GLOBAL UNIFORM SALES LAW – WITH A EUROPEAN TWIST? CISG INTERACTION WITH EU LAW+

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1 INTRODUCTION

According to its Preamble, the *United Nations Convention on Contracts for the International Sale of Goods* of 11 April 1980 (CISG) aims at the 'removal of legal barriers in international trade' through 'the adoption of uniform rules which govern contracts for the international sale of goods'. In somewhat similar terms, the Treaty establishing the European Community calls for 'the progressive abolition of restrictions on international trade' and 'the approximation of the laws of Member States to the extent required for the functioning of the common market'[1], thus providing for essentially the same goals, albeit on a regional scale.[2]

This parallel forms part of a more general phenomenon that we have seen in recent years, namely that regional organisations of States – in diplomatic terms, they are nowadays referred to as 'regional economic integration organisations'[3] – have commenced work on the harmonisation or unification of their contract laws. Perhaps the most prominent example is the European Union, but similar developments are under way in the OHADA in Western Africa,[4] in the Mercado Comun del Sur

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1 Preamble and Article 3(1)(h) of the Treaty establishing the European Community, *Official Journal of the European Union* No. C 321 of 29 December 2006, at pp. 37 ff.

2 Schroeter, U., *UN-Kaufrecht und Europäisches Gemeinschaftsrecht: Verhältnis und Wechselwirkungen*, 2005, Sellier European Law Publishers, Munich, at § 16 para. 9.

3 See, e.g., the wording of Article 29 of the Hague Convention on Choice of Court Agreements concluded on 30 June 2005.

4 See Castellani, L.G., "Ensuring Harmonisation of Contract Law at Regional and Global Level: the United Nations Convention on Contracts for the International Sale of Goods and the Role of

(Mercosur)[5] in South America, and possibly in the future within the North American Free Trade Area (NAFTA).[6] Since the law of international sales contract has already been unified globally through the CISG, these developments lead to a coexistence of global and regional laws. This raises a more general question: what does this phenomenon mean in practical terms, and why is it important?

For the purposes of the present discussion, it may be helpful to think of the sales laws of the world as dishes on the menu of a global restaurant, from which the customers – the buyers and sellers of the world – may choose. Some of the dishes taste good to buyers and sellers, others only to one of the two, some dishes taste exotic or surprising,[7] and yet others may even be considered inedible by some of the world's customers. Many of the dishes listed, quite simply, will not be known to the merchants of most countries,[8] and there may not be a waiter available who can explain their taste and consistence.

But there is one dish on the menu that almost everybody knows. It hails from the city we are meeting in today, which has given it its name: the Viennese *Schnitzel*. It is a traditional dish that has been carefully developed over decades by excellent chefs, it has a sophisticated taste, and it is available in most parts of the world. I might call it a 'global dish'. In terms of sales laws, this is the Vienna Sales Convention, or the CISG.

Other dishes are regional in nature, and have not quite achieved a similar acceptance throughout the world. In the case of EU laws, which are largely drafted and adopted in Brussels, one may compare them to Brussels sprouts. If you imagine for a moment to be served a Viennese *Schnitzel* with Brussels sprouts on top, you can almost taste that the coexistence of the CISG with EU law is not necessarily without problems. Indeed, the 'fusion' between global and regional laws raises many interesting aspects. I will concentrate on two of them, namely the interaction of the CISG and European private law at the law-making level (in Part 3 of this article) and the role of the European Court of Justice in connection with the CISG's interpretation (in Part 4). Before turning to these matters, I will briefly touch upon the history and status quo of the Convention within the European Union (in Part 2).

UNCITRAL" (2008) *Uniform Law Review* 115, at pp. 119ff; Schroeter, U., "Das einheitliche Kaufrecht der afrikanischen OHADA-Staaten im Vergleich zum UN-Kaufrecht" (2001) *Law in Africa* 163.

5 See Ramos da Silva, E., *Rechtsangleichung im MERCOSUL*, 2002, Nomos, Baden-Baden, at pp. 77ff.

6 But see the recent assessment by Kronke, H., "UNIDROIT 75th Anniversary Congress on Worldwide Harmonisation of Private Law and Regional Economic Integration: Hypotheses, Certainties and Open Questions" (2003) *Uniform Law Review* 10, at p. 12: 'no institutionalised private-law agenda'.

7 *Cf.* Honnold, J.O., *Uniform Law for International Sales under the 1980 United Nations Convention*, 3rd ed., 1999, Kluwer, The Hague, at para. 30: who refers to the 'outdated legal formulae that still complicate domestic sales law. One may delight in legal antiques and in the patina of ingenious circumlocutions that have had to substitute for fundamental reform but these aesthetic values may not be appreciated by a modern merchant and, more especially, by his trading partner from a different legal tradition'.

8 *Ibid.*, at para. 45: pointing to the 'uncertainty that was inherent in the likelihood that the applicable domestic law would be unknown (and often inscrutable) to at least one of the parties'.

2 *THE CISG IN THE EUROPEAN UNION – HISTORY AND STATUS QUO*

2.1 *HISTORY*

The role of the European Union within the context of the global sales law unification goes back to the predecessor of the CISG, the Hague Sales Laws (ULIS[9] and ULF[10]) of 1964.[11] While the negotiation of the Hague Sales Laws was at that stage handled by the Member States of the then European Economic Community (EEC), the EEC sent its own observers to the 1964 Diplomatic Conference in The Hague. After the Conference, the then six EEC Member States agreed between themselves on the adoption of ULIS and ULF, in order to thereby establish a uniform sales law within the EEC.[12] This common approach was subsequently extended to the three States which joined the EEC in 1973 and led *inter alia* to the United Kingdom adopting the Hague Sales Laws (which, as not many know, are still in force in the UK today). As Professor Ziegel explains, 'The UK's adherence was inspired by its joining the Common Market and was apparently regarded by the British government of the day as a gesture of goodwill towards its new economic and political partners'[13].

The coordinated (Western) European approach towards the Hague Sales Laws eventually was unsuccessful, since it did not prevent the EEC Member States from an (uncoordinated) declaration of various reservations under ULIS and ULF, which greatly diminished the intra-European uniformity in the implementation of this early global sales law. At the same time (and somewhat paradoxically), the existing coordination may have enhanced the impression in other parts of the world that the Hague Sales Laws were 'too European'[14].

During the drafting of the CISG within UNCITRAL and at the 1980 Diplomatic Conference in Vienna, the EC coordination was therefore deliberately conducted in a less visible manner.[15] Nevertheless, as early as at the Conference's closing ceremony, it became obvious that the interest in using global sales law for the purposes of

9 Convention relating to a Uniform Law on the International Sale of Goods, done at The Hague, 1 July 1964.

10 Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, done at The Hague, 1 July 1964.

11 See Schroeter, U., *supra* fn 2, at § 2 paras. 2 ff.

12 Herber, R., "Das VN-Übereinkommen über internationale Kaufverträge" (1980) *Recht der Internationalen Wirtschaft* 601-2; Plantard, J.-P., "Un nouveau droit uniforme de la vente internationale: La Convention des Nations Unies du 11 avril 1980" (1988) *Clunet* 311, at p. 313.

13 Ziegel, J., 'The Future of the International Sales Convention from a Common Law Perspective' (2000) 6 *New Zealand Business Law Quarterly* 336, at p. 337, fn. 4.

14 *Cf.* Date-Bah, S.K., "The Convention on the International Sale of Goods from the Perspective of the Developing Countries" in *La vendita internazionale – La Convenzione di Vienna dell' 11 Aprile 1980, Atti del Convegno di Studi di S. Margherita Ligure (26-28 settembre 1980)*, 1981, Guiffrè, Milano, at p. 26; Honnold, J.O., *Uniform Law for International Sales*, at para. 9.

15 See Schroeter, U., *supra* fn 2, at § 2 paras. 13 ff.

European integration had not ceased to exist. This is illustrated by the following statement of the head of the German delegation: 'The Federal Republic of Germany had not yet signed the present Convention because its Government wished to study it together with other countries, especially with a view to its signature in common by all Common Market countries. Such an approach was in his view desirable'[16].

2.2 *STATUS QUO*

Since then, the Convention has indeed managed to become 'the most relevant' international instrument harmonising substantive rules of contract law within the EU:[17] among the current twenty-seven Member States of the EU, no less than twenty-three have ratified the CISG. This means that the vast majority of national courts in the EU apply the Convention to most international sales law cases that end up on their docket. As a matter of fact, most of the current CISG Contracting States within the EU – thirteen out of twenty-three[18] – acceded to the CISG even before they became part of the EU. For these states, global uniform sales law therefore has a longer tradition than regional harmonization within the EU.

3 *THE CISG AND THE EUROPEAN HARMONISATION OF PRIVATE LAW*

Most academic discussions about the coexistence of global and regional laws focus on their interaction at the law-making level. The CISG and the European harmonisation of private law is therefore the first of the two areas we are going to look at.

3.1 *THE CISG – INSPIRING EUROPEAN LAW MAKERS*

I start by addressing the ways in which the CISG has inspired European law makers. In other words, has the 'global' Viennese *Schnitzel* influenced cooks in Brussels?

3.1.1 *THE CISG AS A MODEL FOR EU LAW*

In the past, the CISG has sometimes been used by EU law makers as a model for drafting European rules of contract law,[19] thus serving as a vehicle for the

16 Herber, R., in *United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March – 11 April 1980, Official Records: Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committees*, 1981, United Nations, New York, at p. 264. On the steps that were subsequently taken in this matter, see Schroeter, U., *supra* fn 2, at § 2 paras. 20-22.

17 Communication from the Commission to the European Parliament and the Council on European Contract Law of 11 July 2001, COM (2001) 398 final, at para. 18.

18 Austria, Bulgaria, the Czech Republic, Estonia, Finland, Hungary, Latvia, Lithuania, Poland, Romania, the Slovak Republic, Slovenia and Sweden.

19 On the Convention's use as a model for domestic and regional law reform, see Schlechtriem, P., "Introduction" in Schlechtriem, P. and Schwenzer, I. (eds.), *Commentary on the UN Convention on the*

advancement of uniform domestic law within the European Union.[20] The European Parliament, in its 2001 Resolution on the approximation of the civil and commercial law of the Member States, explicitly referred to the Convention as 'a basis for a future common body of law'[21].

3.1.1.1 THE CONSUMER SALES DIRECTIVE (1999)

The most important example for the Convention's influence on lawmaking in the EU is certainly the Consumer Sales Directive[22] which was adopted in 1999: its rules were – at least at the drafting stage – clearly based on the CISG,[23] and one author even described the Directive as a 'copy of the CISG on the consumer level'[24]. Such an inspiration of regional law by global law is generally, I believe, a good thing, since it approximates both bodies of law and thereby makes it significantly easier for merchants, legal counsel and the courts to navigate through the system of uniform laws.

It must, however, be noted that the text of the Consumer Sales Directive, as it was eventually adopted, differs in a number of important aspects from the CISG.[25] Speaking in terms of Art. 35 CISG, the Directive does therefore 'not possess the qualities of goods which have been held out as a model' (Art. 35(2)(c) CISG), although the differences may not always be immediately obvious. Just like the

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International Sale of Goods (CISG), 2nd ed., 2005, Oxford University Press, Oxford, at p. 10; Schroeter, U., *supra* fn 2, at § 16 paras. 43 ff.

20 Bridge, M., "A Comment on 'Towards A Universal Doctrine of Breach – The Impact of the CISG, by Jürgen Basedow'" (2005) 25 *International Review of Law and Economics* 501, at p. 502.

21 European Parliament resolution on the approximation of the civil and commercial law of the Member States of 15 November 2001, *Official Journal of the European Communities* No. C 140 E of 13 June 2001, at p. 539.

22 Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, *Official Journal of the European Communities* No. L 171 of 7 July 1999, at pp. 12-16.

23 See notably Commission of the European Communities, Proposal for a European Parliament and Council Directive on the sale of consumer goods and associated guarantees of 18 June 1996, COM (1995) 520, *Official Journal of the European Communities* No. C 307 of 16 October 1996, at p. 8: 'This proposal for a Directive will also contribute to simplifying existing national rules, by approximating them to the law in force on the international sale of goods between professionals (Vienna Convention of 1980) […]'. The Proposal contains numerous references to the CISG, often stating that a proposed Directive provision is 'based directly' on a provision in the Convention.

24 Micklitz, H.-W., "Ein einheitliches Kaufrecht für Verbraucher in der EG?" (1997) *Europäische Zeitschrift für Wirtschaftsrecht* 229, at p. 230.

25 See in detail Magnus, U., "Der Stand der internationalen Überlegungen: Die Verbrauchsgüterkauf-Richtlinie und das UN-Kaufrecht" in Grundmann, S., Medicus, D. and Rolland, W. (eds.), *Europäisches Kaufgewährleistungsrecht: Reform und Internationalisierung des deutschen Schuldrechts*, 2000, Heymanns, at pp. 79 ff; Mittmann, A., *Einheitliches UN-Kaufrecht und europäische Verbrauchsgüterkauf-Richtlinie: Konkurrenz- und Auslegungsprobleme*, 2004, Peter Lang, Frankfurt, at p. 75 ff; Schroeter, U., *supra* fn 2, at § 6 paras. 188–290 and § 15 paras. 89–120; Troiano, S., "The CISG's Impact on EU Legislation" (2008) *Internationales Handelsrecht* 221, at pp. 225 ff.

Viennese *Schnitzel*, which is only 'the real thing' when made of veal,[26] you may sometimes also come across versions which are made of pork but look almost the same. In case of our 'legal' dishes, this may well have practical effects on the interpretation level, which I will address later.[27]

3.1.1.2 OTHER EC DIRECTIVES

Apart from the Consumer Sales Directive, there are a number of other EC Directives and European legal acts which, at least in the opinion of some authors, may also have been influenced by the CISG.[28] Support for this claim, though certainly arguable, seems to be difficult to find within the legislative history of these legal instruments; and the Convention's model effect – if any – can only have influenced their wording to a much lesser extent.

In spite of this caveat, it has been argued (by a European Commission official) that the EC Directive on Late Payments (2000)[29] was inspired by the CISG.[30] Other authors, however, took the opposite view and have accused the European Commission (who was responsible for drafting the proposal for the Directive on Late Payments) of 'blindness towards the [EU] Member States' international Conventions'[31], since at least the first draft for the Directive was, in a number of ways, incompatible with provisions of the CISG.[32]

As I have demonstrated in detail elsewhere,[33] the text of the Directive on Late Payments as finally adopted still conflicts with the Convention,[34] thus making it

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26 Note that in Austria, the official *Codex Alimentarius Austriacus* (*Österreichisches Lebensmittelbuch* – Austrian Food Code) issued in accordance with § 76 of the *Austrian Lebensmittelsicherheits- und Verbraucherschutzgesetz* explicitly provides that a dish may only be referred to as *Wiener Schnitzel* if made of veal.

27 See *infra* Part 4.

28 *Cf.* Schroeter, U., *supra* fn 2, at § 16 paras. 45–46.

29 Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions, *Official Journal of the European Communities* No. L 200 of 8 August 2000, at pp. 35–38.

30 Schulte-Braucks, R., "Zahlungsverzug in der Europäischen Union" (2001) *Neue Juristische Wochenschrift* 103, at p. 107; Schulte-Braucks, R., "Auf dem Wege zu einem europäischen Privatrecht: Das Beispiel der Richtlinie zur Bekämpfung von Zahlungsverzug im Geschäftsverkehr" in Schwintowski, H.-P. (ed.), *Entwicklungen im deutschen und europäischen Wirtschaftsrecht: Symposium zum 65. Geburtstag von Ulrich Immenga*, 2001, Nomos, pp. 75 and 88.

31 Freitag, R., "Ein Europäisches Verzugsrecht für den Mittelstand?" (1998) *Europäische Zeitschrift für Wirtschaftsrecht* 559, at p. 562.

32 See *ibid.*, at p. 562; Hager, G., "Article 64" in Schlechtriem, P., *Kommentar zum Einheitlichen UN-Kaufrecht – CISG –*, 3rd ed., 2000, C.H. Beck, Munich, at para. 5: 'schwerer Einbruch in das System des CISG'.

33 Schroeter, U., *supra* fn 2, at § 6 paras. 337–399 and § 15 paras. 121–166.

34 Schlechtriem, P., *Internationales UN-Kaufrecht*, 4th ed., 2007, Mohr, Tübingen, at paras. 319, 345a.

necessary to decide whether the Convention or the Directive should eventually prevail.[35]

One author argued that the EC Package Travel Directive (1990)[36] and the EC Credit Transfer Directive (1997)[37] were also influenced by the CISG,[38] although such an inspiration does not seem immediately apparent.[39] One last example of a European legal rule that was – clearly – modelled on the CISG is Art. 18 of the *Rome Convention on the Law Applicable to Contractual Obligations* of 19 June 1980 (which has recently been replaced by a EC Regulation[40]): according to Giuliano and Lagarde's official report on the Rome Convention, this provision was based on the wording of Art. 7(1) CISG.[41]

3.1.2 THE CISG AS A REASON FOR REFORMING EU LAW: THE BRUSSELS REGIME ON JURISDICTION

Occasionally, the CISG has also inspired European law makers in the opposite way, namely to reform EU law so as to *reduce* the Sales Convention's impact.

3.1.2.1 ARTICLE 5 NO. 1 OF THE BRUSSELS CONVENTION: TURNING THE CISG INTO A EUROPEAN 'EXPORTER'S DARLING'

This was notably the case with respect to the so-called 1968 'Brussels' *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*, applicable from 1973 to 2002, which governed the question which court within the EU had jurisdiction over disputes *inter alia* arising out of international sales contracts. Article 5 No. 1 of the Brussels Convention provided that '[a] person domiciled in a Contracting State may, in another Contracting State, be sued [...] in matters relating to a contract, in the courts for the place of performance of the obligation in question'. In

35 See *infra* Part 3.2.

36 Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, *Official Journal of the European Communities* No. L 158 of 23 June 1990, at pp. 59–64.

37 Directive 97/5/EC of the European Parliament and of the Council of 27 January 1997 on cross-border credit transfers, *Official Journal of the European Communities* No. L 43 of 14 February 1997, at pp. 25–30.

38 Magnus, U., "The CISG's Impact on European Legislation" in Ferrari, F. (ed.), *The 1980 Uniform Sales Law: Old Issues Revisited in the Light of Recent Experiences*, 2003, Sellier European Law Publishers, pp. 129 and142–3; Magnus, U., "Europäisches Vertragsrecht und materielles Einheitsrecht – künftige Symbiose oder störende Konkurrenz?" in Mansel, H.-P. et al (eds.), *Festschrift für Erik Jayme*, 2004, Sellier European Law Publishers, p. 1307, at p. 1316.

39 In agreement Troiano, S., *supra* fn 25, at pp. 233–4.

40 Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), *Official Journal of the European Union* No. L 177 of 4 July 2008, at pp. 6–16. This 'Rome I Regulation' will apply to contracts concluded after 17 December 2009.

41 Giuliano, M. and Lagarde, P., *Report on the Convention on the law applicable to contractual obligations, Official Journal of the European Communities* No. C 282 of 31 October 1980, at pp. 1–50.

the famous *Tessili* case, one of the first cases decided under the Brussels Convention, the European Court of Justice held that the place of performance must be determined by resorting to the substantive law applicable to the contract.[42] In cases where the CISG was the law of the contract, it followed that the place of performance of both the seller's obligation to deliver conforming goods and the buyer's obligation to pay the price was at the seller's place of business (Arts. 31 or 57 CISG respectively).[43]

Accordingly, Art. 5 No. 1 of the Brussels Convention always allowed the seller to litigate at home whenever he had concluded a CISG contract. Not surprisingly, this (somewhat accidental) tactical advantage, which the interaction between the Brussels Convention and the Vienna Convention gave the seller, reputedly turned the CISG into something of an 'exporter's darling'[44], and it might have been the reason why European courts were comparatively quick in generating a large number of CISG judgments in the Sales Convention's early years.

There lies a certain irony in this interaction between European procedural law and global uniform sales law, which becomes apparent when looking at the reasoning that the European Court of Justice gave in *Tessili*:

> *Having regard to the differences obtaining between national laws of contract and to the absence at this stage of legal development of any unification in the substantive law applicable, it does not appear possible to give any more substantial guide to the interpretation of the reference made by Article 5(1) to the 'place of performance' of contractual obligations.*[45]

Tessili, which involved an Italian-German contract for the sale of goods, was decided by the European Court of Justice in 1976, but the sales contract that initially gave rise to the dispute had already been concluded in April 1971. At that point in time not even the ULIS had entered into force in Germany (where the buyer had brought his

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42 European Court of Justice, Judgment of 6 October 1976 in Case 12/76 – *Industrie Tessili Italiana Como v Dunlop AG*, at para. 13.

43 See European Court of Justice, Judgment of 29 June 1994 in Case C-288/92 – *Custom Made Commercial Ltd v. Stawa Metallbau GmbH*, at paras. 27–28 (applying Article 59 (1) ULIS); Advocate General Y. Bot, Opinion of 15 February 2007 in Case C-386/05 – *Color Drack GmbH v. LEXX International Vertriebs GmbH*, at para. 67 (on the CISG). *Cf.* also Schroeter, U., "Vienna Sales Convention: Applicability to Mixed Contracts" and Interaction With the 1968 Brussels Convention" (2001) 5 *Vindobona Journal* 74, at pp. 78 ff; Witz, C., "The Place of Performance of the Obligation to Pay the Price: Art. 57 CISG" (2005–06) 25 *Journal of Law and Commerce* 325, at p. 327 (both with further references to domestic case law).

44 See Gebauer, M., *Grundfragen der Europäisierung des Privatrechts,* 1998, Universitätsverlag C. Winter, Heidelberg, at p. 234; Schulte-Nölke, H., "Eine neue Chance für das UN-Kaufrecht" (2003) *Zeitschrift für das Gesamte Schuldrecht* 401.

45 European Court of Justice, Judgment of 6 October 1976 in Case 12/76 – *Industrie Tessili Italiana Como v Dunlop AG*, at para. 14 (emphasis added).

action),[46] so the Court of Justice's statement about the absence of any unification in the applicable substantive law was accurate, at least in the particular case concerned. Once, however, the unification of substantive sales law had moved forward – first through the increasing implementation of the ULF and the ULIS within the European Communities, and later through the adoption and ratification of the CISG – it turned out that the global uniform sales law contained rules on the place of performance which, when applied in connection with Art. 5 No. 1 of the Brussels Convention, led to results that were undesirable from a procedural point of view. *Jamais parfait!*

3.1.2.2 ARTICLE 5 NO. 1 OF THE NEW BRUSSELS I REGULATION: PROBLEM SOLVED?

The procedural effects that Arts. 31 and 57 CISG had under the Brussels Convention attracted a lot of criticism.[47] The impact of these critical voices was enhanced by the fact that, practically speaking, Art. 5 No. 1 had become the most important basis for a special jurisdiction under the Brussels Convention. In an attempt to stop the Brussels regime from 'borrowing' the place of performance from the Vienna Sales Convention,[48] the European Commission suggested a revised version of Art. 5 which was adopted as part of the Brussels I Regulation,[49] that entered into force in 2002 and replaced the Brussels Convention.

The Commission claims that the new Art. 5 employs 'a pragmatic determination of the place of performance'[50]. It does so by providing that 'for the purpose of this provision [...], the place of performance of the obligation in question shall be [...] in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered'. Has this new Art. 5 adapted EU law on jurisdiction so that it need not rely on the CISG anymore? This is difficult to say: at least the Italian Supreme Court is of the opinion that under the revised Art. 5 of the Brussels I Regulation the place of performance still has to be determined in

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[46] The ULIS, implemented in the Federal Republic of Germany through the *Einheitliches Gesetz über den internationalen Kauf beweglicher Sachen* of 17 July 1973, had entered into force in Germany on 16 April 1974 and applied to contracts concluded on or after that date.

[47] See Kropholler, J. and von Hinden, M., "Die Reform des europäischen Gerichtsstands am Erfüllungsort (Art. 5 Nr. 1 EuGVÜ)" in Schack, H. (ed.), *Gedächtnisschrift für Alexander Lüderitz*, 2000, Beck, at pp. 401 and 402 with numerous references.

[48] That this was indeed the primary motive for the revision, is being correctly pointed out by Kohler, C., "Revision des Brüsseler und des Luganer Übereinkommens über die gerichtliche Zuständigkeit und die Vollstreckung gerichtlicher Entscheidungen in Zivil- und Handelssachen – Generalia und Gerichtsstandsproblematik" in Gottwald, P. (ed.), *Revision des EuGVÜ – Neues Schiedsverfahrensrecht*, 2000, Gieseking, p. 1, at pp. 12 and 16: 'eigentliches Revisionsmotiv'.

[49] Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *Official Journal of the European Communities* No. L 12 of 16 January 2001, at pp.1–23.

[50] Commission of the European Communities, Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 14 July 1999, COM(1999) 348 final, at p. 14.

accordance with the CISG, notably its Article 31(a) CISG.[51] Some authors have adopted the same position.[52] Since summer 2008, a reference for a preliminary ruling[53] has been pending before the European Court of Justice – we will have to wait and see what comes out of it.

For the moment, one is tempted to conclude that the waiters in the Brussels restaurant did notice that Viennese *Schnitzel* may cause unfortunate effects when served on the wrong type of tableware but reacted merely by replacing the previously-used paper plates with plates made from a different kind of paper.

3.2 CONTRARY EXAMPLES: IGNORING THE ELEPHANT IN THE ROOM?

3.2.1 A EUROPEAN 'OPTIONAL INSTRUMENT' AND THE CISG

European law making is, however, not always in harmony with the CISG. I will leave aside examples from past EC Directives which include provisions that are in contradiction to provisions of the Vienna Sales Convention – the EC Late Payments Directive has already been mentioned[54] – and will concentrate on the EU's ongoing plans to create a so-called 'optional instrument'. With this somewhat strange term, Brussels refers to a legal instrument that will lay down uniform European rules on various areas of contract law,[55] among others the law of sales.[56] It will be 'optional',

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51 Corte Suprema di Cassazione (Italy), Judgment of 27 September 2006 – *Saneco S.A. v Toscoline S.r.l.*, (2008) *Zeitschrift für Europäisches Privatrecht* 165, at p. 167ff; Corte Suprema di Cassazione (Italy), Judgment of 3 January 2007 – *Bourjois S.A.S. v Gommatex Poliuretani S.p.A.*; similarly Tribunale di Padova (Italy), Judgment of 10 January 2006, (2007) *Rivista di diritto internationale privato e processuale* 147.

52 Mankowski, P., "Der Erfüllungsortsbegriff unter Art. 5 Nr. 1 lit. b EuGVVO – ein immer größer werdendes Rätsel?" (2009) *Internationales Handelsrecht* 46, at p. 55ff; Schlosser, P., *EU-Zivilprozessrecht*, 3rd ed., 2009, C.H. Beck, Munich, Art. 5, at para.10a.

53 Bundesgerichtshof (Germany), Reference for a preliminary ruling of 22 August 2008 in Case C-381/08 – *Car Trim GmbH v KeySafety Systems SRL*, *Official Journal of the European Union* No. C 301 of 22 November 2008, at pp. 15–16.

54 See *supra* Part 3.1.1.2 with references.

55 See Communication from the Commission to the European Parliament and the Council: 'A More Coherent European Contract Law – An Action Plan' of 12 February 2003, COM (2003) 68 final.

56 It indeed seems to be commonly agreed that the law of sales will be included in a uniform European contract law, whatever form such a project may eventually take; see Heutger, V., "Steps towards a European Sales Law" (2003) 7.5 *Electronic Journal of Comparative Law* 1; Huber, U., "Einheitliches Kaufrecht und europäische Privatrechtsvereinheitlichung" in Due, O. et al (eds.), *Festschrift für Ulrich Everling*, 1995, Nomos, at pp. 493 and 496; Staudenmayer, D., "Ein optionelles Instrument im Europäischen Vertragsrecht?" (2003) *Zeitschrift für Europäisches Privatrecht* 828, at p. 829; von Bar, C., "A European Civil Code, international agreements and European directives" in *European Parliament, The Private Law System in the EU: Discrimination on Grounds of Nationality and the Need for a European Civil Code, Working Paper, Legal Affairs Series – JURI 103 EN*, 1999, Luxembourg, at pp. 147, 149 para. 6: 'undoubtedly'.

since the parties will be able to 'opt in' or 'opt out' of it.[57] These plans obviously have a significant importance for the CISG, since they could practically result in a European counterpart to the global Sales Convention.

3.2.2 *HOW TO AVOID OVERLAPS BETWEEN AN OPTIONAL INSTRUMENT AND THE CISG*

This raises the question of how to avoid overlaps between a European optional instrument and the CISG. Two approaches spring to mind: First, one might doubt if there is at all a need for sales law provisions in the optional instrument. After all, the CISG already provides balanced and well-tested rules for sales contracts, and the Convention is also of an 'optional' nature by virtue of Art. 6 CISG. Besides, it comes with the additional advantage of offering identical rules for international contracts within the EU and with parties in third countries. One might therefore convincingly make a case for leaving the law of sales out of the proposed optional instrument, and instead using the global CISG in order to fill this gap in the regional law.[58]

In addition, the EU could (and should) use its legislative powers and – either by way of an EC Regulation (Art. 249(2) EC Treaty) or an EC Decision (Art. 249(4) EC Treaty)[59] – compel the four remaining EU States which have not yet ratified the CISG[60] to do so as soon as possible.[61] Such a step could further be supplemented by obliging those CISG Contracting States within the EU which have declared reservations under the Convention[62] to withdraw them.[63]

This solution is preferable but may not happen for a variety of reasons.[64] Indeed, the rules for international sales of goods contained in all current drafts for an optional

57 See Basedow, J., "Ein optionales europäisches Vertragsgesetz – Opt-in, Opt-out, wozu überhaupt?" (2004) *Zeitschrift für Europäisches Privatrecht* 1.

58 Drobnig, U., "Scope and general rules of a European civil code" (1997) *European Review of Private Law* 489, at p. 489; Magnus, U., *supra* fn 25, at p. 83; Magnus, U., *supra* fn 38, at p. 1320; Tilmann, W., "Eine Privatrechtskodifikation für die Europäische Gemeinschaft?" in Müller-Graff, P.-C. (ed.), *Gemeinsames Privatrecht in der Europäischen Gemeinschaft*, 1993, Nomos, Baden-Baden, p. 485, at p. 488; probably also Staudenmayer, D., *supra* fn 56, at p. 836.

59 Schroeter, U., *supra* fn 2, at § 19 para. 57.

60 Ireland, Malta, Portugal and the United Kingdom.

61 Basedow, J., "The Communitarization of the Conflict of Laws under the Treaty of Amsterdam" (2000) 37 *Common Market Law Review* 687, at p. 702; Magnus, U., *supra* fn 38, at p. 1320; Schroeter, U., *supra* fn 2, § 19 at paras. 48–62.

62 Reservations in accordance with Arts. 92 and 94 CISG have been declared by Denmark, Finland and Sweden, reservations in accordance with Article 95 CISG by the Czech and the Slovak Republics, and reservations in accordance with Art. 96 CISG by Hungary, Latvia, and Lithuania.

63 *Cf.* Schroeter, U., *supra* fn 2, § 19 at paras. 73–81.

64 See e.g. Mak, V., *Performance-Oriented Remedies in European Sale of Goods Law*, 2009, Hart Publishing, Oxford, at p. 31, who argues against the solution proposed here.

instrument differ from the CISG's rules in a significant number of respects.[65] Therefore, a second (and probably more realistic) approach would be to include an explicit clause (a so-called *Relationsnorm*)[66] in the optional instrument stating that the CISG shall prevail in cases of conflicts between the two instruments.[67]

3.2.3 *RESOLVING CONFLICTS BETWEEN EUROPEAN LAW AND THE CISG: VIENNA TRUMPS BRUSSELS*

However, since explicit clauses of the kind mentioned above are not contained in every EU legal act that differs from the CISG, conflicts between EU law and the CISG are always possible. If such a conflict arises, courts in EU States will find themselves in a rather difficult position: on the one hand, they are legally bound to apply the EC Directive or Regulation, because this is an obligation flowing from the European treaties, and on the other hand they are legally bound to apply the CISG, since the CISG is a treaty binding the respective States under public international law. Much has been written on the question how this conflict is to be resolved.[68] The prevailing opinion correctly assumes that Art. 94 CISG (rather than Art. 90 CISG[69]) is the relevant starting point:[70] neither EC Directives nor EC Regulations qualify as 'international agreements' within the meaning of Art. 90 CISG, but rather they result in EU Member States having the same or closely related legal rules on matters governed therein, as addressed in Art. 94 CISG. This so-called *Relationsnorm* would allow for those regionally harmonised legal rules to prevail over the CISG, but it

65 See Hondius, E. et al, *Principles of European Law: Sales,* 2008, Sellier, Munich, at p. 104 (explaining the Principles of European Law's deviations from the CISG); Troiano, S., *supra* fn 25, at pp. 235ff (on the Draft Common Frame of Reference).

66 On this legal term, see Schroeter, U., *supra* fn 2, § 7 at para. 27.

67 *Ibid.,* § 18 at paras. 69–70.

68 See with further references *ibid.,* at §§ 5–15.

69 For the application of Art. 90 CISG to acts of EC secondary law, see, e.g., Herber, R., "UN-Kaufrechtsübereinkommen: Produkthaftung – Verjährung" (1993) *Monatsschrift für Deutsches Recht* 105, at p. 106; Herber, R., "Mangelfolgeschäden nach dem CISG und nationales Deliktsrecht" (2001) *Internationales Handelsrecht* 187, at p. 191 (but see subsequently Herber, R., "Das Verhältnis des CISG zu anderen Übereinkommen und Rechtsnormen, insbesondere zum Gemeinschaftsrecht der EU" (2004) *Internationales Handelsrecht* 89, at p. 92, where said author adopted a decisively modified approach); Schmid, C., *Das Zusammenspiel von Einheitlichem UN-Kaufrecht und nationalem Recht: Lückenfüllung und Normenkonkurrenz,* 1996, Duncker & Humblot, Berlin, at p. 105; Siehr, K., "Artikel 90" in Honsell, H. (ed.), *Kommentar zum UN-Kaufrecht,* 1997, Springer, Berlin, at para. 7; Witz, W., "'Artikel 90" in Witz, W., Salger, H.-C. and Lorenz, M., *International Einheitliches Kaufrecht: Praktiker-Kommentar und Vertragsgestaltung zum CISG,* 2000, Verl. Recht und Wirtschaft, Heidelberg, at para. 3.

70 Brunner, C., *UN-Kaufrecht – CISG: Kommentar,* 2004, Stämpfli, Bern, Einl., at para. 16; Ferrari, F., "Universal and Regional Sales Law: Can They Coexist?" (2003) *Uniform Law Review* 177, at p. 182; Janssen, A., "The Final seller's right of redress under the Consumer Sales Directive and its complex relationship with the CISG" (2003) *European Legal Forum* 181, at p. 183; Magnus, U., *supra* fn 38, at p. 131; Schlechtriem, P. in Schlechtriem, P. and Schwenzer, I. (eds.), supra fn 19, at Art. 90 paras. 12-13, Art. 94 para. 3; Schroeter, U., *supra* fn 2, at § 9 para. 40, § 10 para. 11 (with extensive references); Wartenberg, K., *CISG und deutsches Verbraucherschutzrecht: Das Verhältnis der CISG insbesondere zum VerbrKrG, HaustürWG und ProdHaftG,* 1998, Nomos, Baden-Baden, at pp. 44ff.

would require that a formal declaration be made to the Secretary General of the United Nations (in his function as depositary of the Convention under Art. 89 CISG). Such declaration has not yet been made (nor, it is submitted, should it be made in the future).

Without going into further details here, this essentially means that 'at the current stage of legal development' (if I may use a typical EU phrase), the Vienna Sales Convention trumps EU secondary law.[71] Suffice it to say that this assessment does not mean that we should sit back and refrain from preventing conflicts to happen in the first place – the contrary is true, since each restaurant chef should make sure that the ingredients used in his kitchen go well together. If this is not possible, a well written menu should at least make clear to customers which of the dishes on offer must not be combined.

3.3 *EUROPEAN SUPPLEMENTS TO THE CISG*

Apart from the points already discussed, much can be said in favour of a EU harmonisation of those matters which are not addressed in the CISG, and which are therefore currently governed by domestic law. Here, questions like the assignment of claims or set-off immediately spring to mind. Therefore, European rules supplementing the CISG would be a significant improvement over the current state of affairs, since their content would be much easier to ascertain than that of twenty-seven diverging domestic contract laws. This advantage would work in favour of both parties located within the EU and in other countries of the world. When framing it in terms of my previous food picture, the EU would thereby compose new side dishes to our Viennese *Schnitzel*, which would go better with it than the current calamari or *Sauerkraut* found on domestic menus.

4 *INTERPRETATION OF A GLOBAL SALES LAW IN A REGIONAL UNION OF STATES*

We now turn to the interpretation of the CISG. Staying in my usual picture, the preparation of our global dish may involve all kinds of difficulties: the cook may overcook the food, he may use strange spices, or he may prepare the meal differently every time. I will, again, focus on two selected aspects.

4.1 *THE DANGERS OF A 'REGIONAL' INTERPRETATION OF THE CISG*

When thinking about a possible 'regional' interpretation of the CISG, we must start by asking ourselves: why could such a 'regional' interpretation emerge? There are a variety of reasons. First, the geographical and cultural proximity between countries in the same region might lead courts to primarily take into account the decisions

71 See the authors cited *supra* fn. 68 and Schroeter, U., *supra* fn 2, at § 9 para. 45 with further references.

rendered by other courts in the same region, when they interpret the Convention.[72] Second, if the regional law uses identical or similar terms as the CISG, courts might look to the regional law for guidance when interpreting the Convention.[73] And third, the courts may even intentionally interpret the CISG 'in conformity' with regional law, in order to avoid possible conflicts between global and regional law.[74] Against this background, I therefore believe that it is well possible that 'regional' interpretations of our global sales law could develop in the future. In European courts, this could result in the CISG being applied 'with a European twist'.

This raises a further question: would 'regional' interpretations be a good thing, or not? There are different views in this matter. Some authors – including Professor Flechtner, which whom I generally agree on many questions – welcome regionalized interpretations, and regard them as a probably indispensable step on the way to uniform interpretation.[75] In this respect, I have to disagree with Professor Flechtner: in my opinion, Art. 7(1) CISG calls for *global* uniformity in the Convention's interpretation,[76] and regional interpretations should be avoided,[77] since they constitute an even greater danger than a reading of the CISG through the lenses of domestic law, which Art. 7(1) undisputedly wants to prevent.[78] I fear, in particular, that regional interpretations would soon become entrenched and almost impossible to change, even more so than interpretations that are 'merely' influenced by domestic law. This danger seems to be particular strong when a regional interpretation has developed because of the CISG's interpretation 'in conformity' with regional law. The result would be that

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72 Flechtner, H.M., "Another CISG Case in the U.S. Courts: Pitfalls for the Practitioner and the Potential for Regionalized Interpretations" (1995) 15 *Journal of Law and Commerce* 127, at pp. 134–5; Witz, C., "CVIM: interprétation et questions non couvertes" (2001) *International Business Law Journal* 253, at pp. 258–9.

73 See Schroeter, U., *supra* fn 2, § 20 at paras. 36–48.

74 Grundmann, S., "Introduction" in Bianca, M.C. and Grundmann, S. (eds.), supra *EU Sales Directive: Commentary*, 2002, Intersentia, Oxford, at p. 29; Schmidt-Kessel, M., "Zahlungsverzug im Handelsverkehr – ein neuer Richtlinienentwurf" (1998) *Juristenzeitung* 1135, at p. 1142; Staudinger, A., "Die ungeschriebenen kollisionsrechtlichen Regelungsgebote der Handelsvertreter-, Haustürwiderrufs- und Produkthaftungsrichtlinie" (2001) *Neue Juristische Wochenschrift* 1974, at p. 1978.

75 See Flechtner, H.M., *supra* fn 72, at pp. 132 ff; see also Lookofsky, J., *Understanding the CISG in Scandinavia,* 1996, DJØF, Copenhagen, at § 2-9 fn 80: 'interesting case'. A similar approach (favouring a European interpretation) is adopted by Grundmann, S., "Introduction" in Bianca, M.C. and Grundmann, S. (eds.), *supra* fn 74, at p. 29.

76 It is interesting to note that this point has only been addressed by very few authors. See, however, Bonell, M.J., "Article 7" in Bianca, C.M. and Bonell, M.J. (eds.), *Commentary on the International Sales Law: The 1980 Vienna Sales Convention*, 1987, Giuffrè, Milan, note 2.2.2: '[...] the Convention's ultimate aim [...] is to achieve world-wide uniformity in the law of international sale contracts' (emphasis added).

77 Schroeter, U., "Die Anwendbarkeit des UN-Kaufrechts auf grenzüberschreitende Versteigerungen und Internet-Auktionen" (2004) *Zeitschrift für Europäisches Privatrecht* 20, at p. 22; Schroeter, U., *supra* fn 2, § 20 at para. 16.

78 Accord Ferrari, F., *supra* fn 70, at pp. 186–7; Magnus, U., *supra* fn 38, at p. 135; Magnus, U., "Tracing Methodology in the CISG: Dogmatic Foundations" in Janssen, A. and Meyer, O. (eds.), *CISG Methodology,* 2009, Sellier, Munich, at p. 58.

buyers and sellers who come from other regions of the world are often surprised by the CISG's interpretation when they have to litigate in the courts of a different region.

Consider a chef in the United States, whose daily work mainly consists of preparing a famous regional dish, the Hamburger. When unexpectedly receiving an order for a Viennese *Schnitzel* from a foreign customer, he may think: 'Well, my Hamburger recipe is not *per se* applicable here. However, a colleague has recently told me that it may 'inform' me where the ingredients of the relevant other dish 'track' those of the Hamburger.[79] That seems to be the case here: both Hamburger and Viennese *Schnitzel* have bread substance on the outside, and both have meat on the inside. Thus, my regional Hamburger recipe is 'a useful guide'[80] in addressing the question of how to prepare a *Schnitzel*.'

That is the reason why on occasion Viennese *Schnitzels* ordered in some US district restaurants seem to taste somewhat surprising to the palate of the connoisseur.[81] I believe that it is therefore necessary to ignore regional recipes and look beyond the advice your regional colleagues can give you. Article 7(1) of the Viennese *Schnitzel* cook book rather requires the chef to take into account information from beyond his region's borders, in order to be able to prepare the dish properly.

4.2 *THE EUROPEAN COURT OF JUSTICE AND THE CISG*

I come to my last point: the European Court of Justice in Luxembourg, and the role it could play with respect to the CISG. After briefly touching upon the influence that the CISG already has (and will arguably continue to have) upon the interpretation of European regulations and directives, I turn to another much debated issue, namely the possibility of entrusting the European Court of Justice with the interpretation of the CISG.

4.2.1 *THE CISG'S INFLUENCE UPON THE INTERPRETATION OF EU LAW*

Since the CISG has occasionally been used as a model for EU private law acts,[82] it is not entirely surprising that scholars have called for the Convention to be used as a guideline in interpreting EU law.[83] This approach, which deserves to be supported, means that

79 Similar language has frequently been used by U.S. courts in order to justify an interpretation of CISG provisions in accordance with the UCC; see *Delchi Carrier v. Rotorex*, 71 F.3d 1024 at p. 1028 (2nd Cir. 1995); *Hilaturas Miel, SL v. Republic of Iraq*, 573 F Supp 2d 781, at pp. 799–800 (S.D.N.Y. 2008); *Macromex Srl v. Globex International, Inc*, 2008 WL 1752530 (S.D.N.Y.); *Raw Materials, Inc v Manfred Forberich GmbH & Co KG*, 2004 WL 1535839 (N.D.Ill. 2004).

80 *Cf. Hilaturas Miel, SL v. Republic of Iraq*, 573 F Supp 2d 781, at pp. 799–800 (S.D.N.Y. 2008).

81 See the poignant criticism by Lookofsky, J. and Flechtner, H., "Nominating Manfred Forberich: The Worst CISG Decision in 25 Years?" (2005) 9 *Vindobona Journal* 199, at pp. 202 ff.

82 See *supra* Part 3.1.1.

83 See e.g. Magnus, U., *supra* fn 38, at p. 135; Schlechtriem, P., "Kaufrechtsangleichung in Europa: Licht und Schatten in der Verbrauchsgüterkaufrichtlinie" in Schack, H. (ed.), *Gedächtnisschrift für Alexander Lüderitz* (2000, Beck), p 675, at p. 685; Schroeter, U., *supra* fn 2, at § 17 para. 26 (with further references).

provisions in such EU Directives should, if in doubt, be construed in accordance with similar provisions in the CISG – European law should thus be read in light of the global sales law.

The academic proposition just described did apparently not fall on deaf ears in Luxembourg: in a few recent proceedings that dealt with the interpretation of EU law, the CISG was indeed mentioned, albeit only in passing. An Advocate General at the European Court of Justice, for example, referred to Art. 46(2) CISG when interpreting Art. 3(2) of the EC Consumer Sales Directive,[84] and Art. 78 CISG in support of a Member State's obligation to pay interest to the Commission.[85] Article 78 CISG was also cited by the European Court of First Instance in a ruling on yet another claim for payment of interest, this time against the Commission.[86] Nevertheless, the European Court of Justice has yet to refer to the CISG in a judgment.

4.2.2 THE CASE AGAINST A POWER OF THE EUROPEAN COURT OF JUSTICE TO INTERPRET THE CISG

As far as the uniform interpretation of the Sales Convention itself is concerned, one of the most common criticisms that have been voiced is the lack of a competent international court that guarantees the uniformity of interpretation.[87]

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[84] Advocate General V. Trstenjak, Opinion of 15 November 2007 in Case C-404/06 – *Quelle AG v. Bundesverband der Verbraucherzentralen und Verbraucherverbände*, at para. 44, fn. 28.

[85] Advocate General V. Trstenjak, Opinion of 11 June 2008 in Case C-275/07 – *Commission v Italy*, at para. 90.

[86] European Court of First Instance, Judgment of 9 October 2002 in Case T-134/01 – *Hans Fuchs Versandschlachterei KG v. Commission of the European Communities*, at para. 56. In another proceeding before the European Court of First Instance, the Commission referred to Article 55 CISG; cf. European Court of First Instance, Judgment of 18 September 1997 in Joined Cases T-121/96 and T-151/96 – *Mutual Aid Administration Services NV v Commission of the European Communities*, at para. 62.

[87] Bonell, M.J., "Article 7" in Bianca, C.M. and Bonell, M.J. (eds.), *supra* fn 76, note 3.1.1; Calvo Caravaca, A.-L., "Articulo 7" in Díez-Picazo y Ponce de León, L. (ed.), *La Compraventa Internacional de Mercaderias: Comentario de la Convencion de Viena*, 1998, Editorial Civitas, at p. 109; Diedrich, F., *Autonome Auslegung von Internationalem Einheitsrecht: Computersoftware im Wiener Kaufrecht*, 1994, Nomos, Baden-Baden, at p 46; Drobnig, U., "Ein Vertragsrecht für Europa" in Baur, J.F. et al (eds.), *Festschrift für Ernst Steindorff zum 70. Geburtstag am 13. März 1990*, 1990, de Gruyter, at pp. 1141, 1145; Fallon, M. and Philippe, D., "La Convention de Vienne sur les contrats de vente internationale de marchandises" (1998) *Journal des Tribunaux* 17, at p. 20; Franzen, M., *Privatrechtsangleichung durch die Europäische Gemeinschaft*, 1999, de Gruyter, New York, at p. 483; Grundmann, S., "Introduction" in Bianca, M.C. and Grundmann, S. (eds.), *supra* fn 74, at p. 17; Kilian, W., *Europäisches Wirtschaftsrecht*, 3rd ed., 2008, C.H. Beck, Munich, at para. 187; Kötz, H., "Rechtsvereinheitlichung – Nutzen, Kosten, Methoden, Ziele" (1986) 50 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 1, at p. 7; Kramer, E.A., "Uniforme Interpretation von Einheitsprivatrecht – mit besonderer Berücksichtigung von Art. 7 UNKR" (1996) *Juristische Blätter* 137, at p. 139; Rösler, H., "Die Entgrenzung des Nationalprivatrechts: Potenzialanalyse von Unionsprivatrecht, CISG und Prinzipien" (2003) *European Legal Forum* 207, at p. 212.

One author has even called it a 'birth defect' of the CISG.[88] Against this background, it has often been suggested that the European Court of Justice, which *inter alia* is put in charge of interpreting EU law via so-called preliminary rulings (Article 234 EC Treaty), could do the same with respect to the CISG.[89] In fact, the same suggestion was already made under the ULIS[90].

The legal prerequisites for such a role are not currently fulfilled, but they could indeed be established under the existing EC Treaty, should the EU States so desire.[91] A possible path towards creating an interpretative power of the European Court of Justice over the CISG would be the adoption of a so-called 'Interpretation Protocol', an instrument under public international law.[92] Such an approach has been declared to be in conformity with EC primary law by the European Court of Justice itself,[93] and Interpretation Protocols have in the past successfully been used in connection with the Brussels Convention, the Lugano Convention and the Rome Convention.

The interesting question therefore is: is an international court really indispensable in order to achieve a uniform interpretation of uniform law? I personally do not believe it is,[94] and I find myself in good company: Already Ernst Rabel, writing eighty years ago in 1929, dismissed the urgent calls for an international court as 'exaggerated'.[95] Furthermore, there is even a danger involved, should the European Court of Justice be

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88 Schack, H., *Internationales Zivilverfahrensrecht,* 4th ed., 2006, C.H. Beck, Munich, at para. 85: 'Geburtsfehler'.

89 Basedow, J., "Europäisches Privatrecht: Das UN-Kaufrecht vor den EuGH!" (1992) *Europäische Zeitschrift für Wirtschaftsrecht* 489; Basedow, J., "Das BGB im künftigen europäischen Privatrecht: Der hybride Kodex" (2000) 200 *Archiv für civilistische Praxis* 445, at p. 457; Basedow, J., "Die Europäische Gemeinschaft als Partei von Übereinkommen des einheitlichen Privatrechts" in Schwenzer, I. and Hager, G. (eds.), *Festschrift für Peter Schlechtriem zum 70. Geburtstag,* 2003, Mohr, 165, at p. 186; Bridge, M., *The International Sale of Goods: Law and Practice,* 2nd ed., 2007, Oxford University Press, Oxford, at para. 11.03; Drobnig, U., *supra* fn 87, at p. 1145; Heiss, H., "Europäisches Vertragsrecht: in statu nascendi?" (1995) *Zeitschrift für Rechtsvergleichung, Internationales Privatrecht und Europarecht* 54, at p. 58; Witz, C., "CVIM: interprétation et questions non couvertes", at p. 259; Ziegel, J., "The Future of the International Sales Convention", at p. 346.

90 See Cathala, T., "L'interprétation uniforme des conventions conclues entre États membres de la C.E.E. en matière de droit privé" (1972) *Recueil Dalloz, Chronique* 31; Mertens, H.-J., "Rechtsvereinheitlichung rechtspolitisch betrachtet: Bemerkungen aus Anlass des Haager einheitlichen Kaufrechts" in Lutter, M. et al (eds.), *Recht und Wirtschaft in Geschichte und Gegenwart: Festschrift für Johannes Bärmann zum 70. Geburtstag,* 1975, C.H. Beck, at pp. 651, 669.

91 See Schroeter, U., *supra* fn 2, § 21 at paras. 24 ff.

92 Basedow, J., *supra* fn 89; *cf.* Huber, U., *supra* fn 56, at p. 509.

93 *Cf.* European Court of Justice, Opinion 1/91 of 14 December 1991 – *Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area,* at para. 4: '[…]it is true that there is no provision of the EEC Treaty which prevents an international agreement from conferring on the Court of Justice jurisdiction to interpret the provisions of such an agreement for the purposes of its application in non-member countries […]'.

94 See Schroeter, U., *supra* fn 2, § 21 at paras. 53 ff.

95 Rabel, E., "Observations sur l'utilité d'une unification du droit de la vente du point de vue des besoins du commerce international", reprinted in (1957) 22 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 117, at p. 123: 'Autre exagération!'.

put in charge of interpreting the CISG: First, it is clear that only courts in EU States would refer questions to the European Court, since no other State could accept binding interpretations by a court in which it is not represented by a judge.[96] Secondly, this would result in the risk that the European Court would develop a specific European interpretation of the CISG, taking guidance only (or primarily) from European sources. And thirdly, it has to be pointed out that the European Court's past interpretations of private law acts are widely considered to be far from stellar.[97] This is not surprising, since its judges are not selected because of their experience in private law matters,[98] but because of their expertise in State law, in constitutional law and in government practice. The European Court of Justice is, after all, primarily the EU's constitutional court.[99] Appointing it as the decisive body for interpreting the CISG would be similar to hiring a group of famous sushi chefs in order to have a Viennese *Schnitzel* prepared – and that would be, at the very least, risky.

The preferable alternative therefore lies in: (1) a cooperation by the commercial courts and arbitrators throughout the CISG world; (2) contributions by commentators and academics which assist the practitioners in developing a common understanding of the Convention; and – of course – (3) international projects like the CISG Advisory Council.[100] When looking at these joint efforts, I am confident that the CISG's recipe is in good hands.

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[96] Drobnig, U., *supra* fn 87, at p. 1145; Kramer, E.A., *supra* fn 87, at p. 139; Tuggey, T.N., "The 1980 United Nations Convention on Contracts for the International Sale of Goods: Will a Homeward Trend Emerge?" (1986) 21 *Texas International Law Journal* 540, at p. 556.

[97] *Cf.* the criticism by Junker, A., "Der EuGH im Arbeitsrecht – Die schwarze Serie geht weiter" (1994) *Neue Juristische Wochenschrift* 2527, at p. 2528; Pfeiffer, T., "Die Bürgschaft unter dem Einfluss des deutschen und europäischen Verbraucherrechts" (1998) *Zeitschrift für Wirtschaftsrecht* 1129, at p. 1134: 'grob fehlsam'; Remien, O., "Über den Stil des Europäischen Privatrechts – Versuch einer Analyse und Prognose" (1996) 60 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 1, at pp. 21 ff; Schmid, C., "Legitimitätsbedingungen eines Europäischen Zivilgesetzbuchs" (2001) *Juristenzeitung* 674, at p. 678.

[98] *Cf.* Huber, U., *supra* fn 56, at p. 509; Schmid, C., *supra* fn 97, at pp. 678–9; Streinz, R. and Leible, S., "Die Zukunft des Gerichtssystems der Europäischen Gemeinschaft – Reflexionen über Reflexionspapiere" (2001) *Europäisches Wirtschafts- & Steuerrecht* 1, at pp. 5–6.

[99] Huber, U., *supra* fn 56, at p. 509; Lipp, V., "Europäische Justizreform" (2001) *Neue Juristische Wochenschrift* 2657, at p. 2663; Schwarze, J., "Artikel 220" in Schwarze, J. (ed.), *EU-Kommentar*, 2nd ed., 2008, Nomos, Baden-Baden, at para. 6.

[100] See Karton, J. and de Germiny, L., "Can the CISG-AC Affect the Homeward Trend?" (2009) 13 *Vindobona Journal* 71.