
The Adoption of the CISG by Brazil: How Will the Convention affect Brazilian Law?

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September 2013

Acknowledgments

Firstly, I would like to thank my husband Marcelo for his patience and support through this stressful, but pleasant, period of my life. I would also like to thank my brother Gabriel for motivating me and my parents, Denise and Hugo, who always managed to be available and present in my life. Finally, I would like to thank both my friends Riccardo and Laura for believing in me, my colleagues for being part of this amazing experience and my supervisor Catherine Pedamon for sharing her experience and knowledge.

Authorship Declaration

I, Betina Vargas, hereby certify that the thesis I am submitting is entirely my own original work except where otherwise indicated. I am aware of the University's regulations concerning plagiarism, including those regulations concerning disciplinary actions that may result from plagiarism. Any use of the works of any other author, in any form, is properly acknowledged at their point of use.

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Abstract

This work examines Brazil's adhesion to the United Nations Convention on Contracts for the International Sale of Goods and how this adoption will affect Brazilian Law. With an increase in cross-border commercial transactions and many different attempts to harmonise both private international law and substantive Law, it can be said that this thesis is examining a practical example of what it seems to be a strong tendency in this period of time. More so, Brazil is one of the largest economies of the world with a steady economic growth and which represents an important regional leader for Latin America. The adoption of the CISG in the Country is considered a late but important one, which will have consequences in its Legal system and could also represent an influence on Portuguese-speaking countries.

The methodology used for this dissertation consists mainly of comparative method and empirical-doctrinal research. Original sources such as Brazilian Civil Code, Brazilian Federal Constitution, Vienna Convention on Sales contracts and interviews, will be used throughout this paper; as well as secondary sources such as doctrines, scholarly articles and legal reviews.

Through the analysis of the sphere of Application of the United Nation's Convention and the remaining function of the Brazilian PIL rules and Contract Law; plus the study of the compatibility between the General clauses of Social Function of the Contract and Good Faith to the Principles of the Convention; we arrive at the study of the possible issues regarding the interplay between the Brazilian Civil Code and the CISG and conclude with a positive view of the years ahead, with the suggestion of an increase in study efforts and a possible reform of some Brazilian national legal instruments.

1. Introduction

Brazil is the biggest country on the Southern part of the American continent and currently holds the position of the 7th largest economy in the world¹. It has experienced in the past twenty years a continuous economic and developing growth and has become better known around the world for its resistance to the 2008 financial crises and for being part of the group known as BRIC².

Despite living a good moment in history, Brazil is an independent country for only 190 years and it started its current formation as an exploitation colony of Portugal, which had an immense influence on the slow emancipation of its legal instruments after independency.³ Therefore, its development is still occurring and in many aspects the country now needs to reform its institutions, in order to respond and take advantage of a growing international interest. Brazilian laws are on this list and a legal reform on international sales law is usually encouraged by both the Academic and Legal communities and the industrial sector⁴.

Having said that, it is interesting to note that Brazilian jurists had a great participation in the drafting of the United Nations Convention on Contracts for the International Sale of Goods, but likely because of the disinterest of its politicians, the country has not initially signed the CISG in its beginning and remained an outsider for more than twenty years. However, on the 8th of May 2012, the House of Representatives⁵ approved the text of the CISG and on the 16th of October of the same year the instrument passed by the Senate and finally by the National Congress, which culminated with the promulgation of the Bill of Decree⁶ n. 538/2012 through which the text of the Convention was finally approved with the

¹ See 'Brazil Overview' at <http://www.worldbank.org/en/country/brazil/overview>

² Williams, Sean, 'Why is Brazil an emerging market economy?', 2011, available at <http://ebook.law.uiowa.edu/ebook/sites/default/files/Brazil%20-%20Sean-1.pdf>

³ See 'O Brasil – Períodos históricos' at www.brazil.gov.br/sobre/o-brasil/periodos-historicos

⁴ website de Agosto

⁵ Or as its called in Brazil " *Câmara dos Deputados*".

⁶ In portuguese: "Decreto legislativo".

hierarchical level of ordinary Law.⁷ The adhesion process was then concluded with the deposition of the instrument of adhesion to the general Secretary of the United Nations Ban Ki-moon, on which no declarations or reservations were made⁸, and will entry into force on the 1st of April 2014.⁹

1.1. Previous studies and reasons for this research

In contemporary times we are seeing a significant increase in cross border commercial transactions and to rely only in domestic legal systems, can prove to be a slow and expensive process¹⁰. In line with this understanding, as we have already mentioned, there is a great amount of acceptance in regards to the adhesion of Brazil to the CISG and is in that direction the conclusion of many authors when studying the relationship between Brazilian Law and the instrument. Those studies, such as the ones provided by Eduardo Grebler and Josue Drebes, should actually be acknowledged as the engine behind the recent adhesion, guaranteeing that students and researchers will have not only an international material of study available, but also a significant local one.

However, we find ourselves in a topic moment in history and it was only logical and extremely interesting to take the opportunity to go further and analyse the wide possibilities that open in front of our eyes. It is not our intention to advocate for the adhesion of the Convention, but instead to take in consideration the possible flaws in this adhesion to establish ways to which the obstacles - sometimes found in the Convention and in other times in Brazilian Law - will interact with the other's Legal culture; ultimately trying to collaborate to a level of criticism, so that academics and practitioners could help and guarantee the

⁷ For information on the process of internalization of an international convention in Brazilian Law, we refer to Valerio de O. Mazzuoli, "Direito dos Tratados", Editora Revista dos Tribunais, 2011, p.341

⁸ Information provided on the website www.cisg.law.pace.edu/cisg/countries/cntries-Brazil.html

⁹ For the list of the countries contracting parties and its action on the CISG, go to http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html

¹⁰ For the interview with Luca Castellani about the CISG and Brazil, go to <http://cisgw3.law.pace.edu/cisg/biblio/castellani2.html>

success of this story. Here is where we find the relevance behind this research, dealing and helping to alert to potentially problematic areas in order to guarantee the application of the convention in line with its values.

1.2. Methodology

We do not disregard in the research process the comparative method, once the same is in line with the spirit of the CISG helping to achieve harmonisation among different legal systems, when assists in understanding where those ideas were born, in which context and with which goal.¹¹ The Vienna Convention on international sales contracts is an instrument drafted by the United Nations with the participation of countries previously ignored by precedent conventions that had the same scope in mind.¹² The presence of new legal concepts and terminology prove another characteristic of the Convention: its the attention to an international character, to which comparative studies once again serve for.¹³ The third reason for us to insist in this method is in assisting to ethical concerns, taking in consideration that to study a new body of uniform law without its applicability context in other parts of the world would result in questionable conclusions.

Further than that, we will be ongoing empirical doctrinal research, once we believe that law cannot ultimately be studied without observing social and political context and also because researching in the field of international law brings an inherent necessity for comprehension of deeper aspects surrounding it. If we wouldn't do so and decided to opt for a "black-letter" approach¹⁴ we would miss much of the meaning of the CISG and also

¹¹ De Cruz, P., *Comparative Law in a Changing World*, Cavendish Publishing Limited, 1999.

¹² Carr, Indira, *International Trade Law*, 4th Edition, Routledge-Cavendish, 2010, page 57.

¹³ Bridge, Michael G., 'Uniformity and Diversity in the Law of International Sale', 2013. Available at <http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1173&context=pilr>

¹⁴ See Mike McConville & Wing H. Chui, "Research Methods for Law", Edinburgh University Press, 2012

completely ignore our research question in analysing the application of such instrument in the Brazilian reality.

1.3. The structure of this work as a way to respond to our hypothesis

Throughout this dissertation we intend to challenge the application of the Convention in Brazil once, as an instrument of harmonisation of law, some phases and consequences of the contract of sale are left outside the scope of application of the CISG and many concepts are not explained. In this sense, there is a high weight given to the interpretation given by Scholars and courts and this will be a recurring theme in our work. According to the website of the UNCITRAL “the purpose of the CISG is to provide a modern, uniform and fair regime for contracts for the international sales of goods”¹⁵ and we will bare this in mind through the different stages of our analysis.

More specifically, on the second chapter, we will focus our attention on the sphere of application of the CISG in Brazil, studying what will be the issues surrounding the scope of application of the CISG in that country, taking in consideration barriers imposed by the Brazilian legal culture and culminating in an analysis of article 9 of the Introduction to the Norms of Brazilian Law and the difficulties in regards to parties’ autonomy.

In the third chapter, we will study the spirit of the Brazilian contract Law in the light of the general clauses of good faith and social function of the contract and try to establish if those values can continue to co-exist with the modern notion of international commercial contracts and the adhesion to the Convention.

On the forth chapter we take in consideration the knowledge built in the first two chapters in relation to Brazilian Law and in relation to the Convention, to shift the focus to questions that are not settled in regards to the last, and how it can possibly interact with the provisions found in the Brazilian Civil Code.

¹⁵ Information available at: http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html accessed on 31st August 2013

Finally in our Conclusion we will confirm that the areas of conflict between the CISG and Brazilian legal culture are not enough to create an impediment for the harmonisation of the law of international sales. We intend to corroborate the view that having attention to the differences through the development of academic work and dialogue with other countries, the entry into force of the United Nations Convention on International Sales of Goods will help bringing Brazilian law on international sales contracts to patterns equivalent to the country that it owns to be in the future.

2. The Sphere of Application of the United Nation's Convention on Contracts for the International Sale of Goods in Brazil

The CISG is an example of a formal¹⁶ instrument of uniformisation of substantive law, so flexible that when one of the parties to the contract has not adhered to it, the same allows the forum to resort to its domestic norms of private international law, which may bring the case back to the scope of the Convention.¹⁷ To understand what this means in practice, is necessary to understand how and why a contract is attached to a particular legal system. Is with the intention to show the differences that will happen in Brazil by adhering to the Convention that we will analyze in this chapter the cases in which the CISG will regulate the contract and in which, Brazilian's private international Law and contract law will be revisited. By carrying out such study, we would like to demonstrate that Brazilian domestic Law is obsolete and although it does not represent significant barriers for the proper application of the CISG, it could learn and take inspiration from the last.

2.1. The international Character and the Limitations Faced by Commercial Contracts

The international character of commercial transactions is not a new aspect of the field¹⁸ and it has been increasingly cultivated by the recent phenomenon of globalization.¹⁹ Until this day and definitely because of an historical heritage, a powerful civilization is

¹⁶ Renata F. de Oliveira, "Harmonizacao Juridica no Direito Internacional", Quartier Latin, 2008, p 34.

¹⁷ See page 5, where we present article 1. 1. (b) of the CISG.

¹⁸ See Roy Goode, Herbert Kronke and Ewan Mckendrick, "Transnational Commercial Law", Oxford University Press, 2012, p.4

¹⁹ See Michael G. Bridge, 'Uniformity and Diversity in the Law of International Sale', 2013. Available at <http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1173&context=pilr> accessed on 31st August 2013

always one with a beyond-barriers trade characteristic.²⁰ The great majority of international commercial transactions happens among highly developed countries and is with the intention of being part of this select group, that so many countries are making an effort to attract international attention and hopefully be present on that select list of the greatest importers/exporters of the world.²¹

The desire of the field of commerce in facilitating the trade around the world is not met by the desire of the States in controlling and organizing its society. The legal relationship between two private individuals or companies, even when they are in different States or when the transaction has any foreign elements, still belongs to the field of private law and as such, the rules applicable to that legal agreement are confined to a territory and should be defined in accordance with the norms present in that territory's legal system.

In fact, through the concept of sovereignty, a state has supreme authority in its own territory and the compulsory enforcement of rules, sentences or public policies by another State is not acceptable. According to the *principle of sovereignty*, found in public international law, all the countries shall be treated as equals, not mattering how big or economically influent they are.²²

In this direction, it is important to know well the legal approach given by a particular country when entering into businesses that have a foreign element. Private international law is the field responsible for determining which forum is capable of hearing the plea and which law is the one that should be used to form and guide the obligations.²³ This conflict of law rules, in many cases cause legal uncertainty²⁴, once it is impossible for a trader to be well prepared about all the norms that may deal with the matter, in all the countries in the world and determining the law applicable to the contract can prove to be a costing and difficult task.

²⁰ For information on world development indicators, please visit: <http://data.worldbank.org/data-catalog/world-development-indicators> accessed on 31st August 2013

²¹ See the interview with Luca Castellani, Legal Officer of UNICITRAL, April 2010, available at the following link: <http://cisgw3.law.pace.edu/cisg/biblio/castellani2.html> accessed on 31st August 2013

²² See Ian Brownlie, "Principle of Public International Law", 7th Ed., Oxford University Press, 2008.

²³ See Beat W. Rechsteiner, "Direito Internacional Privado – Teoria e Pratica", 15 Edicao, Editora Saraiva, 2012, p. 24

²⁴ See Indira Carr, "International Trade Law", 4th Edition, Routledge-Cavendish, 2010, page 57

In general terms, what characterizes an agreement between parties as a legal institute is its capacity of creating a binding responsibility or, in other words, its capacity of being enforced²⁵. In terms of the Brazilian domestic view on contracts, Josue Drebes²⁶ brings, in our opinion, the most comprehensive definition:

“According to the general understanding of the national doctrine, the contract is the legal institution, in which the agreement between two or more parties is celebrated, in conformity with legal order, in the limit of social function and the principle of good faith, destined to establish rights and obligations between the parties, until the conclusion of it.”²⁷

In April 2014, the Vienna Convention will entry into force in Brazil²⁸ and having been incorporated into that country will be the legal instrument to guide contracts of international sales.²⁹ In the text of the Convention reference is made to this type of contracts but no definition is provided. On the other hand, it is possible to assume what is understood when looking to the parties rights and obligations, where the contract would be “the contract by virtue of which the seller has to deliver the goods, hand over any documents relating to them and transfer any property in the goods, whereas the buyer is bound to pay the price for the goods, and take delivery of them”³⁰.

Although the definition accepted as the one given by the Convention refers to property, it doesn't seem to give the same weight to the limit or protection found in Law, or at least not as much as the definition given by Brazilian scholars. This is one of the first major

²⁵ See Orlando Gomes, “Contratos”, Editora Forense, 1959, p.10

²⁶ See Josue S. Drebes, ‘O Contrato Internacional a Luz do Direito Internacional Privado Brasileiro’, Revista Eletronica de Direito Internacional Privado Brasileiro, 2010, vol.6, p. 209

²⁷ Our own translation for: Segundo entendimento dominante na doutrina pátria, o contrato é o negocio jurídico em que se celebra o acordo de vontade de duas ou mais partes, na conformidade da ordem jurídica, nos limites da função social e nos princípios de boa-fé e probidade, destinados a estabelecer direitos e obrigações entre as partes, até a conclusão deste.

²⁸ Once the deadline to sign the CISG was expired in 1981, Brazil is considered to have adhered and not ratified, the Convention in March this year.

²⁹ See the Brazilian Federal Constitution, articles 49, I and 84, VIII where it is said that the intention of the Executive, manifested by the President, will not be enough without the approval of the Legislative, constituting a democratic process.

³⁰ See Vera M.J. Fradera, ‘ A noção de contrato na Convenção de Viena de 1980 sobre venda internacional de mercadorias’, p. 13-14. Available at: <http://www.cisg-brasil.net/doc/vfradera1.pdf> accessed on 31st August 2013

characteristics of the CISG, an instrument of communication between commercial partners that intends to bring harmonization and certainty to the parties involved, perhaps even as a way to promote international commerce.

2.2. The Determination of the Law applicable to the Contract

With the entry into force of the CISG, the Brazilian law will not be affected in all its contractual types: the only contracts that will be affected by this change will be the contracts of international sales³¹. The CISG expressly determines to which types of contracts and to which stages of the contractual relationship it will be applied and for that reason, we intend here to analyze the cases where the courts will continue to resort to its domestic law even when the contract has an element of internationality, trying to demonstrate that the issues found in Brazilian domestic Law³² will not cease to haunt international transactions and perhaps with pressure from the legal community some changes could be done to the Brazilian Civil Code.

2.2.1. The Scope of application of the CISG

The Convention has, accordingly with the organ responsible for its creation, the purpose of providing “*a modern, uniform and fair regime for contracts for the international sale of goods*” and its main advantage is introducing certainty and decreasing transaction

³¹ In Brazil there was not a proper discipline that regulates with efficiency the drafting of international contracts. See Joao A. Lima, “A harmonizacao do direito privado”. Brasília: Fundacao Alexandre de Gusmao, 2007, p. 210

³² See Mario L. Q. Soares e Mateus S. de Oliveira, ‘Comercio Internacional: A relacao das normas brasileiras com as Convencoes sobre contratos internacionais da OEA, ONU e UE’, p. 900. Available at: <http://cisgbrasil.dominiotemporario.com/doc/mlqsoares1.pdf> accessed on 31st August 2013

costs.³³ From the article 1 to the article 6, the instrument deals with its sphere of application and there are two meanings to this wording: the first is related to which contracts the convention is applicable and the second is in which circumstances it applies.

On article 1³⁴ we learn about the general sphere of application, where the minimum requirement is that parties to the contract should have their places of business in different States and part (a)³⁵ confirms that such is always the case when both parties are signatories of the Convention. Until this day, we wouldn't be able to find the presence of Brazil in relation to article 1. 1. (a), but with the entry into force of the convention in Brazil in 2014 this will change.

In order to respect the choice made by those countries that haven't ratified the convention, but with the intention to extend the spectrum of an international commercial law, part (b)³⁶ of the same article affirms that the convention will nevertheless be in force "when the rules of private international law lead to the application of the law of a contracting state". We will now study the possibilities surrounding the application of Brazilian private international law, intending to call for the attention of the legal field to the similarities and differences between the CISG and the Brazilian Civil code in regards to contract formation.

2.2.2. The article 1. 1. (b) and Brazilian private international law

As seen before, according to the article 1. 1. (b), when one of the parties to the contract, being subjected to court, is not a signatory State of the Convention, then the court hearing the case will look to its own conflict of law rules in order to find the material law applicable to the transaction and, this way, solve the dispute. This is one of the ways in which

³³ See the UNCITRAL official website at the following link: http://www.uncitral.org/uncitral/uncitral_texts/sale_goods/1980CISG.html accessed on 31st August 2013

³⁴ CISG Art. 1. (1): This convention applies to contracts of sale of goods between parties whose places of business are in different States.

³⁵ Article 1. 1. (a): when the States are Contracting States; or

³⁶ In Portuguese the text of the CISG reads 1. 1. (b) is: quando as regras de direito internacional privado levarem à aplicação da lei de um Estado Contratante.

Brazil already got into contact with the text of the convention.³⁷ In 2003, ten years ago, a Brazilian party has been subject to the sphere of application of the spoken article, when the Justice Tribunal of Karlsruhe in Germany, looking into its own rules of private international law, decided for the application of the law of the country with the closest connection to the case. That was the Substantive Law of Germany, and once that country is a signatory State, the CISG was the fair choice.³⁸

However, considering that the adherence to the Convention will bring more business investments to Brazil and possibly more cases being brought to Brazilian public courts instead of only to arbitral courts, we believe that would be interesting in here to study the possibility where one of the parties is not a member State to the convention and the court hearing the case is one located in Brazil. Such situation brings to light some interesting differences between Brazilian contract of sales law and the CISG and we open the question here if it is truly possible to have an uniform commercial law when so much flexibility exists.

2.2.3. Rules of Brazilian Private International Law

In Brazil, the modern private international law already gave a step ahead and dropped the concept of nationality as a connecting factor, adopting the domicile and habitual residence of the parties as the connecting factor to determine the applicable law to a legal relationship with an international element.³⁹ It was also not ignored by Brazilian scholars the fact that the international commercial law, as it was the famous *lex mercatoria*, intends to be a transnational law and the fact that the majority of them agree with the accession to the Convention⁴⁰ can be seen as an indication of the Country's acceptance of a new era. On the other hand, its domestic law has not followed up with its legal minds.

³⁷ See Iacyr de A. Vieira, 'Brazil' in "The CISG and its impact on National Legal Systems" by Franco Ferrari, Sellier European Law Publishers, 2008, p.25

³⁸ Case number 7 U 40/02, decided on 10th December 2003. Available at: <http://cisgw3.law.pace.edu/cases/031210g1.html> accessed on 31st August 2013

³⁹ See Rechsteiner (n23), p. 28

⁴⁰ See Vieira (n37), p.22

In 2010, the article 9 of the previous Law of Introduction to the Civil Code was reformed and now has the name of Introduction to the Norms of the Brazilian Law (N. 12.376 of 2010)⁴¹. However, nothing else has changed and the article that deals with the determination of the law applicable to a contract reads: “to qualify and to guide obligations, it shall be applied the law of the country in which those would be constituted”. This means that the country follows the *locus regit actum* principle⁴² and on its second paragraph, the article also clarifies that the place of constitution of obligations is the place where the offeror resides⁴³.

Although article 9 is used to solve problems of conflict of laws and it clarifies the understanding on the word *constitute*, it does not deal with the concepts that surround contract formation such as offer, acceptance and counter-offer and, subsequently, offeror and offeree. This means that before the entry into force of the Convention, when faced with a dispute between parties with places of business in different states, the Brazilian court would resort to article 9 and the rules on formation of contract of its Civil Code in order to determine the law applicable to the contract. From the moment the Convention entries into force, Brazilian courts that are faced with the hypothesis of article 1. 1. (b) of the Convention should use the instrument’s rules for contract formation in order to complete the gaps left by article 9.

Therefore, intending to alert for the dangers of forgetting the commitment of article 7 of the CISG which says that in the interpretation of this Convention “regards is to be had to its international character and to the need to promote uniformity in its application” and resorting to its old domestic law, Brazilian jurists should know well the difference between the two systems and guarantee the application of the Convention as part of its now domestic legislation specialized on international sales of goods.

2.2.4. Article 9 and the Issue with Contract Formation

⁴¹ Witch substitutes the bill of decree n. 4.657 of 4th of September 1942.

⁴² See Vieira (n37), p. 14

⁴³ In Portuguese the text of paragraph 2^o reads: A obrigação resultante do contrato reputa-se constituída no lugar em que residir o proponente.

The first important aspect is to help define who is the offeror in accordance to article 9 of the introduction to the Norms of Brazilian Law. In both the CISG and in the Brazilian Civil Code an offer can be expressed or tacit^{44 45}; but while in the Convention a proposal constitutes an offer if it indicates the goods and if expressly or implicitly fixes or makes provision for determining the quantity and the price⁴⁶, in Brazil there is no distinction between proposal and offer and an offer can be directed to one person or the general public⁴⁷, the goods can be determined or determinable, the price may be fixed in many ways and the intent of the parties is more important than the words used⁴⁸. This last provision contrasts with the Convention, once article 8⁴⁹ deals with the expectations of the parties and is much more suited to the problems of communication that can arise in international trade.⁵⁰

So far, issues as those can prove to differentiate when the contract was formed, which may also influence in the case where the offeror is found to reside in Brazil and if the law applicable will be pre-convention contractual law or the CISG after its entry into force.⁵¹

⁴⁴ Article 107 of the BCC reads: the validity of the declaration of will, shall not depend of special form, save cases where the law expressly requests so (A validade da declaração de vontade não dependerá de forma especial, senão quando a lei expressamente a exigir the validity of the declaration of will, shall not depend of special form, save cases where the law expressly requests so).

⁴⁵ CISG Art. 14 (1), 1st part: A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance.

⁴⁶ The determination of price is an issue that will be revisited, in more depth, in chapter 4.

⁴⁷ Article 429 of the BCC reads: The proposal to the public is equivalent to an offer when it contains the requirements essential to contracts, save the cases where the contrary is result of circumstances and usages (A oferta ao público equivale a proposta quando encerra os requisitos essenciais ao contrato, salvo se o contrário resultar das circunstâncias ou dos usos).

⁴⁸ Article 112 of the BCC reads: In declarations of will higher attention shall be given to the intention of the party than the literal meaning of the language (Nas declarações de vontade se atenderá mais à intenção nelas consubstanciada do que ao sentido literal da linguagem).

⁴⁹ CISG Art. 8 (1): For the purposes of this convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

⁵⁰ See Bruno Zeller, “Determining the Contractual Intent of Parties under the CISG and Common Law – A Comparative Analysis” in “European Journal of Law Reform (Kluwer)”, vol. 4, no.4, 2002, p. 629-643

⁵¹ See Anelize S. Aguiar, ‘The Law Applicable to international trade transactions with Brazilian parties: A comparative study of the Brazilian Law, the CISG, and the American Law about contract formation’, 2011, p.3. Available at: <https://tspace.library.utoronto.ca/handle/1807/29626> accessed on 31st August 2013

Further than that, issues relating to the determination of the offeror and the offeree can change which law of which country will be the one to qualify and to guide the parties obligations. If Brazilian practitioners and scholars don't attend to differences in both systems, we may have courts continue to use the Civil code in matters where the CISG should be applied.

In regards to acceptance, both systems consider that it can be expressed or implied⁵², but disagree in regards to silence. While the BCC allows for a non-refusal to amount to acceptance⁵³, the CISG proves once again better suited for international commerce and excludes silence in itself as an acceptance⁵⁴. On the other hand, scholars argue that if failure to act in other direction is linked with practices established by the parties or industry usages, then silence can amount to acceptance.⁵⁵

However, while the BCC considers late acceptance to amount to a counter offer⁵⁶, the CISG opens an exception to the case found in article 21(1)⁵⁷ where the offeror may still decide to see the late acceptance as an effective one. In relation to the case where the delay is not the fault of the offeree, article 21 (2)⁵⁸ is in line with the understanding of the BCC where if the offeror does not notify the offeree about the delay, he can be held liable for the expectations of the sender.

Still in relation to the distinction between acceptance and counter-offer, both the CISG and the Brazilian Civil Code adopt the Mirror Image Rule, where to constitute an

⁵² In regards to Brazilian Law see (n29) and in regards to the CISG, article 18 (1), 1st part, says: A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance.

⁵³ According to art. 111 of the BCC silence means acceptance when circumstances and uses so authorize e the declaration of will is not necessary.

⁵⁴ Contrary to article 111 of the BCC, article 18 (1) of the CISG, 2nd part, reads: Silence or inactivity does not in itself amount to acceptance.

⁵⁵ See Aguiar (n51), p. 38-39

⁵⁶ Article 431 of the BCC reads: A aceitação fora do prazo, com adições, restrições, ou modificações, importará nova proposta.

⁵⁷ The article 21 (1) authorizes the offeror to treat the late acceptance as a valid one, if to that effect is given to the offeree notice is given to. That is an acceptance to the general rule of article 18 (2), 2nd part, which determines that "an oral offer must be accepted immediately unless the circumstances indicate otherwise".

⁵⁸ CISG Art. 21 (2): If a letter or other writing containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror orally informs the offeree that he considers his offer as having lapsed or dispatches a notice to that effect.

acceptance the response to an offer needs to match the first perfectly, so any changes made, on a purported acceptance, constitute in fact a new offer.⁵⁹

On article 431⁶⁰ of the Brazilian Civil Code we can find the definition of a counter-offer in the line already seen - a response to an offer with added or different terms - or, alternatively, an exact response in a later stage - when the deadline for an offer has already expire. On the other hand, on its article 19 (2)⁶¹ the Convention expressly allows for immaterial changes in relation to the offer, considering a response that contain those immaterial changes, still as an acceptance and not as a counter-offer. The rule found on the Convention is more sensible to the reality of international commercial contracts,⁶² but if Brazilian judges mistakenly continue to apply the BCC, a response with added immaterial terms would still be seen as constituting a new offer, which would lead to a different offeror and therefore, a different place of residence and possibly a different substantive law.

The CISG would be the Law to qualify and guide the parties' obligations in the possibilities of article 1. 1. (a) or if the courts found that the CISG is the Law of the place where the offeror resides, in line with articles 9 of the INBL and 1. 1. (b) of the CISG. However, article 9 also deals in its paragraph two, with the law applicable in the light of the execution of the obligations derived from the contract⁶³ and more importantly it does not expressly allows or forbids the parties' autonomy to choose the Law applicable to the contract. These clauses, which are commonly seen in international contracts for the sale of

⁵⁹ CISG Art. 19 (3): Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.

⁶⁰ See (n56).

⁶¹ See 'Apelação. N. 992090506307, 29 Câmara de Direito Privado do Tribunal de Justiça São de Paulo, Relator: Reinaldo Caldas (07/28/2010)' and 'Apelação sem Revisão 439680, 8ª do Extinto 1º Tribunal de Alçada Cível de Sao Paulo, Relator: Narciso Orlandi (10/19/1995)'; 'Apelação com Revisão 992020158776, a 3ª Câmara do Segundo Grupo do Tribunal de Justiça de Sao Paulo (Extinto 2º Tribunal de Alçada Cível), Relator: Antonio Ribeiro (12/12/2003)'.

⁶² See the discussion about difficulties in regards the legal system by Iulia Dolganova & Marcelo B. Lorenzen in 'O Brasil e a Adesão a Convenção de Viena de 1980 sobre Compra e Venda Internacional de Mercadorias'. Available at: <http://www.cisg.law.pace.edu/cisg/biblio/dolganova-lorenzen.html> accessed on 31st August 2013.

⁶³ Art. 9º Para qualificar e reger as obrigações, aplicar-se-á a lei do país em que se constituírem. § 1º Destinando-se a obrigação a ser executada no Brasil e dependendo de forma essencial, será esta observada, admitidas as peculiaridades da lei estrangeira quanto aos requisitos extrínsecos do ato.

goods, are a manifestation of the doctrine of party autonomy⁶⁴ and to be respected, need to count on the court's acceptance of this particular aspect of the principle of freedom of contract. We will now deal with the issue.

2.3. Considerations regarding the parties' autonomy to choose the substantive law applicable to the contract

A choice of forum is seen by the doctrine, as an indirect choice of law and a direct choice of law would happen, when the parties expressly choose the norms that should be applicable to the contract.⁶⁵ Those clauses are manifestations of the doctrine of freedom of contract or, also known in its more specific form called the Principle or doctrine of party autonomy. Brazil approaches such freedom through a conservative fashion, one commonly found in Latin America⁶⁶; but that confronts the current understanding of developed countries, the nature of international commercial transactions and, most importantly, one that is completely opposite to what is celebrated in the United Nation's Convention. The discussion regarding the view taken by Brazilian courts is already a controversial one and is not helped by the confusion expressed by scholars when surrounding the subject.

The autonomy of will, according to Josue Drebes, is a principle that connected to international law, should guide the obligations of the parties; a doctrine that is imposed by contractual agreements in regards to the material law regulating their contract. To him, the article 9 of the Introduction to the Norms of Brazilian Law (previously known as the Law of Introduction to the Civil Code) mentioned before, is also a barrier for such rights when it chooses to regulate the Law applicable to the parties obligations in accordance with the

⁶⁴ See the UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, United Nations, 2012, p. 34. Available at: <http://www.uncitral.org/pdf/english/clout/CISG-digest-2012-e.pdf> accessed on 31st August 2013.

⁶⁵ See George A. Zaphiriou, Choice of Forum and Choice of Law Clauses in International Commercial Agreements, 3 Mariland Journal of International Law, 2013, p. 311. Available at: <http://digitalcommons.law.umaryland.edu/mjil/vol3/iss2/3>

⁶⁶ See Nadia de Araujo, "Contratos Internacionais: autonomia da vontade, mercosul e convencoes internacionais. 2 ed. Rio de Janeiro, 2000, p. 71.

principles of *lex loci actus*⁶⁷ and *lex loci executionis*^{68, 69}. The author not only introduces us to a very concerning characteristic of the Brazilian legal system, but also makes use of a rather strange term⁷⁰ to what we prefer to refer as the doctrine of party autonomy.

The often use of different nomenclatures can lead us to some conclusions in how similar, or not, are the Brazilian Legal system and the CISG, adding to the general misunderstanding that can be carried on until after the Convention entries into force in that country. For that reason, we will firstly analyze how relevant this different nomenclatures can be, to then later demonstrate the different approaches and how the issues could possibly be overcome.

2.3.1. The misunderstanding regarding the principle of party autonomy and the relevance for the future of the convention

It appears that in English the terms autonomy of will, parties autonomy and the general principle of freedom of contract are used to describe similar doctrines or principles that are however not identical. In Portuguese, the confusion grows even stronger among terms such as *autonomia das partes*, *autonomia da vontade*, *autonomia privada e liberdade contractual*⁷¹ and even with its *lato sensu* and *strictu sensu* interpretation.⁷² This somewhat different nomenclatures are also used indiscriminately only to render the text production more rich and less tiring, which ends up causing a great amount of misinterpretation among jurists.

⁶⁷ Translation provided as: the law of the place where the legal action takes place. Available at: <http://definitions.uslegal.com/l/lex-loci-actus%20/>

⁶⁸ The law of the place where the obligations shall be executed will guide the legal dispute.

⁶⁹ See Drebes (n23), p. 196

⁷⁰ To refer to the right to choose the law applicable to the contract, he uses the term *autonomia da vontade*, which would literally translate as the autonomy of will.

⁷¹ The respective literal translations would be: parties' autonomy, autonomy of will, private autonomy and Freedom of contract.

⁷² See the discussion about private autonomy and the autonomy of Will by Lindajara Ostjen Couto, 'O Direito Fundamental da Autonomia Privada no Direito de Família', Revista Ambito Juridico. Available at: http://www.ambito-juridico.com.br/site/index.php?n_link=revista_artigos_leitura&artigo_id=6119

Lucia Carvalho Sica refers to *autonomia das partes* or *autonomia privada* – which would better translate as party autonomy- as being different than the autonomy of will found on private international law. She adopts the view expressed by Nadia de Araujo⁷³, where in the sphere of private international law, the autonomy of will would be the one related to the freedom of the parties in choosing the law applicable to the contract; while what is referred as party autonomy (*autonomia das partes*) in Portuguese, would mean the freedom that individuals and companies have to enter into a contract.⁷⁴

Adding to the confusion, Soares and Oliveira criticize Esther Engelberg, when she affirms that the article 9 of the referred Brazilian Law has an imperative character and does not accept the doctrine of the autonomy of will in matters related to private international law.⁷⁵ If they understood that the Professor Engelberg is referring to what is also called the doctrine of party autonomy, they would then be of the same opinion and not waste any time with criticism⁷⁶.

In their article about the advantages and disadvantages of the Brazilian accession to the CISG, Neto, Radael and Lopes affirm that party autonomy is enshrined in the article 6 of the Convention, with the exception to observe the rule of article 12.⁷⁷ The mentioned article guarantees to the parties the possibility to exclude, derogate or vary the effect of the provisions of the Convention and therefore, seem to give the parties the power to choose the rules applicable to their contract, meaning that in this case, the wording used is not the same one given by Sica or Araujo.

Until then, one may not see relevance in such differences - it appears the authors have

⁷³ See Nadia de Araujo, 'A autonomia da vontade nos contratos internacionais – Direito Brasileiro e Países do Mercosul: Considerações sobre a necessidade de Alterações no Direito Internacional Privado Obrigacional do Bloco'

⁷⁴ See L. C. Sica, A Convenção das Nações Unidas sobre Contratos de Compra e Venda Internacional de Mercadorias: Estados não Signatários e a Situação do Brasil, Revista Trimestral de Direito Civil ano 8, Jul-Sep 2007, vol.31.

⁷⁵ See Soares & Oliveira (n32), p.903.

⁷⁶ See Esther Engelberg, Contratos Internacionais do comércio, 3ed. São Paulo, 2003, p.23.

⁷⁷ See A. de Campos Cordeiro Neto, G. Moura Radael & L.F. Calabria Lopes, Brazil and the Accession to the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG): Advantages and Disadvantages, September 2011. Available at: <http://cisgw3.law.pace.edu/cisg/biblio/neto-radael-lopes.html> accessed on 31st August 2013.

only chosen to use the wording preferred by English and American scholars, when the majority agrees that “*party autonomy* is a choice of law doctrine that permits parties to choose the law of a particular country or sovereignty to govern their contract that involves two or more jurisdictions”⁷⁸. However, the same authors naively declare later that “compared with the Brazilian Legal system, one can clearly conclude in favor of the full compatibility between the two systems”⁷⁹.

Found on article 5, II,⁸⁰ of the Brazilian Federal Constitution is the general clause of freedom, extracted by the Legality Principle; provisions, which take in consideration the intention of the parties, are innumerable in an infra-constitutional level also. However, to affirm that those are manifestations of the principle of party autonomy and indicate the spoken compatibility between Brazilian norms and the text of the CISG, as those authors do, it is a great mistake and we intend to prove our point with the following discussion.

2.3.2. A comparison between Brazilian Law and the CISG in what regards the principle of party autonomy

Historically, this doctrine was introduced against the prevailing approach of *lex loci contractus* and according to Savigny “the very foundation on which party autonomy stands is the concept of freedom of contract”. Those new ideas were inspired by the *laissez faire* philosophy, in a logic that grew in popularity and by which, if a party is free to contract, it should also be free to select the law applicable to such - as long as subject to the limitations found in the *loci forum* insuring the order and authority of a nation.⁸¹

As already explained in the introduction of this topic, the article 9 of the NIDB, is responsible for appointing which law will be applicable to the contract when Brazil is the

⁷⁸ See Mo Zhang, Party Autonomy and Beyond: an International Perspective of Contractual Choice of Law, Emory International Law Review, 2006, Vol.20, p.

⁷⁹ See (n77) above.

⁸⁰ The article 5, II, reads: No one will be obliged to do or to not do anything if not by virtue of law.

⁸¹ See Horatia M. Watt, “Party Autonomy” in international contracts: from the makings of a myth to the requirements of global governance’, 2010, p. 11. Available at: http://www.columbia.edu/cu/alliance/Papers/Article_Horatia-Muir-Watt.pdf accessed on 31st August 2013.

forum. The article states that “to qualify and guide obligations, it shall be applied the law of the country in which those were formulated” and paragraph second clarifies that this will be “in the place where the offeror resides”. Adding to that, on the first paragraph of the same article, in matters where the execution of the contract will happen in Brazil, the law applicable shall always be Brazilian.

What can be noted from this article is the absence of the celebration of the *principle of party autonomy* that used to be present in the Introduction to the 1916 Civil Code, in its article 13⁸². At the same time, no prohibitions can be found in the text of the article either and that is exactly why so many authors debate on the issue. On the other hand, the CISG adopts the principle of party autonomy in a negatively fashion, when it states on its article 6 that “the parties may exclude the application” of the Convention “or, subject to article 12, derogate from or vary the effect of any of its provisions”. Such freedoms can also be evidenciate in articles such as 19 (2); 21; 25, 49 (a) or 64(a); 34, 37 and 48; 49 and 64 and 51(1).

Based only on the two texts, we could perhaps affirm, as some authors do, that both are not distant, but the difference can be evidenced when the decisions⁸³ of the Brazilian courts prove an understanding for the supremacy of the article 9 over the principle that gives such freedom to the parties. What is seems is that Brazilian courts take the easier way out, generally opting for the law that they know best and feel more comfortable with.⁸⁴

Although there are no problems with the choices made in this article in regards to the criteria for application of substantive law, the approach preferred in Brazil in what refers to the freedom of the parties to choose, derogate or change the terms of their contract is that of an undeveloped nation. For a long time contracts are being used as a way of circulation of wealth, having an important function in the economic and social development of a nation. As well put by Thalys Ryan de Andrade, this phenomenon found in the whole of Latin America,

⁸² BCC 1916 article 13: Obligations shall be guided in regards to their substance and their effects, save stipulation to the contrary, by the law of the place where were constituted (Regulará, salvo estipulação em contrário, quanto á substância e aos efeitos das obrigações, a lei do lugar, onde forem contraídas).

⁸³ See (n73), p. 118.

⁸⁴ See TJ-PE - Agravo de Instrumento : AI 477783220118170001 PE 0009575-67.2012.8.17.0000. Available at: <http://tjpe.jusbrasil.com.br/jurisprudencia/22474075/agravo-de-instrumento-ai-477783220118170001-pe-0009575-6720128170000-tjpe> accesses on 31st August 2013.

ties the progress of the international trade in those countries.⁸⁵

Although it seems that all would be over with the adherence to the Convention, we know that when only one or none of the parties are from Member States, the rules applied will be the rules of private international law and so Brazil cannot get completely rid of its outrageous lack of clarity and, worse than that, we also know from other examples that it is very difficult to change the mentality of a whole class of professionals.

We agree with the opinion of Soares and Oliveira when they defend that to resolve this problem for good would be to change the text of article 9. Although it would not fulfill the purpose of legal certainty, we suggest that instead of adopting any new rule, the text should follow the example of the Vienna Convention and simply include the expression “unless otherwise agreed”. This way, the parties that used to count with the provisions of article 9 can still rely on it, but everyone looking to run from its conservative view could simply have the guarantee of a safe opt out. Additionally, we believe that universities should promote the study of the convention and its application in the country and perhaps then, with such clarity and taking in consideration the origins of Brazilian Private international law, the new generation of jurists would have no problem in respecting the intention of the parties in any stage of the contract.

⁸⁵ See Thalys Ryan de Andrade, ‘Autonomia da vontade nos contratos internacionais como instrument de desenvolvimento no Brasil’ in “Direito e Comercio Internacional”, Quartier Latin, 2010, p. 214

3. The General Clauses of the Brazilian Civil code and its compatibility with international commercial contracts and the CISG

3.1. The definition of general clauses and their relationship with principles of law

Historically, the legal traditions of the Latin world and more specifically, of Latin America, are deeply rooted in the theory of positivism.⁸⁶ Legal positivism, in a traditional sense, is rooted in a understanding that what is important is the norm in itself and not the moral behind it⁸⁷ and, although the Brazilian legal system⁸⁸ is deeply attached to closed legal norms, the normative crises lived in the 20th century - that followed the industrial revolution – caused a process which culminated on new roles for the Civil Code and the Federal Constitution⁸⁸.

In the classic theory of the contracts, the principle of *pacta sunt servanda* and the autonomy of will are the pillars of contractual relations.⁸⁹ However, the changes in society and its consequent influence in the European legal systems caused in Brazil a process of legal intervention in the economic field, creating an ever-growing amount of legislations that dealt more specifically with particular areas of conflict. In the second half of that century, the Brazilian Constitution established principles and norms treating the development of the private economic transactions, determining the criteria to interpret those new special laws,

⁸⁶ In reality, positivism was not the same in all the Latin American, nor in the European, Countries. However, it is possible to affirm that in many of those countries, as well as in Brazil “at certain period positivism expressed the national mind”. See Auturo Ardao, ‘Assimilation and Transformation of Positivism in Latin America’ in “Journal of History of Ideas”, Vol. 24, N. 4, 1963, p. 516. Available at: www.jstor.org accessed on 31st August 2013.

⁸⁷ H. L. A. Hart, "Positivism and the Separation of Law and Morals." Harvard Law Review 71 (1957), p.595.

⁸⁸ See Gustavo Tepedino, ‘Premissas Metodologicas para a Constitucionalizacao do Direito Civil’ in “Temas de Direito Civil”. Renovas, 1999, p.2

⁸⁹ See H. Veytia, ‘Requirement of Justice and Equity in Contracts’ in “Tulane Law Review 69”, 1994, p.1202.

invading the field of the civil code and establishing the limits to the parties' autonomy and the right to property. Concerned with the application and clarity of the legal system, the civil code started to regulate the content and intention of parties activity and the federal constitution of 1988, tried to guarantee that the civil code and the other infra-constitutional norms will be interpreted harmoniously, shifting the focus to non-economic values, like the dignity of the person, the development of the rights of personality and the social rights: from that moment, those begin to be the limits that should circle the private economic initiative.⁹⁰

In 2002, with the launch of the new Civil Code, we not only saw for the first time concepts such as gross disparity and hardship⁹¹ as we were also introduced to general clauses, two being of extreme importance to contracts of sales: the clause of the objective good faith and the general clause of social function of the contract.⁹² While the former, refers to a guiding principle of contractual relations which is present in many instruments of national and transnational law, the second is hardly ever seen anywhere else and scholars largely disagree with its scope of application.

However the terms social function and good faith are present in other legal species such as the mentioned principles, it is very important to understand that when such terms are being used to refer to general clauses, it means that those are norms, purposely vague and open, with the intent to leave undefined the exact contours of its sphere of application. Although those general clauses could serve to the interpretation of other norms, they were not designed for this purpose and serve instead to allow the judges to adapt the law to the changes in society; marking a great evolution in relation to previous legal instruments when allowing a wider selection of actions to be attached to a legal consequence.⁹³

Since they cannot be confused with principles, it is important to remember that they need to be absolutely respectful of those. The principles capable of guiding contractual

⁹⁰ See Lauro Gama Jr., "Contratos Internacionais a luz dos Principios do UNIDROIT 2004", Editora Renovar, 2006, p. 172-173

⁹¹ See the discussion on this argument at page 51.

⁹² See André S. Hentz, 'O sistema das cláusulas gerais no Código Civil de 2002 e o princípio da função social do contrato', Jus Navigandi, Teresina, ano 8, n. 317, 2004. Disponível em: <<http://jus2.uol.com.br/dou-trina/texto.asp?id=5219>>. Accessed on 31st August 2013

⁹³ See Fabio U. Coelho, "Curso de Direito Civil", Editora Saraiva, 2012, p.39.

relations are guaranteed by the Constitution, which is the greater codification of norms found in Brazil, and are therefore of a higher hierarchy than the general clauses⁹⁴. But more importantly, after the Brazilian legal system taking “um cunho principiologico”, jurists saw the principles as a way to prescribe the ends that should be achieved when serving as foundation for the application of the constitutional system – and the general clauses are the vehicle used by the principles, positivated or not, to occasion legal effects in the world.⁹⁵ As it is possible to evidence, Gabriel Turiano Moraes Nunes⁹⁶ affirms that some scholars use the terms once again indiscriminately and although there are no practical consequences to this misuse, academic works should observe precision in its analysis and add to clarify legal concepts, instead of contributing to more uncertainty.

3.2. Good faith as a common denominator in Brazilian domestic law, the CISG and principles of international commercial law

If general clauses are norms and are prescribed by the Brazilian civil code, they will not be applicable to cases dealing with international commercial contracts when the convention is and therefore, our intention with this study is to analyze the legal differences and compatibilities among the Brazilian legal system and the CISG, in order to help jurists with the mission to guarantee that the values attached to the Convention will be understood in that country and therefore safe-guarded. For that reason it is necessary to bring to light the relationship between the general clauses with the principles of the CISG and with international commercial law in general.

According to the Brazilian Civil Code - which was influenced by the German instrument BGB - article 422, “the parties entering a contract shall regard, in the conclusion

⁹⁴ See on Introduction page 6 where we talk about the Constitution and hierarchy of Brazilian Law.

⁹⁵ See Gabriel T.M. Nunes, ‘Clausulas gerais e o sistema juridico brasileiro’. Available at: http://www.migalhas.com.br/arquivo_artigo/art_03_01_05.htm accessed on 8th August 2013

⁹⁶ See the previous footnote.

of the contract, as well as in its execution, to the principles of good faith and probity⁹⁷. The general clause exemplified by this article intends to guarantee the observance of the principle of good faith when a contract is being formed and performed and, as well put by Coelho, the concept of probity is in reality, part of the conduct that should be observed by acting in good faith and therefore, the legislators were unhappily redundant when drafting the article⁹⁸.

In the common law world, good faith is a relatively new concept and is only measurable by fair dealing: the desired behavioral pattern used by the parties in a contract.⁹⁹ In Brazil, the doctrine of good faith was divided as subjective and objective, the second being equivalent to fair dealing once is the only measurable type of good faith in contract law. The referred conduct of the parties can be exemplified by providing complete, clear and truthful information; nor deceiving nor trying to hide essential aspects from the other party during the dealing process.¹⁰⁰ In regards to that similarity the statement nr. 26 of the Journey of Civil Law clarifies: “the general clause mentioned in art. 422 of the BCC imposes to the judge the duty to interpret and, when necessary, to supply and correct the contract in accordance with the objective good-faith, understood as the requirement of fair dealing between the contracting parties”.¹⁰¹

However, traditionally the common law world tends to give a higher degree of attention to the principle of *pacta sunt servanda* when tries to honor the terms of the contract, in the civil law world the judges tend to have a higher degree of participation in the interpretation of the terms of the contract and therefore allowed much more space to amend the necessary, in accordance with principles such as this.¹⁰² Being the CISG an instrument of

⁹⁷ We won't refer to any sources when the translations are ours. Article 422 of the BCC in Portuguese reads: “Os contratantes são obrigados a guardar, assim na conclusão do contrato, como em sua execução, os princípios de probidade e boa-fé.”

⁹⁸ Fabio U. Coelho (n93), p.43.

⁹⁹ See R. S. Summers, "General Duty of Good Faith-Its Recognition and Conceptualization." Cornell Law Review , vol. 67, 1981, p. 811.

¹⁰⁰ See P.J. Powers, "Defining the undefinable: good faith and the united nations convention on the contracts for the international sale of goods.", Journal of Law & Commerce, vol.18 (1998), p.336-337.

¹⁰¹ This statement is available at the following website: <http://cisgw3.law.pace.edu/cisg/biblio/neto-radael-lobes.html>

¹⁰² When interpreting, Brazilian Judges will look into ethic criterias.

uniformisation that counted on its drafting with the presence of representatives from all around the world, it is possible to affirm that article 7(1) was actually a compromise between advocates and critics of the good faith¹⁰³, in accordance with their different legal traditions.

3.2.1. The reading and interpretation of Good Faith in the Vienna Convention

The article 7(1) of the Vienna Convention states that “in the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade”. This wording divides the doctrine and commentators have outlined four possible approaches to the role and scope of the principle in regards to the CISG.¹⁰⁴ In the drafting history of the Convention, good faith was rejected as a general requirement and such position was acknowledged by the ICC Court of Arbitration Case No. 8611 of 1997¹⁰⁵ where was decided that no collateral obligation may be derived from the ‘promotion of good faith’.

However, such affirmation has its problems and in the case no. 7U 1720/94¹⁰⁶, the German Provincial Court of Appeal decided that “to allow the buyer to declare the contract void at the time of the trial, two and a half years after the event, would violate the principle of good faith in article 7(1) of the CISG”. This decision is in line with a more realistic idea that “good faith in international trade can only be truly promoted by requiring parties to so act”¹⁰⁷ and such decision actually allows for two distinct views on the matter: for some the courts would be interpreting the provisions of the CISG in good faith or alternatively, relying on the

¹⁰³ See Ulrich Magnus, "Remarks on Good Faith: The United Nations Convention on Contracts for the International Sale of Goods and the International Institute for the Unification of Private Law, Principles of International Commercial Contracts." *Pace International Law Review*, vol. 10, 1998, p.90.

¹⁰⁴ See Troy Keily, ‘Good Faith and the Vienna Convention on Contracts for the International Sale of Goods (CISG)’, *Pace Law School Institute of International Commercial Law*, 2001

¹⁰⁵ This case is available at the following link: <http://cisgw3.law.pace.edu/cases/978611i1.html>

¹⁰⁶ This case is available at the following link: <http://cisgw3.law.pace.edu/cases/950208g1.html>

¹⁰⁷ See Troy Keily (n104) above.

article to impose a general obligation of good faith¹⁰⁸.

The relevance in the different interpretation of the good faith in relation to the Convention is found in searching for the right sources that can help to clarify the parties' rights and obligations and in guaranteeing the success of a judicial dispute. In the controversial case *SARL Bri Production "Bonaventure" v. Societe Pan African Export*¹⁰⁹ the court based its decision on article 7(1) and found that the buyer acted contrary to the principle of good faith in international trade and used the principle to levy a fine to the party in fault. Despite many scholars supporting the court decision in applying article 7(1) to the relationship of the parties, there is a strong sense that they went too far when proposing a penalty for a behavior that was not in breach with any other articles of the Convention¹¹⁰.

It is interesting to know that others even affirm that the obligation of the parties in acting in good faith cannot be assumed by the reading of article 7(1). They reassure that in reality, such obligation can be imposed through article 7(2), which reads: "Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based". In the light of the use of the expression on which is based, we can observe that the principle of good faith and its variants, such as reasonableness, fair dealing, cooperation between the parties, *non venire contra factum proprium*, information and transparency and mitigation of damages¹¹¹, can be actually found throughout the behavior required in many provisions of the Convention¹¹².

To corroborate this view, there is a possibility that the principle of good faith is not

¹⁰⁸ See A. S. Komarov, "Internationality, Uniformity and Observance of Good Faith as Criteria in Interpretation of CISG: Some Remarks on Article 7 (1)." *Journal of Law & Commerce*, vol.25, 2005, p. 76.

¹⁰⁹ This case is available at the following link: <http://cisgw3.law.pace.edu/cases/950222f1.html>

¹¹⁰ See Bruno Zeller, "Good Faith- the Scarlet Pimpernel of the CISG", May 2001, see in particular paragraph 7, the article is available at the following link: <http://www.cisg.law.pace.edu/cisg/biblio/zeller2.html>. See also N. Saba, To Believe or Not to Believe: Good Faith in the CISG, *Macquarie Journal of Business Law*, 2012, Vol 9, p. 85. See also Troy Keily, 'Good Faith and the Vienna Convention on Contracts for the International Sale of Goods (CISG)', *Pace Law School Institute of International Commercial Law*, 2001. Keiley "b."

¹¹¹ See See A. de Campos Cordeiro Neto, G. Moura Radael & L.F. Calabria Lopes, Brazil and the Accession to the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG): Advantages and Disadvantages, September 2011. Available at: <http://cisgw3.law.pace.edu/cisg/biblio/neto-radael-lopes.html> accessed on 31st August 2012.

¹¹² See for example Article 29 of the CISG.

excludable by way of article 6 of the CISG, once such would seriously jeopardize the Convention's aim to achieve worldwide uniformity and guarantee good faith as it is historically expected from parties entering in contracts of sales.¹¹³ In the ICC Arbitration Case No. 8611 of 1997¹¹⁴ the Tribunal was of the opinion that article 7(1) concerns only the interpretation of the Convention, but reported that “ From Art. 7(2) it can be derived that the obligation to deliver subsequent replacement parts would have to be fulfilled within a reasonable time after receiving the buyer's order”. An Arbitral Court, in the award SCH-4318¹¹⁵, determined that the principle of estoppel “represents a special application of the general principle of good faith and without doubt is seen as one of the general principles on which the Convention is based.”

Speaking in general principles, we come to the final interpretation given to the relationship between the Convention and the principle of good faith. Despite the last view on the text of article 7(2), some authority is of the opinion that recourse should be made to general principles outside the Convention.¹¹⁶ The fact that for a party to rely in such principles, the CISG requires that a connection between the instrument and any general principles should be established prevents the arbitrary use of those principles. At the same time, we cannot forget that there is no authoritative judicial body that could pronounce binding determinations and therefore, the development of the CISG in promoting uniformity in its application and good faith in international trade¹¹⁷, rests compromised.

According to Bruno Zeller¹¹⁸, to use principles that are not tied within the Four

¹¹³ See the discussion by J. Felemegas, “The United Nations Convention on contracts for the international sale of goods: article 7 and uniform interpretation.” Diss. University of Nottingham, 2000.

¹¹⁴ This case is available at the following link: <http://cisgw3.law.pace.edu/cases/978611i1.html>

¹¹⁵ This case is available at the following link: <http://cisgw3.law.pace.edu/cases/940615a4.html>

¹¹⁶ See U. Magnus (n103) p.36.

¹¹⁷ See A. de Campos Cordeiro Neto, G. Moura Radael & L.F. Calabria Lopes, Brazil and the Accession to the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG): Advantages and Disadvantages, September 2011. Available at: <http://cisgw3.law.pace.edu/cisg/biblio/neto-radael-lopes.html> accessed on 31st August 2012.

¹¹⁸ See B. Zeller, “Good Faith- the Scarlet Pimpernel of the CISG”, May 2001, see in particular part 2, the article is available at the following link: <http://www.cisg.law.pace.edu/cisg/biblio/zeller2.html>.

Corners of the CISG, would do violence to its mandate. Ulrich Magnus¹¹⁹ does not disagree with such affirmation when states that principles found outside the Convention should generally be excluded, but on the other hand advocates for an exception for those general principles that are internationally coordinated and accepted. Principles with these characteristics can be found in the light of the *lex mercatoria* and also through the UNIDROIT principles, since those deal with the general principles of law that are applied to relations in the international commerce¹²⁰. We will now examine those in order to establish its differences and compatibilities with the Brazilian legal system, in the hope of demonstrating how much they can be of help to the application of the Convention in Brazil.

3.2.2. A study on the compatibility of the principle of Good Faith in the UNIDROIT principles and Brazilian Law and its relevance to the application of the CISG

According to Lauro de Gama Jr.¹²¹ the previously discussed changes to the classic model of the contract, are a response to the prohibition of the enrichment without a cause; the choice of law as a permission to exercise a right and not as only derived by the intention of the parties; and finally, the interpretation of the contract attached to the view of Kelsen, where in the normative field, the judge produces the law based on the legal norms or contractual clauses, proving that the predictability of the contracts passes always by the interpretation given by the courts.

If in the modern view on contract courts should be prepared to interpret the law we might have an obstacle in the fact that, as we have seen, no creation of transnational courts followed the formulation of the CISG and therefore, having in consideration that the UNIDROIT Principles constitute a non-legislative source of uniform international contracts law - where the agents of the international commerce are the most important collaborators -,

¹¹⁹ See Keiley (n104).

¹²⁰ See the official website of the UNIDROIT at the following link: <http://www.unidroit.org/english/principles/contracts/main.htm>

¹²¹ See Lauro Gama Jr., “Contratos Internacionais a luz dos Principios do UNIDROIT 2004”, Editora Renovar, 2006, p.79

we could affirm that if not law in itself, the principles can be a great source of assistance¹²² to the role of capturing the rules that are intrinsic to the transnational business world and guaranteeing the aim of the CISG in harmonizing a secure and reliable law¹²³.

However authors such as Scott Slater¹²⁴ deny the potential found in this instrument when affirm that “Following a failure to resolve an issue left unsettled in the Convention under domestic law, Article 7(1) may indeed provide a proper rationale for turning to a relevant provision in the Principles”, one cannot rely on such understanding since it goes shockingly against the wording used in the whole article 7¹²⁵, which outlines attention to the international character, uniformity and good faith as criteria for the interpretation of the CISG and leaves resort to domestic law in *ultima ratio*. In real life, in the Final Award in the Arbitration case involving the multinational Arthur Andersen, regard was made to the UNIDROIT principles as a restatement of directive principles that enjoy universal acceptance¹²⁶.

In relation to the principle of good faith, the article 1.7 of the UNIDROIT Principles deals with the matter, as an autonomous disposition of imperative character.¹²⁷ The clear and simple writing brought by paragraph (1) “each party must act in accordance with good faith and fair dealing in international trade” proves that if the text of the article

¹²² See Juraj Kotrusz, ‘Gap-Filling of the CISG by the UNIDROIT Principles of International Commercial contracts’. Available at: <http://cisgw3.law.pace.edu/cisg/biblio/kotrusz.html> accessed on 31st August 2013

¹²³ See A. M. Garro, "Gap-Filling Role of the Unidroit Principles in International Sales Law: Some Comments on the Interplay between the Principles and the CISG" in ‘Tulane Law Review’, vol.69, 1994, from p.1149.

¹²⁴ See Scott D. Slater, “Overcome by Hardship: The Inapplicability of the UNIDROIT Principles' Hardship Provisions to CISG”, Florida Journal of International Law, 1998, available at the following link: <http://www.cisg.law.pace.edu/cisg/biblio/slater.html>

¹²⁵ CISG Art. 7 of the convention states:

(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.”

¹²⁶ See the case “Andersen Consulting Business Unit Member Firms v Arthur Andersen Business Unit Member Firms and Andersen Worldwide Societe Cooperative”, 2000, n.9797, available at the following link: <http://www.unilex.info/case.cfm?pid=2&do=case&id=668&step=FullText>

¹²⁷ See L. Gama Jr. (n121), p.313.

7(2) of the CISG could be accepted as pointing to general principles found also outside the Convention, then we would have the certainty that the principle is not to be observed only in the interpretation of the Convention, but also in the conduct of the parties. Also, following the choice of words in paragraph (2) of Art.7.1 where “the parties may not exclude or limit this duty”, we would have the confirmation of the impossibility to exclude good faith by the exception made in the article 6 of the Convention.¹²⁸

In the commentaries to article 1.7¹²⁹, it is also mentioned that many other articles of the UNIDROIT Principles deal with the question of good faith and fair dealing. Of particular interest for us is article 3.5(1), which determines the nullity of a contract when, among other circumstances, the party in fault violates good faith in the commerce. Those articles deal with the validity of a contract, which is not in the scope of the CISG, meaning that if the UNIDROIT Principles are used as a way to fill the gaps of the Convention the requirement of internationality¹³⁰ would then be attended. On the other hand, those provisions tend to opt for the termination of the contract, which seems to us contrary to the spirit¹³¹ of the Convention and for that reason should be ignored.

It is clear to us that the clarity with which the UNIDROIT approaches the subject, plus the history of the Institution signalizes the expectations involved in international commercial relationships and therefore Brazilian courts should take this in consideration when applying the CISG. Further than that, since there are no transnational courts to guarantee precedents and binding uniform directions, the commentaries to the Principles - that in the case of Art.1.7 affirm that good faith should be observed through the life of the contract, including the negotiations - have the opportunity to provide a constant revision and evolution of international commerce, where the aim of the Convention would be safeguarded¹³².

¹²⁸ See note just above.

¹²⁹ See the commentary at page 17, available at: <http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf> Accessed on 31st August 2013

¹³⁰ See Article 7(1) of the CISG.

¹³¹ See the website of the UNCITRAL at the following link: http://www.uncitral.org/uncitral/uncitral_texts/sale_goods/1980CISG.html.

¹³² That is the author's opinion.

3.3. The polemic surrounding the Social Function of the Contract

The reference to the term social function of the contract is neither found in the CISG or in the UNIDROIT Principles. However, that does not necessarily mean that the intention of the Brazilian legislators when creating the general clause of social function of the contract cannot possibly be met when in the application of the Convention. This is mainly because this intention, or in fact the interpretation of the article that brings the general clause, is not pacific in the doctrine and therefore can be in harmony or not with the reality of international commerce, as we will see.

The article 421 of the Brazilian Civil Code estates: “the freedom of contract will be exercised in reason and within the limits of the social function of the contract”. The literal interpretation can contribute to the understanding that a contract will be valid only if celebrated for the good of the public and if one takes in consideration the current understanding¹³³ of the freedom of contract in Brazil we could affirm that the civil code allows to the individual the freedom to enter in a contract, as it also imposes to him the duty to do so in a way which will cooperate with his community.

In this direction is the opinion of Judith Martins-Costa, when she says that the freedom in the civil law is not a “given freedom” nor a freedom exercised in vacuum, but it is a freedom situated in a society where norms are present, generating an idea of what she calls “solidary private autonomy”. For her, the general clauses are divided in restrictive, regulative and extensive; being the social function of the contract situated in the first group, where a restriction to the legal and contractual norms sourced in the principle of freedom of contract is

¹³³ See Arnaldo Wald, ‘O Novo Código Civil e o solidarismo contractual’, *Revista de Direito Bancário, do Mercado de Capitais e da Arbitragem*, vol 21, p.35. See also Jorge C. F. Da Silva, ‘Princípio de direito das obrigações no novo Código Civil’, In “O Novo Código Civil e a Constituição”, Sarlet, Ingo (org.) Porto Alegre, Livraria do Advogado, 2003, p.99. See also Judith Martins-Costa, ‘Reflexões sobre o princípio da função social dos contratos’, *Revista Direito GV*, vol.01,p.41. See also Theodoro De Mello & Adriana Mandim, ‘A função social do contrato e o princípio da boa fé no Novo Código Civil Brasileiro’, *Revista dos Tribunais*, vol.801, 2002, p.11.

applied¹³⁴. In this aspect, agrees Coelho, but he also adds that this restriction exists to avoid any negative effects in public interests that cannot be arranged by the contracting parties¹³⁵.

According to a survey of articles, the majority of Brazilian published authors takes the role of the article a bit too far when affirm that the general clause of social function of the contract extends to the protection of the weakest party in the bargain, guaranteeing the balance between the contracting parties and the protection of legitimate interests of third parties also.¹³⁶ In this sense was decided the Civil Appeal no. 70010372027¹³⁷, 9th Civil Panel of Judges of the Supreme Court of the State of Rio Grande do Sul in August 2005, where based on the social function of the contract the court has changed the housing financial agreement that was executed between the bank and the borrower, in order to strike a balance to the bargain.

However, there is some criticism to the dichotomy that reins in the view of these scholars, demonstrated by the words of Poli and Hazan¹³⁸ when they remind us that the interest of the individual does not necessarily oppose to the interest of the society. That seems to be the intention of Mancebo¹³⁹ when affirming that “ the principle of the autonomy of will protects the individual’s freedom of contract and also the social interest”.

We should not forget that general clauses are a norm that in one side takes in consideration the legal system - made up of principles, Constitution and norms – and on the other the factual case¹⁴⁰. Therefore, applicators of law should avoid utopia and consider any legal concept within the limits proposed by the real case. Having in mind the nature of the

¹³⁴ See Judith M. Costa, ‘As clausulas gerais no projeto do codigo civil brasileiro’ in “O Direito Privado como sistema em construcao”. Available in: <http://www.ufrgs.br/ppgd/doutrina/martins1.htm> accessed in 31st August 2013

¹³⁵ See Fabio U. Coelho (n93).

¹³⁶ See Campos, Cordeiro e Neto (n117).

¹³⁷ See Luciano B. Timm, "The social function of contracts in market economic systems." *Panóptica*, vol.4.2, 2009, in this article the author comment this decision.

¹³⁸ See L. Costa Poli & B. Ferraz Hazan, “ The social function of contracts as an instrument for sustainability”, *Revista Direito e Liberdade* 2013, v. 15 n.1, p.150.

¹³⁹ See Rafael C. Mancebo, ‘A função social do contrato.’ São Paulo, Quartier Latin, 2005.

¹⁴⁰ See Gabriel T.M. Nunes, “Clausuas gerais e o sistema juridico brasileiro”, available at the following link: http://www.migalhas.com.br/arquivo_artigo/art_03_01_05.htm [accessed on 08, Aug, 2013]

contracts being dealt by the CISG, Luciano Benetti Timm¹⁴¹ masters the subject when makes use of an economic analysis and proposes the study of the social function of the contract in a market economy. The author defends that the “society will be represented by the participants (actual or potential) that integrate a certain market of goods and services”, for him the market does not always work properly and the legal intervention is justified in cases such as the reduction of transaction costs once if the article 421 is used to strengthen legal institutes, in this case the contract, for a good performance of the economic system.

The development of the economy in Brazil was followed by the creation of jobs and better standards of life for many of its people and in our opinion this in itself confirms the thesis defended by Timm, especially when Brazil already has special laws to deal with particular unbalanced relationships.

In regards to the CISG this theory of social function in a market economy seems to be the closest to the approach of the Convention. Further than that, it is understood that the general clause of social function of the contract has hermeneutic parameters in the constitutional principles of the human dignity, of the social value of the free initiative, of the substantial equality and of social solidarity¹⁴². This means that even if the general clause of social function of the contract is seen through an extended approach in relation to the one given by Sandroni¹⁴³ and even if those principles are to be taken in consideration when the Convention entries into force, to guarantee the development and the certainty in international contracts is to also guarantee the social function of those same contracts.

¹⁴¹ See Luciano B. Timm (n137).

¹⁴² See L. Costa Poli & B. Ferraz Hazan (n138), p.148.

¹⁴³ The author follows the strict view demonstrated in this paper by Coelho (n50). See Paulo Sandroni, ‘Funcao Social do Contrato: primeiras anotacoes’ in “Revista de Direito Mercantil, Editora Malheiros, 2003, p. 7-24.

4. Technical issues surrounding the CISG and the Brazilian law on contracts of sales

As we have already seen, one of the continuous issues regarding the United Nation's Convention on International Sales of Goods is related to its interpretation. Despite being designed with the purpose of inciting uniformity on the field, the Convention was caught by a surprise brought by its own best characteristic, which is its flexibility, some times provided by compromises when intending to appeal to opposite legal systems. The lack of a transnational court and of binding precedents, respects the sovereignty of Nations and guarantees its growing popularity but also means that the different interpretations given by innumerable courts all around the world are a bitter reality that practitioners and academics have to deal with.

The creation of different databases and the investment in efforts to clarify the concerning issues are commendable and the present work is only one of the innumerable initiatives in contributing for that. Because we still have not come across an article that deals with the 2013 reality of things in relation to the CISG and Brazil - the current accession and near entry into force of the former in that country - we intend here, not to carry a full discretionary study on both systems, but instead to continue to find and point the areas of conflict, so to collaborate with a proper interpretation of the successful instrument in that particular country.

In studying the criteria of determination for the applicable law and the scope of application of the Convention, we have already dealt with issues that may appear by force of articles 1. 1. (b)¹⁴⁴ of the CISG and 9¹⁴⁵ of the introduction to the norms of Brazilian Law, resorting to the rules of contract formation found in both systems in connection with the establishment of offeror and offeree or moment of contract formation. In consideration to its

¹⁴⁴ The CISG is not mandatory to non-contracting States, but by force of article 1. 1. (b) of the CISG, can be applied as *lex causae*.

¹⁴⁵ See discussion page 17.

relevance, we have also dealt with the principles of good faith and social function and its general clauses¹⁴⁶ and we will now carry a comparative study with regards to issues present in the text of the CISG as well as remaining differences that should be alerted for.

4.1. A comparative study on the formation of the contract

While article 428 I of the BCC¹⁴⁷ points to acceptance as the moment of contract formation, it is interesting to mention that a distinction is made in relation to parties that are in the presence or absence of each other. In case of acceptance *inter praesentes* there is absolutely no dispute. However, when the acceptance is made *inter absentes* problems can occur and the doctrine developed two theories to deal with it.¹⁴⁸

There are two opposite theories to explain contract formation among absentees.¹⁴⁹ The Cognition theory defends the moment when the offeror learns about the acceptance as the moment where the contract is formed. The Declaration theory on the other hand is divided in 3 sub-theories, being the dispatch and the Receipt theory the ones said to be present in the Brazilian Civil Code.¹⁵⁰ The article 434¹⁵¹ contains the general and official rule, which follows the Dispatch theory – when the acceptance is sent – as the moment of contract

¹⁴⁶ See discussion on the topic, on page 27.

¹⁴⁷ Article 428, I, of the BCC reads: An offer will be no longer compulsory if, made with no limitation of time to a present person and was not immediately accepted (Deixa de ser obrigatória a proposta: se, feita sem prazo a pessoa presente, não foi imediatamente aceita. Considera-se também presente a pessoa que contrata por telefone ou por meio de comunicação semelhante).

¹⁴⁸ See Maria H. Diniz, “Curso de Direito Civil Brasileiro: teoria das obrigações contratuais e extracontratuais”, Editora Saraiva, 2002, p. 70.

¹⁴⁹ See Manoel I. C. de Mendonça, “Doutrina e Prática das Obrigações ou Tratado Geral dos Direitos de Crédito”. Editora Paranaense, 1908, p. 715-717

¹⁵⁰ See Anelize S. Aguiar, ‘The Law applicable to international trade transactions with Brazilian parties: A comparative study of the Brazilian Law, the CISG, and The American Law about contract formation’, 2011, p. 28. Available at https://tspace.library.utoronto.ca/bitstream/1807/29626/1/Aguiar_Anelize_S_201103_LLM_thesis.pdf accessed on 1st September 2013

¹⁵¹ Article 434 of the BCC reads: Contracts among absents become perfected effective since acceptance is dispatched (Os contratos entre ausentes tornam-se perfeitos desde que a aceitação é expedida).

formation, but the articles 433, 430 and 435¹⁵² seem all to tell the opposite, making the exceptions to look like the rule. It is also interesting to attempt to the fact that although the Cognition theory and the Receipt theory seem the same, in fact there is a big difference between them. In the CISG, when articles 23¹⁵³ and 18(2)¹⁵⁴, refer to the moment that the acceptance reaches the offeror, it means that it has to be the official acceptance not mattering if the offeror new in some other way about the offeree's answer¹⁵⁵.

The "exception" found in the BCC can be said to be the rule for the transnational instrument and even more importantly, it means that article 9 of the INBL that so far dealt with cases containing an international element, points also to the same direction when states that the place of constitution of obligations is where the offeror resides. However, while the BCC uses the place of contract formation as to determine the Law that should guide the contract, the CISG prefers to refer to the places of business of the parties, so it is not even necessary to resort to the any theories that deal with the determination of the law applicable if the two parties are from States that are signatories to the Convention.¹⁵⁶ In this direction was the clarification brought by the CISG Secretariat in their commentary:

“... article 21 [*draft counterpart of CISG article 23*] does not state an express rule for the place at which the contract is concluded. Such a provision is unnecessary since no provision of this Convention depends upon the place at which the contract is concluded. Furthermore, the consequences in regard to conflicts of law and judicial jurisdiction which might arise from fixing the place at which the contract is concluded are uncertain and might be unfortunate. However, the fact that article 21 [*draft counterpart of CISG article 23*], in conjunction with article 16 [*draft counterpart of CISG article 18*], fixes the moment at which the contract is

¹⁵² Art. 430. Se a aceitação, por circunstância imprevista, chegar tarde ao conhecimento do proponente, este comunicá-lo-á imediatamente ao aceitante, sob pena de responder por perdas e danos; Art. 433. Considera-se inexistente a aceitação, se antes dela ou com ela chegar ao proponente a retratação do aceitante; Art. 435. Reputar-se-á celebrado o contrato no lugar em que foi proposto.

¹⁵³ CISG article 23: A contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of this Convention.

¹⁵⁴ CISG article 18 (2): An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

¹⁵⁵ See Aguiar (n150)... not

¹⁵⁶ CISG art 1 (1): This Convention applies to contracts of sale of goods between parties whose places of business are in different States.

concluded may be interpreted in some legal systems to be determinative of the place at which it is concluded (OFFICIAL RECORDS, p.26).”¹⁵⁷

As we can see the CISG proves different but not opposite to Brazilian contract law in many matters, which makes us believe that if awareness is raised, those differences should not be an obstacle for the certainty of international transactions¹⁵⁸. In this line is also the question of formality and more specifically of means of contractual proof. Although both instruments are considered informal, particular since Brazil has not adhere to the exception¹⁵⁹ of article 96¹⁶⁰, the Brazilian civil code surprises when in article 227¹⁶¹ limits the possibility to prove the existence of a contract through witnesses, to causes worth maximum ten times the national minimum wage. Now, this rule would perhaps always be applied since international commercial transactions deal with high quantities of goods and therefore of value.¹⁶² This means that the Convention brings a new light to such transactions when on article 11¹⁶³, authorizes witnesses as means of contractual proof.

More complicated than that is in relation to oral modifications to a contract that was perfected in writing and that contains a provision requiring any agreed modification to follow the same form. The BCC is silent on this matter, but once again in line with the principle of

¹⁵⁷ Available at: <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-23.html> accessed on 1st September 2013

¹⁵⁸ See Iacyr de A. Vieira, ‘Brazil’ in “The CISG and its impact on National Legal Systems” by Franco Ferrari, Sellier European Law Publishers, 2008, p. 23

¹⁵⁹ Official information available on: <http://www.cisg.law.pace.edu/cisg/countries/cntries-Brazil.html> accessed on 1st September 2013

¹⁶⁰ CISG art. 96: A Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration in accordance with article 12 that any provision of article 11, article 29, or Part II of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in that State.

¹⁶¹ Article 227 of the BCC reads: Save exceptions, witness prove will be accepted in legal transactions that do not exceed ten time the minimum wage of the time of celebration of the contract (Salvo os casos expressos, a prova exclusivamente testemunhal só se admite nos negócios jurídicos cujo valor não ultrapasse o décuplo do maior salário mínimo vigente no País ao tempo em que foram celebrados).

¹⁶² See A. de Campos Cordeiro Neto, G. Moura Radael & L.F. Calabria Lopes, Brazil and the Accession to the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG): Advantages and Disadvantages, September 2011. Available at: <http://cisgw3.law.pace.edu/cisg/biblio/neto-radael-lobes.html> accessed on 1st September 2013

¹⁶³ CISG art. 11: A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.

good faith, the Convention guarantees the rights of a party that relied on such oral modifications. The article 29 (2)¹⁶⁴, second part, exists to guarantee such correct conduct and therefore if a party wants to guarantee its original rights, then it should give notice to the other party in regards to that¹⁶⁵.

4.2. Differences in regards to stipulation of price and price reduction

In regards to the stipulation of the price, it seems that in both the CISG and in the Brazilian Civil code the matter is seen with a high degree of uncertainty. On article 482¹⁶⁶ of the BCC it is said that for a contract of sale to be perfected and enforceable the parties shall agree on object and price; however, articles 485 to 487 bring possibilities that if agreed, the price can be left for the stipulation of a third person, market or stock, indices or parameters - as long as all of those are specifically predicted by the parties, in accordance to the Civil Code. Then, article 488¹⁶⁷ comes to fill the gaps; firstly, to resolve the issue of not having stipulated the price, it provides the official price or the price generally charged by the seller, to fill the gap and in the case of the parties not being able to agree it provides the middle term as the solution. The final result is that the stipulation of the price does not seem so important after all, even if one may argue that articles 485 to 488 only deal with the exceptions.

¹⁶⁴ CISG art. 29 (2): A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.

¹⁶⁵ See Maria del P.P. Viscasillas, 'Modification and Termination of the Contract (Art. 29 CISG)', 2006. Available at: <http://www.cisg.law.pace.edu/cisg/biblio/perales7.html#46> accessed on 1st September

¹⁶⁶ Article 482 of the BCC reads: The contract of sale, when pure, shall be considered compulsory and perfect, as long as the parties agree in object and price (A compra e venda, quando pura, considerar-se-á obrigatória e perfeita, desde que as partes acordarem no objeto e no preço).

¹⁶⁷ Article 488 of the BCC reads: Perfected the sale without fixation of price or criteria to its determination, in case of no official table, shall be understood that the parties were subjected to the current price of the habitual sales of the seller. In the lack of agreement, in the consequence of divergence of price, the middle term shall prevail. (Convencionada a venda sem fixação de preço ou de critérios para a sua determinação, se não houver tabelamento oficial, entende-se que as partes se sujeitaram ao preço corrente nas vendas habituais do vendedor. Parágrafo único: Na falta de acordo, por ter havido diversidade de preço, prevalecerá o termo médio).

In the case of the CISG, articles 14(1)¹⁶⁸ points to the determination of the price as one of the necessary elements to make a proposal definite enough to constitute an offer. As well as in the BCC, instead of only expressly or implicitly fixing the price, the offer can contain a provision for the determination of such. And unfortunately as one may think, as well as in the BCC article 55 comes to bring uncertainty to the first provision and provides “the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned” as a way to fill the gap in case of lack of determination or agreement.¹⁶⁹ Although someone may consider the provision of a gap filler something positive to make sure that when the parties wish to contract their intention is attended, it is remarkable that article 55 predicts this solution only for cases where the contract has been validly concluded, going completely against article 14 where it is said that price is one of the necessary components of an offer.

It appears that once again the willingness to compromise different legal traditions was the reason why the CISG ended up with such a confusing rule. According to Alejandro M. Garro¹⁷⁰, the United States was behind the open price provision, once such serves the purpose of the long-term supply contracts used in that country by the time of the Convention’s draft. The author also added that, on the other, hand socialist countries, having in mind their planned economy, objected to the conclusion of contracts with open price terms and in many civil law systems, contracts on those terms were viewed with hostility, specially in regards to the disadvantages that could bring to a weaker party.

Looking back to history we can explain a lot of things, but that will be useful as long as we also look to the understanding of the present and the goal to be achieved in the future. If

¹⁶⁸ CISG art. 14 (1): A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.

¹⁶⁹ See Eduardo Grebler, ‘The convention on International Sale of Goods and Brazilian Law: Are differences irreconcilable?’ in “25 *Journal of Law and Commerce*”, 2006, p. 472. Available at: <http://www.cisg.law.pace.edu/cisg/biblio/grebler.html> accessed at 1st September 2013.

¹⁷⁰ See Alejandro M. Garro, ‘Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods’ in “23 *International Lawyer*”, 1989, p. 443-483. Available at: <http://www.cisg.law.pace.edu/cisg/biblio/garro1.html> accessed on 1st September

Brazilian scholars, practitioners and courts respect the spirit of the Convention, they should resort to the available database where cases dealing with this such issue can be found.

For some authors efforts should be made to construe these seemingly incompatible provisions¹⁷¹. In those lines, Garro¹⁷² suggests that article 14(1) indicates that a contract with open-price is actually a contract with an implicit price fixed by operation of law, which could many times be found by the price generally charged. In terms of the court decisions on the matter, it is possible to find one where the confirmation of the contract was not considered sufficiently defined by means of article 14¹⁷³, but according to the UNCITRAL Digest about article 14 of the CISG, the majority of cases have declined to apply article 55.¹⁷⁴we can affirm that the tendency seems to be the one of making use of the tools provided by article 55 in order to find alternative ways to prove a validly concluded contract.

In regards to reduction of price, the BCC allows it, only when goods contain hidden defects that render them improper for intended use or decrease their value.¹⁷⁵ Meanwhile, the CISG similarly provides for the cases of unfitness for use and decreased value, but also for

¹⁷¹ See Paul Amato, 'U.N. Convention on Contracts for the International Sale of Goods -- The Open Price Term and Uniform Application: An Early Interpretation by the Hungarian Courts' in "13 Journal of Law and Commerce", 1993, Available at: <http://www.cisg.law.pace.edu/cisg/biblio/amato.html> accessed on 1st September 2013

¹⁷² See Garro (n170) above.

¹⁷³ CLOUT case no. 139 [tribunal of International Commercial Arbitration at the Russian federation Chamber of Commerce and Industry, Russian federation, award in case no. 309/1993 of 3 march 1995] (transaction between a Ukrainian seller and an Austrian buyer; court found that buyer may have separate claim for seller's failure to propose a price during the designated time).

¹⁷⁴ Transcript of footnote number 48 of the UNCITRAL Digest about articles 14 and 55: "see also oberlandesgericht frankfurt a.m., Germany, 15 march 1996, available on the Internet at www.cisg-online.ch/cisg/urteile/284.htm (citing articles 14 and 55 when expressing doubt parties had undertaken obligations), *affirmed*, CLout case no. 236 [Bundesger- ichtshof, Germany, 23 July 1997] (no citation to articles 14 or 55); CLout case no. 410 [Landgericht Alsfeld, Germany, 12 may 1995], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/950512g1.html> (court indicates that buyer did not allege circumstances from which a lower price could establish a contract in accordance with article 55) (see full text of the decision); Kantons- gericht freiburg, switzerland, 11 october 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/041011s1.html> (a proposal with no price is not an offer); tribunal of International Commercial Arbitration at the russian Chamber of Commerce and Industry, russian federation, 9 April 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040409r1.html> (a clause about the price requiring it to be agreed within a settled period of time (yet, it was not agreed), served as a foundation for the declaration that the contract was not concluded for the following period, citing articles 14 and 55 as well as domestic law)".

¹⁷⁵ Article 441 of the BCC reads: Good received by virtue of commutative contract that contain hidden vicious or flaws, which make it improper to the use to which is destined, can have its price reduced (A coisa recebida em virtude de contrato comutativo pode ser enjeitada por vícios ou defeitos ocultos, que a tornem imprópria ao uso a que é destinada, ou lhe diminuem o valor).

when goods do not conform to the contract¹⁷⁶, proving that the Convention does not oppose to the BCC and even deals with some important hypothesis that were unfortunately not dealt by Brazilian domestic law before.

4.3. Additional time for performance and notification to the seller

The establishment of additional time for performance is present in the Civil Code only in the case where no time for performance is fixed and a notification to the party in delay is necessary to guarantee accessibility to remedies. In the Convention this establishment of additional time is actually the rule and it appears to be in line with the intention of the CISG in avoiding the abrupt termination of the contract and in facilitating to demonstrate the contractual breach.¹⁷⁷ Therefore, to know the law should be enough for Brazilian parties and courts to get used to it and comply with this new requirement.

Following the same logic is the notification of disconformity. In order to enjoy the remedies available in the CISG, notification to the seller informing the lack of conformity is vital and it should be made within a reasonable time in accordance to article 39¹⁷⁸ of the Convention. However, the facts show us that this case is proved to be a bit more complicated, once while bigger companies are usually well prepared legally, many family businesses are not. This is the case when the transactions involve small family companies in Europe, where the seller does not want to pay the supplier by reason of a product that has not satisfied its expectations and ends up losing the case for not having given such notice.¹⁷⁹

¹⁷⁶ CISG art. 50: If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time. However, if the seller remedies any failure to perform his obligations in accordance with article 37 or article 48 or if the buyer refuses to accept performance by the seller in accordance with those articles, the buyer may not reduce the price.

¹⁷⁷ See Neto, Radael & Lopes (n162).

¹⁷⁸ CISG art. 39: (1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.

¹⁷⁹ See Lucia C. Sica, 'A Convenção das Nações Unidas sobre Contratos de Compra e Venda Internacional de Mercadorias: Estados não Signatários e a Situação do Brasil', 2007. Available at: <http://www.cisg-brasil.net/doc/lstica2.htm> accessed on 1st September 2013

Although Brazil is growing economically and there are huge companies present there, there are also many small family suppliers that will not be able to count with specialized legal help. Once in Brazilian Law there are no provisions regarding such notice of disconformity, it is possible to predict that the same is likely to happen with smaller Brazilian companies.

4.4. The Concept of Fundamental Breach: is Brazilian Law more Suitable than the CISG?

According to Michael G. Bridge¹⁸⁰, the new terminology present in the convention was one of the ways to emancipate the instrument as far as possible from national legal cultures. For some authors this new language can cause imprecision, in special in countries with a legal system based on the common law, once the CISG is usually accused of using a terminology that is closer to the one found in the Civil Law world.¹⁸¹ However, it is studying the case of India, that we understand the problem to go much further than only leading to misunderstanding: the concept of *fundamental breach* introduced by article 25 of the CISG¹⁸² was pointed as one of the reasons for the non ratification of the Convention by that country, once the instrument is much more permissible than their domestic Law.¹⁸³

¹⁸⁰ See Michael G. Bridge, ‘Uniformity and Diversity in the Law of International Sale’, 2013. Available at <http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1173&context=pilr> accessed on 1st September 2013

¹⁸¹ See Andrew Babiak, ‘Defining "Fundamental Breach" Under the United Nations Convention on Contracts for the International Sale of Goods’ in “6 Temple International and Comparative Law Journal”, 1992, p. 113-143. Available at: <http://www.cisg.law.pace.edu/cisg/biblio/babiak.html> accessed on 1st September

¹⁸² CISG art. 25: A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

¹⁸³ See Iulia Dolganova and Marcelo B. Lorenzen in ‘O Brasil e a Adesao a Convencao de Viena de 1980 sobre Compra e Venda Internacional de Mercadorias’, 2008. Available at: <http://www.cisg.law.pace.edu/cisg/biblio/dolganova-lorenzen.html> accessed on 1st September 2013

That seems to be the precisely the case when we compare article 389 of the BCC¹⁸⁴ with provisions of the CISG that deal with the matter¹⁸⁵. The cited article found in Brazilian Law simply states the general rule that unfulfillment of obligations amounts to breach, leaving the Convention seeming lenient with the party in fault, making almost impossible for the innocent party to avoid the contract.¹⁸⁶

Articles 49¹⁸⁷ and 64¹⁸⁸ of the CISG actually list the hypothesis where a party can opt for the termination of a contract. These articles come as a response of the Convention to a reality much different than the one found in national commercial transactions. In this line is the opinion of Neto, Radael and Lopes,¹⁸⁹ which points to the presence of high value transactions and great distances as reason for the imposition of greater importance to the principles of preservation of the contract and mitigation of loss. We not only agree with them in this regard, as we also believe the level of competitiveness present in international sales is by itself a strong way to regulate the parties' behaviors in a way that will want them to honor their contractual obligations.

4.5. The concept of impediment and the lack of a hardship provision

It is also in regards to failure to perform that we find another controversial issue surrounding the CISG. In the section IV of the instrument we find the concept of impediment

¹⁸⁴ Article 389 of the BCC reads: If the obligation is not fulfilled, the debtor shall respond for damages plus interest, according to official indices regularly established, and lawyer's fees (Não cumprida a obrigação, responde o devedor por perdas e danos, mais juros e atualização monetária segundo índices oficiais regularmente estabelecidos, e honorários de advogado).

¹⁸⁵ Article 25. See (n182) above.

¹⁸⁶ See Grebler (n169), p. 474.

¹⁸⁷ CISG art. 49 (1): The buyer may declare the contract avoided.

¹⁸⁸ CISG art. 64 (1): The seller may declare the contract avoided.

¹⁸⁹ See Neto, Radael & Lopes (n162).

as a matter of exemption of liability to pay damages.¹⁹⁰ Other than this impediment being due to something beyond the parties control and that could not have been expected, avoided or overcome by the time of the conclusion of the contract, it does not attempt to clarify the nature of its impossibility. The matter was then defined in the UNCITRAL discussion¹⁹¹, where the general view was that impediment covers both physical and economic failures to perform, as long as - of course – that also attends to the other conditions present in the same article.

If we are talking about an economic reason, it becomes necessary to establish how great that reason has to be in order for a party to be exempt by impediment and such task is not easy if we think about the largely different value of transactions dealt in international sales. The history of the provision does not give much away and the Secretariat Commentary indicates only that the conditions have to be strict.¹⁹² In the case of *Nuova Fucinati S.p.A v Fondmetall International A.B.*¹⁹³, it was affirmed that a party can be excused under article 79 only if the performance is rendered impossible, however, the ruling has been criticized because the court used the standard for the Italian concept of force majeure and not the one intended for the impediment mentioned in the CISG.¹⁹⁴

¹⁹⁰ CISG art. 79 (1): A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

¹⁹¹ “Decisions have granted exemptions for the following breaches: a seller’s late delivery of goods; a seller’s delivery of non-conforming goods, a buyer’s late payment of the price; and a buyer’s failure to take delivery after paying the price. Parties have also claimed exemption for the following breaches, although the claim was denied on the particular facts of the case: a buyer’s failure to pay the price; a buyer’s failure to open a letter of credit; a seller’s failure to deliver goods; and a seller’s delivery of non-conforming goods.” Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V04/556/12/PDF/V0455612.pdf?OpenElement> accessed on 1st September 2013

¹⁹² Available at: <http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-79.html> accessed on 1st September 2013

¹⁹³ Available at: <http://www.unilex.info/case.cfm?pid=1&do=case&id=21&step=FullText> accessed on 1st September 2013

¹⁹⁴ See Scott D. Slater, ‘Overcome by Hardship: The Inapplicability of the UNIDROIT Principles’ Hardship Provisions to CISG’ in “12 Florida Journal of International Law”, 1998, p. 255. Available at: <http://www.cisg.law.pace.edu/cisg/biblio/slater.html> accessed on 1st September 2013

Further than that, what is noted by the doctrine is the absence of any provisions referring to the term *hardship*, making it apparent that in order to clarify some of those issues it might be necessary to resort to gap filling solutions. In relation to how much an alteration in price can be regarded as an impediment, good guidance can be found in the Comment on the UNIDROIT Principles¹⁹⁵, where an alteration of 50% or more is likely to be regarded as a fundamental one for the equilibrium of the contract. In this direction was the decision of determining the renegotiation in good faith of the contract on the case *Scafom International BV v. Lorraine Tubes S.A.S.*¹⁹⁶ where the court took in consideration the provisions 3.1 and 3.2 of the CISG Advisory Council Opinion No 7¹⁹⁷, which provided an important guideline relying on the provisions of the UNIDROIT Principles.

On the other hand Anja Carlsen¹⁹⁸ studies the difference in the provision of impediment as an excuse or validity defense. In a very interesting analysis, she confirm her hypothesis that the *hardship* provisions in the UNIDROIT Principles should not be applied in a gap-filling manner when the CISG is the governing law. Because many national doctrines similar to hardship, give the solution as a validity defense, the UNIDROIT Principles could seem better suited to fill the gaps, once hardship in here is considered as an excuse provision.¹⁹⁹ In regards to Brazilian Law, it becomes evident through the reading of articles

¹⁹⁵ Available at: <http://www.uncitral.org/pdf/english/clout/CISG-digest-2012-e.pdf> accessed on 1st September 2013

¹⁹⁶ Available at: <http://www.unilex.info/case.cfm?pid=1&do=case&id=1457&step=Abstract> accessed on 1st September 2013

¹⁹⁷ See Advisory Council Opinion No.7, 'Exemption of Liability for Damages Under Article 79 of the CISG'. Available at: <http://www.cisg.law.pace.edu/cisg/CISG-AC-op7.html> accessed on 1st September 2013

¹⁹⁸ See Anja Carlsen, 'Can the Hardship Provisions in the UNIDROIT Principles Be Applied When the CISG is the Governing Law?', 1998. Available at: <http://www.cisg.law.pace.edu/cisg/biblio/carlsen.html> accessed on 1st September 2013

¹⁹⁹ See Hoseph M. Perillo, 'Force Majeure and Hardship under the UNIDROIT Principles of International Commercial Contracts' in "*Contratación internacional. Comentarios a los Principios sobre los Contratos Comerciales Internacionales del Unidroit*, Universidad Nacional Autónoma de México - Universidad Panamericana", 1998, p. 111-113. Available at: <http://www.cisg.law.pace.edu/cisg/biblio/perillo3.html> accessed on 1st September 2013

478²⁰⁰ to 480 of the BCC it becomes evident that in Brazil hardship is not a validity defense either.

The concept of *onerosidade excessiva* is one of the new developments brought by the 2002 Civil Code. Although national doctrine and jurisprudence were dealing with the issue before that, there was no provision in the Law that backed those up.²⁰¹ Although it is interesting to have a critical eye on the issue - based on the discussion carried in hour third chapter - Paulo Magalhaes Nasser²⁰² rightly affirms that the preservation of the freedom to contract and of the obligation of the contracts needs to be balanced with limits to the type of freedom that would cause unreasonable social imbalance.

Although it is reassuring to note that the view taken by the BCC and the one found in the Convention are not opposites, when a party in fault wants to terminate the contract - as it is possible in Brazilian Law - due to impediments, the CISG will only provide relief from Damages and not from other remedies²⁰³. As much as this does not seem pleasant for the party who suffered this impediment, we have to affirm that Brazilian courts have no reason to resort to domestic contract law. In the opinion of Carlsen, a change in the market after the conclusion of the contract invokes the same operative facts both in article 79 of the CISG and in article 6.2.2. of the UNIDROIT Principles, showing that there is no need for the use of the principles on the matter. That was the case when the doctrine of *Wegfall der Geschäftsgrundlage* was considered not applicable because these matters are exhaustively

²⁰⁰ Article 478 of the BCC reads: In contracts of continuous or extended performance, if the obligations of one of the parties become excessively onerous, with extreme advantages to the other party, by virtue of the extraordinary and unpredictable events, the debtor will be authorized to ask for the resolution of the contract. The effects of the decision which so declare will be retroactive to the date of the citation (Nos contratos de execução continuada ou diferida, se a prestação de uma das partes se tornar excessivamente onerosa, com extrema vantagem para a outra, em virtude de acontecimentos extraordinários e imprevisíveis, poderá o devedor pedir a resolução do contrato. Os efeitos da sentença que a decretar retroagirão à data da citação.)

²⁰¹ See Lisia C.V. Rodrigues, 'O Código Civil de 2002: Principios Básicos e Clausulas Gerais' in "10 Anos do Código Civil - Aplicação, Acertos, Desacertos e Novos Rumos", Volume I, p. 183. Available at: http://www.emerj.tjrj.jus.br/serieaperfeicoamentodemagistrados/paginas/series/13/volume/10anosdocodigocivil_179.pdf accessed on 1st September 2013

²⁰² See Paulo M. Nasser, 'Onerosidade excessiva no contrato civil'. Available at: <http://www.cartaforense.com.br/conteudo/artigos/onerosidade-excessiva-no-contrato-civil/7140> accessed on 1st September 2013

²⁰³ CISG art. 79 (5): Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

covered by the CISG²⁰⁴ and as we can imagine there should be no reasons for things to be different in relation to the Brazilian doctrine of *onerosidade excessiva*.

On the other hand, we believe Brazil should follow the example of Belgium and at least consider the commentary to the UNIDROIT Principles in relation to how great an alteration has to be in order to be regarded as an impediment, according to the CISG.

4.6. The confusion surrounding Specific Performance in the CISG

The article 46²⁰⁵ of the CISG deals with the matter of specific performance as a remedy available to the buyer and article 28 restricts when it states: "... a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention". The fact that those articles have to be interpreted in conjunction is once again the result of trying to find a middle term between Civil Law and Common Law ²⁰⁶and - as is the apparent rule in those cases - it passes a confusing message to those trying to conform to the Convention.

The Article 475²⁰⁷ of the BCC clearly allows a requirement for specific performance as a remedy available to the buyer and therefore, if left for Brazilian courts there is absolutely no doubt in regards to this possibility. However, it is important to know about the issues raised by article 28.

Firstly, it is not settled in the doctrine if article 28 of the CISG is compulsory or not. The change in the wording from article 26 of the 1978 Draft where "... unless the courts could not do so under its own law" to the equivalent article 28 of the CISG "...unless the courts would..." is seen as an indication of a non-discretionary rule. Scholars who refer to

²⁰⁴ Case available at: <http://cisgw3.law.pace.edu/cases/930514g1.html> accessed on 1st September 2013

²⁰⁵ CISG art. 46 (1): The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement.

²⁰⁶ See Grebler (n169), p. 474-475

²⁰⁷ Article 475 of the BCC reads: The party innocent to the breach can ask for the termination of the contract, if does not prefer to demand performance, being compensation possible in any case (A parte lesada pelo inadimplemento pode pedir a resolução do contrato, se não preferir exigir-lhe o cumprimento, cabendo, em qualquer dos casos, indenização por perdas e danos).

article 28 as a safety valve support this understanding.²⁰⁸ Because Brazilian Law is similar to the Convention on the matter, it may not seem relevant to us, but it actually is if we consider which “own law” is the article referring to.

This discussion is relevant to if the article refers to the Law of the Forum or to the governing law of the contract, because as we seen, in Brazil the party’s autonomy to choose the governing Law didn’t used to be respected. However, at least from the entry into force of the Convention or in arbitration courts, such right will be recognized. In regards to arbitration law is also a concern to if the expression “... its own law...” is to be understood as the private international law or the *lex fori*. It seems that taking in consideration the international nature of arbitration courts, it would make no sense to refer to the *lex fori* whatever that is, which would then point to the law chosen by the parties²⁰⁹.

Scholars also discuss if the parties can derogate from article 28. Initially that does not seem possible because that article is directed to courts or arbitral tribunals, but the fact that article 6 expressly refers only to article 12, indicates that all other provisions of the CISG can have their effects derogated or varied. In settlement, it is possible to predict that a choice of law clause will certainly not be enough to derogate from article 28.²¹⁰ However, its once again important to remember that such is not an issue with which Brazilian courts should be worried about: there would be no reasons to think that parties would have a specific derogation from article 28 in their contracts, once specific performance is accepted in Brazilian Law.

²⁰⁸ See Carlsen (n198).

²⁰⁹ See Schlechtriem & Schwenger, ‘Commentary on the UN Convention on the International Sale of Goods (CISG)’, Oxford University Press, 2010, p. 58

²¹⁰ See Steven Waltt, ‘For Specific Performance Under the United Nations Sales Convention’. Available in: <http://www.cisg.law.pace.edu/cisg/biblio/walt.html> accessed on 1st September 2013

5. Conclusion

In recent years we have been seeing an increase in initiatives to harmonise the Laws of different countries. Those initiatives come as an answer for the demands present in a globalized world, a world that can no longer accept the pace of how things are done when we have to deal with the barriers imposed by States in order to carry on the daily commercial transactions that have been growing in volume for quite some time now. As we have seen at the beginning of this paper, transnational transactions are part of the history of commerce and it was in that ancient times that a transnational commercial Law, the *lex mercatoria*, was developed. This so called law had the characteristics of an instrument for the resolution of conflicts that had in mind the interests of traders: lower costs and fast solutions. In the development of the world in the territories as seen today, a higher degree of importance was given to the sovereignty of Nations and the diplomatic solutions; respecting the decisions and cultural reality of another State, became more common than resolving conflicts in battles. Although it may not seem, we have never lived in a more peaceful era.

On the other hand, the characteristics of trade those days, seem so similar to the ones found in the beginning of civilizations that to answer modern demands we wonder how is it not possible to just go back to the *lex mercatoria* and this way guarantee the steady growth in international commerce. The answer is very simple: we cannot ignore years of societal development on values such as balance between the contracting parties, guarantee of information to consumers and business partners and even the idea that the right to a safe environment is for all.

On top of the values present in society today, we have never been so fast in communicating with each other and the development in technology never took us so far, so safely. The differences in currency and even in Law, for example, make it in many cases, more sense economically for a buyer to trade with a partner that is located in the other side of the globe instead of in its own backyard. As an example of that, is the fact that the sale of

manufactured goods to other countries impelled China to become one of the economic superpowers of the 21st century.

China is Brazil's number one partner and it is only logical that a country would try to reduce the costs and difficulties of its trade with its most important trading partners. As a region, Latin America is Brazil's number one commercial partner with 41,5% of all the commercial transactions and both China and the majority of the Countries in Latin America have adhered to the United Nation's Convention on International Sales of Goods. The fact that Brazil was vivaciously present in the drafting of the Convention but has not signed it, is motive of speculation but it was not the object of our research; our goal was to deal with the reality of the entry into force of the CISG in Brazil in 2014, how it will be the interaction between the Convention's and Brazilian Law, in which hypothesis the Convention will be applied and in which it won't and how can practitioners and Courts avoid and contour the issues that come with the CISG.

One of the first observations made in our chapter two was the fact that the concept of contract in the Convention differentiates from the one found in Brazil and is in accordance with a more liberal fashion, where the drafters had to clearly bear in mind the different legal cultures of the signatory States. This points to one of the first challenges faced by this legal instrument, the sovereignty of each nation that has adhered to it and the space left for domestic Law and legal culture. Here we attempted to demonstrate the Convention leaves space for limits that are important to the Brazilian legal culture and that at the same time, particularities of domestic contracts should not be a concern if we have in mind what is trying to be achieved when acceding to the CISG. Further than that, the Convention will entry into force in that Country with the status of an ordinary law which is applied in specific situations, reaching out to the rules of private international law of the forum to determine the law applicable to the contract when one of the contracting parties is not from a signatory State. We demonstrated here that Brazil has an undeveloped and short article, which will need to resort to its rules on contract formation in order to determine the applicable law and which points to the non acceptance of the party's autonomy. Therefore, we believe that article 9 of

the introduction to the norms of Brazilian law should be reformed taking inspiration in the text of the CISG.

We then go on to approach those limitations found in Brazilian contract law: the general clauses of good faith and social function of the contract. Firstly, we demonstrated the difference between general clauses and principles and demonstrate that for being present in the civil code, the general clauses would not be applicable in international commercial contracts that have the CISG as governing law. On the other hand, they are manifestations of principles found in the Brazilian Convention, which will therefore continue to be limitations for the contracts governed by the CISG. For that reason, we carried on an analysis of the compatibility of those principles with the Convention, concluding that the mentioning of good faith in article 7(1) of the CISG is a result of the compromise between the civil and the common law worlds and while this concept is settled in Brazilian Law, it is not in the Convention. We then concluded that taking in consideration the spirit of the instrument, resort should be given to the UNIDROIT principles, where good faith is seen in a very similar light to the Brazilian view where the parties have to act in good faith in all times. This way we believe the parties and the court would be attending to the requirement of universality found in the Convention and also to values present in the Brazilian Federal Constitution.

On the other side of the spectrum is the principle of social function of the contract, which is not found in any provisions of the CISG or in the UNIDROIT Principles and although is one of the limits provided in Brazilian domestic's legal system, it is a highly debatable one, to which scholars do not manage to agree on. After analysing different propositions we believed to have found a common ground between the purpose of the CISG and the principle if we settle for the interpretation provided by Timm in his theory of social function in a market economy as the one intended for commercial contracts.

Continuing with our study on the challenges possibly faced after the entry into force of the CISG in Brazil, we then studied technical issues - sometimes originated in the former and other times in the later - that can have an impact in the proper interpretation of the Convention. This study has generally helped us demonstrate that the Convention is not

completely different that the rules found in Brazil and when it is, it seems to be better suited for contracts of international commercial nature.

Finally, this study has showed that although not perfect, the CISG is indeed the most successful instrument of harmonisation of the law on international sales of goods when its problems are usually generated in reason of its flexibility and openness. For that reason it is possible to say, that the entry into force of the CISG in Brazil will be a positive evolution of the law of that country and if scholars continue to be supportive and motivated about changes, the academic and legal worlds should be able to deal very well with the differences found in this new Law. It is also possible to predict that parties with a stronger economic power will initially have an advantage in being able to count on specialized legal help, but that with time the situation should be a more balance one. Ultimately, the advantages that will be brought with this adhesion will most likely suffice any obstacles.

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