

1

The CISG:

history, methodology, and construction

I. THE CISG AS A SET OF COMMERCIAL DEFAULT RULES

The United Nations Convention on Contracts for the International Sale of Goods (“the CISG”) is one of the most successful international commercial law treaties ever devised. It has been ratified by most of the world’s important trading countries and become a template for the manner in which commercial law treaties are drafted. As of this writing, the CISG has been adopted by eighty-three countries. These nations are referred to as “Contracting States.” Every major trading nation except India, South Africa, and the United Kingdom has ratified the CISG. Cases interpreting it currently number in the low thousands, and more than 135 United States cases have referred to the CISG. With unreported arbitration awards added, this number must be considerably higher. The effect of the CISG within a Contracting State may vary with domestic law. For example, within the United States, which ratified the CISG in 1986 and where it entered into force in 1988, the CISG is considered a self-executing treaty. The CISG therefore creates a private right of action in federal court under federal law.¹ The CISG provides the default set of rules that govern contracts for the sale of goods between parties located in different Contracting States,² and, in some cases, where only one of the parties is located in a Contracting State. Where applicable the CISG preempts contrary provisions of domestic sales law, such as Article 2 of the Uniform Commercial Code (“UCC”) and other state contract law in the United States, and conflicting provisions of the German Civil Code (“BGB”) or the French Civil Code.

¹ See *Saint Tropez Inc. v. Ningbo Maywood Industry and Trade Co., Ltd.*, 2014 U.S. Dist. LEXIS 96840 (S.D.N.Y. July 16, 2014); *Weihai Textile Group Import & Export Co., Ltd. v. Level 8 Apparel, LLC*, 2014 U.S. Dist. LEXIS (S.D.N.Y. March 28, 2014); *Hanwha Corp. v. Cedar Petrochemicals, Inc.*, 760 F. Supp. 2d 426 (S.D.N.Y. 2011).

² See *Microgem Corp. v. Homecast Co., Ltd.*, 2012 U.S. Dist. LEXIS 65166 (S.D.N.Y. April 26, 2012).

Cambridge University Press

978-1-107-14962-5 - The UN Convention on Contracts for the International Sale of Goods: Theory and Practice: Second Edition

Clayton P. Gillette and Steven D. Walt

Excerpt

[More information](#)

The CISG is relatively well known and researched in Europe. The academic literature on uniform sales law is dominated by European scholars, and some of the methodological developments in legal analysis that have prevailed in the United States have been applied only sparingly to CISG scholarship.³ As a result, at least in the United States, the CISG remains an understudied, largely misunderstood, and somewhat esoteric body of law, unfamiliar to many American commercial lawyers. Many of its provisions are reminiscent of the Uniform Commercial Code, and many American attorneys and courts improperly infer that those similarities mean that the UCC and the CISG have identical scope and meaning. Other provisions of the CISG are largely foreign to common law academics and lawyers. These gaps frequently lead attorneys who are involved in the planning of transactions for the international sale of goods to opt out of the CISG without sufficient consideration of whether a client's interests would be better served by its incorporation.⁴

Our objective in this text is to address these issues by providing material, directed at both American and foreign commercial lawyers, that explains and evaluates the CISG, and to do so through a particular lens. Because most of the cases and commentary on the CISG derive from European or Asian sources that follow civil law traditions and rely on modes of analysis that differ from those in common law traditions, we attempt to introduce civil law concepts to a common law audience and to introduce civil lawyers to comparable provisions within common law nations.

We also bring a particular perspective to our study that is not adequately represented in the doctrinal or theoretical literature on the CISG. Many students of international commercial law celebrate the benefits of uniform law in reducing transaction costs by avoiding the need for each party to understand the law of a counterparty's jurisdiction. We acknowledge that the reduction of transaction costs is a vital objective of commercial law. In addition, we acknowledge that, in theory, a

³ Major European treatises appearing in an English language version include UN Convention on Contracts for the International Sale of Goods (CISG): Commentary (Stefan Kröll, Loukas Mistelis & Pilar Perales Viscasillas eds. 2011) [hereinafter "Kröll et al."]; Joseph Lookofsky, *Understanding the CISG* (4th (Worldwide) ed. 2012); Schlechtriem & Schwenzer, *Commentary on the Convention on the International Sale of Goods (CISG)* (Ingeborg Schwenzer ed., 3d ed. 2010). The primary reference work by American scholars has been John O. Honnold, *Uniform Law for International Sales Under the 1980 United Nations Convention* 190 (Harry M. Flechtner ed., 4th ed. 2009) [hereinafter "Honnold/Flechtner"].

⁴ There is debate over the extent to which opting out occurs. Some efforts to measure the phenomenon conclude that opting out is occurring at rates that are decreasing or that are lower than predicted. The unscientific nature of these studies, however, raises issues about their accuracy. There is a risk that surveys sent to practitioners concerning their knowledge and use of the CISG will have a higher response rate from those who utilize it. These factors, however, tend not to be considered in the empirical evaluations. For unrigorous efforts to measure opting out, see, e.g., Ingeborg Schwenzer & Christopher Kee, *International Sales Law – The Actual Practice*, 29 Penn. St. Int'l L. Rev. 425 (2011); Ulrich G. Schroeter, *To Exclude, to Ignore, or to Use? Empirical Evidence on Courts', Parties' and Counsels' Approach to the CISG (With Some Remarks on Professional Liability)*, in *The Global Challenge of International Sales Law* 649 (Larry DiMatteo ed., 2014).

Cambridge University Press

978-1-107-14962-5 - The UN Convention on Contracts for the International Sale of Goods: Theory and Practice: Second Edition

Clayton P. Gillette and Steven D. Walt

Excerpt

[More information](#)

uniform law can have that effect. Uniformity itself, however, does not perform that function. Whether or not a particular body of uniform law reduces transaction costs depends on whether the default rules it creates reflect the risk allocations to which the parties otherwise would have bargained. If they do not, then the parties will have to invest additional transaction costs in negotiating around the defaults. Thus, it is untenable to maintain the claim that uniform international law, simply by virtue of avoiding the need for one party to learn another party's law, necessarily reduces transaction costs.⁵ To take an extreme case, a uniform law that said "all disputes will be resolved by a coin flip" would avoid the need to learn national law, but it is doubtful that most commercial actors would want to adopt it. Uniformity also prevents a countervailing benefit that arises when legal systems compete with one another. As with competition for goods themselves, competition for law is likely to lead to improvements in legal rules that benefit all parties. Uniform law can become difficult to amend, especially – as with the CISG – when legal change is needed and there is no permanent regulatory or legislative body that has jurisdiction over its provisions. The CISG, promulgated some thirty-five years ago, already suffers some of the effects of its immutability. There is, for instance, substantial debate about its applicability to contracts for software, especially software that is downloaded through electronic means unforeseen at the time of the CISG's drafting. Perhaps more problematically, many of the CISG's provisions reflect compromises among social, economic, and political cultures that have subsequently converged. It is by no means clear that compromises that were necessary to bring both capitalist and socialist nations into the fold in the 1970s would be struck today, or that they reflect the preferences of the commercial actors whose contracts are governed by the CISG.

Throughout this text, we attempt both to explain and to analyze the provisions of the CISG. Our evaluation is measured against the goal of reducing transaction costs and providing default rules that do reflect the preferences of most commercial actors. As with most sales law, the CISG consists almost entirely of default rules: terms that apply unless the parties' agreement provides otherwise. Default rules that consist of terms that most contracting parties prefer to have govern their contracts ("majoritarian" default rules) save the parties the cost of supplying them. Only the minority of parties who prefer different terms must incur the cost of negotiating the terms that suit their contract. If the cost of supplying terms is the same for all contracting parties, a default rule that reflects the preferences of most parties reduces the total cost (the cost of incorporating both default rules and individually negotiated terms) of providing contracting parties with the terms they prefer. Even when contracting costs differ between parties, a majoritarian default rule reduces total contracting costs if the aggregate contracting costs to the majority of parties are

⁵ See Ingeborg Schwenzer & Pascal Hachem, *The CISG—Successes and Pitfalls*, 57 *Am. J. Comp. L.* 457 (2009). For a general critique of the assumption that the CISG reduces transaction costs, see Clayton P. Gillette & Robert E. Scott, *The Political Economy of International Sales*, 25 *Int'l. Rev. L. & Econ.* 446 (2005).

Cambridge University Press

978-1-107-14962-5 - The UN Convention on Contracts for the International Sale of Goods:
Theory and Practice: Second Edition

Clayton P. Gillette and Steven D. Walt

Excerpt

[More information](#)

greater than the aggregate contracting costs to the minority. Concerns that might justify other standards of evaluation, such as paternalistic or other non-economic standards, are rarely implicated in the range of transactions – transactions between commercial actors – to which the CISG applies. We therefore evaluate many of the CISG's rules we discuss through the lens of optimal default rules: rules that minimize the costs of entering into, negotiating, and enforcing contracts for most contracting parties.

Judged by this standard, we question whether many of the CISG's rules are majoritarian default rules. They sometimes encourage strategic behavior in the performance and enforcement of the contract, forcing parties to incur the cost of preventing the behavior or risk its presence. At the same time, the CISG's rules are often (but not always) malleable enough to allow tribunals to construe them to minimize contracting costs for most parties. Where that is the case, we argue that tribunals often but not always use their interpretive authority to reach results consistent with cost-minimization. The fact that tribunals frequently do so does not cure the inefficiency of many of the CISG's default rules. For one thing, the reported cases may or may not be representative interpretations of relevant provisions. This is because arbitral tribunals likely are the bulk of fora interpreting the CISG,⁶ and most arbitral awards are unreported. In addition, even the parties and sales transactions in the reported cases may not be representative of parties who choose not to litigate or arbitrate their sales contracts. For both reasons, a tribunal's construction of the CISG's malleable provisions in a contract cost-minimizing fashion in a particular case does not assure that the provisions are construed in a way most contracting parties prefer.

II. THE HISTORY AND STRUCTURE OF THE CISG

The inefficiency of many of the CISG's rules is due in part to the process by which they were produced. The CISG was promulgated by the United Nations Commission on International Trade Law (UNCITRAL). UNCITRAL is an arm of the United Nations that drafts model commercial laws for enactment as national law and conventions to be ratified as treaties. It organized the effort to create the CISG in response to the failure of prior efforts to create widely acceptable uniform sales law.⁷ The International Institute for the Unification of Private Law, or UNIDROIT, had

⁶ See Loukas Mistelis, *CISG and Arbitration*, in *CISG Methodology* 375, 388 (Andre Janssen & Olaf Meyer eds., 2009) (speculating that more than 70 percent of cases relating to the CISG through 2009 have been arbitrations); Andre Jansen & Matthias Spilker, *The Application of the CISG in the World of International Commercial Arbitration*, 77 *RabelsZeitschrift* 131, 133 (2013) (through 2012, 33 percent of cases were arbitrations).

⁷ The following history is based largely on material in Michael Bonell, *Introduction to the Convention*, in *Commentary on the International Sales Law* 2–16 (Cesare M. Bianca & Michael J. Bonell eds., 1987) [hereinafter “Bianca & Bonell”]; Honnold/Flechtner, *supra* note 3; and *The UNCITRAL Guide: Basic Facts About the United Nations Commission on International Trade Law* (2007) [hereinafter “UNCITRAL Guide”].

Cambridge University Press

978-1-107-14962-5 - The UN Convention on Contracts for the International Sale of Goods: Theory and Practice: Second Edition

Clayton P. Gillette and Steven D. Walt

Excerpt

[More information](#)

previously undertaken a three-decade effort that resulted in the 1964 promulgation of two treaties, the Uniform Law for International Sales (ULIS) and the Uniform Law on the Formation of Contracts for International Sales (ULF). Neither attracted adoption by more than nine nations, in part because the result was considered to have been dominated by European legal concepts that were not recognized elsewhere.⁸ UNCITRAL believed that it could increase adoptions by revising the prior treaties to reflect a more international flavor. UNCITRAL's membership was organized to ensure broad representation in drafting projects. Membership currently is limited to delegations from sixty states selected by the United Nations General Assembly, and is allocated along geographic lines. (UNCITRAL had thirty-four member states at the time of the CISG's drafting.) States from Africa, Asia, Eastern Europe, Latin America, and "Western Europe and Others" all have membership assured under the UNCITRAL charter.⁹ Thus, the project of reforming the ULIS and ULF necessarily involved representation from affluent and developing countries, common law and civil law systems, and market-based and socialist economies (recall that the project pre-dated democratic movements in Eastern Europe).¹⁰

UNCITRAL traditionally employs Working Groups to create initial drafts before submitting a proposed treaty to a conference of delegates from a broader range of states. The Working Group for a project consists of representatives from a diverse set of political and economic systems. Working Groups meet for one or two one-week sessions annually and work primarily from preparatory materials provided by the Secretariat of UNCITRAL, a full-time body composed largely of international lawyers.¹¹ The materials prepared by the Secretariat include draft statutory texts with alternatives that are intended "to facilitate debate and decision with a minimum of confusion or misunderstanding."¹² UNCITRAL and its working groups operate by consensus and almost never take a formal vote on their substantive proposals.¹³ Indeed, proceeding outside of a formal majority or unanimity rule appears to be a matter of pride for some involved in the process.¹⁴

⁸ See Honnold/Flechtner, *supra* note 3, at 5–9; Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. Pa. L. Rev. 687, 725–26 (1998); Gyula Eörsi, *A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods*, 31 Am. J. Comp. L. 333, 335 (1983).

⁹ See John O. Honnold, *The United Nations Commission on International Trade Law: Mission and Methods*, 27 Am. J. Comp. L. 201, 207 (1979) [hereinafter *Mission and Methods*].

¹⁰ See The UNCITRAL Guide, *supra* note 7, at 6–7.

¹¹ See UNCITRAL Rules of Procedure and Methods of Work, Practice and the Implementation of the Applicable Rules of Procedure, A/CN.9/638 paras. 22 & 24 (2007) [hereinafter UNCITRAL Rules of Procedure].

¹² Honnold, *Mission and Methods*, *supra* note 9, at 209; see The UNCITRAL Guide, *supra* note 7, at 7.

¹³ See UNCITRAL Rules of Procedure, *supra* note 11, at Add. 4 paras. 11 & 12. The decision not to reconsider the decision to relocate the Secretariat from New York to Vienna in 1979 was taken by vote.

¹⁴ See Honnold/Flechtner, *supra* note 3, at 8.

Cambridge University Press

978-1-107-14962-5 - The UN Convention on Contracts for the International Sale of Goods: Theory and Practice: Second Edition

Clayton P. Gillette and Steven D. Walt

Excerpt

[More information](#)

In the case of the CISG effort, UNCITRAL created an initial Working Group that comprised representatives from a broad geographic, political, and cultural range of states.¹⁵ UNCITRAL charged the Working Group with the development of legislation that would be acceptable “by countries of different legal, social, and economic systems.”¹⁶ The Working Group met in nine sessions from 1970 through 1977. While the Working Group initially proposed revisions to the ULIS and the ULF, UNCITRAL ultimately decided to consolidate the two treaties into a single document. UNCITRAL thus established a Drafting Committee for this purpose composed of representatives from Chile, Egypt, France, Hungary, India, Japan, Mexico, Nigeria, the USSR, and the United Kingdom.¹⁷ That Committee completed its work in 1978. UNCITRAL approved the draft that resulted and requested the United Nations to convene a Diplomatic Conference to consider it. The Conference was held at Vienna during a five-week period in 1980. Representatives of sixty-two states attended.¹⁸ Representatives from a variety of non-governmental and intergovernmental agencies interested in international trade attended as observers.¹⁹ Two committees performed most of the work for what became known as the Vienna Conference. One committee prepared the substantive provisions of the CISG, while

¹⁵ The original representatives were from Brazil, France, Ghana, Hungary, India, Iran, Japan, Kenya, Mexico, Norway, Tunisia, USSR, the United Kingdom, and the United States. Representatives from Austria, Czechoslovakia, the Philippines, and Sierra Leone were added later. See Bianca & Bonell, *supra* note 7, at 6.

¹⁶ See Documentary History of the Uniform Law of Sales 3 (John O. Honnold ed., 1989) [hereinafter, Documentary History].

¹⁷ See Bianca & Bonell, *supra* note 7, at 6.

¹⁸ Argentina, Australia, Austria, Belgium, Bolivia, Brazil, Bulgaria, Burma, Byelorussian Soviet Socialist Republic, Canada, Chile, China, Colombia, Costa Rica, Cyprus, Czechoslovakia, Denmark, Ecuador, Egypt, Finland, France, German Democratic Republic, Federal Republic of Germany, Ghana, Greece, Hungary, India, Iran, Iraq, Ireland, Israel, Italy, Japan, Kenya, Libyan Arab Jamahiriya, Luxembourg, Mexico, Netherlands, Nigeria, Norway, Pakistan, Panama, Peru, Philippines, Poland, Portugal, Republic of Korea, Romania, Singapore, Spain, Sweden, Switzerland, Thailand, Tunisia, Turkey, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Yugoslavia, and Zaire. Venezuela sent an observer. See 19 I.L.M. 668 (1980). Some commentators characterize the participants by reference to their political cultures. Thus, Alejandro Garro notes that “[s]ixty-two nations were represented at the Vienna Conference. Roughly speaking, twenty-two from the ‘Western developed’ part of the world, eleven from ‘socialist regimes,’ and twenty-nine from ‘Third World’ countries.” Alejandro M. Garro, *Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods*, 23 Int’l Law. 443 (1989).

¹⁹ These included the World Bank, the Bank for International Settlements, the Central Office for International Railway Transport, the Council of Europe, the European Economic Community, the Hague Conference on Private International Law, the International Institute for the Unification of Private Law, and the International Chamber of Commerce. Pre-Conference proposals for the convention were circulated to these observers, and they made comments on various provisions. See Documentary History, *supra* note 16, at 392. For instance, the ICC recommended the deletion of an article, similar to present Article 8, concerning a general rule on interpretation. See *id.* at 394. For the role of participation of observers in UNCITRAL projects, see UNCITRAL Rules of Procedure, *supra* note 11, at Add. 5 para. 6 (2007).

Cambridge University Press

978-1-107-14962-5 - The UN Convention on Contracts for the International Sale of Goods:
Theory and Practice: Second Edition

Clayton P. Gillette and Steven D. Walt

Excerpt

[More information](#)

the other prepared the “final clauses,” which dealt with such issues as reservations, declarations, and ratification by Contracting States.²⁰ Members of the Conference debated the text of each article, but ultimately approved the CISG unanimously. The CISG was then submitted to states for their approval according to domestic processes for adopting international treaties. According to its terms, the CISG was to become effective among signatories, denominated “Contracting States,” approximately one year after the tenth state deposited with the United Nations an instrument indicating its acceptance of the treaty.²¹ China, Italy, and the United States became the ninth, tenth, and eleventh Contracting States in December 1986. As a result, the CISG became effective among then-Contracting States as of January 1, 1988.

The participants who drafted the CISG tended to come from either universities or ministries in their home state.²² They were appointed by the governments of their various states, rather than by the United Nations. Appointing authority varies among the states. In some instances (for instance, Italy), the office of the Secretary of State made the appointment; in other instances (for example, Germany and Switzerland), the appointment was made by the Ministry of Justice. There was apparently no minimum credentialing required for appointment. Some commentators suggest that the representatives were experts in their field. Honnold reports that representatives to UNCITRAL projects tend to be academics who work in commercial or comparative law, practicing attorneys, and members of government ministries with significant experience in international lawmaking. This may be a bit of an overstatement. While most states do send experts, much of the expertise has been gained from academic study rather than participation in international business, and some states simply appoint members of the state’s Permanent Mission to the United Nations.²³ Of the thirteen representatives from nations involved in the first Working Group that led to the CISG, nine were legal academics, three were bureaucrats, and one was a member of the country’s Permanent Mission to the United Nations. Participants continued to hold their academic or ministerial positions while serving in the process of drafting the uniform law.

The predominantly academic affiliation of the participants and UNCITRAL’s voting rule together help explain the character of many of the CISG’s provisions. A substantial number of these provisions we discuss in detail in the following chapters are vague. They lack a precise standard for their application or, in some cases, any standard at all. The interests of academic participants do not necessarily coincide with those of businesses whose contracts will be governed by the CISG. Businesses prefer their contracts to be governed by rules that maximize the contract surplus: the difference between the value of performance and its cost (including negotiation and enforcement costs). They therefore desire that legal rules minimize

²⁰ See Bianca & Bonell, *supra* note 7, at 6. ²¹ See Article 99.

²² See Honnold, *Mission and Methods*, *supra* note 9, at 209.

²³ See Documentary History, *supra* note 16, at 187–88.

Cambridge University Press

978-1-107-14962-5 - The UN Convention on Contracts for the International Sale of Goods:
Theory and Practice: Second Edition

Clayton P. Gillette and Steven D. Walt

Excerpt

[More information](#)

transaction costs directed at the negotiation and enforcement of contract terms. By contrast, an academic's principal interest in uniform law may be in having UNCITRAL's membership approve the proposed convention and having states widely enact it. Participation in an approved and widely adopted convention is a signal of expertise and enhances the academic's reputation. This interest is served even by a uniform law that does not maximize the contract surplus for contracting parties. Put crudely, adoption, not efficiency, is the UNCITRAL participant's primary goal. At the same time, UNCITRAL's voting rule, which requires consensus, effectively gives participants a veto over proposals for a uniform law. This makes achieving a consensus costly with respect to majoritarian default rules among participants from very different legal systems, and risks failure of the underlying project.²⁴ On the other hand, vague rules with few reservations serve the participants' interests: Vague rules make consensus easier to achieve, because they do not contain contestable terms that are inconsistent with domestic law and thus potentially objectionable to some participants.²⁵

Consider, for example, a rule that requires "reasonable" conduct but that does not specify the criteria of reasonableness. Omitting criteria of reasonableness attracts support from participants who might object to specified criteria that are inconsistent with their domestic law. At the same time, no participant is likely to believe that its domestic law is "unreasonable." Thus, no participant is likely to face domestic resistance to a proposed uniform law on the grounds that its vague provisions are inconsistent with domestic law. The dominance of vague rules in the CISG therefore is unsurprising. This is not to say that ambiguity is necessarily a hallmark of interests other than those of commercial parties. A treaty such as the CISG that is intended to cover a broad array of transactions will necessarily include vague terms, because different goods require different treatment with respect to issues such as delivery, payment, or quality. It is only to say that the incentives of the participants likely generated more than an optimal degree of vagueness from the perspective of those whose transactions are subject to the CISG.

Given the objective of creating uniform international sales law, the CISG is notable both for what it contains and for what it omits. The first Part, containing thirteen Articles, deals with the Convention's sphere of application. Article 1(1) recites that the CISG applies to "contracts of sale of goods between parties whose places of business are in different States."²⁶ Nevertheless, neither the term "sale" nor the term "goods" is defined within the CISG, except for exclusions of particular transactions,²⁷ and the definition of "place of business" leaves significant ambiguity

²⁴ The classic discussion of the decision costs of an unanimity rule among multiple parties is James M. Buchanan & Gordon Tullock, *The Calculus of Consent* 84–96 (1962).

²⁵ See Gillette & Scott, *supra* note 5.

²⁶ All references within this text to a specific "Article" (e.g., "Article 1(1)(a)") are to Articles of the CISG unless otherwise indicated.

²⁷ See Article 2 (excluding certain transactions from the scope of "sale"), Article 3 (excluding certain transactions in which the buyer supplies materials for goods or in which the "seller" primarily provides labor or services).

Cambridge University Press

978-1-107-14962-5 - The UN Convention on Contracts for the International Sale of Goods: Theory and Practice: Second Edition

Clayton P. Gillette and Steven D. Walt

Excerpt

[More information](#)

about what law governs where a party has multiple places of business. Part II concerns the formation of contracts. Part III covers the obligations of each party, such as the obligations of buyers and sellers, remedies for breach, passage of risk, anticipatory breach, and damages. The final Part concerns procedural issues for the CISG, such as the capacity of Contracting States to make declarations with respect to specific Articles, and the terms under which the CISG becomes effective among Contracting States. The CISG explicitly excludes certain aspects of sales law, however. Article 4 recites that matters of contract validity and the effect of a contract on property rights in the goods sold are beyond the CISG's jurisdiction. Thus, nothing in the CISG addresses issues such as unconscionability, capacity defenses, or the rights of a bona fide purchaser to goods that turn out to have been stolen.

Even with respect to issues that are covered, the CISG provides only a set of default rules, subject to variation by the parties. This concept of "party autonomy" is illustrated most vividly by Article 6, which provides that the parties to a contract otherwise governed by the CISG "may exclude the application of this Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions."²⁸ This provision permits parties to opt out of the CISG as a whole or any part of it. The process of opting out, however, may be more demanding than Article 6 suggests. As we discuss in Chapter 2, most courts have required a very specific statement of intent to avoid application of the CISG. Selection of the law of a Contracting State, standing alone, typically will not suffice, because the CISG itself will constitute a part of that jurisdiction's law. Opting out of a particular article of the CISG, on the other hand, may be implied merely by the inclusion in the contract of a clause that conflicts with an article of the CISG. For instance, a contractual limitation of warranty to a twelve-month period was interpreted by an arbitral panel as derogating from the two-year statute of repose under Article 39.²⁹ In addition, contractual clauses may clarify vague standards within the CISG. Article 39 prevents a buyer from relying on a lack of conformity of the goods unless the buyer has given the seller appropriate notice within a "reasonable time." A contractual clause that required the buyer to report any complaint within five days of delivery was an effective specification of what would constitute a reasonable time.³⁰

²⁸ Article 12 makes certain parts of the CISG that eliminate writing requirements inapplicable where any party has its place of business in a Contracting State that has made a declaration under Article 96, and prohibits derogations or variations from Article 12. Certainly it would be incongruous to allow parties to circumvent a Contracting State's determination to require writing requirements by opting out of a provision intended to permit the Contracting State to retain the same requirements. We discuss Article 12 in Chapter 3.I. Similarly, courts have concluded that parties may not opt out of those provisions of the CISG that are directed to matters of public international law rather than to the substantive terms of the contract. See District Court Padova (Italy), 11 January 2005, available at <http://cisgw3.law.pace.edu/cases/0501113.html>.

²⁹ See ICC Arbitration Case No. 11333 of 2002, available at <http://cisgw3.law.pace.edu/cases/02133311.html>.

³⁰ See District Court Amhem (Netherlands), 11 February 2009, available at <http://cisgw3.law.pace.edu/cases/09021111.html>.

Cambridge University Press

978-1-107-14962-5 - The UN Convention on Contracts for the International Sale of Goods:
Theory and Practice: Second Edition

Clayton P. Gillette and Steven D. Walt

Excerpt

[More information](#)

III. CISG METHODOLOGY AND THE LIMITS OF INTERNATIONALITY

One of the enduring difficulties related to the CISG involves the appropriate methodology by which its provisions are to be interpreted. Even assuming that uniformity in international commercial law is desirable, the means by which the CISG attempts to implement that goal imposes substantial limitations. Some of these limitations are the necessary consequence of the political environment in which the CISG was promulgated and adopted. Others result from the inherent variations in judicial and arbitral processes involved in the interpretation of a convention intended to have international application. Still others are a consequence of the CISG's own requirements for its interpretation.

The sources of difficulty begin with the text itself. UNCITRAL promulgated the CISG in six languages: Arabic, Chinese, English, French, Russian, and Spanish. In theory, each of these versions is intended to be equally authoritative.³¹ The desire for equality among these versions, however, necessarily interferes with uniformity. Translation from one language to another is imperfect, especially when what must be translated is a legal concept that is unfamiliar in the language to which it is being translated.³² In addition, other jurisdictions have translated the CISG into other languages. Some courts have attempted to deal with the principle of equality by deviating from it. The Swiss Federal Court had to determine whether a buyer that had complained of an unusable machine without specifying individual defects had given sufficient notice to the seller.³³ That determination hinged on the degree of specificity implied by the notice requirement in Article 39. But that implication varied with the different translations of the CISG:

According to the German translation of Art. 39(1) CISG, the buyer must precisely specify the nature of the lack of conformity in the notice to the seller. The English and French texts of the Convention talk about "specifying the nature of the lack of conformity" and "*en précisant la nature de ce défaut*," respectively. Thereby, the notice must specify the nature, type or character of the lack of conformity (*cf.* Merriam-Webmaster [sic] Dictionary, which defines "nature," being a synonym for "essence," as "the inherent character or basic constitution of a person or thing," *cf.* also Le Grand Robert de la langue française, which equates "nature" with "essence"). What must be considered is that the verbs "specify" and "*préciser*" cannot only be translated as "*genau bezeichnen*" (precisely describe), but also with "*bezeichnen*" (describe) or with "*angeben*" (indicate). Consequently, the original

³¹ The Witness Clause included at the end of the CISG recites that it was "done at Vienna . . . in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic."

³² See Royston M. Goode, *Reflections on the Harmonization of Commercial Law*, 1 Unif. L. Rev. 71 (1991).

³³ See Federal Supreme Court (Switzerland), 13 November 2003, available at <http://cisgw3.law.pace.edu/cases/031113s1.html>.