battle of the forms. Up to now, this Opinion has been cited with approval in thirteen cases in thus evidencing its outstanding importance.⁴⁸

The third Opinion that was issued in 2013 was Opinion No. 14 on 'Interest under Article 78 CISG' drafted by Council member Yesim Atamer.⁴⁹ Interest has been one of the mostly debated issues under the CISG. Although Article 78 CISG acknowledges that interest is due on any sum in arrears, it leaves one major issue unresolved, that is the percentage rate of interest. The Opinion aims at proposing an acceptable solution based on the general principles of the Convention (Article 7 CISG) and addresses other issues such as compound interest, currency and place of payment.

45 CISG-AC Opinion No. 11 (M. Davies), 'Issues Raised by Documents under the CISG Focusing on the Buyer's Payment Duty', available at <<http://www.cisgac.com/cisgac-opinion-no11/>> and in this volume at p. xx.

46 CISG-AC Opinion No. 12 (H. Sono), 'Liability of the Seller for Damages Arising Out of Personal Injuries and Property Damage Caused by Goods and Services under the CISG', available at <<http://www.cisgac.com/cisgac-opinion-no12/>> and in this volume at p. xx.

47 CISG-AC Opinion No. 13 (S. Eiselen), 'Inclusion of Standard Terms under the CISG', available at <<http://www.cisgac.com/cisgac-opinion-no13/>> and in this volume at p. xx.

48 Cf. <<http://www.cisgac.com/case-law/>>.

49 CISG-AC Opinion No. 14 (Y. Atamer), 'Interest under Article 78 CISG', available at <<http://www.cisgac.com/cisgac-opinion-no14/>> and in this volume at p. xx.

Finally, still in 2013, Opinion No. 15 on ‘Reservations under Articles 95 and 96 CISG’, drafted by Council member Ulrich Schroeter, was published.⁵⁰ The Opinion gives guidance on some open questions that have arisen when States have made a reservation under Article 95 or Article 96 CISG.

A recurring issue giving rise to divergent case law is the ‘Exclusion of the CISG under Article 6’. This Opinion No. 16 was drafted by rapporteur Dr. Lisa Spagnolo, Monash University, Australia, and approved by Council in 2014.⁵¹ The Opinion takes a pro Convention approach and specifies when a clear intent to exclude the CISG can be inferred and when it cannot.

The last Opinion being published in this volume, Opinion No. 17, deals with ‘Limitation and Exclusion Clauses in CISG Contracts’.⁵² It was drafted by Council member Lauro Gama and approved in 2015. Comparable to agreed sums that were addressed in Opinion No. 10, these clauses can be found in nearly every international sales contract. Although the validity of limitation and exclusion clauses is not covered by the CISG (Article 4 sent. 2(a) CISG), the Opinion seeks to give some advice on how to apply domestic rules protecting the obligee in the CISG context.

Finally, the CISG Advisory Council has published two Declarations. Declaration No. 1 relating to ‘The CISG and Regional Harmonization’ drafted by Council member Michael Bridge and adopted in 2012 was prompted by the Draft of a Common European Sales Law and emphasizes the need to unify or harmonize contract law on the truly international rather than on a regional level. Declaration No. 2 on the ‘Use of Reservations under the CISG’, drafted by Council member Ulrich Schroeter and adopted in 2013, recommends States to abstain from reservations as these undermine uniformity.

There are many more Opinions in the pipeline, some of which hopefully will be finalized in the very near future. For quite some time, the Council has been discussing how public law requirements affect the conformity of the goods, an issue of great practical importance,⁵³ as well as questions of set-off of claims arising from CISG contracts. Further Opinions will deal with arbitration and choice of court clauses in CISG contracts, and the applicability of the CISG to distribution and framework contracts.

50 CISG-AC Opinion No. 15 (U. Schroeter), ‘Reservations under Articles 95 and 96 CISG’, available at <<http://www.cisgac.com/cisgac-opinion-no15/>> and in this volume at p. xx.

51 CISG-AC Opinion No. 16 (L. Spagnola), ‘Exclusion of the CISG under Article 6’, available at <<http://www.cisgac.com/cisgac-opinion-no16/>> and in this volume at p. xx.

52 CISG-AC Opinion No. 17 (L. Gama), ‘Limitation and Exclusion Clauses in CISG Contracts’, available at <<http://www.cisgac.com/cisgac-opinion-no17/>> and in this volume at p. xx.

53 See I. Schwenzer/P. Hachem/C. Kee, *Global Sales and Contract Law*, *supra* note 5, 31.82 et seq.

3.4 Achievements

Naturally, the Opinions by the CISG Advisory Council do not have any binding character on courts or arbitral tribunals. They are, however, regularly cited in scholarly writings on the respective subjects. Moreover, and this is most remarkable, the Opinions have been relied upon by many domestic courts as persuasive authority. All in all, more than twenty published cases from courts in four different Member States, including the respective highest courts, relied on the Opinions of the CISG Advisory Council. Most remarkably, especially Dutch courts seem to constantly cite to the CISG Advisory Council Opinions.⁵⁴ The Opinion apparently most influential is the one on inclusion of standard terms referred by, up to this writing, 13 cases.

4 CONCLUSION

Although the story of the CISG can be labelled as being one of 'worldwide success',⁵⁵ achieving day-to-day uniform application and interpretation of this international instrument and even merely maintaining it is a very difficult task. The CISG Advisory Council has fully committed itself to this endeavour. In this respect, the Council certainly follows a proactive approach: we neither content ourselves with restating the law as it has been conceived at the Vienna Conference in 1980, nor with elaborating the common core as it is reflected in state court decisions and arbitral awards interpreting the CISG. Instead, we seek to carefully develop the CISG and adapt it to the ever changing world of global trade. Thus, we are engaging in fields that in 1980 clearly would have been perceived as external gaps of the CISG to be dealt with by the otherwise applicable domestic law. Prominent examples are the standard of proof in the law of damages, hardship under Article 79 CISG, or the interest rate under Article 78 CISG. Step by step we are expanding on questions that in many legal systems are treated as validity issues and thus are not covered by the CISG.⁵⁶

Some people might ask how the CISG Advisory Council can be so audacious. The answer is easy: because we think that this is the only way to achieve a uniform application and interpretation of the CISG. In all probability, it will never be possible to bring together all Member States of the CISG in order to amend the Convention and to fill the gaps where in 1980 no consensus could be reached. But if the CISG is not cautiously adapted to the change that is taking place on the domestic as well as at the international level, it may

⁵⁴ Cf. <<http://www.cisgac.com/case-law/>>.

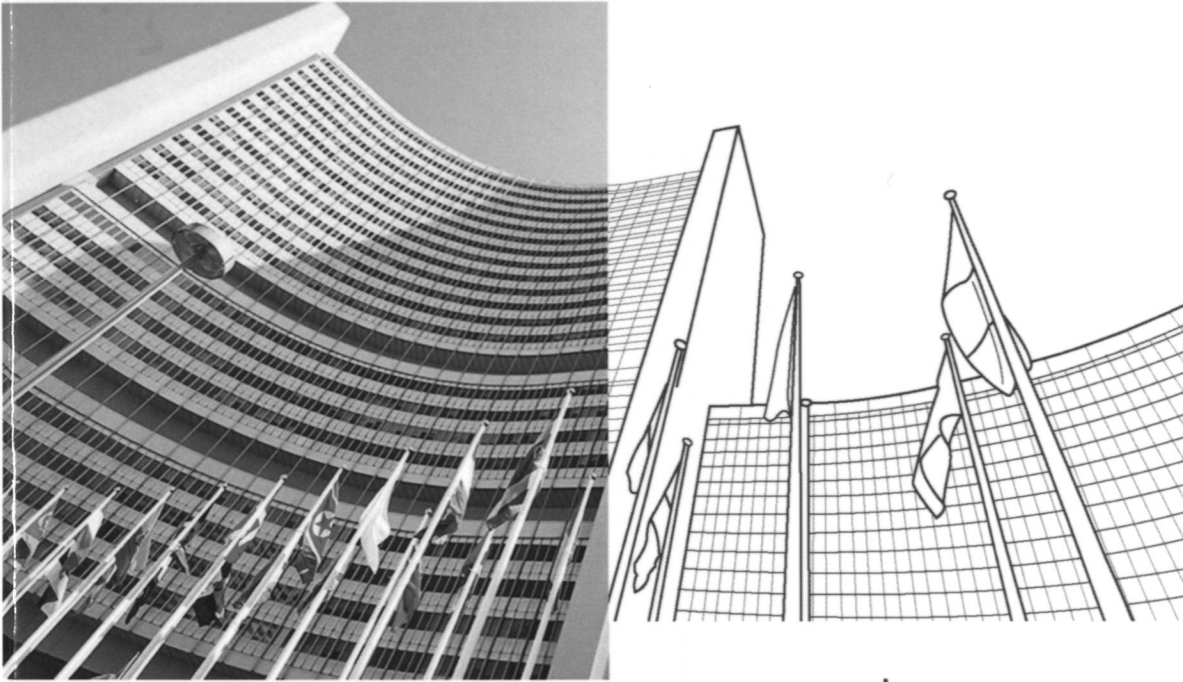
⁵⁵ I. Schwenzler/P. Hachem, 'The CISG – A Story of Worldwide Success', in J. Kleinemann (ed.), *CISG Part II Conference* (Uppsala: Iustus, 2009), 119-140, 140.

⁵⁶ Art. 4 sent. 2(a) CISG.

sooner or later fall into oblivion overgrown by domestic particularities. Anyone who is convinced of the merits and benefits of international uniform commercial law simply cannot let this happen.

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