35 Years of CISG – Present Experiences and Future Challenges

National Report: Switzerland

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1. CISG and the Contracting Parties – exclusion and inclusion

1. No specific empirical study on the international sales contract drafting process in Switzerland was made for this report. However, two surveys from 2008 should be mentioned.

2. A 2008 study on the CISG in Swiss legal practice[1] reports that more than 40% of the members of the Swiss Bar Association[2] will "systematically" exclude the application of the CISG in contracts drafted by them, while only 6% will systematically include it. According to this study, the main reason for excluding the CISG was the lack of legal certainty (use of undetermined legal concepts, absence of a supreme court) (48,09%). The second factor was the client's instructions to exclude the CISG (32,57%). The survey allowed to choose more than one of the four proposed answers to both questions. Interestingly, to another open question about the advantages of the CISG (5 possible answers), 64,13% of the those surveyed either had no opinion or gave no answer.

3. Another survey was conducted in 2008 with registered lawyers practicing in the fields of commercial law and/or conflict of laws in three major Swiss centres of commerce (Basel, Geneva, Zurich)[3]. 62.09% of the participants reported that they "generally" excluded the CISG in their contracts[4]. In short, with 40% "systematic" exclusions versus 62% "general" exclusions, the CISG did not seem to have really been adopted in Swiss legal practice in 2008.

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1 Meyer, *passim*; the questionnaire is available at http://cisgw3.law.pace.edu/cisg/biblio/koehler.html (visited on 31 Oct 2015). See also, Widmer/Hachem, *passim*.

2 Https://www.sav-fsa.ch/en/home.html (visited on 13 Sept 2015).

3 Widmer/Hachem, p. 282.

4 Widmer/Hachem, p. 285.

4. A survey carried out on the web in September-October 2015 shows that a number of the business entities which make their general terms and conditions available on the internet exclude the application of the CISG[5]. In two cases, the contract was subject to Swiss law without any mention of the CISG[6].

2. CISG and the courts

5. The CISG entered into force in Switzerland on 1 March 1991[7]. Since that date, a number of court decisions have been rendered. The earliest one dates from 9 April 1991[8], 39 days after the entry into force. In this decision, the Commercial Court of the Canton of Zürich denies the applicability of the CISG, the contract having been concluded before its entry into force (Article 100(2) CISG). Still, it shows that the awareness of that court regarding the CISG was immediate.

6. Switzerland is a federal state. The 26 Cantons each have their own jurisdiction, and their own rules about the publication of decisions – which is far from exhaustive. For example, the courts of the Canton of Geneva have only two referenced decisions, both from 2014[9]. It certainly does not reflect the activity carried out in Geneva regarding international sales.

7. On the federal level, the Swiss Federal Court (SFC) follows a dual publication policy. The leading cases, recognised as such by the SFC, are published (in paper format). Only four published decisions apply the CISG[10]. Unpublished decisions rendered before 2000 are not available on the Internet, and those rendered until the end of 2006 are only partially available. As of 2007, all federal decisions are accessible on the Internet[11].

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5 ABB Schweiz: www.abb.ch; Ascom: www.ascom.ch/ch-de/agb-secom-fr.pdf; BCA AutoRemarketing AG: http://www.bca-europe.com/fr/ch/BCA-Information/Conditions-Generales-de-Vente/; BOSE: https://www.bose.ch/CH/fr/customer-service/shopping-online/terms-and-conditions-of-sale/; Calida: www.calida.com/media/wysiwyg/CH_AGB_03Jul2012_FR.pdf; Caran d'Ache: http://store.carandache.com/ch-fr/pages/3-conditions-g%C3%A9n%C3%A9rales-de-vente; Home24.ch: www.home24.ch; Jura: https://ch.jura.com/fr/support/conseil-achat/achat-en-ligne-conditions/conditions-generales-de-vente; Syngenta: http://www.syngenta.com/global/corporate/en/about-syngenta/Pages/syngenta-contracts.aspx; Sysmex: http://www.sysmex.ch/ch-fr/agb.html; Swatch: http://www.swatch.com/en/terms-of-use (websites visited on 13 Sept 2015).

6 Manor: http://www.manor.ch/fr/u/agb; Nestlé: http://www.nestle-shop.ch/fr/conditions-generales-vente.html (websites visited on 13 Sept 2015).

7 Https://www.admin.ch/opc/fr/classified-compilation/19800082/index.html.

8 Http://www.unilex.info/case.cfm?pid=1&do=case&id=89&step=Abstract.

9 Geneva Court, ACJC/246/2014; Geneva Court, ACJC/1494/2014.

10 SFC, ATF 122 III 43 (cisg-online 2371); SFC, ATF 130 III 258; SFC, ATF 136 III 56 (cisg-online 2022); SFC, ATF 138 III 601 (cisg-online 840) (checked on 05 Nov 2015). In SFC, ATF 140 III 170, the CISG is mentioned but not applied.

11 Http://www.bger.ch/fr/index/juridiction/jurisdiction-inherit-template/jurisdiction-recht.htm (checked on 25 Sept 2015).

8. The Pace database includes an impressive collection of 581 references to Swiss cases in the 2012 edition of the UNCITRAL Digest of CISG cases[12], making Switzerland the second most referenced country, after Germany (1320 references in the UNICITRAL Digest). Some decisions are cited many times.

9. However, none of these databases are complete, nor is Swisslex[13] – the Swiss leader in legal databases. For example, the two cited decisions from Geneva[14] are not included in any database. But other decisions, like the *Multifunctional facsimile and components case*[15] are recorded, while not available on the domestic Geneva Court website[16]. It must also be noted that arbitral decisions are rarely available.

10. The number of CISG decisions reaches its peak in 2000-2001 and seems to decline since 2013, but this may be a methodological issue. There is no obligation to report new decisions to the examined databases, which are not operated by the State. The lack of reported decisions during certain periods may be due to a lack of human reporting resources. Concerning federal decisions, the partial nature of publication before 2007 makes it hard to determine if the 2000-2001 gap reflects reality.

2.1. Exclusion of the CISG

11. Some decisions exclude the application of the CISG. The earliest ones[17] are based on Article 100(2) CISG, the contract having been concluded before the entry into force of the CISG for Switzerland in 1991.

12. Non-application of the CISG also occurs when an issue falls outside its substantive scope. The most common is the validity of the contract, which is determined by the applicable domestic law (Article 4(a) CISG)[18]. Other cases include matters not settled by the CISG, even if they arise in an international sales context. For example: acknowledgment of debt[19] or securities[20].

13. A dispute over the exclusion of the CISG by the parties pursuant to Article 6 CISG seems quite rare[21]. No federal decisions directly address this issue[22].

12 Http://www.cisg.law.pace.edu/cisg/text/digest-2012-toc.html (checked on 25 Sept 2015).

13 Https://www.swisslex.ch/.

14 See above, n. 9.

15 Http://cisgw3.law.pace.edu/cases/110520s1.html.

16 Http://ge.ch/justice/cour-de-justice-cour-civile.

17 SFC, 11 March 2002 4C.302/2001; SFC, 04 Nov 2003 4C.193/2003.

18 SFC, 11 Dec 2000 4C.272/2000 (cisg-online 1319) (checked on 6 Nov 2015); SFC, 02 Nov 2012 4A_429/2012; SFC, 12 May 2014 4A_522/2013; SFC, 19 June 2014 4A_597/2013 ATF 140 III 170.

19 SFC, 17 Oct 2000 4C.422/1999 (cisg-online 1053) (checked on 6 Nov 2015).

20 SFC, 28 April 2009 4A_74/2009.

21 E.g.: Geneva Court, ACJC/1494/2014.

22 SFC, 19 Feb 2004 4C.307/2003 (cisg-online 839); SFC, 20 Dec 2006 4C.314/2006 (cisg-online 1426) (checked on 6 Nov 2015).

14. Some other decisions do not exclude the CISG, but rather do not apply it directly. For example, a court uses the CISG as a comparative tool[23]. Due to procedural limitations, the Swiss Supreme court is not allowed to fully review arbitral awards. Therefore, the CISG is sometimes mentioned in decisions, without being really applied by the court[24].

2.2. Most applied provisions

15. The most frequently applied provision is Article 1 CISG, which seems obvious since it is a prerequisite for the application of the CISG as a whole[25]. Articles 2-4 CISG, on the substantive scope of application, are also quite often cited, but they usually remain undisputed before the SFC.

16. Other provisions that are often cited by the SFC are Articles 7 (interpretation of the CISG), 8 (interpretation of the declarations of the parties), 25 (fundamental breach), 39 (two-year period), 49 (avoidance) and 74-78 (damages and interest).

17. Using the Pace database – and taking into account the cantonal courts' decisions – there is little difference in the result: Article 53 (general obligations of the Buyer) seems to be more often cited by the cantonal courts, and Article 25 on fundamental breach is somewhat less used.

18. When a problem regarding the interpretation of the CISG is solved by a decision of the SFC, the lower courts tend to follow it.

3. CISG and the legislation, education and legal scholarship

19. General remarks. The Swiss Code of Obligations (SCO) contains rules on contracts in its general part (SCO 1-183) and, specifically on the sales contract in the second part, devoted to the different types of contractual relationships (SCO 184-215). Issues relating to the formation of the sales contract, interpretation, validity, defect of consent, performance, liability for failure to perform, default of the obligor, etc., are provided for in the general part. Special rules on delivery default and warranty of quality and fitness are contained in the second part (SCO 190 ff., 197 ff). This means that the subject matter of the CISG is scattered across the SCO (Articles 1-183 and 184-215).

20. Though Swiss law contains no commercial code nor any consumer code (there are however a few consumer-specific laws, none of which are related to the sale of goods), several provisions of the SCO apply specifically to commercial relationships, others to consumers.

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23 SFC, 28 Jan 2000 4C.353/1999.

24 SFC, 07 April 2014 4A_450/2013; SFC, 19 June 2014 4A_597/2013 ATF 140 III 170.

25 See below, 5.

21. According to a fundamental principle (Swiss Fed. Constitution, Article 5(4), and SPIL Article 1(2)), the CISG has precedence over domestic laws as do other international treaties.

22. Main differences and similarities. Broad similarities between the CISG and the SCO can be noted as far as the formation of the contract is concerned. However, the definition of the sales contract is broader under the CISG on the basis of Article 3 CISG than under the SCO. Contracts for the supply of goods to be manufactured or produced (Article 3(1) CISG) fall mostly under the scope of the contract for work and services (Article 363 ff SCO, *contrat d'entreprise, Werkvertrag*).

23. The SCO does not follow the CISG remedies approach. It rather attaches different legal consequences to the basic hypotheses of non-performance (SCO 97/119), late performance (SCO 102 ff., 191 ff.) and bad performance (SCO 197 ff.). An important consequence of the Swiss approach lies in the treatment of the *aliud*. Instead of treating the delivery of a good of another description than that required by the contract as the delivery of a non-conforming good (Article 35(1) CISG), the SCO applies the rules on late performance (SCO 102 ff) with awkward consequences for the buyer[26]. In a given situation, the buyer wanting to avoid the contract will have the difficult task of deciding whether to fix an additional period of time for the seller to deliver conforming goods, or giving notice of the lack of conformity without delay (Articles 107 and 109, resp. 201 and 205 SCO).

24. The notion of "fault" (*faute, Verschulden, colpa*), defined as a lack of diligence, is a central requirement of Swiss law regarding damages (Articles 97, 101, 208 para. 3 SCO). A debtor can be exempted from damages if he proves that he was not at fault. In the case of late performance, the debtor cannot be exempted, even in case of unforeseeable circumstances (Articles 102-103 SCO). These concepts do not appear in the CISG.

25. The Swiss rules on the remedies for lack of conformity are unfavourable for the buyer who has to examine the goods "as soon as feasible" and notify the seller „without delay" of any defect (Article 201(1) SCO), a requirement very often not satisfied by the buyer in domestic court practice[27]. Escape from this strict requirement has been found in the possibility for the buyer to choose between the rules on defect of consent (Articles 23-31 SCO) and those on lack of conformity under Swiss law. The protection granted by the rules on defect of consent is thus more generous for the buyer. However, a contractual exemption of liability prevents the debtor form avoiding the contract for mistake relating to facts existing when the contract was concluded[28].

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[26] See e.i., SFC, ATF 121 III 453.

[27] See e.i., SFC, ATF 131 III 145 c. 7 (on late notice).

[28] ATF 126 III 59.

26. There has been one major amendment to the SCO on the time limit for bringing action for breach of conformity[29]. The period has been expanded from one year to two years (Article 210(1) SCO) for a number of reasons, one being the contradiction with the two-year notice period based on Article 39(2) CISG[30]. This can be seen as a direct influence of the CISG on the SCO, even if other reasons were also put forward to explain this modification. From the buyer's position this is considered as a welcome change. No other amendment to the Swiss sales law is pending.

27. Teaching. The CISG is generally taught in law schools as a part of Swiss contract law along with domestic sales law (mandatory part of the curriculum). Moreover, most Swiss law schools offer the students the possibility to participate in The Annual Willem C. Vis International Commercial Arbitration Moot (elective).

28. Main areas of scholarly attention. The CISG has attracted great scholarly attention, first of all in terms of commentaries, in Switzerland as in other countries. Commentaries of the CISG are numerous, but it is difficult to isolate Swiss commentaries from those of other countries of the German circle. One of the early Swiss commentaries in the French language was written by Karl H. Neumayer / Catherine Ming, CISG de Vienne sur les contrats de vente internationale de marchandises: commentaire Lausanne, Centre du droit de l'entreprise de l'Université de Lausanne, 1993. The most famous one is the work of Peter Schlechtriem (Ed.), Kommentar zum Einheitlichen UN-Kaufrecht: das Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf – CISG-Kommentar, Munich, C.H. Beck, 1990, in the German language. Ingeborg Schwenzer, a professor at the University of Basle since 1989, became co-editor of the commentary since the fourth edition in 2004. This work could therefore be counted as Swiss, at least in part. As for other commentaries like the one edited by Heinrich Honsell in Berlin (first edition in 1997), many authors are Swiss, and Honsell himself became a Swiss professor at the University of Zurich in 1989. Another commentary is edited by Christoph Brunner, UN-Kaufrecht - CISG: Kommentar zum Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf von 1980: unter Berücksichtigung der Schnittstellen zum internen Schweizer Recht, 2nd edition, Bern, Stämpfli, 2014. The commentary genre being a strong scholarly tradition in Switzerland, as well as in Germany, all areas of international sales are thus thoroughly covered even if the national origin of such commentaries tends to get blurred.

29. Apart from the above mentioned commentaries, a number of dissertations, in French and in German[31], have been written on various topics related to the CISG.

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[29] Switzerland has not ratified the Convention on the Limitation Period in the International Sale of Goods.

[30] FF 2011 2699 ff., 2702, 2706.

[31] See bibliography.

30. Swiss court practice. The charts in the Annex show the number of decisions (cantonal, federal and arbitral) rendered since 1991. They also show which CISG provisions are most cited in Swiss court practice, with a special focus on the Swiss Federal Court (SFC). This report will consider published and several unpublished SFC decisions and show how court practice has changed since the early applications of the CISG. One lower court decision will also be taken in consideration in order to show the evolution of Swiss court practice which will be described below under 6.

4. Personal scope of CISG application

31. When faced with an international sale of goods, the courts determine the application *rationae personae* of the CISG as follows.

32. In accordance with the principles of freedom of contract, the courts will first examine if a choice of law has been made by the parties. Choosing the law of a country which is a CISG member state is interpreted by the Swiss courts as including the CISG[32], unless the CISG is clearly excluded. This follows the modern trend of interpretation. There is no occurrence of a mere choice of the CISG without reference to a domestic legal system, nor any case where the parties decide to apply the CISG and a non-contracting state domestic law.

33. The distinction between Article 1(1)(a) and (b) CISG is well understood by the Swiss courts. Most SFC cases involve bordering countries: Germany, Italy, France or Austria. Since all those countries have also ratified the CISG, the personal scope of application of the CISG will be given under Article 1(1)(a) CISG[33]. The courts also apply it correctly for other CISG parties, like Spain[34] or Ukraine[35].

34. If the CISG is found applicable by the virtue of Article 1(1)(a), the Swiss courts won't examine the application under Article 1(1)(b). Since the CISG is uniform substantive law, it is applicable by itself, without further examination of the principles of private international law[36].

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32 SFC, 17 July 2007 4C.94/2006 (cisg-online 1515) (checked on 6 Nov 2015); ACJC/1494/2014.

33 SFC, 11 July 2000 4C.100/2000 (cisg-online 627); SFC, 15 Sept 2000 4C.105/2000 (cisg-online 770); SFC, 28 Nov 2002 4C.296/2002 (cisg-online 2221); SFC, 04 Aug 2003 4C.103/2003 (cisg-online 804); SFC, 19 Feb 2004 4C.307/2003 (cisg-online 839); SFC, 07 July 2004 4C.144/2004 (cisg-online 848); SFC, 20 Dec 2006 4C.314/2006 (cisg-online 1426); SFC, 17 Dec 2009 4A_440/2009 ATF 136 III 556 (cisg-online 2022); SFC, 26 June 2009 4A_131/2009 (cisg-online 1907); SFC, 26 March 2013 4A_617/2012 (cisg-online 2434) (checked on 6 Nov 2015).

34 SFC, 18 May 2009 4A_68/2009 (cisg-online 1900) (checked on 6 Nov 2015).

35 SFC, ATF 136 III 56 (cisg-online 2022) (checked on 6 Nov 2015).

36 SFC, 23 April 2013 4A_24/2013 (cisg-online 2482) (CISG applicable to a contract with a Buyer having its seat in United Kingdom); SFC, 11 July 2000 4C.100/2000 (cisg-online 627) (checked on 6 Nov 2015).

35. The first application of the CISG by the SFC is the only example of a mistake in this regard. The CISG is applied by virtue of Article 1(2) of the Swiss private international law, without reference to Article 1(1) CISG[37]. Despite this methodological error, the CISG is correctly deemed applicable.

36. If one of the parties has its place of business in a non-contracting state, the courts apply Article 1(1)(b) CISG[38], as one would expect. Switzerland has made no reservation about 1(1)(b) CISG[39], and has ratified the Hague Convention on the law applicable to international sales of goods[40]. Therefore, Swiss law – including the CISG – will apply if the Seller has its place of business in Switzerland.

37. The application of the CISG under Article 1(1)(a) is not analysed explicitly anymore in the most recent decisions. This issue tends to remain undisputed between the parties, leading the SFC to pass over this question[41].

38. The courts adopt a strict approach as to the exception of goods bought for personal, family or household use pursuant to Article 2(a) CISG[42]. There are no cases involving consumers where the CISG applies.

5. Substantive scope of CISG application – extending the CISG beyond the sales of goods contracts

39. As mentioned above[43], the definition of a sale of goods is not identical under Swiss law and under the CISG. From a Swiss perspective, the CISG applies also to contracts falling outside of the traditional scope of a "sale of goods". For example, the sale of goods to be manufactured follows a special regime under Swiss law[44]. Nevertheless, it should be noted that the courts apply the definition provided by the CISG and not by domestic law.

40. There are no cases about contracts which are accessory to the sale of goods.

41. The CISG does not apply to legal issues which are not expressly covered by its provisions. An example worth mentioning is the issue of interest (Article 77 CISG).

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37 SFC, ATF 122 III 43 (cisg-online 214) (checked on 6 Nov 2015).

38 SFC, 16 Dec 2008 4A_326/2008 (cisg-online 1800); SFC, 16 Sept 2010 5A 482/2010 (cisg-online 2220); SFC, ATF 138 III 601 (cisg-online 2371); SFC, 23 April 2013 4A_24/2013 (cisg-online 2482) (checked on 6 Nov 2015).

39 Http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html; see below, 7.

40 Http://www.hcch.net/index_en.php?act=conventions.text&cid=31.

41 SFC, 20 Feb 2012 4A_655/2011 (cisg-online 2347); SFC, 26 March 2013 4A_741/2012 (cisg-online 2561); SFC, 07 April 2014 4A_450/2013; SFC, 23 Sept 2013 4A_264/2013 (cisg-online 2560); SFC, 02 April 2015 4A_614/2014 (cisg-online 2592) (checked on 6 Nov 2015).

42 SFC, 02 Oct 2013 4A_252/2013.

43 See above, n. 22.

44 SFC, 28 Jan 2000 4C.353/1999; see above, n. 22.

The principle and possible exceptions are analysed under the CISG[45], whereas the rate is determined by the applicable domestic law (in Switzerland: 5% a year)[46].

42. The principles of interpretation under Article 8 CISG are comparable to those applicable under Swiss law[47]. But the courts, in accordance with the uniform approach of the CISG, base their decisions on the CISG. Only one decision deviates from this principle[48].

43. The SFC considers that the burden of proof is governed by the CISG, although the matter is not expressly settled in it[49], with one exception[50].

6. Interpretation of the CISG – international and national influences

44. An evolution can be observed as to the interpretation of the CISG by the SFC from a homeward bound towards a more uniform and international approach. The very first SFC decision in 1996 is devoted to competence and based on Article 57(1) (b) CISG[51]. In examining whether the payment of the price was to be made against handing over of the goods or of documents in order to determine the place of payment of the price and the competent tribunal *ratione loci*, the SFC resorted to domestic law terminology like "*Zug-um-Zug Geschäft*" or "*Fälligkeit des Kaufpreises*" or "*Kauf mit Vorausbehahlung des Kaufpreises (Pränumerandokauf)*". However, the same German terminology is used in the Honsell commentary by Schnyder/Straub[52] and seems to correspond to other scholarly writings.

45. Another of the early decisions of the SFC, one of 15 September 2000[53], uses a truly domestic law oriented language and shows a somewhat awkward handling of

45 SFC, 02 April 2015 4C.616/2014 c. 12 (about interest on a damages claim).

46 Article 105 SCO.

47 SFC, 22 Dec 2000 4C.296/2000 (cisg-online 628); SFC, 04 Aug 2003 4C.103/2003 (cisg-online 804); SFC, 13 Nov 2003 4C.198/2003 ATF 130 III 258 (cisg-online 840); SFC, 05 April 2005 4C.474/2004 (cisg-online 1012); SFC, 26 March 2013 4A_617/2012 (cisg-online 2434); SFC, 26 March 2013 4A_741/2012 (cisg-online 2561); SFC, 23 April 2013 4A_24/2013 (cisg-online 2482); 23 Sept 2013 4A_264/2013 (cisg-online 2560); SFC, 02 April 2015 4A_614/2014 (cisg-online 2592) (checked on 6 Nov 2015).

48 SFC, 13 Jan 2004 4C.245/2003 (cisg-online 838) (checked on 6 Nov 2015).

49 SFC, 13 Jan 2004 4C.245/2003 (cisg-online 838); SFC, 13 Nov 2003 4C.198/2003 ATF 130 III 258 (cisg-online 840); SFC, 19 Feb 2004 4C.307/2003 (cisg-online 839); SFC, 17 Dec 2009 4A_440/2009 ATF 136 III 56 (cisg-online 2022); SFC, 16 July 2012 4A_753/2011 ATF 138 III 601 (cisg-online 2371); SFC, 02 April 2015 4A_614/2014 (cisg-online 2592) (checked on 6 Nov 2015).

50 SFC, 15 Sept 2000 4C.105/2000 (SJ 2001 I 304) (cisg-online 770) (checked on 6 Nov 2015).

51 SFC, 18 Jan 1996, ATF 122 III 43 (cisg-online 214) (checked on 6 Nov 2015).

52 Schnyder/Straub, CISG 57 N. 9.

53 SFC, 15 Sept 2000 4C.105/2000 (SJ 2001 I 304) (cisg-online 770) (checked on 6 Nov 2015).

the CISG. The case[54] was about an Italian seller and a Swiss buyer who had entered into a contract for the sale of Egyptian cotton. The SFC held that the time of delivery had been fixed according to Article 33 CISG. Considering the fact that the seller had not performed its obligation to deliver the goods, the SFC further held that the buyer had validly avoided the contract (Article 49 CISG) since the non-performance amounted to a fundamental breach of contract. Referring to Article 25 CISG, the SFC assumed that the final date of delivery was to be considered as fundamental for the buyer, and that consequently the buyer was not bound to fix an additional period of time for performance according to Article 47(1) CISG, but was entitled to declare the contract avoided. Though this decision is (correctly) based on the CISG pursuant to Article 1(1)(a) CISG, it relies only on the above mentioned commentary by Neumayer/Ming[55]. The whole reasoning seems domestic law oriented as is shown by the terminology used: *i*. two contracts of sale made "*à des fins commerciales*"[*for commercial purposes*] when Article 2(a) CISG only excludes the application of the CISG to goods bought for "personal, family or household use"; *ii*. instead of the French word "*résolution*" for avoidance, the decision uses "*résiliation*" which is incorrect (Articles 49 and 81 CISG); *iii*. when examining the fundamental character of the breach the SFC does not follow the usual double test, subjective and objective, related to the foreseeability of the result of non-delivery within the agreed period; *iv*., finally, the decision applies the Swiss provision on proof[56] without any reference to Article 7(2) CISG.

46. The SFC often addressed the allocation of the burden of proof[57], though it rarely addressed it with such bias as did the above mentioned decision of 15 September 2000[58]. A published decision of 13 November 2003[59] correctly holds the burden of proof for a lack of conformity as a matter governed by the CISG but not expressly settled in it; as the CISG is lacking an express rule on the burden of proof, the gap is to be filled in accordance with the general principles upon which the CISG is based (Article 7(2) CISG). Relying on abundant scholarly writings (mainly commentaries) and cases decided by German courts (*i.a.*, the BGH) as well as a Belgium lower court and the Zurich Commercial Court (*Handelsgericht*), the SFC, on the basis of the rule of the "proximity to the evidence" ("*Beweisnähe*"), considered it was justified that the buyer, who had accepted the goods and obtained control over them, was required to prove the lack of conformity of the delivered goods, to the extent that he asserted rights on this basis. This ruling was confirmed in a SFC decision of 19 February 2004[60].

54 As reported by http://www.unilex.info/case.cfm?id=907.

55 See above, n. 28.

56 Article 8 SCC.

57 See above, n. 43.

58 See above, n. 53.

59 SFC, 13 Nov 2003 4C.198/2003, ATF 130 III 258 c. 5.3 (cisg-online 840) (checked on 6 Nov 2015).

60 SFC, 19 Feb 2004 4C.307/2003 (cisg-online 839) (checked on 6 Nov 2015).

47. In contrast, a decision of the same year[61], based only on the above mentioned decision of 15 September 2000[62], though admitting that the courts should not apply domestic law, relied on the rule "*actori incumbit probatio*" and Article 8 SCC without having recourse to the general principles upon which the CISG is based.

48. In the previously mentioned decision correctly deciding on the burden of proof, the SFC[63] refers to the Swiss principles of contract interpretation pursuant to Article 18(1) SCO, instead of applying Article 8 CISG. This is a part of the decision which again relies mainly on Swiss case law. Admittedly the Swiss two-step analysis starting with the common will of the parties and, if the latter cannot be proven, resorting to an objective interpretation according to the principle of trust and basing on what a party could have understood according to the principle of good faith, corresponds in essence to Article 8 CISG, paras (1) and (2) combined with para (3). However, contract interpretation is addressed by Article 8 CISG, which should apply alone on this issue.

49. A published decision of 13 November 2003[64] is noteworthy for the regard it has for the international character of the CISG. It involved the sale of a used laundry machine between a German seller and a Swiss buyer. The machine was delivered on 29 July 1996. By a letter dated 26 August 1996, the buyer gave notice that the distillation of the machine was defective, and that the stainless steel container leaked and urgently needed to be replaced. On 29 August 1996, a representative of the seller examined the machine. In a further letter dated 5 September 1996, under the heading "Unusable machine delivery", the buyer confirmed that the distillation system did not work and listed various defects. The SFC accepted that the notice of the lack of conformity had been timely given (Article 39 CISG), showing its independence from the much stricter requirement of Article 201 SCO (notification "without delay")[65].

50. Furthermore, using various scholarly writings and comparing the different versions of Article 39(1) CISG (English, French and the unofficial German version), the SFC held that in order to circumscribe the nature or type of the lack of conformity, it is sufficient if the buyer communicates that a machine or parts thereof are not functioning and indicates the appropriate symptoms; it is not necessary that he also elaborate on the causes of the functional lack of conformity. However and surprisingly, in the present case, the SFC held that the notice was not specific enough for the buyer to rely on it, even though a general notice of defects using the wording

61 SFC 13 Jan 2004 4C.245/2003 (cisg-online 838) (checked on 6 Nov 2015).

62 See above, n. 53.

63 SFC 19 Feb 2004 4C.307/2003 c. 3.3 (cisg-online 839) (checked on 6 Nov 2015), cited above n. 60.

64 SFC, 13 Nov 2003 4C.198/2003, ATF 130 III 258 (cisg-online 840; http://cisgw3.law.pace.edu/cases/031113s1.html) (checked on 6 Nov 2015), see above N. 0 on the burden of proof

65 See above, n. 25.

"unusable machine" followed by a more detailed one had been timely given. The result appears somewhat surprising in that it adopts a most strict understanding of the content of the notice in line with the restrictive domestic approach favourable to the seller rather than the buyer as far as the remedies for lack of conformity are concerned.

51. This last decision however shows a rather relaxed approach towards the "reasonable time" within which the notice of a lack of conformity has to be given pursuant to Article 39 CISG. As noted above[66], the domestic time requirement is very strict and unduly influences court practice on the CISG contrary to the need to promote uniformity pursuant to Article 7(1) CISG. An early decision of the Obergericht of the Kanton of Luzern[67] shows a true attempt to promote a uniform interpretation in trying to strike a balance between the solutions provided in the German legal system on the one hand, and both the Anglo-American and Dutch legal systems on the other. In view of the fact that in the two former systems the time for notice is generally quite short, while in the latter systems notice may be given within a longer period of time, the Court decided that one month after delivery was a good compromise between the two approaches[68]. On this much debated issue, the trend towards a uniform interpretation may be gaining weight, as the SFC decision of 13 November 2003[69] shows.

52. On fundamental breach, a SFC decision of 18 May 2009[70] is interesting to consider. A Swiss seller and a Spanish buyer concluded a contract for the sale of a packaging machine in December 2000. A dispute arose between the parties regarding the performance of the machine. After several unsuccessful attempts by the seller to increase the performance of the machine, the buyer avoided the contract and claimed restitution of the purchase price plus damages. On the basis of various scholarly writings, the SFC held that the fundamental breach under Article 25 CISG was to be interpreted narrowly. As the packaging machine only achieved 29% of the agreed performance, the defective delivery qualified as a fundamental breach of contract. The issue of the statute of limitations was decided according to the applicable domestic Swiss law (which was modified after this decision)[71].

53. The cases discussed above show that a homeward bound interpretation of the CISG, still prevailing in some decisions, is often the result of the sources used. When the courts do not base their reasoning on scholarly writings about the CISG and foreign cases, but use domestic decisions and writings, their decisions show

66 See above, n. 49 and n. 65.

67 Obger. Luzern, 8 Jan 1998 (cisg-online 228; unilex 241) (checked on 6 Nov 2015).

68 See the abstract in unilex 241.

69 See above, n. 49.

70 SFC, 18 May 2009 4A_68/2009 (cisg-online 1900; unilex 1460) (checked on 6 Nov 2015).

71 See above, n. 26.

a clear domestic bias[72]. Although reference is nowadays commonly made to CISG literature (especially commentaries) with the result of improving the interpretation of the CISG by Swiss courts, a new problem seems to be arising. In the SFC case of 2003 discussed above[73], the abstract interpretation of the CISG cannot be criticised for showing a domestic bias[74]. However, such bias appears in the application of the correctly interpreted principles to the facts of the case[75].

54. It should be noted that, though Swiss courts commonly refer to non-swiss sources – which is particularly true for references made to the various commentaries of the CISG and foreign cases – they never use the only commentary belonging to the common law circle, i.e. Honnold/Flechtner[76]. This is surprising in view of the fact that regard should be given to the international character of the CISG and the need to promote uniformity in its application pursuant to Article 7(1) CISG.

55. The use of "civil law" scholarly writings – mostly German – is quite common. In contrast, references to foreign cases are scarce, and are mainly drawn from the Swiss database *cisg-online.ch*. A single case mentions decisions from Belgium and Germany[77] and two cases mention decisions from Germany only[78], apart from references to Swiss cases. It must be noted that German-speaking Swiss judges and scholars are heavily influenced by German law, and references to the German Bundesgerichtshof are quite common, even outside the scope of the CISG.

56. Foreign law is treated as a matter of fact by the Swiss Civil Procedure Code (SCPC) and must be proven by the parties – *i.e.* the *iura novit curia* principle does not apply (Article 150(2) of the SCPC). In our opinion, the lack of references to foreign cases may be due to a procedural bias: the judges treat these cases as foreign law, and will not actively search for them, despite Article 7(1) CISG. If the parties – or, rather, their representatives – do not base their submissions on foreign cases, no consideration will be given to those cases by the domestic courts.

7. Reservations/Declarations (Articles 92-96 CISG)

57. Switzerland has made no reservations nor declarations under the CISG.

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72 See above, n. 45 and n. 50.

73 See above, n. 49-51.

74 SFC, ATF 130 III 258 c. 4.3.

75 SFC, ATF 130 III 258 c. 4.4.

76 Honnold John O./Flechtner Harry M, Uniform Law for International Sales under the 1980 United Nations Convention, 4th Ed., Alphen aan den Rijn (Kluwer) 2009. No reference at all to this commentary is to be found in the Swiss decisions, whether of federal or cantonal level.

77 SFC, ATF 130 III 258.

78 SFC, ATF 138 III 601; SFC, 02 April 2015 4A_614/2014 (cisg-online 2592) (checked on 6 Nov 2015).

8. Challenges in the application of specific CISG provisions

58. Burden of proof, contract interpretation and remedies for lack of conformity often appear in the above mentioned cases, albeit not always examined in accordance with the requirement of uniformity set in Article 7 CISG. It appears that, after an evolution over the years, the crucial challenges relate more to the application of the CISG to actual facts by Swiss courts, rather than to its interpretation, as has been shown above in relation with the notification of a lack of conformity (see above, 6). The challenge relates to methodology in an environment dominated by decisions and scholarly writings concentrated on the German circle. Opinions from the common law circle remain somewhat secondary[79].

59. According to Article 1(3) SCC, "the court shall follow established doctrine and case law". This provision lays the ground for a true comparative law approach on CISG matters decided by Swiss courts. In this regard, the CISG Advisory Council (CISG-AC) initiative[80], which aims at promoting a uniform interpretation of the CISG, is particularly worth considering. It is a private initiative in the sense that its members are scholars who do not represent countries or legal cultures, but look for a more profound understanding of the CISG. The CISG-AC issued seventeen opinions and two declarations[81] which offer an excellent tool to elaborate an autonomous interpretation of the provisions of the CISG, and thus achieve the goal set by Article 7(1) CISG. The important research on which those opinions are based would be of great help along with the other scholarly writings ("doctrine") now commonly used by Swiss courts. A suggestion addressed to Swiss courts would be to resort to those opinions in their interpretation of the CISG in order to achieve uniformity in the application of the CISG[82].

60. The CISG is drafted in six official languages: Arabic, Chinese, English, French, Russian and Spanish. The opinions and declarations of the CISG Advisory Council are in the English language, with the black letter rules translated in French and Spanish. Most of them are also translated in German, and some in Japanese and Portuguese, even if these languages are not official; a few opinions are translated in Arabic, Russian and Spanish. The comments are not translated with exceptions. It is submitted that, notwithstanding the important efforts in translating cases and CISG Advisory Council opinions, language remains an obstacle towards an autonomous interpretation of the CISG. As far as Switzerland is concerned, literature and cases in German are the decisive sources although judges at the federal level are supposed to be able to resort not only to German, but also to French and Italian. Moreover,

79 See above n. 54.

80 Http://www.cisgac.com/ (checked on 2 April 2016).

81 Http://www.cisgac.com/default.php?ipkCat=128&sid=128 (checked on 2 April 2016).

82 No reference to CISG-AC opinions can be found in Swiss court decisions as yet.

most Swiss judges would be sufficiently fluent in English to be able to ground their reasoning on literature in English and on the many freely available cases translated in English. As a result, there seems to a be a domestic as well as a German bias in Switzerland. This rather pessimistic conclusion is alleviated by the fact that Swiss judges abundantly base their decisions on CISG literature (in German) which, true to its function, analyses and synthesizes foreign sources including cases (translated) in English. All in all, the promotion of uniformity in the interpretation and application of the CISG may be achieved in Switzerland through the abundant literature on the CISG in German.

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[83] This bibliography focuses on "Swiss" scholars, i.e. teaching at Swiss universities or whose writings are published by a Swiss publisher.

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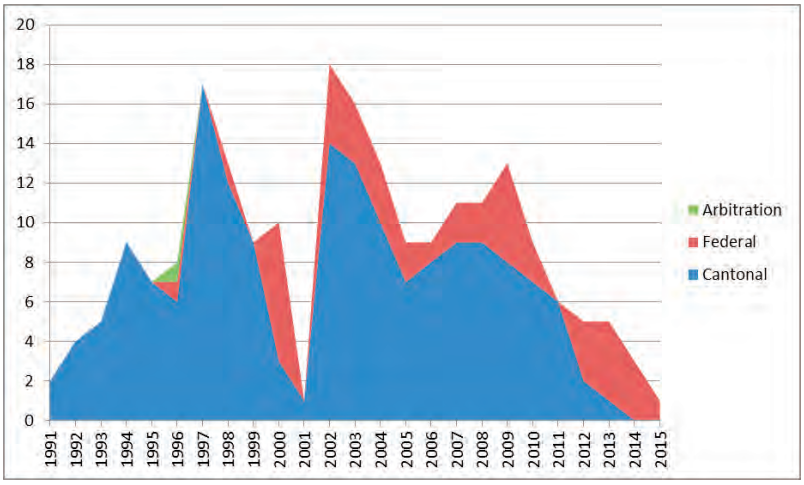
Annexes

1. Swiss cases (1995-2015)

Based on the Tribunal fédéral (Swiss Federal Supreme Court) website[84], Pace database[85], and Swisslex[86].



2. Swiss cases in the UNICTRAL Digest / Pace Database

	Article 1	Article 2	Article 3	Article 4	Article 5	Article 6	Article 7	Article 8	Article 9	Article 10
Cited	-	9	28	39	1	26	26	21	7	2
Reported	-	16	44	72	2	46	49	52	15	7

	Article 11	Article 12	Article 13	Article 14	Article 15	Article 16	Article 17	Article 18	Article 19	Article 20
Cited	12	2	1	9	0	0	0	5	3	0
Reported	13	3	1	26	2	0	0	21	9	0

	Article 21	Article 22	Article 23	Article 24	Article 25	Article 26	Article 27	Article 28	Article 29	Article 30
Cited	0	0	2	0	7	2	1	2	2	0
Reported	0	0	4	0	33	5	4	2	11	20

[84] Http://www.bger.ch/fr/index.htm.

[85] Http://www.cisg.law.pace.edu/.

[86] Https://www.swisslex.ch/.

	Article 31	Article 32	Article 33	Article 34	Article 35	Article 36	Article 37	Article 38	Article 39	Article 40
Cited	2	2	2	1	19	2	0	15	34	2
Reported	15	4	11	4	39	15	1	31	58	7

	Article 41	Article 42	Article 43	Article 44	Article 45	Article 46	Article 47	Article 48	Article 49	Article 50
Cited	0	0	0	2	6	2	1	1	14	4
Reported	1	1	0	6	34	14	16	8	47	22

	Article 51	Article 52	Article 53	Article 54	Article 55	Article 56	Article 57	Article 58	Article 59	Article 60
Cited	1	0	30	12	3	0	11	27	27	3
Reported	11	5	45	15	7	0	17	40	33	3

	Article 61	Article 62	Article 63	Article 64	Article 65	Article 66	Article 67	Article 68	Article 69	Article 70
Cited	12	9	7	5	0	1	4	0	2	0
Reported	18	14	10	10	0	2	8	0	3	0

	Article 71	Article 72	Article 73	Article 74	Article 75	Article 76	Article 77	Article 78	Article 79	Article 80
Cited	3	2	4	21	4	1	3	51	3	1
Reported	5	3	5	73	13	11	14	92	12	3

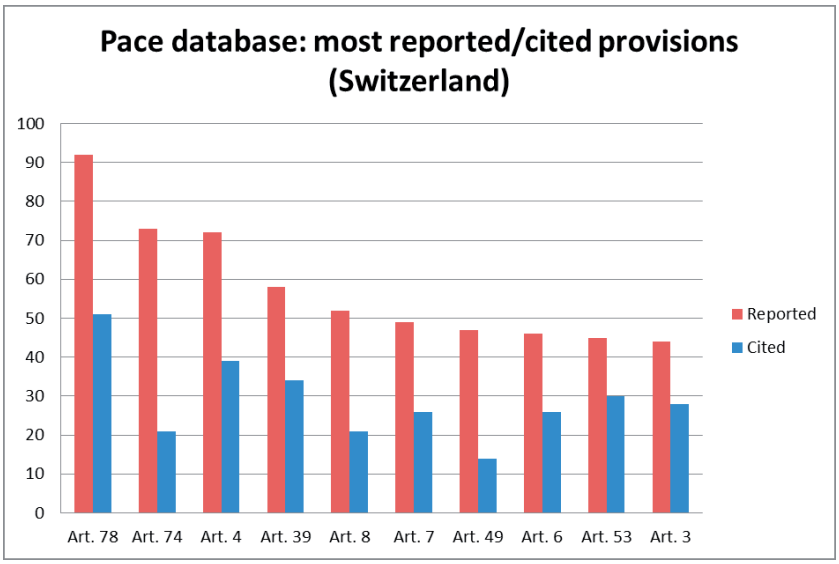
	Article 81	Article 82	Article 83	Article 84	Article 85	Article 86	Article 87	Article 88	Article 89	Article 90
Cited	4	1	0	3	1	0	1	1	0	0
Reported	21	7	0	11	2	0	1	2	0	0

	Article 91	Article 92	Article 93	Article 94	Article 95	Article 96	Article 97	Article 98	Article 99	Article 100
Cited	0	1	0	0	0	0	0	0	0	6
Reported	0	1	0	0	1	0	0	0	0	13

	Article 101
Cited	0
Reported	0

"Cited" decisions are those cited in the 2012 UNCITRAL Case Law Digest.
"Reported" decisions are those accessible on the Pace database.

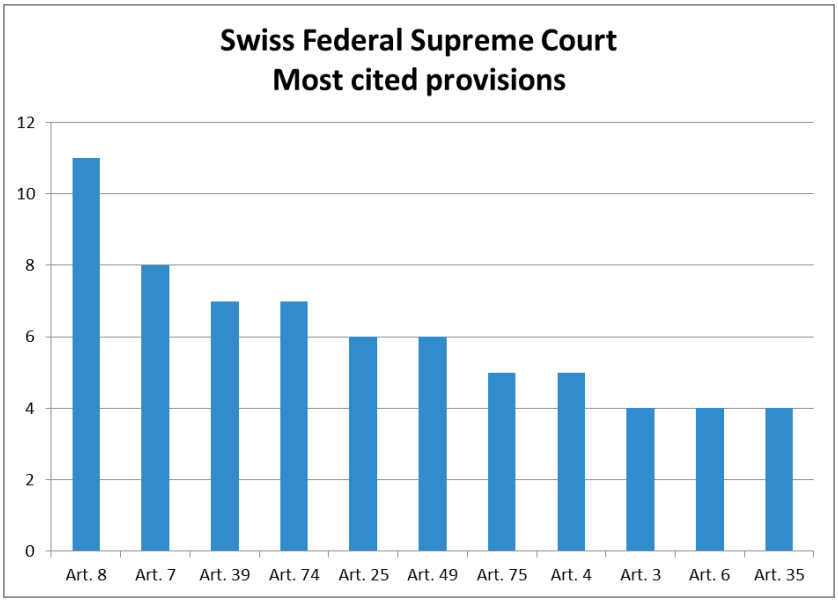
3. Top ten provisions cited by Swiss courts



	Article 78	Article 74	Article 4	Article 39	Article 8	Article 7	Article 49	Article 6	Article 53	Article 3
Cited	51	21	39	34	21	26	14	26	30	28
Reported	92	73	72	58	52	49	47	46	45	44

"Cited" decisions are those cited in the 2012 UNCITRAL Case Law Digest.
"Reported" decisions are those accessible on the Pace database.

4. Swiss Federal Supreme Court – Most cited provisions



	Article 8	Article 7	Article 39	Article 74	Article 25	Article 49	Article 75	Article 4	Article 3	Article 6	Article 35
Federal	11	8	7	7	6	6	5	5	4	4	4