(HST) approach and the "Common consolidated base taxation" (CCBT) approach.

On the base of the HST, that is though as appropriate for SMEs, businesses operating in more than one Member State would determine their overall taxable profit (including the profits from secondary establishments in other Member States) on the base of the tax rules of the Member State of location of their headquarter; this taxable base would then be apportioned according to a specific formula amongst Member States and each Member State would apply its own tax rate to the share of the overall taxable profit that it is allocated.

The CCBT approach would differ with regards to the determination of the overall taxable base, that would be determined according to the rules laid down by a new piece of EC legislation rather than according to those of the Member State of location of the headquarter.

Although the proposals for these approaches contain no reference to the EPC project, in the event of introduction of these schemes the EPC would necessarily need to be included within their scope of application, in order not to be placed at a disadvantage in comparison with the SE (that is regarded as a natural candidate for these schemes, particularly for the CCBT) and with private limited companies governed by national law. Moreover, assuming that a CCBT code were introduced with a more favourable set of provisions than the tax law provisions of the Member State of location of the EPC, the question would arise as to whether only an EPC that has secondary establishments in other Member States could be allowed to opt for the CCBT or whether this option should also be allowed to EPCs that do not have secondary establishments.

The response to this issue would not be easy, as it would need to outweigh the financial interests of Member State to tax the EPC according to their own rules against the need to avoid the risk of preventing some of the businesses organised under a European legal form (even if without secondary establishments in other Member States) from having access to a European tax code.

Conclusion

The EPC project has received, according to surveys carried out in 2002 throughout the Community, a 95% support on behalf of SMEs.[21] Those surveys showed the facilitation of the freedom of establishment that SMEs expect from the implementation of this project as the strongest reason for support.

Most of the companies interviewed stated that they would set up subsidiaries under the EPC form, whose introduction would remove the disincentive currently created by many different company law forms; moreover, it has been highlighted that doing business under a "European label" would bring commercial and marketing advantages to SMEs, and that, after the introduction of the SE, "It wouldn't be fair (...) to deny SMEs a level playing field and a similar opportunity".[22] After the clearly expressed desire for this new form of European company-type, a "feasibility study" on the introduction of the EPC is going to be published this year by the European Commission.

In this context, an overall review of the current version of the draft regulation suggests that – by providing a clear response to some interpretative issues from the company law perspective, and by keeping pace with the evolution of the ECJ case-law and with the Commission's proposals in the field of corporate taxation – the introduction of the EPC would mark by far the most important achievement of European company law in terms of contribution to the completion of the internal market, from the perspective of the greatest part of businesses (the SMEs) operating within the Community.

[21] See, e.g., "Bullettin Quotidien Europe", n. 8250, 8/9 July 2002.

[22] *Inspire Art* (*supra* note 16).

Does the choice of a-national rules entail an implicit exclusion of the CISG?

Comment on the decision of Tribunal of Padova (IT), 11 January 2005, *Ostrotznik Savo v La Faraona*[*]

Cristina Chiomenti[**]

The decision of the Tribunale di Padova[1] commented here is particularly noteworthy for applying the United Nations Convention on Contracts for the International Sale of Goods (hereinafter "CISG")[2] in an exemplary way.[3]

Furthermore, the judgment is of great importance because it is the first State Court decision to deal directly with the selection by the parties of a-national (non-state) rules to govern their contract and with the effects to be given to such selection. The judgment treats the issue specifically and comprehensively and, in my opinion correctly under the present state of the law, it does not recognize a "choice of law" effect to such selection but only a relevance as "incorporation" of said

[*] *For the full text of the decision, please refer to section II of this issue, at 124.*

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[1] Tribunale di Padova, Italy, 11 January 2005, available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/050111i3.html>.

[2] United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, S. Treaty Doc. No. 98-9, 1489 U.N.T.S. 58.

[3] Other significant judgments correctly applying the CISG have been rendered by Italian Courts in recent years: *see e.g.* Tribunale di Padova, Italy, 31 March 2004, GIURISPRUDENZA DI MERITO 1065 ff. (2004); Tribunale di Padova, Italy, 25 February 2004, GIUR. IT. 1405 ff (2004); Tribunale di Rimini, Italy, 26 November 2002, GIUR. IT. 896 ff. (2003); Tribunale di Vigevano, Italy, 12 July 2000, GIUR. IT. 280 ff. (2001); Tribunale di Pavia, Italy, 29 December 1999, CORRIERE GIURIDICO 932 ff. (2000).

rules into the contract (see paragraph 6 *infra*).

It is to be expected, therefore, that this decision will be considered as a particularly important precedent.

1. Description of the Facts

The judgment relates to a supply agreement of goods (specifically, rabbits) entered into in 1999 (hereinafter: the "Agreement") between a Slovenian company (hereinafter: the "Supplier") and an Italian company (hereinafter: the "Buyer"), pursuant to which the Supplier agreed to supply from its farm rabbits of a genetic type named Hyla to the Buyer.

At some stage during the contract period, the Buyer, dissatisfied with the quality of the rabbits, suggested that the Supplier adopt a new genetic type of rabbits, named Grimaud, after selling the existing rabbits and providing for a "sanitary clearing" of the farm. Following the suggestion, the Supplier proceeded with the sale below cost of its rabbits, but was then unable to obtain from Grimaud – the original breeder of the Grimaud genetic type rabbits – the brood-rabbits for its farm and was therefore unable to resume its supplies to the Buyer. As a result the Buyer terminated the Agreement alleging the Supplier's non performance.

The action before the Italian Court was brought by the Supplier (and by an Italian company who under the Agreement was entitled to receive a commission on the supplies from the Buyer), alleging that the inability to continue the supplies was due to the conduct of the Buyer who had suggested the change of the genetic type of rabbits but had subsequently failed to cooperate regarding the delivery of the brood-rabbits by Grimaud to the Supplier's farm. The Supplier (and the co-plaintiff) consequently claimed damages deriving from the sale below cost of the old rabbits and from the termination of the Agreement.

The Buyer appearing before the Court objected that the quality of the Hyla rabbits was defective, that the decision to adopt the Grimaud genetic type had been freely taken by the Supplier in order to solve such problems and that, notwithstanding the Buyer's cooperation, Grimaud had refused to furnish its brood-rabbits to the Supplier because the Supplier had failed to achieve the required "sanitary clearing" of its farm.

Therefore the issue of merit before the Court was whether a breach of contract had been committed by the Buyer in terminating the Agreement or by the Supplier in failing to supply the goods. On the merits the Court concluded that the Supplier had committed a fundamental breach of the Agreement under Article 25 of the CISG since it failed to supply the goods as a result of its failure to perform the "sanitary clearing".

Before dealing with the merits of the case, however, the Court examined various preliminary issues relating to the applicable law. This was necessary in light of Article 7 of the Agreement which provided that the contract "shall be governed by the laws and regulations of the International Chamber of Commerce of Paris, France", thus making it appear as if the parties wanted to exclude not only Italian law or Slovenian law, but also the application of the CISG.

2. The Relationship between substantive Uniform Law Conventions and Private International Law Rules

The judgment dealt first with a preliminary issue which relates not only to the operation of the CISG, but of any substantive uniform law convention.

A court faced with a contract of an apparently international character (*i.e.* a contract whose significant elements have links with more than one State[4]) must preliminarily establish what substantive law applies. When the matter in dispute is governed by a substantive uniform law convention to which the forum country is a party, the issue arises whether the Court should first have recourse to the forum's private international law rules in order to determine the applicable substantive law or whether it should directly look at the uniform substantive law convention.[5]

The Court stated that resort to the substantive uniform law conventions shall prevail over resort to private international law rules and that the Court should favour insofar as possible the application of the substantive rules contained in the uniform law convention.[6]

3. The Scope of Application of the Vienna Convention *ratione materiae*: The Meaning of "Contract of Sale" – the "autonomous" Interpretation of the Convention and the Gap-filling

The Court then examined whether the applicability requirements of the CISG subsisted in the specific case. The Court first took into consideration the material scope of application of the CISG.[7]

The Court acknowledged that the concept of "contract of sale" is not defined by the CISG and needs interpretation and filling in, in light of Article 7 of the Convention.

In considering this issue, the Court stated that the concept of "contract of sale" must not be derived from a domestic definition, such as for example Article 1470 of the Italian Civil

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4 As to the *prima facie* international character of a contract, *see* UGO VILLANI, LA CONVENZIONE DI ROMA SULLA LEGGE APPLICABILE AI CONTRATTI 29 (2000).

5 Article 90 of the CISG provides that "this Convention does not prevail over any international agreement which has already been or may be entered into and which contains provision concerning the matters governed by this Convention, provided that the parties have their places of business in States parties to such agreement." It is commonly agreed that Article 90 does not apply to the relationship between the Convention and private international law conventions, but only to that between the Convention and other substantive uniform law conventions. See Franco Ferrari, International Sales Law and the Inevitability of Forum Shopping: A Comment on Tribunale di Rimini 26 November 2002, 23 J.L.& Com. 169, 176 n. 26 (2004).

6 The solution adopted by the Court, which has also been adopted by previous Court decisions (*see e.g.* Tribunale di Vigevano, Italy, 12 July 2000, GIUR. IT. 280 ff.) and by commentators (*see e.g.* Franco Ferrari, *Rapporto di diritto materiale uniforme di origine convenzionale e diritto internazionale privato,* CORRIERE GIURIDICO 933 (2000)), answers a question which has traditionally confronted international law scholars divided between "uniformists" and "conflictualists".

7 On the material scope of application of the Convention *see* FRANCO FERRARI, THE SPHERE OF APPLICATION OF THE VIENNA SALES CONVENTION (1995); Peter Winship, *The scope of the Vienna Convention on International Sales Contracts,* in INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 1 (Galston & Smit eds., 1984).

Code. Instead, such concept (like most other concepts in the Convention, including that of "place of business", "habitual residence", "goods"), must be derived autonomously, that is without having recourse to categories or definitions peculiar to a specific system of law.[8]

Accordingly the Court made reference to Articles 30 and 53 of the Convention. Article 30 requires the seller "[to] deliver the goods, hand over any documents relating to them and transfer the property in the goods"; while Article 53 requires the buyer "[to] pay the price for the goods and take delivery of them").[9]

As a result, according to the Court, the contract of sale under the Convention is the contract pursuant to which the seller is obliged to deliver the goods, transfer the property in the goods and deliver, if relevant, all documents relating to the goods, and the buyer is obliged to pay the price and accept the goods.

On this basis, the Court proceeded to examine whether the contractual relationship of the specific case, which would be qualified under Italian law as a special contract named "*somministrazione*", falls under the concept of the Convention. The Court conducted this examination leaving aside the domestic qualification and looking at international court decisions relating to the Convention as well as at Article 73 of the CISG.[10]

Quoting court decisions from other countries as well as Article 73 of the Convention, the Padova Court concluded that the CISG covers all contract of sale for the delivery of goods by instalments, including those where the transfer of the property takes place not upon conclusion of the contract but upon each delivery.

4. Applicability of the CISG

Continuing its analysis of the case in logical order the Court then examined whether the contract is international as required by the CISG.

Like most uniform substantive law conventions, the CISG limits its sphere of application to "international" contracts.[11] According to Article 1, the CISG applies to contracts for the sale of goods between parties whose places of business are located in different States.

Under the CISG, however, the different location is not in itself sufficient:[12] for its applicability the CISG requires in addition either that both such States are Contracting States ("direct" applicability of the Convention); or, alternatively, that such States are not both Contracting States, *i.e.* where only one of them or even none of them is a Contracting State, but the rules of private international law of the forum lead to the application of the law of a Contracting State, which may well be a third State with respect to the places of business of the parties[13] ("indirect" applicability of the Convention).

In the specific case it was evident that the parties to the contract had their place of business in different States, the Buyer in Italy and the Supplier in Slovenia. Both Italy and Slovenia were at the time of the conclusion of the contract Contracting States. The Judge therefore did not need to dwell on the issue for long before concluding for "direct" applicability of the CISG under Article 1(1)(a).

5. Exclusion by the Parties of the Application of the Vienna Convention

Having looked into the positive applicability requirements of the CISG, the Court then examined whether the parties had excluded the application of the Convention as permitted by Article 6 thereof. The conclusion of the Court in the specific case was that the choice made by the parties in a provision of their contract in favour of the "laws and regulations of the International Chamber of Commerce of Paris, France" does not constitute an exclusion of the CISG.

The Convention may be excluded expressly or implicitly.

The express exclusion gives rise to little discussion.[14] On the

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8 Most scholars nowadays agree that the general principle to be followed in the interpretation of uniform substantive law conventions is that interpretation should occur independently from the national (domestic) law of the contracting states. (For an exhaustive list of authors who dealt with the issue of the autonomous interpretation of the CISG see Franco Ferrari, Interpretation of the Convention and Gap-Filling: Article 7 in The Draft Uncitral Digest and Beyond 138, 139 note 7 (Ferrari et al. eds. 2004). In general on the interpretation of uniform law conventions *see* STEFANIA BARIATTI, L'INTERPRETAZIONE DELLE CONVENZIONI INTERNAZIONALI DI DIRITTO UNIFORME (1986)). As to gap-filling, and in particula the distinction between gaps *intra legem* and gaps *praetor legem*, *see* Michael J. Bonell, *Art. 7*, in COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980N VIENNA SALES CONVENTION 75 (Massimo Bianca and Michael J. Bonell eds., 1987); Franco Ferrari, *Das Verhältnis zwischen den Unidroit-Grundsätzen und den allgemeinen Grundsätzen internationaler Einheitsprivatrechtskonventionen,* JURISTEN ZEITUNG 9, 10 (1998); Leonardo Graffi, *L'interpretazione autonoma della Convenzione di Vienna: rilevanza del precedente straniero e disciplina delle lacune*, GIURISPRUDENZA DI MERITO 872, 879 (2004).

9 For a general definition of "contract of sale" on the basis of Articles 30 and 53 of the CISG see Fritz Enderlein & Dietrich Maskow, International Sales Law 27 (1992); Tribunal Cantonal de Vaud, 11 March 1996, available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=302&step>; Oberster Gerichtshof, Austria, 10 November 1994, available at <http://www.cisg-online.ch/cisg/urteile/117.htm>.

10 Article 73 of the CISG expressly acknowledges that the contract for delivery of goods by instalments falls within the scope of application *ratione materiae* of the CISG, by stating that "In the case of a contract for delivery of goods by instalments, the failure of one party to perform any of his obligations in respect of any instalment constitutes a fundamental breach of contract with respect to that instalment, and the other party may declare the contract avoided with respect to that instalment (...)".

11 For a criticism of the limitation to international contracts *see* Michael J. Bonell, *La Convenzione di Vienna sulla Vendita Internazionale: origine, scelte e principi fondamentali*, RIV. TRIM. DIR. E PROC. CIV. 715, 717 (1990); Arthur Rosett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods*, 45 OHIO ST.L.J. 265, 269 (1984). In general on the limitation of unification efforts to international contracts *see* Bernt Lemhöfer, *Die Beschränkung der Rechtsvereinheitlichung auf Internationale Sachverhalte*, RABELSZ 401 (1960).

12 Franco Ferrari, "*Forum Shopping" despite International Uniform Contract Law Conventions,* ICLQ 689, 697 (2002).

13 For example, assuming that the Rome 1980 Convention on the Law Applicable to Contractual Obligations or the 1955 Hague Convention on the Law Applicable to the International Sale of Goods were the relevant private international law rules, the mere choice of the law of a Contracting State by the parties would bring to the applicability of the CISG. *See* Franco Ferrari, *The CISG's Sphere of Application: Articles 1-3 and 10*, in THE DRAFT UNCITRAL DIGEST AND BEYOND 21, 47 ff. (Franco Ferrari et al. eds., 2004).

14 For a review of issues which might arise in connection with express exclusion of the CISG *see* Franco Ferrari, *CISG Rules on Exclusion and*

other hand, there are diverging views and several open issues as to implicit exclusion.[15]

We should examine in which way the CISG may be implicitly excluded according to the views of the courts and of the scholars:

(1) A first group of situations relates to those instances where the parties have made a choice of a specific State law. If the parties have chosen the law of a non Contracting State to govern their contract there is no doubt that this choice entails as a consequence the non applicability of the CISG.

Some doubts, on the contrary, may surround the cases where the parties have made a choice of law in favour of the law of a Contracting State. Different views have been expressed in this respect. Some courts and authors have held that the indication of the law of a Contracting State amounts to an implicit exclusion of CISG as an uniform law convention.[16] Other scholars, however, have expressed the view that the reference to the law of a Contracting State necessarily includes the uniform law and therefore cannot amount *per se* to an exclusion.[17] Along the latter line of thought some commentators and courts have pointed out more specifically that the choice of the law of a Contracting State can amount to an implicit exclusion only if it is accompanied by other circumstances which clearly show the parties' intention to exclude uniform conventions, as would be the case if the parties made particular reference to the domestic law of the State.[18] This latter position was shared by the Padova Court in the decision herein commented. The Court stated that there is an implicit exclusion of the CISG if the parties "choose the law of the Contracting State but by referring to its 'domestic' law, for example by referring to 'Italian non uniform laws' or to 'the Italian law of the Civil Code'".

(2) A second group of situations relates to those instances where the implicit exclusion may be deduced not from the direct choice of the law of a State (whether a non Contracting State or a Contracting State) but indirectly from the choice of a-national rules (for example of standard contract forms or of sets of rules elaborated by non-state organizations such as Unidroit) or from the choice of a forum (whether a State forum or an arbitral tribunal). This is the situation which regards the present case more closely, since in the present case the parties had made a choice in favour of "the laws and regulations of the International Chamber of Commerce of Paris".

Within this second group of situations it is necessary to identify those where the choice of the non-state originated rules or of a forum entails at the same time the choice of a specific State law. This would be the case, for example, where the selected standard contract forms are so strictly connected with a specific State law that the parties intentions to refer to such State law can be clearly inferred. This would also be the case where the choice of a State court is accompanied by the clear intention to have the contract governed by the substantive State law of the forum.[19] In these cases, therefore, the parties have made an (indirect) choice of a State law (whether a non Contracting or a Contracting State) and accordingly in order to establish whether there is an implicit exclusion of the CISG the matter should be dealt with as described under (1) above.

In other cases the choice of rules other than those of a State does not entail with it the choice of a specific State law. For instance, some of the best known and classical cases of a-national rules often referred to by contracting parties, such as the so called *lex mercatoria* and the Unidroit Principles, are typically transnational provisions which are not linked to any specific state law. The inspiration and purpose of such a-national rules is precisely to overcome the limitations of the domestic legal systems. It would therefore be impossible in such cases to infer the choice of a specific state law. To establish whether the choice of these a-national rules entails an implicit exclusion of the CISG requires a preliminary answer as to the relevance to be recognized to the reference by the parties of a-national rules. This is clearly an issue of a general nature which has much wider implications and consequences than simply on the exclusion of the CISG. It is an issue which has attracted since long the attention and the diverging views of scholars of international law and of uniform law. It is of great importance that the decision of the Padova Court commented upon has taken a clear stand on the issue and I shall accordingly devote a separate paragraph of this comment to examine the general issue and the current state of the debate surrounding it (see paragraph 6 *infra*).

Concerning the specific point of the implicit exclusion of the CISG, it must be noted as from now that on the general issue of the relevance to be acknowledged to the choice by the

Derogation: Article 6, in THE DRAFT UNCITRAL DIGEST AND BEYOND 114, 132-134 (Franco Ferrari et al. eds., 2004).

15 It must be noted that, in contrast to Article 3 of the Uniform Law on the International Sale of Goods (ULIS) annexed to the 1964 Hague Convention, which expressly mentioned the possibility of an implicit exclusion, Article 6 of the CISG is silent on the point. However, only the U.S. Courts have consistently held the view that the CISG is applicable "unless the parties expressly contracted out of the Convention's coverage"(*see e.g. Helen Kaminski PTY. Ltd. v. Marketing Australian Prods.*, 1997 U.S. Dist. LEXIS 10630 (S.D.N.Y. 1997); *Delchi Carrier SPA v. Rotorex Corp.*, 71 F.3d at 1027 (2d Cir. 1995), to the point that it should be concluded that implicit exclusion has no room in the U.S. Courts. Both scholars and courts from other countries do not believe that the silence of Article 6 of the CISG means a denial of implicit exclusion, also in the light of the *travaux préparatoirs* (*see* Winship, *supra* note 7, at 32-34; Ferrari, *supra* note 14, at 121).

16 *See e.g.* Cour d'Appel Colmar, France, 26 September 1995, available at <http://witz.jura.uni-sb.de/cisg/decisions/260995.htm> and Martin Karollus, *Der Anwendungsbereich des UN-Kaufrechts im Überblick,* JURISTISCHE SCHULUNG 381 (1993).

17 Michael J. Bonell, *Art. 6*, in COMMENTARY ON THE INTERNATIONAL SALES LAW 51, 56 (Massimo Bianca & Michael J. Bonell eds., 1987).

18 BERNARD AUDIT, LA VENTE INTERNATIONALE DE MARCHANDISES 39 (1990); Bonell, *supra* note 17, at 56; Allen E. Farnsworth, *Review of Standard Forms or Terms under the Vienna Convention,* 21 CORNELL INT'L L.J. 439, 442 (1988); Rolf Herber, *Anwendungsvoraussetzungen und Anwendungsbereich des Einheitlichen Kaufrechts,* in EINHEITLICHES KAUFRECHT UND NATIONALES OBLIGATIONENRECHT 93, 104 (P. Schlechtriem ed., 1987); R. HERBER & B. CZERWENKA, INTERNATIONALES KAUFRECHT 44 (1992); FRANCO FERRARI, VENDITA INTERNAZIONALE DI BENI MOBILI. ART. 1-13. AMBITO DI APPLICAZIONE. DISPOSIZIONI GENERALI 110 (1994). For recent cases on the issue *see* Hof van Beroep Gent, Belgium, 17 May 2002, available at <http://www.law.kuleuven.ac.be/int/tradelaw/WK/2002-05-17.htm>; Oberlandesgericht Frankfurt, Germany, 30 August 2000, available at <http://cisgw3.law.pace.edu/cisg/text000830g1german.html>.

19 A similar issue arises in arbitration where under the rules of an Arbitral Institution the choice of that Institution automatically involves the choice of the substantive law of the country where the arbitration takes place: *see* for example the Hamburg Chamber of Commerce with respect to German Law: Schiedsgericht der Hamburger freundlichen Arbitrage, Germany, 29 December 1998, INTERNATIONALES HANDELSRECHT 36-37 (2001).

parties of a-national rules, the Court adopts the position that such choice cannot amount to a choice of private international law nature, but can only have the effect of determining the content of a contract by incorporation of the a-national rules as terms of the contract.

The Court derives from this that the reference to a-national rules (as such, that is when it does not involve at the same time the choice of a specific State law, as discussed above) cannot amount to an implicit total exclusion of the CISG as an uniform substantive law convention.

In theory, according to the Court, such a reference to a-national rules could entail a derogation from the CISG, through the adoption in the contract of the a-national rules. In the specific case, however, the Court concluded that even a partial implicit exclusion did not occur since the reference to "the laws and regulations of the Paris Chamber of Commerce" was too vague and undetermined.[20]

6. The Choice of a-national Rules by the Parties

A. The a-national rules

We have seen that one of the key points of the judgement of the Tribunale di Padova is the dictum that reference by the parties to a-national rules cannot be recognised as a choice of law under private international law rules.

It therefore seems useful to examine the present state of the debate on a subject which is of significant interest in the context of international contract law.

The issue has been discussed by scholars of international law especially in the last two decades in parallel with the huge expansion of international commerce and with the elaboration by specialised private institutions of sets of rules supposedly more appropriate to govern the contractual relationships arising in the context of international commerce.

There are three ways in which the legal issues arising out of the internationalisation of business transactions have been dealt with: (a) traditionally, the legal system has concentrated on the definition of conflict of law rules to establish which state law would govern the contract. Such conflict of law rules were initially only national rules but they have more recently formed the object of international conventions such as the Rome Convention on the Law Applicable to Contractual Obligations (hereinafter: "the Rome Convention")[21] and the 1955 Hague Convention on the law applicable to the international sales of goods;[22] (b) in the course of time, international conventions of substantive uniform law have been elaborated in order to govern international business transactions or certain aspects thereof (the CISG is probably the most significant of such conventions). These conventions, as confirmed by the present judgement, prevail over resort to conflict of law rules for the reasons mentioned in paragraph 2 *supra*; (c) in parallel with the creation of substantive uniform law conventions, and with the similar aim to obtain the availability of instruments particularly fit for the requirements of modern business and at the same time independent from any specific state law, scholars and businessmen have focused more and more on transnational rules, whether traditionally existing in the business community or created *ad hoc* by specialised private institutions. The a-national rules obviously cover a larger area of transactions and of contractual issues than the substantive uniform law conventions.

The transnational rules utilised in international trade have been traditionally referred to as *lex mercatoria*, *i.e.* "the body of customs and rules of international commerce directly created and followed by businessmen and which usually find their best guarantee in application by international arbitrators and in effective sanctions of professional nature".[23]

Reference is also often made by the parties in their business transactions to "usages of international commerce" and to "general common principles".[24]

Only in more recent times have some specialised private institutions tried to codify these rules. The most significant attempt are the Unidroit Principles of International Commercial Contracts first published in 1994 (herein referred to as "Unidroit Principles" or "the Principles").[25]

B. The prevailing view: a-national rules cannot be the governing law of the contract

The judgment of the Tribunale di Padova confirms the conclusions on which a large majority of scholars[26] now appear to

[20] For a similar situation, applying to the adoption of Incoterms, *see* the Austrian case Oberster Gerichtshof, Austria, 22 October 2001, available at <http://www.cisg.at/1_7701g.htm>.

[21] Rome Convention on the Law Applicable to Contractual Obligations of June 19, 1980, Treaty 80/934, 1980 O.J. (L 266), reprinted in 19 I.L.M. 1492 (1980).

[22] Convention on the Law Applicable to International Sales of Goods, June 15, 1955, 510 U.N.T.S. 147.

[23] VILLANI, *supra* note 4, at 80. For recent analysis of the concept and aspects of the *lex mercatoria see* KLAUS P. BERGER, THE CREEPING CODIFICATION OF THE LEX MERCATORIA (1999); Uwe Blaurock, *The Law of Transnational Commerce*, in THE UNIFICATION OF INTERNATIONAL COMMERCIAL LAW 9 (Franco Ferrari ed., 1996); FILIP DE LY, INTERNATIONAL BUSINESS LAW AND LEX MERCATORIA (1992); Clayton P. Gillette, *The Law Merchant in the Modern Age: Institutional Design and International Usages under the CISG*, 5 CHICAGO JOURNAL OF INTERNATIONAL LAW 157 (2004); Friedrich K. Juenger, *The Lex Mercatoria and Private International Law*, 60 LA. L. REV 1133 (2000); FABRIZIO MARRELLA, LA NUOVA LEX MERCATORIA. PRINCIPI UNIDROIT ED USI DEI CONTRATTI DEL COMMERCIO INTERNAZIONALE (2003).

[24] Sergio M. Carbone, *Il "contratto senza legge" e la Convenzione di Roma del 1980*, in LA CONVENZIONE DI ROMA SULLA LEGGE APPLICABILE ALLE OBBLIGAZIONI CONTRATTUALI 107 (1983).

[25] UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (2nd ed. 2004). Significantly, the Unidroit Principles have been defined by one of their authors as an international "Code" of the law of contracts (*see* MICHAEL J. BONELL, UN "CODICE" INTERNAZIONALE DEL DIRITTO DEI CONTRATTI. I PRINCIPI UNIDROIT DEI CONTRATTI COMMERCIALI INTERNAZIONALI (1995).Reference is also often made to the "Principles of European Contract Law" drawn up by a Commission on European Contract Law chaired by Professor OLE LANDO, THE PRINCIPLES OF EUROPEAN CONTRACT LAW, PART I: PERFORMANCE, NON-PERFORMANCE AND REMEDIES (Ole Lando & H. Beale eds., 1995).

[26] Michael J. Bonell, *The Unidroit Principles of International Commercial Contracts: Why? What? How?*, 69 TUL. L. REV. 1121, 1143-1144 (1995); BONELL, *supra* note 25, at 153-154; Katharina Boele-Woelki, *Principles and Private International Law, The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law: how to apply them to International Contracts*, UNIFORM LAW REVIEW 652, 673 (1996); Ulrich Drobnig, *The Unidroit Principles in the conflict of laws,* UNIFORM LAW REVIEW 385, 394 (1998); Franco Ferrari, *Defining the Sphere of Application of the 1994 "Unidroit Principles of International Commercial Contracts"*, 69 TUL. L. REV. 1225, 1229 (1995); Franco Ferrari, *I principi per i contratti*

agree, at least under the present state of the law and in the countries that have adopted the Rome Convention, and which may be summarised as follows:

(1) the reference to a-national rules is certainly effective as incorporation of the rules in the contract as contractual terms (*materiellrechtliche Verweisung*);

(2) the reference to a-national rules cannot be effective to make such rules the governing law of a contract (*kollisionsrechtliche Verweisung*); the governing law of the contract, the *lex contractus*, must be a state law;

(3) the principal practical effect of this distinction is that through their reference to the a-national rules the parties cannot avoid the application to the contract of the mandatory provisions of the otherwise applicable law;

(4) a distinction must, however, be drawn between the State Courts and Arbitral Tribunals. Before an Arbitral Tribunal the a-national rules chosen by the parties may be recognised as the governing law of the contract, with the effect that the mandatory rules of the otherwise applicable law do not apply.

C. The basis for the prevailing view: the unavoidable part of the state

The conceptual starting point of this reasoning is the statement that "States are the only subjects entitled to establish and give effect to situations having legal relevance".[27]

Although this statement might appear to reflect the "positivistic" school of thinking, it is also accepted by scholars who oppose the so called "state monopoly of the law", who recognise the utmost importance of the will of the parties and who intend to promote private autonomy, particularly in the field of international commerce.[28]

In fact, the recognition of the irreplaceable role of the State goes together with underlining the flexibility of the concept. It is pointed out that the State, the only subject ultimately entitled to confer legal relevance, is not bound to recognise legal relevance only to state originated rules, in line with the classical solution, but may well decide to recognise legal relevance also to rules of a-national origin.[29] Hence the distinction elaborated by German scholars between "state rules" and "state-permitted rules".[30] As a result, there is no conceptual boundary or limit which prevents state legislation (whether domestic legislation or international conventions of private international law) from giving relevance to a set of a-national rules as the governing law of the contract.[31]

This position, which is shared by the large majority of scholars, makes it necessary for a court to examine what recognition is given to the adoption by the parties of a-national rules, by the conflict of laws rules (whether domestic or resulting from international conventions) of the forum,[32] *i.e.* by the conflict of law rules applied by the court.[33]

D. The interpretation of the Rome Convention

In the European countries where the Rome Convention is in force, it is therefore necessary to look in the first place at the system created by said Convention.

According to common interpretation, the Convention, notwithstanding its fundamental recognition of the will of the parties who are given the freedom to choose a governing law even if entirely unconnected with the factual elements of the contract, still only contemplates the choice of a state law.[34]

Some scholars have attempted to give the Convention a more extensive interpretation. These authors argue that the language of Article 3(1) of the Convention, which deals with the law chosen by the parties and refers generally to "law", contemplates a-national rules, when compared with the language of Article 4, which deals with the law applicable in the case of lack of choice and refers to "the law of a country".[35] However, this textual argument is refuted by the majority of authors on the basis of a comprehensive reading of the Rome Convention and in particular of Articles 2, 3(3), 5(2), 6(2) and 7(1), all of which refer to a "foreign law" or to the "law of a country".[36]

commerciali internazionali dell'Unidroit ed il loro ambito di applicazione, CONTRATTO E IMPRESA EUROPA 300, 305-306 (1996); Ferrari, *Das Verhältnis, supra* note 8, at 16-17; Andrea Giardina, *Les Principes UNIDROIT sur les contrats Internationaux*, JOURNAL DU DROIT INTERNATIONAL 547, 549 and note 2 (1995); Andrea Giardina, *Le convenzioni internazionali di diritto internazionale privato e di diritto uniforme nella pratica dell'arbitrato commerciale internazionale*, 8 RIVISTA DELL'ARBITRATO 191, 200 (1998); Paul Lagarde, *Le Nouveau Droit International Privé des Contrats après l'Entrée en Vigueur de la Convention de Rome du 19 juin 1980*, 80 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVE 300, 300-301 (1991); Ole Lando, *Some Issues Relating to the Law Applicable to Contractual Obligations*, KING'S COLLEGE LAW JOURNAL 55, 64 (1997); Peter Mankowski, *Überlegungen zur sach- und interessengerechten Rechtswahl für Vertrage des internationalen Wirtschaftensverkehrs*, RIW 2, 11 and 14 (2003); Ralf Michaels, *Privatautonomie und Privatkodifikation. Zu Anwendbarkeit und Geltung allgemeiner Vertragsrechtsprinzipien*, in RABELSZ 580, 622 (1998); Andreas Spickhoff, *Internationales Handelsrecht vor Schiedsgerichten und staatlichen Gerichten*, RABELSZ 116, 133-34 (1992); VILLANI, *supra* note 4, at 80-82.

27 Carbone, *supra* note 24, at 114.

28 In addition to Carbone, *see* Stefan Leible, *Außenhandel und Rechtssicherheit*, ZEITSCHRIFT FUR VERGLEICHENDE RECHTS-WISSENSCHAFT 286, 315 (1998); Wulf-Henning Roth, *Zur Wählbarkeit nichtstaatlichen Rechts*, FS JAYME 757, 759-60 (2004); Johannes C. Wichard, *Die Anwendung der UNIDROIT- Prinzipien für internationale Handelsvertrage durch Schiedsgerichte und staatliche Gerichte*, RABELSZ 269, 275 (1996).

29 Giardina, *Les Principes*, *supra* note 26, at 562; Leible, *supra* note 28, at 315; Roth, *supra* note 28, at 759-60; Wichard, *supra* note 28, at 283.

30 "Staatliche Normen und staatlich erlaubte Normen". *See* Michaels, *supra* note 26, at 621.

31 Wichard, *supra* note 28, at 283 (stating that "Die positivistische Argumentation ist jedoch in sich nicht stimmig: Wenn Recht alles das ist, was letztlich mit staatlicher Anerkennung gilt und mit staatlicher Hilfe durchgesetzt werden kann, so kann sich diese Anerkennung auch auf der Ebene des Kollisionsrechts vollziehen (...) Rechtlich ist der staatliche Souveräne nicht gehindert, kollisionsrechtliche Verweisungen auf nichtstaatliche Rechtsnormen zu gestatten").

32 Michaels, *supra* note 26, at 593.

33 Giardina,, *Les Principes*, *supra* note 26, at 562.

34 Boele-Woelki, *supra* note 26, at 673; BONELL, *supra* note 25, at 153-154; Drobnig, *supra* note 26, at 388-389; Giardina, *supra* note 26, at 200-201; Lagarde, *supra* note 26 at 300; Michaels, *supra* note 26 at 597; VILLANI, *supra* note 4, at 80-81.

35 Leible, *supra* note 28, at 315; Arthur Hartkamp, *The Use of the UNIDROIT Principles of International Commercial Contracts by National and Supranational Courts*, in THE UNIDROIT PRINCIPLES FOR INTERNATIONAL COMMERCIAL CONTRACTS: A NEW LEX MERCATORIA? ICC/DOSSIER OF THE INSTITUTE OF INTERNATIONAL BUSINESS LAW AND PRACTICE 254, 256 (1995); Andreas Kappus,"*Lex mercatoria" als Geschäftsstatut vor staatlichen Gerichten im deutschen internationalen Schuldrecht*, IPRAX 137, 139-40 (1993); Wichard, *supra* note 28, at 282.

36 Mankowski, *supra* note 26, at 11-12; Michaels, *supra* note 26, at 597.

E. Arbitral Tribunals

These issues may be solved differently where the forum is an Arbitral Tribunal.

The starting point is the same: although arbitration is based on the will of the parties, it still derives its effectiveness from state recognition.[37]

There are, however, several state laws on arbitration, both domestic laws and international conventions, which explicitly permit the parties to an arbitration to choose any "rules of law", not necessarily restricted to those of states.[38]

An example of a similar convention is the 1965 Washington Convention on the Settlement of Investment Disputes.[39]

At the same time it is clear that the Rome Convention, while not contemplating itself the choice of a-national rules, pursuant to Article 21 does not prejudice the application of the international conventions to which a contracting state is a party.[40]

F. Mandatory rules

The most significant consequence of attributing a mere contractual relevance to the adoption of a-national rules, relates to the applicability of mandatory state rules.

If the choice of the a-national rules is considered merely as an agreement to incorporate them into the contract as contractual terms, these rules cannot prevail over the mandatory rules of the *lex contractus*. In other terms, the a-national rules will be binding only to the extent that they do not conflict with the provisions of the *lex contractus*.[41]

This position was confirmed by the decision herein commented, when the Court stated that "since the choice made by the parties does not amount to a private international choice of law, it cannot determine the prevalence of the selected rules over the mandatory rules of the applicable law", and that "by choosing non-state rules and referring to them as contractual clauses the parties may depart only from the dispositive provisions of the applicable law".

G. The negative choice of law

A particular consequence of the position that only state laws can be the governing law of a contract, regards the effects of the so called "negative choice of law".

In the present case the parties had chosen to submit their contract to "the laws and regulations of the International Chamber Commerce of Paris". Since the Court considered this reference "extremely vague and non precise", maybe equivalent to an exclusion of any state law, the Court also faced the problem of how to treat the exclusion of state law altogether. The Court decided that "the choice of the parties cannot have the effect of excluding any state law, which in theory could amount to preventing the application of the CISG as part of the law of the Contracting States, since private international law in force in Italy admits a negative choice of the law but does not admit the exclusion of state law altogether".[42]

H. A different view: a-national rules can be the governing law of a contract also before State Courts

For other scholars, however, the view that a-national rules may be chosen also before State Courts as the governing law of the contract is part of a wholly different legal-philosophical approach.

These scholars reject the orthodox notion that States are the only source of the law; they support a new legal pluralism which should recognise private law-making processes as a separate source of law;[43] and they assert therefore the existence of a transnational commercial law (the *lex mercatoria* and its descendants, such as the Unidroit Principles) as an autonomous and independently developing law of world trade, which need not be impeded by deviation through the channels of national law.[44]

I. Conclusive remarks

More than fifty years ago, in the aftermath of the Second World War, one of the greatest Italian jurists of the 20th century[45] affirmed that the War had prepared the end of national states and of national state sovereignty, so that it would become easier to contest the state appropriation of the field of private law which had started with the Napoleonic codification and to reaffirm that private law is by its nature the subject of "free deliberations". The eminent jurist invited law scholars to operate in order to overcome the dogma of state monopoly of the law and at the same time to bring closer the private laws of Europe and of Anglo-American countries. The adoption of substantive uniform law conventions and of sets of rules of transnational origin that we have observed throughout this commentary is a development of such thinking. However,

See also the comments on the language of the Rome Convention by Giardina, *supra* note 26, at 200.

37 Roth, *supra* note 28, at 760 (stating that "Zwar beruhen Schiedsgerichte in ihrer Legitimation primär auf dem Parteiwillen, doch vollzieht sich ihre Tätigkeit auf der Grundlage staatlicher Anerkennung"). We are considering here only arbitration in law. Arbitration *ex aequo et bono* would need a different reasoning, where there is more room for private autonomy and for a-national rules. The necessity to carefully distinguish the two types of arbitration for the purpose of the relevance of a-national rules is underlined by Giardina, *Les Principes*, *supra* note 26 at 561-62.

38 Giardina, *Les Principes*, *supra* note 26, at 560-63.

39 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, International Centre for Settlement of Investment Disputes, Washington 1965. Article 42.1 of this Convention reads as follows: "The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable".

40 Carbone, *supra* note 24, at 116.

41 *See* Comment 2 to Article 1.4 of the Unidroit Principles; BONELL, *supra* note 25, at 176; Ferrari, *Defining the Sphere*, *supra* note 26, at 1229; Roth, *supra* note 28, at 768.

42 The decision of the Tribunal of Padova also deals with the "opting in" of the CISG by the parties in situations where the CISG would not otherwise be applicable, and affirms that in such cases the CISG should be considered as an a-national rule and consequently should not prevail over the mandatory rules of the otherwise applicable law.

43 *See* Klaus P. Berger, Rezension *of* Fabian Burkart, *Interpretatives Zusammenwirken von CISG und UNIDROIT Principles*, ZEITSCHRIFT FÜR VERGLEICHENDE RECHTSWISSENSCHAFT 252 (2002).

44 *See* Blaurock, *supra* note 23, at 20.

45 FILIPPO VASSALLI, ESTRASTATUALITÀ DEL DIRITTO CIVILE, in STUDI GIURIDICI III, II, 753 (1960) (first published in 1949).

considering the laws currently in force at least in the countries which have adopted the Rome Convention, it appears that a private international law relevance cannot be given by State Courts to the choice of a-national rules. As a result, private international arbitration is at the present time the only playground where a-national rules are extensively utilised. The majority of scholars acknowledge this fact and, rather than insisting on different views or interpretations of the law, aim at its modification. It can be hoped that future developments of the private international law of the countries concerned, such as a reform of the Rome Convention which is currently being considered also in this respect,[46] may lead in time to a larger utilisation of qualified a-national rules such as the Unidroit Principles.[47]

[46] In January 2003 the European Commission published a Green Book on the updating of the 1980 Rome Convention. One of the issues considered was precisely whether in a modified Convention the parties should be entitled to choose a-national rules as governing law of the contract. *See* Roth, *supra* note 28, at 757.

[47] Ferrari, *Das Verhältnis, supra* note 8, at 17 (stating that "Die Wahl nichtstaatlicher Normen als Vertragsstatut *de lege lata* [ist] genauso unzulässig [...] wie die objektive Anknüpfung an diese Normen. Man kann nur hoffen, dass die daran geübte (und durchaus überzeugende) Kritik dazu führen wird, dass die Unidroit-Grundsätze eines Tages auch in staatlichen Gerichten zum Zuge kommen können. Staatliche Richter dürfen aber nicht versuchen, diesen Idealzustand durch ungerechtfertigte Bezugnahme auf die Unidroit-Grundsätze bei der Lösung von Problemen zu schaffen").

BGH (DE) 2 March 2005 – VIII ZR 67/04
CISG Article 7(1), 35(2) lit. a, 36(1) – Lack of contractual conformity at the time of passage of risk – Public laws and regulations – Latent defect

In the sector of wholesale trade and intermediate trade, food products do not conform to the contract if the suspicion that these products are dangerous to health has caused public law measures which exclude their merchantability. This applies even if the suspicion is only acknowledged after the point of time of the passage of risk to the buyer. (*Editor's Headnote*)

Extract from the Decision:[1] "(...) 1. Zutreffend ist der rechtliche Ausgangspunkt des Berufungsgerichts, daß sich die Begründetheit der verfahrensgegenständlichen Kaufpreisforderungen nach den Vorschriften des UN-Kaufrechts (CISG) richtet, weil beide Vertragsparteien ihre Niederlassung in verschiedenen Vertragsstaaten haben (Art. 1 Abs. 1 lit. a CISG). Soweit das Oberlandesgericht allerdings bei der Prüfung der Frage, ob das gelieferte Fleisch im Zeitpunkt des Gefahrübergangs vertragsgemäß im Sinne der Art. 35, 36 CISG war, auf die Senatsurteile vom 16. 4. 1969[2], vom 14. 6. 1972[3] und vom 23. 11. 1988[4] Bezug nimmt, verkennt es, daß diese Entscheidungen noch vor dem Inkrafttreten des CISG in Deutschland und zu § 459 BGB a.F. ergangen sind. Die dort entwickelten Grundsätze können nicht ohne weiteres auf den vorliegenden Fall übertragen werden, obwohl die Sachlage – bestehender Verdacht gesundheitsgefährdender Beschaffenheit von Lebensmitteln im grenzüberschreitenden Handel – ähnlich ist; denn bei der Auslegung der Bestimmungen des CISG sind ihr internationaler Charakter und die Notwendigkeit zu berücksichtigen, ihre einheitliche Anwendung und die Wahrung des guten Glaubens im internationalen Handel zu fördern (Art. 7 Abs. 1 CISG). Die Vorschriften des CISG sind daher grundsätzlich autonom, das heißt aus sich selbst und aus dem Gesamtzusammenhang des Übereinkommens heraus, ohne Rückgriff auf die zu den Normen des unvereinheitlichten nationalen Rechts entwickelten Regeln auszulegen. Nur soweit davon ausgegangen werden kann, daß nationale Regeln auch international anerkannt sind – wobei allerdings Zurückhaltung geboten ist –, kommt ihre Heranziehung im Bereich des CISG in Betracht. (...)

3. Die Minderung ist nur in Höhe von 79.066,- DM (= 40.425,80 EUR) berechtigt, so daß ein Kaufpreisanspruch in Höhe von 7.233,12 EUR noch offensteht.

a) Nach Art. 50 Satz 1 CISG kann der Käufer unabhängig davon, ob der Kaufpreis bereits bezahlt worden ist oder nicht, den Preis in einem dem Minderwert der Ware entsprechenden Verhältnis herabsetzen, wenn die Ware in dem maßgeblichen Zeitpunkt des Gefahrübergangs nicht vertragsgemäß war; dies war – entgegen der Ansicht des Berufungsgerichts allerdings nur teilweise – der Fall (dazu unten b) bis d)). Die Beklagte durfte deshalb den Kaufpreis für die nicht vertragsgemäßen Teillieferungen bis auf Null mindern, weil auch eine andere Möglichkeit der Verwertung des Fleischs – etwa zum Zwecke einer Verfütterung – nicht bestand. Der Umstand, daß die Beklagte, offenbar noch in Unkenntnis des Verdachts der Dioxinbelastung von in Belgien produziertem Rinder- und Schweinefleisch, auf die Rechnungen der Firma G. bereits Teilzahlungen in Höhe von 35.000 DM geleistet hatte, bevor sie weitere Zahlungen ablehnte, steht der Minderung des Kaufpreises nicht entgegen. (...)

Nach Art. 35 Abs. 1 CISG ist eine Ware (nur) dann vertragsgemäß, wenn sie in Menge, Qualität und Art den Anforderungen des Vertrages entspricht. Haben die Parteien nichts anderes vereinbart, so entspricht die Ware dem Vertrag nur, wenn sie sich für die Zwecke eignet, für die Ware der gleichen Art gewöhnlich gebraucht wird (Art. 35 Abs. 2 Buchst. a CISG). Zur Eignung der Kaufsache zum gewöhnlichen Gebrauch zählt im internationalen Groß- und Zwischenhandel vornehmlich auch ihre Wiederverkäuflichkeit (Handelbarkeit).[5] Bei zum menschlichen Verzehr bestimmten Lebensmitteln gehört es zur Wiederverkäuflichkeit, daß die Ware gesundheitlich unbedenklich, das heißt jedenfalls nicht gesundheitsschädlich ist. Soweit es hierfür auf die Einhaltung öffentlich-rechtlicher Vorschriften ankommt, sind grundsätzlich die Verhältnisse im Land des Verkäufers maßgebend, weil vom Verkäufer die Kenntnis der einschlägigen Bestimmungen im Land des Käufers oder – beim Streckengeschäft – im Land des Endabnehmers regelmäßig nicht erwartet werden kann.[6] Etwas anderes gilt allenfalls dann, wenn die Bestimmungen im Verkäufer- und Käuferland im wesentlichen übereinstimmen oder wenn der Verkäufer auf Grund besonderer Umstände mit den Vorschriften des Käuferlandes vertraut ist.[7] Auf die Bestimmungen des Landes Bosnien-Herzegowina, die nach der – bestrittenen – Behauptung der Beklagten Anlaß für die Beschlagnahme und Vernichtung der gesamten Ware waren, kommt es deshalb nicht an.

c) Im maßgebenden Zeitpunkt des Gefahrübergangs – hier: bei Übergabe der Ware am belgischen Sitz der Verkäuferin an den ersten Beförderer (Art. 67 Satz 1 CISG) im April 1999 – bestand allerdings weder der Verdacht einer gesundheitsschädlichen Dioxin-Belastung des Schweinefleischs noch waren – erst recht – die einschlägigen Verbote Belgiens, Deutschlands und der EU erlassen. Dieser Umstand

[1] For a more extensive text of the decision, please refer to section II of this issue, at 127.

[2] BGHZ 52, 51.

[3] VIII ZR 75/71, NJW 1972, 1462 = WM 1972, 1314.

[4] VIII ZR 247/87, NJW 1989, 218.

[5] Senatsurteil BGHZ 129, 75, 81; *Achilles*, CISG, Art. 35 Rn. 4; *Schlechtriem/Schwenzer*, CISG, 4. Aufl., Art. 35 Rn. 14 m.w.Nachw.; *Witz/Salger/Lorenz*, International Einheitliches Kaufrecht, Art. 35 Rn. 9.

[6] BGHZ (Fn. 5), S. 81 m.w.Nachw.; ebenso Beschlüsse OGH (AT) 13. 4. 2000 – 2 Ob 100/00w, ZfRVgl 2000, 231; und OGH (AT) 27. 2. 2003 – 2 Ob 48/02a, CISG-online Nr. 794.

[7] BGHZ (Fn. 5), S. 84.