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The United Nation's Convention on Contracts for the International Sale of Goods

Why is it being excluded from International Sales Contracts?

Master's thesis in Commercial Law and Tax Law (International Contract Law)

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Abstract

The development of the United Nation's Convention on Contracts for the International Sale of Goods (CISG) started at the beginning of the 20th century in order to provide a uniform legal regime for international sales contracts. The development started because of a belief that a uniform international sales convention would contribute certainty in commercial trade and decrease transaction costs for the contracting parties. The Convention was signed in Vienna 1980 and came into force in 1988 after securing the necessary number of ratifications. The CISG is automatically applied to international sale contracts in certain given situations but the contracting parties are free to exclude the Convention as applicable law in favour of another regulation. As of today, more than 25 years after the CISG came into force, the Convention is commonly being excluded as the governing law of international sales contracts. By studying surveys and academic writings, certain factors can be derived as reasons prior to an exclusion of the CISG. The factors can be referred to as unfamiliarity, time and costs, negotiation strength and standard form contracts or standard terms. Regarding unfamiliarity, the importance given to the Convention in law faculties within the signatory states, together with time and costs attributed to a familiarization process, seems to play an important role. Moreover, the Convention is associated with problems regarding a non-uniform interpretation of the Convention's provisions within the national courts and arbitral tribunals, as well as regarding its incompleteness, meaning that there are gaps that need to be filled by national law. These problems affect the Convention's ability to provide potential users with legal certainty and predictability, which in turn may affect the familiarity with the Convention and hence have an impact on an exclusion of the CISG.

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1 Introduction

1.1 Background

The CISG developed in order to provide a uniform legal regime for international sales contracts.[1] The aim with a uniform convention is to promote the development of international trade and contribute to the removal of legal barriers.[2] The CISG is by many described as a success and it has been argued to be "the most successful international document so far".[3] The Convention has had great influence on the laws of transnational commerce on both an international and a domestic level, and it has served as a source of inspiration for amendments on national sales law and for the development of other international sales regimes.[4] The success is hence fairly clear on a state level.

However, the Convention is designed to work as a legal framework for commercial parties, operating on the international market, why the main concern should be whether the Convention is to be regarded as an equivalent success also from the view of consulting lawyers and business engaged in international trade. The essential touchstone for such an assessment ought to be whether contracting parties, dealing with international trade, actually is using the Convention as governing law on their international sales contracts. The CISG automatically applies on an international sales contract between two parties located in different signatory states or when the rules of international private law lead to the application of the law of a state that has signed the CISG. The contracting parties is, however, free to exclude the application of the CISG from their contract.[5] There are several studies made on the frequency of exclusion of the CISG, which illustrates that the Convention not uncom-

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[1] A/CONF.97/19 United Nations Conference on Contracts for International Sale of Goods – Documents of the conference and summary records of the plenary meetings and of the meetings of the main committees, New York 1991, p. xiii

[2] The preamble, The United Nations Convention on the International Sale of Goods (1980)

[3] Bruno Zeller, CISG and the Unification of International Trade Law (1st ed, 2007) p. 94. See also Ingeborg Schwenzer & Pascal Hachem, The CISG – Successes and Pitfalls, *American Journal of Comparative Law 57* (2009), p. 477. Cf Joseph Lookofsky, Loose ends and contorts in international sales: problems in the harmonization of private law rules, *American Journal of Comparative Law 39,* (1991), p. 403. Peter Schlechtriem, 'Requirements of Application and Sphere of Applicability of the CISG', *36 Victoria University of Wellington Law Review,* (2005), p. 781.

[4] Zeller, *supra note 3,* p. 81 ff. Schwenzer & Hachem, *supra note 3*, p. 457-478. See also Prof. Dr. Stefano Troiano, The CISG's Impact on EU Legislation, *Internationales Handelsrecht*, 6/2008, p. 223; COM (95) 520 Final, Proposal for a European Parliament and Council Directive on the sale of consumer goods and associated guarantees, p. 11 (regarding article 2), p. 12 f. (regarding article 3), p. 14 (regarding article 4).

[5] Article 1 and Article 6 the CISG.

monly is being excluded from international sales contracts.[6] The question that then arises is, why? Is the Convention regarded as a futility amongst businesses dealing with international trade and their legal consultants or are there other reasons behind an exclusion of the CISG? This thesis aims to sort out the relevant factors behind an exclusion of the Convention and hence answer the question: *why do contracting parties exclude an application of the CISG in their international sales contracts?*

[6] See for instance Martin F Koehler & Guo Yujun's survey, "The Acceptance of the Unified Sales Law (CISG) in Different Legal Systems: An Interna-tional Comparison of Three Surveys on the Exclusion of the CISG's Application Conducted in the United States, Germany and China", 2008, *20 Pace International Law Review*; Peter L Fitzgerald, The International Contracting Practices Survey Project: An Empirical Study of the Value and Utility of the United Nations Convention on the International Sale of Goods (CISG) and the UNIDROIT Principles of International Commercial Contracts to Practitioners, Jurists, and Legal Academics in the United States, *Journal of Law and Commerce*, vol. 27:1, 2008; Prof. Ingeborg Schwenzer and Dr. Christopher Kee, International Sales Law – The Actual Practice, *Penn State International Law Review*, Vol. 29:3, 2011.

1.2 Aim

The aim of this master thesis is to examine why contracting parties exclude an application of the CISG from their international sale contracts.

1.3 Delimitations

This thesis neither examine which regulatory legislation contracting parties, who excludes the application of the CISG, applies instead of the Convention, nor add any value to whether an exclusion of the Convention is legally advantageous or not for the contracting parties, since these considerations must be examined on a case-to-case basis.

Moreover, this thesis describes the general problems associated with the uniformity under the CISG which are chiefly attributable to Article 7 in the Convention, wherefore problems with interpretation of other certain specific provisions are not illustrated, though with the exception if it is used as an example in a wider context.

1.4 Methodology and Material

This thesis starts of by providing a description of the history of the establishment of the Convention in order to give an understanding for the underlying reasons behind the development of an international sales law. Furthermore, the aims of the Convention are demonstrated to illustrate the goals that the CISG is aiming to achieve. These descriptions are based on what transpires in the preamble of the Convention and in the *travaux préparatoires*, which is the preparatory work for the Convention.

The Convention's influence on other regulations worldwide is reported to illustrate why the Convention often is referred to as a success. This part is based on what, after examining different academic writings, seems to be the general opinions regarding the Convention's achievements in doctrine. Moreover, the structure and the application of the Convention are described, intending to demonstrate the scope of the Convention and to give a hint on how the legal regime operates in practice. This description is primarily based on the provisions within the Convention, though the travaux préparatoires and academic literature have been used where a further explanation have been considered necessary to provide an understanding for a certain statement. The travaux préparatoires must although be used care-

fully as it has been established that the legislative history only is of importance if it reflects a general view of the drafters.[7]

The CISG developed in order to provide a uniform legal regime for international sales contracts, aiming to contribute certainty in commercial exchanges and decreasing transaction cost for the contracting parties. It is however clear that the mere existence of a unified document, such as the CISG, does not guarantee uniformity. It is therefore necessary to provide the reader with a description of the problems regarding uniformity under the Convention in order to further illustrate how the Convention operates in practice. It is also of interest to examine these problems, as it is not unlikely to believe that if the Convention is connected with problems, it may affect an exclusion of the CISG. The description starts of by being based on what it is with the content of the Convention that is giving rise to these problems. Moreover, to give as fair a picture as possible regarding these problems various sources of academic articles and literature are used. This because a difficulty regarding these problems are that academics seems to perceive them in different manners and adding more or less importance to them, hence it is relevant to highlight these different approaches. Court judgements are also used to illustrate how these problems are reflected practically in the national courts.

Before answering to the aim of this thesis it is relevant to declare the frequency of exclusion of the CISG, since the aim of this thesis would be irrelevant if the Convention never were excluded from governing international sales contracts. To examine how frequently the CISG is being excluded from international sales contracts, surveys that have been found on the subject will be demonstrated to illustrate figures on the frequency of exclusion amongst practitioners from different countries. Also academic articles written on the subject will be referred to, that, although not illustrating any figures regarding an exclusion of the CISG, contributes to present a broader picture on the frequency of exclusion. It should, however, be pointed out that some of the illustrated surveys have obtained relatively poor responses, whereby the presented figures and answers may in no manner be considered as any general truth, but it can, although, be seen as an indication on the frequency of exclusion of the CISG. However, the exact frequency of exclusion is not the decisive factor in order to answer to the aim of this thesis, hence it is not essential to provide precise figures regarding

[7] Article 32, The Vienna Convention on the Law of Treaties (Vienna, 23 May 1969).

the frequency of exclusion. The relevance is merely to demonstrate that exclusions actually do occur, although it might be to a greater or lesser extent.

The importance of this thesis lies in the relevant factors that precede an exclusion of the CISG amongst businesses and legal consultants. In order to derive the relevant factors, studies and articles that have been found on the subject have been carefully examined to deduce what businesses and legal consultants consider crucial prior to an exclusion of the CISG. To ensure the relevancy of the factors that this thesis refers to, they are derived from several various sources. The main sources have been surveys, were businesses and legal consultants have answered questions regarding their reasons for an exclusion of the CISG in their international sales contracts. Academic writings have also been studied in order to further sort out relevant factors and to further examine reported reasons from businesses and consulting lawyers. It has although required considerable consideration when further examining the relevant factors from articles and other academic writings in order to not confuse what is the author's own opinion regarding why an exclusion of the CISG might be made, and what, that in any way, have the support from the reasons given by businesses and legal consultants. Some authors have, however, raised interesting arguments why these are referred to, as they are considered to have a value for the interest of the reader.

1.5 Disposition

Chapter two starts with a description of the legislative history of the CISG and the reasons for the development of the Convention. The aim of the CISG is explained and the influences the Convention has had on other legal instruments are illustrated. Further, the structure and the application of the Convention is described in *chapter three* and the content of the Convention is portrayed.

In *chapter four* the problems regarding uniformity under the Convention are demonstrated and the chapter is divided into one descriptive part regarding the problem with a uniform application by national courts and arbitral tribunals, and a descriptive part regarding the problem with the incompleteness of the CISG.

Chapter five deals with the frequency of exclusion of the CISG and describes how contracting parties may proceed in order to exclude the application of the CISG from their international sales contracts. The relevant factors of an exclusion of the CISG are given in *chapter six* and each factor is separately portrayed.

C*hapter seven* contains the analysis where a discussion is conducted regarding the information that has emerged in the previous chapters, in order to provide an answer to the aim of this thesis. Finally, *chapter eight* provides a conclusion of what has been transpired in the analysis.

2 The CISG

2.1 Background

The CISG is the result of a legislative effort that started at the beginning of the twentieth century in order to provide a uniform international sales law. The CISG was developed by the United Nations Commission on International Trade Law, UNCITRAL, and is a modification of the 1964 Hague Sales Convention and the 1964 Hague Formation Convention, which were submitted by the International Institute for the Unification of Private Law, UNIDROIT. The development of a uniform international sales law started because of a conviction that a harmonization and unification of international sales law, by reducing or removing legal obstacles of international trade, would significantly contribute to economic cooperation among states worldwide.[8]

UNCITRAL decided to modify the two Hague Conventions in 1968 in order to make them capable of wider acceptance by countries of different legal, social and economic systems.[9] The amendments resulted in the CISG and the modified convention was finally signed in Vienna 1980 and came into force in 1988 after securing the necessary number of ratifications.[10] Currently the CISG has been adopted by 80 countries, including all the important industrialized nations, such as USA and Germany, thus with the exception of the United Kingdom.[11] As uniform law the CISG, when implemented as national law in a contracting state, take the stand as a supreme law of that country. Meaning that the Convention displaces both that state's domestic law and private international law rules concerning the sale of goods. This means that in case of a dispute between parties from signatory states, where the contract contains no choice-of-law clause, the CISG will be applied to the contract regardless of where the dispute is litigated.[12] In some cases it is not even necessary for the Convention to be implemented in order to be part of the supreme law of that coun-

[8] A/CONF.97/19, *supra note 1*, p. xiii.

[9] A/CONF.97/10 Proposals, Reports and other Documents, p. 3-5.

[10] A/CONF.97/SR.12, 12th Plenary Meeting, p. 234. M G Bridge, The International Sale of Goods, third edition, Oxford, 2013, p. 467 paragraph 10.01.

[11] The Pace University Institute of International Commercial Law, CISG: Table of Contracting States, to be found at: http://www.cisg.law.pace.edu/cisg/countries/cntries.html (2014-03-18). See Apendix I.

[12] Article 1 (1a) the CISG, M G Bridge, *supra note 10*, p. 467 f. paragraph 10.01-10.02.

try. For instance in the USA, the CISG is a part of the state's supreme law since the Convention has been signed and ratified in accordance with the U.S. Constitution.[13]

2.2 The Aim of the CISG

The aim of the CISG is to provide a uniform and fair legal regime, which take into account different social, economic and legal systems, for contracts regulating international sale of goods.[14] The Convention will apply whenever contracts are concluded between commercial parties with a place of business within a signatory state.[15] In these cases, the CISG will be directly applicable, with the purpose to avoid recourse to private international law rules to determine the law applicable to the contract, hence adding significantly to the legal certainty and predictability of international sales contracts. Moreover, the CISG may apply to a contract for international sale of goods when the rules of private international law point at the law of a contracting state as the applicable one, or by virtue of the choice of the contractual parties, regardless of whether their place of business is located in a signatory state. In this latter cases, the CISG aims to provide a neutral body of rules that can be easily accepted in light of its transnational character.[16]

Furthermore, by providing a uniform set or rules, the CISG aims to contribute to promote the development of international trade and to the removal of legal barriers in international trade, and thereby to the decreasing of transaction costs.[17] When dealing with international trade, it is assumed that concluding a contract will be more complicated than if a contract would be concluded domestically, since the contracting parties come from different legal backgrounds. Typically regarding international trade, there will be negotiation between the parties regarding choice of law, whereby one of the contractual parties will be faced with

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[13] William P Johnson, Understanding the exclusion of the CISG: A new Paradigm of Determining Party Intent, Buffalo Law Review, Vol. 59, 2011, p. 223 f.

[14] The preamble of the CISG.

[15] Article 1 (1a) the CISG.

[16] Article 1 (1b) the CISG; United Nations Commission on International Trade Law, UNCITRAL Texts & Statues, International Sale of Goods (CISG), available on the internet at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html (2014-05-09).

[17] *Supra note 14,* and also, The United Nations Convention on Contracts for the International Sale of Goods - Explanatory Documentation prepared for Commonwealth Jurisdictions by Muna Ndulo in association with the Commonwealth Secretariat, Commonwealth Secretariat, Marlborough House, Pall Mall, London SW1Y 5HX, (October 1991), p. 6-8.

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the law of a foreign country. The former party will hence be required to understand the applicable foreign legal regime and to undertake a costly translation of its provisions.[18] By providing a uniform international sales regime, there is neither any need for negotiation regarding applicable law when the contracting parties are from signatory states, nor is it required to undertake any costly translation, as the Convention is available translated into several different languages.[19]

2.3 An Influential Convention

The CISG is in a wide variety of doctrine described as a great success for international trade and it has been pronounced to be "the most successful international document so far".[20] Several countries have implemented the Convention in their own national law, including China, Singapore and Australia, the North American Free Trade Area (NAFTA) countries along with some South American countries and most of the Eastern European countries.[21] The CISG is also being acclaimed as a great achievement because of its influence on the law of trans-border commerce on both an international and a domestic level. Besides the fact that the CISG has been implemented by a numerous number of countries, the convention has also served as a model for modifications on national sales law, such as the 1988 uniform Nordic Sale of Goods Act, the 1999 Contract Law of the People's Republic of China and the new German law of obligations of 2002.[22] The Convention has also served as a source of inspiration for the development of the European Union's Directive on Consumer Sales and other international law instruments such as the Principles of European Contract Law (PECL) and the UNIDROIT Principles for International Commercial Contracts (PICC).[23]

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[18] Muna Ndulo in association with the Commonwealth Secretariat, *Supra note 17*, p. 6. See also Gilles Cuniberti, Is the CISG benefiting anybody? ? *Vanderbilt Journal of Transnational Law*, Vol 39:1511, (2006), p. 1519.

[19] The CISG is found translated into English, Chinese, Spanish, Russian, and French (Arabic texts are being prepared for entry in the database) at the Pace University CISG Database. To be found at http://www.cisg.law.pace.edu/cisg/text/text.html

[20] Zeller, *supra note 3,* p. 94; See also Schwenzer & Hachem, *supra note 3,* p. 477; Cf Joseph Lookofsky, *supra note 3,* p. 403. Peter Schlechtriem, *supra note 3,* p. 781.

[21] M G Bridge, *supra note 10*, p. 467 paragraph 10.01.

[22] Zeller, *supra note 3*, p. 83. Ingeborg Schwenzer & Pascal Hachem, *supra note 3*, p. 457-478. See also Thor Thingbø, 1993, The United Nations Convention on Contracts for the International Sale of Goods (1980) and Norway's Ratification Process, *Lex Mundi World Reports*, Suppl. No. 30 p. 32 ff.

[23] Zeller, *supra note 3*, p. 81 and p .95. Prof. Dr. Stefano Troiano, *supra note 4,* p. 223. See also COM (95) 520, *supra note 4*, p. 11 (regarding article 2), p. 12 f. (regarding article 3), p. 14 (regarding article 4).

3 The Structure and the Application of the CISG

3.1 The Structure of the Convention

The CISG is divided into four parts. Part I describe the sphere of application and state the general provisions of the convention.[24] Part II regulate the formation of the contract and part III cover the rights and obligations of the contracting parts.[25] The last part of the CISG, Part IV, regulate how and when the Convention come into force, which kind of reservations and declarations that are permitted by the adopting states, and how states may denounce the Convention.[26] Part IV, along with the Preamble, is addressed primarily to the signatory states and not to businesses attempting to use the CISG for international trade. The Part may, however, have an impact upon the CISG's applicability to a given sales contract, thus required be taken into account when determining each particular case. The provisions in Part IV should therefore not be ignored because of their location in the last part of the convention since some of the provisions address matters which can be attributable to other parts of the Convention.[27]

3.2 The Sphere of Application

The CISG applies in two alternative cases. Firstly, the CISG applies to contracts of sale of goods between businesses located in different signatory states.[28] Secondly, the CISG applies if the rules of private international law lead to the application of the law of a state that has signed the CISG.[29] The CISG is, however, optional and the contracting parties may exclude the application of the CISG in their contract or derogate from or vary the effect of any of its provisions.[30]

Moreover, the CISG is only applicable regarding contract on sale of goods. However, the convention defines neither "sale" nor "goods" nor "contract of sale of goods". Although,

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[24] Article 1-13 the CISG.

[25] Article 14-24 and Article 25-88 the CISG.

[26] Article 89-101 the CISG.

[27] Ulrich G Schroeter, Backbone or Backyard of the Convention? The CISG's Final Provisions, Simmonds & Hill Publishing, (2008), p. 425 f.

[28] Article 1 (1a) the CISG.

[29] Article 1 (1b) the CISG.

[30] Article 6 the CISG.

certain types of sale as well as certain types of property are explicitly excluded. Consumer sales, auction- and compulsory sales are all expressly excluded from the CISG's sphere of application. Additionally, securities, ships and aircrafts and electricity also fall outside the scope of the Convention.[31] The CISG governs the formation of the contract and the rights and obligations of the seller and the buyer arising from the contract. Thus the CISG do neither regulate the validity of the contract or of any of its provisions, nor the effect that the contract may have on the property in the goods sold.[32]

The CISG states that the interpretation of the Convention should be done in the light of the Conventions international character and that consideration should be given to the need to promote a uniform application of the CISG and to the observance of good faith in international trade.[33] This provision is to certify a unanimous interpretation of the CISG and to induce the courts to escape the trap of a 'homeward tendency' in interpretation.[34] The meaning of 'the need to promote the observance of good faith' is, however, something of a mystery. It is unclear if the statement is an expression for a legal principle to be incorporated in the contract between the parties, meaning that the parties' rights and duties are subject to good faith, or if it is to be seen as a mere moral principle.[35] Questions concerning matters governed by the CISG but not expressly settled in the convention are to be settled in conformity with the general principles upon which the CISG is based or, in the absence of such principles, in conformity with the law applicable according to the rules of private international law.[36]

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[31] Article 2 the CISG.

[32] Article 4 the CISG.

[33] Article 7 (1) the CISG.

[34] A/CONF.97/5 Commentary on the Draft Convention on Contracts for the International Sale of Goods Prepared by the Secretariat, p.17. M G Bridge, *supra note 10,* p. 506, paragraph 10.39.

[35] M G Bridge, *supra note 10*, p. 510, paragraph 10.41. Recourse to the travaux préparatoires neither does not provide with any specific guidance. It states that the provisions of the Convention shall be interpreted an applied in such a manner that the observance of good faith in international trade is promoted and that the principle of good faith applies to all aspects of interpretation and application of the provisions of the Convention, A/CONF.97/5, *ibid*, p. 18.

[36] Article 7 (2) the CISG.

3.3 Formation of the Contract

According to the CISG, a contract is formed the moment when the offeree accept the offer made by the offeror.[37] A proposal for concluding a contract is considered to be an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is considered to be sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provisions for determining the quantity and the price of the goods to be sold.[38] Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance. An offer cannot, however, be revoked if it is reasonable for the offeree to rely on the offer as being irrevocable or if the offer indicates that it is irrevocable by stating a fixed time for acceptance or otherwise implies that it is irrevocable.[39]

The offeree makes an acceptance by a statement or other conduct, indicating assent to the offer. Silence or inactivity by the offeree may never in itself be considered as acceptance. If by virtue of the offer or as a result of practices, which the parties have established between themselves, the offeree may indicate assent by performing an act. An acceptance is effective when the indication of assent reaches the offeror within a reasonable time or within the time the offeror has fixed, or at the moment the act is performed. An oral offer must, however, be accepted immediately in order to be effective, unless the circumstances indicate otherwise.[40] A late acceptance may be effective if the offeror informs the offeree that a late acceptance will be considered as an acceptance by the offeror.[41] The offeree may only withdraw an acceptance if the withdrawal reaches the offeror no later than at the same time as the acceptance otherwise would have become binding.[42]

3.4 The Rights and Obligations of the Contracting Parts

The CISG regulates the obligations of the seller and the buyer. The seller is obligated to deliver the goods, hand over any documents relating to them and transfer the property in the

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[37] Article 15 the CISG.

[38] Article 14 the CISG.

[39] Article 16 the CISG.

[40] Article 18 the CISG.

[41] Article 21 the CISG.

[42] Article 22 the CISG.

goods, as required by the contract.[43] The buyer is obliged to pay the price, which include taking such steps and complying with such formalities as may be required under the contract or under any laws or regulations to enable payment to be paid. The buyer is also obligated to take delivery of the goods as required in the contract.[44] The goods delivered by the seller must be of the quality, quantity and description required by the contract and the goods must be contained and packaged in accordance with the contract.[45] It is however up to the buyer to examine the goods within as a short a period as is achievable after the delivery.[46] The seller is liable for any lack of conformity, which exist at the time when the risk passes to the buyer. The risk generally passes from the seller to the buyer when the goods are handed over to the carrier and the goods are clearly identified to the contract.[47]

If the buyer or the seller fails to perform any of their obligations the remedies depends on the character of the breach of the contract. If the breach is fundamental the aggrieved party may avoid the contract and claim damages.[48] A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party, which the party is not entitled to expect under the contract, provided that the breach could not have been foreseen.[49] In case of avoidance of the contract, both parties are released from their obligations. A party, who has performed the contract either wholly or partly, may however, claim restitution from the other party of what the first party has supplied or paid under the contract.[50] If a breach is not fundamental, the remedies are to be sought by claiming damages, requiring performance or adjustment of price.[51] If a party's failure is due to the failure by a third party whom is engaged to perform the whole or a part of the contract, the first party is exempted from liability only under certain circumstances.[52]A party is however not liable to perform any of its obligations if a failure to perform is due to an impediment beyond the

[43] Article 30 the CISG.

[44] Article 53-54 and Article 60 the CISG.

[45] Article 35 the CISG.

[46] Article 38 the CISG.

[47] Article 67 the CISG.

[48] Article 49 and Article 64 the CISG.

[49] Article 25 the CISG.

[50] Article 81 the CISG.

[51] Article 46-52, Article 62-65 and Article 74-77 the CISG.

[52] Article 79 (2) the CISG.

party's control that the party neither could reasonably be expected to have taken in regard at the time of the conclusion of the contract, nor to have avoided or to overcome its consequences.[53]

3.5 Final Provisions

The last part of the CISG deals with technical matters regarding the Convention's ratification and questions regarding rights and obligations the Convention give rise to for the signatory states.[54] However, the final provisions may also have an impact on the Convention's applicability to a given sales contract and many of the provisions correspond to provisions that are to be found in other parts of the Convention. For example, one of the final provisions[55] of the CISG states that the Convention applies to the formation of a contract only when the proposal for concluding the contract is made on or after the date when the Convention entered into force in the contracting states, which thereby correspond to the signatory states referred to in part I regarding when the CISG is applicable to a given sales contract.[56] The CISG's Final Provisions may thus have a significant impact on the Convention's applicability to a particular sales contract and need consequently be considered when dealing with the CISG. The location in the final part of the Convention should therefore not distract from the fact that many of the provisions address matters, which are also to be found elsewhere in the Convention.[57]

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[53] Article 79 (1) the CISG.

[54] Article 89-101 the CISG.

[55] Article 100 the CISG.

[56] Article 1 (1a-1b) the CISG.

[57] Ulrich G. Schroeter, *supra note 27*, p. 425 f.

4 Problems with the Application of the CISG

4.1 Introduction

The aim of the CISG is to provide a uniform set of rules applicable to international sales contracts, as it is universally accepted that legal risks and costs are reduced if there would be only one law dealing with international trade.[58] However, it is questionable whether uniformity under the CISG exists or is at all possible. The answer to that question depends entirely on what one consider uniformity to be. On one hand, uniformity may be considered to be achieved when an exporter from a signatory state know that all of its international transactions with businesses from other signatory sates will be governed by the same law. On the other hand, uniformity may not be considered as achieved until a uniform application of the Convention's provisions by national courts is provided.[59]

The following of this chapter will illustrate the problems regarding a uniform application of the Convention by the national courts and arbitral tribunals. Furthermore, the CISG do not cover a complete area of law and domestic law will be needed to fill in the gaps, hence the unification process is curtailed as soon as domestic law needs to be applied since the contract then no longer is governed by one law, but by several legal fragments.[60]

4.2 Uniform Application by the National Courts

As mentioned previously, it is questionable whether uniformity under the CISG exists or is at all possible. It is however clear that the mere existence of a unified convention, such as the CISG, does not guarantee a uniform application. In order to provide a uniform application, the Convention must be uniformed applied by the national courts and arbitral tribunals. The provisions of the CISG are the result of negotiation between states. In order to satisfy all of the negotiating states, many of the Convention's provisions were designed in a general and abstract manner, to regulate as wide a range of relationships as possible.[61] Thereby, the CISG contains vague terms and provisions, which need to be interpreted by the domestic courts and arbitral tribunals. The drafters of the CISG have tried to provide

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[58] Zeller, *supra note 3*, p. 3.

[59] *Ibid*, p. 16 ff. and p. 99.

[60] *Ibid*, p. 1.

[61] Huber Peter & Alastair Mullis – The CISG: A New Textbook for Students and Practitioners, Sellier, (2007), p. 33 f.

for a uniform interpretation in national courts by stating that the interpretation should be done in the light of the Conventions international character.[62] However, even if the CISG states that the interpretation should be done in the light of the Conventions international character in order to promote a uniform application of the CISG, there is no guarantee for the interpretation to be uniform. Different legal systems may perceive the wording of the Convention's provisions not within the context of the CISG but within the context of their domestic legal traditions.[63] There is neither any common authority such as a supreme court, guarding a uniform interpretation amongst the contracting states, and several national courts have explicitly stated that foreign court decisions, although having persuasive value, they are not binding upon courts in other jurisdictions.[64] Criticism regarding problem of uniform interpretation is especially more common amongst those with a Common Law background.[65] This is although due to the fact that Common Law practitioners have been accustomed to detailed statues, and extensive catalogues of definitions as well as meticulous instructions for the construction and interpretation of contracts, in order to restrict the room for interpretation.[66]

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[62] Article 7 (1), the CISG.

[63] Zeller, *supra note 3,* p. 17

[64] U.S. District Court, Northern District of Illinois, United States, 21 May 2004 (*Chicago Prime Packers, Inc. v. Northam Food Trading Co., et al*), "[...] although foreign case law is not binding on this court, it is nonetheless instructive [...]." Available on the Internet at http://cisgw3.law.pace.edu/cases/040521u1.html (2014-03-28); Tribunale di Padova, Italy, (*Agricultural Products Case*), 25 February 2004, "Although not binding, [...], the jurisprudence on the Convention must be very carefully considered in order to assure uniformity in the application of [CISG]." Available on the Internet at http://cisgw3.law.pace.edu/cases/040225i3.html (20014-03-28); Tribunale di Rimini, Italy, (*Al Palazzo S.r.l. v. Bernardaud di Limoges S.A.*), 26 November 2002, "[...] the court decisions and arbitral awards of other countries, [...], have only persuasive and not binding value." Available on the Internet at http://cisgw3.law.pace.edu/cases/021126i3.html (2014-03-28); Tribunale di Vigevano, Italy, (*Rheinland Versicherungen v. Atlarex*), 12 July 2000, "[...] with respect to foreign jurisprudence that, even if it is not binding [...] should be taken into consideration with "regard" to promoting uniform application of the CISG and the observance of good faith [...]." Available on the Internet at http://cisgw3.law.pace.edu/cases/000712i3.html (2014-03-28); Tribunale di Pavia, Italy, (*Tessile v. Ixela*), 29 December 1999, "foreign case law which, [...] although not binding, is however to be taken into consideration as required by Art. 7(1) of the CISG." Available on the Internet at http://cisgw3.law.pace.edu/cases/991229i3.html (2014-03-28).

[65] Ingeborg Schwenzer & Pascal Hachem, *supra note 3*, p. 467. Also, see for instance Clayton P. Gillette and Robert E. Scott, The Political Economy of International Sales Law, International Review of Law and Economics, (September 2005), p. 473. James E. Bailey, Facing the Truth: Seeing the Convention on Contracts for the International Sale of Goods as an Obstacle to a Uniform Law of International Sales, 32 Cornell International Law Journal, (1999), p. 275, wherein it states "[…] the CISG's rules on interpretation are so obscure that the treaty's own guidelines for producing consistent interpretations fail to promote uniformity."

[66] Ingeborg Schwenzer & Pascal Hachem, *supra note 3*, p. 467. See also, § 1-201 General Definitions, the UCC, § 2-103 Definitions and Index of Definitions, § 2-104 Definitions; "Merchant": "Between Merchants"; "Financing Agency", § 2-105 Definitions: Transferability; "Goods"; "Future" Goods; "Lot"; "Commercial Unit", § 2-106 Definitions: "Contract"; "Agreement"; "Contracting for Sale"; "Sale"; "Present Sale"; "Conforming to Contract"; "Termination"; "Cancellation".

By the fact that the interpretation of the Convention is to be done in the light of its international character in order to promote uniformity in its application, the courts are, impliedly, urged to look at international practice to see how the interpretation have been done in foreign courts, and at scholarly writings. Resorting to the *travaux préparatoires* can also neutralize the risk of differing interpretations.[67] Although, it is impliedly proscribed, judges and arbitrators, especially in the US, have a homeward tendency in their interpretation of the CISG. Because a wording of a provision within the Convention is characteristic of a provision in their national law, the assumption is not uncommonly made that domestic jurisprudence can be used to determine the matter.[68] Some courts have stated that case law interpreting domestic sales law, although "not per se applicable," may influence a court's approach to provisions within the Convention where the relevant articles follow the language of the domestic law.[69] An example of such homeward tendency is displayed in the case *Raw Materials Inc v Manfred Forberich GmbH*. In this judgment the court stated, "[…] in applying Article 79 of the CISG, the court will use as a guide case law interpreting a similar provision of article 2-615 of the UCC[70]". The reason expressed by the court for using domestic case law for interpretation of the CISG provision was "while no American court has specifically interpreted or applied Article 79 of the CISG, case law interpreting the UCC provides guidance for interpreting the CISG article 79". This way of interpretation conflicts with the Conventions need to be interpreted in the light of its international character in order to promote a uniform application. The right way for the court would have been to consult international case law, which at that time, consisted of 27 reported cases regarding the specific provision.[71] However, the reason for the court using the UCC when interpreting the

[67] F Ferrari, Specific Topics of the CISG in the Light of Judicial Application and Scholarly Writing, 15 *Journal of Law and Commerce* (1995), p. 10 ff. Zeller, *supra note 3*, p. 33 ff.

[68] Zeller, *supra note 3,* p. 37.

[69] UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, to be found on the Internet at http://www.uncitral.org/pdf/english/clout/08-51939_Ebook.pdf (2014-03-28), p. 28. Federal Court of Appeals for the Second Circuit, United States, (*Delchi Carrier v. Rotorex*), 6 December 1995, available on the Internet at http://cisgw3.law.pace.edu/cases/951206u1.html (2014-03-28), Federal Court of Appeals (4th Circuit), (*Schmitz-Werke v. Rockland*), 1 June 2002, available on the Internet at http://cisgw3.law.pace.edu/cases/020621u1.html (2014-03-28).

[70] The U.S Uniform Commercial Code.

[71] Zeller, *supra note 3,* p. 37.

Convention is not due to the ignorance by the court itself, as this approach was proposed by the plaintiff and also the defendant pointed to case law interpreting the UCC.[72]

If different legal systems interpret the same words within the context of their legal traditions and not within the context of the CISG, the aim with the Convention – uniformity – has not been taken into consideration and will not be fulfilled.[73] This issue is though not to be addressed to the CISG itself but rather to the interpreters of the Convention, since the CISG explicitly stipulates that the international character of the Convention must be observed. However, there are though a lot of cases where the international character of the Convention and the need to promote uniformity has been recognized and more and more courts refer to foreign court decisions.[74] In two different CISG relating cases, the Italian court made reference to over 40 foreign court decisions and arbitral awards, and there are several cases that have made reference to at least a single foreign decision.[75] Reference to the need to interpret the CISG in the light of its international character may be found in US cases as well. As an example, in the case *Calzaturificio Claudia v. Olivieri Footwear,* the court stated that "although the CISG is similar to the UCC with respect to certain provi-

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[72] United States 6 July 2004 Federal District Court (*Raw Materials Inc. v. Manfred Forberich GmbH & Co., KG*), to be found on the Internet at http://cisgw3.law.pace.edu/cases/040706u1.html (2014-05-07).

[73] Zeller, *supra note 3*, p. 17.

[74] UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, *supra note 69*, p. 28. See for example: New Zealand 30 July 2010 High Court of New Zealand (*RJ & AM Smallmon v. Transport Sales Limited and Grant Alan Miller*), available on the Internet at http://cisgw3.law.pace.edu/cases/100730n6.html (2014-03-28), United States 17 December 2009 Federal District Court [Georgia] (*Innotex Precision Limited v. Horei Image Produdts, Inc., et al.*) available on the Internet at http://cisgw3.law.pace.edu/cases/091217u1.html (2014-03-28), Netherlands 25 February 2009 District Court Rotterdam (*Fresh-Life International B.V. v. Cobana Fruchtring GmbH & Co., KG*) available on the Internet at http://cisgw3.law.pace.edu/cases/090225n1.html (2014-03-28), Netherlands 21 January 2009 District Court Utrecht (*Sesame seed case*) available on the Internet at http://cisgw3.law.pace.edu/cases/090121n1.html (2014-03-28).

[75] UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, *supra note 69*, p. 28. See Italy 11 December 2008 Tribunale di Forli [District Court], (*Mitias v. Solidea S.r.l.*), available on the Internet at http://cisgw3.law.pace.edu/cases/081211i3.html (2014-03-28), Tribunale di Vigevano, (*Rheinland Versicherungen v. Atlarex*), Italy, 12 July 2000, available on the Internet at http://cisgw3.law.pace.edu/cases/000712i3.html (2014-03-28), (See also Tribunale di Rimini, Italy, 26 November 2002, available on the Internet at http://cisgw3.law.pace.edu/cases/021126i3.html (2014-03-28), where 37 foreign cases were cited); Federal Northern District Court for Illinois, (*Usinor Industeel v. Leeco Steel Products*), 28 March 2002, available on the Internet at http://cisgw3.law.pace.edu/cases/020328u1.html (2014-03-28), Supreme Court of Queensland, Australia, (*Downs Investments v. Perwaja Steel*), 17 November 2000, available on the Internet at http://cisgw3.law.pace.edu/cases/001117a2.html (2014-03-28), Oberster Gerichtshof, Austria, *(Machines case)*, 13 April 2000, available on the Internet at http://cisgw3.law.pace.edu/cases/000413a3.html (2014-03-28), Tribunale di Pavia, Italy, 29 December 1999, available on the Internet at http://cisgw3.law.pace.edu/cases/991229i3.html (2014-03-28), Cour d'appel Grenoble, (*Gaec des Beauches v. Teso Ten Elsen*), France, 23 October 1996, available on the Internet at http://cisgw3.law.pace.edu/cases/961023f1.html (2014-03-28).

sions, [. . .] it would be inappropriate to apply the UCC case law in construing contracts under the CISG."[76]

4.3 Gap-Filling

Uniformity is not only a question of matters that are included in the Convention but also a question of what is excluded.[77] Since many of the Convention's provisions were designed in a general and abstract manner, to regulate as wide a range of relationships as possible, questions may occur, which, although being matters governed by the CISG, are not explicitly settled by any of its provisions. According to the CISG, such gaps are to be filled in conformity with the general principles on which the Convention is based, or in absence of such principles, in accordance with the law applicable pursuant to the rules of private international law.[78]

As mentioned in previous chapter[79], the CISG only governs the formation of the contract and the rights and obligations of the seller and the buyer arising from the contract. Thus, the CISG do neither regulate the validity of the contract or of any of its provisions, nor the effect that the contract may have on the property in the goods sold.[80] Although certain matters are explicitly excluded from the application of the CISG, their definitions are to be settled by the Convention autonomously, regardless of how other countries national sales law might define it.[81] Consideration must hence be taken to the CISG's requirement of observance of 'the Conventions international character and the need to promote uniformity in its application and the observance of good faith in international trade'.[82] Thus matters commonly treated as relating to sale in the domestic laws of some countries, may be excluded from the CISG due to that the matters do not sufficiently concern the rights and obligations of the contractual parties arising from the contract. The difficulty is, however, to determine whether the matter in question is to be considered as excluded from the

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[76] *Calzaturificio Claudia v. Olivieri Footwear*, United States 6 April 1998 Federal District Court [New York], *Calzaturificio Claudia v. Olivieri Footwear,* available on the Internet at http://cisgw3.law.pace.edu/cases/980406u1.html (2014-03-28).

[77] Zeller, *supra note 3*, p. 64.

[78] Article 7 (2) the CISG.

[79] Chapter 2.2.1, "The Sphere of Application".

[80] Article 4 the CISG.

[81] M G Bridge, *supra note 10*, p. 494 f. paragraph 10.28

[82] Article 7 (1) the CISG.

CISG or whether it is to be considered as a gap to be filled by general principles or private international law.[83] For example, the CISG does not say anything about foreign currency payment. On one view, a matter of the currency of a payment falls outside the CISG and is dealt with by the applicable law according to private international law rules. Another view is that if a contract calls for payment in a particular currency, then it should be paid in that currency in accordance with the provision regarding the sellers right to require performance.[84]

It is easy to precipitously draw the conclusion that if a matter of validity is not expressly stated within a provision, it is excluded pursuant to the statement that the CISG does not govern the validity of a sales contract. However, a matter of validity cannot be dismissed so easily. The CISG does not exclude validity *per se,* hence consideration must be taken to the general principles within the CISG. Arguably, all validity issues, which are governed by the Convention's general principles, can be considered as being explicitly stated within the Convention. The CISG does not, however, make it clear what validity issues are. Thus, as an example, if a question would arise whether a contract has been validly concluded, the matter falls within the application of the CISG because the convention expressly deals with the formation of the contract.[85] An example on the contrary is if it would arise a common law question of consideration. In a common law legal system consideration is required for an offer to be valid. The CISG, on the other hand, lack such a requirement. The CISG lists matters that are required for the formation of the contract, thus the CISG does not contain any principle of consideration, and such a validity issue is hence not governed by the CISG. Once a gap is discovered which cannot be filled by the CISG, a domestic law will be applied to the issue. Consequently, validity issues not governed by the CISG need to be resolved by validity laws of the relevant domestic law, pointed out by international private law rules.[86]

It is debated whether the UNIDROIT Principles of International Commercial Contracts may be used to fill in gaps within the CISG. The principles themselves explicitly provide for the possibility to be used for gap filling by stating that the principles may be used to

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[83] M G Bridge, *supra note 10*, p. 494 f. paragraph 10.28.

[84] Article 62 the CISG. M G Bridge, *supra note 10,* p. 496, paragraph 10.28.

[85] Article 4 the CISG. Zeller, *supra note 3*, p. 64 ff.

[86] Zeller, *supra note 3,* p. 70 f.

complement international uniform law instruments. However, the use of these principles is hard to justify since the CISG states that gaps have to be filled in conformity with general principles that are to be found *within the CISG*. Although, It is arguable that both the CISG and the UNIDTOIT Principles have retrieved their fundamental policy decisions from a common ground and that a general principle that are explicitly stated in the UNIDROIT Principles might underlie in the CISG as well, although indistinctly formulated. This argument does, however, require an indication that the principle in question is to be found within the CISG, to be justified.[87]

If a gap occur, which cannot be filled by the CISG, this means that the CISG will not be exclusively applicable to the international sales contract; hence the unification process is curtailed as soon as an additional law needs to be applied.[88] The gap will then have to be filled by the law applicable in accordance with international private law rules.[89] Meaning that the contracting parties are no longer governed by one law, but by several fragments consisting of the provisions of the CISG and of the rules applicable as a result of international private law rules. In order to know to what extent the CISG is applicable and which areas are excluded from the scope of the Convention, international jurisprudence and academic writings need to be examined.[90]

[87] Huber Peter & Alastair Mullis, *supra note 61*, p. 35 f.

[88] Zeller*, supra note 3*, p. 1.

[89] Article 7 (2) the CISG.

[90] F Ferrari, *supra note 67,* p. 10 ff. Zeller, *supra note 3*, p. 33 ff.

5 The Exclusion of the CISG

5.1 Introduction

The CISG is an optional framework and although the Convention has been implemented in national law, the contracting parties have the right to opt out of the application of the CISG, or derogate from or vary the effect of any of its provisions, in their contract.[91] The CISG, although, automatically applies when the contracting parties have their businesses in states that have signed the CISG or when the rules of private international law lead to the application of the law of an signatory state.[92] If the contracting parties, when the CISG otherwise automatically would apply, wishes to not let the CISG govern their contract, they must exclude the Convention from applying to the contract.

5.2 Ways of Exclusion

There are generally three ways to exclude the application of the CISG: by an explicit exclusion of the application of the Convention in the contract, by implicitly exclude the CISG by a choice-of-law clause, or implicitly by choice of forum. The most clear way to exclude the CISG is by explicitly mention in the contract that the parties intend to exclude the application of the CISG and point out another regulatory framework as applicable to the contract. An implicit exclusion of the CISG by a choice-of-law clause will only exclude the application of the CISG if the law chosen is the law in a non-contracting state. If the choice-of-law clause refers to the law in a contracting state the CISG will although be applicable since the CISG is part of that country's national law. The same concerns an implicit exclusion by choice of forum. A forum selection is only to be considered as an implicit exclusion if the forum is located in a non-contracting state and the parties' intention is to have the domestic law of the state where the forum is located applicable to the contract.[93]

It has been argued that parties from signatory states that have provided a choice of law clause in their contract, referring to the law of the state of one of the parties' and not ex-

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[91] Article 6 the CISG.

[92] Article 1 the CISG.

[93] William P Johnson, *supra note 13*, p. 220 ff. Thomas J. Drago, Esq. and Alan F. Zoccolillo, Esq, Be Explicit: Drafting Choice of Law Clauses in International Sale of Goods Contracts, *The Metropolitan Corporate Counsel* (May 2002) 9.

plicitly mentioned the CISG, should be interpreted as an exclusion of the CISG.[94] However, a review of the travaux préparatoires shows that the intention of the drafters of the Convention seems not to be that an inclusion in a contract of an express choice of law clause should have the automatic effect of excluding application of the CISG.[95] There is, however, cases from US courts that although have interpreted a choice of law clause, which referred to the law of a signatory state, as an exclusion of the CISG. In the case *American Biophysics Corp. v. Dubois Marine Specialties,* the contract contained a choice of law clause that stated that the contract "[…] shall be construed and enforced in accordance with the laws of the state of Rhode Island". The US court found this provision to be sufficient to exclude an application of the CISG, although the CISG has been ratified by the US and hence is the supreme law of the country, displacing the domestic law in the state of Rhode Island.[96] Thus the court rejected the intention of the drafters of the CISG. There is although cases where the drafters intention have been recognized. One such example is the case *Automation Systems, Inc. v. Thyssenkrupp Fabco, Corp.* where the court stated that when the contract is between parties within signatory states, it is insufficient to merely include a choice of law clause stating that the law of a party's state governs the contract to exclude the CISG from applying to the contract. The court further held that since the choice of law clause did not expressly indicated that the CISG did not apply, the clause could not be seen as an exclusion of the Convention.[97]

5.3 Frequency of Exclusion

Several Studies have been made on the frequency of exclusion of the CISG. Some of the surveys have though obtained relatively poor responses, whereby the presented figures and

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[94] See for instance United States 27 July 2001 Federal District Court [California] (*Asante Technologies v. PMC-Sierra*), available in the Internet at http://cisgw3.law.pace.edu/cases/010727u1.html (2014-03-28), where the buyer argued that, even if the parties are from two states that have signed the CISG, the choice of law clause set by both parties reflect the parties' intent to exclude an application of the Convention.

[95] Only a small minority of representatives considered that an expressed choice of law clause, where the CISG is not explicitly pointed out as the governing law, should have the automatic effect of excluding application of the CISG (United Kingdom, Canada, India, German Democratic Republic, Belgium, Pakistan and Italy. Document A/CONF.97/11, B. Amendments, paragraph 2-3(i-vii).

[96] United States District Court, Rhode Island, *American Biophysics v. Dubois Marine Specialties, a/k/a Dubois Motor Sports*, No. C.A. 05-321-T, 30 January 2006, available on the Internet at http://cisgw3.law.pace.edu/cases/060130u1.html (2014-05-07).

[97] United States District Court, Eastern District Michigan, *Easom Automation Systems, Inc. v. Thyssenkrupp Fabco, Corp.* No. 06-14553, 28 September 2007, available on the Internet at http://cisgw3.law.pace.edu/cases/070928u1.html (2014-05-07).

answers cannot be considered as a declared truth.[98] The figures may, however, serve as an indication on the frequency of exclusion of the CISG.

Surveys show that the majority of practicing jurists in the USA and Germany excludes the application of the CISG on international sales contract. Somewhat between 55 % - 70,8 %[99] of the practitioners in the USA and 45 % - 72,7 %[100] of the practitioners in Germany have reported that they, principally or preponderantly, exclude the CISG from their contracts. In China, 44,4 % of the practicing jurists excludes the CISG principally or preponderantly.[101] The vast majority seems to favour an explicit exclusion of the CISG, while only a minority favour an implicit exclusion by selecting the national law of a non-signatory state as applicable to the contract, or by a choice of forum.[102] In Switzerland surveys show that 41 % - 62 %[103] out of the practicing lawyers normally or regularly opt out the CISG, and in Austria the figure amounts to approximately 55 %.[104] In Canada, although no number of the frequency of exclusion exists, it is claimed that the use of the Convention is "limited by the tendency to exclude its application on international sales contract".[105] A survey which

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[98] Koehler & Yujun's survey, *supra note 6,* was sent to more than 3 000 attorneys in private practice and in-house counsels in the USA alone, but only 48 completed questionnaires were returned. Even less questionnaires returned from Germany, where only 33 completed questionnaires were sent back. In China, the survey was addressed to 331 practitioners, wherein only 27 completed questionnaires were returned. Furthermore, J Meyer's surveys': UN-Kaufrecht in der deutschen Anwaltspraxis, 2005*, 69 Rabels Zeitschrift für ausländisches und internationales Privatrecht* p. 457; UN-Kaufrecht in der schweizerischen Anwaltspraxis", 2008, *104 Schweizerische Juristen-Zeitung* p. 421; UN-Kaufrecht in der österreichischen Anwaltspraxis, 2008, *63 Österreichische Juristen-Zeitung,* p. 792, obtained 479 responses from German lawyers, 393 Swizz lawyers, 296 Austrian lawyers. A survey made by Peter L Fitzergald, *supra note 6,* was conducted online and got 236 respondents to the survey, with 66% of the responses coming from practitioners, 7% from jurists, and 27% from legal academics. An invitation to participate in a survey made by Prof. Ingeborg Schwenzer and Dr. Christopher Kee, *supra note 6,* was sent to an estimate number of 9 000 and only received 640 useable responses.

[99] The results have differed between different surveys. According to the survey conducted by Fitzgerald, *supra note 6,* p. 14, 55 % of U.S. practitioners who said they were familiar with the CISG specifically choose to opt out of its coverage, According to a survey made by Martin F. Koehler, "Survey regarding the relevance of the United Nations Convention for the International Sale of Goods (GISG) in legal practice and the exclusion of its application", 2006, (available online at http://www.cisg.law.pace.edu/cisg/biblio/koehler.html) (2014-05-07),70,8 % of the US practitioners answered that they principally or preponderantly exclude the CISG.

[100] The results have differed between different surveys. According to J Meyer, *supra note 98,* Question 4, tables 4A-4C, 45 % of practitioners from Germany exclude the CISG. According to Koehler, *supra note 99*, 72,7 % of the German practitioners exclude the application of the CISG principally or preponderantly.

[101] Koehler & Yujun, *supra note 6*.

[102] 77, 8 % of practicing jurists in the USA and Germany and 92,5 % in China generally makes an explicit exclusion, according to Koehler's surveys, *supra notes 6 and 99*. In Germany and the USA an implicit exclusion by selecting the national law of a non-signatory state as applicable to the contract was favoured by 4,9 % and an exclusion by choice of forum was favoured by 3,7%.

[103] The results have differed between different surveys. J Meyer, UN-Kaufrecht in der schweizerischen Anwaltspraxis, *supra note 98, p. 421,* showed a result of 41 % of the swizz layers normally exclude the CISG. C Widmer & P Hachem, "Switzerland", in F Ferrari, *The CISG and its Impact on National Legal Systems*, (Sellier, 2008), p. 285-286: Out of 153 swizz layers, 62 % exclude the CISG on a regularly basis.

[104] J Meyer, UN-Kaufrecht in der österreichischen Anwaltspraxis, s*upra note 98*, Question 4, tables 4A-4C.

[105] John P. McEvoy, "Canada", in F Ferrari, *supra note 103*, p. 67 f.

examined the frequency of exclusion in a number of 85 different countries, reported that a total figure of 45 % of practicing lawyers and 58 % of businesses in signatory states always or sometimes exclude the CISG when dealing with international sales contract. Amongst non-contracting states, 51 % reported that they always or sometimes exclude the CISG from their contract.[106]

[106] Prof. Ingeborg Schwenzer and Dr. Christopher Kee, *supra note 6*, p. 430 f. Of the signatory states 13 % report that they always exclude the CISG and 32 % report that they sometimes exclude the CISG. Of the non-signatory states 19 % report that they always exclude the CISG and 32 % report that they sometimes exclude the CISG.

6 Relevant Factors When Excluding the CISG

6.1 Introduction

There are some relevant factors often recurrent regarding the reasons of exclusion of the CISG from international sales contracts. These factors will further be examined in greater detail in the following of this chapter and the factors will be referred to as *Unfamiliarity*, *Time and Costs*, *Negotiation Strength* and *Standard Form Contract or Standard Terms*. Furthermore, as an interesting note, it has been argued, based on a study of CISG relating cases, that contracting parties not generally are concerned over the law governing their contract. Hence, this observation will be pointed out under the title *No Concern Over the Law Governing the Contract*. Finally, there seems to be *Differences Depending on Legal Traditions* regarding the approach held towards the CISG, hence these differences will be highlighted in the end of this chapter.

It should be pointed out that in the surveys' examined regarding unfamiliarity with the CISG, the targeted groups have differed. In some surveys the targeted group have explicitly been in-house counsels and attorneys in private practice who have been assumed likely to have regular dealings with International Sales Law[107], while other surveys have not, at least not explicitly, made such a deliberately selection.[108] Amongst attorneys or in-house counsels who on a daily basis works with international sales contracts a familiarity with the CISG ought to be more common, as the chances are that one then has encountered the Convention more frequently than one who do not work with international sale on a regular basis. One should therefore bear in mind that regarding what areas the respondent legal practitioners regular work within might affect the result gained from the surveys' examined. Moreover, whether one consider oneself as familiar or not with the Convention is also a question regarding the individual's yardstick, why two legal practitioners with the same degree of knowledge regarding the Convention might perceive their familiarity with the CISG in two complete different manners.

6.2 Unfamiliarity with the CISG

A well reported reason for excluding the CISG is a lack of familiarity with the uniform law, and that the Convention considers to not be very widely known, which creates an uncer-

[107] See for example Koehlers surveys', *supra notes 6 and 99*.

[108] See for example the survey made by Prof. Ingeborg Schwenzer and Dr. Christopher Kee, *supra note 6*.

tainty amongst jurists in dealing with the CISG.[109] The unfamiliarity with the CISG amongst legal practitioners seems to vary depending on jurisdiction. The unfamiliarity seems to be higher in Common Law jurisdictions, such as the USA, where 44 % of the practitioners have been reported to be not at all familiar with the Convention.[110] Although no figures are available, there are academics claiming that the familiarity with the CISG in Australia[111] and Canada[112] are considerable low amongst legal practitioners. Practitioners from Civil Law jurisdictions, on the other hand, seem to have a higher familiarity with the Convention, such as in Germany, Austria, and Switzerland, where lower rates on unfamiliarity have been reported. In Germany it is indicated that 18 % of the lawyers are spending more than a quarter of their undertakings on disputes that regards the CISG. In Austria the indication is 13 % and Switzerland indicates 10 %.[113] Also in China the familiarity with the CISG is considered to be high.[114] A reason for a higher familiarity in China might be because the CISG is a part of the compulsory curriculum and also examinable within the National Judicial examination for qualification. Whereby it is, for those who want to be an eligible lawyer in China, necessary to understand or even gain mastery of rules of the CISG.[115] Also in Germany, where the familiarity with the Convention is indicated to be high, the CISG is part of the ordinary curriculum of most German law faculties. This can be compared to Canada, where in many law facilities, the CISG is not taught to students in courses

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[109] Koehler & Yujun, *supra note 6,* p. 49 f. Prof. Ingeborg Schwenzer and Dr. Christopher Kee, *supra note 6,* p. 433. Of the total number of respondents 78 % of lawyers and only 45 % of businesses reported being familiar or somewhat familiar with the CISG, of the number of respondents from signatory states the respective figures were 84 % for lawyers and 63 % for businesses. P L Fitzgerald, *supra note 6*, p. 7, 43% of all respondents declaring that they felt "thoroughly" or "moderately" familiar with the CISG, Law professors claimed the greatest familiarity with 75% declaring that they were "thoroughly" or "moderately" familiar with the CISG, U.S. practitioners reported much lower levels of familiarity of 30% regarding the CISG, regarding the judiciary 82% declaring that they were "not at all familiar" with the CISG.

[110] Fitzergald, *supra note 6*, p. 23.

[111] Lisa Spagnolo, The Last Outpost: Automatic CISG Opt Outs, Misapplications and the Costs of Ignoring the Vienna Sales Convention for Australian Lawyers, 10 *Melbourne Journal of International Law,* (2009), p. 162 f.

[112] John P. McEvoy, "Canada", in F Ferrari, *supra note 103,* p. 67 f.

[113] J Meyer, "UN-Kaufrecht in der deutschen Anwaltspraxis", "UN-Kaufrecht in der schweizerischen Anwaltspraxis" and" UN-Kaufrecht in der österreichischen Anwaltspraxis", *supra note 98*. Regarding Germany see also Ulrich Magnus, "Germany", in F Ferrari, *supra note 103*, p. 145.

[114] F Ferrari, "General Report", in F Ferrari, *supra note 103*, p. 422, Shiyuan Han, "China", in F Ferrari, *supra note 103,* p. 71 f.

[115] Prof. Ingeborg Schwenzer and Dr. Christopher Kee, *supra note 6*, p. 438 f. F Ferrari, "General Report", in F Ferrari, *supra note 103*, p 422.

on commercial law.[116] Also regarding Australia it has been argued that the low familiarity with the CISG may be due to the lack of coverage of the CISG in compulsory law school courses.[117]

The most extreme form of unfamiliarity must be considered to exist when practitioners are so completely unaware of the CISG that they do not know when the Convention applies. Meaning that the Convention may apply by default since neither an explicit or implicit exclusion of the uniform law is made in the contract, because the practitioner did not realize that the Convention otherwise will apply. A less extreme form of unfamiliarity, however, exist when a practitioner knows of the Convention, but has insufficient acquaintance about its content to determine whether it is the better law applicable for a given situation.[118] In neither of the surveys examined, the term unfamiliar have been defined, hence the degree of unfamiliarity among practitioners cannot be determined. However, a survey, examining US practitioners' familiarity with the CISG, the participants were asked to interpret the meaning of a choice of law clause in an international sales contract between two signatory states. The meaning read "the law of (insert name of your jurisdiction) shall apply". Only 48 % of the respondents answered that the CISG would apply since it is part of the law of their jurisdiction, while as many as 40 % answered that the UCC would be applicable to the contract.[119]

There are academics claiming that the familiarity with the CISG will increase amongst future legal practitioners and that the exclusion of the CISG thereby will decrease[120], since a "new generation of lawyers is being educated and at one stage a critical mass of internationally informed legal practitioners will take a completely different view on what will fulfil the parties needs on international trade".[121] However, law schools from contracting states reports an indication on that in 40 % of the schools, the CISG is only dealt within optional

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[116] Ulrich, Magnus, "Germany", in F Ferrari, *supra note 103*, p. 145 and John P. McEvoy, "Canada", in F Ferrari, *supra note 103,* p. 34.

[117] L Spagnolo, *supra note 111*, p. 162.

[118] Lisa Spagnolo, Green Eggs and Ham: The CISG, Path Dependence, and the Behavioural Economics of Lawyers' Choice of Law in International Sales Contract, *6 Journal of Private International Law 417*, (2010), p. 5-6.

[119] Fitzgerald, *supra note 6,* p.11.

[120] Zeller, *supra note 3*, p. 8. Prof. Ingeborg Schwenzer and Pascal Hachem, The CISG – A Story of Worldwide Success, Kleinemann Jan (eds.), CISG Part II Conference, Stockholm: Justus Förlag, 2009, p.140.

[121] Zeller, *supra note 3*, p. 8.

courses and 6 % do not teach about the CISG at all. Only 34 % of the law schools indicate that the CISG is taught within an obligatory course. Moreover, the fact that the CISG is part of an obligatory course does not mean that it is necessarily mentioned much more than occasionally or in passing.[122]

6.3 Time and Costs

The degree of familiarity with the CISG seems also to be a matter of time and costs.[123] There have been reported remarks such as "you can't teach an old dog new tricks," and that companies "do not have the time or occasion to try to determine whether the CISG […] might actually be favourable in a particular situation and choose instead to exclude […] because of the need for consistency in template agreements." It has also been argued that the learning costs are perceived to be higher where the familiarity with the CISG is low and that this is considered to be because of three reasons: *education*, *CISG-relating dispute exposure* and *the CISG's influence on domestic law*.[124] Firstly, it is indicated that exposure to the CISG at law schools influences an increase of familiarity with the CISG amongst jurists. In jurisdictions, such as China and Germany, where study of the CISG is compulsory, the practicing jurists tend to be less unfamiliar with the Convention, hence the learning costs might be perceived to be lower amongst legal practitioners. Secondly, in jurisdictions where the CISG commonly is subject to judicial review in courts, it is argued that, it is bound to be more practitioners, who thereby might be more willing to make an investment in familiarization with the CISG. Finally, it is claimed that, where domestic law has been influenced by or modelled on the CISG, as for instance in China and Germany where the CISG has had a direct impact on domestic law, legal practitioners might perceive CISG learning costs as lower.[125]

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[122] Prof. Ingeborg Schwenzer and Dr. Christopher Kee, *supra note 6,* p. 438 f. Fitzgerald, *supra note 6*, Amongst the U.S. law professors teaching a basic contracts course only 54%, address the CISG "in passing," although 46% do incorporate detailed reference to at least portions of the CISG at various points in their contracts courses.

[123] In Koehler & Yujun's survey, *supra note 6*, p. 49 f. one respondent remarked "you can't teach an old dog new tricks," and another pointed out the "steep learning curve" that lawyers faced in order to "buy into the CISG". A respondent to Fitzgerald's study, *supra note 6*, commented that companies "do not have the time or occasion to try to determine whether the CISG […] might actually be favourable in a particular situation and choose instead to exclude […] because of the need for consistency in template agreements."

[124] L Spagnolo, A Glimpse Through the Kaleidoscope: Choices of Law and the CISG (Kaleidoscope part I), *13 Vindobona Journal of International Commercial Law & Arbitration, (2009),* p. 140 ff.

[125] L Spagnolo, *ibid*, p. 148 f. See also Filip De Ly, The Relevance of the Vienna Convention for International Sales Contracts-Should We Stop Contracting It Out? 2003, 4 *Business Law International 241*, p. 244, where it is argued that one reason for the absence of a general pattern for an exclusion of the CISG amongst Dutch lawyers might be the resemblance between Dutch law and the CISG.

6.4 Negotiation Strength

Another pointed out reason for exclusion of the CISG is that practitioners do not manage to negotiate themselves out of applying their contracting parties national law on the contract. It is not remarkable that a party, if given the choice and being the dominant partner in the negotiations, will choose its own law, presumably by using the familiarity argument to justify such a choice. This means that even if one of the contracting parties favour the CISG that party may be 'forced' to apply another regulatory framework to the contract because of their weaker position in relation to the counterparty. The remark "it is not possible to dissuade our business partners or the business partners of our client from the application of their national law" has been given as a reason for opting out the CISG amongst legal practitioners in China, Germany and the USA. Whereby the reason tend to be most commonly amongst the practitioners in Germany.[126] Swiss lawyers indicate a similar reason, wherein "the CISG was unacceptable to counterparties" have been reported as a not uncommonly reason for excluding the CISG.[127] Mexican lawyers tend to exclude the CISG when dealing with US parties, who commonly favour to opt out the CISG, since the parties then generally use standard forms drafted in the USA since the US lawyers tend to convince the Mexican lawyers that UCC is a much more complete legal framework.[128] Slovenian lawyers is also reported to have a general tendency to follow drafts submitted by the counterparty, since they already initially consider themselves to be in a weaker position, due to their small-sized country and their own legal system which have a relatively short independent tradition so far.[129]

6.5 Standard Form Contracts and Standard Terms

Another relevant factor for an exclusion of the CISG is that the decision of choice of law sometimes is predefined by standard form contracts, designed by industry bodies, or by standard terms, published by trade associations involved in certain commodities.[130] Examples of such standard terms are the rules set by the branch organizations The Federation of

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[126] Koehler & Yujun, *supra note 6*; 37 % of the respondents from China remarked this reason, 39,4% of the respondents from Germany, and 27,1 % of the U.S respondents.

[127] C Widmer & P Hachem, in F Ferrari, *supra note 103,* p. 285.

[128] Hernany, Veytia, "Mexico", in F Ferrari, *supra note 103,* p. 238-239.

[129] Damjan Mozina, "Slovenia", in F Ferrari, *supra note 103*, p. 266.

[130] Zeller, *supra note,* p. 3 f. Koehler & Yujun, *supra note 6*, p. 47 f. L Spagnolo, *supra note 118*, p. 11, Jan M Smits, Problems of Uniform Sales Law – Why the CISG May Not Promote International Trade, *Maastricht European Private Law Institute Working Paper No. 2013/1*, p.8.

Oils, Seeds and Fats Associations (FOSFA) and The Grain and Feed Trade Association (GAFTA). By using standard form contracts or standard terms drafted by an industry body or a trade association, there is no necessary for negotiations between the contracting parties regarding choice of law, since the applicable law already is predetermined. Especially in the commodities market standard form terms plays an important role. The commodities market has a rich history, which is dominated by very few commercial actors and which have developed a private language that is incomprehensible to commercial parties outside the specific market. It is argued that the commodities market has its own uniform law, namely the law of United Kingdom.[131] GAFTA, which is a branch organization aiming to promote international trade in grain, animal feed materials, pulses and rice and further to protect the interests of their members by providing the support and international contacts, states in their standard form contract, GAFTA 100:

"Buyers and Sellers agree that, for the purpose of proceedings either legal or by arbitration, this contract shall be deemed to have been made in England, and to be performed there... and the Courts of England or Arbitrators appointed in England [...] shall [...] have exclusive jurisdiction over all disputes which may arise under this contract. Such disputes shall be settled according to the law England, whatever the domicile, residence or place of business of the parties to this contract may be or become [...]."[132] Since the United Kingdom has not ratified the CISG, the domestic law of England will be applicable to a standardized contract formed by GAFTA. Also the terms formed of FOSFA, which is an international contract issuing and arbitral body concerned exclusively with the world trade in oilseeds, oils and fats, favour English law to govern commodities contracts.[133]

Moreover, there is indication that 22.2% of practicing lawyers in Germany and the USA, and 40.7% of practicing lawyers in China who exclude the CISG, do so by having inserted an explicit exclusion of the applicability of the CISG into the general terms and conditions of their contracts.[134] Standard form contracts is also a common factor for exclusion of the CISG amongst Mexican layers, who tend to exclude the CISG when dealing with US par-

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131 Zeller, *supra note 3*, p. 5 f.

132 Clause 31 in GAFTA No. 100 - Contract for Shipment of Feedstuffs in Bulk Tale Quale CIF Terms.

133 See example FOSFA 4A form, which refers to English Law and makes an explicit exclusion of the CISG, paragraph 28 and 29.

134 Koehler & Yujun, *supra note 6*, p. 47 f.

ties, since the parties then generally use standard forms drafted in the USA, where commercial parties commonly exclude the CISG.[135]

6.6 No Concern Over the Law Governing the Contract

It has been argued that contracting parties of international trade might generally not be concerned with regulating the legal regime applicable to their contract.[136] In a study of 181 CISG relating cases rendered by courts in the US, Germany and France, and awards of arbitral tribunals primarily constituted under the aegis of the International Chamber of Commerce, it was indicated that in 63 % of the cases in the US, the parties were not concerned about including a provision regarding the law governing the contract, or to ensure that the chosen law would be applicable. The same was held for 75 % of the studied cases in Germany and for 95 % of the studied cases in France. Furthermore, the arbitral awards revealed that the parties had provided for the applicable law in only twelve out of thirty cases.[137]

One must although be careful before drawing any conclusion from this study. The figures are very limited since thousands of international sale contracts are concluded every day and this study only examined a few dozen. Moreover, the study only examined contracts that led to a dispute, wherein it could be argued that better drafted contracts exists which do not give rise to dispute. Also, even if the court states the CISG as applicable to the contract because the parties were in different signatory states, it cannot be ruled out that these contracts indeed contained a choice of law clause but that the court found it irrelevant assessing whether the CISG applied.[138] It may also be argued that the parties indeed were concerned over the law applicable to the contract, but since they were aware of that the CISG would apply automatically because of their place of businesses located in signatory states, they found it unnecessary to provide the contract with a choice of law clause.

6.7 Differences Depending on Legal Tradition

There is an indication that the familiarity with the CISG is higher amongst Civil Law countries, such as Germany or China, compared to Common Law countries, such as the USA or

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[135] Hernany, Veytia, "Mexico" in F Ferrari, *supra note 103,* p. 238 f.

[136] Gilles Cuniberti, *supra note 18*, p. 1529.

[137] *ibid*, p. 1519 ff.

[138] *ibid*, p. 1536.

Australia. US legal practitioners have also indicated that because the CISG often tend to follow the principles of a Civil Law country it deviates from the UCC and thereby from the legal sources, which the practitioners in the USA are generally familiar with.[139] The interpretation of the CISG shall however be independent from concepts of a specific legal system, even when the stated expressions are characteristic of a specific national law. Consequently, one should not have recourse to any domestic concept in order to solve interpretive problems arising from the CISG.[140] Common Law practitioners are though accustomed to very detailed statutes, where extensive catalogues of definitions and accuracy in the instructions for the construction and interpretation of contracts often are provided.[141] In this respect the CISG does not follow the Common Law tradition since the CISG contains vague terms and provisions that requires interpretation, which is considerably more common within the Civil Law tradition. However, without any intention to be provocative, in case of any American reader of this thesis, I would also like to stick my neck out and assert that US practitioners often tends to be 'suffered' by what may be referred to as the '*Goliath Syndrome'*. By this is meant that legal practitioners become blind to other jurisdictions because their view of the domestic country and its legal system as the greatest. US legal practitioners are very proud over their country's' legal achievements and hence arrogant and disdainful of others, which hence may affect their approach towards the CISG. I once heard a story by my professor, Jan Andersson, about one of his Colleague's who had had a conversation with an US legal practitioner who refused to recognize that Sweden had certain rules just because similar rules were not to be found in the US. Without dragging this statement to far, I end with letting this story serve as an evident example of the 'Goliath Syndrome' amongst US legal practitioners.

Dealing with foreign judgments is also considered to be unusual amongst US practitioners and the reason for this have been argued to be because of the varying structures of American judgments and, for the US practitioners, unusual opinions in Common Law jurisdictions.[142] US practitioners have also pointed out the importance of comprehensive case law and argued that the scarcity of CISG relating case law enhances the uncertainty regarding

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[139] Koehler & Yujun, *supra note 6*, p. 50.

[140] F Ferrari, The relationship between the UCC and the CISG and the Construction of Uniform Law, *29 Loyola of Los Angeles Law Review* (1996), p. 1021-1033.

[141] Ingeborg Schwenzer & Pascal Hachem, *Supra note 3*, p. 467.

[142] Koehler & Yujun*, supra note 6,* p. 50.

the Convention and thereby contributes to an exclusion of the CISG in international sales contracts. The importance of case law amongst US practitioners, however, is not particularly remarkable, considering their Common Law legal system, which is largely based on case law. In contrast to US practitioners' perception of a shortage of CISG relating case law, there is an indication that German practitioners have an opposite view. German practitioners have remarked statements such as, the CISG provides a "greater legal security to international contracts because of the existing case law in the contracting states", and "significant legal problems [...] have, in the interim, been decided by the superior courts", within the scope of the Convention.[143]

In respect to the practitioners from the different jurisdictions' divergent perceptions on the quantity of case law, question arises regarding the actually amount of existing CISG relating cases. The number of CISG relating cases in court and arbitral proceedings, registered in the CISG Database, amounts to 2 951, whereof at least over 1 700 cases are translated to English.[144] Germany[145] and China[146] reports the most number of CISG relating cases, but also the US[147] lies on top. It might be seen as a misconception to describe almost 3 000 cases as a scarcity of case law. It cannot, however, be clearly defined that the perception of US practitioners relates to the low familiarity with the CISG or whether it relates to their legal background, wherein their legal system largely is based on case law, which might make US practitioners perceive approximately 3 000 cases as a scarcity. The content of the judgments must also be regarded. It has been argued that relatively few cases deal with matters of substantive law and many are about the very applicability of the CISG, wherein questions like whether the CISG was excluded or not, whether there was a contract of sale and whether the contract could be qualified as an international and commercial one seem to play a large role.[148] If the cases do not contain interpretation of substantive law, that regulates the rights and obligations of the contracting parties, this might also be a reason for the

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[143] Koehler, *supra note 99*.

[144] The Pace University Institute of International Commercial Law's CISG Database, to be found at: http://www.cisg.law.pace.edu/cisg/text/casecit.html (2014-03-28).

[145] There are 501 CISG relating cases reported in the CISG database, which makes Germany the country with the most reported CISG relating cases.

[146] China reports the second most CISG relating cases, where 432 cases are reported in the CISG database.

[147] The US reports 161 CISG relating cases, which makes the US the sixth most reporting country of CISG relating cases.

[148] J Smits, *supra note 130*, p. 10.

CISG relating cases to be described as a scarcity of case law, hence sufficient guidelines in interpretation might not be provided regarding provisions regulating the rights and obligations of the buyer and the seller.

It may also be asked whether the number of reported CISG relating cases can be seen as a reflection of the importance of the Convention in practice and indicate to which degree the Convention is used. However, the reported cases are only a limited share of all the court cases and arbitral awards in which the CISG is applied.[149] And even if the total number of CISG relating cases were known, this would not answer to the number of contracts governed by the CISG, since most international sales contracts are concluded and performed without any dispute arising.

[149] The Pace University Institute of International Commercial Law's CISG Database *(supra note 144)* is not an exhaustive list of all CISG relating cases; "The CISG Case Schedule lists the court and arbitral rulings on the CISG we have identified".

7 Analysis

The CISG developed in order to provide a modern, uniform and fair legal regime for international sales contracts, which would contribute to the removal of legal barriers and promote the development of international trade by decrease transaction costs. As been illustrated in this thesis, the Convention is although not uncommonly being deselected as applicable law on international sales contracts in favour of a domestic law. The main factors for an exclusion of the CISG that has been presented is unfamiliarity, time and costs, negotiation strength and standard form contracts and standard terms. Unfamiliarity may although be considered as the superior factor as the unfamiliarity has an underlying role in the other factors as well. Furthermore, it has been possible to deduce different approaches towards the CISG by reason of which jurisdiction a legal practitioner can be derived from.

Unfamiliarity

Unfamiliarity is the most recurrent reason for why commercial parties, operating on the international market, make an exclusion of the CISG from their contract. Unfamiliarity as a factor of exclusion means that the contracting party or its legal consultant does not feel comfortable by letting the Convention governing the contract since they do not have sufficient knowledge on how the Convention might operate in practice. It must be regarded as generally accepted that contracting parties are requesting legal certainty and predictability of the law governing their contract. If a contracting party lacks knowledge about a certain law and is mastering another law, presumably the party's national law, it is rather obvious that the party will prefer to have the latter law governing the contract. The absence of legal certainty or predictability regarding the CISG might though be connected with the practitioners' unfamiliarity with the Convention rather than connected with the Convention itself. The CISG is however connected with certain problems that may affect the provision of legal certainty and predictability, which will be further discussed in the following.

There are different degrees of unfamiliarity. The highest degree of unfamiliarity must be considered as not even knowing when the Convention applies to an international sales contract, while a lower degree must be considered to exist when a practitioner are familiar with the Convention but do not have sufficient knowledge about the content of the Convention to determine whether it is the more appropriate law applicable to a given sales contract. In neither of the surveys examined, the term unfamiliar has been further defined; hence the general degree of unfamiliarity as a factor of exclusion among practitioners cannot be de-

termined. Although one survey tested the highest degree of unfamiliarity among legal practitioners within the US, which showed that such a degree of unfamiliarity was not uncommon, it is not possible to draw a predominant illation of this being the case in every signatory state.

As previously been mentioned, a legal consultant or an in-house counsel must be considered seeking after applying the law they consider providing them with most legal certainty and predictability. Where the highest degree of unfamiliarity is to be found as a reason for exclusion of the CISG, the lack of legal certainty and predictability must be considered attributed to the legal practitioners unfamiliarity with the Convention, while where a low degree of unfamiliarity is found as a reason for exclusion there is reason of questioning the Convention's ability to provide its potential users with sufficient legal certainty and predictability. As has been portrayed in this thesis, the Convention is associated with certain problems regarding its application, which might hamper a familiarization process. The fact that the Convention consists of vague terms and provisions that need to be interpreted complicates the application, as it cannot be guaranteed that the provisions are interpreted unanimously amongst courts and arbitral tribunals in the different signatory states. To familiarize with the Convention and to know how certain provisions within the Convention applies, one must study doctrine and legal cases. It is although not enough to turn to academic writings and court cases from the domestic country, but recourse must not uncommonly be done to foreign doctrine and legal cases. It might also be necessary to recourse to the travaux préparatoires, although this require consideration thus the preparatory work is only of importance where a general opinion of the drafters may be gained.

Furthermore, the CISG is not an own jurisdiction and it does not have an overruling body, such as a supreme court which contributes to enhance the guarantee for a unanimously interpretation in the different courts. Cases have shown that the interpretation of the Convention's provisions have been made differently amongst the courts in the signatory states. If the interpretation of the same provisions is not consistent in the different courts, this decrease the Convention's ability to provide its users with legal certainty and predictability and it hampers a familiarization amongst legal practitioners as they receive variant answers of how the Convention is to be interpreted from the different sources. The Convention states that consideration is required to be taken to its international character, hence impose the courts to look at previously made judgements in other tribunals to promote an uniform interpretation of the Convention. Foreign court decision is although not binding upon the

courts hence this, along with the lack of an overruling body, leads to that a uniform interpretation never can be guaranteed and the predictability of how the Convention's provisions are to be applied is decreased.

Getting familiar with the Convention is thus not an easy task. For in-house counsels or legal consultants, who is trying to get a grip of how the Convention operates in practice in order to be able to master the Convention, it might be frustrating having one court interpret a provision in one certain way, while another court might interpret the same provision in a different way. Even if one can deduce a predominant way of interpretation by studying several court decisions, one can never be guaranteed that the court one might be facing in case of a dispute will be following the general way of interpretation made in previous decisions. The fact that the CISG is not a complete statement of sales law, meaning that there are gaps within the convention that need to be filled, also curtails the unification of the Convention and might hamper a familiarization process. Regarding questions concerning matters governed by the CISG but not expressly settled in the convention, the CISG refers to the general principles upon which the CISG is based or the law applicable according to private international law rules. This implies an underlying risk of a non-uniform application of the Convention since the outcomes of disputes thereby are determined by choice of laws. This means that the contracting parties nevertheless might have to apply national sales law on the contract in case of a dispute regarding an issue that is not settled in the Convention. The contracting parties are then not governing by one law, but by several legal regimes. The increase of the legal regimes governing the contract is scarcely good for legal certainty and it is not unlikely to believe that contracting parties prefer having one law applicable on their contract instead of several legal fragments.

However, as the meaning of unfamiliarity has not been defined in any of the surveys' it cannot be established that the potential users of the Convention actually are considering the problems regarding a uniform application of the Convention prior to an exclusion of the CISG. The unfamiliarity might be stretching as far as meaning that businesses and legal consultants do not even know of the existence of the problems regarding the application of the Convention; hence these problems have had no influence on the reported frequency of exclusion of the CISG from international sales contracts. It is neither any certainty that commercial parties even have an interest in unification of laws. The main concern for the commercial parties must be assumed to be that there is some legal system applicable to their contract, rather than the law to be a uniform one. And in so far as commercial parties

have a choice between various legal systems that can be applicable to their contract, they are likely to choose the legal system they know best and that provides them with most legal certainty, which in most of the cases presumably is the national law in the domestic country of the commercial party. Awareness should also be taken to the fact that an exclusion of the CISG may be due to the custom of concluding contracts by the legal consultant or the in-house counsel. A legal consultant or in-house counsel who exclude the CISG on a regular basis have presumably been accustomed to conclude contracts where the CISG may not even be considered as an option. One should also bear in mind that most contracts do not lead to any dispute; hence the matter of the governing law seldom becomes an object for a 'real' evaluation for the legal consultant or in-house counsel of whether the law governing the contract was the most appropriate one or not.

Furthermore, since the CISG frequently is excluded from international sales contracts this leads to a lesser selection of CISG relating case law compared to the amount of case law that could be found if the Convention was excluded more rarely. A poor selection of case law in turn means that lesser clarity is given regarding the interpretation of the convention's provisions. The CISG might therefore be considered caught in a vicious circle. Since the unfamiliarity with the convention make commercial parties exclude the CISG from their contracts, this makes the convention seldom an object for a judicial review or arbitration and therefore the ways for application and interpretation of the CISG are rarely being examined. Thus, neither the clarity of how the Convention should be interpreted increase and thus nor increases the familiarity with the CISG.

Time and costs

Time and costs have been referred to as a reason for exclusion of the CISG. The reason is associated with unfamiliarity as the time and costs refers to the time that needs to be allocated and the expenditure that needs to be spent in order to familiarize with the Convention The time and costs required to familiarize with the Convention is depending on the degree of unfamiliarity. The higher degree of unfamiliarity, the more time and costs is required to familiarize with the Convention. It has been argued that the perception of the amount of time and costs needed to familiarize with the Convention is due to three different considerations. The considerations are education, exposure to CISG-relating disputes and the influence the Convention has had on the domestic law. As can be seen amongst legal practitioners in China and Germany, where the Convention is part of the ordinary cur-

riculum in the national law faculties, learning about the CISG at law schools influences an increase of familiarity with the Convention. It is rather obvious that exposure to the CISG at law schools influences a perception of lower learning costs, as one already is somewhat familiar with the Convention and the familiarization process likely is considered as more effortless. Even if the ratio between education and a greater familiarity with the CISG is fairly clear, the CISG is, however, not commonly being taught within legal faculties courses in the signatory states. If the Convention is not considering to be of importance during ones legal education, this state of mind is not unlikely to be following the student even after graduation and in to the start of his or hers legal career. Also, a frequent exclusion of the Convention might discourage the law schools within the signatory states to cover the CISG in their legal courses. This creates a vicious circle as the students might not consider the Convention to be of importance in their upcoming legal career as well as the costs of familiarization with the Convention will be perceived as high, which in turn leads to the CISG being frequently excluded.

Furthermore, a legal practitioner in a jurisdiction where the CISG commonly is subject to judicial review in courts might have a stronger willingness to make an investment in familiarization with the CISG. The perception of allocated time or the expenditure spent might, however, not be lesser, but as it in such a jurisdiction presumably is a greater demand after legal practitioners who master the Convention, the familiarization process may be considered as a more valuable investment. Also, it is not an unlikely thought that a familiarization with the CISG might be seen as a more valuable investment for an in-house counsel or a legal consultant who is dealing with international trade on a regular basis compared to one who only occasionally concludes international agreements. As only a minority of all agreements lead to a dispute the risk of actually facing a foreign law in court or in an arbitral tribunal must be considered minor for one who only occasionally deals with international trade compared to one who does it on a regular basis. Therefore, it is more likely that the effort regarding time and costs attributed to a familiarization with the CISG, exceed the perceived regained value for a practitioner who only exceptionally conclude contracts with commercial parties from other countries than for one who regularly operates on the international market.

The final claim, that the learning costs might be perceived as lower in a jurisdiction where the domestic law has been influenced by or modelled on the CISG, is nor an unlikely reasoning as the familiarization process might be perceived as lower if the domestic law and

the CISG resemble each other. For this perception it is, however, a prerequisite that the legal practitioner is aware of the resemblance between the legislations. A legal practitioner with a substantial high degree of unfamiliarity and who is unaware of the content of the Convention might not be aware of the similarities between the regulations. The effort of familiarization is then not unlikely still perceived as high. In China and Germany, where the CISG has served as a model for the national legislation, the CISG is also part of the compulsory curriculum within the national law faculties. Hence it is not possible to exclude a perception of lower learning costs to be referred to the fact that the CISG is part of the legal education rather than the fact that the CISG has served as a model for the domestic legislation. There might, however, be a correlation between the influence of the Convention on the national legislation and the importance of the CISG given in the law faculties.

Negotiation strength

A decisive factor regarding an exclusion of the CISG is the negotiation strength of the commercial party. As have been pointed out, a contracting party will, if one has the choice, choose to apply the regulation that provides the party with the most predictability and legal certainty. Not uncommonly this will be the legislation in the domestic country of the commercial party. A commercial party who is unfamiliar with the CISG and who is the stronger negotiator in relation to the counterparty is most likely to use its negotiation strength to apply the national sales law of its domestic country. This means that a legal consultant or in-house counsel who is familiar with and comfortable using the Convention might nonetheless have to succumb to the willingness of the counterparty and exclude the CISG as the law governing the contract. In an inverse relationship this could however also lead to the opposite. In some cases, the negotiation strength of a commercial party might however not be due to the individual negotiation power but to the strength of the jurisdiction wherein the commercial party is located. This has been shown amongst Mexican and Slovenian lawyers who tend to underestimate their domestic jurisdiction in favour for a foreign jurisdiction. In Slovenia there is a general tendency amongst the lawyers to follow drafts submitted by the counterparty, since the Slovenian lawyers already initially consider themselves to be in a weaker position, due to their small-sized country and their own legal system which have a relatively short independent tradition. Also Mexican lawyers initially tends to consider themselves to be in a weaker position in relation to commercial parties within the US, since Mexican lawyers generally agrees to use standard forms drafted in the

USA since US lawyers manage to convince the Mexican lawyers that the UCC is a more complete legal framework.

Where the negotiation strength of two commercial parties is equally powerful and no agreement on the governing law can be made, there is not an unlikely thought that recourse to the Convention might be considered as an appropriate solution. It also occurs that contracting parties initially seeks to have a third, neutral body of rules governing their contract. It is not unlikely that the CISG then is considered as a suitable set of rules for the contracting parties who want to apply a neutral law to the contract, although one has to be aware of potential gaps that may occur. The CISG is aiming to be a neutral set of rules not favouring any of the parties, and the Convention is easily available to both parties since it is translated into English. When there is a risk of costly protracted negotiations, which might also have an underlying hazard of harming the commercial relationship between the parties, it might hence be seen as advantageous for both of the parties, and for the relationship between them, to apply the Convention as the governing law to their contract.

Standard form contracts and standard terms

An exclusion of the CISG may on a regular basis be made by the fact that a commercial party use standard form contracts or standard terms where the governing law is predetermined. A standard form contract containing a standardized choice-of-law clause subscribed by a commercial party is presumably ought to be the law that party is most familiar with and that provides the party with the most legal certainty. Where a standard form contract or a standard term regarding choice of law is used there is not any need for negotiation between the contracting parties as the contracting conditions already are settled. Standard form contracts or standard terms set up by a commercial party are however likely to best be served where the originator is the more powerful party in the contracting parties commercial relationship. Hence, even if, when the use of a certain standardized contract or a standard term is settled, there is no need for negotiation regarding specific conditions, it is although a question regarding the power assigned to the commercial parties within their commercial relationship. As been portrayed, Mexican lawyers do not uncommonly submit to a standardized contract drafted within the US, due to their tendency of underestimating their jurisdiction in favour of the US regulations. If a party initially see oneself as the weaker party, the chance is bigger that the party gives in for the counterparty's request of using a

standard form contract or a standard term where the CISG might be excluded as the governing law.

In certain market sectors there is also usual with standard form contracts or standard terms, developed by the custom of commercial parties within the certain market. This may especially be seen in the commodities market where standard form contracts are used where the law of United Kingdom commonly is appointed as the governing law. Legal consultants or in-house counsels operating in favour of businesses in a market where such a custom regarding the choice-of-law has been developed, there might be considered as pointless to familiarize with the CISG since the custom of applying the English law to commodities contracts means that the English law operates as a unified legal regime which is governing their contracts regardless of with whom the contract is concluded. The English law is hence operating within the commodity market as the CISG aims to operate on the whole international market regarding sales of goods. Within a market where a custom regarding governing law is developed, the power of the commercial parties might have no influence on the choice-of-law clause as both parties already initially presupposes that the governing law will be the custom developed regime within that particular market sector. Thus by avoiding a need for negotiation between the contracting parties, there are costs saved that could be associated with a protracted negotiation. As commercial parties on the commodity market have been accustomed to the use of English law and the law is the governing law chosen in the standard form contracts, it is evident that the CISG will be excluded as there must be considered as needless to apply the Convention when the English law have developed to operate as a unified legal regime within the commodities market.

Differences depending on legal tradition

It has been indicated that there is a higher familiarity with the CISG within Civil Law countries compared to the familiarity with the Convention within Common Law countries. It has been argued, especially within the US, that the higher familiarity within the Civil Law countries is because the CISG tends to follow the principles of a Civil Law legal system and hence differ from the legal sources a Common Law practitioner usually are familiar with. There is for sure a greater similarity between the CISG and the Civil Law legal regimes regarding the fact that the CISG contains vague terms and provisions that need to be interpreted, while a Common Law practitioner are accustomed to extensive catalogues and instructions for the construction and interpretation of contracts. The tendency of the Con-

vention to follow the principles of a Civil Law legal system might discourage a Common Law practitioner to familiarize with the Convention, as there might be a perception of greater costs connected to a familiarization process compared to the perception of a Civil Law practitioner. The fact that the unfamiliarity is higher within Common Law countries might also be due to a lesser exposure to the CISG at law schools, as it is indications that the CISG is given more importance within the legal education in Civil Law countries – especially in China and Germany, where the Convention is part of the compulsory curriculum. As been portrayed as the '*Goliath Syndrome*' in this thesis, US legal practitioners also have a tendency to have a very high reliance to their own legal system and to be very proud over their country's' legal achievements and hence arrogant and disdainful of others jurisdictions'. This 'syndrome' might hence affect their approach towards the CISG and there is a risk that the CISG is being treated with arrogance and excuses that devalues the Convention is constructed without further consideration

Legal practitioners from Civil Law countries and from Common Law countries have also indicated to have a different perception of the CISG relating case law. Legal practitioners within the US tends to have a perception that there is a scarcity of CISG relating cases, which enhances the uncertainty regarding the Convention and thereby contributes to an exclusion of the CISG in international sales contracts. Civil Law practitioners, on the other hand, tends to have an opposite perception, wherein the case law have been described to provide a greater legal security to international contracts and that significant legal problems connected to the Convention have been solved within the national courts. CISG relating cases are important for the familiarization with the Convention as it is within the courts and arbitral tribunals that answers might be given to questions of interpretation of the Convention's provisions. As of today there is almost 3 000 CISG relating cases registered in the CISG database, whereof at least 1 700 are translated to English. Whether the amount of CISG relating cases is to be regarded as enhancing the familiarity with the Convention or not is although due to content of the judgements. If only few of the cases deals with matters of substantive law and hence do not contain interpretation of provisions regulating the rights and obligations of the contracting parties, the case law might not provide sufficient guidelines in interpretation and hence the CISG relating cases do not increase the familiarity with the Convention. However, there is a chance that the US legal practitioners perception of a scarcity of CISG relating cases is due to their unfamiliarity with the Convention. As the unfamiliarity with the Convention within the US is considerable high, the

legal practitioners might neither be aware of the actual amount of CISG relating cases and nor aware of their content. Also, as been portrayed previously in this thesis, there is a problem regarding a homeward tendency of interpretation within the national courts, especially within the US, which decreases the chances for an unanimous interpretation of the Convention's provisions within the signatory states - hence hampers a familiarization with the Convention. US legal practitioners perception of a scarcity of case law can therefore not be dismissed to be due to their unfamiliarity with the Convention, since the perception might be due to a lack of unanimous interpretation regarding the Convention's substantive provisions.

Concluding remark

Finally, one may ask, what can be done in order to decrease the frequent exclusion of the CISG? Although the aim of this thesis is not to contribute with a solution to a more rarely exclusion of the Convention, it may still be considered to be of interest to, in small tensile, report what may be done to increase the use of the CISG as governing law on international sales contracts. As unfamiliarity is the impending factor regarding an exclusion of the Convention, there is ought to be given a greater importance to the CISG in courses at the law faculties within the signatory states in order to increase the familiarity even before the start of ones legal career. Since unfamiliarity is associated with time and costs regarding the effort required to familiarize with the Convention, the perceived exertion would be reduced if the CISG more commonly were to be taught within law schools.

Furthermore, the CISG is associated with problems regarding a non-guaranteed uniform interpretation of the Convention's provisions within arbitral tribunals and national courts in the signatory states. A non-uniform interpretation leads to a lack of legal certainty and predictability. The problem with an absence of legal certainty and predictability might be solved by introducing an overruling body, such as a supreme court, that would contribute to enhance the guarantee for a unanimously interpretation in the different courts. With the possibility to turn to a common authority and ask for a preliminary ruling, when the ways for interpretation is unclear, this would contribute to a unanimous interpretation within the courts in the signatory states. Although the judgment might not be binding upon the national courts, it would still work as a guideline in a future dealing of a similar dispute. Whether an establishment of a common authority is an actual possibility or not, I, however, leave unsaid. Another problem with the application of the Convention that decreases the

legal certainty is the potential gaps that may occur, meaning that a national law although has to be applied. This problem is more difficult to avoid. No sales law may be considered as a complete set of rules that captures all potential issues that may occur in a commercial relationship, why a total completeness cannot be claimed by the Convention either. However, by increase the familiarity regarding potential gaps, this would contribute to a greater certainty in the application of the Convention.

8 Conclusion

The factors that can be derived to be considered by legal practitioners prior to an exclusion of the CISG is unfamiliarity, time and costs, negotiation strength and standard form contracts or standard terms. Out of these factors the unfamiliarity seems to play the greatest role as to why the CISG is being excluded from international sales contracts. Legal consultants or in-house counsels seek to apply the law they find themselves most familiar with and which provides them with the most legal certainty and predictability, which means that the CISG commonly is being excluded in favour of the domestic law of the stronger negotiating commercial party. This means that a legal consultant or in-house counsel who favour the CISG, nonetheless might have to succumb to an exclusion of the Convention. Furthermore, the CISG is associated with certain problems regarding its application, which affect the Convention's ability to provide its potential users with predictability and legal certainty. Also, the unfamiliarity with the Convention seems to vary between jurisdictions, whereof Common Law practitioners indicate a greater unfamiliarity compared to Civil Law practitioners.

Unfamiliarity is also a matter of time and costs. Where the time and costs required to familiarize with the Convention is perceived as high there is a greater risk of a legal practitioner not to undertake the effort required to familiarize with the CISG. The importance given to the CISG in law faculties within the signatory states also have an impact on the frequency of exclusion since this increase the familiarity and decrease the perceived costs connected to a familiarization. Moreover, in jurisdictions where the CISG commonly is made subject for judicial review, it is obliged to be more practitioners who might be willing to make an investment in familiarization with the CISG. An exclusion of the CISG may also be due by the fact that a commercial party use standard form contracts or standard terms where the governing law is predetermined and the CISG is excluded in favour of another regulation. In certain markets, such as the commodities market, it is usual with standard form contracts or standard terms, developed by the custom of commercial parties within the market. The applicable law given in the standard form contracts is then operating within the specific market as the CISG aims to operate on the whole international market regarding sales of goods, why there is no need for the parties operating within the certain market to consider applying the CISG or any other regulation to their contracts.

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Appendix I

Table of CISG Signatory States

As of 26 September 2013, UNCITRAL reports that 80 States have adopted the CISG:

- Albania
- Argentina
- Armenia
- Australia
- Austria
- Bahrain
- Belarus
- Belgium
- Benin
- Bosnia-Herzegovina
- Brazil
- Bulgaria
- Burundi
- Canada
- Chile
- China (PRC)
- Colombia
- Croatia
- Cuba
- Cyprus
- Czech Republic
- Denmark
- Dominican Republic
- Ecuador
- Egypt
- El Salvador
- Estonia
- Finland
- France
- Gabon
- Georgia
- Germany
- Greece
- Guinea
- Honduras
- Hungary
- Iceland
- Iraq
- Israel
- Italy
- Japan
- South Korea
- Kyrgyzstan
- Latvia
- Lebanon
- Lesotho
- Liberia
- Lithuania
- Luxemburg
- Macedonia
- Mauritania
- Mexico
- Moldova
- Mongolia
- Montenegro
- Netherlands
- New Zeeland
- Norway
- Paraguay
- Peru
- Poland
- Romania
- Russian Federation
- Saint Vincent & Grenadines
- San Marino
- Serbia
- Singapore
- Slovakia
- Slovenia
- Spain
- Sweden
- Switzerland
- Syria
- Turkey
- Uganda
- Ukraine
- United States
- Uruguay
- Uzbekistan
- Zambia