CHAPTER-8

'CISG: A WINDFALL FOR THE UNIFICATION OF INTERNATIONAL SALES LAW'- PRESENT DAY NEED FOR WIDE-REACHING SOLIDARITY

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I INTERNATIONALISATION OF TRADE LAW AND THE BARRIERS

The problem relating to the unification of international trade transactions is not ideological or socio-political, it is outstandingly connected with various factors like tariffs, export and import licenses, subsidies etc. Nonetheless the issue relating to the application of laws to diversified parties having branch out legal practice and procedures is one of the emerging challenges in international trade. As Camilla Baasch Andersen defines 'uniformity' as the varying degree of similar effects on a phenomenon across boundaries of different jurisdictions resulting from the application of deliberate efforts to create specific shared rules in some form[1]. For the intercontinental approach, the harmony of International Trade Law is the need of the hour. However, despite of the continuous efforts at international level, the harmonisation of trade law has been very difficult. In the public law, Bretton Woods Agreement was the footstep for the harmonisation of international trade law with the subsequent developments resulting in the establishment of the WTO. Similarly, in private law, the UNIDROIT being the foundation for the unification of private international law has played a significant role in the process of the internationalisation of trade law. At present, the UNCITRAL is the core legal body to promote the international trade law. The expansion of international trade created a need to unify substantive law of sales for merchants to operate within increasingly complex legal systems. The budding number of disputes in international trade transactions is a threat to internationalisation of trade. The only solution to the problem is unification of trade law.

II CISG - A MOMENTOUS CONVENTION FOR UNIFICATION OF INTERNATIONAL TRADE LAW: IMPACT ANALYSIS

'International sale' being the mainstay of international trade, the attempt made by the United Nations (UN) for a uniform legal instrument for international sale of goods is noteworthy. The United Nation's Convention on International Sale of Goods (CISG), is one of the momentous contributions made by the United Nation's Commission on International Trade Law (UNCITRAL) for unification of international trade law and has 89 member states. Nearly about 30 % of the Asian Countries are the parties to the CISG. The CISG is a self – executing treaty 'where legal rules arising from the treaty are open for immediate application by national judges and all living persons in contracting states are entitled to assert their rights

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[1] Camilla Baasch Andersen, 'Defining Uniformity in Law' (2007) 12 Uniform Law Review 5.42.

or demand the fulfilment of another person's duty by referring directly to the legal rules of the treaty'[2].

Party autonomy[3] is one of the significant features of the CISG, where the parties can either exclude the application of the CISG or may derogate, in compliance with Article 12. It provides the freedom to the parties, for complete and partial reservation of the CISG, express or implied exclusion of the CISG, choice of law by the contracting states and non-contracting states, etc. Many times, the national courts also have taken very strong stand to apply the CISG and also been unable to apply the CISG because of party autonomy. In *Kunsthaus Mathias Lempertz OHG v. Wilhelmina van der Geld*[4], the Dutch Appellate Court denied the application of the CISG because the buyer's standard terms were applicable to the facts. In many cases without doubt, the courts apply the CISG. In *BJR Trading v. Ekasa GMBH*[5], the Denmark Appellate Court found that the CISG was applicable, since both Denmark and Germany were contracting States (Article 1 (1) (a) CISG). Conscious choices to exclude can take place *ex ante*, up until the time of contracting or *expost*, since in most cases parties can exclude the CISG from application to their contract by modifying an earlier choice of law. The latter is another example of how the 'CISG' operates as soft law[6].

In *Thermo King v. Transports Norberts Dentressangle SA, et al*[7]. the French Supreme Court annulled and reversed the judgment of the Court of Appeals. Citing Article 1 of the CISG, which stated that the Convention applies to contracts for the international sale of goods, and Article 4 of the CISG, which states that the Convention governs only the rights and obligations of the seller and the buyer arising from contract of sale, the Supreme Court held that the contractual relationship between the U.S. Company and the French transport company was not a sales contract governed by the CISG. This was all the more so since the grounds of action of the French transport company was a guarantee for lack of conformity. In *Corporate Web Solutions v. Dutch company and Vendorlink B.V.*[8], the Dutch Court had to decide whether the license agreement was governed by the CISG. After recalling that both the Netherlands and Canada are parties to the Convention, the Court observed that the CISG does not provided a definition neither of the notion of sales contract' (whose main elements can still be deducted by Articles 30 and 53, CISG) nor of the notion of 'goods'. However, taking into account of the Convention's aim to remove legal barriers to trade through establishing a uniform set of rules, the Court reached the conclusion that a broad definition of 'goods' must be assumed in the framework of the uniform test. Thus, the Court found that, even if the software is not recorded on a tangible medium such as DVDs, CDs or USB sticks, nevertheless it is to be regarded as "goods" within the meaning of Article 1 of the CISG. In this backdrop, worldwide solidarity to apply the CISG can be a boon for the harmonisation of international sales law. In one case[9] between a German seller and Swiss buyer, the court held that the CISG is not applicable to the contract. The court without referring to Art 6 of the CISG interpreted the choice of law clause in the sense that it was the common intention of the parties to apply only the German Civil Code (BGB) rules to the contract, and not the CISG, the German Civil Code being the only law

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[2] Franco Ferrari, The Sphere of Application of Vienna Sales Convention (Kluwer Law International 1995) 4-5.
[3] United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980), Article 6.
[4] Case Number/Docket Number: 97/805, Netherlands: Hof Arnhem (Hof = Gerechthof = District Appeal Court) 9 February 1999.
[5] Case Number/Docket Number: U.2001.713Ø, Denmark: Østre Landret (Appellate Court) København (ØLK), 4 December 2000.
[6] Lisa Spagnolo, *CISG Exclusion and Legal Efficacy* (Wolters Kluwer Law International, 2014) Chapter 2 'Birth of the CISG: It's Applicability and Nature', 7-23.
[7] Case Number/Docket Number: P 96-19.992, France: Cour de Cassation (Supreme Court), 5 January 1999.
[8] Case No. C/16/364668 / HA ZA 14-217, the Netherlands: Rechtbank Midden-Nederland, 25 March 2015.
[9] Bezirksgericht Weinfelden, Switzerland, 23/11/1998.

familiar to the plaintiff. In *American Biophysics v. Dubois Specialties, a/k/a Dubois Motor Sports*[10], the court expressed that although the CISG would be applicable in accordance with its Art 1(1) (a), the party's choice of the law of Rhode Island amounted to an implicit exclusion of the Convention (Article 6 of the CISG) and called for a different forum as the parties had expressly agreed to the exclusive jurisdiction of the courts of Rhode Island's Tribunals.

According to Joseph Lookofsky[11], Article 7(2) is used for filling in the gaps of the Convention by analogy or referring to general principles of the Convention (governed but not settled) or the private international law rules of the forum. The use and application of the Article is highly debatable, and courts are known to have drawn different lines upon the issue of *matters governed but not settled*. The first case highlighted by the author is concerning the avoidance declaration under Article 49 of the Convention from the Hamburg Court, where the court adopting an expansive interpretation invoked the principle of good faith under Article 7(1) of the Convention to avoid the need for an express declaration. The same, however, was reported in the *Case Digest* under Article 7(2), which was not invoked, giving it a spin of *gap filling the Convention*. Further, the author cites another instance of a case concerning revocation of avoidance declaration from a Danish arbitral tribunal, where the principle of estoppel was held to deem lawful the conduct of party by relying on Article 7(2). The fallback on Article 7(2) is considered preferable than going beyond the Convention to include general principles such as estoppel within the CISG. The second pair of cases concern damages for breach, where the conundrum of Article 7(2) arises again. The first case is concerning the recovery of Attorney fees, where the Appellate Court in interpreting Article 7(2) deemed such a matter governed but not settled by the Convention. However, the court rejecting the claim ruled that fee shifting is a procedural issue while the CISG is concerning contracts. This was contrary to the European approach where adopting the same approach Attorney fees was considered recoverable as damages.

III GOOD FAITH AND GAP FILLING

Article 7's mandate that the interpretation of the CISG should take into account its international character and the need to promote uniformity in its application is unobtainable without reviewing well-reasoned cases from other jurisdictions[12]. For example, in *Ajax Tool Works, Inc. v. Can-Eng Manufacturing Ltd*.[13], the U.S. District Court, Northern District of Illinois, Eastern Division applying Article 1(1) read with Article 7 of the CISG held that the Canadian substantive law for international transaction would be applicable. Lisa Spgnolo, says the good faith provision in the CISG remains unresolved. When good faith is being applied to the formation of a contract, it might follow that the CISG is applicable to the precontractual agreements[14].

Only contracts for sale of goods are covered by the CISG. In *Viva Vino Import Corp. v. Farnese Vini S.r.I*,[15] the US District Court held that the three agreements i.e., distribution ship, another to grant Defendant a 25% interest, and a third agreement on sales commission

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[10] Case No.: 05-321-T, U.S District Court, Thode Island District, USA, 30/01/2006.

[11] Joseph Lookofsky, 'Walking the Article 7(2) Tightrope between CISG and Domestic Law' (2005-06) 25 Journal of Law and Commerce 87-105.

[12] Larry A. Di Matteo, *International Sales Law A Global Challenge* (Cambridge University Press 2014) 5.

[13] Case Number/Docket Number: 01 C 5938, U.S. District Court, Northern District of Illinois, Eastern Division, USA, 29 January 2003.

[14] Lisa Spagnolo, 'Opening Pandora's Box: Good Faith and Pre-Contractual Liabilities in CISG' <https://www.researchgate.net/publication/228169657_Opening_Pandora's_Box_Good_Faith_and_Precontractual_Liability_in_the_CISG> accessed 21July 2016.

[15] Case Number/Docket Number: CIV.A. 99-6384, US District Court, Eastern District of Pennsylvania, USA, 29 August 2000.

were not for the sale of goods, thus the CISG did not apply (Article 1(1)). The three agreements between the parties were relating to distribution and commission. The Court stated that the CISG does not apply to contracts that do not cover the sale of specific goods and do not contain definite terms regarding quantity and price. The Court applied its conflict of laws doctrine to determine that Pennsylvania law should apply to the dispute.

In his article, Alexander S. Komarov[16] opines that, the need for a common and consistent interpretation of the CISG to be adopted by courts and tribunals in order to ensure that an effective and sound legal environment is in place. The application of the principles laid down under Article 7 (1) of the CISG i.e., *international character*, *uniformity* and *observance of good faith* for interpretation of the Convention are elaborated upon by the author. While Article 7 is drafted vaguely, the intention is to avoid domestic-oriented interpretation causing conflicting interpretations and provide a reference point for all Articles for manifestation of purpose and policy of the Convention. The *Internationality* of the Convention is stressed upon to ensure that there is less influence of domestic courts/homeward trend and that the CISG is viewed as an exhaustive regulation, not complimentary law. The Convention's legislative history, precedents with critical annotations and scholarly contributions/commentaries are a source of authentic interpretation as they emphasize upon the international character and origin of the Convention. While the courts are at liberty to highlight the similarity between the Convention norms and domestic law, there is a need for *autonomous* interpretation of the CISG, distinct from domestic rules/concepts for its uniform and effective application.

Similarly in *BSC Footwear Supplies v. Brumby SL*[17], the Spanish Appellate Court confirmed the decision holding that the CISG is not applicable to the dispute, as according to the Spanish Constitution, international conventions are incorporated in the Spanish law, but pointed out that under Article 6 of the CISG, the application of the CISG may be excluded by the parties. In these circumstances, the cooperation from the national courts in making effort to apply the CISG, can bring harmony to the application of the CISG.

IV DECLARATION UNDER THE CISG:

Reservation under Article 96 gives more scope to exclude the application of the CISG. In *Mitchell Aircraft Spares Inc. v. European Aircraft Service AB*[18], an Illinois (USA) buyer contracted with a Swedish seller to buy integrated drive generators, which were aircraft parts. After it was delivered, the buyer was unhappy with the goods as they were not in consonance with the contract and sued for breach of contract, guarantee and damages for the same. The issue here was that the buyer argued that the aircraft parts were supposed to be three in number and with three specific part numbers for the same. The seller argued that it would suffice if it had been with different part numbers as given in an international database. Going into the merits, the Court decided that the CISG would apply as both were from different contracting states.

The Court held that, it was permissible under Article 8 to allow subjective intent of parties and the CISG requires the consideration of the contract with all the evidence, which concerns the negotiations, agreements and statements made. The CISG further did not apply to the formation of the contract because Sweden had explicitly excluded the application of Part II of the CISG, which governed the same.

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[16] Alexander S. Komarov, 'Internationality, Uniformity and Observance of Good Faith as Criteria in Interpretation of CISG: Some Remarks on Article 7(1)' (2005-06) 25 Journal of Law and Commerce 75-85.
[17] Audiencia Provincial de Alicante, Spain, 16/11/2000.
[18] Case No.: 97 C 5668, U.S. District Court, N.D., Illinois, Eastern Division, USA, 28.10.1998.

Since the subjective evidence and related circumstances rule is embodied in Article 8, which is in Part I of the CISG, it would be binding on parties. This is also since neither party has excluded the application of Part I of the CISG specifically.

V WRITTEN FORM NOT REQUIRED

Article 11 of the CISG gives a liberal approach to the formation of contract. Franco Ferrari says[19] about the viability of having a uniform set of private international law rules as compared to a unified set of substantive law and proceeds to bring to light, the importance of private international law rules even in areas of a unified substantive law. Relying on express references within the CISG, the application of the Convention and its gap filing mechanism are dependent on rules of private international law based on domestic concepts of various jurisdictions. The determination agency/party to contract, applicable law under Article 1(2), substantive application of the CISG on certain contracts under Article 2 or its non-applicability of the CISG in cases failing to satisfy its subjective international requirement, are all dependent on rules of private international law. Moreover, the direct or indirect application of the Convention in terms of Article 1, as well as the effectiveness of reservations made by Contracting States under Article 92 -94 have their basis in rules of private international law. The issue of 'matters governed but not settled' by the Convention are resolved by using general principles of the Convention or placing reliance on private international law (of the forum) in terms of Article 7(2) of the CISG. The author, further, argues that certain matters labelled 'external gaps' beyond the scope of the Convention are suited to be resolved as per the rules of private international law.

VI CISG AND THE USAGE AND PRACTICES

The 'ICC Incoterms' formulated by the International Chamber of Commerce and other trade terms are also widely used by the countries in international trade transactions. The chances of overlapping of the concept of passing of risk under the CISG, and ICC Incoterms may be footraces for the application of the CISG. Article 9 of the CISG gives the scope for the application of any usage or practices. If the parties incorporate the 'incoterms' in the contract, then the Incoterms will prevail over the provisions of the CISG. In one of the cases [20] the contract was between a German seller and a Swiss buyer. The buyer had placed orders for the supply of fibreglass. The seller had issued three different invoices, which had the amount payable. The cause of action arose when the buyer refused to pay the amount as stated in these invoices. On the basis of the used *Incoterm DDU*, the Court dismissed the buyer's claim for set-off, which was for setting off the money it owed to the seller from the non-payment of the invoices with a claim for customs duties that it had to pay. Here, this was reasoned by stating that invoice clearly contained the terms INCOTERMS DDU: buyer's place of business. Under the Convention, it is clear that the INCOTERMS can be applied in two cases: when the parties expressly agree to do so, as well as in the absence of the same. This is because they are widely used and observed in international trade. This is backed by Article 9 of the CISG. This was permitted because the INCOTERMS were both an established practice and because the term clearly represented a binding usage under Article 9. The Court also upheld the seller's claim for recovery of exchange rate loss it had suffered due to the buyer's delay in paying the invoices' amount in two out of three cases. However, it dismissed the claim of the buyer to receive the amount for the last (i.e. third invoice), because the seller was unable to prove that the goods had been delivered.

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[19] Franco Ferrari, "PIL and CISG: Friends or Foe" (Fall 2012-Spring 2013) 31 Journal of Law and Commerce 45-107.

[20] Case No.: C1 08 45, Tribunal cantonal du Valais, Switzerland, 28.01.2009.

Sandra Saiegh[21] brings to light, the issue of application of multilateral conventions on private transactions entered into by international organizations. The author uses the CISG and UN as examples to better elucidate this point. The UN enjoys a legal capacity and certain immunities as per the UN Charter and the UN Convention on Privileges and Immunities, which affect their position even in private transactions. The CISG terms are incorporated in UN commercial contracts (possibly to legislate by contract) and the Convention is referred to solve disputes, but no express declaration of application like in case of INCOTERMS is made for the Convention. UN commercial contracts are mostly boiler plate in nature, with little scope for interpretation/gap-fling or negotiation and conciliation/arbitration selected as dispute settlement mechanism. The UN commercial contracts do not provide for issues such as breach and lack proper definitions but mirror text Section V and VI as well as Article 86 and 87 of the Convention. However, certain issues such as recovery of interest, avoidance mechanism, provision of liquidated damages or performance bond are proof of detraction (different course of action) of the UN contracts from the Convention. A possible reason for the same is that the business of the UN is different from other traditional buyers and thus, the remedies sought/available are different. Even other issues such as accounting for benefits and restitution of goods find no place in the UN contracts or the Convention.

In *Treibacher Industrie, A.G. v. Allegheny Technologies, Inc.*,[22] there was an Austrian vendor, who dealt in hard metals and had agreed to sell such hard metal gun powder to a company situated in Alabama, USA. They referred to delivery as "consignment." The buyer needed this powder for manufacturing, and after receiving some of the powder, it refused to take delivery of more. It informed the seller that it did not have a binding obligation to take delivery or pay for the powder, which it did not intend to use. This was after the fact that the buyer had purchased powder at a lower price without the knowledge of the seller. The court of first instance in the US held this case in favour of the seller, stating that the buyer was to pay damages along with interest. The dispute was in the understanding of the term consignment. The buyer argued that it meant, in the industry, that a sale was not complete unless the powder was actually put to use. The seller argued that the term had been used between the parties for seven years to mean that the buyer had a binding obligation to pay for all the powder given in the contract. The appellate court upheld this decision and stated that the meaning of consignment should be understood from the practices established between parties and not the industry meaning. This is in consonance with Article 8.

VII THE ROLE OF NATIONAL COURTS

For applying the Convention in true letter and spirit, a worldwide solidarity is the needed. Not only the ratification of the Convention will bear out the purpose of harmonisation but also proactive role of national courts is vital.

In *Forestal Guarani S.A V Daros International*[23] the dispute was between one Argentina-based manufacturer (seller) and a New Jersey based import-export Corporation, where the buyer refused to pay in full after the sale transaction. On the initiation of legal proceeding by the seller, the US Court of Appeal agreed that, the CISG is the governing law as the places of business of both the parties were in contracting states. Further the Court of Appeal noted a very interesting point in the fact i.e., regarding the requirement of writing to conclude a contract and any reservation made by the concerned countries. According to the CISG, a

[21] Avoidance under the CISG and its Challenges under International Organizations Commercial Transactions) (2005-06) 25 Journal of Law and Commerce,443-449.
[22] Case No.: 05-13995, U.S. Court of Appeals, 11th Circuit, USA, 12.09.2006.
[23] Case No.: 08-4488, U.S Court of Appeals, 3rd circuit, USA, 21/07/2010.

contract for sale of goods need not be concluded in writing[24]. At the same time, it enables the contracting countries to make a declaration to exclude the application of Article 11 i.e. no requirement in writing[25]. In this case, Argentina had made such a declaration, whereas the USA had no such declaration. The Court of Appeal turned the foreign case law and scholarly writings to take a proper decision. The majority view held that, a court must conduct a choice of law analysis on the basis of Private International Law principles to determine which state's law governs the formation of contract and then to apply that law for the claim of the parties. Neither the parties nor the District Court have determined whether the law of New Jersey or of Argentina govern the case. The Court of Appeal finally left the question open and remanded the case to the lower court for further proceedings.

In *Proforce Recruit Ltd v. The Rugby Group Ltd*, [26] the agreement stated that the parties (an employment agency and the other party, the customer) would have "preferred supplier" status for a period of time but did not provide the meaning of the same. Another clause stated that the contract would supersede all prior agreements between the parties. The High Court used English law to hold that pre-contractual negotiations are not admissible as evidence to interpret the contract and ruled in favour of the customer. However, the Court of Appeal overruled this and referred to two international law statutes: a) UNIDROIT Principles, Article 4.3., which states that primacy must be given to the common intention of the parties and on questions of interpretation, giving regard to pre-contractual negotiations is permissible. b) The CISG's Article 8 (3) states that to determine the intention of the parties, it is permissible to give regard to relevant circumstances including preliminary negotiations.

In *MCC-Marble Ceramic Center Inc. v. Ceramica Nuova D'Agostino S.p.A.,*[27] the dispute arose between an Italian seller and a US buyer, who had entered into a contract for the sale of ceramic tiles. They also entered into a requirements contract, which stated that on a sufficient purchase order, the buyer was entitled to get a discount. The buyer concluded their former contract by signing a pre-printed order form of the seller, which had standard terms printed at the back in Italian. The buyer commenced a suit against the seller when the seller failed to satisfy some orders, and the seller invoked his standard terms to defend the same. The first instance court in the US granted a summary judgment in favour of the seller on the basis of the standard terms mentioned on the seller's order form, signed by the buyer.

The appellate court reversed this, stating that the CISG is binding, in which mere statements of parties is not sufficient, but Article 8 (1) requires consideration of the parties' subjective intent and the circumstances of the case must be kept in mind. The Court stated that this is different from the domestic law rule, but since the CISG is the binding law, it must be adhered to. In *InterlandChemie BV v. TessenderloChemi BV*[28] the Belgian seller and Dutch buyer entered into a contract for the sale of certain goods, and this was not signed by either party. The buyer sued the seller for alleged delay in delivery, stating that the date of delivery was not respected. The seller argued that as per his general terms and conditions as mentioned in the invoice, it is clearly stated that the time of delivery was only indicative and not binding on the seller. The buyer's argument was that he did not explicitly agree to these terms and conditions, as no written agreement was signed. The Court determined that the CISG was applicable to this contract as per Article 1 (1) (b). The Court, using the CISG, held that although

[24] United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) Article 11.
[25] Article 12 in conjunction with Article 96.
[26] 2006 EWCA Civ 69, Court of Appeal (Civil Division) United Kingdom, 17.02.2006.
[27] Case No.: 97-4250, U.S. Court of Appeals, 11th Circuit, USA, 29.06.1998.
[28] Case No.: 160136 / HA ZA 06-826, Rechtbank Breda, Netherlands, 27.02.2008.

the seller's terms and conditions are not explicitly agreed upon and the fact that the buyer did not have the invoices until the delivery of goods, it would form a part of the contract.

Authors have addressed the common misconception regarding the lack of practice with respect to the CISG in common law courts. For example, an author[29] through an analysis of a wide variety of cases laws attempts to examine the misinformed conception of common law jurisdictions adopting a narrow approach to the CISG (an increased homeward trend and lack of reference to scholarly writings) and arrives at a conclusion that the CISG is well practiced and growing in these jurisdictions, with judges leading the front and lawyers faltering behind. The article begins by providing an introduction to the CISG and concerns over its use in common law countries before proceeding to provide a historical background of the CISG. The lack of practice of the CISG in certain common law jurisdictions does not lead to the conclusion that common law is incompatible with the CISG as the obstacles in implementing the CISG are not peculiar to common law nor can be considered as permanent obstacles. While providing a background to the issues specific to common law, the author categorizes them under three broad heads: Approach adopted in interpreting the statutes/ treaties, lack of familiar concepts and reliance on the CISG precedents. Under the first head with respect to common law approach in interpreting statutes and treaties the author, relying on a broad set of cases, highlights the common law courts are working towards a uniform interpretation using different interpretative methods (purposive interpretation) as well as moving towards a civil law oriented approach, dropping the traditional literal rule for international covenants. This is further on account of change in domestic legislation concerning interpretation.

With respect to the broad theme of lack of common law concepts such as consideration, parol evidence rule etc. have been addressed by court decisions/precedents as well as scholarly writings from these jurisdictions (especially USA) showcasing a trend towards engagement with the Convention. Further, others issues such as courts' reluctance to refer scholars, or lack of cases on online databases are overstated as courts in common law are interpreting the Convention relying on writings and the online databases distort reality as the Convention is widely practiced in certain jurisdictions (New Zealand) with no reporting of the same available in databases. The non-adoption of the Convention by UK is a stumbling block creating hindrance in interpretation, but the major fault lies with lawyers' or parties' ignorance. The attempts made by the courts for a uniform interpretation must be appreciated and showcase the compatibility of the CISG with common law.

VIII CONCLUSION AND SUGGESTION

Nonetheless, hindrances are there in ratifying the CISG, countries can take hold of the legal and jurisdictional issues. Attempt should be made by the countries to ratify the CISG. National interests connected with the legal system are the most challenging factor in the application of the CISG. So, the countries can try to make balance between the CISG and national laws. In the present context, the role of the national Courts are very important. Regard should be given by the courts to the application of the CISG. Whenever any conflict arises with regard to the application of the CISG and any other law, regard must be given to the application of the CISG. The first form of homeward trend consists of simply disregarding the application of the CISG.[30]. Article 7 has to be given regard at the time of interpretation. The national courts should avoid the non-application of the CISG and should try to apply the CISG in more number of facts. In *Roster Technologies v Carl Schreiber GmbH*[31], the U.S Federal court while

[29] Henning Lutz, 'The CISG and Common Law Courts: Is there really a problem?' (2004) 35 Victoria University of Wellington Law Review, 711-733.
[30] Tribunale Forli, December 11,2008, CISG online 1788.
[31] Case No.: 11 cv302 ERIE, U.S. District Court, Western District of Pennsylvania, USA, 10.09.2013.

determining the applicable law in the case decided that the Convention (CISG) is applicable. The court held that in order for a CISG's exclusion to be effective, the contact must indeed contain the explicit language that the convention does not apply[32].

Rolf Knieper[33] considers the Convention a unique opportunity for former Soviet countries to participate in world trade and engage with nations from diverse legal and political background, shedding away the dominance of Moscow on their relations. He gives a three-fold argument for nations to join the CISG: *Compatibility, Stability and Flexibility*. The speaker states clearly that irrespective of differences over issues such as forms, specific performance etc., the same are not insurmountable and the Convention fits well within the laws of post-Soviet countries. The CISG was even taken into consideration while developing the national laws and thus, there is high degree of identical regulation. The second argument of stability is in light of the volatile and erratic environment prevalent in these countries, which is problematic. Thus, in such a scenario, the CISG ensures a fair and equitable instrument, especially in the interest of small and middle enterprises as it reduces transaction costs. Lastly, the power of contracting states to submit reservations or opting out for parties is highlighted as another key factor in ensuring flexibility for these countries to partake in the evolving transnational trade regime.

In the initial implementation stage of any law, there have been divergent applications and interpretations, however subsequently the law mellows with a distinctive silhouette. Attention to the law is utmost important. Wide-reaching solicitous approach to the application, interpretation and ratification of the CISG can accelerate the process of unification of international trade law. Participation of more countries is possible by amending and upgrading the domestic laws. Use of case law of other country in interpretation can be a tool for unification as Larry A. DiMatteo says[34] that another element which has reduced the number of divergent interpretations of the UCC, overtime, is the case law from other states as persuasive precedent. Even though, it is very difficult to draw unified approach to conflict of laws, but efforts must be made by the countries. Role of national courts are very important in bringing uniformity, by applying the provisions of the CISG. At the same time, after a successful journey (close to 40 years) of the CISG, now flexible nature of some provisions (*for example, the flexibility through declaration under Article 92, Article 95, Party Autonomy, Avoidance of contract etc*.) may be little tightened. The authors Larry A. DiMatteo in the book[35] International Sales Law, have addressed very interesting questions:

> How has the CISG in fact been interpreted and applied by the various national courts? Is there evidence of convergence or divergence among the national courts in interpreting the CISG? Is the current level of disharmony associated with divergent national interpretation acceptable from the perspective of the CISG's mandate of uniformity? How does divergence in national interpretation impact the effectiveness or functionality of the CISG?

The authors have concluded answering to the above questions that, despite the problem of diverging interpretations, there are signs that courts are taking more seriously their role in applying the CISG interpreting methodology developing an international jurisprudence.

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[32] Ibid.

[33] Rolf Knieper, 'Celebrating Success by Accession to CISG' (2005-06) 25 Journal of Law and Commerce 477-481.

[34] Larry A. DiMatteo, *International Sales Law - A Global Challenge* (Cambridge University Press 2014) 5.

[35] Larry A. Dimatteo, Lucien J Dhooge, Stephanie Greene, Virginia G. Maurer and Marisa Anne Pegnattaro, *International Sales Law- A Critical Analysis of CISG Jurisprudence* (Cambridge University Press, 2005).

In case where the CISG fails to provide a specific default rule, courts have been tempted to apply the default rules provided under their domestic laws.

CISG-A worldwide solidarity is the need of the hour. –John F. Coyle.