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THE CISG BEFORE THE COURTS OF NON-CONTRACTING STATES? TAKE FOREIGN SALES LAW AS YOU FIND IT

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The United Nations Convention on Contracts for the International Sale of Goods (CISG) is currently in force in almost 80 countries worldwide. Among the Contracting States are all Member States of the EU except the UK, Ireland, Portugal and Malta.[1] The following contribution analyses whether courts in *non*-Contracting States to the CISG are required to apply the CISG in cases in which their rules of private international law (PIL) designate the law of a Contracting

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[1] Among the Contracting States are the USA, Canada, Russia, China, Japan, most South American States (apart from Brazil and Bolivia), Australia, Singapore, and Switzerland; text, list of Contracting States and case-law on the CISG *e.g.* available at <www.unilex.info>. For the situation in the UK see S. MOSS, Why the United Kingdom Has Not Ratified the CISG, 25 *Journal of Law and Commerce* (2005-06) 483.

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State to the CISG, or if, on the contrary, they have to apply the domestic, non-unified sales law of the Contracting State.

It is submitted that if the PIL of a non-Contracting State designates the law of a Contracting State which has fully integrated the CISG into its domestic sales law, the courts of non-Contracting States (such as the UK, Ireland, Portugal and Malta) are required to apply the CISG as special part of the substantive sales law of the respective Contracting State.

I. A Short View on the Situation in Contracting States to the CISG

When it comes to determining the law applicable to a transnational case scenario, the first question a court has to ask is whether there is any *uniform substantive law* that applies; if the case is governed by uniform substantive law rules, no conflict of law arises and no recourse to rules of PIL is to be made.[2]

When dealing with an international sales contract, courts in Contracting States to the CISG will thus first have to analyse whether the case falls within the *scope of application* of the CISG. With respect to cases falling into the scope of application of the CISG, no conflict of laws arises and the courts in Contracting States are treaty bound to apply the CISG.[3]

The scope of application of the CISG is determined in Art. 1 *et seq.* of the CISG. The first articles of the CISG do not provide connecting factors allowing to

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[2] K. ZWEIGERT/ U. DROBNIG, Ohne Rechtskollision kein Kollisionsrecht, Einheitliches Kaufgesetz und Internationales Privatrecht, *RabelsZ* 1965, 146 at 147 (translation: Where there is no conflict of laws, there is no need for choice of law rules).

[3] This is why the courts in EU Member States that are also Contracting States to the CISG do *not* first have to resort to the rules of private international law of the forum, and in particular to Art. 25(1) of the Rome I Regulation, which would then give priority to the CISG as such. Where uniform substantive law is applicable, there is simply no conflict of laws between national systems in the sense of Art. 1(1) of the Rome I Regulation and consequently no need to start the analysis with the rules of the Rome I-Regulation; see *e.g.* M. BRIDGE, *The International Sale of Goods, Law and Practice* (2nd ed.), Oxford 2007, No. 11.14: "Where the CISG is applicable, the forum is treaty bound to go directly to the CISG and not to discover it through its private international law rules", No. 11.01: Where applicable, "the CISG displaces both that State's domestic law and choice of law rules concerning the sale of goods"; F. FERRARI, in P. SCHLECHTRIEM/ I. SCHWENZER, *Kommentar zum Einheitlichen UN-Kaufrecht – CISG* (5th ed. by SCHWENZER), München/ Basel 2008, Vor Artt. 1-6, No. 34; K. SIEHR, in H. HONSELL (ed.), *Kommentar zum UN-Kaufrecht* (2nd ed.), Heidelberg 2010, Art. 1, No. 2: "Das IPR ist, abgesehen von Art. 1 Abs. 1 lit. b und Art. 7 Abs. 2 (Füllung von Lücken, die nicht anders geschlossen werden können), im Rahmen des CISG überflüssig und kommt lediglich bei solchen Fragen zur Anwendung, welche die im CISG nicht geregelten Gegenstände betreffen (vgl. Art. 4)".

make choices between different domestic laws, but determine the scope of application of the CISG's uniform substantial law rules; they are thus not itself conflict of law rules.[4] According to its Art. 1(1) the CISG "applies to contracts of sale of goods between parties whose places of business are in different States: (a) when the States are Contracting States; or (b) when the rules of private international law [of the forum[5]] lead to the application of the law of a Contracting State". In Contracting States to the CISG, the forum's PIL rules thus come into play only if the conditions of Art. 1(1)(a) of the CISG are *not* met, *i.e.* only if one of the parties has its place of business in a non-Contracting State. The court then has to turn to Art.1(1)(b) of the CISG and analyse whether its PIL rules designate the law of a CISG Contracting State, in which case the CISG applies. When applied according to Art. 1(1)(b) of the CISG, the forum's PIL rules do not fulfil their traditional role to make a choice between different national laws but are applied as part of the rules determining whether the case falls within the *scope of application* of the CISG.

Only if the conditions of neither Art. 1(1) lit. (a) nor of lit. (b) of the CISG are fulfilled and, consequently, the CISG is not applicable, or if the question under examination is not covered by the CISG (Art. 7(2) *in fine* of the CISG), recourse to the PIL rules of the forum is made in order to coordinate, and make a choice between, different domestic non-unified systems of law.

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[4] On the much debated question of whether Art.1(1) of the CISG is a conflict of law rule, see *e.g.* A.T. VON MEHREN, *Report on the Hague Sales Convention 1986, Proceedings of the Extraordinary Session of October 1985*, para. 192: "a kind of choice-of-law-rule", "an incomplete provision respecting choice of law"; 193: "it seems both unnecessary and undesirable" to interpret Art. 1(1)(a) as a choice of law rule; J. FAWCETT/ J. HARRIS/ M. BRIDGE, *International Sale of Goods in the Conflict of Laws*, Oxford 2005, Nos 16.24 and 25: at best an "incomplete choice of law rule"; I. SCHWENZER/ P. HACHEM, in P. SCHLECHTRIEM/ I. SCHWENZER (eds), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd ed. by SCHWENZER), Oxford 2010, Intro to Art. 1-6, N. 5: "unilateral conflict of law rules which determine the scope of the Convention"; M. PELICHET, Vente internationale de marchandise et conflit de lois, *Recueil des Cours* 1987 I, p. 36: Art. 1(1)(a) "ne saurait être regardée comme une règle de conflit, mais se présente comme une simple norme, objective et autolimitative, d'application de la convention"; G. SCHULZE, in F. FERRARI/ E. M. KIENINGER/ P. MANKOWSKI / K. OTTE/ I. SAENGER/ R. SCHULZE/ A. STAUDINGER, *Internationales Vertragsrecht, Kommentar* (2nd ed.), München 2012, Rom I-VO, Art. 25, No. 4: "*nur statutorisches Kollisionsrecht*"; A. LOHMANN, *Parteiautonomie und Internationales Kaufrecht*, Tübingen 2005, p. 50 *et seq.*

[5] It is unanimously understood that Art. 1(1)(b) CISG refers to the PIL rules of the forum, see *e.g.* F. FERRARI, *Contracts for the International Sale of Goods*, Leiden/ Boston 2012, p. 76 with further references; J. FAWCETT/ J. HARRIS/ M. BRIDGE (note 4), at No. 16.26; I. SCHWENZER/ P. HACHEM (note 4), Art. 1, No. 32; L. MISTELIS, in S. KRÖLL/ L. MISTELIS/ P. PERALES VISCASILLAS, *UN Convention on Contracts for the International Sale of Goods (CISG)*, Munich 2011, Art. 1, No. 51; K. SIEHR (note 3), Art. 1, Nos 4, 16; U. MAGNUS, in *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch – Wiener UN-Kaufrecht (CISG)*, Berlin 2005, Art. 1, No. 93.

II. The CISG in Non-Contracting States?

A. Presentation of the Problem

In non-Contracting States to the CISG, judges are not treaty-bound to apply the CISG. They will, as an initial step, consequently ignore the CISG and turn to their conflict of law rules instead. Courts in the UK, Ireland, Portugal, and Malta, for example, will determine the law applicable to an international sales contract according to the rules set forth in the Rome I Regulation.

If, *e.g.*, an English merchant orders cars from a German manufacturer or watch mechanisms from a Swiss manufacturer, courts in the UK will determine the applicable law according to Art. 3 or Art. 4(1)(a) of the Rome I Regulation. If the parties have not chosen the applicable law, the courts will apply Art. 4(1)(a) of the Rome I Regulation, which provides that "a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence" or, in the case of companies, its "central administration" (Art. 19). Given that the sellers in the scenario have their central administrations in Germany and Switzerland respectively, the contracts in the scenarios would be governed by German or Swiss law respectively.

Will English courts then be required to apply the sales law of the German Civil code (§§ 433 *et seq.* of the *Bürgerliches Gesetzbuch, BGB*) or the provisions on sales of the Swiss Code of obligations (Art. 184 *et seq.* of the *Code des obligations/Obligationenrecht, CO*) respectively, or will they have to apply the CISG given that the CISG is in force in Germany and Switzerland?

The leading treatises and commentaries on the conflict of laws and on international sales contracts still leave the question open whether courts in non-Contracting States to the CISG are required to apply the CISG where the PIL of the forum refers to the law of a Contracting State. According to DICEY, MORRIS, and COLLINS, "[t]here is one possible circumstance in which an English court *might be required* to apply the [CISG] despite the fact that the United Kingdom has not ratified the Convention. This is where the law applicable to the contract of sale under the Rome Convention [now the Rome I Regulation] is found to be the law of a country which is a party to the United Nations Convention and that country would regard the Convention as applicable."[6] Michael BRIDGE states that, "[e]ven before the courts of their own country, UK merchants *may find* the CISG *applied* to one of their contracts if it contains a choice of law clause in favour of the law of a Contracting State or if that law proves to be the applicable law for other reasons. The CISG *might be applied* here as part of the applicable law".[7] Loukas MISTELLIS states that in such cases "the

[6] L. COLLINS, *et al.* (eds), *Dicey, Morris & Collins on the Conflict of Laws* (14th ed.), vol. 2, London 2006, No. 33-103 (emphasis added).

[7] M. BRIDGE (note 3), at No. 11.05 (emphasis added).

Convention ... *should be considered* by the courts".[8] According to Christophe BERNASCONI, "if the Private international law of the forum points to the law of a Contracting State, *it is suitable to apply* the CISG".[9] Last but not least, according to Peter SCHLECHTRIEM'S and Ingeborg SCHWENZER'S Commentary on the UN Convention on the International Sale of Goods; "courts in non-Contracting States *may have to apply* the Convention as foreign law, if their conflict of law rules refer to the law of a Contracting State".[10]

The scenarios that these authors refer to are identical to the one in the above case study: courts in England, Ireland, Portugal, Malta, or any other non-Contracting State to the CISG apply their domestic PIL rules and these rules designate the law of a Contracting State that would consider the CISG as applicable to the contract of sale under examination. English, Irish, Portuguese, or Maltese courts as well as courts in other non-Contracting States might thus be required, according to the authors cited, to apply the CISG despite the fact that these States have not ratified the Convention.

It is striking that all these authors are very careful in their wording as to the application of the CISG by courts in non-Contracting States: Courts in non-Contracting States "may" or "might" apply the CISG in these situations, the CISG "should be considered" and it is possibly "suitable to apply" the CISG. Given that as yet there is, astonishingly, no published case law on this point by courts in non-Contracting States to the CISG, it is, for the moment, indeed far from certain that they actually *will* apply the CISG.[11]

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[8] In S. KRÖLL/ L. MISTELIS/ P. PERALES VISCASILLAS (note 5), Art. 1, No. 54 (emphasis added).

[9] Ch. BERNASCONI, *NIPR* 1999, 137, at 168-169.

[10] I. SCHWENZER/ P. HACHEM (note 4), Art. 1 No. 31, see also No. 32.

[11] In the 1990ties many courts on the continent, in particular in Belgium, the Netherlands, Germany, and Switzerland applied the CISG in cases in which their conflict of law rules designated the law of a Contracting State of the CISG, even though the CISG was not yet in force in the forum State, for references, see P. SCHLECHTRIEM/ I. SCHWENZER (note 3), Art. 1, No. 81. Many authors on the continent are clearly in favour of the application of the CISG in non-Contracting States if the forum's PIL designates the law of a Contracting State; see *e.g.*, M. AMSTUTZ/ N.P. VOGT/ M. WANG, in H. HONSELL/ N.P. VOGT/ A. SCHNYDER/ S. BERTI (eds), *Basler Kommentar Internationales Privatrecht* (2nd ed.), Basel 2007, Art. 118, No. 4; K. NEUMAYER/ C. MING, *La Convention de Vienne sur les contrats de vente international de marchandises: commentaire*, Lausanne 1993, Art. 1 CVIM, No. 7; D. MARTINY, in Ch. REITHMANN/ D. MARTINY (eds), *Internationales Vertragsrecht* (7th ed.), No. 903; U. MAGNUS (note 5), Art. 1 CISG, No. 95; see also R. PLENDER/ M. WILDERSPIN, *The European Private International Law of Obligations* (3rd ed.), London 2009, No. 1-046. – The question of *how* exactly the forum arrives at the CISG once it is directed by its PIL rules to apply the law of a Contracting State is however usually not discussed and eventually left open; see however P. HUBER/ A. MULLIS, *The CISG – A new textbook for students and practitioners*, Munich 2007, p. 53: according to these authors, once the PIL has designated the law of a Contracting State to the CISG, Art.1(1)(b) "operates as an internal conflicts rule for the Contracting State in question".

B. Arguments against Applying the CISG in Non-Contracting States?

Several arguments seem to speak *against* applying the CISG when, in a non-Contracting State, the PIL of the forum designates the law of a Contracting State to the CISG. The arguments may be based either on Art. 95 and Art. 1(1)(b) of the CISG or – in the EU – on Art. 20 or on Art. 25 of the Rome I Regulation. However, these arguments against the application of the CISG do not withstand a closer analysis. Other arguments plead *for* the application of the CISG in cases where, before the courts in non-Contracting States to the CISG, the PIL of the forum refers to the law of a Contracting State. The following considerations will take a closer look at the arguments that might be advanced against the application of the CISG, analyse these arguments and then turn to the arguments in favour of applying the CISG if the forum's PIL rules designate the law of a Contracting State to the CISG.

1. Art. 95 and Art. 1(1)(b) of the CISG (Application of the CISG Only as between Contracting States)

A first argument against applying the CISG in non-Contracting States may be drawn from Art. 95 of the CISG. Art. 95 allows any State to "declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph (1)(b) of article 1" of the CISG. Art. 95 thus allows Contracting States to apply the CISG only if *both* parties have their places of business in different Contracting States. This reservation was declared by the USA, China, the Czech Republic, Slovakia, Singapore, and St. Vincent and Grenadines. These States, although Contracting States to the CISG, thus apply the Convention *only as between Contracting States*. A sales contract between a seller having its place of business, for example, in New York and a buyer with its place of business in Ireland, is, before courts in the USA, without any doubt *not* governed by the CISG but by domestic sales law. This is so even if the conflict of law rules of the forum in the US designates the law of New York, *i.e.* US law, and thus the law of a Contracting State to the CISG.[12] If this is so, and if even Contracting States to the CISG may declare that they wish to apply the CISG only as between Contracting States, should the application of the CISG then – *a fortiori* – not be excluded altogether in a State that has not even ratified the CISG at all?

However, this argument compares two situations that are fundamentally different:

(1) the situation in which the forum's PIL rules designate the law of a *Contracting State that has opted out of Art. 1(1)(b)* of the CISG and has hereby declared to apply the CISG only as between Contracting States (example of a seller

[12] See *e.g.* J. HERRE, in S. KRÖLL/ L. MISTELIS/ P. PERALES VISCASILLAS (note 5), Art. 95, No. 3 with further references in fn. 3; P. SCHLECHTRIEM/ I. SCHWENZER (note 3), Art. 95, No. 3; V. HEUZÉ, *La vente internationale de marchandises*, Paris 2000, p. 107.

in New York and a buyer in the UK; before the courts in NY the CISG is not applicable); and

(2) the situation in which the PIL in a non-Contracting State designates the law of a *Contracting State to the CISG that has not opted out of Art. 1(1)(b)* and that thus applies the CISG also to cases in which only one party has its place of business in a Contracting State (example of a Swiss seller and an English buyer; before English courts, the Rome I Regulation designates Swiss law, *i.e.* the law of a State that applies the CISG also with regard to non-Contracting States). In the first situation, the law of a State having declared *not to be bound* by Art. 1(1)(b) of the CISG applies; in the second scenario, the law of a State that has *not opted out* of Art. 1(1)(b) of the CISG is applicable.

A court in a non-Contracting State to the CISG must apply the applicable foreign law as it finds it. It is thus for the foreign law that is applicable to the sales contract to determine whether the CISG on the one hand or, on the other hand, the domestic non-unified sales law of this country applies (*e.g.* because the foreign State has declared to apply the CISG only if both parties have their places of business in Contracting States). That is why the *a fortiori* argument based on Art. 95 of the CISG is, eventually, not convincing. Art. 95 thus does not exclude the application of the CISG in non-Contracting States. It has, however, other important implications; we will come back to them in a moment.[13]

2. *Art. 25 of the Rome I Regulation (Relationship with Existing International Conventions)*

In the EU, another possible argument refers to Art. 25 of the Rome I Regulation.[14] Art. 25 provides that "[t]his Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to contractual obligations". According to Dicey, Morris, and Collins' treatise on English conflict of laws it is "possible to construe Article 21 of the Rome Convention [the predecessor of Art. 25 of the Rome I Regulation] as rendering international conventions [such as the CISG] applicable [...] only as between Contracting States which are parties thereto. If this [...] view is correct, then since the United Kingdom is not a party to the United Nations Convention, the law applicable to a contract of sale, if that of a foreign country which is a party to the United Nations Convention, will be the contract law of this country, excluding the rules of that latter Convention."[15] Under the construction mentioned by Dicey, Morris, and Collins, Art. 25 would thus

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[13] See *infra*, 4.b).

[14] L. COLLINS, *et al.*, (note 6), at No. 33-103; *Benjamin's Sale of Goods* (8th ed.), London 2010 (gen. ed. M. BRIDGE), No. 25-026.

[15] L. COLLINS, *et al.*, (note 6), at No. 33-103; see also M. BRIDGE (gen. ed.) (note 14), No. 25-026.

protect the freedom of States to not enter into an international convention such as the CISG. – In the case of a contract between an English buyer and a German or Swiss seller, according to this proposal the CISG would only be applicable if not only Germany or Switzerland but also the UK were Contracting States to the CISG (which is not the case).

However, Art. 25 of the Rome I Regulation arguably does not address the question we are dealing with, and thus does not lead to the application of the CISG only as between Contracting States to the CISG. First of all, the CISG is not an international convention in the sense of Art. 25 as it does not lay down conflict of law rules but rules on substantive sales law and, in Art. 1 *et seq.* of the CISG, rules determining its *scope of application.*[16] Secondly, the purpose of Art. 25 of the Rome I Regulation is only (and arguably exclusively) to allow EU Member States to respect their obligation under public international law and to continue to apply other *private international law instruments* to which they are party. Art. 25 shall, for example, allow Finland, France, Italy, and Sweden to respect their obligations to determine the applicable law according to the 1955 Hague Convention on the law applicable to international sales of goods (to which they are Contracting States)[17] instead of applying the Rome I Regulation. Recital 41 to Art. 25 of the Rome I Regulation clearly confirms that the purpose of Art. 25 is the "[r]espect for international commitments entered into by the Member States". Art. 25 of the Rome I Regulation thus does not give an answer to the question of whether courts in the UK, Ireland, Portugal, and Malta are required to apply an international convention to which these countries are *not* parties once Rome I designates the law of a Contracting State of this convention. It simply does not address this issue at all.

3. *Art. 20 of the Rome I Regulation (Exclusion of* "Renvoi")

According to a third line of reasoning, in Europe Art. 20 of the Rome I Regulation prohibits the application of the CISG in non-Contracting States.[18] Art. 20 provides that "[t]he application of the law of any country specified by this Regulation means the application of the rules of law in force in that country *other than its rules of private international law* [...]."[19] According to this argument, if, in a non-Contracting State to the CISG, the Rome I Regulation designates the law of a Contracting State to the CISG, the judge would then need to analyse whether the conditions for the application of the CISG set out in Art. 1(1) *et seq.* CISG are fulfilled under the law of the foreign Contracting State. This might require him to

[16] See *supra* A.

[17] Text and Contracting States available at <www.hcch.net>. The Convention is in force in Denmark, Finland, France, Italy, Norway, Sweden, Switzerland and Niger.

[18] See on this argument M. BRIDGE (note 3), at No. 11.05; J. FAWCETT/ J. HARRIS/ M. BRIDGE (note 4), at No. 13.76 (the authors do eventually not share this opinion).

[19] Emphasis added.

have recourse to foreign private international law rules: According to Art. 1(1) of the CISG it "applies to contracts of sale of goods between parties whose places of business are in different States: (a) when the States are Contracting States; or (b) when the rules of private international law lead to the application of the law of a contracting state." If one party has its place of business in a non-Contracting State, the conditions of Art. 1(1)(a) of the CISG are *not* fulfilled, so the CISG can only apply – according to this line of arguments – by virtue of its Art. 1(1)(b), *i.e.* "when the rules of private international law lead to the application of the law of a Contracting State". The argument then is that Art. 20 of the Rome I Regulation (exclusion of *renvoi*) prevents the courts in a non-Contracting State from examining exactly this question of whether the conditions of Art. 1(1)(b) of the CISG under a foreign law are fulfilled since Art. 20 of Rome I prevented any recourse to foreign rules of private international law – a recourse that would be necessary in order to determine whether the CISG applies.

A closer analysis shows however that Art. 20 of the Rome I Regulation does not exclude the application of the CISG by courts in non-Contracting States either. There are two distinct lines of reasoning according to which Art. 20 of Rome I does not prevent courts in non-Contracting States from applying the CISG.

The first line of reasoning focuses on the purpose of Art. 20 of the Rome I Regulation. Art. 20 excludes the application of foreign private international rules when the Rome I Regulation designates the law of a foreign country. It hereby makes sure that the connecting factors used in Rome I prevail and ensures that they do not have to give way to, and be thwarted by, diverging connecting factors of a foreign legal system that would refer back to the forum's law (or that would designate the law of a third country), hereby contradicting the connecting factors used in the Rome I Regulation. Art. 20 thus excludes the application of foreign PIL rules *in order to exclude renvoi.*

However, when recourse to foreign PIL rules is made in order to determine whether a foreign jurisdiction would regard the CISG as applicable, it is by definition excluded that the foreign PIL rules refer back to the law of the forum (*renvoi premier degré* or *Rückverweisung*) or to the law of a third country (*renvoi deuxième degré* or *Weiterverweisung*). Let us assume that the PIL of a non-Contracting State (*e.g.* English PIL) designates the law of country X, a Contracting State to the CISG. The English court would then need to analyse whether the CISG, as part of the sales law of country X, or, on the contrary, this country's domestic non-unified sales law applies. In order to draw the line between the scopes of application of the different systems of sales law, the court in the non-Contracting State (in our example: the English court) would then need to analyse whether, according to the law of country X, the conditions for the application of the CISG (as opposed to this country's domestic non-unified sales law) are fulfilled. The court might then possibly be required to analyse Art. 1(1)(b) and the PIL rules of country X.[20] This could, however, never lead to a *renvoi*: if the PIL of country X designates the law of a Contracting State to the CISG (be it the

[20] See however *infra*, 3.

law of X or of any other Contracting State), the conditions for the application of the CISG are – under the law of country X – fulfilled and the CISG applies; if, on the contrary, the PIL of State X designates the law of a foreign non-Contracting State, the CISG does *not* apply and the domestic sales law of country X applies instead.

According to this first line of reasoning, the PIL of country X is thus *not* applied in order to choose between the laws of different jurisdictions (potentially leading to *renvoi* and hereby violating Art. 20 of Rome I) but exclusively in order to determine which rules of country X apply (the CISG or this country's domestic, non-unified sales law). They are thus not applied in their function of PIL rules, making a choice between different jurisdictions and potentially leading to the application of a foreign law, but, on the contrary, as part on the rules of the scope of application of the CISG. The choice between the laws of different States (in our example: the choice of the law of country X, as opposed to the law of any other country) is exclusively made by the PIL of the forum (*i.e.* the PIL rules of the non-Contracting State, in our example: English PIL). If this is so, there is no room for *renvoi* and for a violation of Art. 20 of the Rome I Regulation.

A closer look shows moreover that, in cases in which the PIL of a non-Contracting State designates the law of a Contracting State, the court in the non-Contracting State arguably *does not have to apply lit. (b) of Art. 1(1) of the CISG at all* when it comes to determining the scope of application of the CISG under the foreign law, as opposed to the foreign country's domestic sales law. This second line of reasoning will be further set out in the following section.

C. Determining the Scope of Application of the CISG under a Foreign Law, Applicable to the Contract

In this chapter it will be argued that, if the PIL of a non-Contracting State designates the law of a Contracting State to the CISG, all the court in the non-Contracting State still needs to determine is whether the case is within the material (or substantive) scope of application of the CISG, *i.e.* whether the CISG applies *ratione materiae*. For this purpose, no resort to foreign PIL rules is required at all.

In our scenario of the English buyer and the German or Swiss seller, in the absence of a choice of law agreement by the parties (Art. 3 of Rome I) it is Art. 4(1)(a) of Rome I that designates, before English courts, the substantive law of the seller's country of habitual residence, *i.e.* German or Swiss law respectively. Once the law of a foreign country has been designated, the next question is to determine which set of rules *within* this state's legal system to apply, and in particular whether the rules of the applicable law are to be found in the CISG or the domestic sales law – in our examples: the German Civil code's provisions on sales contracts or the Swiss Code of obligations provisions on sales contracts.

At this stage of the analysis, the decision on the applicable law has already been made by the PIL rules of the forum state. *Within* the legal system of the Contracting State of the CISG, designated by the PIL rules of the forum state, the *scope of application of the CISG*, as opposed to the scope of application of this

state's domestic sales law, is defined in Art. 1(1) (first half of the sentence)[21] and in Art. 2 *et seq.* of the CISG: The CISG applies *ratione materiae* "to contracts of sale of goods between parties whose places of business are in different States", Art. 1(1) (first half of the sentence)[22] unless the application of the CISG is excluded for the reasons listed in Art. 2 lit. a) to f), Art. 3(2), 5, or 6 of the CISG.

Since the PIL of the forum (in our example: the Rome I Regulation before English courts) have already designated the law of a Contracting State as the applicable law (in our examples: the law of the German or Swiss seller), *no further analysis is necessary; in particular, no recourse is to be made to lit. a) or lit. b) of Art. 1(1) CISG.* At this stage of the analysis, Art. 1(1) (first half of the sentence) of the CISG (as part of the foreign law, designated by Rome I) is thus applied *exclusively* in order to examine whether the case falls within the *material (or substantive) scope of application* of the CISG.[23]

Consequently, if the PIL of a non-Contracting State designates the law of a Contracting State to the CISG, and if the case falls within the *territorial scope* of application of the CISG, there is no need, no place and not even a possibility for any further analysis of lit. (a) or (b) of Art. 1(1) CISG.[24] The decision on the *territorial scope of application* of the CISG has already been made by the PIL of the forum (in our example: the Rome I Regulation before English courts); as far as the *territorial scope* of application of the CISG is concerned *alea iacta est.* The court of the non-Contracting State is thus not obliged to apply any foreign PIL rules at all in order to draw the line between the scope of application of the CISG and the foreign domestic non-unified sales law.

If, before the courts in the UK, Ireland, Portugal or Malta, the Rome I Regulation designates the law of a Contracting State of the CISG, Art. 20 of the Rome

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[21] For contracts for the supply of goods to be manufactured or produced it is defined in Art. 1(1) and Art. 3 of the CISG.

[22] CISG, Art. 1(1) reads: "This Convention applies to contracts of sale of goods between parties whose places of business are in different States [...]".

[23] See also M. PELICHET, *Recueil des Cours* 1987 I, 39: "Certains se sont demandés s'il était suffisant que la règle du conflit du for désignât la loi d'un Etat contractant, ou s'il ne fallait pas en plus vérifier si cet Etat lui-même appliquait la Convention de Vienne, ce qui impliquait un recours aux règles de conflit de l'Etat désigné par la règle de conflit du for [ThKa: see for this approach *e.g.* P. HUBER/ A. MULLIS (note 11)]; see also J.P. PLANTARD, Un nouveau droit uniforme de la vente internationale: La Convention de Vienne des nations Unies du 11 avril 1980, *Clunet* 1988, 312 at 323: "Ce n'est pas, semble-t-il ce qu'ont voulu les négociateurs de la Convention de Vienne: l'article premier, lettre *b)*, signifie simplement que *lorsque la règle de conflit du juge saisi* indique la loi d'un Etat contractant, *et si* par ailleurs *les autres conditions d'applicabilité de la convention sont remplies*, c'est la Convention de Vienne qui s'appliquera et non le droit interne de l'Etat désigné" (emphasis added).

[24] This interpretation is fully in line with the unanimous understanding (references *supra*, note 5) that a case falls within the scope of application of the CISG once the PIL rules *of the forum* designate the law of a Contracting State.

I Regulation consequently does not prevent these courts from applying the CISG.[25] Quite the opposite: they have to apply the CISG as part of the domestic sales law of the foreign jurisdiction, provided that the case falls within the *material scope of application* of the CISG – and provided the CISG has been fully integrated into the applicable law of this jurisdiction.[26]

D. CISG: Specific Rules for Transnational Case-Scenarios. No Cherry Picking

1. Contracting States Having Fully Integrated the CISG

The above reasoning is based on the idea that from its entry into force in a Contracting State, the CISG becomes an *integrated part of the domestic sales law* of this State. Within the legal system of the Contracting State, the CISG exists on an equal level with all other laws in force in this jurisdiction, such as, *e.g.*, the domestic rules on sales contracts, commercial contracts or consumer contracts. In other words: "the Convention is [...] local, specialized law that applies in the same way as are applied any separate laws for commercial and consumer contracts of sale".[27] If the PIL rules of the forum designate the law of a Contracting State to the CISG, the court simply does not have the power to "cherry-pick" certain rules of the foreign law designated by its conflict of law rules while leaving aside others.

Within the legal system of the Contracting State designated by the PIL of the forum, the substantive sales law of the CISG provides *specific rules* that are made for, and adapted to, the needs that arise in cross-border cases. While the French *Code civil*, the German *BGB*, the Swiss *Obligationenrecht*, the Spanish *Código civil*, the Italian *Codice civile*, the Polish *Kodeks cywilny*, etc. are made primarily for domestic situations, the CISG contains a set of rules that are specifically set up for the needs of transnational actors. Within the jurisdiction of a Contracting State, the CISG (where applicable) provides specific rules for transnational sales contracts, as opposed to the domestic codes which are made primarily for domestic situations. The principle of *lex specialis derogat legi generali* clearly speaks in favour of applying the CISG as part of the law of the designated jurisdiction.[28]

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[25] See also M. BRIDGE (note 3), at No. 11.05, "The better view [...] is that the prohibition of renvoi is not breached"; J. FAWCETT/ J. HARRIS/ M. BRIDGE (note 4), at Nos 16.28 and 29: "The forum is therefore not infringing provisions of conflicts of law conventions [or regulations] that proscribe the use of renvoi".

[26] As opposed to the situation that the Contracting State has declared to apply the CISG only as between Contracting States, see *infra*, D.2.

[27] J. FAWCETT/ J. HARRIS/ M. BRIDGE (note 4), *e.g.* at No. 16.22.

[28] See, among many others, V. HEUZÉ (note 12), at 107.

2. *Contracting States Having Used the Option under Art. 95 of the CISG*

The above reasoning requires the CISG to be fully integrated into the domestic sales law of the respective Contracting State. If the PIL of the forum, *e.g.* the Rome I Regulation before courts in the UK, Ireland, Portugal, or Malta, designates the law of a Contracting State to the CISG, and if the case falls *ratione materiae* into the scope of application of the CISG, the judge in the non-Contracting State has to apply the CISG – just as the CISG would be given preference over the non-unified domestic sales law within the contract law system of the Contracting State.

The situation is different if the forum's PIL rules designate a jurisdiction that has used the option in Art. 95 of the CISG and consequently applies the CISG only if both parties to an international contract have their places of business in different Contracting States. This opportunity has been used by China, Singapore, the USA, Saint Vincent and the Grenadines, and – in Europe – by the Czech Republic and Slovakia. In these jurisdictions, the sales law of the CISG has *not* become a fully integrated part of the domestic sales law. On the contrary, the application of the CISG is limited to situations in which *both* parties have their places of business in different Contracting States. In these jurisdictions, the CISG is treated rather like an international Convention requiring reciprocity than as an integral part of the domestic sales law.[29] This has to be taken into consideration by courts in non-Contracting States when its PIL rules designate the law of a State having used the option under Art. 95. Here again courts in non-Contracting States have to take the foreign law, applicable to the contract, as they find it, including these countries' rules on the coordination between an international convention (such as the CISG) on the one hand and the domestic non-unified contract law on the other.

This argument might again be illustrated by a case scenario: China is among the countries having made an Art. 95 reservation. If for example a Chinese company sells goods to an English buyer, and if before an English court Chinese contract law is applicable to the sales contract (*e.g.* according to Art. 4(1)(a) of the Rome I Regulation), it is arguably not sufficient that the case falls *ratione materiae* within the scope of application of the CISG for the CISG to apply, as opposed to the Chinese Contract Act of 1999. Here again, the English judge has to take the foreign contract law as he finds it; the CISG and the Chinese Contract Act consequently have to be coordinated according to the law applicable to the contract, *i.e.* Chinese law. Since, under Chinese law, the CISG applies only if both parties have their places of business in different Contracting States to the CISG, and since, in the above example, one of the parties to the contract has its place of business in a non-Contracting State, under Chinese law the case is not governed by the CISG but by the Chinese Contract Act. Given that the English court has to take Chinese law as it finds it, including its rules on the coordination of the CISG and the Chinese Contract Act, the court will have to

[29] See, *e.g.*, G.F. BELL, Why Singapore should withdraw its reservation to the United Nations Convention on Contracts for the International Sale of Goods (CISG), *Singapore Yearbook of International Law* 2005, 55, at 56-57, 59-60.

apply the Chinese Contract Act as opposed to the CISG (just as a Chinese court would do).

E. Intermediate Conclusions

1. In Contracting States to the CISG that have fully integrated the CISG into their domestic sales law, the CISG is, on the substantive law level, *lex specialis* for international sales contracts and prevails over the domestic non-unified rules on sales contracts, provided that the case falls within the material scope of application of the CISG.
2. Neither Art. 1(1)(b) and 95 CISG (application of the CISG only if both parties have their places of business in different Contracting States), nor – in EU Member States – Art. 25 of the Rome I Regulation (on the relationship with existing international conventions), nor Art. 20 of the Rome I Regulation (exclusion of *renvoi*) prevent courts in EU Member States that are non-Contracting States to the CISG from applying the CISG.
3. If, in a non-Contracting State to the CISG, the PIL designates the law of a Contracting State that has fully integrated the CISG into the domestic sales law, courts in the non-Contracting States are *required* to apply the CISG to a contract of sale between parties whose places of business are in different states (CISG, Art. 1(1)(1st half of the 1st sentence), unless an exception under Art. 2 *et seq.* of the CISG applies.

F. Is it Advisable to Apply the CISG in Non-Contracting States if Rome I Designates the Law of a Contracting State?

Even though the better arguments plead for the application of the CISG, courts in non-Contracting States (such as the UK, Ireland, Portugal, and Malta) may nevertheless follow the opposite opinion and decide not to apply the CISG. Would it be *advisable* for courts in non-Contracting States, and in particular courts in Common law countries such as England and Ireland, to apply (or not to apply) the CISG in such scenarios? It may, again, be helpful to illustrate this issue by our case scenario; for this purpose it will be slightly modified.

Let us assume that an English car merchant has sent an order for several sports cars to the German manufacturer. Before the German manufacturer sends an acceptance, the English car dealer sends a fax or e-mail declaring that he wishes to revoke his order. In a second scenario an Irish jeweller orders a batch of watch mechanisms from a Swiss manufacturer but cancels his order before the Swiss manufacturer sends its acceptance. Both the German and the Swiss company subsequently send letters of acceptance to their English and Irish counterparts. Was the offer revocable or has a contract been concluded?

Should the parties have chosen German or Swiss law as the law applicable to the contract, the contract would, before English or Irish courts, be governed by the law chosen, Art. 3(1) of the Rome I Regulation. If the parties have not chosen the applicable law, the contract is governed by the law of the seller, *i.e.* German law in the first scenario, and Swiss law in the second, Art. 4(1)(a) or the Rome I Regulation. According to Art. 10(1) of the Rome I Regulation, the applicable law governs also the question of whether a contract was concluded.

In the majority of European jurisdictions, the offeror is bound by his offer for a certain amount of time; either for the period set out in the offer or, in the absence of a set period, for a reasonable length of time, Art. 3 and 4 of the Swiss Code of obligations, §§ 145-148 of the German *BGB*, § 862 of the Austrian Civil code (*Allgemeines Bürgerliches Gesetzbuch, ABGB*), Art. 185 of the Greek Civil code (*Αστικός Κώδικας*), Art. 230 of the Portuguese Civil code (*Código civil*), etc.[30] This gives the other party time to consider and evaluate the offer.

If a court in the UK or Ireland applies the German *BGB* or the Swiss Code of obligations, the offer was irrevocable and the contract, in both scenarios, concluded. Not so according to the CISG: Art. 16(1) of the CISG states, on the contrary, that "[u]ntil a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance". If the judge applies the CISG, the offer was thus revocable and no contract was concluded – just as under the English postal rule[31] on which Art. 16(1) of the CISG is based. This is but one of many examples in which the solutions in the CISG are more familiar to English or Irish parties, their lawyers and the judges than the solutions they will find in many foreign countries, in particular those on the continent.

Another example concerns the role of fault in the law of contracts. Under German law, even in sales law, contractual liability depends on the fault of the defendant, the fault being presumed, § 280(1) BGB.[32] The same is true, with some modifications, for Swiss law, Art. 208(3) of the Code of obligations,[33] and it is also the case, *e.g.*, in the law of Belgium.[34] This solution might be due to the fact, and is

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[30] English translations of these provisions in Th. KADNER GRAZIANO, *Comparative Contract Law – Cases, Materials and Exercises*, Basingstoke/ New York 2009, Case 3, p. 164 *et seq.*

[31] See, *e.g.*, M.P. FURMSTON, *Cheshire, Fifoot & Furmston's Law of Contract* (15th ed.), Oxford 2007, p. 72 *et seq.*; G. TREITEL, *The Law of Contract* (12th ed. by E. PEEL), London 2007, Nos 2-023 – 2-034.

[32] § 280 (Compensation for breach of duty) provides (in English translation): "(1) If the obligor fails to comply with a duty arising under the obligation, the obligee may claim compensation for the loss resulting from this breach. This does not apply if the obligor is not liable for the failure".

[33] § 208(3) provides: "The seller is obligated to compensate for further damage unless he proves that no fault at all is attributable to him". English translations of the provisions cited in Th. KADNER GRAZIANO (note 30), Case 6, p. 277 *et seq.*, 283 *et seq.*

[34] Art. 1645 of the Belgian *Code civil* and Belgian case law, see Cour de cassation belge/Hof van Cassatie (*Belgian Cour de cassation*), 1e ch. 19.09.1997, Arresten van het

probably (only) understandable when taking into account, that both Germany and Switzerland are major exporting countries and the fault principle is supposed to favour parties having their place of business in these countries.[35] On the contrary under the CISG, just like in English law, the contractual liability of the seller is strict (and thus favours the buyer).

There are many more issues for which the solution under the CISG is more familiar to English parties, lawyers and judges than the solutions of the German *BGB*, the Swiss *CO*, the French *Code civil*, the Spanish *Código civil*, the Italian *Codice civile*, the Polish *Kodeks cywilny*, etc. To cite just one more example: under many domestic laws on the continent, the parties to a contract have a contractual right to receive performance and the rules on civil procedure in these countries provide sophisticated remedies to enforce this right.[36] On the continent, the remedy of specific performance is regarded as an inherent component of contractual rights and the backbone of all contractual obligations. In Common Law, on the contrary, specific performance is regarded as an exceptional remedy.[37] The CISG takes the Common Law approach into account and provides, under Art. 28, that "a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention." Here, again, the domestic codifications on the continent provide for solutions that, at least in principle, fundamentally differ from English law whereas the CISG takes the English law into consideration and provides the English judge with a way to avoid ordering specific performance where he would not do so if English law were applicable.

The above scenarios show that the rules and solutions under the CISG are often much more familiar to parties, lawyers and judges in Common law countries

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Hof van Cassatie 1997(362); Pas. 1997(I/362), English translations in Th. KADNER GRAZIANO (note 30), Case 6, p. 273-274.

[35] German importers might, in other scenarios, suffer from this state of the law. Imagine the case of a German company that buys goods from a Chinese company that then cause damage to the buyer in Germany. If the parties have chosen the German domestic sales law (*i.e.* the BGB) to apply, the Chinese seller might be able to escape from liability to pay damages if he manages to show that he did not commit any fault; under Chinese law, contractual liability would have been strict, see Art. 107 (Liabilities for Breach) of the Contract Law of the People's Republic of China of 1999: "If a party fails to perform its obligations under a contract, or rendered non-conforming performance, it shall bear the liabilities for breach of contract by specific performance, cure of non-conforming performance or payment of damages, etc.".

[36] See, *e.g.*, §§ 883-890 of the German Code of civil procedure (*Zivilprozessordnung*), English translation in Th. KADNER GRAZIANO (note 30), Case 5, p. 230-232.

[37] See, *e.g.*, G. TREITEL, *An Outline of The Law of Contract* (6th ed.), Oxford 2004, p. 408 *et seq.*; O. WENDELL HOLMES, *The Common Law*, Boston 1881, p. 301: "[T]he only universal consequence of a legally binding promise is that the law makes the promisor pay damages if the promised act does not come to pass".

than those in force under foreign domestic non-unified laws. Furthermore, the English translations of many foreign legal texts are unfortunately still poor and not sufficiently precise. Many legal materials, such as commentaries to foreign codes, have not yet been translated into English at all. The CISG and the case law to it have, on the contrary, the advantage of being easily accessible to lawyers and judges worldwide.[38]

III. Conclusions

1. In Contracting States to the CISG, the first question a court has to ask is whether the case falls within the scope of application of the CISG's uniform substantive law rules. Where there are uniform substantive law rules that apply, there is no conflict of laws.
2. It is submitted that courts in non-Contracting States to the CISG (in the EU: English, Irish, Portuguese and Maltese courts) have to *apply the foreign law as they find it*. They are thus *required to apply the CISG*, as opposed to of a foreign non-unified sales law, in cases where their PIL designates the law of a Contracting State to the CISG, provided that the case falls within the CISG's *material scope of application*. Once the CISG applies *ratione materiae,* on the substantive law level the CISG is *lex specialis* for international sales contracts in cases in which the parties have their places of business in different states, and it thus prevails over the foreign non-unified sales law.
3. If the PIL of the forum in a non-Contracting State designates the law of a foreign Contracting State that has made an Art. 95 reservation, the court in the non-Contracting State has, here again, to apply the foreign law as it finds it, and the coordination, under the foreign law, of the CISG and the domestic non-unified sales law has to be respected and followed. If the foreign country has used the option in Art. 95, and if the law of this country applies, the CISG is then to be treated rather like an international Convention requiring reciprocity than an integral part of this country's domestic sales law. The CISG then is only applicable if both parties have their places of business in different Contracting States.
4. For many issues, the solutions provided for in the CISG are much more familiar to parties, lawyers, and judges in Common Law countries than the solutions they will find in many foreign legal systems with civil law traditions, in particular those on the continent. Courts in the UK and Ireland and other non-Contracting States consequently are not only *required* to apply the CISG if the Rome I Regulation designates the law of a Contracting State of the CISG; they are arguably also *well advised* to do so.

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[38] See <www.unilex.info>; <www.cisg.law.pace.edu>; <www.cisg-online.ch>.

5. Last but not least, if judges in non-Contracting States to the CISG did apply the CISG in cases where their PIL rules refer to the law of a Contracting State of the CISG, they would apply the same set of rules as judges in Contracting States. Forum shopping would be avoided and legal certainty and the foreseeability of the outcome would be considerably enhanced in cases of international sales of goods.