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## THE CISG: APPLICABLE LAW AND APPLICABLE FORUMS

*Ronald A. Brand\**

### I. INTRODUCTION

The United Nations Convention on Contracts for the International Sale of Goods (CISG)<sup>1</sup> is like domestic politics: what you see depends on where you stand. Different people observe either success or failure depending on what aspect of the CISG picture they are viewing. From the perspective of one interested in how many states are party to a treaty, the fact that the CISG has 93 contracting states makes it an overwhelming success in the realm of international private law treaties.<sup>2</sup> On the other hand, empirical evidence that many private parties in some countries routinely opt out of the CISG when engaging in cross-border trade, paints a picture of failure.<sup>3</sup>

The truth must lie somewhere in between, but how do we then assess that truth? Moreover, are there future scenarios that might change the evaluation of the CISG. In other words, can success or failure depend, at least in part, on what scholars, governments, and practitioners do with the CISG going forward? And can that future include new approaches to the use of the CISG? If the problem has been in getting private parties to choose the CISG as the applicable law, are there more appropriate situations for use of the CISG?

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<sup>1</sup> U.N. Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3 [hereinafter CISG].

<sup>2</sup> UNCITRAL CISG Status Chart, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=X-10&chapter=10&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10&lang=en) [hereinafter Status Chart].

<sup>3</sup> See, e.g., John Coyle, *The Role of the CISG in Canadian Contract Practice*, 38 J.L. & COMM. 69 (2019–2020) [hereinafter Coyle, *Canada*]; John Coyle, *The Role of the CISG in U.S. Contract Practice: An Empirical Study*, 38 U. PA. J. INT'L L. 195, 196 (2016) [hereinafter Coyle, *U.S.*].

In this article, I will first briefly discuss the possible tests by which the success or failure of the CISG might be measured. These include not only the number of ratifications and evidence of the adoption or rejection of the CISG in private commercial contracts, but other indicia of success as well. This latter category includes the use of the CISG as a tool of legal education, the use of the CISG as a template for domestic law, and the use of the CISG in conjunction with other recent international legal instruments dealing with matters other than the unification of substantive law.

While the text of the CISG was completed in 1980, and first became effective in 1988,<sup>4</sup> much has happened in the realm of private international law and international private law since that time. And much has happened in terms of developments in the way people trade, and what they trade. Much of cross-border trade is now in services and other property rights that do not fall in the traditional category of goods, and to which the CISG thus does not apply. Nonetheless, much cross-border trade remains—and will always be—in goods, and the CISG is the default law for most of the global trade in goods. Unless we believe there is a much better solution to the problem of applicable law for cross-border contracts for the sale of goods, then it would seem that the CISG has a role to play. The question is whether that role can be something more than has transpired to date.

In order to address this “something more” question, after discussing the current possible metrics of success and failure of the CISG, I will consider in particular the relationship of the CISG to both choice of forum and choice of law, with particular attention to developing legal frameworks which may offer new opportunities for the CISG which in turn might add to the success side of the scoreboard. In doing so, I move from the concept of the CISG as the applicable law, through either default operation under Article 1(1)(a) or party choice, to thinking about new fora in particular in which applicable disputes might determine applicable law to be the CISG.

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<sup>4</sup> CISG, *supra* note 1.

## II. MEASURING CISG SUCCESS AND FAILURE

### *A. Ratifications as International Law Success for a Treaty*

The UNCITRAL website lists 93 party states to the CISG as of May 2020.<sup>5</sup> These include most of the major trading nations of the world, with the notable exceptions of India and the United Kingdom. By any measure of treaty ratification, this is an overwhelming success. It makes the CISG the default sales contract law for a significant portion of the trade in goods throughout the world through the Article 1(1)(a) rule which provides that the Convention “applies to contracts of sale of goods between parties whose places of business are in different States . . . when the States are Contracting States.”

### *B. Private Party “Rejection” of the CISG*

While 93 Contracting States make the CISG the dominant international sales law for the world, it must be recognized that this is the default law, which applies if the parties to sales contracts do not opt out of the CISG. Article 6 of the CISG states clearly that “[t]he parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.” Thus, party autonomy is respected, and private parties may choose to leave behind the default law through contract clauses which clearly opt out of the CISG.

As Professor Coyle has demonstrated in greater detail, the default approach to the CISG is to opt out of its otherwise default contract law rules.<sup>6</sup> Thus, at least in the United States and Canada, the overwhelming body of international sales contracts contain provisions explicitly replacing the CISG’s default rules with the domestic law of a state.

The tendency of private parties to opt out of the CISG in their international sales contracts to which it would otherwise apply can be seen as demonstrating that the CISG has failed in its goal to become global contract law. It means nothing to have law available if the parties may and do choose to reject it in their commercial transactions. While states may have voted in favor of the CISG through the process of ratification and accession,

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<sup>5</sup> Status Chart, *supra* note 2.

<sup>6</sup> Coyle, *Canada*, *supra* note 3; Coyle, *U.S.*, *supra* note 3.

private parties seem to have voted against it in their contracts. The rules of the CISG are designed to and do affect the rights and obligations of private parties, not states, and thus its rejection by private parties may be seen as demonstrating its failure, despite widespread ratification by states.

### *C. The CISG and the Development of Domestic Law*

Vjosa Osmani, with the example of Kosovo, has demonstrated that the CISG may provide a measure of success despite rejection in some corners, through its influence on the development of domestic sales law.<sup>7</sup> This example proves that private party adoption of the CISG is not the only test of success. If enough states enact sales laws that conform in large part to the CISG, then the CISG's rules may apply indirectly, even where private contracts contain provisions explicitly opting out of the CISG as the directly applicable law.

### *D. The CISG and Legal Education*

Janet Checkley, using the Vis Moot example, has demonstrated another realm in which the CISG can and has had significant impact: the realm of legal education.<sup>8</sup> Through the Vis Moot, students from many countries each year study the CISG and apply it to complex scenarios presented in the Moot problem. Their careful study of the CISG in this process results in thousands of young lawyers well versed in the CISG and able to apply it to international transactions, whether moot or real.

### *E. The Collective Record: What Really Matters in Testing Success and Failure?*

Is it possible then to draw clear conclusions on the question of whether the CISG has been a success or a failure? And, if the result is not yet clear one way or the other, what might affect the final conclusion in terms of future developments? That is the focus of the next section of this offering.

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<sup>7</sup> Vjosa Osmani-Sadriu, *Domestication of the CISG: Examples From a Few Jurisdictions*, 38 J.L. & COM. 390, 397 (2019–2020).

<sup>8</sup> Janet Checkley, *The Role of the CISG and International Legal Education: A Model for Future Promotion of the CISG*, 38 J.L. & COM. 420, 425 (2019–2020).

### III. CHOICE OF LAW, CHOICE OF FORUM, AND THE CISG: INCREASING THE LIKELIHOOD OF PRIVATE PARTY OPT-IN TO THE CISG

#### *A. Uniform Default Law, Neutral Chosen Law, and Party Autonomy: Apparent Success with Resulting Ambiguity*

The CISG equation at first appears to be one geared for success. Through the widespread ratification and accession to the Convention, the CISG has become the world's principal default law for international sales contracts. It is also a neutral commercial law for sales contracts, allowing parties to avoid the uncomfortable choice of being subject to either the law of the seller's state or the law of the buyer's state. This appears to allow parties to choose either to avoid reference to choice of law in the contract—because the law of the states of both parties is the CISG—or to choose the CISG in order to avoid being subject to the law of the state of only one of the parties. Thus, at first glance, there should be comfort with either allowing the state to choose the law (i.e., the common default law), or having the parties choose the law; and either way ending up with the CISG. Transaction costs would seem to be avoided either way.

But, as Professor Flechtner has indicated, that has not been the real equation.<sup>9</sup> Rather, the equation is one which, as Professor Flechtner describes it, creates a dilemma in which a choice must be made between on the one hand educating all transactions lawyers (and business persons) engaged in cross-border contract negotiations in the CISG, so that transaction costs are low in choosing (or defaulting to) the CISG; and, on the other hand, having lawyers not educated in the CISG choose the law they know over a law they would have to learn.<sup>10</sup> The first would be more efficient on a global basis, but the second is more efficient on a single transaction basis. Of course, contracts are negotiated and drafted on a single transaction basis (most of the time).

If, however, we could start with a contract designed to work with the CISG, which does not have to be drafted from scratch by every lawyer, then perhaps we could move from second-best to the ideal result. But Susanne

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<sup>9</sup> See Harry M. Flechtner, *The Past, Present and Future of the CISG (and Other Uniform Commercial Law Initiatives)*, 38 J.L. & COM. 38, 40 (2019–2020).

<sup>10</sup> *Id.* at 43.

Cook provided just such a contract in a Center for International Legal Education CISG Conference in 2005,<sup>11</sup> and the world did not come rushing to her door. So, does this mean that moving from second-best to the ideal result is not possible?

*B. Uniform Law and Choice of Forum*

I would suggest that developments not in choice of law, but in choice of forum, might well provide the path to some greater success for the CISG. In order to understand that path, and those developments, it is useful, I believe, to consider various levels of contract value and sophistication.

*1. Arbitration—for the Big Guys (Who Can Afford the Transaction Costs)—and the New York Convention*

On one end of the spectrum lie very large multi-million-dollar contracts, involving large multinational companies, experienced legal departments (and experienced outside counsel), and the resources that should lead to first-best contract terms. These are the deals that generally include choice of forum clauses calling for arbitration. Arbitration has been the darling of large international commercial transactions largely because of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the New York Convention.<sup>12</sup> With 163 contracting states,<sup>13</sup> the New York Convention brings together even more of the world than does the CISG.

If larger deals justify larger transaction costs, then it would seem that the first of the CISG equations discussed above would be applicable. Thus, the CISG as neutral law would be both an inviting and an economically possible choice. But it appears from Professor Coyle's research on databases of contracts used by publicly-traded (and hence large) companies that this has not been the choice in either the United States or Canada.<sup>14</sup> Whether this

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<sup>11</sup> V. Susanne Cook, *Sample Agreement of Installment Sale and Purchase*, in DRAFTING CONTRACTS UNDER THE CISG 7 (Harry M. Flechtner, Ronald A. Brand & Mark S. Walter eds., 2005).

<sup>12</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), June 10, 1958, 330 U.N.T.S. 38.

<sup>13</sup> NEW YORK CONVENTION STATUS CHART, [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXII-1&chapter=22&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&lang=en).

<sup>14</sup> Coyle, *Canada*, *supra* note 3, at 69; Coyle, *U.S.*, *supra* note 3, at 216.

result holds in other countries is not clear, and no published studies appear to be available to date.

Arbitration is the international home of party autonomy. Parties may choose both the substantive and the procedural law, as well as the specific individuals who will serve to decide any disputes. Article II of the New York Convention provides for the recognition and enforcement of the agreement to arbitrate, and Article III provides for the recognition of the resulting award, in all Contracting States. The exceptions to both rules are limited. The result is greater predictability of the likelihood of enforcement of any dispute settlement decision.

As the home of party autonomy, arbitration also allows the parties to choose dispute resolution professionals well-versed in the law of the contract. If that law is the CISG, then arbitrators may be chosen who know and can efficiently apply the CISG.

The arbitration community has been heavily influenced by the educational tool which is the Willem C. Vis International Commercial Arbitration Moot. Through the Vis Moot, thousands of students each year are trained at nearly 400 law schools throughout the world to apply the CISG to a specific transaction in an arbitration setting. This process extends beyond the Moot itself to multiple pre-moots and a culture of intensive research and study which provides an excellent preparation for applying the skills required of a dispute resolution lawyer in a global economy. It also contributes to the education of the lawyers who will draft international sales contracts, helping us move toward the ideal solution: a world in which the CISG is known and understood and can be used to reduce transaction costs by being a widely understood set of default rules for international sales contracts as well as a neutral choice for carefully negotiated contracts.

The process which has made the CISG a success as an educational tool can also serve as part of the process which leads to global understanding and a resulting reduction in transaction costs through the use of the CISG in cross-border sales contracts. While I am not aware of any empirical study that can help either prove or disprove that this is actually happening, my own experience with Vis Moot training in the Balkans and in the Middle East (as explained more thoroughly by Janet Checkley) offers anecdotal proof that strides are being made in the right direction.



*2. Litigation—for the Middle-Class Business Person (Reducing Transaction Costs)*

In the middle of the spectrum we find the “middle class litigants.”<sup>15</sup> It is this group that those involved in the negotiation believed would benefit from the 2005 Hague Convention on Choice of Court Agreements.<sup>16</sup> Like the New York Convention, the Hague Convention also provides rules respecting both party choice of forum and the resulting decision. Article 5 provides that a court chosen in an exclusive choice of court agreement shall have jurisdiction, and shall exercise that jurisdiction, with limited exceptions. Article 6 provides that courts in other Contracting States shall respect the jurisdiction of the chosen court, again with limited exceptions. Article 8 provides that the resulting judgment shall be recognized and enforced in other Contracting States. Article 9 rounds out the basic set of rules by providing judgment recognition exceptions very similar to those found in Article V of the New York Convention for refusal of recognition of foreign arbitral awards.

While the Hague Convention has come into effect, that is the case so far for only the 27 European Union Member States, Montenegro, Mexico, Singapore and the United Kingdom.<sup>17</sup> China, Macedonia, Ukraine, and the United States have signed, but not yet ratified. Thus, the Convention does not have the broad effect of the New York Convention. Should a significant number of states become Contracting States, however, the Hague Convention has the potential to level the playing field with arbitration, providing broader opportunity for enforceable choice of forum, and making litigation a more palatable choice in international sales contracts. Quite simply, it would require that contract drafters give more careful consideration to the real differences (strengths and weaknesses in each transaction) between arbitration and litigation.

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<sup>15</sup> This is the term used by Peter Trooboff, a member of the U.S. Delegation at the Hague Conference of Private International Law which negotiated and concluded the 2005 Hague Convention on Choice of Court Agreements, to describe the potential value of that Convention. See Louise Ellen Teitz, *The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration*, 53 AM. J. COMP. L. 543, 544 n.8 (2005).

<sup>16</sup> Hague Convention of 30 June 2005 on Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294. See also Teitz, *supra* note 15, at 544 n.7.

<sup>17</sup> HAGUE CONVENTION STATUS TABLE, <https://www.hcch.net/en/instruments/conventions/status-table/?cid=98>.

Just as the New York Convention has been a catalyst in spawning competing arbitral institutions vying for the business of the dispute resolution community, the Hague Convention has caused the creation of competing commercial courts. This type of sovereign entrepreneurship on the part of states, designed to garner litigation business (and reap the corresponding taxation and other general economic benefits) has the potential to be its own catalyst for the use of the CISG in choice of law clauses in international sales contracts.

The possibility of sovereign entrepreneurship through the creation of international commercial courts has become a reality, with such courts being created in Amsterdam, Brussels, Frankfurt, Paris, and Singapore, among other locations. Each of these courts has a bit different structure, and it will take time to determine whether they have real impact in replacing current magnet courts for international commercial disputes like those in London and the Southern District of New York. In order to be successful, each of them will have to overcome the same dilemma faced by nascent international arbitration institutions: they will have to be chosen in contracts; those contracts will have to lead to disputes; those disputes will have to be litigated in the new court; decisions will have to be rendered; and a body of decisions will have to be created which provides predictability and proof of the value of the court. This last element of public decisions has the potential to create certain advantages for litigation in specialized courts over arbitration. But the entrepreneurial side of such courts clearly requires belief in long-term benefits.

Many are not satisfied with the possibility of results that take decades to be realized. We are, however, engaged in a discussion of a treaty that was completed nearly 40 years ago. The fact that we are still trying to determine whether that treaty has been a success demonstrates clearly that the process of developing both international commercial law and the private international law that must evolve with it, is not one that can be measured in quarterly or annual reports. It simply takes time. And that time *is* measured in decades.

Some of the new international commercial courts are doing what they can to try to reduce the time required to develop a reputation of competence. For example, the government of Singapore has appointed to the Singapore International Commercial Court both Singaporean judges and 16 “international judges” from countries such as Australia, Canada, France,

Hong Kong, Japan, the United Kingdom, and the United States.<sup>18</sup> Whether any of these judges has expertise in the CISG is not clear from the Court's website, but one could hope that some of them do. If the Hague Convention gains wide ratification and accession, and if an international commercial court in a country which is a Contracting State demonstrates efficiency as well as competency in cases applying the CISG, that could go far in encouraging parties to international sales contracts to opt-in to the CISG in those contracts. It could create a measure of success for the CISG which has so far not been achieved. It will, however, take some time to tell if that will occur.

### 3. *Online Dispute Resolution and the CISG*

Perhaps the area in which success for the CISG has the greatest possibility of short-term increased impact is that of online dispute resolution ("ODR"). As Mark Walter demonstrates, this is an area garnering a great deal of interest from both the private and government sectors across the globe.<sup>19</sup> Its real development, however, has been hindered by governments, but advanced by the private sector.

A good example of how the development of ODR has been hindered by governments is found in the agenda at UNCITRAL, through its Working Group III efforts from 2010 until 2016 to prepare a set of procedural standards and substantive principles for ODR.<sup>20</sup> Early in that process, many private sector ODR experts participated in the discussions and had hope for success. As the discussions continued, however, private sector participation diminished, largely as a result of an understanding that the project was not going to have practical results. The process did not result in agreed upon standards, with a record of the discussions saved in what became the "UNCITRAL Technical Notes on Online Dispute Resolution."<sup>21</sup>

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<sup>18</sup> *Judges*, SING. INT'L COM. CT., <https://www.sicc.gov.sg/about-the-sicc/judges>.

<sup>19</sup> Mark Walter, *The CISG and Cross-Border Access to Commercial Justice*, 38 J.L. & COM. 157, 161 (2019–2020).

<sup>20</sup> *Online Dispute Resolution (2010–2016)*, U.N. COMMISSION OF INT'L TRADE LAW, [https://uncitral.un.org/en/working\\_groups/3/online\\_dispute](https://uncitral.un.org/en/working_groups/3/online_dispute).

<sup>21</sup> U.N. Commission on Int'l Trade Law, *UNCITRAL Technical Notes on Online Dispute Resolution* (Apr. 2017), [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/v1700382\\_english\\_technical\\_notes\\_on\\_odr.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/v1700382_english_technical_notes_on_odr.pdf) [hereinafter *UNCITRAL Technical Notes*].

During the Working Group III ODR negotiations, the University of Pittsburgh School of Law Center for International Legal Education (CILE) prepared for that body two documents. The first document, which was not an official document of the proceedings, was distributed to delegations at the Twenty-Third Session of Working Group III, held on May 23–27, 2011 in New York, and was titled “Draft Substantive Legal Principles for Deciding Cases Through Online Dispute Resolution (ODR).” This document provided a review of the process in the United States applied by credit card companies when there are disputes over credit card transactions. Under the Fair Credit Billing Act, which is part of the Truth in Lending Act, a consumer with a complaint against a merchant in a sales transaction in which payment was made by credit card may raise claims he has against the merchant directly with the issuer of the credit card.<sup>22</sup> This provides a type of alternative dispute resolution with the credit card issuer responsible for considering the claims of the consumer against the merchant. A second provision of the Fair Credit Billing Act, and the “Regulation Z” which implements it, set up a procedure for consumer complaints against merchants in sales transactions for which payment was made by credit card.<sup>23</sup> If the goods or services purchased are “not accepted” or “not delivered . . . as agreed” (e.g., the goods did not comply with the contract, were different from that agreed upon, were the wrong quantity, or were delivered late), the law requires that the merchant/seller investigate and resolve the dispute if a consumer cardholder contacts the card issuer (within a certain time frame) and asserts such a claim. Resolution of the dispute in favor of the consumer may result in the consumer’s credit card account being credited with the disputed amount, as well as any related finance charges, with a corresponding charge back to the merchant.<sup>24</sup>

The CILE Draft Substantive Legal Principles reviewed the online dispute resolution procedures used by Visa, Master Card, American Express,

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<sup>22</sup> Fair Credit Billing Act, 15 U.S.C. § 1666i (2018); and Regulation Z, 12 C.F.R. § 226.12(c) (2019).

<sup>23</sup> Fair Credit Billing Act, 15 U.S.C. § 1666 (2018); and Regulation Z, 12 C.F.R. § 226.13 (2019).

<sup>24</sup> *Id.*; 12 C.F.R. § 226.13(e)(1). For a review of national approaches to consumer contracts, indicating that only the United States authorizes charge back of credit sales, see OECD, *The Report on OECD Member Countries’ Approaches to Consumer Contracts*, DSTI/CP(2006)8/FINAL (6 July 2007), <http://www.oecd.org/dataoecd/11/28/38991787.pdf> (concluding that “on the basis of the fairly large range of differences in the way in which the topics are handled by the countries surveyed, it may be appropriate for each member country to establish a system in accordance with its socio-economic circumstances, local idiosyncrasies and cultural characteristics (including legal culture)”).

and Discover. This review disclosed that the number of types of substantive claims considered in each of the four systems was rather limited. Because the dispute resolution process was carried out within the framework of a finance system that involved the accounts of both parties, remedies too were rather limited and simple, with the principal method of providing remedy being a charge back by which the account of the merchant was debited, and the account of the consumer was credited.

Based upon the review of the U.S. credit card charge-back system, the following Draft Substantive Legal Principles were stated for consideration by Working Group III of UNCITRAL:

**Chapter I—Claims**

**Principle 1—Buyer’s Right to Receive Goods, Services or Other Legal Rights**

The seller must deliver the goods, services, or other form of legal rights that are described in the contract.

The buyer has a right to receive the goods, services, or other form of legal rights that are described in the contract.

**Principle 2—Buyer’s Right to Receive Conforming Performance**

The seller must deliver goods, services, or other form of legal rights which are of the quantity, quality and description required by the contract.

The buyer has a right to receive goods, services, or other form of legal rights which are of the quantity, quality and description required by the contract.

**Principle 3—Buyer’s Right to Receive Performance in Required Time**

The seller must deliver conforming goods, services, or other form of legal rights within the time required by the contract.

The buyer has a right to receive conforming goods, services, or other form of legal rights within the time required by the contract.

**Principle 4—No Payment for Cancelled Recurring Transactions**

The seller may not receive payment for recurring transactions that have been cancelled by the buyer.

The buyer has a right not to be charged for recurring transactions after cancellation by the buyer.

**Principle 5—No Duplicate Processing**

The seller may not charge a buyer more than once for any single transaction.

The buyer has a right not to be charged more than once for any single transaction.

**Principle 6—Correct Amount Debited/Credited**

The seller is entitled to receive the contract price.

The buyer has a right not to be charged more than the contract price.

**Principle 7—Fraudulent and Counterfeit Transactions**

The seller has a right to receive payment only for a transaction that was contracted for by the buyer, or a person authorized by the buyer.

The buyer has a right not to pay for a transaction that was not contracted for by the buyer, or a person authorized by the buyer.

**Chapter 2—Remedies**

**Upon proof of a designated claim, the following remedies may apply:**

**Principle 8—Buyer’s Right to Refund of Purchase Price**

The buyer may be credited with or paid a refund of the purchase price

**Principle 9—Buyer’s Right to Replacement or Repair**

The seller may be required to deliver replacement goods or services, or to repair the delivered goods.

**Principle 10—Buyer’s Right to Price Reduction and Refund**

The buyer may be credited with or paid a refund of the portion of the purchase in excess of the value of the goods or services delivered.

**Principle 11—Seller’s Right to Return of Goods**

The buyer may be required to return the goods in exchange for the right to receive any of the remedies set forth in Principles 8–10.

The second document prepared by CILE was an official document of the Working Group negotiations, requested by the UNCITRAL Secretariat. This “Analysis and Proposal for Incorporation of Substantive Principles for ODR Claims and Relief into Article 4 of the Draft Procedural Rules,”<sup>25</sup> proposed a set of “Core Principles Underlying a Global ODR System”:

- 1) **The ODR system must recognize that alternatives for efficient and effective dispute resolution do not currently exist for cross-border, high volume, low value electronic transactions.**
- 2) **The ODR system will not work unless it is simple, efficient, effective, transparent, and fair.** Only a system that has these characteristics will

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<sup>25</sup> U.N. GAOR, 25th Sess., U.N. Doc. A/CN.9/WG.III/WP.115 (Mar. 12, 2012).

- invite the trust of both merchants and purchasers (including consumers) to enter into cross-border, high volume, low value electronic transactions that otherwise create risks that keep both sellers and buyers from entering into such transactions. The process of developing the system must recognize that both sellers and buyers require insurance that their interests will be protected in order to generate the proper level of trust in that system. If either sellers or buyers opt out of, or are inadequately protected by, the system, then it simply will not work.
- 3) **Simplicity and efficiency require as few exclusions from scope as possible.** A system that begins with computer-based communication and analysis will not easily allow determinations that require human discretion or the application of difficult definitions designed to distinguish between types of parties to a dispute. As has been repeatedly recognized in the Commission and in Working Group III, it is practically and theoretically difficult to make a distinction not only between business-to-business and business-to-consumer transactions but also between merchants and consumers. *See* July 2010 Report of the United Nations Commission on International Trade Law, A/65/17, at para. 256; 3 June 2011 Report of Working Group III (Online Dispute Resolution) on the work of its twenty-third session (New York, 23–27 May 2011), A/CN.9/721, at para. 37.
  - 4) **Simplicity, efficiency and effectiveness require that the ODR system be self-contained and avoid the need for reference to national rules of private international law.** A uniform system that relies on the differences that exist in national rules of private international law will create disparate results depending on factors such as the location of parties and the need to “locate” the transaction. This would create difficulties that should not occur in the system. Additionally, there is no clear understanding internationally on how such determinations of applicable national law should be made (*e.g.* country-of-contract, country-of-origin, country-of-destination, or most significant relationship approach). Stated more simply, **efficiency and effectiveness** require that the system avoid the trap of thinking that rules of private international law can be used to protect the weaker party in cross-border, high volume, low value electronic transactions.
  - 5) **Efficiency, effectiveness, and transparency require that the ODR system encourage dispute resolution that results in a binding decision.** It does little good to provide dispute settlement that still allows parties to relitigate what has already been decided. This is very different, however, from the question of retaining the option to go to national courts or utilize other dispute resolution mechanisms for resolution of claims that are outside the ODR system. (See Principle 9, below).
  - 6) **Efficiency, effectiveness, and transparency require that the ODR system allow ODR providers to incorporate automatic methods for the enforcement of decisions** (*e.g.*, charge-back methods or automatic payment reversal).

- 7) **Transparency and fairness require** that a party to a cross-border, high volume, low value electronic transaction receive **clear notice of the dispute resolution option and a separate opportunity to choose not to engage in a transaction** if that party decides to avoid the dispute resolution process that is offered.
- 8) **Fairness** requires that the ODR system be **designed so that states may agree that the system itself is simple, efficient, effective, and transparent**. Private international law rules that exist to protect “weaker” parties from unfair procedures are not necessary when states agree at the outset that the system of dispute resolution operates to provide adequate protection of the weaker party. Thus, the fairness of the system itself is the ultimate test of the simplicity, efficiency, effectiveness, and transparency required to replace protective rules of private international law. If states find the system to meet these tests, then the system itself will replace the need for “protective” rules of private international law, and will itself result in the type of consumer (and other) protection often sought by such rules of national law. This is one of those instances where a uniform system of rules applied on a comprehensive basis is much better than reliance on national rules of private international law or national rules of consumer protection. **Simplicity, efficiency, effectiveness, and transparency can only result if there is a single, self-contained system, with as few opportunities as possible for divergence from that system through national law.**
- 9) **Simplicity and effectiveness require** that, at the outset, the substantive legal principles to be applied in the ODR process relate to **a focused and limited set of fact based claims** that may be brought and **a focused and limited set of remedies** that may be assessed. Existing ODR systems for online transactions have demonstrated that the vast majority of disputes in high-volume, low-value online transactions lend themselves to a small, discrete set of claims and remedies. More complex issues and claims (*e.g.*, bodily harm, consequential damages, and debt collection) should be excluded from the ODR system. *See* 21 November 2011 Report of Working Group III (Online Dispute Resolution) on the work of its twenty-fourth session (Vienna, 14–18 November 2011), A/CN.9/739, at paras. 18–19 and 76.

Based upon these Core Principles, the document also provided draft sample ODR claim and response forms for an ODR system.<sup>26</sup>

The UNCITRAL effort to move forward on an ODR framework was unsuccessful largely because of different approaches to allowing consumers to agree to pre-dispute binding choice of forum, including ODR. The premise underlying the entire process was that access to courts is not access to justice

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<sup>26</sup> *Id.* at 10–20.



for small online transactions. Who, after all is going to bring a lawsuit on the purchase of a \$100 pair of shoes online and then bring a second action to enforce the resulting judgment in the merchant's home court? But states with a prohibition on pre-dispute binding choice of forum would move forward in the UNCITRAL process only if consumers were allowed to always keep the option of going to court (the very option which it had been agreed at the outset did not provide access to justice), because giving up that right was seen as giving up access to justice. The result was that no state-centered framework for ODR was created.<sup>27</sup>

The failure of UNCITRAL Working Group III may not really matter. The most effective ODR systems to date have not been created by states, but rather by private parties. Even a number of years ago, the Ebay/PayPal ODR system was said to be successfully handling over 60 million disputes per year.<sup>28</sup> That was possible because, like the credit card charge-back system in the United States, the dispute resolution system is tied to the finance system, and enforcement is generally automatic through a charge back arrangement. So far at least, states seem not to have proved very effective in creating ODR systems, while the market place has filled this void rather well.

So, how then does this tie in to the future of the CISG? As noted in the "Proposed Principles for ODR" above.<sup>29</sup> "Simplicity, efficiency and effectiveness require that the ODR system be self-contained and avoid the need for reference to national rules of private international law." The CISG does not remove all need for rules of private international law. It in fact requires reference to private international law in the application of its own terms in Article 7(2). By providing uniform substantive rules of contract formation and performance, it does, however, significantly reduce the need

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<sup>27</sup> The European Union has moved forward on its own ADR and ODR procedures. See Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004; Directive 2009/22/EC (Directive on consumer ADR), 2013 O.J.E.U. 165/63; Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR), 2013 O.J.E.U. 165/1.

<sup>28</sup> Louis Del Duca, Colin Rule & Zbynek Loebel, *Facilitating Expansion of Cross-Border E-Commerce—Developing A Global Online Dispute Resolution System (Lessons Derived From Existing ODR System—Work of the United Nations Commission on International Trade Law*, 1 PENN ST. J.L. & INT'L AFF. 59, 63 (2012).

<sup>29</sup> U.N. GAOR, 25th Sess., U.N. Doc. A/CN.9/WG.III/WP.115 (Mar. 12, 2012).

for reference to rules of private international law. It also provides a set of rules that is largely consistent with the more simply stated principles of claim and remedy suggested in the May 2011 CILE document presented in the UNCITRAL Working Group III deliberations. It also could be incorporated into an ODR system in which the three stages of ODR noted in the UNCITRAL Technical Notes would be applied: negotiation; facilitated settlement; and a third (final) stage.<sup>30</sup>

While the third stage of the process was not specifically stated as arbitration in the UNCITRAL Technical Notes, that could in fact be the procedure in the third stage, initially facilitated electronically and ultimately (but only if required) involving real persons stepping in to conclude the matter in a binding decision. This would place the process within the framework of the New York Convention. While actual use of the New York Convention for recognition and enforcement would not occur in the smallest transactions, the ability to have it available should increase actual compliance with final decisions. This third stage is the point at which it is most logical to have a single sales law governing all transactions so as not to violate the goals of simplicity and efficiency. This is where the CISG characteristics of uniformity and neutrality serve to make it a logical exclusive law to be applied in such an ODR system.

#### IV. CONCLUSION

The United Nations Convention on Contracts for the International Sale of Goods has been available to states since 1980 and to private parties since 1988. In its nearly four decades of existence, it has been embraced by 93 states. At the same time it appears to be often rejected by private parties in their international sales contracts, at least in some countries. It has served as a source for the development of national commercial law and a platform for legal education in international sales law. Yet, it is probably too soon to declare it either a success or a failure. The ultimate determination of success will likely require both more time and the consideration of the applicable forum as well as the applicable law. There remains significant opportunity for success at three levels of international sales contract relationships: large contracts often accompanied by arbitration clauses; “middle class” contracts

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<sup>30</sup> *UNCITRAL Technical Notes*, *supra* note 21, ¶ 18.

that may fit well into developing international commercial courts and the 2005 Hague Convention on Choice of Court Agreements; and small and medium-sized contracts which lend themselves to the developing area of online dispute resolution. Our hope should be that the equation for success is to be determined not by lawyers and business persons who do not want to spend the time learning about one more sales law, but rather by the role the CISG can play in providing both uniformity and neutrality in developing legal landscape.