

# THE 1980 VIENNA SALES CONVENTION (CISG) AS STANDARD SETTER FOR OR OBSTACLE TO INTERNATIONAL COMMERCIAL LAW UNIFICATION\*

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I. INTRODUCTION

The United Nations Convention on Contracts for the International Sale of Goods (CISG), adopted in Vienna on April 11, 1980, is commonly regarded as the most successful uniform law convention drafted under the auspices of the United Nations Commission for International Trade Law (UNCITRAL),<sup>1</sup> and one of the most prominent uniform commercial law instruments in general.<sup>2</sup> Details of the CISG’s success story, both in terms of the number of Contracting States and of its application in international practice, have often been outlined. The same is true for an additional function of the CISG, namely its role as a model for the reform of domestic and

<sup>1</sup> See Luca G. Castellani, *Promoting the Adoption of the United Nations Convention on Contracts for the International Sale of Goods (CISG)*, Vol. 13, VINDOBONA J. INT’L COM. L. & ARB., 1 (2009); Renaud Sorieul et al., *Possible Future Work by UNCITRAL in the Field of Contract Law: Preliminary Thoughts from the Secretariat*, Vol. 58, VILLANOVA L. REV., 491, 492 (2013).

<sup>2</sup> See Herbert Kronke, *The UN Sales Convention, the Unidroit Contract Principles and the Way Beyond*, Vol. 25, J. L. & COM., 451 (2005); Keith Loken, *A New Global Initiative on Contract Law in UNCITRAL: Right Project, Right Forum?*, Vol. 58, VILLANOVA L. REV., 509, 510 (2013); Ulrich G. Schroeter, INTERNATIONALES UN-KAUFRECHT, ¶7 (Mohr Siebeck, 7th edn., 2022); Ingeborg Schwenzer & Pascal Hachem, *The CISG — A Story of Worldwide Success in CISG PART II CONFERENCE: STOCKHOLM 4-5 SEPTEMBER 2008*, 119 (Stockholm Centre for Commercial Law, 2009).

regional laws.<sup>3</sup> In recent years, it has also increasingly been explored why India has not yet acceded to the CISG.<sup>4</sup>

This article will focus on an aspect of the CISG less frequently investigated, namely the role of the CISG within the general development of uniform international commercial law.<sup>5</sup> In doing so, it will analyse two separate but related topics: *First*, the CISG's acquired role as a 'standard setter' in uniform commercial law-making will be surveyed, outlining the extent to which provisions, structure and practical application of the CISG have influenced later uniform commercial law instruments and presenting possible reasons for this influence.<sup>6</sup> *Second*, it will be addressed whether the CISG — maybe somewhat surprisingly — can at the same time be viewed as an obstacle to the further development of uniform commercial law.<sup>7</sup> In both contexts, a holistic view of uniform commercial law will be taken, which looks beyond the activities of UNCITRAL by also including instruments drafted by its two sister organisations, namely the International Institute for the Unification of Private Law (UNIDROIT) and the Hague Conference on Private International Law ('the HCCH'). The article concludes with a brief summary of its essential findings.<sup>8</sup>

<sup>3</sup> Luca G. Castellani, *Uniform Law and the Production and Circulation of Legal Models* in CONVERGENCE AND DIVERGENCE OF PRIVATE LAW IN ASIA, 7, 27 (Cambridge University Press, 2022); Angelo Chianale, *The CISG as a Model Law: A Comparative Law Approach*, SINGAPORE J. LEGAL STUD., 29 (2016); Ulrich G. Schroeter, *Does the 1980 Vienna Sales Convention Reflect Universal Values? The Use of the CISG as a Model for Law Reform and Regional Specificities*, Vol. 41, LOYOLA OF LOS ANGELES INT'L. & COMP. L. REV., 1-2 (2018); Schroeter, *supra* note 2, ¶¶27-32; Schwenger & Hachem, *supra* note 2, 123-125.

<sup>4</sup> See Kartikey Mahajan & Kanika Sanwal, *The Case for a Uniform Sales Law and CISG in India*, Vol. 20, INT'L CO. & COM. L. REV., 359 (2009); Robert Walters & Bruno Zeller, *It is Time for India to Adopt the Convention on the Sale of Goods?*, Vol. 26(3), INT'L TRADE L. & REG., 158 (2020).

<sup>5</sup> See Ulrich G. Schroeter, *Gegenwart Und Zukunft Des Einheitskaufrechts*, Vol. 81(1), RABELSZ, 32, 67 (2017).

<sup>6</sup> See *infra* Part II on "The CISG as a Standard Setter in International Commercial Law Unification".

<sup>7</sup> See *infra* Part III on "The CISG as an Obstacle to the Development of Uniform Commercial Law?".

<sup>8</sup> See *infra* Part IV on "Conclusion".

## II. THE CISG AS A STANDARD SETTER IN INTERNATIONAL COMMERCIAL LAW UNIFICATION

The terms ‘standards’ and ‘standard setting’ are not often used in the context of uniform commercial law-making, being more commonly connected with areas such as accounting (the IFRS global accounting standards) or with technical standards regarding technology, food safety, agriculture, healthcare or environment set by the entities like the International Organization for Standardization. In the application of the CISG, standards have mostly been discussed when assessing whether and to which extent goods delivered by a seller have to comply with standards of and in the buyer’s country or a third country in order to be regarded as conforming goods under Article 35 of the CISG.<sup>9</sup> However, the term ‘standard’ as generally understood, namely as a benchmark or a level of quality or attainment, with reference to which something is evaluated or the compliance with which is desirable or expected,<sup>10</sup> is also suitable for purposes of the present article, in order to address whether and how the CISG’s provisions and their application have developed into benchmarks for more recent uniform law making.

From the outset, it is obvious in this context that the CISG does not set any mandatory standards for uniform commercial law-making; instead, it was the CISG’s voluntary use as a benchmark by the drafters of various later instruments that, gradually over the past decades, turned the CISG’s model into a non-binding law-making standard. Therefore, the CISG’s standard-setting function did not form part of the CISG’s initially envisaged role but was acquired over time.

The following examination of the CISG’s standard-setting function will commence by collecting examples of how the

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<sup>9</sup> Djakhongir Saidov, *CISG Advisory Council Opinion No. 19, Standards and Conformity of the Goods under Article 35 CISG* in THE CISG ADVISORY COUNCIL OPINIONS, 709 (Michael Bridge et al. eds., Eleven International Publishing, 2nd edn., 2021).

<sup>10</sup> See *id.* ¶1.1.

CISG's provisions have served as a model for provisions in other commercial law conventions over the past forty years.<sup>11</sup> In a subsequent shorter section, examples of CISG-induced standards concerning the promotion and application of uniform law conventions will be presented,<sup>12</sup> before possible reasons for the CISG's standard-setting role will be investigated.<sup>13</sup> A last section will address what effect, if any, the CISG's influence should have on the interpretation of other uniform law conventions.<sup>14</sup>

### A. EXAMPLES OF CISG-INDUCED STANDARDS CONCERNING THE CONTENT AND DESIGN OF UNIFORM LAW CONVENTIONS

#### 1. GENERAL STRUCTURE OF CONVENTIONS

Although it may not be very obvious, already the CISG's general structure has influenced many more recent conventions.<sup>15</sup> This influence extends, on the one hand, to the CISG's design as a *convention intégrale* encompassing both the substantive provisions and the treaty law framework in the same instrument, instead of — as still was the case in its predecessors, the 1964 Hague Sales Conventions<sup>16</sup> — placing the substantive uniform provisions in a 'uniform law' (*loi uniforme*) attached to a carrier convention.<sup>17</sup> On the other hand, the CISG's division into several parts, with the first part

<sup>11</sup> See *infra* Part II.A on "Examples of CISG-Induced Standards Concerning the Content and Design of Uniform Law Conventions".

<sup>12</sup> See *infra* Part II.B on "Examples of CISG-Induced Standards Concerning the Post-Adoption Promotion and Application of Uniform Law Conventions".

<sup>13</sup> See *infra* Part II.C on "Reasons for the CISG's Acquired Standard-Setting Role".

<sup>14</sup> See *infra* Part II.D on "Effect on the Interpretation of Uniform Commercial Law Conventions".

<sup>15</sup> For the 1988 Factoring Convention, see Franco Ferrari, *Einleitung FactÜ* in MÜNCHENER KOMMENTAR ZUM HANDELSGESETZBUCH, ¶34 (Beck, 2019).

<sup>16</sup> Convention relating to a Uniform Law on the International Sale of Goods, 834 U.N.T.S. 107 (adopted on July 1, 1964, entered into force on August 23, 1972); Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, 834 U.N.T.S. 169 (adopted on July 1, 1964, entered into force on August 23, 1972).

<sup>17</sup> See Schroeter, *supra* note 5, 32, 51.

defining the sphere of application and the last part covering treaty law matters, while the substantive uniform provisions are ‘sandwiched’ in the parts between, has been copied in most contemporary uniform commercial law conventions. (The 1958 New York Arbitration Convention,<sup>18</sup> for example, while already designed as a *convention intégrale*, had not yet been structured into separate parts, although this may have been due to its smaller overall number of provisions.)

## 2. PROVISIONS DEFINING CONVENTIONS’ SPHERE OF APPLICATION

A more easily traceable type of influence that the CISG has had is the use of individual CISG provisions as a model for similar provisions in newly drafted instruments. As will be shown below, the CISG standard-setting function of this kind has been particularly important with regard to provisions defining conventions’ sphere of application.<sup>19</sup> The first example arose as early as the drafting of the CISG itself and concerned UNCITRAL’s 1974 Limitation Convention.<sup>20</sup> When the Limitation Convention was adopted in 1974, there had been an expectation among the delegates that some type of remedial action would be taken in the future in case the rules on the scope of application in the CISG would differ from those in the Limitation Convention.<sup>21</sup> This remedial action would consist of the Limitation Convention being harmonised with the CISG and not the other way around.<sup>22</sup> As a result, the 1980 Diplomatic Conference in Vienna adopted the CISG together with a less well-known Protocol that aligned the 1974 Limitation Convention’s sphere of application and its general provisions with those of the CISG.<sup>23</sup>

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<sup>18</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 U.N.T.S. 3 (adopted on June 10, 1958, entered into force on June 7, 1959).

<sup>19</sup> Peter Schlechtriem, *Requirements of Application and Sphere of Applicability of the CISG*, Vol. 36(4), VICTORIA UNIV. OF WELLINGTON L. REV., 781, 782 (2005).

<sup>20</sup> Convention on the Limitation Period in the International Sale of Goods, 1511 U.N.T.S. 3 (adopted on June 14, 1974, entered into force on August 1, 1988).

<sup>21</sup> UNCITRAL, *Yearbook Volume XI*, 24 May 1978, A/CN.9/XI/CRP.2, 46, ¶1.

<sup>22</sup> *Id.*, ¶5.

<sup>23</sup> Protocol amending the Convention on the Limitation Period in the International Sale of Goods, 1511 U.N.T.S. 77 (adopted on April 11, 1980, entered into force on August 1, 1988).

a. Internationality Requirement, Article 1(1) CISG

Turning to the various components defining the sphere of application of commercial law conventions, the first common component is the internationality requirement. This is expressed in Article 1(1) of the CISG through the words: “This Convention applies to contracts of sale of goods between parties whose places of business are in different States”. Most uniform commercial law conventions share this restriction to international transactions and thereby adopt a different approach than European Union (EU) Regulations,<sup>24</sup> which aim at creating a European internal market “without internal frontiers in which the free movement of goods, persons, services and capital is ensured”<sup>25</sup> and therefore cover international as well as domestic transactions.

The internationality requirement in Article 1(1) of the CISG has served as a model for various other uniform commercial law conventions.<sup>26</sup> However, differences between the types of transactions governed have sometimes resulted in the requirement being framed in a different way. The basic rule for international sales contracts in Article 1(1)(a) of the CISG looks at the place of business of the buyer and the seller, stating that they must be located in different Contracting States.

Similarly, the 2018 Singapore Mediation Convention focuses on the place of business of the parties to the settlement agreement,<sup>27</sup> while the 2005 Electronic Communications Convention

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<sup>24</sup> Roy Goode, *Reflections on the Harmonisation of Commercial Law in COMMERCIAL AND CONSUMER LAW: NATIONAL AND INTERNATIONAL DIMENSIONS*, 3, 4 (Clarendon, 1993).

<sup>25</sup> The Treaty on the Functioning of the European Union, 1958, OJ L 326/47-326/390, Art. 26(2).

<sup>26</sup> See Franco Ferrari, *The Relationship Between International Uniform Contract Law Conventions*, Vol. 22, J. L. & COM., 57, 64, 65 (2003); Ferrari, *supra* note 15, ¶36; Goode, *supra* note 24, 15.

<sup>27</sup> United Nations Convention on International Settlement Agreements Resulting from Mediation, 3360 U.N.T.S. (adopted on December 12, 2018, entered into force on September 12, 2020), Art. 1(1)(a) (‘2018 Singapore Mediation Convention’).

allows the places of business of parties to any type of contract in different States to suffice.<sup>28</sup> By contrast, the 1988 Factoring Convention does not deal with single contractual agreements but with pluricontractual transactions, making the model of Article 1(1)(a) of the CISG, at first sight, less suitable. Nevertheless, the drafters of the Factoring Convention chose to follow the CISG's standard by not having the necessary internationality pertain to the contractual relationship between supplier and factor who, therefore, can have their places of business in one and the same State but to the contract of sale from which the receivables assigned under the factoring contract arise;<sup>29</sup> insofar, the Factoring Convention's focus is less on the internationality of the factoring contract than on the internationality of the receivables.<sup>30</sup>

The internationality requirement's design becomes even more challenging in the case of conventions that do not deal with bilateral transactions, such as a contract of sale between one buyer and one seller, but with tripartite scenarios.<sup>31</sup> Thus, the 1983 Geneva Agency Convention, which provides rules for the relationship between a principal, an agent and a third party, requires that the principal and the third party have their places of business in different States and that the agent has his place of business in a Contracting State.<sup>32</sup> The 1988 Leasing Convention makes the applicability of its rules to the tripartite relationship between the lessor, the lessee and the supplier dependent on the lessor and the lessee having their places of business

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<sup>28</sup> United Nations Convention on the Use of Electronic Communications in International Contracts, 2898 U.N.T.S. 3 (adopted on November 23, 2005, entered into force on March 1, 2013), Art. 1(1) ('2005 Electronic Communications Convention'). (Note that Art. 20 of this Convention adds further prerequisites for its application.); See Charles H. Martin, *The UNCITRAL Electronic Contracts Convention: Will It Be Used or Avoided?*, Vol. 17, *PAGE INT'L L. REV.*, 261, 266-269 (2005).

<sup>29</sup> Unidroit Convention on International Factoring, 2323 U.N.T.S. 373 (adopted on May 28, 1988, entered into force on May 1, 1995) Art. 2(1) ('1988 Ottawa Factoring Convention').

<sup>30</sup> Ferrari, *supra* note 26, 65.

<sup>31</sup> Roy Goode, *Creativity and Transnational Commercial Law: From Carchemish to Cape Town*, Vol. 70(1), *INT'L COMP. L. Q.*, 11 (2020).

<sup>32</sup> Convention on Agency in the International Sale of Goods, (adopted on February 17, 1983) Art. 2(1)(a) ('1983 Geneva Agency Convention').

in different States and those States and the State in which the supplier has its place of business, all three being Contracting States.<sup>33</sup>

Even more difficult challenges for Article 1(1) of the CISG's internationality test arise where a convention's subject matter makes recurrence to the parties' location unsuitable, as in the area of uniform law for bills of exchange. Given that it is a tenet of rules governing such instruments that the terms of payment are to be found exclusively on the instrument itself, any reference to extraneous facts, such as the parties' place of business, must be avoided.<sup>34</sup> Accordingly, UNCITRAL's 1988 Bills of Exchange Convention defines the bill's required internationality by instead looking to the place where the bill is drawn, the place indicated next to the signature of the drawer, the name of the drawee or the name of the payee, or to the place of payment.<sup>35</sup> Similarly, Conventions on the transport of goods, such as the 1978 Hamburg Rules and the 2008 Rotterdam Rules, do not focus on the place of business of shippers or carriers; instead, the port of loading and the port of discharge are used as points of attachment for their internationality requirement.<sup>36</sup>

In spite of these (sometimes significant) drafting variations, the single internationality criterion adopted in Article 1 of the CISG, with its focus on the parties' place of business, is today viewed as the norm in uniform international law convention making.<sup>37</sup> Accordingly, its use is also being advocated for future conven-

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<sup>33</sup> Unidroit Convention on International Financial Leasing, 2321 U.N.T.S. 195 (adopted on May 28, 1988, entered into force on May 1, 1995), Art. 3(1)(a) ('1988 Ottawa Leasing Convention').

<sup>34</sup> Goode, *supra* note 24, 16.

<sup>35</sup> United Nations Convention on International Bills of Exchange and International Promissory Notes, G.A. Res. 43/165 (adopted on December 9, 1988), Art. 2(1); see Goode, *supra* note 24, 16.

<sup>36</sup> United Nations Convention on the Carriage of Goods by Sea, 1695 U.N.T.S. 3 (adopted on March 21, 1978, entered into force on November 1, 1992) Art. 2 ('1978 Hamburg Rules'); United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, G.A. Res. 63/122 (adopted on December 11, 2008), Art. 5(1) ('2008 Rotterdam Rules').

<sup>37</sup> Goode, *supra* note 24, 15.

tions as a possible Convention on Expert Determination and Dispute Boards.<sup>38</sup>

b. Identification of Decisive Place of Business, Article 10 CISG

In order to determine the parties' relevant location and a transaction's internationality resulting therefrom, the CISG and its progenies look to the 'place of business' of each party. While the CISG contains no express definition of the term 'place of business', even though case law under the CISG has attempted to define it,<sup>39</sup> Article 10(a) & (b) of the CISG provide guidance for constellations in which a party has more than one place of business or no place of business at all. This provision has been an important model for many other conventions, with Article 10 of the CISG having been copied in its entirety in the 1983 Geneva Agency Convention,<sup>40</sup> the 1986 HCCH Sale of Goods Convention,<sup>41</sup> the 1995 Independent Guarantees Convention<sup>42</sup> and the 2018 Singapore Mediation Convention.<sup>43</sup> In addition, Article 10(a) of the CISG, which is practically more important, has been followed in the 1988 Factoring Convention,<sup>44</sup> the 1988 Leasing Convention,<sup>45</sup> and even the 2015 Hague Choice of Law Principles.<sup>46</sup> As a consequence,

<sup>38</sup> See Djakhongir Saidov, *An International Convention on Expert Determination and Dispute Boards?*, Vol. 71(3), INT'L COMP. L. Q., 28 (2022).

<sup>39</sup> See *Floor Coverings case* (Oberlandesgericht Stuttgart), February 28, 2000, Case No. 5 U 118/99, CISG-online 583, (2001) IHR 65, 66 (Court of Appeal Stuttgart); *Al Palazzo S.r.l. v. Bernardaud s.a.* (Tribunale di Rimini), November 26, 2002 CISG-online 737, (2003) G it 896 (District Court Rimini).

<sup>40</sup> Geneva Agency Convention, 1983, *supra* note 32, Art. 8.

<sup>41</sup> The 1986 Hague Convention on the Law Applicable to Contracts for the International Sale of Goods (adopted on December 22, 1986), Art. 14 ('1986 HCCH Sale of Goods Convention').

<sup>42</sup> United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, 2169 U.N.T.S. 163 (adopted on December 12, 1995, entered into force on January 1, 2000), Art. 4(2) ('1995 Independent Guarantees Convention').

<sup>43</sup> Singapore Mediation Convention, 2018, *supra* note 27, Art. 2(1).

<sup>44</sup> Ottawa Factoring Convention, 1988, *supra* note 29, Art. 2(2).

<sup>45</sup> Ottawa Leasing Convention, 1988, *supra* note 33, Art. 3(2).

<sup>46</sup> HCCH, PRINCIPLES ON CHOICE OF LAW IN INTERNATIONAL COMMERCIAL CONTRACTS, Art. 12 (HCCH, 2015) (although using the term 'establishment' instead of 'place of business'); See HCCH, COMMENTARY ON THE PRINCIPLES ON CHOICE OF

Article 10 of the CISG is being viewed as a point of reference in the interpretation of these provisions.<sup>47</sup> Article 10 of the CISG's standard-setting function was taken very seriously when the 1986 HCCH Sale of Goods Convention was drafted. A proposal to include a definition of 'place of business' in the convention was rejected solely because Article 10 of the CISG left the term undefined,<sup>48</sup> thus treating strict parallelism between the two instruments as more important than a possible improvement of the CISG's approach.

c. Applicability of Conventions via Rules of Private International Law, Articles 1(1)(b) and 95 CISG

The CISG's second path towards its applicability — Article 1(1)(b) of the CISG with its reliance on the rules of private international law of the forum — has generally been less popular as a model.<sup>49</sup> This is not entirely surprising given that Article 1(1)(b) of the CISG was a disputed solution when the CISG was drafted and only became part of the Convention's eventual text as a last-minute compromise, with Article 95 authorising Contracting States to make a reservation against Article 1(1)(b) of the CISG. Nevertheless, the 1983 Geneva Agency Convention faithfully copied the CISG's compromise solution by including verbatim counterparts to both Articles 1(1)(b) and 95 of the CISG,<sup>50</sup> driven by the general policy of its drafters that the Agency Convention "should, as a general rule, be applicable to cases falling under the Vienna Convention".<sup>51</sup> A number of UNCITRAL conventions, such as the 1991 Operators of Transport

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LAW IN INTERNATIONAL COMMERCIAL CONTRACTS, Art. 12, ¶12.2 (HCCH, 2015) ("Art. 12 has primarily followed the model of the CISG (Art. 10(a)) ...").

<sup>47</sup> Ferrari, *supra* note 15, ¶35; Peter Mankowski, *Einleitung FactÜ* in INTERNATIONALES VERTRAGSRECHT, ¶4 (Beck ed., 2nd edn., 2012).

<sup>48</sup> Arthur Taylor Von Mehren, CONVENTION ON THE LAW APPLICABLE TO CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS – EXPLANATORY REPORT, Vol. 13(3), 46, ¶144 (HCCH, 1987).

<sup>49</sup> See Ulrich G. Schroeter, *Applicability of UNCITRAL's Sales Convention of 1980 and its Limitation Convention of 1974/1980 via 'Rules of Private International Law': Remarks on Occasion of Czechia's Declaration Withdrawals*, Vol. 22(14), VINDOBONA J., 19-20 (2018).

<sup>50</sup> Geneva Agency Convention, 1983, *supra* note 32, Art. 2(1)(b), 28.

<sup>51</sup> Malcolm Evans, *Explanatory Report on the Convention on Agency in the International Sale of Goods*, Vol. 12(1), UNIFORM L. REV., 73 (1984), ¶26.

Terminals Convention,<sup>52</sup> and the 1995 Independent Guarantees Convention,<sup>53</sup> also copied Article 1(1)(b) of the CISG but, interestingly, contain no counterpart to Article 95 of the CISG.<sup>54</sup>

In light of the tripartite and pluricontractual relationships forming their subject, both the 1988 Leasing Convention and the 1988 Factoring Convention again had to adapt Article 1(1)(b) of the CISG's approach by requiring that both the supply agreement and the leasing agreement (Leasing Convention) respectively both the contract of sale of goods and the factoring contract (Factoring Convention) are governed by the law of a Contracting State.<sup>55</sup> In addition, none of the two sister conventions has a counterpart to Article 95 of the CISG,<sup>56</sup> although the inclusion of such a reservation had been proposed in both cases.<sup>57</sup>

Overall, Article 1(1)(b) of the CISG has arguably not set any accepted standard for the design of uniform law conventions' sphere of application, and the related reservation of Article 95 of the CISG has clearly not done so.

d. Exclusion of Consumer Transactions from Conventions' Sphere of Application, Article 2(a) CISG

The CISG's influence has been nuanced also as far as the relationship between uniform commercial law conventions and

<sup>52</sup> United Nations Convention on the Liability of Operators of Transport Terminals in International Trade, Vol. 19(2), UNIFORM L. REV., 115-141 (1991) (adopted on April 19, 1991), Art. 2(1)(c) ('1991 Operators of Transport Terminals Convention').

<sup>53</sup> Independent Guarantees Convention, 1995, *supra* note 42, Art. 1(1)(b).

<sup>54</sup> Schroeter, *supra* note 49, 14-20.

<sup>55</sup> Ottawa Leasing Convention, 1988, *supra* note 33, Art. 3(1)(b); Ottawa Factoring Convention, 1988, *supra* note 29, Art. 2(1)(b).

<sup>56</sup> But see Goode, *supra* note 24, 18.

<sup>57</sup> See UNIDROIT SECRETARIAT, *Draft Final Provisions Capable of Embodiment in the Draft Convention on International Financial Leasing Drawn up by a Unidroit Committee of Governmental Experts, with Explanatory Notes*, July 1987, Study LIX — Doc. 49, Art. F; UNIDROIT SECRETARIAT, *Draft Final Provisions Capable of Embodiment in the Draft Convention on International Factoring Drawn up by a Unidroit Committee of Governmental Experts, with Explanatory Notes*, August 1987, Study LVIII — Doc. 34, Art. F.

consumer transactions is concerned. Article 2(a) of the CISG declares the Sales Convention inapplicable to sales of goods bought for personal, family or household use if the seller, at any time before or at the conclusion of the contract, knew or ought to have known that the goods were bought for such use ('recognisability requirement').<sup>58</sup> Due to the recognisability requirement, some consumer transactions may be governed by the CISG, namely those with a 'hidden' private purpose.<sup>59</sup>

The CISG's solution has not always been followed by drafters of later uniform commercial law instruments. While the 1986 HCCH Sale of Goods Convention copied the approach of Article 2(a) of the CISG,<sup>60</sup> many other instruments such as the 1988 Factoring Convention,<sup>61</sup> the 2005 Electronic Communications Convention,<sup>62</sup> the 2015 Hague Choice of Law Principles,<sup>63</sup> or the 2018 Singapore Mediation Convention<sup>64</sup> dispense with the recognisability requirement.<sup>65</sup> The 1983 Geneva Agency Convention, which often stayed strictly true to the CISG's model, has no direct counterpart to Article 2(a) of the CISG but more broadly provides that "[n]othing in this Convention affects any rule of law for the protection of consumers".<sup>66</sup>

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<sup>58</sup> Because it frames this requirement negatively ("unless the seller [...] neither knew nor ought to have known that ..."), the wording of Art. 2(a) CISG has been read as allocating the burden of proof; see Ulrich Magnus, *Artikel 2* in J. VON STAUDINGERS KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH MIT EINFÜHRUNGSGESETZ UND NEBENGESETZEN — WIENER UN-KAUFRECHT (CISG), ¶28 (Sellier-de Gruyter, 2013); Schroeter, *supra* note 2, ¶116; but see John O. Honnold & Harry M. Flechtner, HONNOLD'S UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION, ¶63 (Wolters Kluwer, 5th edn., 2021).

<sup>59</sup> Schroeter, *supra* note 2, ¶116.

<sup>60</sup> HCCH Sale of Goods Convention, 1986, *supra* note 41, Art. 2(c).

<sup>61</sup> Ottawa Factoring Convention, 1988, *supra* note 29, Art. 1(2)(a); but see Mankowski, *supra* note 47, ¶¶16-18.

<sup>62</sup> Electronic Communications Convention, 2005, *supra* note 28, Art. 2(1)(a); see Martin, *supra* note 28, 274, 275.

<sup>63</sup> Hague Choice of Law Principles, 2005, *supra* note 46, Art. 1 sentence 2.

<sup>64</sup> Singapore Mediation Convention, 2018 *supra* note 27, Art. 1(2)(a).

<sup>65</sup> See Commentary on the Principles, *supra* note 46, ¶1.12.

<sup>66</sup> Geneva Agency Convention, 1983, *supra* note 32, Art. 3(2).

e. Other Questions Regarding Conventions' Sphere of Application

Yet other components of the CISG's sphere of applicability have also served as a model for later uniform law conventions. This is true for the awareness requirement in Article 1(2) of the CISG, according to which a transaction's international nature must be apparent at the moment of contract conclusion in order to render the Convention applicable, and for the clarifying rule in Article 1(3) of the CISG, which declares the parties' nationality and their civil or commercial character irrelevant in determining the Convention's application. Counterparts to Article 1(2) and (3) of the CISG can *inter alia* be found in the 1983 Geneva Agency Convention,<sup>67</sup> and in the 2005 Electronic Communications Convention.<sup>68</sup> The non-reproduction of Article 1(2) of the CISG in the 1988 Factoring and Leasing Conventions has been explained with an oversight of their drafters.<sup>69</sup>

By contrast, both the specific exceptions from the CISG's scope in Article 2(b)–(f) of the CISG and the rules on the coverage of 'mixed contracts' in Article 3(1) and (2) of the CISG have not set a standard for uniform commercial law conventions in general. The 1986 HCCH Sale of Goods Convention is an exception as the instrument copied some of the CISG provisions on point,<sup>70</sup> although its drafters had doubted whether all of these provisions would work well in the HCCH Convention's private international law setting.<sup>71</sup> The same considerations lead to sales of ships etc. and of electricity, which are excluded from the CISG's scope by Article 2(e) and (f), being expressly included in the 1986 HCCH Sale of Goods Convention,<sup>72</sup> because it was felt that this instrument's choice-of-law regime would be suitable for them.<sup>73</sup>

<sup>67</sup> Geneva Agency Convention, 1983, *supra* note 32, Arts. 2(1)(b) and 28.

<sup>68</sup> Electronic Communications Convention, 2005, *supra* note 28, Art. 1(2), (3); see Martin, *supra* note 28, 269, 270.

<sup>69</sup> Goode, *supra* note 24, 16.

<sup>70</sup> Namely Arts. 2(c), 3(1), (2) CISG and, albeit with a clarifying addition, Art. 2(d) CISG in the HCCH Sale of Goods Convention, 1986, *supra* note 41, Arts. 2(a), (b), 4(1), (2).

<sup>71</sup> See Von Mehren, *supra* note 48, ¶12.

<sup>72</sup> HCCH Sale of Goods Convention, 1986, *supra* note 41, Art. 3.

<sup>73</sup> Von Mehren, *supra* note 48, ¶33.

### 3. GENERAL PROVISIONS

As far as the standard-setting function of the CISG's 'general provisions' in Articles 7–13 of the CISG is concerned, a few remarks must suffice, given that Article 10 of the CISG concerning the 'place of business' has already been addressed above,<sup>74</sup> and the important provisions on the interpretation of the Convention and on gap-filling in Article 7(1) and (2) of the CISG will be covered separately below.<sup>75</sup>

In principle, the remainder of the CISG's general provisions would be a suitable model for non-sales commercial law instruments because their content is not specifically reflective of sales law matters but — as their chapter title suggests — treats issues of a 'general' nature. In accordance with this assessment, Article 6 of the CISG, with its rules on the parties' freedom to exclude or modify the Convention's application, has been copied in the 2005 Electronic Communications Convention.<sup>76</sup> It has furthermore inspired the 1988 Factoring and Leasing Conventions,<sup>77</sup> although these instruments restrict the parties' freedom to derogate from or vary their provisions<sup>78</sup> — restrictions that have been regarded as a significant deviation from the model in Article 6 CISG — or require an agreement of more than just two parties to do so, given the pluricontractual relationship concerned.<sup>79</sup> Article 9 of the CISG on practices and usages was duplicated in the 1983 Geneva Agency Convention.<sup>80</sup>

<sup>74</sup> See *supra* Part II.A.2.b on "Identification of Decisive Place of Business, Art. 10 CISG".

<sup>75</sup> See *infra* Part II.A.4 on "Provisions Governing the Interpretation of Uniform Instruments" and Part II.A.5. on "Provisions Governing Gap-Filling".

<sup>76</sup> Electronic Communications Convention, 2005, *supra* note 28, Art. 3.

<sup>77</sup> Ottawa Factoring Convention, 1988, *supra* note 29, Art. 3(1); Ottawa Leasing Convention, 1988, *supra* note 33, Art. 5(1); see Mankowski, *supra* note 47, ¶4.

<sup>78</sup> Ottawa Factoring Convention, 1988, *supra* note 29, Art. 3(2): Exclusion only permitted as regards the Convention as a whole; Ottawa Leasing Convention, 1988 *supra* note 33, Art. 5(2): Certain provisions cannot be derogated from.

<sup>79</sup> 1988 Ottawa Leasing Convention, 1988, *supra* note 33, Art. 5(1): Exclusion of the Convention requires that each of the parties to the supply agreement and each of the parties to the leasing agreement agree to exclude it.

<sup>80</sup> Geneva Agency Convention, 1983, *supra* note 32, Art. 7.

By contrast, Article 13 of the CISG, which defines the term ‘writing’ as including telegram and telex, has not been copied in any other commercial law instrument. Soon after the CISG had been adopted, the drafters of the 1983 Geneva Agency Convention remarked about Article 13 CISG that “the model in the Vienna Convention had not made full allowance for more modern forms of communication as, for example, where information appears on a screen but is subsequently erased”.<sup>81</sup> And indeed, the references in Article 13 of the CISG, albeit only exemplary in nature,<sup>82</sup> mention the means of communication that were common in the 1970s, implying that the provision’s wording has not aged well. Accordingly, newer uniform law instruments such as the 2018 Singapore Mediation Convention contain more modern definitions of ‘writing’.<sup>83</sup>

#### 4. PROVISIONS GOVERNING THE INTERPRETATION OF UNIFORM INSTRUMENTS

A particularly challenging issue that all uniform commercial law-making organisations have to address is the ongoing uniformity of any instrument’s interpretation and the means to achieve that. As is well known, the CISG attempts to tackle the issue through Article 7(1), a programmatic provision naming three interpretative goals that “regard is to be had to” by courts and arbitral tribunals when interpreting the CISG: (1) the recognition of the CISG’s international character, (2) the closely related need to promote uniformity in the CISG’s application and (3) the observance of good faith in international trade. Article 7(1) is sometimes viewed as the most important provision in the CISG.<sup>84</sup> However, it was not the first clause of its

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<sup>81</sup> Evans, *supra* note 51, ¶61.

<sup>82</sup> Schroeter, *supra* note 2, ¶291.

<sup>83</sup> Singapore Mediation Convention, 2018, *supra* note 27, Art. 1(2).

<sup>84</sup> M.G. Bridge, *THE INTERNATIONAL SALE OF GOODS*, ¶10.40 (Oxford University Press, 4th edn., 2017); Pilar Perales Viscasillas, *Article 7 in The UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALES OF GOODS (CISG)*, ¶2 (Beck eds., 2nd edn., 2018). (For a more sceptical assessment, see Thomas Neumann, *Is the Albert H Kritzer Database Telling us More than We Know?*, Vol. 27, *PACE INT’L L. REV.*, 119, 125 (2015): ‘The wishbone of the CISG rather than its backbone’); Christopher Sheaffer, *The Failure of the United Nations Convention on Contracts for the International Sale of Goods and a Proposal for a New*

kind in a UNCITRAL Convention; Article 7 of the 1974 Limitation Convention already contained a similar clause,<sup>85</sup> although it did not include the third interpretative goal of good faith. Nevertheless, it was Article 7(1) of the CISG that inspired a significant number of comparable provisions in later Conventions.<sup>86</sup>

The degree to which these counterpart provisions stayed true to the model in Article 7(1) of the CISG or partially deviated from it nevertheless varied. Precise copies of Article 7(1) of the CISG can be found in the 1983 Geneva Agency Convention,<sup>87</sup> the 1995 Independent Guarantees Convention,<sup>88</sup> the 2005 Electronic Communications Convention,<sup>89</sup> and the 2008 Rotterdam Rules.<sup>90</sup> The 1988 Factoring Convention<sup>91</sup> and the 1988 Leasing Convention<sup>92</sup> similarly copied the three interpretative goals of Article 7(1) of the CISG but also added a reference to the Convention's "object and purpose as set forth in the preamble". It has been argued that this difference is merely a terminological one and not one of substance.<sup>93</sup> As a consequence, Article 7(1) of the CISG is being viewed as providing guidance also for the interpretation of its progenies in more recent conventions.<sup>94</sup>

By contrast, counterpart provisions in the 1980 Rome Convention,<sup>95</sup> in UNCITRAL's 1991 Operators of Transport Terminals Convention<sup>96</sup> and in various HCCH Conventions<sup>97</sup> were

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*Uniform Global Code in International Sales Law*, Vol. 15, CARDOZO J. INT'L & COMP. L., 461, 470 (2007).

<sup>85</sup> Castellani, *supra* note 3, 25.

<sup>86</sup> Perales Viscasillas, *supra* note 85, ¶¶2, 68.

<sup>87</sup> Geneva Agency Convention, 1983, *supra* note 32, Art. 6(1).

<sup>88</sup> Independent Guarantees Convention, 1995, *supra* note 42, Art. 5.

<sup>89</sup> Electronic Communications Convention, 2005, *supra* note 28, Art. 5(2).

<sup>90</sup> Rotterdam Rules, 2008, *supra* note 36, Art. 2.

<sup>91</sup> Ottawa Factoring Convention, 1988, *supra* note 29, Art. 4(1).

<sup>92</sup> Ottawa Leasing Convention, 1988, *supra* note 33, Art. 6(1).

<sup>93</sup> Ferrari, *supra* note 26, 57, 67 at n 66; Mankowski, *supra* note 47, ¶1.

<sup>94</sup> Mankowski, *supra* note 47, ¶9; Perales Viscasillas, *supra* note 85, ¶68.

<sup>95</sup> The Convention on the Law Applicable to Contractual Obligations, OJ C 27 (adopted on January 26, 1998, entered into force on January 26, 1998) Art. 18.

<sup>96</sup> Operators of Transport Terminals Convention, 1991, *supra* note 52, Art. 14.

<sup>97</sup> HCCH Sale of Goods Convention, 1986, *supra* note 41, Art. 16; Convention on Choice of Court Agreements, (adopted on June 30, 2005, entered into force

also modelled on Article 7(1) of the CISG,<sup>98</sup> but limit themselves to its first two interpretative goals, without mentioning the observance of good faith in international trade. Yet another counterpart provision can be found in UNIDROIT's 2001 Cape Town Convention,<sup>99</sup> expressing "what have become standard principles of interpretation as exemplified by Article 7(1) of the UN Sales Convention".<sup>100</sup> However, the Cape Town Convention's clause on interpretation deviates even further from its model in the CISG, by adding a reference to the Convention's purposes as set forth in the preamble, insofar resembling earlier UNIDROIT conventions and furthermore replacing Article 7(1) of the CISG's goal to promote the observance of good faith with the need to promote predictability in the Cape Town Convention's application. The Official Commentary on the Cape Town Convention explains that this substitution was made due to the unacceptable uncertainty that good faith is considered to create in high-value cross-border financing transactions,<sup>101</sup> and the goal to stress the importance attached to predictability in this field.<sup>102</sup>

## 5. PROVISIONS GOVERNING GAP-FILLING

A particularly influential, probably the most influential, provision when it comes to the CISG's standard-setting role has

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on October 1, 2015) Art. 23 ('2005 HCCH Choice of Court Convention'); Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary (adopted on July 5, 2006, entered into force on April 1, 2017) Art. 13; Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (adopted on July 2, 2019, entered into force on September 1, 2023) Art. 20.

<sup>98</sup> On the Rome Convention, 1980, see Mario Giuliano & Paul Lagarde, EUROPEAN UNION, *Report on the Convention on the Law Applicable to Contractual Obligations*, October 31, 1980, OJ C282/1, 38.

<sup>99</sup> Convention on International Interests in Mobile Equipment, 2307 U.N.T.S. 285 (adopted on November 16, 2001, entered into force on March 1, 2006) Art. 5(1) ('2001 Cape Town Convention').

<sup>100</sup> Roy Goode, CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT AND PROTOCOL THERETO ON MATTERS SPECIFIC TO AIRCRAFT OBJECTS: OFFICIAL COMMENTARY, ¶4.67 (Unidroit, 4th edn., 2019) ('Official Commentary'); Kronke, *supra* note 2, 451, 459.

<sup>101</sup> Official Commentary, *supra* note 101, ¶4.67.

<sup>102</sup> Official Commentary, *supra* note 101, ¶4.2.

been Article 7(2) of the CISG. Article 7(2), which had no predecessor in the 1974 Limitation Convention, addresses the manner in which the so-called ‘internal gaps’ in the Convention or, in the provision’s words: “questions concerning matters governed by this Convention which are not expressly settled in it” are to be filled. Primarily, these gaps are to be addressed in conformity with the general principles on which the Convention is based and only in the absence of such general principles in conformity with the domestic law applicable by virtue of the rules of private international law.

Article 7(2) has been copied, either verbatim or with very slight adjustments in wording, in the 1983 Geneva Agency Convention,<sup>103</sup> the 1988 Factoring Convention,<sup>104</sup> the 1988 Leasing Convention,<sup>105</sup> the 2001 Cape Town Convention,<sup>106</sup> and the 2005 Electronic Communications Convention.<sup>107</sup> It has been recognised that the rules of Article 7(2) have today become standard principles of gap-filling in uniform commercial law instruments.<sup>108</sup>

However, the model function of Article 7(2) has been limited to conventions that create substantive uniform law without ever having been copied in uniform conflict of laws conventions. Not even the 1986 HCCH Sale of Goods Convention, which was strongly inspired by the CISG and includes a counterpart to Article 7(1) of the CISG, has copied Article 7(2). Indeed, the approach of this gap-filling provision appears to be ill-suited for conflict of laws instruments. To fill internal gaps in a uniform private international law instrument “in conformity with the law applicable by virtue of the rules of private international law”, as Article 7(2) CISG in fine states, would make little sense. It is, therefore, understandable that the drafters of the 2015 Hague Choice of Law Principles opted against a gap-filling provision

<sup>103</sup> Geneva Agency Convention, 1983, *supra* note 32, Art. 6(2).

<sup>104</sup> Ottawa Factoring Convention, 1988 *supra* note 29, Art. 4(2).

<sup>105</sup> Ottawa Leasing Convention, 1988, *supra* note 33, Art. 6(2).

<sup>106</sup> Cape Town Convention, 2001, *supra* note 100, Art. 5(2).

<sup>107</sup> Electronic Communications Convention, 2005, *supra* note 28, Art. 5(1).

<sup>108</sup> *C.f.* Official Commentary, *supra* note 101, ¶4.67; Goode, *supra* note 31, 22; Schlechtriem, *supra* note 19, 781, 789.

as the one in Article 7(2) of the CISG, leaving it to the parties to address the issue in their choice of law clause.<sup>109</sup>

## 6. SUBSTANTIVE PROVISIONS

The CISG's substantive provisions — namely those in its Part II, which contains Articles 14–24 on the formation of sales contracts and Part III, which contains Articles 25–88 on the rights and obligations of sellers and buyers — could, from the outset appear less likely to serve as a model for other uniform commercial law texts. This is because these CISG provisions were developed with international sales contracts in mind, while other commercial law texts will usually cover other types of contracts. However, closer scrutiny reveals the issue to be more complex.

### a. CISG Provisions about the Formation of Contracts

The contract formation rules in Articles 14–24 of the CISG are, in principle, suitable as a model for contract formation provisions concerning any type of agreement. This is because, in spite of having been developed as part and parcel of a sales law instrument, they, in essence, reflect general rules of contract formation.<sup>110</sup> As a result, a number of soft law instruments with a general commercial or contract law scope have drawn inspiration from Articles 14–24 of the

<sup>109</sup> Commentary on the Principles, *supra* note 46, ¶3.15.

<sup>110</sup> Fritz Enderlein & Dietrich Maskow, *INTERNATIONAL SALES LAW: UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS — CONVENTION ON THE LIMITATION PERIOD IN THE INTERNATIONAL SALE OF GOODS: COMMENTARY*, pre Art. 14 ¶8 (Oceana, 1992); Aleksandrs Fillers, *Application of the CISG to Arbitration Agreements*, Vol. 30(4), EUR. BUSINESS L. REV., 663, 690, 691 (2019); Ulrich Magnus, *Aktuelle Fragen Des UN-Kaufrechts*, ZEuP, 79, 80 (1993); Christina Ramberg, *The E-Commerce Directive and Formation of Contract in a Comparative Perspective*, EUR. L. REV., 429, 431 (2001); Peter Schlechtriem, *The New Law of Obligations in Estonia and the Developments Towards Unification and Harmonisation of Law in Europe*, Vol. 6, JURIDICA INT'L, 16, 19 (2001); Ulrich G. Schroeter, *Introduction to Articles 14-24 CISG: General Questions Regarding the Formation of the Contract* in SCHLECHTRIEM & SCHWENZER: COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG), ¶6 (Oxford University Press, 5th edn., 2022).

CISG,<sup>111</sup> as the Principles of European Contract Law ('the PECL'), the UNIDROIT Principles of International Commercial Contracts ('the PICC') or the Draft Common Frame of Reference ('the DCFR'). In the case of the PICC, the official comments stress that "[n]aturally, to the extent that the UNIDROIT Principles address issues also covered by CISG, they follow the solutions found in that Convention, with such adaptations as were considered appropriate to reflect the particular nature and scope of the Principles".<sup>112</sup> A significant number of the PICC's provisions on contract formation have been literally taken from or closely followed approaches developed in Articles 14–24 of the CISG. For example, Article 16 of the CISG and its rules on the complex question of the revocability of offers have influenced various soft law instruments.<sup>113</sup> It has not only been duplicated in the PICC,<sup>114</sup> but has also inspired slightly revised but substantially identical counterpart provisions in the PECL<sup>115</sup> and the DCFR.<sup>116</sup>

The fact that Articles 14–24 of the CISG have not yet influenced any uniform commercial law conventions is, therefore, not due to their lack of suitability but rather due to the current lack of other conventions containing contract formation rules. While a number of existing conventions deal with particular types of agreements, they do so without providing rules about their formation. For example, the 1988 Factoring Convention governs factoring contracts,<sup>117</sup> and the 1988 Leasing Convention governs supply agreements and leasing

<sup>111</sup> See Schroeter, *supra* note 111, ¶140.

<sup>112</sup> UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS, Introduction, 29 (Unidroit, 2016) ('Unidroit 2016').

<sup>113</sup> Mads Bryde Andersen, *CISG Article 16: A Well-Placed Principle in the Law of Contract Formation?* in THE CISG CONVENTION AND DOMESTIC CONTRACT LAW: HARMONY, CROSS-INSPIRATION, OR DISCORD? (DJØF 2015), 35, 39; Ulrich G. Schroeter, *Artikel 16 CISG* in SCHLECHTRIEM/SCHWENZER/SCHROETER, KOMMENTAR ZUM UN-KAUFRECHT (CISG), ¶10 (Beck ed., 8th edn., 2024).

<sup>114</sup> Unidroit 2016, *supra* note 113, Art. 2.1.4.

<sup>115</sup> Commission on European Contract Law, PRINCIPLES OF EUROPEAN CONTRACT LAW, Part I, Art. 2:202 (2002).

<sup>116</sup> Study Group on a European Civil Code & the Research Group on EC Private Law, DRAFT COMMON FRAME OF REFERENCE, Book II, Chapter 4, Section 2, Art. 4:202 (2009).

<sup>117</sup> Ottawa Factoring Convention, 1988, *supra* note 29, Art. 1(2).

agreements.<sup>118</sup> However, neither of these instruments addresses how such agreements are formed.

Similarly, conventions governing the jurisdiction of courts such as the 2005 HCCH Choice of Court Convention and, albeit merely indirectly, the 2019 HCCH Judgments Convention or of arbitral tribunals such as the New York Convention deal with the practically important forum selection or arbitration agreements but do not provide any express rules governing their formation.<sup>119</sup> Therefore, the limited influence of Part II of the CISG on other uniform commercial law conventions is not due to a lack of suitability but due to a lack of opportunities.

b. CISG Provisions about the Rights and Obligations of Contracting Parties

A survey of the past standard-setting function of Part III of the CISG, the CISG's core part with its rules on sellers' and buyers' obligations and the remedies of parties in case of breaches of contract, yields a similar result. Articles 25-88 of the CISG have not yet visibly inspired any other conventions governing commercial contracts, neither conventions on contracts of sale nor conventions on other types of contracts. This is in spite of the generally shared assessment that the characteristic features of the CISG's remedies system, such as the unitary breach of contract concept, the no-fault liability of breaching parties and the exemption from liability in case of impediments beyond a party's control, are, in principle, not only suitable for sales contracts, but also for other contracts.<sup>120</sup> Nevertheless,

<sup>118</sup> Ottawa Leasing Convention, 1988, *supra* note 33, Art. 1(1).

<sup>119</sup> See HCCH Choice of Court Convention, 2005, *supra* note 98; Trevor Hartley & Masato Dogauchi, CONVENTION OF 30 JUNE 2005 ON CHOICE OF COURT AGREEMENTS: EXPLANATORY REPORT, ¶94 (HCCH, 2006); Louise Ellen Teitz, *The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration*, Vol. 53, AM. J. COMP. L., 543, 552 (2005) ("Interestingly, earlier drafts of the comprehensive convention and the Working Group discussions for the present Convention attempted to incorporate and harmonise substantive contract rules. But this approach proved unworkable and was abandoned in favour of resort to national law...").

<sup>120</sup> Ulrich Magnus, *Einleitung Zum CISG* in J. VON STAUDINGERS KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH MIT EINFÜHRUNGSGESETZ UND NEBENGESETZEN

no inspiration from other commercial law conventions can be found. This is simply because there are no other international conventions which provide uniform contract law rules of this kind. This, in turn, raises the question of whether the existence of the CISG itself may be a reason why no other conventions governing these matters have been adopted and whether the CISG may, therefore, operate as an obstacle to uniform lawmaking. This matter will be addressed in Part III of this article.

The above-mentioned suspicion is bolstered by the fact that the provisions in Part III of the CISG have influenced various legal instruments other than conventions, proving their suitability as model provisions. In a regional law-making context, the uniform provisions for commercial sales adopted by the Organisation for the Harmonization of Business Law in Africa ('OHADA')<sup>121</sup> were strongly influenced by the CISG,<sup>122</sup> as was the EU Consumer Sales Directive of 1999,<sup>123</sup> which once was aptly described as an 'adoption of the CISG at consumer level'.<sup>124</sup> Other EU Directives not dedicated to sales contracts but to other types of contractual relationships have also been viewed as inspired by the CISG's breach and remedy system, as the European Community (EC) Package Travel Directive of

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— WIENER UN-KAUFRECHT (CISG), ¶2 (Sellier — De Gruyter, 2013); Oliver Remien, *Vertragsrecht im Europäischen Raum: Eine Stellungnahme Mit Schlußfolgerungen Zur Mitteilung Der Kommission an Den Rat Und Das Europäische Parlament Zum Europäischen Vertragsrecht Vom 11.7.2001*, KOM (2001)398 Endg. in RAUM UND RECHT: FESTSCHRIFT 600 JAHRE WÜRZBURGER JURISTENFAKULTÄT, 219, 225 (Duncker & Humblot eds., 2002); Ulrich G. Schroeter, UN-KAUFRECHT UND EUROPÄISCHES GEMEINSCHAFTSRECHT: VERHÄLTNIS UND WECHSELWIRKUNGEN, §18, ¶30 (Sellier, 2005); Winfried Tilmann, *Eine Privatrechtskodifikation Für Die Europäische Gemeinschaft?* in GEMEINSAMES PRIVATRECHT IN DER EUROPÄISCHEN GEMEINSCHAFT, 485, 493 (Nomos, 1993).

<sup>121</sup> Uniform Act Relating to General Commercial Law, 1999 (OHADA) (Revised in 2012).

<sup>122</sup> Schroeter, *supra* note 2, ¶27.

<sup>123</sup> E.U. Directive 1999/44/EC, *Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees*, May 25, 1999, O.J.L 171.

<sup>124</sup> Hans Micklitz, *Ein Einheitliches Kaufrecht Für Verbraucher in Der EG?* EuZW, 229, 230 (1997).

1990,<sup>125</sup> the EC Directive on Cross-Border Credit Transfers of 1997,<sup>126</sup> and the EU Late Payment Directive of 2000,<sup>127</sup> although the CISG's model function may have been limited to certain of its concepts in these cases.

Finally, Part III of the CISG had a strong influence on the general contract law provisions in the most prominent soft law instruments of general scope, namely the PICC and the PECL<sup>128</sup> — both of which, however, are not binding, requiring the parties' agreement in order to govern a particular contract.

## 7. TREATY LAW FRAMEWORK

Part IV of the CISG, its 'Final provisions' in Articles 89–101 containing the Convention's treaty law framework, has again been rather influential from a standard-setting perspective. A necessary, although in itself not sufficient, prerequisite was the character of many of the final provisions as generic rules not specifically designed for a convention governing sales contracts, instead being suitable as framework provisions for any uniform law convention.

Against this background, it is not surprising that the housekeeping provisions of the CISG — Articles 89, 91, 99(1), (2) and 101 — have been particularly successful as a model, having first been verbatim copied in UNIDROIT's 1983 Geneva Agency Convention,<sup>129</sup> and then in various UNCITRAL Conventions (among

<sup>125</sup> Ulrich Magnus, *Europäisches Vertragsrecht Und Materielles Einheitsrecht — Künftige Symbiose Oder Störende Konkurrenz?* in Festschrift für Erik Jayme, 1307, 1316 (Sellier, 2004).

<sup>126</sup> Magnus, *supra* note 126, 1316.

<sup>127</sup> Reinhard Schulte-Braucks, *Zahlungsverzug in Der Europäischen Union*, Vol. 54(2), NEUE JURISTISCHE WOCHENSCHRIFT, 103, 107 (2001).

<sup>128</sup> Michael Joachim Bonell, *The UNIDROIT Principles of International Commercial Contracts and the CISG — Alternatives or Complimentary Instruments?* in EMPTIO-VENDITIO INTER NATIONES: FESTGABE FÜR KARL HEINZ NEUMAYER, 59, 65 (Verlag für Recht und Gesellschaft, 1997); Kronke, *supra* note 2, 451, 456; Schlechtriem, *supra* note 19, 781; Schroeter, *supra* note 2, ¶27; Sorieul et al., *supra* note 1, 491, 492.

<sup>129</sup> Geneva Agency Convention, 1983, *supra* note 32, Arts. 21, 22, 33, 35.

them the 1991 Operators of Transport Terminals Convention,<sup>130</sup> the 1995 Independent Guarantees Convention,<sup>131</sup> the 2005 Electronic Communications Convention,<sup>132</sup> the 2008 Rotterdam Rules,<sup>133</sup> and the 2018 Singapore Mediation Convention<sup>134</sup>).

Some UNIDROIT Conventions copied the CISG's housekeeping provisions with the sole exception of Article 89 of the CISG, drafting their respective clauses on the depositary's tasks differently (1988 Factoring Convention,<sup>135</sup> 1988 Leasing Convention,<sup>136</sup> and 2001 Cape Town Convention<sup>137</sup>). In the case of HCCH Conventions, the CISG's final clauses of this sub-category have been less influential, although the 1986 HCCH Sale of Goods Convention copied Articles 91 and 101 of the CISG,<sup>138</sup> the 2005 HCCH Choice of Court Convention modelled its denunciation clause in part on Article 101 of the CISG, but deviated from (one could say: improved) the CISG's model by expressly authorising a denunciation that is limited to certain territorial units of a multi-territorial State,<sup>139</sup> a step that would arguably not be allowed under Article 101 of the CISG.<sup>140</sup>

Another final provision of a generic nature is Article 93 of the CISG and its rules on the Convention's application to multi-territorial States, commonly (but imprecisely) dubbed a 'federal State clause'. Its purpose as such is not connected to the particular content of a uniform law convention but to the constitutional division of legislative powers within certain multi-territorial States. Article

<sup>130</sup> Operators of Transport Terminals Convention, 1991, *supra* note 52, Arts. 17, 18, 22(1), (2), 25.

<sup>131</sup> Independent Guarantees Convention, 1995, *supra* note 42, Arts. 23, 24, 28, 29.

<sup>132</sup> Electronic Communications Convention, 2005, *supra* note 28, Arts. 15, 16, 23, 25.

<sup>133</sup> Rotterdam Rules, 2008, *supra* note 36, Arts. 87, 88, 94, 96.

<sup>134</sup> Singapore Mediation Convention, 2018, *supra* note 27, Arts. 10, 11, 14, 16.

<sup>135</sup> Ottawa Factoring Convention, 1988, *supra* note 29, Arts. 13, 14, 22.

<sup>136</sup> Ottawa Leasing Convention, 1988, *supra* note 33, Arts. 15, 16, 24.

<sup>137</sup> Cape Town Convention, 2001, *supra* note 100, Arts. 47, 49, 59.

<sup>138</sup> HCCH Sale of Goods Convention, 1986, *supra* note 41, Arts. 25, 30.

<sup>139</sup> HCCH Choice of Court Convention, 2005, *supra* note 98, Art. 33.

<sup>140</sup> Ulrich G. Schroeter, *Article 101 CISG: Denunciation* in SCHLECHTRIEM & SCHWENZER: COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG), ¶9 with references (Oxford University Press, 5th edn., 2022).

93 of the CISG was therefore used as a verbatim model in various other conventions like the 1983 Geneva Agency Convention,<sup>141</sup> the 1988 Factoring Convention,<sup>142</sup> the 1988 Leasing Convention,<sup>143</sup> the 1995 Independent Guarantees Convention,<sup>144</sup> the 2005 Electronic Communications Convention,<sup>145</sup> or the 2008 Rotterdam Rules.<sup>146</sup>

Yet other conventions have followed the CISG's model with the exception of Article 93(3) of the CISG because the latter provision specifies the effect of declarations made by a multi-territorial State upon the Convention's application and the other Convention's sphere of application may not precisely resemble that of the CISG. Limited adjustments to Article 93 CISG's model can therefore be found in the 1986 HCCH Sale of Goods Convention,<sup>147</sup> the 1991 Operators of Transport Terminals Convention,<sup>148</sup> the 2001 Cape Town Convention,<sup>149</sup> the 2005 HCCH Choice of Court Convention,<sup>150</sup> and the 2018 Singapore Mediation Convention.<sup>151</sup>

By comparison, other reservations authorised by the CISG have a less generic character than the federal-state clause, instead being more closely connected to the Sales Convention's subject matter. It is, therefore, natural that they have been less frequently used in other conventions, although Articles 94–96 CISG were all copied into the 1983 Geneva Agency Convention,<sup>152</sup> reflecting the particularly strong influence of the CISG's final provisions on this convention.<sup>153</sup> In addition, Article 94 CISG was duplicated in the 1988 Factoring and Leasing Conventions.<sup>154</sup>

<sup>141</sup> Geneva Agency Convention, 1983, *supra* note 32, Art. 24.

<sup>142</sup> Ottawa Factoring Convention, 1988, *supra* note 29, Art. 16.

<sup>143</sup> Ottawa Leasing Convention, 1988, *supra* note 33, Art. 18.

<sup>144</sup> Independent Guarantees Convention, 1995, *supra* note 42, Art. 25.

<sup>145</sup> Electronic Communications Convention, 2005, *supra* note 28, Art. 18.

<sup>146</sup> Rotterdam Rules, 2008, *supra* note 36, Art. 92.

<sup>147</sup> HCCH Sale of Goods Convention, 1986, *supra* note 41, Art. 26.

<sup>148</sup> Operators of Transport Terminals Convention, 1991, *supra* note 52, Art. 19.

<sup>149</sup> Cape Town Convention, 2001, *supra* note 100, Arts. 52 (4), (5).

<sup>150</sup> HCCH Choice of Court Convention, 2005, *supra* note 98, Art. 28.

<sup>151</sup> Singapore Mediation Convention, 2018, *supra* note 27, Art. 13.

<sup>152</sup> Geneva Agency Convention, 1983, *supra* note 32, Arts. 26–28.

<sup>153</sup> See also Evans, *supra* note 51, ¶108 (“With the exception of Arts. 25, 29 and 30, the final provisions of the Convention are modelled on the corresponding articles of the Vienna Convention ...”).

<sup>154</sup> Ottawa Factoring Convention, 1988, *supra* note 29, Art. 17; Ottawa Leasing Convention, 1988, *supra* note 33, Art. 19.

In 1983, a reason for the CISG's final provisions' standard setting function was viewed in their role as 'the most recent expression in this respect of the will of the international community in conventions dealing with international trade law'.<sup>155</sup> Since that time, the constant repetition of these clauses' wording in newer conventions has arguably further strengthened this role rather than having worn it off.

A sub-area within the treaty law framework in which the CISG's influence has been more mixed is the formal rules on reservations found in Articles 97 and 98 CISG. After they had been copied in the 1983 Geneva Agency Convention,<sup>156</sup> the 1988 Factoring Convention,<sup>157</sup> the 1988 Leasing Convention,<sup>158</sup> and the 1995 Independent Guarantees Convention,<sup>159</sup> the drafters of the more recent 2005 Electronic Communications Convention chose to strictly prohibit any reservations, while at the same time authorising certain 'declarations on the scope of application'.<sup>160</sup>

The purpose of this change in terminology is not immediately obvious, but the fact that the procedural rules in Article 97 CISG were maintained in the 2005 Electronic Communications Convention<sup>161</sup> suggests that the change was one of label, without affecting the substance: Authorised declarations on the scope of a uniform law convention's application are, in fact, authorised reservations,<sup>162</sup> as the customary international law definition of 'reservation' in Article 2(1)(d) of the 1969 Vienna Convention on the Law of Treaties ('... a unilateral statement, however phrased or named, ...') clearly indicates.

<sup>155</sup> Evans, *supra* note 51, ¶108.

<sup>156</sup> Geneva Agency Convention, 1983, *supra* note 32, Arts. 31, 32.

<sup>157</sup> Ottawa Factoring Convention, 1988, *supra* note 29, Arts. 19, 20.

<sup>158</sup> Ottawa Leasing Convention, 1988, *supra* note 33, Art. 21.

<sup>159</sup> Independent Guarantees Convention, 1995, *supra* note 42, Arts. 26, 27.

<sup>160</sup> Electronic Communications Convention, 2005, *supra* note 28, Arts. 19, 21.

<sup>161</sup> Electronic Communications Convention, 2005, *supra* note 28, Art. 21.

<sup>162</sup> See Martin, *supra* note 28, 261, 273; Ulrich G. Schroeter, *Introduction to Articles 89–101 CISG: General Questions Regarding the Final Provisions* in SCHLECHTRIEM & SCHWENZER: COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG), ¶36 (I. Schwenzer & U.G. Schroeter eds., Oxford University Press, 5th edn., 2022).

*B. EXAMPLES OF CISG-INDUCED STANDARDS  
CONCERNING THE POST-ADOPTION PROMOTION AND  
APPLICATION OF UNIFORM LAW CONVENTIONS*

In addition to setting standards for provisions in later uniform commercial law texts,<sup>163</sup> the CISG has also functioned as a real-life ‘sandbox’ for two phases that follow the drafting and adoption of a convention’s text, namely the convention’s promotion among States and its subsequent interpretation and application in practice.

John Honnold aptly described the first of these phases as the ‘care and feeding’ of uniform law conventions.<sup>164</sup> In this regard, UNCITRAL has, over the years, developed and engaged in various activities aimed at promoting UNCITRAL conventions among interested States<sup>165</sup> and at educating stakeholders about the existence and benefits of these instruments.<sup>166</sup> The CISG has often been used as a testing ground in this context,<sup>167</sup> with successful approaches subsequently being extended to other UNCITRAL texts.

The second, long-term phase concerns the interpretation and application of uniform commercial law conventions by courts and arbitrators and the goal of achieving an internationally uniform interpretation. Sceptics have often named the absence of an international court charged with resolving divergent interpretations as the greatest handicap to the creation of a unified CISG jurisprudence,<sup>168</sup>

<sup>163</sup> For details on the standard set by CISG in other Conventions, see *supra* Part II.A on “Examples of CISG-induced standards concerning the content and design of uniform law conventions”.

<sup>164</sup> John O. Honnold, *Uniform Laws for International Trade: Early ‘Care and Feeding’ for Uniform Growth*, Vol. 1, INT’L TRADE & BUS. L. J., 1 (1995).

<sup>165</sup> Castellani, *supra* note 1, 1-3; Castellani, *supra* note 3, 22, 23; Goode, *supra* note 24, 24.

<sup>166</sup> Luca G. Castellani, *The Contribution of UNCITRAL to the Harmonisation of International Sale of Goods Law besides the CISG?*, Vol. 59, BELGRADE L. REV., 28, 35-38 (2011); Renaud Sorieul et al., *Possible Future Work by Uncitral in the Field of Contract Law: Preliminary Thoughts from the Secretariat*, Vol. 58, VILLANOVA L. REV., 491, 498, 499 (2013).

<sup>167</sup> Castellani, *supra* note 1, 2; Magnus, *supra* note 121, ¶27a.

<sup>168</sup> 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*

and other uniform law conventions face the same challenge. Given that the likelihood of establishing such an international court is slim to non-existent,<sup>169</sup> other solutions to the uniform interpretation problem had to and have been found, all of which provide practical support for the implementation of Article 7(1) of the CISG's interpretation goals.<sup>170</sup>

In this regard, UNCITRAL's secretariat again developed a number of successful projects, in particular the CLOUT ('Case Law on UNCITRAL Texts') system and UNCITRAL Case Law Digests,<sup>171</sup> which have seen their most extensive use with respect to the CISG.<sup>172</sup> Although in no way limited to the CISG, their application to the CISG has been particularly influential in further developing their details, thereby indirectly shaping their use for other uniform law instruments. Not surprisingly, such CISG-induced mechanisms have even been suggested for future uniform law conventions.<sup>173</sup> Apart from UNCITRAL initiatives, other tools developed under the CISG have also been considered for use in connection with different uniform law conventions, where similar tools are yet missing. An example is the CISG Advisory Council ('CISG-AC'), a private group of academic experts on the CISG who issue non-binding opinions on the interpretation of the CISG provisions.<sup>174</sup> Recently, the CISG-AC has been suggested as a model for similar bodies assisting in the uniform

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*Sales*, Vol. 32, CORNELL INT'L. L. J., 273, 310 (1999).

<sup>169</sup> Schroeter, *supra* note 2, ¶135.

<sup>170</sup> For details on the implementation of Art. 7(1) of the CISG on interpretation goals, *see supra*, Part II.A.4 on "Provisions Governing the Interpretation of Uniform Instruments".

<sup>171</sup> Castellani, *supra* note 1, 25.

<sup>172</sup> Sorieul et al., *supra* note 1, 491, 501.

<sup>173</sup> Ingeborg Schwenzer, *Who needs a Uniform Contract Law, and Why?*, Vol. 58, VILLANOVA L. REV., 723, 731 (2013); Loken, *supra* note 2, 509, 518.

<sup>174</sup> On the CISG-AC, *see* Joshua D.H. Karton & Lorraine de Germiny, *Has the CISG Advisory Council Come of Age?*, Vol. 27, BERKELEY J. INT'L. L., 448 (2009).

interpretation of other conventions,<sup>175</sup> as the 1956 Convention on the Contract for the International Carriage of Goods by Road ('CMR').<sup>176</sup>

### *C. REASONS FOR THE CISG'S ACQUIRED STANDARD-SETTING ROLE*

When asking for the reasons of the CISG's role as a standard setter in uniform commercial law,<sup>177</sup> the answer is not immediately obvious. As will be shown, it is arguably a combination of different reasons that resulted in the CISG's influence since its adoption in 1980, with the relevant reasons evolving over various phases.

#### 1. FIRST-MOVER ADVANTAGE?

It is clear that the decisive reason underlying the CISG's influence cannot be that this convention simply was the first, given that commercial law unification did not start with the CISG. A number of conventions in the field of commercial law predated it. Even when focusing more narrowly on UNCITRAL's unification work, it was not the CISG but the 1974 Limitation Convention that was UNCITRAL's 'first-born'.<sup>178</sup> In spite of being the earliest instrument drafted and adopted by UNCITRAL after its creation in 1966, the 1974 Limitation Convention appears to have had limited influence on later UNCITRAL conventions, apart from inspiring a number of provisions in the CISG itself.

Another instrument predating the CISG is the 1958 New York Convention, which had already been adopted prior to UNCITRAL's establishment but is nevertheless actively

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<sup>175</sup> Cécile Legros, *The CISG Advisory Council: A Model to Improve Uniform Application of the CMR?*, Vol. 9, EUROPEAN J. OF COMMERCIAL CONTRACT L., 27 (2017); Sheaffer, *supra* note 85, 461, 482.

<sup>176</sup> Legros, *supra* note 176, 27.

<sup>177</sup> For details on the reasons of the CISG's role as a standard setter, *see supra*, Part II.A on "Examples of CISG-induced standards concerning the content and design of uniform law conventions"; Part II.B on "Examples of CISG-induced standards concerning the post-adoption promotion and application of uniform law conventions".

<sup>178</sup> *See* Hans Smit, *The Convention on the Limitation Period in the International Sale of Goods: Uncitral's First Born*, Vol. 23, AM. J. COMP. L., 337 (1975).

promoted by UNCITRAL, with a ‘UNCITRAL Secretariat Guide’ on the Convention having been published in 2016.<sup>179</sup> The New York Convention has, of course, been a great success, far outranking the CISG in its number of Contracting States and shaping the law and practice of international commercial arbitration more than any other instrument before and since. However, the New York Convention’s model function has essentially been limited to the area of arbitration law, where Article V of the 1958 New York Convention was notably the model for Articles 34 and 36 of UNCITRAL Model Law on International Commercial Arbitration (1985/2006) and the limited grounds for setting aside or refusing recognition of arbitral awards listed therein. By contrast, international instruments in other fields of commercial law have seemingly not been significantly inspired by the 1958 New York Convention, in spite of its outstanding success in arbitration law.

## 2. ENABLING A FLAWLESS INTERACTION WITH THE CISG AS THE CORE COMMERCIAL LAW CONVENTION

Instead of the CISG’s age, it is submitted that this Convention’s subject matter — the sales contract — was the initial ground for the CISG’s influence on other conventions. The drafters of subsequent conventions followed the CISG’s models in order to enable a flawless interaction between their newly drafted conventions and the CISG as the core convention in international commercial law, making this consideration the first important reason for the CISG’s standard-setting function.

### a. Commercial Law Conventions from the Early 1980s

Support for this assumption can be found in looking at the two conventions that, according to the survey conducted above,<sup>180</sup> were most strongly influenced by the CISG, namely the UNIDROIT’s

<sup>179</sup> United Nations, UNCITRAL SECRETARIAT GUIDE ON THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS (United Nations, 2016).

<sup>180</sup> For details on the survey conducted on the conventions influenced by the CISG, see *supra* Part II.A on “Examples of CISG-induced standards concerning the content and design of uniform law conventions”.

1983 Geneva Agency Convention and the HCCH's 1986 Sales of Goods Convention. It is remarkable that both of these conventions were drafted and adopted soon after the CISG, at a time when the CISG itself had not yet entered into force and at which its later success appeared far from certain.<sup>181</sup> The CISG's influence on the drafters of these early post-CISG conventions cannot yet have been driven by the CISG having been widely accepted by States or by its successful application in commercial practice because neither of these quality indicators were present in 1983 and 1986.

Instead, it appears that a different reason was underlying the CISG's early use as a model, namely the goal to enable a flawless interaction between the newly drafted conventions and the CISG. In order to achieve this goal, the drafters of later conventions modelled those conventions' sphere of application on that of the CISG,<sup>182</sup> in the hope that this congruence would make both texts' parallel application easier and, thereby, also increase the likelihood that the new convention would be ratified by States.

In essence, the conventions of 1983 and 1986 were, therefore, developed as supplements to the CISG, as the official explanatory reports on both instruments indicate. The report on the UNIDROIT's 1983 Geneva Agency Convention remarks that, in light of this instrument's narrowly designed scope, it 'can no longer be viewed as an attempt to codify the law relating to international agency; rather it should be seen as a supplement, albeit an important one, to the existing conventions dealing with the international sale of goods', namely the 1964 Hague Sales Conventions and the recently adopted CISG.<sup>183</sup>

Regarding the HCCH's 1986 Sales of Goods Convention, its explanatory report points out that 'the view was

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<sup>181</sup> See Peter Schlechtriem, *UNIFORM SALES LAW: THE UN-CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS*, 115 (Manz, 1986) (who wrote in 1985 that "the fate of the convention remains uncertain").

<sup>182</sup> For the Geneva Agency Convention, 1983, see Evans, *supra* note 51, ¶26 ("the intention of the authors of the Convention being that it should, as a general rule, be applicable to cases falling under the Vienna Convention ...").

<sup>183</sup> Evans, *supra* note 51, ¶11.

widely and consistently held that [the CISG]’s language should, to the extent possible, be adapted for use in the [1986 Hague Convention’s] draft. Parallelism was said to be desirable because the choice-of-law convention would thereby be rendered more comprehensible and easier to administer for those States that might put both instruments into force.<sup>184</sup>

The same policy consideration had already driven the amendment of UNCITRAL’s 1974 Limitation Convention through the 1980 Protocol,<sup>185</sup> when it was believed that ‘to conform’ the 1974 Limitation Convention to the newly adopted CISG “would promote the adoption of the uniform rules governing the limitation period contained in the 1974 Limitation”,<sup>186</sup> in this earliest instance, the recognition of the CISG’s position as the core commercial law convention accordingly even had ‘retroactive’ consequences, with an already existing convention being amended to guarantee its flawless interaction with the CISG.

The CISG’s above-mentioned role as the core commercial law convention is supported by further factors. Among them are the sales contract’s systematic position as the core contract both in international trade relationships and in domestic contract law systems,<sup>187</sup> as well as the exceptionally long and careful preparatory work that eventually resulted in the CISG’s text. The CISG’s extensive drafting history, which started with Ernst Rabel’s treatise *Recht des Warenkaufs* in the 1930s, resulted in the CISG being viewed as condensed comparative law wisdom and as a set of rules arguably based on broader research than newer, more narrowly drafted conventions. In the early 1980s, these aspects may also have carried the

<sup>184</sup> Von Mehren, *supra* note 48, ¶11.

<sup>185</sup> See for more details on the policy consideration which drove the amendment of UNCITRAL’s Limitation Convention, 1974 through the Protocol, 1980, *supra* Part II.A.2 on “Provisions Defining Conventions’ Sphere of Application”.

<sup>186</sup> Protocol to Limitation Convention, 1980, *supra* note 23, Preamble.

<sup>187</sup> See Castellani, *supra* note 3, 26; Kronke, *supra* note 2, 451, 452; Magnus, *supra* note 121, ¶2; Paul B. Stephan, *The Futility of Unification and Harmonisation in International Commercial Law*, Vol. 39, VIRGINIA J. INT’L L., 743, 772 (1999) (In a world economy dominated by trade in primary and manufactured products, the contract for the sale of goods serves as a fundamental unit of legal status).

prognosis that the CISG would become a success by being widely ratified by States and achieving a broad application in practice.

In implementing the CISG's still fledgling standard-setting role, the drafters of the early supplementary conventions still put a strong emphasis on parallelism with the CISG. In the case of the 1983 Geneva Agency Convention, it was the drafters' declared intention that this instrument 'should, as a general rule, be applicable to cases falling under the Vienna Convention', although it was noted that the coincidence was incomplete.<sup>188</sup> The 1986 Sales of Goods Convention followed the same general approach, at the same time recognising that 'the quite different functions' served by a conflict-of-laws convention and by the CISG's substantive sales law rules meant that 'there are few points at which considerations either of substance or of technique strictly require that the two texts be parallel'.<sup>189</sup> 'The desire to imitate Vienna perhaps has led on occasion to drafting that, for choice-of-law purposes, is problematical',<sup>190</sup> leading the 1986 Convention's explanatory report to conclude that "[i]n the final analysis, therefore, parallelism between the two instruments must, for the most part, be justified by the assumption that the draft's administration will be facilitated in States that ultimately adopt both the Vienna and the Hague Conventions".<sup>191</sup>

#### b. Later Commercial Law Conventions

The goal of enabling a flawless interaction with the CISG as the core commercial law convention was not limited to the early years after the CISG's adoption but also carried the CISG's standard-setting function in case of some later conventions. Examples are UNIDROIT's 1988 Leasing Convention, given that international financial leasing covered by this convention was viewed as, in economic terms, equivalent to a sale or purchase-money loan<sup>192</sup> and therefore close to an international sale, as well as the 1988 Factoring

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<sup>188</sup> Evans, *supra* note 51, ¶26.

<sup>189</sup> Von Mehren, *supra* note 48, ¶11.

<sup>190</sup> Von Mehren, *supra* note 48, ¶¶12, 23.

<sup>191</sup> Von Mehren, *supra* note 48, ¶13.

<sup>192</sup> Goode, *supra* note 24, 12.

Convention, which governs the assignment of receivables arising from sales contracts defined in accordance with Article 1(1) of the CISG<sup>193</sup> and has therefore been described as the ‘son’ of the CISG.<sup>194</sup> UNCITRAL’s 2005 Electronic Communications Convention was similarly drafted as an instrument of supplementary character to the CISG,<sup>195</sup> with various of its provisions being inspired by the CISG.<sup>196</sup>

However, the strictness with which standards of the CISG were followed decreased in these later conventions in comparison to instruments from the early 1980s. While the drafters of the 1983 Geneva Agency Convention and the HCCH’s 1986 Sales of Goods Convention had more often than not opted for exact concordance with the CISG,<sup>197</sup> conventions adopted from 1988 onwards took to a greater extent the differences between the subject matters governed by each convention into account, therefore, refraining from copying the CISG solutions that were not considered appropriate for the other convention.<sup>198</sup> In addition, one may assume that drafters of later conventions may have had regard to the accumulating practical experience with certain CISG provisions, a piece of information that could not be relied upon in the case of the earlier conventions. Insofar, the CISG’s standard setter function evolved in line with this convention’s use in action and the lessons learned thereby.

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<sup>193</sup> Ottawa Factoring Convention, 1988, *supra* note 29, Art. 2.

<sup>194</sup> Giorgio De Nova, *Il Progetto Unidroit Sul Factoring Internazionale*, DIRITTO DEL COMMERCIO INTERNAZIONALE, 716 (1987); *See also* Ferrari, *supra* note 26, 64; Mankowski, *supra* note 47, ¶4.

<sup>195</sup> Martin, *supra* note 28, 265-266; Leandro Tripodi, TOWARDS A NEW CISG: THE PROSPECTIVE CONVENTION ON THE INTERNATIONAL SALE OF GOODS AND SERVICES, 121 (Brill Nijhoff, 2016).

<sup>196</sup> Castellani, *supra* note 1, 4; Martin, *supra* note 28, 261, 266.

<sup>197</sup> For details on the accordance of other conventions with CISG, *see supra* Part II.C.2.a on “Commercial Law Conventions from the Early 1980s”.

<sup>198</sup> Draft Final Provisions [for the] Convention on International Financial Leasing, *supra* note 57, ¶ 2; Draft Final Provisions [for the] Convention on International Factoring, *supra* note 57, ¶1.

### 3. CISG SOLUTIONS AS ACCEPTED PRACTICE IN UNIFORM COMMERCIAL LAW CONVENTION DRAFTING

When it comes to more recent uniform commercial law conventions, yet another reason for the CISG's influence can be identified: As a result of earlier conventions following the CISG's model in order to enable a flawless interaction with the CISG,<sup>199</sup> such CISG solutions had by now become the standard practice in commercial law drafting, simply because they had often been duplicated. This, in turn, led to solutions that had initially emanated from the CISG, which are now also being used in uniform commercial law conventions about subject matters largely unrelated to the law of international sales.

Examples are the UNIDROIT's 2001 Cape Town Convention and the HCCH's 2006 Securities Convention, whose respective drafters regarded Article 7(1) of the CISG as an exemplification of 'standard principles' of interpretation,<sup>200</sup> or — even further removed — the HCCH's 1989 Convention on the Law Applicable to Succession to the Estates of Deceased Persons,<sup>201</sup> where the use of Article 101 of the CISG as the model for the convention's denunciation clause "appeared to delegates to be a sound idea, and the proposal was adopted without further to-do".<sup>202</sup> Recently, the CISG has even been named as a model for future international conventions on data privacy<sup>203</sup> or on expert determination and dispute boards.<sup>204</sup>

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<sup>199</sup> See *supra* Part II.C.2 on "Enabling a Flawless Interaction with the CISG as the Core Commercial Law Convention".

<sup>200</sup> Official Commentary, *supra* note 101, ¶4.67; Roy Goode et al., EXPLANATORY REPORT ON THE HAGUE CONVENTION ON THE LAW APPLICABLE TO CERTAIN RIGHTS IN RESPECT OF SECURITIES HELD WITH AN INTERMEDIARY (HAGUE SECURITIES CONVENTION), ¶13-1 (HCCH, 2nd edn., 2017).

<sup>201</sup> Convention on the Law Applicable to Succession to the Estates of Deceased Persons, (adopted on August 1, 1989), Art. 30.

<sup>202</sup> Donovan W.M. Waters, CONVENTION ON THE LAW APPLICABLE TO SUCCESSION TO THE ESTATES OF DECEASED PERSONS – EXPLANATORY REPORT, ¶153 (HCCH, 1988).

<sup>203</sup> Morgan Corley, *The Need for an International Convention on Data Privacy: Taking a Cue from the CISG*, Vol. 41, BROOKLYN J. INT'L. L., 721, 766 (2016).

<sup>204</sup> Saidov, *supra* note 38, 28.

This development was made possible by the most influential standard-setting provisions addressing issues of a general nature which arise irrespective of a convention's subject matter, such as the instrument's sphere of application,<sup>205</sup> its interpretation,<sup>206</sup> or its treaty law framework.<sup>207</sup> In addition, it must be remembered that more recent conventions have deviated from model provisions in the CISG to a larger extent than earlier conventions, demonstrating that the standard practice in drafting continues to evolve. In this context, it is apparent that CISG provisions whose wording was controversial at the CISG's drafting stage have less often been accepted as standard-setting provisions than provisions that were based on a broad consensus among its drafters. The limited role of Article 95 of the CISG as a model<sup>208</sup> and the frequently missing reference to the observance of good faith in later provisions inspired by Article 7(1) of the CISG<sup>209</sup> are telling examples.

#### 4. REASONS FOR THE CISG SETTING POST-ADOPTION PROMOTION AND APPLICATION STANDARDS

As far as post-adoption activities concerning the promotion and application of uniform commercial law conventions are concerned,<sup>210</sup> a combination of further factors, likely contributed

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<sup>205</sup> For details on the influence of an instrument's sphere on application on standard setting, *see supra* note Part II.A.2 on "Provisions Defining Conventions' Sphere of Application".

<sup>206</sup> For details on the influence of an instrument's interpretation on standard setting, *see supra* note Part II.A.4 on "Provisions Governing the Interpretation of Uniform Instruments".

<sup>207</sup> For details on the influence of an instrument's framework on standard setting, *see supra* note Part II.A.7 on "Treaty Law Framework".

<sup>208</sup> For details on the limited role of Art. 95 of the CISG as a model, *see supra* note Part II.A.2.c on "Applicability of Conventions via Rules of Private International Law, Arts. 1(1)(b) and 95 of the CISG".

<sup>209</sup> For details on the observance of good faith in provisions inspired by Art. 7(1) of the CISG, *see supra* note Part II.A.4 on "Provisions Governing the Interpretation of Uniform Instruments".

<sup>210</sup> For details on the post-adoption activities concerning the promotion and application of uniform commercial law conventions, *see supra* note Part II.B on "Examples of CISG-induced standards concerning the post-adoption promotion and application of uniform law conventions".

to the CISG's acquired role as a standard-setting instrument. First, the significant number of CISG Contracting States comes to mind, although the 1958 New York Convention, as well as a number of transport law conventions, have been more widely ratified without acquiring a comparable standard-setting role.<sup>211</sup>

Second, and arguably more important, the comparatively large number of court cases and arbitral awards applying the CISG in practice has guaranteed a critical mass of practical experience in the CISG's application, which in turn made the CISG a suitable 'guinea pig' for developing and testing measures aimed at furthering the uniform interpretation of commercial law conventions.

Third, the fact that the contract of sale forms the CISG's subject matter arguably also contributed to the CISG's suitability as a testing ground: The sales contract is both the most basic and most general type of commercial contract concluded by parties of all sizes and levels of legal expertise (from one-person shops to large multi-national companies)<sup>212</sup> and by parties from all over the world, with each country being the home of both buyers and sellers alike.<sup>213</sup> The latter aspect is different in the case of other types of commercial contracts, notably shipping contracts (contracts for the carriage of goods by sea): There is only a limited number of States worldwide with large merchant fleets, which, therefore, typically are the home countries of carriers, while most other States are primarily the home of shippers and consignees – an inherent structural imbalance that may make international conventions governing shipping contracts less suitable as a testing ground for uniform law in general.<sup>214</sup>

Yet other types of contracts, such as transactions regarding the asset-based financing and leasing of spacecraft and the respective security interests which the 2001 Cape Town Convention<sup>215</sup>

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<sup>211</sup> Castellani, *supra* note 3, 18, 19.

<sup>212</sup> Schroeter, *supra* note 2, ¶20.

<sup>213</sup> Stephan, *supra* note 188, 743, 774.

<sup>214</sup> See Stephan, *supra* note 188, 743, 762, 766.

<sup>215</sup> Cape Town Convention, 2001, *supra* note 100.

in conjunction with the 2012 Space Protocol<sup>216</sup> are dealing with, will only ever be concluded by a limited number of actors from a highly specialised industry. It is, therefore, similarly uncertain to which extent lessons learned from practice under such instruments are representative of other types of transactions. By contrast, the contract of sale has traditionally been the everyday type of contract that in many domestic legal systems also drives the development of general contract law rules,<sup>217</sup> and this structural characteristic arguably extends to the uniform commercial law level.

#### D. EFFECT ON THE INTERPRETATION OF UNIFORM COMMERCIAL LAW CONVENTIONS

Before turning the CISG's possible role as an obstacle to uniform commercial lawmaking,<sup>218</sup> one last question regarding the CISG's standard-setting role should be addressed: Does or should this role affect the interpretation of uniform commercial law conventions that have followed the CISG's standards?

The answer is simple for those authors who argue in favour of a general cross-convention systematic interpretation of uniform commercial law conventions, irrespective of any convention's use as a model at the other convention's drafting stage.<sup>219</sup> A broad interpretative approach of this kind has been justified by different commercial law conventions supposedly serving the same goal, as well as by the existence of identical rules of interpretation for each convention<sup>220</sup> (the latter aspect having already been addressed above,

<sup>216</sup> Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets, (adopted on March 9, 2012).

<sup>217</sup> Magnus, *supra* note 121, ¶2.

<sup>218</sup> For details on the CISG's possible role as an obstacle to uniform commercial lawmaking, *see infra* note Part III on "The CISG as an obstacle to the development of uniform commercial law?".

<sup>219</sup> Ferrari, *supra* note 26, 66-68; Franco Ferrari, *Artikel 7 CISG in SCHLECHTRIEM/SCHWENZER/SCHROETER, KOMMENTAR ZUM UN-KAUFRECHT (CISG)*, ¶38 (Beck ed., 8th edn., 2024); Ulrich Magnus, *Konventionsübergreifende Interpretation Internationaler Staatsverträge Privatrechtlichen Inhalts in AUFBRUCH NACH EUROPA: 75 JAHRE MAX-PLANCK-INSTITUT FÜR PRIVATRECHT*, 571, 579 (Mohr Siebeck, 2001); Perales Viscasillas, *supra* note 85, ¶68.

<sup>220</sup> Ferrari, *supra* note 26, 57, 67.

in connection with the standard setting function of Article 7(1) of the CISG).<sup>221</sup> However, such a general approach arguably goes too far because it equates the same (or at least similar) end with identical means, thereby ignoring that each convention constitutes an autonomous system which is often a reflection of specific compromises made at its drafting stage.<sup>222</sup>

According to the preferable view, an interpretation of one convention in the light of another convention's similar provisions is, therefore, only admissible if the younger convention's provision was modelled on its older counterpart.<sup>223</sup> A cross-convention interpretation with such a narrower scope constitutes a historical interpretation of the younger instrument in accordance with its drafting history, a methodological approach generally accepted as compatible with Article 7(1) of the CISG and with its counterpart provisions in other conventions.<sup>224</sup>

In using this approach, it seems feasible to extend it to cases in which a convention's provision has been modelled on another convention, which in turn had been modelled on a third convention — in such cases of a 'grandparent' convention having historically inspired a 'parent' convention which in turn inspired a 'grandchild' convention, an interpretation of provisions in the grandchild convention in light of forerunners in the grandparent convention should be allowed.

In the context of the CISG's standard-setting role as surveyed earlier, this extended historical interpretation is particularly relevant because two 'parent' conventions drafted soon

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<sup>221</sup> For details on the standard setting function of Art. 7(1) of the CISG, *see supra* note Part II.A.4 on "Provisions Governing the Interpretation of Uniform Instruments".

<sup>222</sup> Schroeter, *supra* note 121, §20, ¶43.

<sup>223</sup> Frank Diedrich, AUTONOME AUSLEGUNG VON INTERNATIONALEM EINHEITSRECHT: COMPUTERSOFTWARE IM WIENER KAUFRECHT, 69, 70 (Nomos, 1994); Wolfgang Witz, *Artikel 7* in W. Witz, H-C Salger, M. Lorenz, INTERNATIONALES EINHEITLICHES KAUFRECHT: KOMMENTAR, ¶21 (Verlag Recht und Wirtschaft, 2nd edn., 2016).

<sup>224</sup> *See* Honnold & Flechtner, *supra* note 58, ¶¶112, 113; Schroeter, *supra* note 2, ¶141.

after ‘grandparent’ CISG – the UNIDROIT’s 1983 Geneva Agency Convention and the HCCH’s 1986 Sales of Goods Convention – were both strongly influenced by the CISG’s model, but themselves never entered into force. Various UNIDROIT and HCCH ‘grandchild’ conventions that were inspired by provisions in these two parent conventions should, therefore, be open to an interpretation in light of the CISG whenever a provision has indirectly emanated from this grandparent convention.

However, even a historical cross-convention interpretation of this kind must be careful to consider the specific goals of each convention and the intra-conventional context in which each provision operates because those factors may call for an interpretation that differs from that of its historical model. This caveat was acknowledged when the 1986 HCCH Sale of Goods Convention was drafted in light of the CISG: ‘To the extent, of course, that similar or identical language is used in the two instruments in different contexts and to advance different policies, interpreting and administering one in the light of the other may distort the meaning of the instrument so interpreted and administered’.<sup>225</sup>

### III. THE CISG AS AN OBSTACLE TO THE DEVELOPMENT OF UNIFORM COMMERCIAL LAW?

#### A. INTRODUCTION

The examination of the CISG’s standard-setting function above<sup>226</sup> has demonstrated that, on the one hand, the CISG’s Parts I and IV, with their general and treaty framework provisions, have inspired many other conventions, while, on the other hand, a similar influence of the CISG’s Parts II and III (the provisions on contract formation and on rights and obligations of the parties) has remained conspicuously absent, as far as other international conventions are concerned. This raises a question that at first sight may

<sup>225</sup> Von Mehren, *supra* note 48, ¶11.

<sup>226</sup> For details on the standard setting function of the CISG, *see supra* note Part II on “The CISG as a standard setter in international commercial law unification”.

appear surprising: Has the CISG become an obstacle to the further development of uniform international commercial law? The question can be assessed from different angles:

First, the CISG's mere existence as a widely ratified instrument governing the theoretically and practically most important type of contract — the sales contract — could be viewed as an obstacle to a broader unification of international commercial law. Should, for example, a new international convention be envisaged that would govern the formation of any commercial contract, parties' remedies for all types of contracts, or the general law of damages, or should a contract law instrument addressing questions raised by the increasing digitalisation be envisaged, each of these new uniform law instruments would significantly overlap (or 'collide') with the already existing CISG. This, in turn, may discourage lawmaking organisations from even attempting such broader unification projects.

Second, the CISG has sometimes been viewed as an obstacle to a successful unification of international commercial law not because of its widespread adoption but because of doubts regarding the quality of its provisions.<sup>227</sup> In this regard, some authors have expressed general doubts about the quality of the CISG's content<sup>228</sup> or, more frequently, have pointed to the fact that the CISG contains a number of gaps.<sup>229</sup> From this perspective, the CISG's allegedly less-than-suitable rules could be viewed as standing in the way of better rules that may be part of a newly developed uniform commercial law instrument.

Third, others have argued that CISG's provisions may have been fit for their task when the CISG was adopted in 1980 but no longer provide the best solutions in light of the changes that cross-border trade has undergone since that time.<sup>230</sup> When assessed in this manner, the CISG could — again — be regarded as an obstacle to the

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<sup>227</sup> Bailey, *supra* note 169, 273, 312; Martin, *supra* note 28, 261, 279.

<sup>228</sup> Bailey, *supra* note 169, 273, 312; Tripodi, *supra* note 196, 33 et seq.

<sup>229</sup> Sheaffer, *supra* note 85, 461, 469; Stephan, *supra* note 188, 743, 776; *see also* Sorieul et al., *supra* note 1, 491, 493.

<sup>230</sup> Tripodi, *supra* note 196, 39 et seq.

development of new uniform approaches that are better adapted to today's world of international trade.

### B. OBSTACLE OR MISSION ACCOMPLISHED?

It is open to different assessments of whether the CISG is viewed as an obstacle to the further development of uniform commercial law or as the source of an already existing uniformity that, in spite of certain shortcomings, is an outstanding accomplishment that should be preserved. The following remarks are limited to outlining some of the factors that should be included in any such assessment<sup>231</sup> and addressing technicalities that may play an important role in this context.<sup>232</sup>

#### 1. FEASIBILITY OF A BETTER OR BROADER COMMERCIAL LAW UNIFICATION

Occasionally, general doubts have been expressed about whether the drafting of a new commercial law convention would lead to an improvement over the CISG. In this regard, some authors, from the outset, regard it as a duplication of legislative work to again address the matters already governed by the CISG;<sup>233</sup> others caution that it is far from clear whether a broad consensus could today be reached on the many challenging issues that were deliberately left out of the CISG in 1980.<sup>234</sup> If viewed as decisive, these arguments would mean that the 1980 Sales Convention is no obstacle to the development of uniform commercial law for the simple reason that any new instrument is unlikely to constitute a quality improvement. However,

<sup>231</sup> For details on the assessments of the CISG as an obstacle or as the source of an already existing uniformity that should be preserved, *see infra* note Part III.B.1 on “Feasibility of a Better or Broader Commercial Law Unification”; *see infra* note Part III.B.2 on “Destructive Effect upon the Existing Uniformity”.

<sup>232</sup> For details on the technicalities in the assessment of the CISG, *see infra* note Part III.C on “Options for the CISG’s coexistence with or replacement by future conventions”.

<sup>233</sup> Castellani, *supra* note 1, 1, 2; Goode, *supra* note 31, 1, 19 (“As regards sales law we already have the CISG, which has attracted a large number of ratifications. Why do we need to reinvent the wheel – again?”).

<sup>234</sup> Loken, *supra* note 2, 509, 515; Saidov, *supra* note 38, 1, 20.

it is submitted that this general assessment is overly sceptical and, therefore, in and of itself, not convincing because the content and scope of a future commercial law convention cannot reasonably be compared with the CISG before it has been drafted.

## 2. DESTRUCTIVE EFFECT UPON THE EXISTING UNIFORMITY

The more significant factor in assessing the CISG's alleged role as an obstacle to uniform law development seems to be a different one, namely, the impact that a new convention would have on the already existing uniformity. Given the CISG's widespread ratification and application in commercial practice, this instrument has already established significant uniformity in the law of international sales. Any further development of uniform commercial law does, therefore, not occur on a clean slate (*tabula rasa*) and cannot be equated with a mere 'return to the drawing board' in order to improve the plans for a future edifice of international commercial law — instead, it must be taken into account that a uniform law building is already standing (the CISG) and is being lived in. At stake is not the replacement of non-uniformity with uniformity but the replacement of an existing uniformity with a (potential) new one, making it paramount to also consider what would be lost by infringing on the CISG as it stands in force today. The details, in turn, depend on how the CISG's relationship with a new instrument would be designed, a question to be discussed next.

### *C. OPTIONS FOR THE CISG'S COEXISTENCE WITH OR REPLACEMENT BY FUTURE CONVENTIONS*

It would be an elegant solution to the conundrum to leave it to the parties of international commercial transactions to choose between the CISG and an alternative, newer commercial law instrument by designing the latter as a mere 'opting in' instrument. This approach has been used in the case of soft law instruments like the PICC,<sup>235</sup> but was also proposed for an international hard law instrument, namely the European Commission's 2011 draft of a

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<sup>235</sup> Kronke, *supra* note 2, 451, 458.

Common European Sales Law (later withdrawn).<sup>236</sup> An ‘opting in’ design of concurrent instruments means that any contracting parties’ choice of such an instrument would constitute an (at least implicit) derogation from the CISG in accordance with Article 6 of the CISG, with the CISG governing undisturbed whenever parties remain inactive. At the same time, it is clear that reliance upon an ‘opting in’ mechanism would significantly reduce any new convention’s application in practice; the use of such a design accordingly presupposes that the drafters of such an instrument regard the CISG as a uniform law accomplishment that should not be disturbed.

Should the drafters of a new uniform law convention reach the contrary conclusion and regard the CISG as an obstacle to the development of uniform commercial law that should be overcome, it would need to be decided how best to achieve this and what the resulting coexistence between the two conventions would be. The options are different in the case of conventions unifying matters covered by the CISG<sup>237</sup> and of conventions unifying other commercial law matters.<sup>238</sup>

#### 1. IN CASE OF CONVENTIONS UNIFYING MATTERS THAT ARE ALREADY COVERED BY THE CISG

As far as commercial law matters governed by the CISG are concerned, a new uniform law instrument could have the same or a similar scope as the CISG (thus being primarily designed as a renewed sales law unification, possibly covering a number of additional matters where the CISG has gaps), or it could be a much broader instrument aiming at a unification of commercial contract

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<sup>236</sup> Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law of October 11, 2011, COM (2011) 635 final, Art. 3.

<sup>237</sup> For details on conventions unifying matters covered by the CISG, *see infra* note Part III.C.1 on “In Case of Conventions Unifying Matters that are Already Covered by the CISG”.

<sup>238</sup> For details on conventions unifying other commercial law matters, *see infra* note Part III.C.2 on “In Case of Conventions Unifying Other Commercial Law Matters”.

law in general.<sup>239</sup> (Obviously, a narrower scope is also conceivable, although it appears to be a less likely choice). Irrespectively, any project of this type would have to take care in designing its effect upon the CISG, given that the CISG already covers some (or most) of the matters within the new instrument's scope and that its drafters will want to entice as many CISG Contracting States as possible to switch to the new instrument. Two options could be considered in this regard:

a. Revision of the CISG

The first theoretical option would be a revision of the CISG, i.e., an amendment of those among its provisions that have been identified as unsuitable, outdated, or otherwise worthy of replacement, potentially combined with an addition of further provisions. Although the CISG does not contain an express provision addressing its revision, as some other uniform commercial law conventions like the 1978 Hamburg Rules,<sup>240</sup> the 2008 Rotterdam Rules,<sup>241</sup> or the 2018 Singapore Mediation Convention<sup>242</sup> do, it is largely undisputed that the CISG's text could be revised if such a step was desired.<sup>243</sup> Technically, such a revision could be attempted by drafting a protocol,<sup>244</sup> i.e., a convention aimed at amending the CISG, an approach that was used at the 1980 Diplomatic Conference in Vienna in order to amend the 1974 Limitation Convention.<sup>245</sup>

In the context of domestic law revisions — a similar process that some proponents of a CISG revision may unconsciously have in mind — the draft of the revised law would have to be passed by the national parliament in order to complete the intended revision. The comparable step is more complex in the case of the CISG,

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<sup>239</sup> See Schwenzer, *supra* note 174, 723, 728 (regarding the implementation of the 'Swiss Proposal').

<sup>240</sup> Hamburg Rules, 1978, *supra* note 36, Art. 32.

<sup>241</sup> Rotterdam Rules, 2008, *supra* note 36, Art. 95.

<sup>242</sup> Singapore Mediation Convention, 2018, *supra* note 27, Art. 15.

<sup>243</sup> Schroeter, *supra* note 163, ¶54; *but see* Sheaffer, *supra* note 85, 461, 479, 480.

<sup>244</sup> See Tripodi, *supra* note 196, 112 et seq.

<sup>245</sup> See for details on the approach that was used at the Diplomatic Conference in Vienna, 1980 in order to amend the Limitation Convention, 1974, *supra* note Part II.A.2 on "Provisions Defining Conventions' Sphere of Application".

and it is here that the CISG's nature as an obstacle may manifest itself: Given that the Convention has today been acceded to by over ninety Contracting States, it is not one, but over ninety parliamentary procedures that a revision would have to pass in order to actually revise the CISG's rules as currently in force. The likelihood that such a comprehensive ratification of any Protocol revising the CISG would be achieved is arguably small,<sup>246</sup> and it is foreseeable that such a process would, in any case, take decades to complete. The revision of the 1974 Limitation Convention through the 1980 Protocol provides a telling example: When the Protocol was adopted in 1980, the Limitation Convention had been ratified by a mere six States and had entered into force in none of them. Today, over four decades after the Limitation Convention's attempted revision through the Protocol, three of these six States have still not ratified the Protocol,<sup>247</sup> and three further States have since acceded only to the original 1974 Limitation Convention (without the Protocol); the Limitation Convention, therefore, continues to be in force in two different versions.

Against this background, any assessment of the CISG's possible revision should not only focus on the quality improvements in the CISG's text to be achieved but must also take into account the need for the subsequent ratification of any revision in all current CISG Contracting States, with the unavoidable coexistence of two CISG versions resulting therefrom.<sup>248</sup> The degree of confusion caused in practice<sup>249</sup> would inevitably be extreme – the cure, quite simply, would be worse than the disease. This is all the truer because the further development of commercial law in the CISG matters would arguably be in good hands when left to courts interpreting and applying the Convention. The identification of general principles in the sense of Article 7(2) of the CISG has proven an effective tool by which gap-filling solutions consistent with the Sales Convention's text can

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<sup>246</sup> Schlechtriem, *supra* note 19, 781, 789.

<sup>247</sup> The count is rendered more complicated by the fact that one of these six Contracting States — Yugoslavia — was subsequently dissolved, and two successor States (Bosnia and Herzegovina as well as Serbia) have filed notices of succession into Yugoslavia's position under the original Limitation Period.

<sup>248</sup> Tripodi, *supra* note 196, 115.

<sup>249</sup> See Castellani, *supra* note 167, 28, 32.

be developed in case a practical need for such solutions arises in commercial practice.

b. Replacement of the CISG by a New Convention

A second, technically somewhat different option would be the replacement of the CISG by an entirely new convention.<sup>250</sup> Examples from past uniform commercial lawmaking include the replacement of the 1923 Geneva Protocol on Arbitration Clauses and the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards by the 1958 New York Convention.<sup>251</sup>

In principle, this option would include the possibility of a new convention being drafted and adopted not under the auspices of UNCITRAL but by another international organisation. The CISG itself is a pertinent example of such a process, given that its predecessors — the 1964 Hague Sales Conventions<sup>252</sup> — had been prepared by UNIDROIT and already ratified by some States when UNCITRAL undertook to develop the CISG as its soon-to-be successor.<sup>253</sup>

An advantage of this approach may be seen in the higher degree of clarity it provides: The CISG would not exist in an original and a revised version but would continue unchanged unless a State decides to switch to the new Convention. In substance, the trade-off is nevertheless similar to a CISG revision,<sup>254</sup> because the uniformity in law already achieved would be affected by the presence of a new instrument. A convincing case for such a step, therefore, arguably presupposes that fundamental changes in the factual circumstances of international commerce or within commercial law have

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<sup>250</sup> See Tripodi, *supra* note 196, 135 et seq.

<sup>251</sup> See New York Convention, 1958, *supra* note 18, Art. VII (2).

<sup>252</sup> Hague Sales Conventions, *supra* note 16.

<sup>253</sup> See Eric E. Bergsten, *Thirty-Five Years of the United Nations Convention on Contracts for the International Sale of Goods: Expectations and Deliveries* in THIRTY-FIVE YEARS OF UNIFORM SALES LAW: TRENDS AND PERSPECTIVES, 7, 11 (UNCITRAL, 2015) (“This was a somewhat problematic decision, given that the uniform laws had been prepared by UNIDROIT”).

<sup>254</sup> For details on the revision of CISG, see *supra* note Part III.C.1.a on “Revision of the CISG”.

taken place, changes that are so great that they require an entirely new uniform commercial law instrument.

## 2. IN CASE OF CONVENTIONS UNIFYING OTHER COMMERCIAL LAW MATTERS

As far as matters not covered by the CISG are concerned — and there are a relevant number of such matters, given that the CISG’s scope is limited<sup>255</sup> — the CISG is at the outset no obstacle to the making of uniform law conventions to cover these matters. Instead, such instruments can function as welcome supplements to the CISG.<sup>256</sup> The issue then becomes one of coordination, with the goal of avoiding unintended and unnecessary overlaps between the CISG and supplementary instruments.

A number of uniform commercial law conventions expressly acknowledge their aim to supplement the CISG in their preambles and/or accompanying explanatory reports, in line with their general goal to enable a flawless interaction with the CISG as the core commercial law convention identified earlier in this article.<sup>257</sup> This is true for UNCITRAL’s 1980 Protocol amending the Limitation Convention,<sup>258</sup> the UNIDROIT’s 1983 Geneva Agency Convention<sup>259</sup>

<sup>255</sup> See only Pascal Hachem, *Article 4 CISG: Substantive Scope of Convention* in SCHLECHTRIEM & SCHWENZER: COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG), ¶29 et seq. (I. Schwenzer & U.G. Schroeter eds., Oxford University Press, 5th edn., 2022).

<sup>256</sup> See Tripodi *supra* note 196, 119 et seq.

<sup>257</sup> For details on the interactions between CISG and other uniform commercial law conventions, see *supra* note Part II.C.2 on “Enabling a Flawless Interaction with the CISG as the Core Commercial Law Convention”.

<sup>258</sup> Protocol to Limitation Convention, 1980, *supra* note 23, Preamble (“Considering that the Convention on the Limitation Period in the International Sale of Goods, concluded at New York on June 14, 1974 (the Limitation Convention, 1974), to conform to the United Nations Convention on Contracts for the International Sale of Goods, concluded at Vienna on April 11, 1980 (the Sales Convention, 1980), would promote the adoption of the uniform rules governing the limitation period contained in the Limitation Convention, 1974 ...”).

<sup>259</sup> Geneva Agency Convention, 1983, *supra* note 32, Preamble (“Bearing in mind the objectives of the United Nations Convention on Contracts for the International Sale of Goods, ...”); see also Evans, *supra* note 51, ¶11.

and the HCCH's 1986 Sales of Goods Convention.<sup>260</sup> Interestingly, the Preamble of UNCITRAL's 2005 Electronic Communications Convention contains no comparable statement; however, this instrument's supplementary nature<sup>261</sup> follows from its sphere of application, which covers the use of electronic communications in connection with the formation or performance of a contract to which one of six international conventions applies, among them the CISG.<sup>262</sup> These examples prove that the use of supplementary conventions is nothing new in uniform law-making practice, at the same time providing models for suitable and less suitable drafting options.

Also, drafters of future supplementary conventions should, of course, commence by carefully evaluating whether a supplementary instrument is actually needed, taking into account not only the CISG's express provisions but also their interpretation in international case law and the general principles underlying the CISG (Article 7(2) of the CISG) which courts have identified over the decades.<sup>263</sup> A number of topics that were traditionally regarded as not covered by the Sales Convention have more recently been addressed by recourse to the CISG's underlying principles, with set-off being a prominent example.<sup>264</sup> Questions raised by the increasing digitalisation for the conclusion and performance of cross-border sales

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<sup>260</sup> HCCH Sale of Goods Convention, 1986, *supra* note 41, Preamble ("Bearing in mind the United Nations Convention on contracts for the international sale of goods, concluded at Vienna on April 11, 1980, ..."), Art. 8(5) ("Para 3 does not apply in respect of issues regulated in the United Nations Convention on contracts for the international sale of goods (Vienna, April 11, 1980) where, at the time of the conclusion of the contract, the seller and the buyer have their places of business in different States both of which are Parties to that Convention"), Art. 23(a) ("This Convention does not prejudice the application — (a) of the United Nations Convention on contracts for the international sale of goods (Vienna, April 11, 1980); ...").

<sup>261</sup> Tripodi, *supra* note 196, 121.

<sup>262</sup> Electronic Communications Convention, 2005, *supra* note 28, Art. 20(1).

<sup>263</sup> See for details on factors drafters of supplementary conventions should take into account, *supra* note Part III.B on "Obstacle or mission accomplished?"

<sup>264</sup> See Hungarian injection moulding tools case, CISG-online 2545, ¶55 et seq. (German Supreme Court); Högsta domstolens, CISG-online 5500, May 29, 2020, ¶¶40, 41 (Swedish Supreme Court); Christiana Fountoulakis, *CISG Advisory Council Opinion No. 18, Set-Off under the CISG* in THE CISG

contracts can likely also be answered by the CISG's provisions and general principles alone, making a supplementary instrument about such topics unnecessary. In case any instrument of this type is drafted and adopted, it should ideally include an express provision granting prevalence to the CISG,<sup>265</sup> thereby leaving the CISG's application and future interpretation undisturbed.

#### IV. CONCLUSION

In addition to its original effect of unifying the law applicable to international sales contracts, the CISG has, over time, acquired the role of a standard setter in uniform commercial law-making. In light of its resulting influence on the drafting, the post-adoption promotion, and the interpretation of later commercial law conventions, the CISG's characterisation as the 'mother of all modern conventions on the law of specific contracts'<sup>266</sup> appears justified.

The survey conducted earlier in this article<sup>267</sup> has shown that notably provisions about the CISG1980 Sales Convention's sphere of application, the so-called general provisions in Part I of the CISG (Articles 1–13 of the CISG), as well as final provisions from its Part IV (Articles 89–101 of the CISG), have been duplicated in many later commercial law conventions. They have evolved into and continue to set a standard for uniform commercial law-making in general.

The reasons underlying the CISG's standard-setting function have similarly evolved and partially changed over time. In the early years after the CISG's adoption, the use of its provisions as a model was mostly driven by the goal to enable a flawless interaction of newly drafted conventions with the CISG, which already at that time was recognised as the core commercial law convention. Not surprisingly, this goal primarily materialised in conventions unifying commercial law matters closely related to those of the CISG, notably

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ADVISORY COUNCIL OPINIONS, 679 et seq., Rule 1 (Michael Bridge et al. eds., Eleven International Publishing, 2nd edn., 2021).

<sup>265</sup> On so-called relationship clauses, *see* Schroeter, *supra* note 163, ¶¶29–31.

<sup>266</sup> Kronke, *supra* note 2, 451, 458; Loken, *supra* note 2, 509, 514.

<sup>267</sup> For details on the survey conducted, *see supra* note Part II on "The CISG as a standard setter in international commercial law unification".

the 1983 Geneva Agency Convention and the 1986 Sales of Goods Convention. At the same time, these two examples demonstrate that the CISG's standard-setting function was and is not limited to instruments drafted under the auspices of UNCITRAL but similarly extends to conventions developed by the UNIDROIT or the HCCH.

The same goal led further conventions to partially follow the CISG's model, such as the 1988 Factoring and Leasing Conventions or the 2005 Electronic Communications Convention. More recently, the CISG's standard setting function has been supported by a different consideration because many provisions in Parts I and IV of the CISG have today become an accepted practice in uniform commercial law convention drafting. As an accepted practice, the CISG standards have commenced to also influence conventions on subject matters lacking a close relationship to the law of international sales, such as the 2001 Cape Town Convention.

Over the years, the strictness with which other conventions followed the CISG's standards has also been subject to changes. The earliest post-CISG conventions typically copied the CISG's provisions verbatim and opted for strict parallelism, even where the suitability of a given CISG solution for another convention's purposes was not free of doubt. Later conventions adopted a more balanced approach, with their drafters putting a stronger focus on both the quality of a given CISG provision in light of practice and academic discussion and its suitability within a different convention's framework. In consequence, some CISG solutions grew into accepted uniform commercial law standards over time, such as the gap-filling rules in Article 7(2) of the CISG and many of Part IV's provisions regarding treaty law framework issues. By contrast, other CISG provisions could not maintain their initial role as drafting models and, therefore, no longer set the standard for their regulatory topic as the reference to good faith in Article 7(1) of the CISG or the Article 95 of the CISG reservation.

It is remarkable that the standard-setting function identified for Parts I and IV of the CISG does not extend to Parts II and III, the heart of the CISG, with its rules on the formation of

sales contracts and on the rights and obligations of buyers and sellers. While the provisions in Articles 25–88 of the CISG have significantly influenced domestic laws, international soft law instruments (notably the PICC and the PECL) and the occasional ‘optional’ international hard law instrument (the draft Common European Sales Law), they have had almost no visible influence on other international conventions, simply because no conventions covering these subject matters have been adopted since 1980.<sup>268</sup>

This, in turn, raises the question of whether the CISG’s existence effectively operates as an obstacle to the further development of uniform commercial law by impeding new conventions from being drafted.<sup>269</sup> In response, it has to be admitted that the CISG’s rules are neither perfect nor comprehensive and that good reasons can be advanced in favour of an improved or broader uniform commercial law instrument. At the same time, it should be acknowledged that the CISG constitutes an impressive accomplishment in commercial law unification, which — maybe most importantly — already has the force of law in many parts of the world today after decades of ratification. Although the CISG’s existence is not an insurmountable obstacle to further unification projects in the CISG’s fields, it therefore raises the policy hurdle for such a step, with any attempt to revise or replace the CISG by a new convention being more likely to destroy than to improve legal uniformity. In conclusion, uniform commercial law should be further developed within (namely through interpretation of) the CISG and possibly through the adoption of supplementary conventions while preserving the CISG’s status as the core international commercial law convention.

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<sup>268</sup> For details on the influence of the CISG on conventions adopted post 1980s, *see supra* note Part II.A.6 on “Substantive Provisions”.

<sup>269</sup> For details on the CISG being an obstacle in the development of new uniform commercial law conventions, *see supra* note Part III on “The CISG as an obstacle to the development of Uniform Commercial Law?”.