Fall October, 2017

Teaching Comparative Contract Law through the CISG

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The author submits that the 1980 United Nations Convention on the International Sale of Goods (the "CISG") serves as an effective tool to teach and learn comparative contract law. This work attempts to contribute to the scholarship and teaching of comparative contract law by unveiling the CISG as a material that may successfully set the students' learning process into motion. The author demonstrates how students can discover knowledge about foreign legal systems by decomposing the content and design of the CISG with the professor's help. The author offers some guidelines on how to use the CISG to overcome the apparent difficult questions of comparative contract law and suggests some starting point exercises to teach comparative contract law through the CISG.

Keywords: Teaching Law, Comparative law, Contract Law, CISG.

The Indonesian Journal of International & Comparative Law
ISSN: 2338-7602; E-ISSN: 2338-770X
http://www.ijil.org

I. INTRODUCTION

The CISG is an international treaty that governs the international sale of goods in over 87 nations.[1] The CISG is regarded as a compromise between the laws on contracts in the common law and the civil law legal traditions.[2] However, not every single CISG provision represents a new *sui generis* rule that came unexpectedly, or that was enacted in order to find a middle ground solution between the contract laws of these legal traditions.[3] On the contrary, most of the CISG provisions embody doctrines and principles rooted in legal systems belonging to either the common law or the civil law tradition.[4] Because the CISG becomes part of the law of a Contracting State upon adoption,[5] the law applicable to international sales[6] in various civil law jurisdictions is also made out of

1. *See* Status in: UNCITRAL, www.uncitral.org (last visited September 2017).

2. Cesare M. Bianca & Joachim M. Bonell, Commentary on the International Sales Law: The 1980 Vienna Sales Convention Introduction ¶ 2.2.1, 8 (Giuffré. 1987); Philippe Fouchard, *Rapport de synthese*, *in* La Convention de Vienne sur la Vente Internationale et les Incoterms 163, (Yves Derains & Jacques Ghestin eds., 1990).

3. Only a couple of provisions like article 16 CISG on the revocation of offers and Article 28 CISG on the remedy of specific performance are a real compromise see further sections II, 1 and IV, 3 below.

4. Irrespective of its origin, article 7 CISG provides that in the interpretation of the CISG regard is to be had of its international character and to the need to promote uniformity in its application and the observance of good faith in international trade; cf. Ulrich Magnus, *The Vienna Sales Convention (CISG) between Civil and Common law: Best of all Worlds?*, 3 J. of Civil L. Stud. 67, 74 (2010).

5. ICC Arbitral Award No.7565 in CLOUT Abstract No. 300; *see also* ICC Arbitral Award Case No. 6653 in CLOUT Abstract No. 103.

6. The CISG applies to the sale of goods between parties whose places of business are in CISG Contracting States. Likewise, the CISG applies to international sales of goods governed by the law of a CISG Contracting States; cf. Art 1 (1) (a) CISG; ICC Final Award Case No. 11826 *Lex Contractus* CISG and Mexican Law as suppletive law; Argentina National Commercial Court of Appeals, *Bravo Barros, Carlos Manuel Del Corazón De Jesús v. Martínez Gares, Salvador S*, 31 May 2007; Art 1 (1) (b) CISG. Absent an agreement as to the applicable law, whenever the application of the conflict of law provisions of the forum judge leads to the application of any of the CISG Contracting States laws, the CISG

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some rules inspired by the common law on contracts and *vice versa*.[7] Moreover, a third group of CISG provisions has a shared legal background in both common law and civil law based systems.

In this regard, the CISG currently reflects the convergence of contract law rules of the two most prominent legal families. Because the CISG Working Group's objective was to find by comparison the best solution for each sales problem at an international level,[8] the CISG has for some matters privileged rules of one legal family over the other. Of course, the drafters' role was not to disfavor other legal systems. It simply ensued that some aspects of the international sale of goods could be better addressed by one specific rule that happened to have its origin, for instance, in the civil law tradition.

Against this background, the author submits that the CISG could be used as an educational material to teach and learn "foreign contract law"[9] in a comparative manner. If one adheres to the educational method of constructivism where each student is regarded as an active person who is actively building or constructing knowledge and skills,[10] the material provided by the professor is regarded as a kind of stimulus that sets the student's learning process into motion. The stimulus (the material that is taught) is not as important as the cognitive process that the stimulus is producing in active learners.[11] From the perspective of law teaching, comparative law can be understood as a pedagogical method that offers the material required to set the learning process into

would apply in accordance with Article 1 (1) (b) CISG.

7. However, as Ferrari recalls, the CISG does not want to identify itself with any legal system, because it wants to conjugate with all. He warns to be aware that terms in the CISG does not always correspond to the same terms in a specific domestic law, *cf*. Franco Ferrari, *Homeward Trend: What, Why and Why not*, *in* CISG Methodology 177, (André Janssen & Olaf Meyer eds., 2009).

8. Fouchard, *supra* note 2, at 163.

9. Although at the end of the day what we call foreign contract law may not be so since the CISG is likely to be adopted by all nations, which will lead us to realize that our own national law applicable to international sales is in some parts the same as the domestic law on contracts of other nations.

10. Jaakko Husa, *Turning the Curriculum Upside Down: Comparative Law as an Educational Tool for Constructing the Pluralistic Legal Mind*, 10 German L.J. 913, 921 (2009).

11. *Id.*

motion.[12] The core pedagogical point here is to try to make students learn the laws of systems that differ from their own[13] by using as material the provisions of an instrument rooted in principles from both their own legal family as well as from a different legal family. The CISG comparative law origin and structure offers the perfect material for comparative law teaching. In the case at hand, however, the author proposes to first decompose the material in order to, later on, construct knowledge about foreign systems. In other words, using a reverse engineering process, law professors and students can extract knowledge and design from the CISG in order to reproduce in separate parts the main rules and principles of contract law in both the common law and the civil law legal families.

In the next sections, we propose to disassembling the CISG, analyzing some of its components in order to appreciate the origin of its design, content, and features. The process of back engineering an item is also in itself an effective method for learning because it allows acquiring knowledge about the elements and procedures involved in the material that is not evident in its outer layer.[14] In the context of back engineering the CISG, the benefits double because it does not only allow us to re-document the background of its provisions but also to determine which alternative solution was abandoned by the Working Group and learn from that simple determination which system offers the best solution in the international context.[15]

The result of such reverse engineering process will also contribute to the dissemination and understanding of the CISG in all countries. However, we should keep in mind that the CISG was created as an

12. *Id.* at 920.

13. *Id.* at 921.

14. Kristin L Wood, *et al., Reverse engineering and redesign: Courses to incrementally and systematically teach design*, 90 J. of Engineering Education, 363, 364 (2001).

15. This would be in line with one of the main of objectives of comparative law under its functional method, according to which the diverse legal systems solution to one specific problem are to be identified and analyze in order to find the most appropriate concept or solution that may be adopted as a best rule for a given context, *cf. generally* Ralf Michaels, *The Functional Method of Comparative Law*, *in* The Oxford Handbook of Comparative Law (Mathias Reimann & Reinhard Zimmermann eds., 2006).

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autonomous system with its own principles and rules of interpretation.[16] Despite the background of its provisions and the comparative law exercise that we develop in this article, we strongly discouraged the reader to automatically interpret the CISG with the lenses of a similar domestic law since such approach is likely to result in a wrong application of the CISG.[17]

There is a caveat about the utility of the CISG to teach and learn comparative contract law. The CISG does not govern all matters of the international sale of goods.[18] Article 4 CISG excludes from the scope of application of the CISG issues pertaining to the validity of the contract and the transfer of title.[19] The CISG governs neither the possibility for the seller to sell third persons' goods nor the time when transfer of property occurs. These questions are governed by, and thus to be taught and learned on the basis of, domestic laws.

This article discusses some of the CISG provisions that the author considers to reflect a position on the law of contracts that usually distinguishes the two main legal families from each other. The author has been teaching comparative law to both civil law and common law students.[20] From observing the reactions and learning progress of his

16. Article 7 CISG; Ulrich Magnus, Journal of Civil Law Studies, 74 (2010): "Even though–unavoidably–most of its provisions have a clear national origin, their inclusion in the Convention and the commandment to interpret the CISG in an autonomous way have freed the Convention from its national backgrounds since long".

17. Ferrari, *supra* note 8, at 185-201. Providing some case law examples that evidence some mistakes made by courts misinterpreting the CISG based on a domestic law.

18. Bruno Zeller, CIG and the Unification of Trade Law 74 (2007).

19. Art 4 (a) (b) CISG. It is generally agreed that the CISG does not determine whether the sales contract is illegal or immoral. Nor does the CISG governs questions concerning the legal capacity of the parties, the authority of agents to enter into the contract of sale or the nullity of the contract on the grounds of mistake, unconscionable conduct, fraud, duress or gross disparity. Except for the form of the international sale of goods contract, since article 11 provides that these contracts are free from requirements as to the form, except if a State has made a reservation under article 96.

20. The author currently works as professor of comparative law at Universidad Panamericana, Guadalajara and as Course Leader of the Module International Sales and Transport Laws at Swiss International Law School (SILS)'s LL.M. in

students, the author has concluded that some of the most challenging but interesting doctrines of contract law to teach from the civil law and the common law perspective are those addressed in this article.[21] Of course, there may be other matters that also raise difficult and interesting questions from a practical or academic point of view that are not addressed in this article. In the next sections, the author offers some guidelines and suggests some starting point exercises to teach comparative contract law through the CISG. Section II starts with the rules on contract formation in the CISG, uncovering substantial differences with regard to revocation of offers, time of contract conclusion and form requirements in the common law and the civil law legal traditions. Section III highlights the rules on interpretation and supplementation of contracts that the CISG adopted in some instances from the common law while in others from the civil law. Section IV describes the system of remedies for breach of contract under the CISG while the author reflects on the strong influence that the common law had in both its structure and principles.

II. CONTRACT FORMATION

The CISG works under the assumption found in all legal systems that a contract is made by an offer and acceptance.[22] The CISG also follows

International Commercial Law and Dispute Resolution which is designed to make the learning of foreign and international law highly practical and takes a truly international and comparative approach. As part of SiLS's unique concept, each LL.M module brings together students from both common law and civil law jurisdictions to work on mock case and try to resolve them by means of domestic and international law, cf. generally, Edgardo Muñoz, *The Swiss International Law School's LL.M. In International Commercial Law And Dispute Resolution: A Fascinating Journey towards the Global Lawyer*, *in* Yearbook on International Arbitration (Marianne Roth & Michael Geistlinger eds., 2015).

21. During his teaching activities, the author has gathered some empirical evidence about the challenges faced by law students while learning comparative contract law by means of direct and indirect observation.

22. Michel G. Bridge, The International Sale of Goods 531 (3d ed., 2013); Ingeborg Schwenzer, *et al.*, Global Sales and Contract Law 130 (2011); Ulrich Schroeter, *Intro to Arts 14–24*, *in* Schlechtriem & Schwenzer:

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the general rule of all common law and civil law legal systems that an offer must contain the *essentialia negotiii* of the envisaged contract to be concluded,[23] which may be inferred by reference to other statements in the offer or subsequently determined by a third party.[24] Article 18(1) CISG stipulates the rule in all legal systems[25] that the acceptance must also indicate the offeree's assent to the terms of the offer by express declaration or other conduct.[26]

Nevertheless, the CISG does not always follow a rule that is shared by in most domestic laws in terms of contract formation. As it will be addressed below, the CISG's Working Group had to take important decisions regarding the possibility to revoke an offer, the rule that would set the time for contract conclusion and the form requirements for the contract of sale. These three decisions involved choosing a rule generally accepted only in one of either the common law or the civil law tradition.

A. Revocability of Offers

The comparative law professor may launch a lively discussion about the position generally taken by the common law and the civil law legal traditions with regard to the following type of statements in a an offer: "our offer is good in any case until 6 March," "if we do not hear from you before Friday we may allocate the goods to a different customer," "we will hold our offer until the end of the month" or "we will wait for your acceptance until tomorrow at close of business," etc. If the professor then asks whether an offer with such statements may be revoked or not, the answer will be different depending on the legal background of the student questioned. Students with a civil law legal education will tend to answer that offers including the above statements may not be revoked. Numerous civil law based systems follow the rule according

Commentary on the UN Convention on the International Sale of Goods 221, 222, (Ingeborg Schwenzer ed. 2010); E. Allan Farnsworth, United States Contract Law 83 (1999).

23. *Cf.* Article 14 CISG; Schwenzer, *et al.*, *supra* note 22, at 131, 132. 2011; Farnsworth, *supra* note 22, at 79, 80.

24. Schwenzer, *et al.*, *supra* note 22, at 132, 133. 2011.

25. *Id.* at, 146, 147.

26. *Id.* at, 146, art. 18(1) in conjunction with art. 8(1)(2) CISG.

to which an offer may not be revoked[27] if the offeror has waived his right to revoke the offer by obliging himself to uphold the offer until a certain time,[28] fixing a time for acceptance[29] or if the law establishes a default time to uphold the offer or,[30] if not time limit is stated, for a reasonable period of time.[31]

On the other hand, students with a common law legal education will tend to disagree. They may understand that those statements only mean that the offer expires after the time limit therein referred.[32] In

27. The consequence of revoking an irrevocable offer before acceptance in civil law jurisdictions is the remedy of damages for pre-contractual liability or extra-contractual liability, *cf*. Konrad Zweigert & Hein Kötz, Introduction to Comparative Law 360 (1998); Peter De-Cruz, Comparative Law in a Changing World 320 (2007).

28. Edgardo Muñoz, Modern Law of Contracts and Sales in Latin-America, Spain and Portugal 98, 99 § 6 (Ingeborg Schwenzer ed., Eleven International Publishing, 2011). Referring to the position in the following civil law countries: Chile Art 99 Com C; Cuba Art 317.1 CC; Costa Rica Art 443 (a) Com C; Ecuador Art 143 CC; El Salvador Art 969 CC; Honduras Art 718 Com C; Uruguay Art 1265 CC & Art 204 Com C; Venezuela Art 1.137 para 5 CC; *see* Argentina National Civil Chamber, *Sala* A*, Municipalidad de Buenos Aires v. Consorcio Colombres,* 1175/77, Aug. 10, 1988: stating that ". . . the acceptance may be revoked or withdraw until its acceptance, except if the right to revoke has been renounced or if an obligation to keep the offer in force for a certain term has been created (art 1150 CC) and . . . [if] the offeror has stated a term in which the offeree could accept or reject the offer, this commitment is equivalent to keeping the offer in force during such term. In such circumstances, the proposal is binding, and not even its revocation shall impede the perfection of the contract when the acceptance of the offer has been made during the term fixed; . . . except if the revocation had occurred before such offer reached the offeree."

29. Zweigert & Kötz, *supra* note 28 at 359, 361, 362. 1998; Muñoz, *supra* note 29, at 98, 99. 2011. Referring to the position in the following civil law countries: Cuba Art 317.1 CC; Guatemala Art 1521 CC; Mexico Art 1084 CC; Uruguay Art 204 Com C; Venezuela Art 1.137 para 5 CC; Mexico Collegiate Tribunals, *Novena Época,* Registry 177'335, SJF XXII, September 2005, p 1436.

30. *See for example* Costa Rica, art 443 (b) Com C: duty to withhold the offer during 5 days if the parties are in the same place, 10 days in another place within the country and 1 month if in different countries.

31. Zweigert & Kötz, *supra* note 27, at 359, 361, 362; Schwenzer, *et al.*, *supra* note 22, at 141. 2011.

32. Zweigert & Kötz, *supra* note 27, at 357.

other words, there is no offer after the deadline fixed for acceptance.[33] Consequently, an offer may always be revoked at any time before acceptance. This interpretation is correct from the point of view of most common law systems that rest on the principle that offers are freely revocable.[34] Subject to some exceptions,[35] the revocation of an offer is unrestricted under most common law based systems even if the offeror has declared to be ready to hold his offer for a given period or where the offer fixes a time-limit for acceptance.[36]

The floor will then be open for the class to discuss the reason behind this rule, which lays on one of the most important doctrines of contract formation under the common law. Pursuant to the common law doctrine of consideration, a promise does not create any obligation for the promisor if the latter has not received a benefit in exchange for his promise.[37] Accordingly, a promise to make a gift does not meet the requirements of an enforceable contract if there is no consideration, i.e. something or benefit in exchange for the promisor.[38] It follows from

33. *Id.*

34. Farnsworth, *supra* note 22, at 91; Schwenzer, *et al.*, *supra* note 22, at 141. 2011; Robert Clark, Contract Law in Ireland 26 (2004); Claude D. Rohwer & Anthony M. Skrocki, Contracts 49 (West Group Fifth ed. 2000).

35. Namely, option contracts in which case the offeree must pay for the offer to be kept open, Cf. Bridge, *supra* note 23, at 531. But also in under US law where pursuant to section 2-205 UCC an offer by a merchant to buy or sell goods "in a signed writing which by its terms gives assurance that it will be held open is not revocable, either during the time stated or if not time is stated for reasonable time." Also the doctrine of promissory estoppel has been used to prevent the revocation of offers where the offeree has relied on its detriment on the offer and such reliance could be reasonably expected by the offeror, *cf.* John O. Honnold, Uniform Law for International Sales 161 (Kluwer Law International. 1999); Schwenzer, *et al.*, *supra* note 22, at 141. 2011; Farnsworth, *supra* note 22, at 92.

36. Zweigert & Kötz, *supra* note 27, at 357, 358. 1998; Bridge, *supra* note 22, at 531; Schwenzer, *et al.*, *supra* note 22, at 141. 2011.

37. Farnsworth, *supra* note 22, at 74, 91; Zweigert & Kötz, *supra* note 27, at 357.

38. Farnsworth, *supra* note 22, at 75. Although a donation promise made under deed or settled in trust will make that promise enforceable under the common law. cf. Zweigert & Kötz, *supra* note 27, at 357. 1998; Clark, *supra* note 34, at 47; Rohwer & Skrocki, *supra* note 34, at 130.

the above that a promise to keep an offer open is, in the absence of the acceptance, no more binding than a promise to make a gift because at that point there is no consideration, *i.e.* a promise in return by the offeree.[39]

The discussion should then turn to the *sui generis* rule adopted by the CISG in order to conciliate these remarkable differences between the common law and the civil law traditions.[40] The CISG approach in the first part of article 16 CISG starts from the common law principle of revocability of offers until they are accepted.[41] However, the second part of article 16 CISG attempts to create a compromise between the traditional common law position that an offeror is not bound by offers unsupported by consideration and the civil law position that offers are irrevocable for a given time.[42] Article 16 (2) (a) CISG restricts the offeror's power to revoke where there is a promise or indication that the offer will not be revoked. In this regard, an explicit promise to hold the offer, usually known as "firm offers" in common law countries, will prevail over the doctrine of consideration.[43] Article 16(2)(a) CISG also considers that fixing a period of time for acceptance is an indication of the irrevocability of offers as widely outlined in many civil law based systems.[44] This would be at least the solution where the parties or the offeree have a civil law background since article 8(2) CISG requires

39. Bridge, *supra* note 22, at 531; Honnold, *supra* note 36, at 159; Peter Huber & Alastair Mullis, The CISG: A New Textbook for Students and Practitioners 82 (Seiller. 2007).

40. Huber & Mullis, *supra* note 39, at 81; Thomas Kadner Graziano, Le Contrat en Droit Prive European: Exercices de Comparaison 203 (LGDJ 2d ed. 2010). presenting a summary table of the different approaches taken by various legal systems, including the CISG, on the issue of offer's revocation.

41. Honnold, *supra* note 35, at 159; Schwenzer, *et al.*, *supra* note 22, at 142. 2011; Huber & Mullis, *supra* note 39, at 81.

42. Bridge, *supra* note 22, at 531.

43. Larry A. DiMatteo, The Law of International Contracting 223 (Kluwer Law International. 2000); Honnold, *supra* note 35, at 160, 161; Farnsworth, *supra* note 22, at 92; Marvin A. Chirelstein, Concepts and Case Analysis in the Law of Contracts 46, 47 (4th ed., 2001).

44. Karl H. Neumayer & Catherine Ming, Convention de Vienne sur les Contrats de Vente Internationale de Marchandises: Commentaire 158, 159 (Francois Dessemontet ed., CEDIDAC. 1993).

to interpret any statement in accordance with the understanding of the receptor in the shoes of a reasonable person.[45] However, where the parties or the offeree are from common law countries, a period for acceptance will by itself not always indicate that the offeror intended to be bound for that period, a clearer indication of revocability may be needed.[46]

Moreover, pursuant to Article 16(2)(b) CISG, an offer cannot be revoked if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree had accordingly acted. This rule finds support in both the common law and the civil law legal traditions. On the one hand, some civil law systems hold offers to be irrevocable for a reasonable period of time which can give rise to the reliance of irrevocability in certain factual scenarios involving civil law parties.[47] On the other hand, common law systems, for example, the US Restatement Second of Contracts Sec. 87, hold that reasonable reliance on the offer bars the revocation of offers.[48]

In the context of teaching comparative contract law, article 16(2)(b) in conjunction with article 29(2) CISG is the gateway to discuss the theories of estoppel under the common law and *venire contra factum proprium* in the civil law world. Both doctrines embody the rule that a person should not act in a contradictory manner and makes that person to be bound by its original conduct where such has induced reliance by

45. Schroeter, Article 16 308. 2010. United Nations, United Nations Conference On Contracts for the International Sale of Goods, Vienna, Mar. 10 - Apr. 11, 1980 - Official Records - Documents of the Conference and SummaryRecords of the Plenary Meetings and of the Meetings of the Main Committees 75 (UNCITRAL ed., United Nations 1991). That was indeed the understanding of delegates from civil law jurisdictions during the Vienna Conference. However, delegates from common law jurisdictions, such as the United Kingdom proposed an amendment to provide that the stating of a fixed time for acceptance would not of itself indicate that an offer was irrevocable. The U.K. proposal was never addressed.

46. Art. 8(2) CISG in conjunction with art. 16(2)(a) CISG, *cf.* Schroeter, *supra* note 45, art. 16 308.

47. Schwenzer, *et al.*, *supra* note 22, at 138. 2011; Honnold, *supra* note 35, at 165.

48. Honnold, *supra* note 36, at 165.

the other party.[49] However, estoppel has various variants that should be distinguished by the comparative law professor teaching to civil law educated students, while the broad scope of the *venire contra factum proprium* principle covering a wide range of fact scenarios should also be explained the common law educated students.

B. Time of Contract Conclusion

The CISG also gives the comparative law professor and his/her students an opportunity to discuss and understand the two competing theories adopted in national laws concerning the time when an acceptance becomes effective. The latter is relevant for the conclusion of contracts *inter absentes* only. When the offer is made *inter presentes* or by other means of communication which allow instantaneous communication, all legal systems including the CISG share the rule that the contract is brought about as soon as the offeror correctly and completely understands the acceptance.[50]

In the case of dealings *inter absentes*, however, many common law based systems stipulate the so-called mailbox rule whereby an acceptance becomes effective as against the offeror when it is dispatched by the offeree.[51] In this regard, the comparative law professor could provide an account of the landmark common law precedents at the origin of such rule and discuss the facts and *ratio* in decisions like *Adams vs. Lindsell*.[52] The mailbox rule seeks at narrowing the time for the revocation of offers, which is widely accepted in the common law despite any time for acceptance fixed by the offer (see subsection A above).[53] On the other hand, civil law based systems widely follow the

49. Bénédicte Fauvarque-Cosson, *La Confiance Légitime e l'Estoppel: Rapport General*, *in* La Confiance Légitime e l'Estoppel 11, (Bénédicte Fauvarque-Cosson ed. 2007).

50. Schwenzer, *et al.*, *supra* note 22, at 149. 2011; Neumayer & Ming, *supra* note 44, at 172.

51. Honnold, *supra* note 35, at 177; Zweigert & Kötz, *supra* note 27, at 358; Clark, *supra* note 35, at 20; Rohwer & Skrocki, *supra* note 35, at 116; Alain A. Levassuer, Le Contrat en Droit Américain 31 (Dalloz. 1996).

52. Zweigert & Kötz, *supra* note 27, at 358 (citing (1818) I B. & Ald. 68I, Io6 Eng. Rep. 250.).

53. Honnold, *supra* note 35, at 177; Zweigert & Kötz, *supra* note 27, at 358.

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so called reception rule, pursuant to which the acceptance is effective and thus the contract concluded as soon as the acceptance reaches the offeror.[54]

Article 18(2) CISG adopts the reception rule for contract conclusion, and thus its drafters made a choice influenced by the solution followed by many civil law jurisdictions.[55] Once more, the comparative law professor will have material to discuss with the students the implications of the reception rule and its convenience for today's contract practice. Contrary to the dispatch rule, the reception rule places the risk of the acceptance's transmission on the offeree. In this regard, the offeree is not only responsible for making sure that the acceptance arrives at destination within the time for acceptance fixed by the offer or the statute, but also that it arrives at all. As pointed out by Honnold, the reception rule makes sense because the offeree who transmits the acceptance has greater opportunity to know whether the means of communication he or she has used is at that point subject to hazards or delays.[56] The dispatch rule, on the other hand, puts the risk on the offeror who ignores the time of dispatch and the means of transmission used by the offeree, making it more likely that both the offeror and the offeree are disappointed or legally liable for any delay or mishap in communication.[57]

These two theories should also open the floor for discussion about the time window during which an offer may be revoked. Under most national laws, the time for revocation generally corresponds to the approach taken regarding the time for contract conclusion. Civil law jurisdictions that typically maintained the irrevocability of the offer during a statutory period or when the offer establishes a fixed time for acceptance required that the acceptance has reached the offeror in order to have a contract.[58] This approach allocates responsibility to the offeree so that he/she timely prepares and sends its acceptance due

54. Zweigert & Kötz, *supra* note 27, at 363; Schwenzer, *et al., supra* note 22, at 149. 2011; Honnold, *supra* note 35, at 177.

55. Schwenzer, *et al.*, *supra* note 22, at 149. 2011; Honnold, *supra* note 35, at 163, 177.

56. Honnold, *supra* note 35, at 177.

57. *Id.* at, 163 [177].

58. Schwenzer, *et al.*, *supra* note 22, at 150. 2011.

consideration of the time it may take to reach the offeror. On the other hand, in the common law countries where the permanent revocability of the offer is accepted, the mailbox rule functions as a mechanism that protects the offeree from revocation by narrowing the window during which the offeror may revoke his/her offer.[59]

The comparative law professor may then highlight the modern solution adopted by the CISG on this point. The CISG distinguishes between time for revocability and time for the effectiveness of the acceptance. As previously addressed, the CISG generally accepts the revocation of an offer until the dispatch of the acceptance[60] but assumes the conclusion of the contract only upon the reception of the acceptance by the offeror.[61] In this way, the CISG adopts the best of the two worlds by limiting the possibility to revoke the offer once the acceptance is dispatched by the offeree and by allocating to the latter the risk of the acceptance transmission's failure.

C. Form Requirement

Articles 11 and 29(1) CISG provide that a contract of sale need not be concluded or modify in writing and is not subject to any other requirement as to form. The principle of freedom of form in contracts may not surprise most lawyers, since in many jurisdictions business deals, and in particular, the sale of goods, are not subject to any form requirements either.[62] In view of that, we could only oversimplify the current stay of affairs in this matter asserting that Articles 11 and 29(1) CISG tends to follow the solution endorsed by one of the two main legal families. In particular, since English law has abolished all form requirements for the sale of goods[63] and some civil law jurisdictions

59. *Id.*; Honnold, *supra* note 35, at 140 [159].

60. Article 16 (1) CISG: "Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has *dispatched* an acceptance" [emphasis added].

61. Article 18 (2) CISG: "An acceptance of an offer becomes effective at the moment the indication of assent *reaches* the offeror" [emphasis added].

62. Honnold, *supra* note 36, at 134; for Latin American law countries *see* Muñoz, *supra* note 29, at 175, 176. 2011; in England the Sale of Goods Act sec. 4(1) embodies the principle of freedom of form, cf. Bridge, *supra* note 23, at 542.

63 Honnold, *supra* note 36, at 134; Bridge, *supra* note 23, at 542.

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still impose the in writing requirement on the sale of goods.[64]

That being said, Articles 11 and 29 CISG provide the comparative law professor with an excellent pretext to discuss the form requirements that the Statute of Frauds of different common law jurisdictions imposed on a wide variety of transactions and its fraudulent practice's prevention purpose.[65] Pursuant to Section 2-201 UCC, for example, a contract for the sale of goods for a price of $500 [USD] or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought.[66] The U.S. approach contrasts with provisions in various civil law codes that protect the freedom of form of contracts.[67]

Lastly, Articles 11 and 29 CISG remind us that doctrine such as consideration in the common law tradition or *causa* in the civil law tradition that may be labeled under domestic law as validity matters are pre-empted by the CISG provisions on the formation of the contract.[68] Under the above CISG provisions, there is no need of consideration to create or modify a contract.

64. Schwenzer, *et al.*, *supra* note 22, at 266. 2011; Zweigert & Kötz, *supra* note 27, at 368-72.

65. Zweigert & Kötz, *supra* note 27, at 366; Rohwer & Skrocki, *supra* note 34, at 195-197; Levassuer, *supra* note 51, at 49.

66. DiMatteo, *supra* note 43, at 211. 2000; Rohwer & Skrocki, *supra* note 34, at 205; Levassuer, *supra* note 51, at 50.

67. *Cf.* France, art. 6 CC, Switzerland, art. 11 CC, Germany, art. 125 CC; Russia, art. 434(1) CC. DiMatteo, *supra* note 43, at 211; De-Cruz, *supra* note 27, at 315.

68. Pilar Perales-Viscasillas, *Comments on the draft Digest relating to Articles 14-24 and 66-70*, *in* The Draft UNCITRAL Digest and Beyond 260, 261, (Franco Ferrari, *et al.* eds., 2004); Christian Mouly, *La Formation du Contrat*, *in* La Convention de Vienne sur la Vente Internationale et les Incoterms 71, (Yves Derains & Jacques Ghestin eds., 1990).

III. INTERPRETATION AND SUPPLEMENTATION OF CONTRACTS

As stated above, the CISG has its own rules of statutory interpretation in article 7.[69] The method to interpret the CISG is quite original and has served as the model for conventions that are more recent, model laws and uniform projects of the same nature.[70] The CISG commands to interpret its provisions in light of their international character and the need to promote uniformity in its application and the observance of good faith in international trade.[71] This principle of statutory law interpretation focusing on its international and uniform nature has no background on either the common law or the civil law.

Notwithstanding the above, the CISG offers the comparative contract law professor a space of opportunity for discussing the different approaches to the interpretation of statements made by contracting parties as well as to the supplementation of the contract concluded by them. It is in this area of contract law where the CISG has again borrowed or discard rules from both the common law and the civil law. As further developed below, the common law and the civil law often start from entirely different principles but usually arrive at the same result by means of exceptions or subsidiary rules of interpretation and supplementation. In this regard, the CISG has taken the closest road to achieving the best solutions for this matter at an international level.

A. Criteria for the Interpretation of (Contract) Statements and Conducts

The CISG contains the rules for the interpretation of the parties' contract in article 8 CISG.[72] In preparing this provision, the drafters

69. Urs Peter Gruber, *Legislative Intention and the CISG*, *in* CISG Methodology 54, (André Janssen & Olaf Meyer eds., 2009).

70. Ingeborg Schwenzer & Pascal Hachem, *Article 7*, *in* Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods 6, (Ingeborg Schwenzer ed. 2016).

71. Ulrich Magnus, *Tracing Methodology in the CISG: Dogmatic Foundations*, *in* CISG Methodology 39-42, (André Janssen & Olaf Mayer eds., 2009).

72. Martin Schmidt-Kessel, *Article 8*, *in* Schlechtriem & Schwenzer: Commen-

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of the Convention had to face and reconcile two conflicting principles about the fundamental nature of the process of contracting.[73] According to one of them, interpretation shall seek to unveil the true intention of the parties according to their shared subjective understanding.[74] This principle is the starting point for the interpretation of contractual statements in most civil law legal systems.[75] This principle is embodied in Article 1156 of the French civil code, which looks to construct the internal will of the parties, beyond the mere literal meaning of the words used in the contract.[76]

This subjective criterion has been retained by the CISG in the first paragraph of article 8.[77] An important caveat has been placed: statements and other conduct of a party are to be interpreted according to his subjective intent "where the other party knew or could not have been unaware what that intent was."[78] The problem with this subjective criterion is that when a dispute arises over the meaning of a contractual statement or conduct, the contending parties are generally in disagreement as to where their minds met regarding the statement at stake.[79] In the civil law legal family, this deficiency is redressed by means of parallel rules of interpretation designed to help in the task of unveiling the parties' shared subjective intent. For example, the contract is to be interpreted in its totality.[80] Because every single term may

tary on the U.N. Convention on the International Sale of Goods 146, (Ingeborg Schwenzer ed. 2010).

73. Honnold, *supra* note 35, at 117.

74. Zweigert & Kötz, *supra* note 27, at 401, 404; Schwenzer, *et al.*, *supra* note 22, at 293. 2011.

75. Schwenzer, *et al.*, *supra* note 22, at 293. 2011. Muñoz, *supra* note 28, at 241. 2011.

76. Zweigert & Kötz, *supra* note 27, at 402.

77. Huber & Mullis, *supra* note 39, at 12.

78. *Id.*

79. Honnold, *supra* note 35, at 117.

80. Zweigert & Kötz, *supra* note 27, at 402. *See* besides France other case law from civil law jurisdictions in Latin America: Bolivia Supreme Court, *Estudio Jurídico Moreno Baldiviezo v. Prefectura de Tarija*: confirming that in the interpretation of contracts it should be considered the totality of their clauses, seeking to unveil the meaning that results from the transaction as a whole; Peru

provide a bit of significance to others, and isolated clauses would not always reflect its authentic meaning, many civil law based systems call for interpreting the contract's clauses systematically, i.e. conjunctively, giving to the unclear clauses the significance resulting from the contract taken as a whole,[81] or giving to the terms the meaning that better suits the overall contract.[82]

The inherent difficulty involved in adducing evidence of the parties' common subjective intent, led common law systems to adopt an objective criterion to interpret the parties' contractual statements and conduct.[83] The starting point in the common law is that statements in a contract should be given the meaning that a reasonable person in the shoes of the party concerned would give to such words.[84] The question is not about how an ordinary reasonable person would understand the statement at stake, but about how a reasonable person in the shoes of the concerned person would understand the statement. So if the parties are in a special trade, the interpretation must include the usages of the trade.[85]

That being said, there is one important exception to the above

Supreme Court, *Sala civil transitoria,* Resolution 002380-2007, 12 December 2007: preventing the avoidance of the contract through a systematic interpretation of the contract which showed that no time of payment was established in the contract, hence, avoidance on the grounds of delay of payment could not work before establishing an agreed or judicially decided date of payment.

81. *Id. See for example* some civil law codes: Bolivia Art 514 CC; Guatemala Art 1598 CC; Paraguay Art 709 CC; Peru Art 169 CC; Spain Art 1.285 CC; Uruguay Art 1299 CC & Art 296 (2) Com C; ICC Final Award Case No. 13685 *Lex Contractus* Paraguayan Law: in order to unveil the meaning of an unclear clause, the Arbitral Tribunal considered a subsequent clause inserted in the same contract; basing his interpretation on Paraguay Art 709 CC.

82. *Id. See* some provisions in civil codes: Chile Art 1564 para 1 CC; Colombia Art 1622 para 1 CC; Ecuador Art 1607 para 1 CC; El Salvador Art 1435 para 1 CC; Uruguay Art 1299 CC & Art 296 (2) Com C.

83. *Id.* at 406; Farnsworth, *supra* note 22, at 80, 81.

84. Schwenzer, *et al.*, *supra* note 22, at 293. 2011; DiMatteo, *supra* note 43, at 232; Farnsworth, *supra* note 22, at 80, 81; Levassuer, *supra* note 51, at 32, 33; Nicole Kornet, Contract Interpretation and Gap Filling: Comparative and Theoretical Perspectives 116, 167 (Intersentia. 2006).

85. DiMatteo, *supra* note 43, at 232; Farnsworth, *supra* note 22, at 80, 81; Kornet, *supra* note 84, at 116, 167.

objective criterion under the common law. When it can be proven that both parties subjectively attach the same meaning to a term, although that meaning is not a reasonable interpretation, that subjective meaning shall be upheld.[86] In other words, the subjective criterion followed by civil law systems works as an exception to avoid injustice in the common law when it is clear that the parties shared a common understanding.

The CISG has also endorsed the objective criterion rooted in common law jurisdictions. Article 8(2) CISG provides that if article 8(1) CISG does not apply, which will be most likely the case if a dispute over the interpretation of a term arises, statements made by and other conduct of a party are to be interpreted according to the understanding of a reasonable person of the same kind as the other party would have had in the same circumstances.[87] In this regard, the CISG strikes a balance between the two starting points we find in the civil law and common law traditions. The subjective intent of one of the parties is only relevant if there is evidence that the other party could not have been unaware of that intent. If this is not applicable, which will be the case in practice given the difficulty of proving that that one party knew the exact meaning attached to a declaration by the other party, the understanding of a reasonable person is relevant.[88]

A. Consideration of External Evidence to Interpret Terms, Vary or Contradict a Written Contract (Plain Meaning Rule and Parol Evidence rule)

A further occasion to reflect about one of the features that divides the common law and the civil law traditions is offered by article 8(3) in conjunction with 11 Article CISG. Under these provisions, in determining the intention of the parties or the understanding of a reasonable person, the adjudicator may give due consideration to all relevant circumstances of the case, including statements made orally or in writing (Article 11 CISG) during and after the negotiations, and to any practices between the parties and usages.[89]

86. U.S., Statement Second on Contracts sec. 2-201(2).

87. Huber & Mullis, *supra* note 39, at 13.

88. Schwenzer, *et al.*, *supra* note 22, at 294, 295. 2011.

89. Huber & Mullis, *supra* note 39, at 13, 14.

For the civil law educated student, this rule of contract interpretation and supplementation will look quite familiar. Various civil law legal systems call for considering the parties' overall conduct and the surrounding circumstances at the conclusion of the contract in order to reveal the common intention of the contractors.[90] This may include talks, telephone conversations, minutes, private documents, messages, letters of intent, MOU, previous drafts, contracts and negotiations, company's acts, etc. prior and subsequent to the conclusion of the contract.[91] This exercise also allows the adjudicator to define the extent of the obligations agreed which may result in the variation or modification of the written contract. In some civil law countries, this principle has outplayed a "merger clause".[92] In this regard, oral promises also may be considered to vary or modify the terms of a written contract.[93] Moreover, on the basis of the principle of *venire contra factum proprium*, some courts and tribunals applying civil law based rules have found that non-oral modification clauses have no effect against a *de facto* oral modification when one of the parties' conduct has encouraged or tolerated such oral modification, to the extent that the other party has relied on that conduct.[94]

90. Schwenzer, *et al.*, *supra* note 22, at 300, 301. 2011. See some examples of civil codes: Bolivia, art. 510 (2) CC; Mexico, art. 1855 CC; Spain, art. 1282 CC; Uruguay, arts 1301 CC and 296 (4) Com C.

91. Chile, art. 1564 para. 2 CC; Colombia, art. 1622 para. 2 CC; Ecuador, art. 1607 para. 2 CC; El Salvador, art. 1435 para. 2 CC.

92. *Cf.* Schwenzer, *et al.*, *supra* note 22, at 300, 301. 2011; Muñoz, *supra* note 29, at 165, 245. 2011 (referring to an ICC Final Award Case No. 13678 *Lex Contractus* Spanish Law: upholding that such a clause does not impede the arbitrator to take into account all relevant circumstances since the arbitrator's obligation to do so is established by the rules of interpretation of Spanish Law.).

93. France, art. 6 CC, Switzerland, art. 11 CC, Germany, art. 125 CC; Russia art. 434(1) CC.

94. *See for example*, ICC Final Award Case No. 13435 *Lex Contractus* Spanish Law with implied exclusion of the CISG: noting that the modification did not need to be recorded in writing since the Contract did not so require; "nevertheless, even if it had been required, the conduct of the [seller] would in any event prevail, expressed by unequivocal own acts in its own interests, which would prevent it from invoking the need for written form of the termination agreement since the other party has relied on that conduct"; Mexico Collegiate Tribunals, *Novena Época,* Registry 172234, SJF XXV, June 2007, at 1048: sustained that contracts can be impliedly modified (orally) by the parties based on the princi-

In contrast, the common law educated students will be intrigued by such broad possibility to interpret and modify the contract in light of the restrictions imposed by the plain meaning rule and the parol evidence rule in Anglo-American law. The so-called plain meaning rule has been used to exclude all extrinsic evidence, i.e. prior and subsequent, to interpret a contract when the writing is deemed unambiguous.[95] On the other hand, the no parol evidence rule bars the admissibly of oral testimony that varies, adds or contradicts a written contract the parties intended to be the final and complete expression of their agreement.[96]

The comparative law class will realize that the CISG has thus been influenced by the less restrictive approach followed in civil law countries. The CISG does not contain any parol evidence rule and allows consideration of all extrinsic evidence in the interpretation of the sales contract.[97] The instruction of Articles 8(3) and 11 CISG is incompatible with the principle that excludes the consideration of the sounding events, usages and practices and that bars evidence of prior oral agreements.[98] The fact that a sales contract is in writing does not bar oral modifications pursuant to Article 29(2) CISG either.[99] This being said, Article 29(2) CISG gives full effect to non-oral modification clauses with one exception: a party may be precluded by his conduct from asserting such provision to the extent that the other party has

ple of party autonomy, provided the public order, the moral conventions or the good customs are not affected, and despite the fact that the parties had agreed on an "in writing" modification clause; ICC Final Award Case No. 11404 *Lex Contractus* Argentinean Law: An ICC Arbitral Tribunal also acknowledged that one cannot rule out the possibility of an amendment other than in writing even in the presence of NOM clause. However, in the Tribunal's opinion the existence of such a NOM clause requires a very strong showing of the parties' intent to the contrary.

95. DiMatteo, *supra* note 43, at 231; Rohwer & Skrocki, *supra* note 34, at 253, 254.

96. Farnsworth, *supra* note 22, at 109, 110; Bridge, *supra* note 22, at 545; DiMatteo, *supra* note 43, at 212; Rohwer & Skrocki, *supra* note 34, at 240; Chirelstein, *supra* note 44, at 88.

97. Honnold, *supra* note 35, at 121; Huber & Mullis, *supra* note 39, at 13, 14; DiMatteo, *supra* note 43, at 213-15.

98. Schmidt-Kessel, *supra* note 72, at 161; Huber & Mullis, *supra* note 39, at 13, 14.

99. Honnold, *supra* note 35, at 230; Huber & Mullis, *supra* note 39, at 13, 14.

relied on that conduct. In this regard, the CISG has endorsed the exception found in both common law and the civil law legal systems through the doctrine of estoppel and the principle of *venire contract factum proprium,* respectively.[100]

IV. REMEDIES FOR BREACH OF CONTRACT

A. The System

Pursuant to articles 45 and 61 CISG, a party's failure to perform any of its obligations will entitle the other party to claim the legal remedies available under the CISG.[101] A breach will ensue regardless of whether the obligation at stake is the main obligation or an ancillary one, whether it arises under the CISG provisions or the sales contract. For example, a seller's failure to hand over to the buyer the agreed assembling instructions constitutes a breach of contract, so as the total non-delivery of the goods is.[102] The buyer in such a case will be able to access at least the remedy of damages and under some circumstances also the remedies of specific performance and avoidance of the contract.[103]

This approach will look quite standard to the common law students while it will raise the eyebrows of most civil law students. It has been the standpoint of the common law that a party is liable for breaching its contractual promise irrespective of any fault and the type of obligation

100. Neumayer & Ming, *supra* note 44, at 235; Perales-Viscasillas, *supra* note 68, at 263, 264; Schwenzer, *et al.*, *supra* note 22, at 194. 2011.

101. Alejandro M. Garro & Alberto L. Zuppi, Compraventa Internacional de Mercaderías 285 (AbeledoPerrot, 2012).

102. Markus Muller-Chen, *Art. 45*, *in* Schlechtriem & Schwenzer: Comentario sobre la Convención de Viena de las Naciones Unidas sobre los Contratos de Compraventa Internacional de Mercaderías 1217, (Ingeborg Schwenzer & Edgardo Muñoz eds., 2011).

103. Articles 25, 49, 46, 61, 62, 74 CISG; Garro & Zuppi, *supra* note 102, at 287.

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breached,[104] i.e. warranties, conditions or intermediate terms,[105] or its U.S. law equivalent.[106] The approach is known as the unitary approach of strict liability.[107] In contrast, civil law systems predominantly followed a caused oriented approach.[108] These systems structure their remedies for breach of contract in a way so that each cause for a disturbance in the performance of the contract triggers a specific remedy.[109] In addition, various civil law jurisdictions subject some remedies to demonstrating that the breaching party was at fault.[110] The caused oriented approach is complex when compared with the unitary approach of strict liability of the common law. However, the topic constitutes an excellent opportunity for common law students to learn a system ingrained in the civil law tradition that dates back to Roman times.

The comparative law professor may start by lecturing the traditional Roman law that for the contract of sale distinguished three scenarios and offered different remedies to each of them: improper performance, delay in performance, and impossibility.[111] The vast

104. Richard A. Posner, *Let Us Never Blame a Contract Breaker*, *in* Fault in American Contract Law 4, (Omri Ben-Shahar & Ariel Porat eds., 2010); De-Cruz, *supra* note 28, at 346; Barry Nicholas, *Fault and Breach of Contract*, *in* Good Faith and Fault in Contract Law 337 (Jack Beatson & Daniel Friedmann eds., 1995) (referring to the endorsement of this principle in *Paradine v. Jane (1647)* Aleyn 26, 82 ER 897 and Introductory Note to Chapter 11 of United States, Restatement (Second) Contracts); Zweigert & Kötz, *supra* note 27, at 503.

105. Magnus *supra* note 16, at 75, 76. 2010; Schwenzer, *et al.*, *supra* note 22, at 541. 2011; De-Cruz, *supra* note 27, at 432; Clark, *supra* note 34, at 239.

106. Conditions and duties. *cf.* Farnsworth, *supra* note 23, at 142-47.

107. Posner, *supra* note 104, at 5; This does not necessary mean that the injured party will be redressed with all remedies stipulated under the law, since specific outcomes my follow according to the degree of breach and the nature of the obligation broken, *cf.* Schwenzer, *et al.*, *supra* note 23, at 541. 2011; Zweigert & Kötz, *supra* note 28, at 503.

108. Schwenzer, *et al.*, *supra* note 22, at 534. 2011.

109. Zweigert & Kötz, *supra* note 27, at 488-502.

110. Nicholas, *supra* note 104, at 337; Posner, *supra* note 104, at 7; Graziano, *supra* note 40, at 332, 333 (presenting a very clear and useful summary table regarding the systems that stipulate pre-requisite of fault to access some of the remedies in different legal systems, including the CISG.).

111. Schwenzer, *et al.*, *supra* note 22, at 534. 2011.

majority of the civil codes have adopted this structure. With regard to improper performance, the general statutory warranty of fitness of the goods encompasses three remedies available for two different types of breaches by the seller.[112] First, the redhibitory action and the *quanti minoris* action.[113] The redhibitory action may lead to the termination of the contract while the *quanti minoris* action may result in a right to reduce the price.[114] Second, when the goods delivered do not have a clear title and the buyer is defeated in trial by a third party holding a better right of property, use or exploitation over the goods, the civil law systems grant the buyer a right to compensation against eviction, which has its own rules and type of procedure.[115]

On the other hand, the breach of other general obligations unrelated to the characteristics of the goods affords three main remedies: specific performance, the avoidance of the contract or/and the compensation for damages. These remedies are available in case of the debtor's delay in performing, partially or totally, any of the obligations agreed to in the contract.[116] Moreover, civil law legal systems distinguish between the delivery of goods with defects (*redhibitory vices*) and the delivery of goods which are entirely different to those agreed (*aliud pro alio*).[117] The latter is considered as a breach caused by delay in performance while the former is characterized as improper performance.

Finally, most civil law systems require the existence of fault for the remedy of avoidance, specific performance and damages (but not for the redhibitory and *quanti minoris* claims).[118] In practice, most civil law lawyers know that the requirement of fault is automatically met and so the latter is of little practical importance since fault by the debtor in

112. France, art. 1641 CC; De-Cruz, *supra* note 28, at 404.

113. *Id.;* Pierre Engel, Contrats de Droit Suisse 32, 40 (Staempfli Editions. 2000).

114. De-Cruz, *supra* note 27, at 404; Engel, *supra* note 113, at 40, 41, 42, 45.

115. Engel, *supra* note 113, at 27, 28.

116. Schwenzer, *et al.*, *supra* note 22, at 537. 2011; De-Cruz, *supra* note 27, at 404.

117. Schwenzer, *et al.*, *supra* note 22, at 540. 2011.

118. *Id.* at 537, 540; Gunnar H. Treitel, Remedies for Breach of Contract 56 (Arthur von Mehren ed., Mohr Siebeck. 1976); *See some examples* Chile, art. 1547 (3) CC; Colombia, art. 1604 (3) CC; Ecuador, art. 1590 (3) CC; El Salvador, art. 1418 (3) CC.

breach is presumed.[119] However, fault by one of the parties affects the rules of impossibility, as the debtor may still be liable for damages and loss of profits if the impossibility was caused by his fault.[120]

Against this background, the comparative contract law class will be able to assess the benefits brought by the unitary and strict liability approach of the common law that strongly influenced the CISG.[121] The CISG has a unitary breach of contract system that does not distinguish between remedies on the grounds of defect of title,[122] nonconformity, delay performance, or non-performance at all. All are considered similar breaches and the same remedies are always triggered regardless of the type of breach.[123] That being said, as further developed in the next sections, the CISG requires the standard of fundamental breach for some of its remedies,[124] which is also a feature of the common law on contracts. Moreover, the CISG does not make the civil law distinction between the delivery of goods affected by nonconformity (*redhibitory vices*) and the delivery of goods which are completely different to those agreed (*aliud pro alio*).[125] The CISG does not require the existence of fault to make a debtor liable for its breach.[126]

Despite such a remarkable common law influence, the CISG has retained some remedy rules rooted in the civil law legal family. For

119. De-Cruz, *supra* note 27, at 346; Angel López-López, *Article 45*, *in* La Compraventa Internacional de Mecaderias: Comentario Sobre la Convención de Viena 411-414, (Luis Díez-Picazo-y-Ponce-De-León ed. 1998).

120. *Cf.* De-Cruz, *supra* note 27, at 346; Schwenzer, *et al.*, *supra* note 22, at 537. 2011. Muñoz, *supra* note 28, at 384, 385. 2011.

121. Nicholas, *supra* note 104, at 352.

122. Articles 40 and 41 CISG. The CISG does not afford a different treatment to goods affected by third party rights. Under the CISG system, the seller has an obligation to deliver goods that are free of any right or claim of a third party, including intellectual property rights. Failure to comply with this obligation is regarded as a delivery of non-conforming goods subject to the same remedy system for goods containing material defects.

123. Zweigert & Kötz, *supra* note 27, at 515.

124. Arts 49(1), 46 (2), 64(1)(a) of CISG.

125. Sonja Kruisinga, (Non-)conformity in the 1980 UN Convention on Contracts for the International Sale of Goods: Uniform Concept? 27, 28 (Intersentia. 2004).

126. *Id.* at 61, 123.

example, the CISG actively promotes the remedy of price reduction, influenced by the *quanti minoris* claim, in article 50 CISG.[127] The Germanic law mechanism of *nachfirst*[128] that grants the obligor an additional period of time beyond the contractual time for performance has also inspired the rule in article 47(1) CISG.[129] During this additional period, the obligor cannot resort to other remedies, however, retains his right to claim damages for the obligee's delay in performing.[130] This being said, the German law *Nachfirst* was originally intended to favour the specific performance remedy giving by the obligee a second chance to perform the contract.[131] In the context of the CISG however, the fixing of an additional period of time is of paramount importance because a repeated failure to deliver the goods will automatically entitle the buyer to declare the avoidance of the contract.[132]

B. Damages

In accordance with the CISG, liability for damages arises when one of the parties breaches any of its obligations under the sales contract or the CISG.[133] The breach does not have to be a "fundamental" one under article 25 CISG (section IV, 4 below). The principle of full compensation followed by all legal systems is reflected by the CISG where damages shall be equal to the financial loss suffered by the other party because of the breach.[134] On this issue, the comparative contract law professor and the class may revisit the role that damages have as a remedy for breach of contract in the common law and civil law traditions.[135] The

127. Schwenzer, *et al.*, *supra* note 22, at 544. 2011.

128. Germany, arts. 437, 439, 281, 323 CC.

129. DiMatteo, *supra* note 43, at 238.

130. Schwenzer, *et al.*, *supra* note 22, at 544. 2011.

131. *Id.*

132. *See* pursuant to article 49(1)(b) of CISG.

133. Article 74 of CISG.

134. Ingeborg Schwenzer & Pascal Hachem, *The Scope of the CISG Provisions on Damages*, *in* Contract Damages: Domestic and International Perspectives 92, 93, (Djakhongir Saidov & Ralph Cunnington eds., 2008).

135. *Cf.* Farnsworth, *supra* note 22, at 167, 168 (accurately identities the different goals of the system of remedies in the common law and the civil law juris-

common law systems traditionally regard damages as the preferred and most practical remedy for all kinds of breaches, while other remedies are considered exceptional for cases where damages are insufficient to compensate the loss flowing from the breach fully.[136] On the contrary, in civil law systems damages had been traditionally seen as the supplement of other two main remedies, *i.e.* specific performance and avoidance. What may be relevant at this point is that the comparative law professor adverts the students that in practice the most important remedy to which the parties resort to in case of breach contract, in both the civil law and the common law tradition, are damages.[137] In view of that, the CISG never limits the recourse to damages[138] irrespective of other concurrent remedies that the injured party may resort to.

C. Specific Performance

The CISG gives the aggrieved party the remedy to require the specific performance of any obligation breached by the other party.[139] Again, this rule provides excellent food for discussion about two conflicting perceptions regarding the enforcement of claims. On the one hand, in civil law systems, a party has an automatic right to claim the specific performance.[140] The rule is based on the law principle of *pacta sunt*

dictions, stating that the common law system is not directed at compulsion of promises to prevent breach but at relief to promises to redress breach. The common law is consistent with a market economy to promote the use of contract by encouraging promisees to rely on the promises of other rather than compelling promisors to perform their promises.).

136. *Id.* at 167, 168, 173; Magnus, *supra* note 16, at 76. 2010; Zweigert & Kötz, *supra* note 27, 503; Clark, *supra* note 34, at 543; Rohwer & Skrocki, *supra* note 34, at 433; Levassuer, *supra* note 51, at 73, 74; Chirelstein, *supra* note 43, at 159.

137. Schwenzer, *et al.*, *supra* note 22, at 577. 2011.

138. Unless the obligee does not perform because of a situation covered by Article 79 of CISG.

139. Article 46 CISG and Articles 61 and 62 CISG unless the injured party had opted for a different remedy that is inconsistent with specific performance, such as the avoidance of the sales contract; Garro & Zuppi, *supra* note 101, at 287.

140. *Cf.* Shael Herman, *Specific Performance: A Comparative Analysis*, 7 Edinburgh L. Rev. 5, 1 (2003); Zweigert & Kötz, *supra* note 27, at 472, 475. France, art. 1184 para. 2 CC; Germany, art. 241 CC; Brazil, arts 474, 475 CC; Chile, arts

servanda. Under this principle, the party suffering the breach of contract has, first and foremost, the right to claim the performance of the obligation contracted and not its equivalent.[141] A different approach would mean that any obligation has an optional character. Consequently, no creditor is bound to concede the performance of an alternative obligation that was not in principle agreed. Only when performance is impossible, or when it is possible but unreasonable, the creditor may claim an equivalent performance, namely financial compensation.[142]

Conversely, in common law jurisdictions, a court may not require the specific performance of obligations if there is another adequate remedy.[143] This means that the primary remedy for breach of contract in common law systems is the financial compensation for damages.[144] Specific performance is only ordered by the court when the parties have so agreed[145] or when financial compensation is inadequate.[146] For example, where the subject matter of the contract has a unique character that cannot be performed by a different obligee.[147] The comparative law professor may take this opportunity to explain the background of the exceptional nature of the remedy of specific performance which was developed as a response of the English Court of Chancery to the rigid

1489 CC and 156 Com C; Mexico, arts 1949 CC and 376 Com C; Portugal, arts 817, 801 (2) CC; Spain, arts 1.124 CC and 330 Com C; ICC Final Award Case No. 13127 *Lex Contractus* Brazilian Law.

141. Schwenzer, *et al.*, *supra* note 23, at 542. 2011.; Antonio Casillas-Sanchez, *Article 28*, *in* La Compraventa Internacional de Mecaderias: Comentario sobre la Convención de Viena 232, (Luis Díez-Picazo-y-Ponce-De-León ed. 1998).; ICC Final Award Case No. 13882 *Lex Contractus* Spanish Law.

142. Zweigert & Kötz, *supra* note 27, at 472. *See for example* in this regard Brazil, arts 461, 287 CPC; Chile, art. 152 Com C; Paraguay, art. 722 CC; Uruguay, art. 544 Com C.

143. *Id.* at, 479, 480; Rohwer & Skrocki, *supra* note 35, at 462; Levassuer, *supra* note 52, at 62, 63.

144. Graziano, *supra* note 41, at 286. Presenting a very clear and useful summary table on the place that the claim for specific performance takes in the system of remedies under different laws, including the CISG.

145. Muller-Chen, *supra* note 102, art. 28 460.

146. *Id.* at.; Zweigert & Kötz, *supra* note 27, at 480.

147. Muller-Chen, *supra* note 102, art. 28 461. 2011.

system of remedies under the old common law in *stricto sensus*, and some of the equity principles first derived from such a court.[148]

Thereafter, the comparative law class may discuss how the CISG takes into account both the civil law and the common law approach to this remedy. On the one hand, the CISG follows the civil law approach as it entitles a party to opt for a claim for specific performance as a primary remedy. The remedy of damages may be accessed jointly to the extent that the indemnity requested is not incompatible with the remedy of specific performance.[149] On the other hand, the CISG also follows the common law approach since in accordance with article 28 CISG a court is not bound to enter a judgment for specific performance unless such court would do so under its law. In other words, the remedy of specific performance under the CISG will be subject to the common law requirements mentioned before when a common law court is called to decide the claim for specific performance.[150]

In addition, the CISG has narrowed down the general right to specific performance in the civil law tradition to breaches that merit its enforcement. Article 46(2) CISG grants the buyer a right to request the delivery of substitute goods only if the lack of conformity constitutes a fundamental breach. In other words, only if keeping the nonconforming goods substantially deprives the buyer of what it was entitled to expect under the contract, and the seller at the conclusion of the contract foresaw this deprivation.[151] The rationale for requiring the high standard of breach of substantial deprivation for the delivery of substitute goods assumes that the nonconforming goods have already been shipped and transported to the buyer's place of business or to the place where the goods are intended to be resold or used. In that case, the delivery of substitute goods is considered a *ultima ratio* remedy which is made available only to the extent other remedies, which do not require a fundamental breach such as repair of the goods (Article 46 (3) CISG),

148. Zweigert & Kötz, *supra* note 27, at 480; Farnsworth, *supra* note 22, at 170; Levassuer, *supra* note 51, at 62, 63.

149. Jarno Vanto, *Article 46 CISG-PECL*, *in* An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods 372 (John Felemegas ed. 2006).

150. Magnus, *supra* note 16, at 77, 2010.

151. Article 25 of CISG.

the reduction of the price (Article 50 CISG) or/and damages (Article 74), would not fully remedy or compensate the seller's breach.[152]

In conclusion, the CISG provides the remedy of specific performance generally available in civil law jurisdictions, yet without forcing the common law jurisdictions to accept this solution. This is the unique instance where the substantive provisions of the CISG allow a split solution in order to accommodate a strongly grounded difference of the two main legal families.[153]

D. Avoidance

Pursuant to article 49 CISG, resort to the remedy of contract avoidance is limited to the occurrence of a breach that is fundamental in nature. The CISG stipulates that a breach is fundamental if it results in a detriment to the suffering party as to substantially to deprive it of what it was entitled to expect under the contract, and such result was, or ought to be, foreseeable for the breaching party.[154] Again the CISG has attempted to provide a rule suitable for international trade that takes into account the existing approaches in domestic laws. The comparative law professor may invite students to recall the rule on this matter on their jurisdictions in the context of the contract of sale, for example.

Students with an English law background will evoke the distinction made between conditions, warranties and intermediate terms.[155] Conditions are considered to form the basis of the contract.[156] In this regard, the breach of a condition by one of the parties is considered to attack the basis of the contract and thus justifies the avoidance.[157] Warranties, on the other hand, are stipulations of secondary importance,

152. Markus Müller-Chen, *Article 46*, *in* Schlechtriem & Schwenzer: Commentary on the U.N. Convention on the International Sale of Goods 712, 713, (Ingeborg Schwenzer ed. 2010).

153. Magnus, *supra* note 16, at 82. 2010.

154. Article 25 of CISG.

155. Bridge, *supra* note 22, at 567.

156. De-Cruz, *supra* note 27, at 432.

157. Schwenzer, *et al.*, *supra* note 22, at 715. 2011.; De-Cruz, *supra* note 27, at 432.

ancillary to the contract.[158] A warranty must be performed as well, but it is not as vital as a condition. The breach of a warranty may give rise to a claim for damages but not to a right to avoid the contract.[159] Finally, an intermediate term may be defined as a term of the contract which may or may not entitle the innocent party to avoid the contract depending on whether the breach goes so much to the root of the contract that makes its further commercial performance impossible or the whole contract frustrated.[160] A determination about whether a term of a contract is a condition, a warranty or an intermediate term depends, in each case, on the construction of the contract, the comparative law professor and the civil law educated students will have an opportunity to discuss the common law jurisprudence that helps to understand each of these concepts.[161]

Likewise, the civil law rules for contract avoidance should be of interest to the common law educated students. From a comparative perspective, civil law jurisdictions appear to be more prepared to allow

158. De-Cruz, *supra* note 27, at 432.

159. Schwenzer, *et al.*, *supra* note 22, at 715. 2011.; De-Cruz, *supra* note 27, at 432.

160. Schwenzer, *et al.*, *supra* note 22, at 716. 2011.

161. A good illustration is provided by House of Lords case of Cehave NV v. Bremer Handelsgesellschaft (The Hansa Nord) [1975] 3 All ER 379. According to the facts of this case, the defendants entered into a contract to sell citrus pulp pellets to the plaintiffs for use in animal food. One of the terms of the contract was that the goods should be shipped in "good condition." The plaintiffs paid the purchase price in advance. The goods, when delivered, were in a damaged state and the plaintiffs rejected them, purportedly because the term "goods in good condition" was a condition of the contract whose breach entitled them to treat the contract as repudiated and to a refund of the purchase price. The goods were left at the port and, subsequently, the port authority sold the goods to another person. Coincidently, that person later sold them to the plaintiffs at a fraction of the original price. Reportedly, the plaintiff used the goods for the same purpose as they originally intended to use them. The plaintiffs sued to recover the purchase price on the ground of total failure of consideration. However, the issue was whether the term "goods shipped in good condition" was a condition or a warranty. It was held that "it was one of the intermediate stipulations which give no right to reject unless the breach goes to the root of the contract." The court further explained that, the fact the plaintiffs were able to use the goods in their "damaged" state showed that the breach was not sufficiently serious as to justify their rejection of the goods.

the avoidance of contracts. We mentioned before that in the case of defective goods, the statutory warranty of fitness allows a buyer to rely upon the *actio redhibitoria*, which leads to the termination of the contract whenever the goods have defects that make them improper for the use they are generally intended to (see subsection A for this section above).[162] However, many civil law based systems have developed a standard that requires the defects on the goods to be grave and important.[163] Accordingly, the civil law systems also require that the breach is of certain seriousness. That being said, this requirement could be insufficient in a contract governed by the CISG since the right to avoid the contract under the CISG does not, necessarily, focus on the goods' characteristics but on the possibility for the buyer to achieve his interest under the contract.[164] Concerning the breach of agreed obligations, civil law based systems have also introduced standards that are similar to the fundamental breach standard under the CISG. Courts and tribunals have often decided that the plaintiff shall establish the importance or gravity of the breach in the economy of the contract in order to justify the avoidance.[165] In this regard, the circumstances of the case and the intention of the parties become relevant to establish the importance or gravity of the breach in the economy of the contract.

Against this background, the CISG seems to have been influenced by the intermediate terms doctrine of English law. However, a right to avoid the contract under the CISG may arise with respect to a wide variety of contractual obligations. It is irrelevant whether they constitute a condition, warranty or intermediate terms under the common law or a principal or ancillary obligation under the civil law. The CISG takes into account the economic cost of unwinding an international contract and therefore, considers the avoidance of the contract a remedy of

162. Magnus, *supra* note 16, at 77, 2010.

163. Schwenzer, *et al.*, *supra* note 22, at 727, 728. 2011; Muñoz, *supra* note 28, at 476, 480. 2011.

164. For this reason, some courts dealing with CISG claims have denied the remedy of avoidance to buyers if the goods, although improper for the use generally given, can be resold at a lower price or can be given an alternative use in the normal course of the buyer's business, see for example the decisions in Germany Bundesgerichtshof, Apr. 3, 1996, CISG-online 135 and Oberlandesgericht Stuttgart, Mar. 12, 2001, CISG-online 841.

165. Muñoz, *supra* note 29, at 478-80. 2011.

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last resort.[166] The topic should also provide some food for discussion about the policy considerations for such rule and its suitability for domestic trade, in light of the fact that some civil law jurisdictions have abandoned their old avoidance rules in favour of the fundamental breach approach in the CISG.[167]

V. CONCLUSION

The CISG reconciles conflicting positions of the common law and the civil law systems on issues of contract formation, interpretation and remedies for breach. In other instances, the CISG has adopted a rule rooted in either the common law or civil law for being better designed for international trade. In the context of law teaching, however, these features are less relevant than the possibility offered by the CISG to be used as educational material to learn comparative contract law. The CISG's dual common law and civil law background is ideal to set the students' learning process about foreign contract law into motion. By decomposing the content and design of the CISG, students can discover knowledge about foreign legal systems with the professor's help.

166. Bridge, *supra* note 22, at 568, 569; Huber & Mullis, *supra* note 39, at 181, 182.

167. *For example*, Finland, Iceland, Norway, Estonia, China, *cf.* Huber & Mullis, *supra* note 39, at 181, 182; Schwenzer, *et al.*, *supra* note 22, at 738. 2011.