

National Report: Italy

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1. CISG and the Contracting Parties – Exclusion and Inclusion

** This section of the Report should be based on an empirical survey of the process of drafting and entering into contracts.*

This could be done by reviewing standard terms of ten or more major exporters/importers, by contacting those exporters/importers directly and/or by contacting law firms which deal with international contracts of sale. Reporters should disclose their method – how many business entities and law firms have been taken into account.

- Is CISG usually an integral part of the international contracts of sale entered into by the parties from the reporting country?

- When choosing the applicable law do the parties want the application of CISG? If they do is it done by a direct reference, or by referring to a law of the country which has adopted CISG?

- Is CISG applied only as a default rule without being especially intended by the parties?

- Is the application of the CISG frequently excluded?

- If CISG is often excluded, what would be the reason for such exclusion? Do the parties consider that CISG is inferior to national sale laws? Are they worried because it does not contain comprehensive rules on all contractual problems which may arise?

1. Empirical survey on the process of drafting and concluding international of contracts sale

The empirical survey on the process of drafting and concluding international contracts by Italian exporters/importers was conducted in collaboration with the Turin Chamber of Commerce (*Camera di Commercio di Torino, Settore Sviluppo competitività e internazionalizzazione*)¹. The legal data regarding the impact of CISG on standard B2B terms was collected via a questionnaire, composed of the first series of questions of this Report². The Turin Chamber of Commerce sent the questionnaire, via email, to over 3,000 small and medium enterprises (SMEs): ‘small & medium’ being the average size of Italian businesses.

¹ Thanks to Dr. Giovanni Pischedda and Monica May, Turin Chamber of Commerce.

² Is CISG usually an integral part of the international contracts of sale entered into by the parties from the reporting country? When choosing the applicable law do the parties want the application of CISG? If they do is it done by a direct reference, or by referring to a law of the country which has adopted CISG? Is CISG applied only as a default rule without being especially intended by the parties? Is the application of the CISG frequently excluded? If CISG is often excluded, what would be the reason for such exclusion? Do the parties consider that CISG is inferior to national sales laws? Are they worried because it does not contain comprehensive rules on all contractual problems which may arise?

The number corresponds to all Piedmont importers/exporters registered in the Chamber of Commerce database: ‘Promopoint’. In most cases, these enterprises do not have in-house lawyers or legal consultants, and managers are in charge of external relations. So far, a reasonable number of them have answered, but we hope more will do so in the coming months. Many simply replied that they do not use standard contracts and only exchange ‘documents of transport’; others said they had never heard of the CISG. The questionnaire was also sent to the Chambers of Commerce in Padua and Florence, in order to test different economic contexts in Italy. With the help of an important law firm in Rome, we were able to send the questionnaires to the *Finmeccanica* group and other major corporations. Only one has answered.

According to the answers gathered, the CISG plays a modest role in the Italian legal system. Although the CISG is well known within academic circles, it has not gained widespread popularity in practice and only a few businesses actually use it³.

The task of drafting international sales contracts, including standard forms, should be assigned to lawyers or legal consultants with in-depth knowledge of both CISG and the transnational dispute context, as well as the necessary language skills. However, due to economic constraints, not all entrepreneurs have access to such support. In fact, as previously mentioned, SMEs rarely have in-house lawyers to draft standard forms⁴. Therefore, in the majority of cases CISG is not an integral part of the international sales contracts entered into by Italian parties. On the other hand, when standard forms are adopted, Italian parties do not want to apply CISG, in fact they explicitly exclude it, or at least try to⁵. Only in a few cases, the parties agree on the application of CISG by direct reference to it in a contract clause⁶. They highlight gaps in CISG: it does not contain comprehensive rules covering all contractual

³ F. Ferrari, *La vendita internazionale. Applicabilità e applicazioni della Convenzione delle Nazioni Unite sui contratti di vendita internazionale di beni mobili*, 2 ed., in F. Galagno (dir.), *Trattato di diritto commerciale e di diritto pubblico dell'economia*, vol. XXI, Padova, Cedam, 2006, at 304.

⁴ M. Frigo, *L'efficacia delle condizioni generali di contratto alla luce delle Convenzioni di Roma e di Vienna del 1980*, in *Diritto del commercio internazionale*, 1993, 521-537 and *ibid.* in Sacerdoti & Frigo, *La Convenzione di Roma sul diritto applicabile ai contratti internazionali*, Milano, Giuffrè, 1994, 91-109. Cf. also A. Frignani, *Il contratto internazionale*, in F. Galagno (dir.), *Trattato di diritto commerciale e di diritto pubblico dell'economia*, vol. XII, Padova, Cedam, 1990, at 128.

⁵ Cf. Questionnaires of Elgaviva di Monsini Valeria, C.I.P. S.p.A., Selex ES S.p.A., Cultraro Automazione Engineering S.r.l.

⁶ Cultraro Automazione Engineering S.r.l., SILENTRON SPA.

problems which may arise, mainly validity issues⁷. The reasons stated for excluding the CISG Convention are: a) it is too strict⁸; b) it is not compulsory for all transactions⁹; c) it has scarce practical results¹⁰. Some business entities considered CISG inferior, or less important, than national sales law, apparently forgetting that it became domestic law after the ratification of the Convention¹¹. Others stated the exact opposite, although they still prefer to exclude it¹².

To summarise, Italian business contractual practice, and in particular standard forms, usually exclude the application of CISG on the basis of CISG art. 6. However, the opt-out clause under CISG art. 6 does not work properly without a positive choice of the applicable law: indeed, it does not always lead to the application of the domestic law of one of the parties (the seller) according to the private international law rules of the *forum*. As Italian case-law demonstrates, the interpretation of CISG articles 1, 6, and 39 can lead some cases out of the ‘comfort zone’ of well-known domestic rules¹³.

2. CISG and the Courts

- When did the CISG enter into force in the reporting country?
- How many court decisions have been rendered which have applied the Convention?
- Are there any court decisions which have determined the exclusion of CISG?
- To which extent are court decisions on CISG made available to the public?
- Is there an accessible collection of national CISG court decisions? Are they translated in English and available in international databases, e.g., in the CLOUT Database or the Pace Law School CISG Database?
- In the course of time, is there a significant increase or a decrease in the number of decisions? What could be the reason for an increase or decrease? For example, expansion/reduction of trade, the readiness of the courts to apply the CISG, or frequent exclusion of CISG?
- Which articles of the CISG have been most commonly applied and most commonly discussed by the courts?
- Are there any specific articles of the CISG which have caused persistent problems for the courts?

⁷ Alter, C.I.P. S.P.A., Cultraro Automazione Engineering S.r.l.

⁸ Elgaviva di Monsini Valeria.

⁹ Cultraro Automazione Engineering S.r.l.

¹⁰ All the questionnaires.

¹¹ See § 2.

¹² Elgaviva, Cultraro Automazione Engineering S.r.l., SILENTRON SPA. *Contra*: Alter, C.I.P. S.P.A, Selex ES S.p.A.

¹³ See § 2.

2. 1988: CISG's entry into force in Italy

The UN Convention on Contracts for the International Sale of Goods (CISG) came into force in Italy on 1 January 1988, after its ratification on 11 December 1985 by virtue of the Italian Statute no. 765 of 11 December 1985¹⁴, along with a non-official translation of the CISG text. It is worth noting that other translations were subsequently circulated; however these Italian versions of CISG are not comparable to the first non-official translation published in 1985 in the Official Journal (*Gazzetta Ufficiale*). They are merely a 'copy and paste' of the academic translation published as an appendix to the famous Bianca & Bonell *Commentary on the International Sales Law*¹⁵. Furthermore, these Italian translations are not *equally authentic* pursuant to CISG art. 101 (2) which states that only Arabic, Chinese, English, French, Russian and Spanish texts are qualified as such.

2.1 Denunciations of other Conventions: relationship between the 1955 Hague Convention and the CISG

The CISG came into force in Italy and replaced other conventions, following the denunciation of both Hague Conventions of 1964, the Formation Convention and the Sales Convention¹⁶, according to CISG art. 99(3)(6). In the absence of such a denunciation, the CISG could not have prevailed over any international agreement already entered into, containing provisions concerning matters regulated by the CISG, provided that the parties have their place of business in States party to the agreement¹⁷.

However, the Italian State did not denounce the 1955 Hague Convention on the Law Applicable to International Sales of Goods¹⁸, which is still in force. Therefore, despite its

¹⁴ Official Journal (*Gazzetta Ufficiale RI*) Ordinary Supplement no. 303 of 27 December 1985.

¹⁵ C. M. Bianca, M. J. Bonell, *Commentary on the International Sales Law - The 1980 Vienna Sales Convention*, Milano, Giuffrè, 1987, at 825.

¹⁶ Italy was one of the States where the Conventions of 1964 came into force on 1 January 1972, by virtue of the Italian Statute no. 816 of 21 June 1971.

¹⁷ Cf. the judgment of the Italian Supreme Court (*Corte di Cassazione*), 24 October 1988, no. 5739, in *Diritto del commercio internazionale*, 1992, at 636. Cf. M. Torsello, *Italy*, in F. Ferrari (ed.), *The CISG and its Impact on National Legal Systems*, Sellier, Munich, 2008, 187-224.

¹⁸ Which came into force in Italy on 1 September 1964, by virtue of the Italian Statute no. 50 of 4 February 1958.

practical failure¹⁹, the 1955 Hague Convention still formally prevails over the European Regulation No. 593/2008 on the Law Applicable to Contractual Obligations (so-called Rome I)²⁰ which repealed the 1980 Rome Convention on the Law Applicable to Contractual Obligations²¹.

In Italy, both Conventions on international sales are in force today: the 1955 Hague Convention (a set of rules for conflict of laws) and the 1980 Vienna Convention (a substantive set of rules on international sales)²². Many Italian courts have dealt with the issue of which was to be applied, also regarding the 1968 Brussels Convention, now replaced by the Regulation No. 44/2001 (Brussels I).

In some previous Italian Supreme Court cases (*Corte di Cassazione*), jurisdiction was determined by applying art. 5 no. 1 of the 1968 Brussels Convention, which in turn referred to the 1980 Rome Convention, without any reference to the 1955 Hague Convention²³: the argument was that the latter had been poorly ratified. The consequence was that the issue of the place of performance was determined pursuant to the substantive law applicable to the

¹⁹ Only eight other countries ratified the Convention: Belgium, Denmark, Finland, France, Niger, Norway, Sweden and Switzerland. Cf G. Cassoni, *La compravendita nelle Convenzioni e nel diritto internazionale privato italiano*, in *Rivista di diritto internazionale privato e processuale*, 1982, 429-483; F. Padovini, *La vendita internazionale dalle Convenzioni dell'Aja alla Convenzione di Vienna*, in *Riv. dir. int. priv. proc.*, 1987, 47-58.

²⁰ Cf. art. 25(1) Reg. 593/2008, which prevails over art. 25(2) of the same Regulation, because the 1955 Hague Convention has been ratified also by non-European States. Conversely, some doubts are expressed in A. Frignani, M. Torsello, *Il contratto internazionale*, in F. Galagno (dir.), *Trattato di diritto commerciale e di diritto pubblico dell'economia*, vol. XII, Padova, Cedam, 2010, at 438.

²¹ The Rome Convention of 19 June 1980, ratified by the Italian Statute no. 975, 18 December 1984, came into force on 1 April 1991 and has been replaced by the European Regulation no. 593/2008 (art. 24 (1) Reg.).

²² *Cassazione civile, Sezioni unite – SSUU* (Joined Chambers of the Supreme Court), 19 June 2000, n. 448, *Premier Steel Service v. Oscam*, in *Giur. it.*, 2001, 233; in *Foro it.*, 2001, I, c. 527; in *Corriere giur.*, 2002, 369; also available at <http://cisgw3.law.pace.edu/cases/000619i3.html>.

²³ *Cass. SSUU*, 1 February 1999, n. 6, at <http://cisgw3.law.pace.edu/cases/990201i3.html>; *Cass. SSUU*, 14 December 1999, n. 895 at <http://www.jus.unitn.it/cardoza/Review/International/Migliore1.html>, comment by P. Migliore. These 1999 precedents were followed every now and then by the same Court: see *Cass. SSUU*, 6 June 2002, n. 8224, at <http://cisgw3.law.pace.edu/cases/020606i3.html>; *Cass.*, 20 April 2004, n. 7503, in *Riv. dir. int. priv. proc.*, 2005, 111 at <http://cisgw3.law.pace.edu/cases/040420i3.html>, and *Cass.*, 20 September 2004, n. 18902, *Soc. Kling v. Soc. Reference*, in *Foro it.*, 2005, I, 1, c. 3420 also in *Giust. civ. Mass.* 2004, 9 at <http://www.unilex.info/case.cfm?id=1037>, also at <http://cisgw3.law.pace.edu/cases/040920i3.html>; *Cass. SSUU*, 20 June 2007, n. 14299 and n. 14300 in *Dir. maritt.*, 2009, 2, 469, comment by Tuo and in *Riv. dir. int. priv. proc.*, 2008, 511 (no text available in English).

case, according to domestic private international law (PIL). According to the Italian PIL²⁴, either the place of delivery of movable goods, or the place where the payment of the price was to be made, was to be determined in accordance with the law governing international sales contracts, i.e. the CISG. In particular, when the sales contract involved the carriage of goods, the place of delivery was the place where *the goods are handed over to the first carrier for transmission to the buyer* (CISG art. 31(1) lit. a).

However, not all lower courts followed these precedents²⁵ and subsequent Italian Supreme Court decisions explicitly referred to the 1955 Hague Convention, although still excluding its application²⁶ in favour of CISG²⁷. In fact, even though the 1955 Hague Convention prevails over the 1980 Rome Convention and also over the Italian Statute No. 218/1995 on private international law, because of the principle *lex specialis derogat legi generali*, the CISG applies to international sales contracts where both parties have ratified the Convention, i.e. the States are Contracting States, according to CISG art. 1(1) lit. a).²⁸

2.2 CISG Articles most commonly discussed by Italian Courts: the relationship between CISG, Regulation No. 593/2008 (Rome I) and Regulation No. 44/2001 (Brussels I)

In order to positively affirm, or exclude, their jurisdiction, Italian courts have to decide where the most characteristic performance of the contract ('the relevant obligation'), must take

²⁴ Our PIL is contained in the Statute 218/1995 'Legge 31 maggio 1995, n. 218 di Riforma del sistema italiano di diritto internazionale privato'. Its art. 57 refers to the 1980 Rome Convention (now European Reg. 593/2008).

²⁵ See, for example, Tribunale Pavia, 29 December 1999, *Tessile 21 S.r.l. v. Ixela S.A.*, in *Corriere giur.*, 2000, II, 932, with a comment by Ferrari, available at <http://cisgw3.law.pace.edu/cases/991229i3.html>; Tribunale Vigevano, 12 July 2000, cit. ft. 50.

²⁶ With some exception, such as, for example Appello Milano, 11 December 1998, in *Riv. Dir. Int. Priv. Proc.*, 1999, 112, which applied art. 3 of the 1955 Hague Convention.

²⁷ See *Cass. SSUU*, 18 October 2002, n. 14837, *Janssen Cosmeceutical Care GmbH v. Munda Alberto*, at <http://cisgw3.law.pace.edu/cases/021018i3.html>; Tribunale Padova, 31 March 2004, in *Giur. merito*, 2004, 1065, with a comment by Ferrari at <http://cisgw3.law.pace.edu/cases/040331i3.html>; Tribunale Padova, 11 January 2005, in *Riv. dir. int. priv. proc.*, 2005, 791, and in *Foro pad.*, 2006, I, 600, at <http://www.unilex.info/case.cfm?id=1005> and at <http://cisgw3.law.pace.edu/cases/050111i3.html>; Tribunale Forlì, 11 December 2008, available at <http://cisgw3.law.pace.edu/cases/081211i3.html>; and Tribunale Forlì, 26 March 2009, available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=1394&step=Abstract>.

²⁸ The rule is definitely followed by the courts since Tribunale Rimini, 8 January 2003 *Soc. Al Palazzo v. Bernardaud SA*, in *Riv. Dir internaz. priv e proc.*, 2003, 190. See, for example, Tribunale Chieti, 19 May 2006, in *Iusexplorer*. In this case, the judge of Chieti said that both parties, one from Canada and the other from Italy, ratified the CISG, so the CISG should apply according to its art. 1(1) lit. a).

place. In other words, the courts must investigate where the delivery of goods is made. Most international sales involve carriage: in deciding the place of delivery (either where the goods are handed over by the seller to the first carrier, or where the goods are handed over by the last carrier to the buyer), Italian courts support the view that their jurisdiction is affirmed when goods are delivered to the first carrier in Italy, making explicit reference to CISG art. 31(1) lit. a).

In current (and past) commercial practice, the place of delivery is (was) always determined by the agreement between the parties: when the contract does not state otherwise, the seller's obligation to deliver the goods is fulfilled when goods are delivered to the first carrier, according to the mainstream interpretation of CISG art. 31(1) lit. a). Therefore, when the first carrier is based in Italy, the 'relevant obligation' is considered as 'performed in Italy'. This rule prevails over any different wording in contract clauses, such as Incoterms, *Ex Works* term, C&F term²⁹, or a clause referring to the place of the 'final destination of goods'³⁰, unless a specific agreement between the parties can be derived clearly and unequivocally from within the contract terms³¹.

The lower courts follow the Italian Supreme Court on the 'first carrier' rule³². So the trend seems clear: the CISG Convention, which provides a substantive uniform law on sales, tends

²⁹ The textual interpretation of the contract in order to find an 'express and definite agreement by the parties' on the application of Incoterms (International Commercial Terms) is indispensable: see F. Bortolotti, *Manuale di diritto commerciale internazionale. Diritto dei contratti internazionali*, vol. I, Cedam, Padova, 2009, 33. Cf *Cass. SSUU*, 19 June 2014, n. 13941, in *Iusexplorer.it*; *Cass. SSUU*, 4 November 2011, n. 22883, *Soc. Generale Latte e derivati e altro v. Soc. in.Al.Pi. e altri*, in *Giustizia Civile*, 2013, 1, I, 154 and in *Giustizia Civile Massimario* 2011, 11, 1558. On the lower level see Tribunale Piacenza, 14 May 2013, *Faro Industriale s.p.a v. L. V. S.*, in *Iusexplorer.it*, in which the judge excluded the validity of the parties' agreement based on Incoterms because the unequivocal common will of the parties on their application was missing. Many precedents of lower courts: Tribunale Napoli, 25 March 2010, *Soc. Ifi Iniziative forestali v. Soc. Pappalardo*, in *Dir. Marittimo*, 2011, 1, 252; Appello Trieste, 9 March 2009, *Delta transport GmbH v. Soc. Assicur. Generali*, in *Dir. Marittimo*, 2010, 3-4, 585.

³⁰ *Cass.*, 27 September 2006, n. 20887, *Saneco S.A. v. Toscoline S.r.l.*, in *Giustizia civile*, 2007, 1393, at <http://www.unilex.info/case.cfm?pid=1&do=case&id=1153&step=Abstract>; *Cass.*, 3 January 2007, n. 7, *Bourjois S.A.S. v. Gommatex Poliuretani S.p.A.*, in *Rivista di diritto internazionale privato e processuale*, 2007, 1105; in *Giust. civ.* 2007, 7-8, I, 1624; in *Giust. civ. Mass.* 2007, 1; in *Foro it.* 2007, 4, I, 1132, also available at <http://cisgw3.law.pace.edu/cases/070103i3.html>; *Cass.*, 14 May 2007, n. 10941, *Soc. Euro Elevators v. Soc. Centoducati*, in *Guida al diritto* 2007, 26, 69; *Cass.*, 14 June 2007, n. 13891, available at <http://www.ilcaso.it/giurisprudenza/archivio/3471.php>; previously *Cass.*, 24 August 1989, n. 3751, available at *Iusexplorer.it*.

³¹ Cf *Cass.*, sez II, 16 February 2006, n. 3429, available at *Iusexplorer.it*.

³² Tribunale Padova, Sez. Este, 25 February 2004, available at <http://cisgw3.law.pace.edu/cases/040225i3.html>, in *Giur. it.*, 2004, 1402, and in *Riv. dir. internaz. priv. e proc.* 2004, 697 with comments by F. Ferrari, and in *Giur. merito*, 2004, 867, with comments

to prevail on conventional conflict of law rules³³, at least when an international sales contract is involved³⁴.

In some cases, Italian Courts considered the place of delivery of the goods to the first carrier irrelevant, because the ‘preponderant part of the obligations’ of the seller consisted in the supply of labour or other services, thus CISG did not apply according to CISG art. 3(2).³⁵

To summarise, according to the case-law developed until 2008, the *forum destinatae solutionis* for supranational sales was:

- 1) for the seller’s obligation, the *place of business*: so that if the contract implies the transport of goods, it will be the place of the delivery to the first carrier (CISG art. 31);
- 2) for the buyer’s obligation, still the *place of business*: unless the parties agreed to make payment in a different place, the payment will be made at the same time of the delivery of goods, or of the pertaining documents, that is in the same place of the delivery (CISG art. 57)³⁶.

Applying these criteria, many lower courts declined their jurisdiction, and the Italian Supreme Court confirmed the exclusion of the Italian jurisdiction over the cases.

by L. Graffi, *L’interpretazione autonoma della Convenzione di Vienna: rilevanza del precedente straniero e disciplina delle lacune*; Tribunale Modena 25 October 2007, n. 1891, unpublished; Tribunale Rovereto, 21 November 2007 available at <http://www.cisg.law.pace.edu/cisg/text/casecit.html#italy>; see also Tribunale Arezzo 3 July 2006, Tribunale Bolzano 18 September 2006, Tribunale Vicenza, order of 27 February 2009, all available at lusexplorer.it.

³³ For another example, Tribunale Reggio Emilia, 3 July 2000, at <http://www.unilex.info/case.cfm?pid=1&do=case&id=762&step=FullText> (only abstract available in English).

The Court applied art. 5(1) of the 1988 Lugano Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters, which states that a person domiciled in a contracting State may be sued in the Court of the place of performance of the obligation in question (in the case at hand, the delivery of conforming goods). The Court held that CISG art. 31(a) was applicable for determining the place of performance, considering Italian law applicable as the “*lex causae*” and Italy being a contracting State of CISG. According to CISG Art. 31(a), in a sale involving the carriage of goods, the obligation to deliver consists in the handing over of the goods to the first carrier. The Court then found that the place of performance was England, since the goods had been delivered to a carrier in Sheffield.

³⁴ On the contrary, when it is a European sale within the internal market, the EU Regulations prevail.

³⁵ *Cass.*, 10 March 2000, *Krauss Maffei AG v. Bristol Meyer Squibb S.p.A* at <http://cisgw3.law.pace.edu/cases/000310i3.html>. See also § 5.3.

³⁶ *Cass. SSUU*, 21 October 2009, n. 22239, *Soc. Giacometti Group v. Soc. David*, in *Riv. dir. internaz.*, 2010, 1, 197, in *Giust. civ. Mass.* 2009, 10, 1472, in *Giust. civ.* 2010, 10, I, 2202, and in *Guida al diritto* 2010, 2, 71; *Cass. SSUU*, 9 February 2009, n. 3059, available at lusexplorer.it; Tribunale Padova sez. II, 16 January 2007, n. 114, *S. s.p.a. v. O.O.O. Y.*, in *Massimario della Giurisprudenza Civile Patavina*, 2009. Previously, *Cass.* 20 April 2004, n. 7503, already quoted at ft. 23.

In 2009, the Italian Supreme Court³⁷ stopped following the rule of *the place of the delivery to the first carrier* and adopted a new paradigmatic interpretation in order to determine the jurisdiction concerning disputes arising from supranational sales contracts.

Perhaps inspired by some previous Italian lower court decisions³⁸ and based on a more concrete criterion (the so-called ‘economic criterion’) the Supreme Court identified the place of delivery as the place in which the goods actually entered the material (*physical*) availability (*control*) of the buyer, that is to say their ‘ultimate destination’³⁹. So that in the case at hand, CISG could not be applied. In this 2009 decision, the Italian Supreme Court relied mostly on some ECJ judgments⁴⁰ on the first indent of art. 5(1) lit. b) Reg. 44/2001⁴¹. By that provision, with regards to sales contracts where goods are delivered in different places between a single Member State, European legislature intended (according to the Court) to break from the earlier solution, under which the place of performance was determined for each of the obligations in question, in accordance with the private international rules of the court of the dispute. By autonomously designating ‘the place of performance’ where the obligation which

³⁷ Cass. SSUU, order 5 October 2009, n. 21191, *Soc. Kaufland Warenhandel GmbH v. Soc. Cirio Dal Monte*, in *Resp. civ. e prev.* 2010, 2, 453 at <http://www.unilex.info/case.cfm?pid=1&do=case&id=1502&step=FullText>, followed by Tribunale Milano, sez. XII, 17 October 2012, n. 11276, at *Iusexplorer.it*, and Tribunale Piacenza, 14 May 2013, *cit.*, ft. 29; confirmed by Cass. SSUU, 19 June 2014, n. 13941, *cit.*, ft. 29, and Cass. sez. II, 14 April 2015, n. 7471, available at *Iusexplorer.it*.

³⁸ See Tribunale Rovereto, 24 August 2006; Tribunale Verona 22 February 2005: ‘ultimate destination’ rule, all available at *Iusexplorer.it*.

³⁹ “*In tema di compravendita internazionale di cose mobili, individuato il luogo di consegna in quello ove la prestazione caratteristica deve essere eseguita, e riconosciuto come luogo di consegna principale quello ove è convenuta la esecuzione della prestazione ritenuta tale in base a criteri economici (e cioè il luogo di recapito finale della merce, ove i beni entrano nella disponibilità materiale e non soltanto giuridica dell'acquirente), sarà dinanzi al giudice di quello Stato che tutte le controversie sorte in tema di esecuzione del contratto, ivi compresa quella relativa al pagamento dei beni alienati, andranno legittimamente introdotte e conseguentemente dibattute (a prescindere dal luogo in cui il vettore eventualmente incaricato prenda in consegna la merce stessa). Va, pertanto, dichiarato il difetto di giurisdizione del giudice italiano*”.

⁴⁰ ECJ C-386/05, 3 May 2007, *Color Drack GmbH*; ECJ C-381/08, 25 February 2010, *Car Trim*; and ECJ C-87/10, 9 June 2011, *Electrosteel Europe SA*.

⁴¹ “... for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be: - in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered (...)”. This Regulation, and the case-law developed in interpreting the previous 1968 Brussels Convention (superseded by this Regulation), addresses the issue of the “special jurisdiction” under art. 5. According to this article, a party domiciled in a Member State may be sued before a court in another Member State if that court is located in the state where performance of the obligation has, or should have, taken place: in the case of the sale of goods, the place where the goods were delivered, or should have been delivered.

characterises the contract is to be performed, European legislature decided to centralise at the place of performance the jurisdiction over disputes concerning all contractual obligations and determine a unique jurisdiction for all claims arising from the contract. Therefore, the characteristic performance of a European cross-border sales contract, i.e. delivery of the goods, is only achieved when the goods are effectively placed under the physical control of the buyer at the place of their *ultimate destination*. With the possible exception of a different agreement between the parties, which the judge can infer from the wording of the contract.

The 2009 rule of the Italian Supreme Court brings some advantages: a) an economic advantage - the new *ultimate destination* criterion is easier in terms of burden of proof, because the place can be inferred by documentary evidence; b) a normative advantage - the Court's reasoning is coherent with the primacy of EU law recognised by the Italian State⁴² and can be applied to all European sales transactions.

To summarise, following the 2009 Italian Supreme Court decision regarding the place of delivery, we must discern whether the party (seller) delivered the goods or not:

- a) in case of delivery, the place is where the buyer accepts that the goods enter his/her physical control (it normally coincides with the place mentioned in the contract);
- b) in case the goods have not been delivered, or have been delivered to a place different to that specified in the contract and not been accepted by the buyer, the place is that specified by the parties in the contract. When such an agreement is breached, art. 5(1) lit. b) of the European Reg. No. 44/2001 will apply. So far, the Regulation on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters prevails over the CISG Convention in the assessment of the *place of delivery* concerning disputes arising from European sales.

2.3 Accessibility to Italian court decisions on CISG

The UNCITRAL reporting system for case law on UNCITRAL texts (CLOUT), that makes court decisions and arbitral tribunals interpreting the CISG Convention available, is the first well-known tool for monitoring relevant judicial decisions. Case-law is ordered by CLOUT number, legislative text, country, or decision date. In light of the large number of CISG-

⁴² And precisely by the Supreme Court: *Cass., SSUU* 19 March 2009, n. 6598, available at *Iusexplorer.it*: unless the parties agreed to make the payment in a different place, the payment has to be made in the place of the delivery of goods, to be determined according to the ECJ criteria and conflict of rules EU Regulations.

related cases collected in CLOUT, the Commission requested a tool specifically designed to present only selected information on CISG: this is the UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, a second place where relevant national case law can be found⁴³. Another tool for searching Italian case-law is the PACE Database on CISG, a collaborative effort between the Institute of International Commercial Law and the Pace Law Library of NY⁴⁴. Last but not least is the UNILEX Database: a freely accessible on-line collection of national CISG court decisions, developed in a joint effort by the Centre for Comparative and Foreign Law Studies, the National Research Council (CNR), the UNIDROIT and La Sapienza University in Rome, under the supervision of Professor Bonell⁴⁵. Due to the fact that different databases make a number of case-law cases available,⁴⁶ and checking case-law in three⁴⁷ different databases is time consuming, a more comprehensive and systematic tool for searching seems indispensable: one suggestion could be to integrate all databases into one single search engine. In any case, to acquire complete and up-to-date information on CISG application by national courts, legal practitioners must also search national case-law databases. In Italy, universities often subscribe to IUSEXPLORER, an admission fee database (only available in Italian) where the latest court decisions can be found.

The accessibility of Italian court decisions regarding CISG is in line with the goal of the Convention itself: to achieve greater coherence between the laws of different States. It can also avoid the risk of forum shopping, whereby a litigant chooses to have their case heard in a certain jurisdiction likely to provide a favourable judgement. Divergences between decisions delivered by judges from different legal systems are not particularly worrying, as long as they do not lead to trends firmly established in one legal system rather than another, resulting in an

⁴³ In the UNCITRAL DIGEST of Case Law on the United Nations Convention on the International Sale of Goods, New York, 2008 (e-book on line at https://www.uncitral.org/pdf/english/clout/08-51939_Ebook.pdf) 19 Italian cases are reported; in the UNCITRAL CLOUT Database 31 cases are reported for Italy, with all abstracts available in English, and in some cases complete original text in English as well, up to the year 2014 (last access, 23.12.2015).

⁴⁴ In the PACE Database 61 cases are reported in Italy, up to the year 2012, with 39 abstracts available in English (last access, 23.12.2015).

⁴⁵ In the UNILEX Database 42 cases are reported in Italy, with abstracts available in English, up to the year 2012 (last access, 23.12.2015).

⁴⁶ See previous footnotes.

⁴⁷ Or more, because there are other databases developed in different countries, such as CISG-France available at <http://www.cisg.fr/?lang=fr>, or the project cisg-online.ch based in Basel, available at <http://www.globalsaleslaw.org/?pageID=28>.

increased workload for some jurisdictions⁴⁸. To counteract this scenario, an easily accessible and comprehensive search engine where judges can compare how other judges handle similar cases in other jurisdictions is advisable.

2.4 Assessment of the impact of CISG in Italian courts

The impact of CISG in Italian courts has been minor, as Marco Torsello explains in his *Report*, published in the book edited by Franco Ferrari: *The CISG and its impact on National Legal Systems* (2008)⁴⁹. We can still affirm that CISG is perceived as a distinct set of rules, separate from domestic law, and of interest to some lawyers passionate about transnational law, and their clients. Since that 2008 report, only a dozen new decisions were rendered until 2015.

In many cases, the CISG has been applied *ex officio*: the courts resort to the principle of *iura novit curia* using their own knowledge to identify and apply CISG rules relevant to the case at hand, irrespective of the parties' submissions and arguments⁵⁰. This is probably due to the fact that the vast majority of legal practitioners today still seem to underestimate the significance of CISG for international business; they do not often refer to the CISG rules because they overlook its applicability, both in drafting standard clauses and in litigations, therefore failing to make any argument based on CISG in the law suit⁵¹.

The situation has not changed much even after the National Bar Association (*Consiglio Nazionale Forense*) introduced a further requirement for practicing as a lawyer in Italy: 'continuing legal education' (2008). Lawyers in Italy are now required to obtain a certain number of professional credits each year, through attendance of conferences or short seminars in order to further develop their skills. Initiatives related to the CISG Convention have taken

⁴⁸ S. Ferreri, *Remarks Concerning the implementation of the CISG by the Courts (The Seller's Performance and Article 35)*, in *Journal of Law and Commerce*, 2005-2006, 223-239, at 228.

⁴⁹ *Cf supra* ft. 15.

⁵⁰ See, for instance, the well-known case Tribunale Vigevano, 12 July 2000, in *Giur. it.*, 2001, 280 comment by Ferrari, in *Riv. dir. int. priv. proc.*, 2001, 143, and in *Dir. Comm. Internaz.*, 2001, 497 comment by Veneziano, available in English at <http://cisgw3.law.pace.edu/cases/000712i3.html>. Also Appello Milano, 23 January 2001, in *Riv. dir. int. priv. proc.*, 2001, 1008, available at <http://www.unilex.info/case.cfm?id=768>, in English at <http://cisgw3.law.pace.edu/cases/010123i3.html>.

⁵¹ The Italian court rate of application is lower than the German one, for example: cf. S. Kröll, *German Country Analysis: Good Faith, Formation, and Conformity of Goods*, S. Kiene, *German Country Analysis: Remedies*, and E. Ferrante, *Italy*, in L. Di Matteo (ed.), *International Sales Law: A Global Challenge*, Cambridge Univ. Press, 2016, 361 ff. For an overview of CISG application across national legal systems see L. Di Matteo in the same book, at 588 ff.

place, but are still rare⁵². As a result, only a few lawyers in the Italian legal system are perfectly aware of CISG rules, with the majority preferring to plead cases based exclusively on the grounds of domestic rules contained in the Civil Code (art. 1470 CC and *ff*). Only very few judges accept the jurisdiction of an international sales contract by applying the rules of the CISG Convention.

3. CISG and the Legislation, Education and Legal Scholarship

- Is CISG similar to the national sales law of the reporting country?
- What are the main differences/similarities?
- What is the status of international treaties in your national legal system? Do they have precedence over statutory law?
- Has there been a major amendment of the national sales law since the CISG entered into force?
- Has the national sales law been directly or indirectly influenced by the CISG?
- If the national sales law has been amended in accordance with CISG, can it be considered as a welcome change?
- Is there any pending legislation of national sales law inspired by CISG?
- Is the CISG taught in law schools of the reporting country? Is it a mandatory part of the curriculum?
- What are the main areas of scholarly attention in regard to CISG?
- Are the courts willing to consult and cite relevant scholarly works?

3. A brief comparison between CISG and Italian substantive rules: the main differences

In Italy, adaptation to the CISG has caused some problems in relation to the reasonable time criterion (CISG art. 39), compared to the fixed 8-day period set out in art. 1495 of the Italian Civil code, mainly in relation to provisions concerning the conformity of the delivered goods (CISG art. 35). Pursuant to the CISG rules, the delivery of defective goods does not fulfil the performance; the seller will be in breach of contract and the buyer will have recourse to the remedies provided by CISG articles 45 *et seq.*. The main difficulty consists in classifying, by way of domestic concepts, the duty of the seller to repair or replace the goods. According to Italian law, these duties *do not arise* from the sale, the object of which is only *to transfer the property of the selected goods*. The only possible interpretation may be by means of an

⁵² Once a year, the CNF organizes a conference on the issue; for upcoming initiatives see <http://www.consiglionazionaleforense.it/>. The Milan Chamber of Commerce also organizes Conferences and Meeting on the CISG Convention: the last one was held in October 2011, <http://www.mi.camcom.it/english-version>.

implied promise by the seller who, somehow, tacitly agrees to a *collateral duty*⁵³. The main reason for such difficulties is connected to the approach that Italian law has taken regarding the effects of the contract of sale in general⁵⁴.

On the trail of French Law, the Italian Civil code has adopted the solution that gives the contract of sale the effect of *immediately* transferring the property to the buyer through the *consent* lawfully expressed (art. 1376 c.c.) as soon as the goods are *identified* in a manner that prevents their being mixed with others (art. 1378 c.c.), or as soon as the future goods are manufactured (art. 1472 c.c., *emptio rei speratae*). It is said that the contract has ‘real effect’, meaning that the agreement of the parties is sufficient to transfer ownership. The possible alternative solution of the German BGB would have made things easier, as it states that the contract will only create a duty (an *obligation*), to transfer the property of the goods sold: therefore, the *delivery* of goods in conformity to the parties’ agreement is simply an obligation descending from the contract⁵⁵. Italy, however, followed a different pattern.

In Italy, once the goods have been selected and separated from the larger group to which they belong (*genus*), the property passes to the buyer, i.e. the contract itself acts to transfer property without the need for a separate conveyance, because the transfer is an immediate result of the parties’ agreement. From that moment, the only conceivable obligation for the seller is to deliver those goods, however defective they may be. As a general rule, the risk follows property (*res perit domino*): according to Italian law, the buyer accepts the risk of destruction, or deterioration, as soon as the property passes to him/her (art. 1465 c.c.). According to CISG, on the other hand, the seller is generally liable up until delivery (CISG art. 69). In other words, the adoption of the international point of view (CISG) imposes a certain departure from the (French) tradition that Italy belongs to, and is also perceived as a change to the theory of risk (*perpetuatio obligationis*)⁵⁶.

⁵³ This is possible when the contract is of an international character, or is stipulated with a consumer (B2C contracts) according to the implementation of the European Directive No. 99/44: *infra* this §.

⁵⁴ E. Rabel, *The Nature of Warranty of Quality*, 24 *Tul.L.R.*, 1950, 273 ff.

⁵⁵ S. Ferreri, *cit.*, 229 ff.

⁵⁶ *Cass., sez. III*, 3 September 2007, n. 18514, *Venimpex s.a.s., di D.L.A. e M.L. (Venimpex) v. la Veneziana trasporti s.n.c. (Veneziana) e le assicurazioni Generali s.p.a.*, at *lusexplorer.it*. This decision concerns the interpretation of CISG art. 67: when the sale involves the carriage of goods, the risk passes to the buyer with the delivery to the first carrier.

Legal scholars insist that it is hard to justify an obligation of the seller to choose different goods to be delivered, or to deliver conforming goods for a second time⁵⁷: that would mean *to substitute a performance of an obligation which* under Italian law *does not exist*. Nonetheless, the buyer is still protected: he/she may avail himself/herself of the guarantee provided by a default rule (art. 1490 c.c.) that grants him/her the right (from the moment the contract is stipulated) to complain of any defects within a limited time period (8 days from their discovery) and begin court action within a time limit of one year from the delivery of goods. As is known, this mechanism comes from the Roman tradition of the *actiones aediliciae* that provided the two remedies of *redhibitio* (the seller gets the goods back and returns the money paid, to the buyer) and *quanti minoris* (the seller agrees on a reduction of the price owed to him).

What is missing in Italian case-law and literature is the French solution of an *obligation de conformité*: the strict literal meaning of the rules provided by the Italian Civil code is not overcome by any judicial construction implying a duty/obligation to deliver goods in line with the buyer's expectations. Once the goods are *chosen, selected, or individuated*, those are the ones to be delivered; if they fail to reach the standard fixed by article 1490 c.c.⁵⁸, the buyer acts according to the guarantee of the Roman *actio redhibitoria*. This guarantee works strictly, that is to say it operates *objectively*: independently from any allegation that the defect was through any fault of the seller, but it is limited in time under the rule on prescription (art. 1495(3) c.c.) and subject to some conditions: the complaint about the defects must be notified immediately within a very short 8 day time limit (art. 1495(1) c.c.) and damages may be recoverable, unless the seller can prove that he/she was unaware of the defects (art. 1494 c.c.).

In facing the issue of defining the duty of the seller to deliver the goods sold as an *obligation*, Italian scholars run into the question of how far it is possible to say that the seller has to deliver goods of a certain standard when the goods have *already passed* into the buyer's possession. What seems difficult is to create a duty to deliver goods that are different from those that have *already passed* into the buyer's possession.

⁵⁷ C. M. Bianca, *La vendita e la permuta*, in F. Vassalli (dir.), *Trattato di diritto civile italiano*, 2nd ed., Utet, Torino, 1993; see also A. Luminoso, *La compravendita*, 8th ed., Giappichelli, Torino, 2015.

⁵⁸ The warranty for defects concerns any imperfection of the product, regarding the form, the structure, or the composition, which may render the product unfit for the use for which it was intended, or that substantially reduces its value. S. Pellegrino, *Vendita internazionale e garanzia per i vizi della cosa*, in *Obbligazioni e contratti*, 4/2012, 276.

It is true that in *choosing* the goods to fulfil his/her obligation of delivery, at an earlier stage the seller is expected to select items of *average quality* (art. 1178 c.c.), and furthermore ensure that those goods are of the *quality* agreed by the parties, or have *certain qualities* necessary for the normal or the typical use of the good (with particular reference to the functionality and utility of the good, art. 1497 c.c.). But once the *selection* has been carried out in agreement with the buyer (or according to the conditions agreed between the parties), any defect detected afterwards cannot prevent delivery: at most, it will render the seller liable under the conditions granted to the buyer. Legal scholars have often described the mechanism of the guarantee as a sort of *collateral insurance*: the seller cannot promise that the goods have certain qualities, as this is beyond her/his capacity, she/he cannot change the reality of things, but she/he can “promise to make good for a defect”⁵⁹. That is to say, she/he may promise to act in a certain way if a certain event arises. The seller will take the goods back and refund payment or she/he will accept a smaller reward, or a reduction of the price, if the buyer wants to keep the goods in spite of their poor quality.

The Italian Civil code does order the seller to deliver, but it states that the “seller must deliver the good in the condition it was at the moment of the sale” (art. 1477 c.c.). The only other obligation under Italian legislation is that the seller must keep the goods with care once they are sold: if a defect is the result of a negligence during that custody (e.g. the goods have not been stored correctly between sale and delivery), the seller will be liable according to general provisions on the performance of obligations. Finally, there is a less known and quite specific type of obligatory guarantee imposed by trade usage, or upon the customer’s request: a guarantee for the good functioning of the sold item (art. 1512 c.c., *garanzia di buon funzionamento*) applicable even without explicit agreement between the parties.

In an attempt to mitigate strict domestic rules on guarantees in sales, Italian judges recourse to the well-known instrument of *aliud pro alio*: the exception that exempts the buyer from having to promptly notify of the defect, and the time limit in which an action can be brought when the goods are so different from those expected that they can be said to be something different, belonging to a different category of goods. Lawyers often argue that the delivery of goods substantially different from those expected is comparable to a total defect of delivery -

⁵⁹ G. Gorla, *La compravendita e la permuta*, in F. Vassalli (dir.), *Trattato di diritto civile italiano*, Giappichelli Torino, 1937, at 89-90; E. Rabel, *Nature of Warranty of Quality*, *cit. supra*, at 278: “warranty is the promise to make good for a statement”.

the latter being governed by ordinary rules on performance with a longer period of limitation for the action, no need to notify the seller immediately, and damages rewarded as a general rule. The courts have been generous in accepting the lawyer's qualification, creating a case-law when it is difficult to distinguish why a certain imperfection is classified either as a "defect" or an "*aliud pro alio*". The *aliud pro alio* is disappearing from the international context, but a number of writers argue that the silence of the international uniform law could be interpreted as allowing an exception for these situations⁶⁰.

To summarise, CISG assimilates defects existing before the conclusion of a sale contract and those emerging afterwards, up until delivery to the buyer, whilst Italian law makes a clear distinction, attributing defects caused *before* the sale to the special guarantee, and defects occurring *between* the sale and the delivery to ordinary rules on performance of obligations, with some appreciation of fault on the debtor's part. Nevertheless, looking at Italian decisions that enforced CISG art. 35, we discover that the worrying consequences announced by legal scholars are quite neglected on a practical level. The courts did not formulate statements about the specific nature of the liability of the seller: in one case the court simply speaks of non-performance of the contract (*inadempimento contrattuale*), bypassing the long discussions that have seen Italian authors classifying the liability under the Romanistic guarantees separately from contractual liability⁶¹.

Some of these difficulties became reality following the adoption of the Italian Statute which implemented the Directive no. 44/99 on certain aspects of the guarantees in sales of consumer

⁶⁰ C. M. Bianca, *Art. 35*, in Bianca/Bonell *Commentary on the International Sales Law*, *cit.*, 268, at 273-274. F. Ferrari, 2006, *cit.* ft. 3, 252.

⁶¹ Tribunale Busto Arsizio, 13 December 2001, available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=927&step=Abstract> concerning the selling of industrial equipment to process the packaging of bananas in Equador. The judge applied CISG art. 35 to rescind the contract according to the "fundamental breach" doctrine. See also Tribunale Vigevano, 12 July 2000, *cit.*, ft. 50, for the sale of rubber to be processed in order to produce shoe soles. The court does not consider the nature of the liability, identified as "contractual"; the decision insists on the fact that the period of time for the seller to notify the lack of conformity must be reasonable, while in this case it was "unreasonable". On this notion *cf* S. Troiano, *The exclusion of the seller's liability for recognizable lack of conformity under the CISG and the new European sales law, the changing fortune of a notion of variable content*, in F. Ferrari (ed.), *The 1980 Uniform Sales Law*, Giuffrè Milano, 2003, 147 ff, at 166.

goods⁶², rules that were formerly introduced into the Italian Civil Code and then inserted into a new Consumer code enacted with Legislative Decree 6 September 2005, no. 206⁶³.

The scope of application of this European Directive concerns B2C contracts, but it is fair to assume that the interpretation trends in this area will affect the nearby field of the CISG Convention. Some provisions in particular deserve special attention: for instance, art. 2(d) of the Directive explicitly states that advertisements published by the seller (or the producer, or her/his agent) may cause a legitimate expectation in the buyer that the goods provided will have “certain qualities”; art. 3(6) also mentions that “minor defects” will not be motive to rescind the contract. We can also wonder what the consequence will be at a global level of the case-law developed by the ECJ in application of this European Directive, mainly in assessing which terms may be “implied” in sales.

3.1 The impact of CISG on the Italian legislature and status of international treaties on the Italian legal system

Since CISG came into force in Italy, there have been a couple of major amendments to contract law rules contained in the Italian Civil code, to begin with the introduction of arts. 1469 c.c. *bis* to *sexies*, and arts. 1519 c.c. *bis* to *nonies*. These amendments have been enacted as a result of the transposition into the Italian legal system of two European Directives addressing contractual issues in the field of consumer protection, Dir. 13/93 and Dir. 44/99 respectively. These rules were later separated from the Civil code and added to the Consumer code⁶⁴.

There has also been new legislation concerning general aspects of sales law, such as the rules on late payments in business contracts, introduced with Legislative Decree of 9 October 2002, No. 231. This new legislation was also enacted as a result of the transposition of European Directives into the Italian legal system, and not as a result of CISG influence. Accordingly,

⁶² C.M. Bianca, *Consegna di aliquid pro alio e decadenza dai rimedi per omessa denuncia nella direttiva 1999/44/CE*, in *Contratto e Impresa/Europa*, 2001, 16; E. Gabrielli, *Aliquid pro alio e difetto di conformità nella vendita di beni di consumo*, in *Riv. Dir. Priv.*, 2003, 657.

⁶³ Italian Consumer code: Legislative Decree 6 September 2005 No. 206, pursuant to Article 7 of Statute no. 229 of 29 July 2003, available in English at http://www.codicedelconsumo.it/Codice_del_consumo_english_version.pdf.

⁶⁴ *Cit. previous ft.*

the impact of CISG on Italian legislation is only indirect, mainly through the consumer sales Directive 44/99 that took inspiration precisely from the CISG Convention.

The CISG's real influence is more in terms of a 'cultural turn' of the Italian legislature, which since the 1990's has been inspired by foreign sources, models and rules. It transplanted (more in a mechanical way by copy and paste, rather than discussing the reform introduced) supranational measures and international treaties into the Italian legal system which have precedence over statutory law. Technically, international agreements are introduced into Italian legal system by an 'incorporation order' (*ordine di esecuzione*), grounded in art. 10(1) of the Italian Constitution. It states that "the Italian legal system conforms to the generally recognised principles of international law. (...)". The provision has been interpreted as implying that international customs and general principles are automatically valid in the Italian legal system, while treaties require an incorporation order in an appropriate form (a constitutional act, or ordinary statute) to introduce changes and amendments to domestic law. After the intervention of an Italian constitutional act or ordinary statute, the rule of international origin becomes part of the national legal system: this so-called *dual model* works for the incorporation of EU law into the Italian legal system. Another provision which has been interpreted in a purposive way to cover the participation of Italy in European Communities (now well accepted by the judiciary) is that originally introduced to permit Italy to become member of the United Nations. According to art. 11(2) of the Italian Constitution "Italy (...) agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations. Italy promotes and encourages international organisations furthering such ends". The limitation of sovereignty was understood as limiting Italy's powers in its international relations with other States but despite this limited original intent, the rule ensures that all supranational laws will prevail over conflicting internal provisions.

3.2 The impact of CISG on Italian scholars

Very few Universities in Italy offer courses on international sales law at undergraduate level. Rather than reflecting a conscious or strategic decision, this is more a consequence of the scarcity of professors committed to detailed study of CISG, or other supranational laws on sales. Study of the CISG is not mandatory, therefore, Italian law courses on sales law, *can* dedicate a small part to the CISG Convention: this is the case of Introduction to Private law (1st year of studies), Civil law (2nd year of studies), and sometimes European Law (2nd year

of studies). CISG is taught less frequently as part of the International Private Law course (optional in most Italian Universities), whilst International Public Law is compulsory.

At postgraduate level there is a wider choice and CISG is part of the courses in international sales law which are run in the best LLM courses in leading universities, such as, the LUISS in Rome, or the BOCCONI in Milan, or in other leading institutions such as the ILO in Turin (see the LLM on International Trade Law): they all compete to attract foreign students. But this ultimately means that the vast majority of law students being taught about CISG are not in fact Italian.

Some Italian law professors are interested in commenting on the CISG: during the '80s their research was published in English such as the (above quoted) *Commentary on the International Sales Law* by Bianca & Bonell, still one of the most influential legal works on the CISG in Italy today. This means that the average lawyer, judge, or professional in Italy can find it difficult to learn about the CISG if they have poor knowledge of the English language. Nowadays, more and more law students are acquiring language skills during their academic studies and influential works such as *Convenzione di Vienna sui contratti di vendita internazionale di beni mobili* by C.M. Bianca (1992) are published in Italian and in widespread Italian law reviews: *Diritto del commercio internazionale*, *Contratto e Impresa /Europa*, *Europa e diritto privato*, *Rivista trimestrale di diritto e procedura civile*, *Rivista di diritto internazionale privato e processuale*, *Diritto marittimo*⁶⁵. These essays frequently consist of case-law annotations and it would seem that practitioners have access to material on the matter. However, without the lack of a solid educational framework, their view on international sales law cannot be defined as comprehensive and systematic. A practical suggestion to enhance the CISG's impact on Italian legal scholars (and consequently on legal professionals) would be to support a 'CISG Chair' with UNCITRAL funding, in the same way that the EU supports the famous 'Jean Monnet Chair' with European grants for university professors who want to specialise in European Union studies.

3.3 The Impact of CISG on Italian courts

Despite the Italian Civil law background, the impact the CISG has on courts is actually quite relevant in terms of how many decisions are rendered according to it⁶⁶. However, there is not

⁶⁵ An extended bibliography is available at the PACE Database on CISG (last access, 20.12.2015).

⁶⁶ See ft. 43 to 45 on CLOUT, UNILEX and PACE Databases.

enough empirical information to confirm that Italian courts apply the CISG, therefore promoting uniformity due to its international character. The degree of compliance with the CISG interpretive mandate is still low, although ‘enlightened minority’ decisions (following the well-known innovative judgments of the lower Courts of Vigevano and of Padua), have triggered a positive effect on subsequent decisions of the Italian Supreme Court, as some scholars have already highlighted⁶⁷.

At times, lower courts refer to the CISG also in non-CISG cases, where its application is excluded because, for example, the dispute regards a purely domestic sale. In such cases,⁶⁸ the court used the CISG and other international instruments, such as UNIDROIT principles, as *obiter* to corroborate its solution based on an Italian provision of the Civil code, but interpreted in the light of the most common international principles and rules on sales law. The same strategy has been adopted by litigants before the Supreme Court as well⁶⁹.

More recently there have been a remarkable number of cases devoted to ‘inter-conventional interpretation’ of international instruments, other than CISG: Italian courts more frequently apply art. 5 Reg. 44/2001, which substitutes the 1968 Brussels Convention, to answer questions regarding the ‘place of delivery’⁷⁰ and to structure basic concepts of uniform sales law, such as the notion of ‘breach of contract’⁷¹.

Italian courts are heavily influenced by scholarly writings and they tend to follow the prevailing opinions expressed by scholars on the interpretation of specific CISG provisions. The point is that Italian courts cannot cite scholarly works as the grounds to their decisions: indeed, pursuant to art. 118(3) of the implementation rules of the Italian Code of civil procedure⁷², a judge cannot quote articles, essays or other scholarly material (*‘deve essere*

⁶⁷ M. Torsello, *cit.*, 217.

⁶⁸ For example, Tribunale Bergamo, 19 April 2006, *Corriere del merito*, 2006, 835: it was a claim for restitution, stemming from a domestic transaction, based on art. 2033 of the Italian Civil code, interpreted according to a purposive approach by referring to CISG art. 81(2).

⁶⁹ *Cass. Sez II*, 12 November 2013, n. 25423, available at *lusexplorer.it*: in this case, the issue was whether art. 1510(2) of the Italian Civil code is to be interpreted according to CISG rules concerning the limit of the seller’s liability when the goods are delivered to the first carrier.

⁷⁰ *Cf supra* § 2.1 and 2.2.

⁷¹ *Cf infra* § 8.3.

⁷² *Disposizioni di attuazione del codice di procedura civile*, as amended by the Italian Statute No. 69/2009.

omessa ogni citazione di autori giuridici). Naturally, this means that a judge will use this material without explicitly referring to it.

On the contrary, reference to other court decisions is admitted according to art. 118(1) of the implementation rules of the Italian Code of civil procedure, which makes an explicit reference to the use of precedents (*‘riferimento a precedenti conformi’*). The number of references to foreign cases included in the written opinions of Italian judges is striking, as is the significant number of quotations of German texts - not the most commonly spoken or understood foreign language in Italy⁷³. Some courts cite cases from the UNCITRAL CLOUT or the Digest, which in turn cite foreign case law. The direct or indirect quotation of precedents of Italian case law, foreign law and ECJ case law, is changing the style of Italian court decisions: nowadays they appear less syllogistic and more detailed and pragmatic. This is coherent with facts regarding the appreciation of tribunals: as far as contract interpretation is concerned, the Supreme Court can rely on the discretion of lower courts in qualifying the facts.

4. Personal Scope of CISG Application

- How do the courts arrive at application of the CISG in regard to the parties of the contract?

- Do they apply CISG directly, by virtue of Art. 1 (1) (a) CISG or they primarily use the rules of the private international law (1 (1) (b) CISG)?

- If the CISG is found applicable, do the courts specify whether the decision was based on Art. 1 (1) (a) or on 1 (1) (b) CISG?

- Is the difference between Art. 1 (1) (a) and 1 (1) (b) CISG fully recognized? What if prerequisites for both Art. 1 (1) (a) and 1 (1) (b) CISG are fulfilled (both states are contracting states and the private international law leads to the application of the law of a contracting state)?

- What is the role of the parties' choice of law clause?

- What if parties have chosen a law of the country where the CISG is applicable? Can this be interpreted as an exclusion of the CISG, i.e. that parties wanted to apply only statutory provisions of the chosen law? Or that the intention of the parties was to choose the entire legal system, including the CISG?

- What if parties have chosen direct application of the CISG, without any reference to the applicable national law? Is such choice interpreted as a choice of law clause or as an incorporation of CISG text into the contract?

- How is the "place of business in different States" (Art. 1 CISG) interpreted? Is the notion of place of business limited by any formal requirements such as registration?

- Is CISG applied only to commercial contracts, or also to other civil contracts (Art. 1 (3) CISG)?

⁷³ From the well-known decision by Tribunale Vigevano, 12 July 2000, *cit. ft.* 50.

- Is CISG applied to consumer contracts despite Art. 2 (1) (a) CISG? Is there a divergence in the definition of consumer contracts by CISG and by the national law? Especially in regard to the fact that CISG will be applicable if “the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use”.

- Is the national consumer sales law similar to CISG?

4. Application of CISG by virtue of CISG articles 1(1)(a), or 1(1)(b) respectively; choice of law and exclusion of CISG (CISG art. 6)

According to a first approach, Italian courts applied the CISG Convention through the rules of private international law, according to CISG art. 1(1) lit. (b). The arguments were as follows: a) with regards to international transactions, the sale has to be qualified according to conflict of law rules; under art. 5(1) of the 1968 Brussels Convention on the Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, the jurisdiction rests on the court of the place where the obligation has been, or must be, performed; b) the place of performance must therefore be determined pursuant to the substantive law applicable to the dispute according to the domestic private international law; c) with regards to the international sale of moveable goods, Italian law is based on the 1955 Hague Convention on the Law Applicable to International Sales of Goods, and according to art. 3, unless the parties agree otherwise in the contract, the law of the place of performance is where the seller has its current ‘habitual residence’ at the time she/he receives the order; d) if the seller has her/his ‘habitual residence’ in Italy, the Italian substantive law is therefore applicable, and since Italy is also a CISG Contracting State, the CISG becomes the substantive law governing the case, pursuant to CISG art. 1(1), lit. b)⁷⁴.

⁷⁴ This approach was adopted at the end of the 1990’s: cf Appello Milano, 20 March 1998, in *Riv. dir. int. priv. proc.*, 1998, 170, in *Dir. comm. int.*, 1999, 455, and available at <http://cisgw3.law.pace.edu/cases/980320i3.html>. Cf. also *Cass.*, 1 February 1999, n. 6; *Cass.*, 14 December 1999, n. 895, and *Cass.*, 6 June 2002, n. 8224, all *cit. supra* ft. 23. Also Tribunale Pavia, 29 December 1999, *cit. ft.* 25; *Cass. SSUU, Premier Steel Service v. Oscam*, 19 June 2000, n. 448, *cit. ft.* 22. In this last case, the Italian Supreme Court had to decide the preliminary motion challenging jurisdiction, according to the Italian rules of civil procedure. The Court, after recalling the rules of private international law which led to the application of the law of a contracting state, decided that CISG was the substantive law governing the case. However, pursuant to CISG art. 6, the parties may depart from the Convention’s provisions. So far as the determination of the place of performance is concerned, it is important to refer to the contractual provisions in order to define both parties’ intent. In light of the contractual provisions (i.e., the assembling and installing duties, the warranty clause including the seller’s duty to participate in the assembling and set up of the plant, etc.), the court found that Malaysia was the place of performance (not the place of handing over the goods to the first carrier, according to CISG art. 31), therefore Italian courts did not have jurisdiction over the case.

According to a second approach regarding the international sale of moveable goods, the CISG is *lex specialis* with regards to the conflict of law rules and applies directly when the States are Contracting States, as set out in CISG art. 1(1) lit. a). Under this approach, no reference is made to the 1955 Hague Convention, which merely indicates the connecting factor to ensure the jurisdiction of one competent court. The courts then held that uniform substantive law prevails over the conflict of laws rules, because of its speciality⁷⁵.

Incidentally, the true story of the application of the CISG in Italy must refer to its ‘missed application’. A first group of Italian Court decisions, which assessed the application of CISG and excluded it, were rendered in the field of inter-temporal issues linked to the transition from the 1964 Hague Conventions⁷⁶ to the CISG Convention: the first applicable up to 31 December 1987, the latter from 1 January 1988⁷⁷. A second group of Italian Court decisions excluded the application of CISG on the basis of CISG art. 1(1) lit. a)⁷⁸: starting from the well-known Tribunal of Monza decision, *Nuova Fucinati c. Fondmetall International*, which held that CISG was not applicable since at the time of the conclusion of the contract⁷⁹ CISG

⁷⁵ Cf. *Cass. SSUU*, 18 October 2002, n. 14837, *cit. ft.* 27; also *Cass., sez. Tributaria*, 16 May 2007, n. 11226, *Min. economia e fin. v. Soc. Ford Italia*, in *Guida al diritto* 2007, 31, 42 and in *Dir. e prat. soc.* 2008, 1, 72 comment by Pretorio; and *Cass. Sez. III*, 3 September 2007, n. 18514, *cit. ft.* 56.

⁷⁶ *Cit. ft.* 16.

⁷⁷ See for example, *Cass.*, 24 October 1988, n. 5739, in *Foro it.*, 1989, I, c. 2878, in *Giust. civ.*, 1989, I, 1888, and in *ULR*, 1989, II, 857, also available at <http://www.unilex.info/case.cfm?id=2>. An Italian seller and a German buyer concluded a contract for the sale of a cargo of fruit. In this case, the Supreme Court held that CISG did not apply as the contract had been concluded *before* 1 January 1988 (according to CISG Art. 99(6), the date CISG took effect).

⁷⁸ Tribunale Monza, 14 January 1993, in *Giur. it.*, 1994, I, 2, c. 149, in *Foro it.*, 1994, I, c. 916, in *Contratti*, 1993, 580, in *Riv. dir. int. priv. proc.*, 1994, 367; its English translation is available at <http://cisgw3.law.pace.edu/cases/930114i3.html>; cf also F. Ferrari, *Diritto uniforme della vendita internazionale: questioni di applicabilità e diritto internazionale privato*, in *Riv. dir. civ.*, 1995, II, 669; V. Maglio, *I criteri di applicazione della Convenzione di Vienna sulla vendita internazionale: una sentenza italiana non persuasiva e l'insegnamento della giurisprudenza tedesca*, in *Contratto Impresa/Europa*, 1996, 29; and F. Bortolotti, 2009, *cit. ft.* 29, at 732.

⁷⁹ The contract was concluded in February 1988 between an Italian seller and a Swedish buyer; it was a contract for the sale of 1,000 metric tons of metal – ferrochrome, but the seller did not deliver the goods. In the opinion of the court, even if CISG had been applied, the seller could not have relied on hardship (*eccessiva onerosità sopravvenuta*, art. 1463 It. c.c. *et seq.*) as grounds for avoidance, since the price of the goods had increased after conclusion of the contract and before delivery by almost 30%. Indeed the CISG does not contemplate such a remedy in its art. 79 nor elsewhere, and the domestic court could not integrate into CISG the provisions of domestic law, recognizing the right of avoidance of the contract in case of hardship. Thus the Italian plaintiff, a seller who failed to deliver the goods to the Swedish defendant, could not have claimed avoidance of the sales contract on the grounds of hardship. The normal risk of commercial activities, in which the risk of increasing market prices is included, is incumbent upon the seller.

was in force in Italy, but not in Sweden. The court also excluded the application of the CISG on the ground that the parties had chosen Italian law as the law governing their contract, holding that CISG art. 1(1) lit. b) operates only in the absence of a choice of law by the parties. The Chamber of National and International Arbitration of Milan expressed a similar opinion in solving another case⁸⁰.

Italian legal scholars contested the solution adopted in these cases: the *professio juris*, indeed, does not prevail over (neither does it absorb) conflict of law rules, but it is the appropriate connecting factor for the choice of the applicable law⁸¹. The CISG Convention is part of the Italian law; thus the choice of Italian law implies (or at least cannot exclude) that CISG is considered as internal ‘applicable law’⁸². Then the CISG Convention finds application in the dispute as *lex specialis* within the domestic general law of sales, when both contractual parties have ratified the Convention⁸³.

On the other hand, when a contract clause reads as follows: “*the contract is to be governed exclusively by Italian law*” (translation for: *il contratto è regolato esclusivamente dalla legge italiana*) and one of the parties of the contract does not ratify the CISG, its application can be excluded according to the party autonomy principle set out in CISG art. 6⁸⁴. Pursuant to the same article, the parties may depart from the Convention’s provisions either expressly, or implicitly⁸⁵. Therefore, it is important to refer in the first instance to the contractual provisions in order to define the parties’ intent. Mere reference to the domestic law in the parties’ agreement or in pleadings is not in itself sufficient to exclude application of the CISG. To this

⁸⁰ Milan Arbitration Proceeding, 28 September 2001, available at <http://cisgw3.law.pace.edu/cases/010928i3.html>. Although in this case one of the arbitrators, dissenting, held that CISG did apply since the choice of Italian law confirmed that the parties intended to apply CISG pursuant to CISG art. 1(1) lit. b) and that it was not a declaration pursuant to CISG art. 6.

⁸¹ E. Ferrante, in L. Di Matteo, *cit. ft.* 51; S. Sendmeyer, *The Freedom of Choice in European Private International Law. An Analysis of Party Autonomy in the Rome I and Rome II Regulation*, in *Contratto impresa / Europa*, 2009, 792.

⁸² Cf. Tribunale Forlì, 6 March 2012, at <http://globalsaleslaw.org/content/api/cisg/urteile/2585.pdf>.

⁸³ This is the prevailing opinion today.

⁸⁴ Florence Arbitration Proceeding, 19 April 1994, *Leather/textile wear case*, in *Dir. comm. int.*, 1994, 861, available at <http://cisgw3.law.pace.edu/cases/940419i3.html>. Also Tribunale Forlì, 26 March 2009, available at <http://www.globalsaleslaw.org/content/api/cisg/urteile/2336.pdf>, commented by Ferrari, 2006, *cit. ft.* 3, 214 *et seq.*

⁸⁵ An implicit opting-out is affirmed in the Italian legal scholarship by N. Landi, *Autonomia delle parti ed interpretazione della CISG*, in L. Mastromatteo (cur.), *La vendita internazionale*, Giappichelli Torino, 2013, at 59.

effect, parties must be aware that *i*) CISG would be applicable and, moreover, *ii*) they must intend to exclude it in a clear and unequivocal way⁸⁶, therefore providing guidance to other courts as to how to adhere to the CISG interpretive mandate and defeat the forum shopping phenomenon.

Legal scholars cast doubts on the capacity of the “party autonomy” or of the “*lex mercatoria*”⁸⁷ to solve all questions concerning the applicable law (CISG art. 6 and 9). In one case⁸⁸ concerning a contract for the supply of goods (rabbits) between a Slovenian company (seller) and an Italian company (buyer), the court in *obiter* held that reference made by the parties to the “laws and regulations of the International Chamber of Commerce, Paris, France” as the law governing the contract was ineffective. They considered it was too vague and imprecise and that it did not amount to an implied exclusion of CISG under CISG art. 6. Moreover, reference by parties to the *lex mercatoria*, Unidroit principles or CISG (where the latter is not per se applicable) as the law governing the contract were not considered a veritable choice of law clause, but merely amounted to incorporation of such non-binding rules into the contract. Therefore, the contractual clause was not qualified as a ‘choice of law clause’ according to private international law rules, since under the 1980 Rome Convention (now Reg. No. 593/2008)⁸⁹ the law chosen by the parties must be that of a State.

Furthermore, some lower courts decided that the exclusion of CISG can be determined not only by written clauses inserted into the contract, but also by acting in a certain way during the formation of the contract, or sometimes after the conclusion of contract (so called “tacit

⁸⁶ Tribunale Vigevano, 12 July 2000, *cit. ft.* 50. In the same vein, Tribunale Rimini, 26 November 2002, in *Giur. it.*, 2003, 896, comment by Ferrari, abstract available at <http://cisgw3.law.pace.edu/cases/021126i3.html>, and also in *International Sales Law and the Inevitability of Forum Shopping: A Comment on Tribunale di Rimini*, in *Vindobona Journal of International Commercial Law and Arbitration*, 2004, 1; Tribunale Padova, 25 February 2004, *cit.*; Tribunale Padova, 31 March 2004, *cit. ft.* 27; Tribunale Rovereto, 21 November 2007 <http://www.unilex.info/case.cfm?id=1219>; Tribunale Forlì, 11 December 2008, available at https://www.uncitral.org/clout/clout/data/ita/clout_case_867_leg-2592.html; Tribunale Forlì, 16 February 2009 at <http://www.unilex.info/case.cfm?id=1394> and at <http://cisgw3.law.pace.edu/cases/090216i3.html>; Tribunale Forlì, 26 March 2009, *cit.*

⁸⁷ Cf. F. Galgano, F. Marrella, *Diritto e prassi del commercio internazionale*, in F. Galgano (dir.), *Tratt. dir. comm. e dir. pubbl. econ.*, Cedam Padova, 2010, 432 ff; A. Frignani, M. Torsello, *Gli usi nella Convenzione di Vienna sulla vendita internazionale di beni mobili*, in *Contratto e Impresa/Europa*, 2013, 407.

⁸⁸ Tribunale Padova, sez. Este, 11 January 2005, *cit. ft.* 27.

⁸⁹ *Supra* § 2.2.

form”, or “implicit form of the contract”)⁹⁰. While it is true that CISG art. 11, together with CISG art. 7(2), recognise the principle of freedom of form⁹¹, it is also true that a clause of exclusion is not explicitly regulated into the CISG, thus CISG art. 7(2) does not apply to this kind of clause, which instead will follow the ordinary conflict of law rules (but as we know, domestic PILs are not always in favour of such a freedom of form principle). In the end, the rule ultimately applicable to a clause of exclusion often requires a specific form.

To summarise, CISG art. 1(1) lit. a) is clearly becoming dominant in dispute resolution (both in court and arbitration procedures) with an increasing number of CISG Contracting States: Italian courts and arbitrators mention parties’ home countries, without making explicit reference to CISG art. 1(1) lit. a), but merely remarking that the CISG applies. In contrast, CISG art. 1(1) lit. b) was more frequently applied immediately after the Convention came into force in 1988, when the number of CISG Contracting States was still small, and many sale contracts adjudicated by Italian courts had been concluded before Italy became a Contracting State to the CISG itself (CISG art. 100). In rare cases in which the CISG found application by virtue of CISG art. 1(1) lit. b), the courts specified this basis for their decision⁹². Coming to the role of the parties’ choice of law clause, we observe that Italian courts generally applied a rather strict standard when determining whether the parties wanted to exclude the CISG, in order to identify a sufficiently clear party intention to exclude the Convention’s application in accordance with CISG art. 6. When the parties chose the law of a country that is a CISG Contracting State, Italian courts have almost unanimously held that such a clause does not constitute an exclusion of the CISG application, because CISG forms part of the law of each Contracting State. The choice of law clause would therefore require further indications, for instance, that the parties wanted to choose only the sales law contained in the Civil Code (cf. supra § 2). On the other hand, it is rare to find a direct contractual choice invoking the application of CISG (cf. supra § 1).

4.1 The “place of business in different States” notion (CISG art. 1)

⁹⁰ Tribunale Vigevano, 12 July 2000, *cit. ft.* 50; Tribunale Rimini, 26 November 2002, *cit. ft.* 85; Tribunale Padova, 25 February 2004, *cit. ft.* 83; Tribunale Padova, 31 March 2004, *cit. ft.* 27; Tribunale Padova, 11 January 2005, *cit. ft.* 27; Tribunale Forlì, 11 December 2008, *cit. ft.* 82; Tribunale Forlì, 16 February 2009, *cit. ft.* 82 Cf. S. Patti, *Silenzio, inerzia e comportamento concludente nella Convenzione di Vienna sui contratti di vendita internazionale di beni mobili*, in *Riv. dir. comm.*, 1991, I, 135.

⁹¹ *Cass., Sez. Tributaria*, 16 May 2007, n. 11226, *cit. ft.* 72.

⁹² On the “indirect application” of CISG through art. 1(1) lit. b) see L. Mastromatteo, *La vendita internazionale*, Giappichelli Torino, 2013, at 43.

Italian courts usually scrutinize the applicability of CISG with regards to the contract *ex officio*⁹³, assuming that the place of business constitutes the basis for the its application in accordance with CISG art. 1(1). The interpretation of this notion, “place of business”, is not guided by any formal requirements, such as registration. According to our case law, it is any location where the business operates trade activities, characterized by a certain duration in time, trade stability, and organizational autonomy⁹⁴. That is to say, the place from which the business activity is carried out *de facto*, notwithstanding the fact that a party has more than one place of business: in this circumstance, the “place of business” will be that which presents the closest relationship to the contract and its performance, according to CISG art. 10(a)⁹⁵. Thus, if the seller and the buyer have their place of business in different States and the States are CISG Contracting Parties, then CISG requirements are fulfilled and CISG applies.

4.2 The “commercial contract” and “other civil law contracts” notions (CISG art. 1(3))

Furthermore, CISG applies notwithstanding the commercial or civil character of the parties or of the contracts, according to CISG art. 1 (3), because the Italian legal system adopted a monist model, that is one unitary Civil code containing civil and commercial contract as well, without distinguishing between them as other European countries (such as Spain, France or Germany) do. In the absence of an explicit definition of sale contract, the concept has been extrapolated from the Convention itself, according to CISG arts. 30 and 53⁹⁶. According to Italian courts, a sale under the CISG is a contract between a seller and a buyer, where the seller has to deliver tangible and moveable goods (eventually also their pertaining documents) and transfer their property, while the buyer has to pay the price and accept delivery of the goods.

4.3 The exclusion of “consumer contracts” (CISG art. 2(a))

⁹³ As we said above, § 3.

⁹⁴ Cf Tribunale Trento, 24 January 2014, n. 105, available at *Iusexplorer.it*. Cf. also Tribunale Rimini, 26 November 2002, *cit.* ft. 85. On this concept see D. Memmo, *La “sede d'affari” secondo la disciplina uniforme della vendita internazionale nella più recente giurisprudenza della corte federale tedesca*, in *Riv. trim. dir. e proc. civ.*, 1983, 755; and recently Frignani/Torsello, *cit.*, 2010, at 450.

⁹⁵ Chamber of National and International Arbitration of Milan, 29 September 2001, available at https://www.uncitral.org/clout/clout/data/ita/clout_case_727_leg-2351.html

⁹⁶ Cf Tribunale Trento, *cit.* ft. 94. Previously, Tribunale Forlì, 16 February 2009, *cit.* ft. 83, where foreign precedents are largely quoted.

The application of CISG is excluded in B2C contracts pursuant to CISG art. 2(a). The definition of what is “consumption” (goods bought for personal, family or household use) is specular to the definition of “consumer or user” contained in the Italian Consumer code⁹⁷ at art. 3(1) lit. a): any natural person who is acting for purposes which are outside her/his trade, business or profession. The Italian consumer sales law contained in the Consumer code is indeed derived from the European Directives and, for instance, Directive 44/99 has been modelled on the CISG Convention. The goal of European consumer legislation is to ensure appropriate protection for anyone deemed less experienced in relation to certain supplies and services than the other contracting party, while being a professional operator in other supplies or services.

In fact, Italian Courts seem to propose a more liberal interpretation of the concept of consumer. *Consumer*, under the above mentioned provision means only a natural, not legal, person acting outside her/his trade, business or profession. But *consumer* is also the person who acquires a good or a service for purposes related to her/his normal business activity, where *the contract is unconnected* with this normal business activity. Thus, the Italian Courts seems to emphasize the link between the trade, or profession, of the person concerned and the *contractual content* itself, rather than the purpose of the consumption⁹⁸.

On the fact that CISG will be applicable if “the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use” no Italian case-law is reported.

5. Substantive scope of CISG Application – Extending the CISG Beyond the Sales of Goods Contracts

- Can the CISG be applied to contracts that do not represent sale of goods?

- What is considered as a sale of goods? Especially, what is a good? Is it decided in accordance with the CISG or the national law rules?

⁹⁷ Cf ft. 63.

⁹⁸ Cf. the Court of Rome, in a case decided on 20 October 1999, in *Foro it.*, 2000, I, c. 646.: a sculptor concluded a standard form contract with a carrier company; the contract fell within the scope of his profession since the transported item was a statue made by the sculptor to be exhibited in a competition. Commentators take the view that the decision deals with the protection of the party who is presumed to be in a weaker position than the other party in case of “contracts with a dual purpose”, that is to say where the contract relates to activities of a partly professional and a partly private nature. Cf. R. Alessi, *The implementation and interpretation of the Standard Contract Terms Directive in Italy*, paper (2005) available at <http://www.secola.org/vortraege/prague/IV-2Alessi.pdf>.

- Is the CISG applicable to contracts similar to contracts of sale, e.g. licence or distribution? If it is applicable, what is the justification?

- Is the CISG applicable to the services contracts? How is Art. 3. CISG interpreted?

- Is the CISG applicable to contracts which are accessory to sale of goods, e.g. suretyship?

- Can the CISG be applied to the legal issues connected with the sales of goods, but not expressly covered by CISG (e.g. validity, contractual penalties, limitations, interest, set-off)?

- What can be considered as “matters governed by this Convention which are not expressly settled in it” and what can be considered as a „general principle“ of CISG adequate to resolve those matters (Art. 7 (2) CISG)? If those notions are interpreted extensively, is there a danger to exceed the intentions of the CISG drafters and the national legislators?

5.1 Extending the CISG beyond the sales of goods contracts: Notion of “goods”

The CISG Convention does not contain any definition of good, although it can be extracted from CISG art. 30 (the seller must deliver the goods to the purchaser). Thus, Italian courts interpreted it as every asset that can be delivered, movable and tangible, disregarding whether the good is second-hand, inanimate or living⁹⁹. Some legal scholars propose to include human organs, works of art and medicines in the definition of goods as well¹⁰⁰.

5.2 CISG’s applicability to contracts “other than sales contracts”

Adhering to a very schematic notion of *sale* as that contract where goods are exchanged for money¹⁰¹, CISG will apply also to what is a distinct contract under Italian law¹⁰², that is the supply contract¹⁰³. Moreover, the Italian Supreme Court also decided to apply the CISG rules

⁹⁹ Tribunale Pavia, 29 December 1999; Tribunale Rimini, 26 November 2002; Tribunale Padova, 25 February 2004; *ibid.*, 11 January 2005; Tribunale Forlì 11 December 2008; Tribunale Forlì, 16 February 2009: all quoted above.

¹⁰⁰ Mastromatteo, *cit. ft.* 92, at 45.

¹⁰¹ A judge affirmed that this is the very essence of the contract: cf. *Kantonsgericht des Kantons Zug* (Switzerland), 21 October 1999, in CLOUT case n. 328. In Italy, the same notion is adopted by Frignani/Torsello, *cit.*, 2010, at 459.

¹⁰² *Contratto di somministrazione*. According to art. 1559 It. c.c., when the object of the contract is the supply of things or services on a continuous basis, in the case of non-performance of one single obligation, the aggrieved party can demand the termination of the contract if the breach is fundamental and compromises her/his confidence for future supplies (art. 1464 c.c.). Price reduction can be an alternative remedy under art. 1570 It. c.c.

¹⁰³ Tribunale Padova, 11 January 2005, *cit.*; also confirmed by *Cass. SSUU*, 15 February 2005, n. 2983, *Soc. Dagard v. Coop. Produttori Ortofrutticoli del Piceno*, in *Dir. maritt.* 2007, 4, 1121; in *Giust. civ. Mass.* 2005, 2; in *DeG - Dir. e giust.* 2005, 16, 34; in *Foro it.* 2006, 7-8, I, 2187 with a comment by Silvestri.

to distribution agreements¹⁰⁴ and licence agreements¹⁰⁵. Legal scholars would apply the CISG Convention to preliminary contracts¹⁰⁶ as well, i.e. to contracts in which the parties undertake to conclude a future, definitive, contract of international sale.

5.3 The “substantial part” and “preponderant part” (CISG art. 3)

When the services supplied by the seller consist in the manufacture or production of the goods and the buyer does not provide a “substantial part” of the materials necessary for such production, the contract comes very close to a works contract (*contratto di appalto*). It is disputed whether works contracts, in their entirety or in part, should be considered among the contracts that CISG art. 3 assimilates as sales contracts. Only two cases have been decided by Italian courts on this issue. The problem was addressed by the Italian Supreme Court for the first time in a case concerning a contract concluded between two parties (an Italian and an English company) for the manufacture and supply of leather items to be marked with the latter’s brand¹⁰⁷. The Italian company brought an action claiming damages and avoidance, for fundamental breach by the English company. The defendant objected that the Italian court had no jurisdiction and deferred the matter to the Supreme Court for a final decision. In the Court’s opinion, distinction was to be made between the fundamental purpose of the contract and the importance of supplying the materials necessary for the manufacture of the goods, and the services necessary to do so. On these grounds, the Italian Supreme Court stated that under CISG art. 3, as well as under Italian law, a contract is a works contract when the materials are merely a means for manufacturing the goods, and the essential purpose of the contract is the production of the goods¹⁰⁸. In another case¹⁰⁹ the court was called to explain the meaning of

¹⁰⁴ Cass. SSUU, 20 September 2004, n. 18902, Soc. Kling v. Soc. Reference, in *Foro it.* 2005, I,3420, in *Riv.trim.dir.internaz.priv.e proc.*, 2005, 433 and in *Giust. civ. Mass.* 2004, 9; Cass. SSUU., 14 December 1999, n. 895, in *Giust. Civ.*, 2000, I, 2333.

¹⁰⁵ Cass., 18 October 2002, n. 14837, *cit.* ft. 26: the case dealt with an exclusive licence to resell the German cosmetics in Italy (CISG art. 3(1) applied).

¹⁰⁶ D. Memmo, *Il contratto di vendita internazionale nel diritto uniforme*, in *Riv. trim. dir. e proc. civ.*, 1983, 180-214, at 193 and M. Torsello, *cit.*, 2008, 195.

¹⁰⁷ Cass. SSUU, 9 June 1995, n. 6499, *Alfred Dunhill v. Tivoli*, in *Giustizia Civile*, 1997, 1, 2065, and in *Foro it.*, 1997, I, c. 562; full text available in English at <http://cisgw3.law.pace.edu/cases/950609i3.html>.

¹⁰⁸ Cf. case note in M.J. Bonell, F. Liguori, *The U.N. Convention on the International Sale of Goods: A Critical Analysis of Current International Case Law - 1997 (Part 1)*, in *Revue de droit uniforme/Uniform Law Review*, 1997, 385-395.

¹⁰⁹ Cass., 10 March 2000, *Krauss Maffei AG v. Bristol Meyer Squibb S.p.A.*, *cit.*

the expression “preponderant part” under CISG art. 3(2), which is different from the expression used under CISG art. 3(1) (“substantial part of the materials necessary for such manufacture or production”). The case concerned an Italian buyer and a German seller, who concluded a contract for the sale of two industrial machineries to be used in the filtering and drying of intermediate chemicals for antibiotics and to be installed by the latter in Italy. Upon installation, the machineries turned out to be defective: contractual clauses providing the obligations of the seller to install the machineries at the factory of the buyer in Italy and to guarantee their well-functioning were to be deemed preponderant (CISG art. 3(2)) and the CISG was not applied¹¹⁰. In Italian legal writings we find different opinions: for the purposes of CISG art. 3(1) the qualitative thesis prevails¹¹¹, while for the purpose of CISG art. 3(2) the main criterion for making a distinction is quantitative, based on a comparison between the values of the goods supplied and the services provided¹¹². For example, construction contracts are sales contracts under CISG art. 3(2)¹¹³, that is contracts which require the delivery of goods even if they are primarily contracts for the supply of labour or services. Other commentators qualified the construction contract as a works contract (*appalto*) rather than a contract for the sale of goods, thus excluding the application of CISG¹¹⁴.

5.4 CISG’s applicability to contracts which are accessory to the sale of goods

The rule of CISG art. 80 according to which a party may not rely on the failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission, applies to the contract of transport, that is, accessory to sales¹¹⁵.

¹¹⁰ The installation obligation is generally minor in value if compared to the sale’s obligations: in this sense *cf* Tribunale Padova, 10 January 2006 and Tribunale Forlì, 16 February 2009, *cit.* However, if planning, design and installation obligations prevail and the party has to provide for a network of mutual duties to collaborate with and assist the other party, then CISG will not apply (so-called turnkey contracts). *Cf* A. Busani, *Il contratto di compravendita internazionale*, Giappichelli Torino, 2015, at 55.

¹¹¹ Ferrari, 2006, *cit.*, ft. 3, at 142; and S. M. Carbone, M. Lopez De Gonzalo, *sub Art. 3*, in C. M. Bianca (dir.), *Commentario Convenzione di Vienna sui Contratti di Vendita Internazionale di Beni Mobili*, Padova Cedam 1992, at 8.

¹¹² Frignani/Torsello, *cit.*, 2010, at 461.

¹¹³ Bianca/Bonell, *cit.*, 1987, 41-43.

¹¹⁴ G. De Nova, *Il tipo contrattuale*, ESI Napoli, 2014, 97 ff and G. Alpa, *Nuovi contrasti giurisprudenziali in tema di engineering*, in *Giur. Commerciale*, 1984, II, 65-75.

¹¹⁵ *Cass., sez. III*, 12 April 2011, n. 8321, *Soc. Pacific Fruit Company Italy v. Rijjal Co*, in *Giustizia Civile Massimario*, 2011, 4, 588.

5.5 CISG's applicability to legal issues connected with the sale of goods, but not expressly covered by CISG (e.g. validity, contractual penalties, limitations, interest, set-off)

In Italy, non-applicability of CISG to certain legal issues, such as that of validity, has caused problems in relation to standard terms (*condizioni generali di contratto*). These are provisions prepared in advance, without any negotiation with the other party, for general and repeated use by one party. These terms, that can be unfair (*clausole vessatorie*), can of course be inserted in sales contracts in general, not only in B2C transactions. The Italian Civil code contains two general provisions on the issue. Article 1341 c.c. states that standard terms will be binding for the assenting party only if the latter was aware of those terms when agreeing to them, or she/he should have been, following normal diligence. Basically, the provision regulates the grounds for incorporating standard terms into the contract. Article 1341(2) lists some terms that weaken the assenting party's position: such terms are considered unfair and are to be treated as of no effect if not specifically drafted in writing and accepted by a separate signature. According to the consolidated Italian case law, a specific acceptance of the unfair term by separate written signature, as provided in the Civil code, is not necessary if there is evidence that the term was negotiated by the parties. Article 1342 c.c. deals with the case of standard contracts formulated in advance, that is contracts concluded through signing standard forms: it rules that supplementing clauses will prevail on the clauses contained in the form, and it extends the provisions on unfair clauses to this case¹¹⁶. The question then is whether or not CISG art. 11 could find application providing that standards terms will not be subject to any formal requirements. The answer seems positive¹¹⁷.

Another problem concerns the *caparra confirmatoria* (advance deposit). The case involved a contract between a Nigerian buyer and an Italian seller for the sale of professional cooking equipment to be used by the Nigerian Prison Service¹¹⁸. After signing the contract, the buyer postponed payment and delivery several times, and only after several requests did it eventually lodge a deposit. Soon thereafter it failed to pay the invoices or take any steps to receive delivery. As a consequence, the seller retained the deposit and informed the buyer of

¹¹⁶ These rules of the Italian Civil Code continue to apply also after the implementation of the Directive 93/13: this has raised some problems of compatibility between the Italian legal system and the new legislation on unfair terms in B2C contracts.

¹¹⁷ Tribunale Rovereto, 21 November 2007, *cit. ft.* 85; and Busani, *cit.*, 2015, at 115.

¹¹⁸ Tribunale Modena, 9 December 2005 at <http://cisgw3.law.pace.edu/cases/051209i3.html>.

the termination of the contract. Since CISG was not applicable, the case required the identification of the applicable law: the Court therefore referred to CISG art. 7, which states that questions concerning matters governed by the Convention, which are not expressly settled in it, should be settled in conformity with the general principles on which the Convention is based or, in their absence, in conformity with the law applicable by virtue of international private law rules. Pursuant to the latter, the Court resorted to art. 4 of the Rome Convention, according to which a contract is governed by the law of the country with which it is most closely connected. In this case, Italy was the country most closely connected to the contract and Italian domestic law was the applicable one. The Court, referring to a previous Italian case law of the Supreme Court, held that the seller had the right to retain the deposit.

A further issue concerned problems related to set-offs, the determination of the requisites that must exist in order to balance mutual debts (*compensatio*). In the course of the preparation of the CISG Convention, the question was never addressed. The case involved an Austrian seller who applied for an injunction before the Tribunal of Padova, Este section, against an Italian buyer for the payment of Lit. 40.690.916, expenses and interest, for agricultural products¹¹⁹. The Court granted the injunction. The Italian buyer filed an objection on two grounds: first that the Austrian company had failed to formally request payment before applying for the injunction; second, that it had, on its part, a claim for payment of Lit. 245.605.200 against the Austrian seller which it intended to set-off. As to the merits regarding the request for set-off, the Court pointed out that the matter was not covered by CISG and had therefore to be determined in accordance with the otherwise applicable domestic law, which for the case in hand was Austrian law. According to Austrian law, one of the conditions for set-off is that the two claims involve the same parties. In this case, the condition was not met, since the claim which the Italian buyer intended to set-off against the Austrian seller's claim was in fact a claim against another company, albeit closely linked with the Austrian seller. The Court therefore rejected the request for set-off and confirmed the injunction granted to the Austrian seller. The lack of regulation in this matter has caused a dispute between those who maintain that set-offs must be treated as matters regulated by CISG, even if not expressly settled in (*lacuna praeter legem*), and those who instead believe that set-offs are matters excluded from the scope of CISG (*lacuna intra legem*). In the first case, it is possible to turn to the general principles of CISG, while in the second case, it is necessary to look to the rules of private

¹¹⁹ Tribunale Padova, Sez. Este, 25 February 2004, *cit.*

international law to determine the applicable substantive law. In accordance with most of the doctrine and jurisprudence, Italian judges embraced the second solution. The consequence is that, according to CISG art. 7(2), it is not possible to turn to the general principles of the Convention¹²⁰, even when considering counterbalancing credits arising from contracts subject to CISG.

6. Interpretation of the CISG – International and National Influences

- Is the CISG interpreted in an international, autonomous and uniform way (Art. 7 (1) CISG)?

- Is there an effort being made to depart from the interpretation of the domestic legal system?

- Are foreign decisions and legal scholarship consulted by the courts?

- Are foreign decisions and legal scholarship referenced in decisions of national courts?

- What is the meaning of “good faith in international trade”?

- In many national legal systems, good faith is a principle which can be directly applied to resolve situations where there are no specifically designated rules. Is good faith in international trade to be understood in such a broad manner?

- Is there a difference between domestic good faith and good faith in international trade?

- Are the general principles of the CISG interpreted in the same way as the domestic equivalents of those principles?

- Are there any problems in reconciling the CISG and the subsidiarily applicable national law?

- What suggestions would you make to improve the uniformity of interpretation in the region?

- What suggestions would you make to further harmonize and/or unify contract law in the region and internationally?

6.1 Interpretation in an “international, autonomous and uniform way” (CISG Art. 7 (1))

When it initially came into force, the CISG was not interpreted in an international, autonomous or uniform way (CISG art. 7(1)). Although some effort is being made to depart from the interpretation of the domestic legal system¹²¹, explicit references to the Italian Civil code were made to legitimize the decisions¹²²: in particular, in the first few years after CISG

¹²⁰ Among which it is worth noting: the principle of the prevalence of the freedom of contract; of the freedom of choosing the form of the contract; of the binding effect of generally known usages, which are regularly observed by the parties; of the principle of *venire contra factum proprium*; of mitigation of damages by the damaged party; of the limitation of liability of damages to foreseeable losses; of the principle of *full compensation*; as well as the principle that any notice, or any other kind of communication made or transmitted after the conclusion of the contract, can cause effects from the moment of its dispatch; and of the principle of *onus probandi incumbit ei qui dicit*.

¹²¹ The most relevant Italian decision, which complied with the aim of promoting uniformity in the CISG’s application has been Tribunale Vigevano, 12 July 2000, *cit. ft.* 50, and also Appello Milano, 23 January 2001, *cit.*

¹²² Cfr. Pret. Parma-Fidenza, 24 November 1989, in *Dir. comm. int.*, 1995, 441-442 at <http://cisgw3.law.pace.edu/cases/891124i3.html>: “*Tale inadempimento non può certo dirsi di scarsa*

came into force, the still unfamiliar provisions of the CISG were interpreted in accordance with the content and interpretation of counterpart provisions in the Italian Civil code (see for instance, cases on the “reasonable time” requirement, CISG art. 39(1)¹²³, or on “fundamental breach”, CISG art. 49(1)¹²⁴).

Today it is still possible that the CISG is not interpreted in an autonomous, international and uniform way (CISG art. 7(1)) because Italian is not an official language of the Convention (only Arab, Chinese, English, French, Russian and Spanish are), therefore courts can argue to apply a text which has been freely and informally translated (cf. CISG art 101(2))¹²⁵. Nevertheless, today courts are ready to solve disputes involving international uniform law without any reference to Italian Civil code, or other domestic statutes¹²⁶.

Furthermore, legal scholars have highlighted a new trend: Italian judges are interpreting the domestic law according to CISG uniform law: for instance, art. 1453 c.c.¹²⁷ is interpreted in light of CISG articles 46 and 62; art. 1495 c.c.¹²⁸ is to be interpreted in light of art. 1218 c.c.¹²⁹ and the latter in light of CISG articles 46, 49 and 50¹³⁰.

importanza (ex art. 1455 cod. civ.) rappresentando viceversa una inosservanza essenziale ex art. 49, co. 1 lett. a) L. n. 765/1985”; cf also Cass., 9 June 1995, n. 6499, in Giust. civ., 1996, I, 2065 at <http://cisgw3.law.pace.edu/cases/950609i3.html>; Pretura Torino, 30 January 1997, in Giur. it., 1998, 982, comment by Callegari, at <http://cisgw3.law.pace.edu/cases/970130i3.html>.

¹²³ Courts from time to time pointed out differences between the Convention and the Italian Law, such as, for example, Pretura Torino, 30 January 1997, in *Giur. It.*, 1998, 982: the difference is between the reasonable time criterion used in CISG art. 39 and the fixed 8-day period set in art. 1495 Italian c.c. (cf also § 3).

¹²⁴ See § 8.3.

¹²⁵ Tribunale Padova, 11 January 2005, *cit. ft.* 27; Tribunale Reggio Emilia, 12 April 2011, at <http://www.globalsaleslaw.org/content/api/cisg/urteile/2229.pdf>.

¹²⁶ Among others, Appello Milano, 11 December 1998, in *Riv. dir. int. priv. proc.*, 1999, 112, at <http://cisgw3.law.pace.edu/cases/981211i3.html>; Tribunale Vigevano, 12 July 2000, *cit. ft.* 50; Tribunale Rimini, 26 November 2002, *cit. ft.* 85; Tribunale Padova, 25 February 2004, *cit.*; and Chamber of National and International Arbitration of Milan, 30 July 2007, at <http://cisgw3.law.pace.edu/cases/070730i3.html>.

¹²⁷ It states that in case of agreements providing for mutual performances, when one of the parties fails to perform its obligations, the other party can choose to claim either performance or termination of the contract, and damages.

¹²⁸ The seller’s liability has a short limitation period pursuant to art. 1495 c.c.: after the buyer has proved the seller is at fault (s/he either knew of, or should have known of the defect), these actions must be brought by the buyer within one year from the date in which the good was delivered to her/him, and only if s/he declared the defect to the seller within 8 days from its possession.

¹²⁹ A party who does not perform the obligations under the contract is liable for compensation damages unless such party proves that the non-performance, or delay, was due to reasons out of her/his control.

6.2 General Notions: “good faith in international trade”

Italian courts have made no attempt to define in the abstract what these expressions under the CISG mean. So far, there is no Italian case-law addressing the general principle of “good faith in international trade”. The general clause of good faith is directly applied by Italian courts as an interpretive rule and it has been progressively understood by scholars¹³¹ in a broader manner, to fill the internal gaps of the Convention, not only to interpret the contract but also to create new obligations for the parties and resolve situations where there are no specific rules¹³².

6.3 Suggestions to further harmonize and/or unify contract law in the region and internationally

The CISG alone cannot harmonize or unify sales law¹³³, and the new Proposal of Regulation on CESL adds a certain complexity to the issue¹³⁴: indeed, after the amendments of the EU Parliament, the Common European Sales Law may be chosen partially (CESL Proposal art. 8(3)) while it is well-known that the CISG can be only partially excluded (CISG art. 6). Therefore, in B2B contracts for example, the parties could expand or restrict the combination of sources of law to be applied to their agreement¹³⁵.

¹³⁰ See S. M. Carbone, *L'attualità dei criteri interpretativi adottati nella CVIM*, in *Dir. comm. int.*, 2011, 909 – 926, at 912.

¹³¹ Cf Busani, *cit.*, 2015, at 80-82.

¹³² To understand to what extent there is a common core regarding good faith outcomes in Europe cf R. Zimmermann, S. Whittaker (eds.), *Good Faith in European Contract Law (The Common Core of European Private Law)*, Cambridge University Press, 2008.

¹³³ L. Mengoni, *L'Europa dei codici o un codice per l'Europa?*, in *Pubblicazioni del Centro di studi e ricerche di diritto comparato e straniero*, Roma, 1993, before in *Riv. crit. dir. priv.*, 1992, 515.; see also J. Bonell, *La Convenzione di Vienna sulla vendita internazionale: origini, scelte e principi fondamentali*, in *Riv. dir. int. priv. proc.*, 1990, 715.

¹³⁴ O. Lando, *CESL or CISG? Should the proposed EU Regulation on a Common European Sales Law (CESL) replace the United Nations Convention on International Sales (CISG)?*, in O. Remien, S. Herrler e P. Limmer (eds.), *Gemeinsames Europäisches Kaufrecht für die EU*, München, 2012, at 15; L. Di Matteo, *How Innovative is the Common European Sales Law? Using the CISG as a Benchmark*, in *Contratto e Impresa/Europa*, 2013, 512; E. Ferrante *L'uso del precedente straniero nella giurisprudenza italiana fra Convenzione di Vienna e futuro regolamento europeo sulla vendita*, in *Contratto e impresa / Europa*, 2015, 512.

¹³⁵ *Contra*: C. Wendehorst, *Article 4. Cross-border contracts*, in R. Schulze (ed.), *Common European Sales Law*, Beck und Hart Publishing 2012, at 60-61.

In order to encourage a uniform interpretation of CISG, it is necessary to provide one free accessible database (merging together the existing ones, *supra* § 2.3) and translate case-law rendered by all national courts, into English.

X 7. Reservations/Declarations (Art. 92,96 CISG) see answer under § 2. Point 1

- Were there and reservations declared by the reporting country?
- If they were, are they still in force?
- What were the reasons for those reservations and do they still exist?
- Are CISG reservations declared by the reporting country applied by the courts?
- Is there any pending legislation or movements to withdraw reservations?
- Would it make a significant difference in the application of the CISG if the reservations had not been declared?

7. Reservations

Italy ratified the CISG without any declaration or reservation permitted under Part IV of the same Convention¹³⁶.

8. Challenges in the application of specific CISG provisions

** This section intends to cover the important issues arising out of the application of CISG in the reporting country which were not encompassed by previous sections. National reporters are especially encouraged to cite court decisions which provide insight of how CISG is understood.*

Possible, but not exclusive, areas of interest in CISG application:

- **Contract formation:** offer (Art. 14, 15), its revocability (Art. 16), acceptance (Art. 17), questions as to the contract form, i.e. entering into a contract by electronic means (Art. 11. CISG)
- **Conformity of the goods:** what is considered as quality of goods (Art. 35.), how detailed does the examination of the goods have to be and how long is the short period of time for examination (Art. 38.); how detailed and in which form does the notice of non-conformity have to be (Art. 39.);
- **Remedies of the buyer:** which remedies are most commonly claimed; fundamental breach of the contract (Art. 25.), is the avoidance treated as a remedy of last resort and what is its relationship with seller's right to performance (Art. 48, 49.), what are the prerequisites for giving an additional period of time (Art. 47.)
- **Payment of the price:** what is considered as steps and formalities in regard to the payment (Art. 54.), payment via establishing the letter of credit, place and time of the payment (Art. 57, 58.), opportunity to examine the goods (Art. 58 (3))

¹³⁶ M. Torsello, *Reservations to International Uniform Commercial Law Conventions*, 5 *Uniform Law rev.*, 2000, 35.

- **Remedies of the seller:** what are the differences in comparison with the remedies of the buyer; the length of the additional period of time (Art. 63); which characteristics of goods can be subject to buyer's specifications (Art. 65 CISG)
- **Damages and interest:** relationship between the CISG and national law in determining the damages (Art. 74.), foreseeability (Art. 74.), reasonable mitigation measures (Art. 77.), can interest be calculated solely on the basis of CISG, or this has to be determined in accordance with the private international law (Art. 78.)
- **Limitations:** has the reporting country ratified Convention on the Limitation Period in the International Sale of Goods (1974)? What is its relationship with CISG?

8. Incorporation of Standard Terms into CISG Contracts

A first issue discussed in Italian courts concerns the requirements for the inclusion of one party's standard terms into a CISG contract, i.e. the inclusion of contract terms by reference. The discussion concerns the interpretation of CISG arts. 8 and 14. Italy¹³⁷ follows the approach developed by the leading decision rendered by the German Federal Supreme Court in 2001, in the machinery case¹³⁸.

8.1. Questions as to the contract form

Article 11 CISG recognises the principle of freedom of form: the sale contract does not need to be concluded in or evidenced by writing and is not subject to any formal requirement. It may be proved by any means, including witnesses.

The first part of the provision did not cause much debate in Italy¹³⁹, except for the arbitration clause, which must be in writing in order to be considered valid, according to art. II(2) of the 1958 New York Convention and also according to the Italian national law, arts. 807 and 808 c.p.c. (Italian code of civil procedure). Legal scholars and courts agree on the non-applicability of CISG art. 11 to the arbitration clause¹⁴⁰. The second part of the sentence contained in CISG art. 11 is more problematic. The question is rather controversial because in civil law jurisdictions the legislator draws some restrictions to admissible evidence where the

¹³⁷ Tribunale Rovereto, 21 November 2007 and Tribunale Rovereto, 24 August 2006, all *cit.* above.

¹³⁸ *Bundesgerichtshof*, 31 October 2001, Docket No VIII ZR 60/01, CISG-online No 617. The BGH held that the CISG "requires the use of standard terms and conditions to send their text or make it otherwise available" to the offeree, if the offeree is not, and could not have been, aware of the standard term text before.

¹³⁹ The principle of freedom of form has been recognized by the courts: see *Cass.*, 13 October 2006, n. 22023, in *Corriere trib.* 2006, 3727, commented by Bergami; *Cass.*, 16 May 2007, n. 11226 in *Fisco*, 2007, 4471, and in *Guida al diritto*, 2007, 31, 42.

¹⁴⁰ Cf U. Draetta, *La convenzione delle Nazioni Unite del 1980 sui contratti di vendita internazionale di beni mobili e l'arbitrato*, in *Dir. comm. int.*, 2011, 633-646, at 638.

contract has been written down¹⁴¹. In Italy, contracts exceeding a certain value (2,58 Euro) cannot be proved by testimony (art. 2721(1) c.c.); however the courts have broad discretionary powers to admit testimony in derogation to this rule after taking into consideration the status of the parties, the nature of the contract and every other circumstance (art. 2721(2) c.c.). Article 2722 It. c.c. also contains an exclusionary rule for oral testimony which limits evidence by witnesses of further oral agreements where the contract is in writing. The solution could depend on the rather subtle distinction between proof meant to contradict a clause (forbidden) or clarify or interpret it (allowed)¹⁴².

8.2 Buyer's notice of non-conformity

Much has already been written on the predilection of courts for definite time limits and the excess of rigidity that some courts have shown in appreciating the “reasonable time” granted to the buyer in order to inform the seller of any defects found in the delivered goods¹⁴³.

Article CISG 39 (1) is one of the provisions most frequently applied by Italian courts. It raises two main issues: the first is the degree of detail with which the defect(s) of the delivered goods must be described, which the courts applied very strictly; the second is the reasonable time requirement, considered as a ‘general clause’ to be determined case by case, regarding the circumstances and the nature of goods, and once again interpreted very strictly¹⁴⁴.

8.3 Buyer's remedies

In order to apply the rule on the fundamental breach of contract, pursuant to CISG art. 25, the conduct of the party must go against a contract clause agreed by the parties, or to a usage of

¹⁴¹ For instance, in France, the problem may have special features where business are concerned because of the interaction between art. 1341 of the French Civil code and art. 109 of the *Code de Commerce*.

¹⁴² S. Ferreri, *cit.*

¹⁴³ Among others, P. Schlechtriem, *Uniform Sales Law in the Decisions of the Bundesgerichtshof, in 50 Years of the Bundesgerichtshof. A Celebration Anthology from the Academic Community* (Todd J. Fox trans., 2001), available at <http://www.cisg.law.pace.edu/cisg/biblio/slechtriem3.html>.

¹⁴⁴ Tribunale Cuneo, 31 January 1996, available at <http://cisgw3.law.pace.edu/cases/960131i3.html>; Tribunale Busto Arsizio, 13 December 2001, *Plasticos de Exportacion Expoplast C.A. v. Soc. Reg Mac*, in *Riv. dir. internaz. priv. e proc.* 2003, 151; also Tribunale Vigevano, 12 July 2000, *cit.* ft. 50; Tribunale Rimini, 26 November 2002, *cit.* ft. 85 (case related to porcelain tableware: a notice given six months after taking possession of the goods was not considered timely); Tribunale Trento, 24 January 2014, n. 105, *cit.*, (the buyer informed the seller of the defects that he found in the goods ‘as soon as he knew about the defects’ and the notice was considered ‘timely given’); Tribunale Trento, 29 May 2015, n. 539 (the buyer ‘immediately (via telephone call)’ notified the seller of the defect); *cf* also *Cass. sez. II*, 30 September 2015, n. 19509 (‘5-months is not a reasonable time’). According to F. Ferrari, 2006, *cit.* ft. 3, the notice must be in the same language as the contract, or in a language that the seller knows.

which parties knew, or ought to have known, and in which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned, as set out in CISG art. 9(2).

Furthermore, the party's conduct must deprive the other party of what it was entitled to expect under the contract, according to the understanding that a reasonable person of the same kind as the other party would have in the same circumstances, as provided for by CISG art. 8(2)¹⁴⁵. Italian case law considers as "fundamental breach" the untimely delivery when a timing delivery is to be considered the essence of the contract¹⁴⁶; the case of a partial delivery¹⁴⁷; non-delivery within the additional period of time fixed by the buyer in accordance with CISG art. 49(1) lit. b)¹⁴⁸, and failure to receive the delivery of goods by the date fixed in the contract under CISG art. 49(1) lit. a)¹⁴⁹.

Among the remedies claimed in court, the first should be the full performance by the seller of her/his obligation, pursuant to CISG art. 46(1). Domestic courts contemplate the delivery of substitute goods (CISG art. 46(2)) after the addition of a reasonable time limit to fulfil the performance (CISG art. 47), and the specific performance (CISG art. 28)¹⁵⁰ as possible only

¹⁴⁵ F. Ferrari, *L'inadempimento essenziale nella vendita internazionale - 25 anni di art. 25 della Convenzione delle Nazioni Unite sui contratti di vendita internazionale di beni mobili*, in *Dir. Comm.int.*, 2005, 59-78.

¹⁴⁶ Appello Milano, 20 March 1998 in *Dir. Mar.*, 1999, 390 (a case of seasonal goods).

¹⁴⁷ Pretura Parma, 24 November 1989, available at CLOUT case n. 90.

¹⁴⁸ Tribunale Padova, 11 January 2005, *cit. ft.* 27. In the case at hand, the Italian Court concluded that the supplier had committed a fundamental breach of contract according to CISG art. 25 since it had failed to supply the goods as a result of its failure to provide the "sanitary clearing". Indeed while the contract was being performed, the buyer, unsatisfied with the quality of the goods, suggested that the supplier adopt a new genetic breed of rabbits (called Grimaud), after selling the remaining rabbits and providing for a "sanitary clearing" of the farm. The supplier proceeded with the sale below cost of the remaining rabbits, but was then unable to obtain from the breeder the new Grimaud rabbits for its farm and was therefore unable to fulfil the supply contract to the buyer. As a result, the buyer terminated the contract alleging the supplier's non-performance.

¹⁴⁹ Appello Milano, 20 March 1998, available at <http://cisgw3.law.pace.edu/cases/980320i3.html>, and annotated in *Rivista di diritto internazionale privato e processuale*, 1998, 170-175, and in *Dritto del commercio internazionale*, 1999, 455-459, also by Graffi, *Case Law on the Concept of "Fundamental Breach" in the Vienna Sales Convention*, in *Revue de droit des affaires internationales / International Business Law Journal*, 2003, 338-349. In the case at hand, even though the contract was of extremely short duration, taking into account clarifications between the parties in the days following the agreement, there is no doubt that the agreed time of delivery was a fundamental term and that the contract turned on the availability of the knitted goods (*maglieria*), just before buyer's end of the year sales. However, the seller let the fixed time pass without any excuse.

¹⁵⁰ Article 2930 It. c.c. concerns the performance in kind of the obligations to deliver goods, other provisions concern the performance in kind of the obligations to do (art. 2931 It. c.c.) and not to do

under certain circumstances, and certainly influenced by Italian rules¹⁵¹. Avoidance is treated as a last resort, but it turns out to be the most commonly applied remedy.

8.4 Damages and interests

The general principle of full compensation is recognised equally, both in CISG art. 74 and according to national law in art. 1223 c.c.¹⁵²; the same is true for the principle of foreseeability contained in CISG art. 74 and art. 1225 c.c.¹⁵³; also the reasonable mitigation measures according to CISG art. 77 operate in a similar manner according to objective standards (reasonableness and *ordinaria diligenza*), although the rules are formulated in a very different way in art. 1227 (2) c.c.¹⁵⁴. The substitute transaction, as well as any further damages recoverable under CISG arts. 74-76 when the contract is avoided, is also conceived in Italian law at arts. 1515, 1516 and 1518 c.c.¹⁵⁵, but the Italian disposition refers to the current market price of the place and day on which the delivery should have been performed, and not the price at the time of avoidance¹⁵⁶.

(art. 2933 c.c.). Article 2932 c.c. concerns the performance in kind of the obligation to enter into a contract (*obbligatio di concludere un contratto*).

¹⁵¹ F. Bortolotti, *Remedies Available to the Seller and Seller's Right to Require Specific Performance*, 25 *J. L. & Com.*, 2005-2006, 335. It seems admitted only in certain cases: when there is a guarantee for the good functioning of the good sold (art. 1512 c.c.) and when the sale is a B2C contract (art. 128 *et seq* of the Italian Consumer code). *Cf Cass. SSUU*, 13 November 2012, n. 18702, in *Europa e diritto privato*, 2013, 1179 with a comment by Guffanti Pesenti.

¹⁵² Compensation for damages arising from non-performance or delay must include the loss sustained by the creditor and the lost profits insofar as they are a direct and immediate consequence of the non-performance or delay.

¹⁵³ The loss and damage must also have been foreseeable at the time the contract was entered into. However, Italian courts concede also unforeseeable damages as a possible consequence of the fraudulent breach of contract.

¹⁵⁴ Art. 1227 It. c.c.: If the creditor has contributed to the cause of damage, the compensation of damages is diminished, taking account of the gravity of the fault and the extent of the consequences deriving therefrom. No compensation is awarded in relation to damages that the creditor could have avoided by exercising the "ordinary diligence". The general principle renders the contributory negligence of the creditor relevant. It provides that damages are not due insofar that they could have been avoided by duly exercising diligence. But, more than that, the rule requires that damages were caused by an "unlawful act" (i.e. an act against the law and conflicting with the conduct expected by an average person).

¹⁵⁵ But the Italian Civil code contemplates the substitute transaction only as a right of the creditor.

¹⁵⁶ F. Bonelli, *Il risarcimento dei danni nei principi Unidroit, nella Convenzione di Vienna del 1980 e nel diritto italiano*, in *Dir. Comm. Int.*, 2012, 851.

Finally, to regulate the effect of delays, pursuant to CISG art. 78, a sum in arrears is due without prejudice to any claim for damages. The provision does not resolve all the problems related to interest on sums not paid. In fact, as is often emphasized by judicial decisions, the provision only forecasts a general right to interest, while other issues were not addressed by the drafters of the CISG Convention, among those the applicable rate of interest. Therefore, courts must first of all clarify that legal interests are due without giving any prior formal notice to the debtor, requesting her/him to pay¹⁵⁷. Default interests run automatically and immediately from the moment in which the time-limit for the performance has expired (mostly the date of loss)¹⁵⁸, without putting the debtor on notice (*mora in re*)¹⁵⁹. Secondly, concerning the missing criteria on the base of which the rate of interest is to be determined¹⁶⁰, Italian courts are inclined towards the necessary reference to the rules of private international law, in order to identify the applicable substantive law. The measure of interest must be considered a subject excluded from the Convention and it is not justified, as per art. 7(2) CISG, to turn to the general principles on which the Convention is based. In order to determine the interest rate, one must then make reference to the law applicable by virtue of the rules of the private international law of the forum¹⁶¹. In the case at hand, the court referred to the previously mentioned articles of the 1955 Hague Convention that refer back to Italian

¹⁵⁷ In many European Civil codes, formal notice is required and regulated under certain conditions: the obligor is put on notice of default by a formal document provided that the content of the obligation is clear, the performance can be demanded and the non-performance is unjustified. Cf for example art. 1219(1) It. c.c.

¹⁵⁸ See, for instance, Tribunale Padova, 31 March 2004, in *Giur. Merito*, 2004, I, 1067, available at <http://cisgw3.law.pace.edu/cases/040331i3.html>: a buyer from Germany and a seller from Italy entered into a contract for the sale of pizza boxes. See also F. Ferrari, 2006, *cit.*, ft. 3, 245; *Id.*, *La disciplina sostanziale della vendita internazionale ed il saggio di interessi*, in *Giur. Merito*, 2004, I, 1069.

¹⁵⁹ This works as an exception to the rule on formal notice in Civil law countries: indeed, the formal notice is not always required in case of damages resulting from unlawful conduct (for instance according to art. 1219(1) Italian c.c.; art. 1153(3) Belgian c.c.; art. 6:83 b) Dutch c.c.), and also when the time-limit for the performance has expired and the performance was supposed to be carried out at the obligee's address (for instance, art. 1219(2), point 3) Italian c.c.; art. 1.100(2) Spanish c.c.; § 286(2), point 1) BGB), and in some other hypothesis: cf B. Pasa, *Mora in diritto comparato*, in *Digesto civ. Aggiornamento*, Utet, Torino, 2012, 669.

¹⁶⁰ It has generated a debate among those who sustain that the question is dealt with by the Convention, even if not expressly (internal gap), and those who, on the other hand, believe that the determination of the rate of interest is a subject excluded from the scope of application of the Convention (external gap). In the first case, it is possible to make reference to the general principles of the Convention, meanwhile, in the second, it is necessary to make reference to the rules of private international law.

¹⁶¹ See also Pretura Parma, 24 November 1989, and Tribunale Forlì, 11 December 2008, *cit.* above.

law as “the law of the seller”¹⁶². Consequently, it was necessary to apply the legal rate set out in art. 1284 of the Italian Civil code¹⁶³ (considering the variations that this has undergone over time)¹⁶⁴.

9. Limitation Period Convention

Italy did not sign the Convention on the Limitation Period in the International Sale of Goods (New York, 1974)¹⁶⁵.

¹⁶² See art. 3(1) of the 1955 Hague Convention.

¹⁶³ The article (after the amendment of art. 2, Statute no. 662/1996 of 23 December 1996) reads as follows: *The rate of Legal Interest is determined at the rate of 5 per cent per year. The Italian Minister of Treasury, through its acts published in the Official Gazette of the Italian Republic before 15 December of the year preceding that for which the rate refers, may change annually the measure, based on the average annual gross yield of government bonds for periods not exceeding twelve months and considering the rate of inflation reported during the year. If before December 15 a new rate of Legal Interest was not determined, this remains unchanged for the following year. (Current: 0,20 %).*

¹⁶⁴ As for the monetary revaluation requested by the seller, the court pointed out that CISG art. 78, referring back to CISG art. 74, allows that the award of interest be cumulated with the award of other damages not paid through the determination of the interest; but it is necessary that the proof is timely, by virtue of the general principle of *onus probandi incumbit ei qui dicit*, (for example, affirming that the devaluation was greater than the legal interest rate and that, if the sum of money had been timely received, it would have been invested so as to reduce the impact of the depreciation, or in any case so as to obtain remuneration in excess of the legal rate).

¹⁶⁵ S. Tonolo Sacco, *La disciplina della prescrizione nelle convenzioni internazionali di diritto uniforme*, in *Riv. Dir. Int. Priv. e proc.*, 1999, 437.