Loyola of Los Angeles International and Comparative Law Review

Volume 41 | Number 1 Article 1

Winter 2-1-2018

Does the 1980 Vienna Sales Convention Reflect Universal Values? The Use of the CISG as a Model for Law Reform and Regional Specificities

ULRICH G. SCHROETER
University of Basel, Switzerland

Does the 1980 Vienna Sales Convention Reflect Universal Values? The Use of the CISG as a Model for Law Reform and Regional Specificities

ULRICH G. SCHROETER*

I. INTRODUCTION

The United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980 (CISG)[1] was originally designed as a treaty creating uniform legal rules for international sales contracts. Its primary function may therefore be called the "unification function." In addition, the 1980 Vienna Sales Convention has been used and continues to be used as a model for regional law harmonisation,[2] as well as for domestic and regional law reforms,[3] thereby serving a secondary "model

* Professor of Law at the University of Basel, Switzerland.

1. United Nations Convention on Contracts for the Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3 [hereinafter Sales Convention or CISG].

2. *See generally* Luca G. Castellani, *The three dimensions of the CISG, in 360°* DE LA COMPREVENTA INTERNACIONAL DE MERCADERÍAS: MEMORIA DEL II CONGRESSO IBEROAMERICANA DE DERECHO INTERNACIONAL DE LOS 325 (Adriana Castro Pinzón ed., 2016); For Europe, *see* Ulrich Magnus, *The CISG's Impact on European Legislation, in* THE 1980 UNIFORM SALES LAW: OLD ISSUES REVISITED IN LIGHT OF RECENT EXPERIENCES (Franco Ferrari ed., 2003); ULRICH G. SCHROETER, UN-KAUFRECHT UND EUROPÄISCHES GEMEINSCHAFTSRECHT – VERHÄLTNIS UND WECHSELWIRKUNGEN 559-563 (2005); for Africa, *see* Franco Ferrari, *CISG and OHADA Sales Law – Or the Relationship between Global and Regional Sales Law*, in CISG VS. REGIONAL SALES LAW UNIFICATION 79 (Ulrich Magnus ed., 2012).

3. *See* Angelo Chianale, *The CISG as a Model Law: A Comparative Law Approach*, SING. J. LEGAL STUD. 29 (2016); Stefan Kröll, Loukas Mistelis & Pilar Perales Viscasillas, *Introduction to the CISG, in* UN CONVENTION ON THE INTERNATIONAL SALES OF GOODS (CISG) paras. 29-38 (Stefan Kröll, Loukas Mistelis & Pilar Perales Viscasillas eds., 2011); Sonja A. Kruisinga, *The Impact of Uniform Law on National Law: Limits and Possibilities – CISG and its Incidence in Dutch Law*, 13(2) ELECTRONIC J. COMP. LAW 1 (2009); Ulrich G. Schroeter, *Gegenwart und Zukunft des Einheitskaufrechts*, 81 RABEL J. COMP. & INT'L PRIV. L. 32, 67-69 (2017) (Ger.); ANDREAS SCHWARTZE, EUROPÄISCHE SACHMÄNGELGEWÄHRLEISTUNG BEIM WARENKAUF 600 (2000); Ingeborg Schwenzer & Pascal Hachem, *The CISG – Successes and Pitfalls*, 57 AM. J. OF COMP. L. 457, 461-463 (2009); Fryderyk Zoll, *The Impact of the Vienna Convention on the*

function." Although it was arguably not prominently on the Convention drafters' mind when they developed and adopted the CISG's text, this model function has been described by the late Professor Schlechtriem as "maybe [the] most important part of the CISG's success story."[4]

The present paper enquires whether the Sales Convention reflects "universal values," and how its model function relates to and coincides with regional "specificities." The latter term was coined by Professor Fontaine in his writings on the regional harmonization of African contract law.[5] The term "universal values" in turn is one that may be more familiar in the context of human rights or similar topics than in the rather more prosaic commercial law context.[6] When "values" is being combined with "regional," one is immediately reminded of the concept of "Asian values" developed by the founding father of Singapore, Lee Kuan Yew,[7] and subsequently adopted elsewhere in South East Asia.[8]

The present paper's title, were it understood in this way, would be promising too much to too many. Its focus is simpler: it explores whether the 1980 Vienna Sales Convention (or CISG), although designed for its unification function as a directly applicable set of rules for world-wide cross-border contracts, is similarly suitable as a model for law reforms in the various regions of the world, in spite of the regional or local specificities that may exist. In doing so, the paper attempts to clarify whether the provisions of the Sales Convention reflect particular underlying values, despite their nature as predominantly technical rules of international commercial (or mercantile) law. It furthermore asks

---

International Sale of Goods on Polish Law, With Some References to Other Central and Eastern European Countries, 71 RABEL J. COMP. & INT'L PRIV. L. 81, 89 (2007) (Ger.); *See generally* FRANCO FERRARI, THE CISG AND ITS IMPACT ON NATIONAL LEGAL SYSTEMS (2008); Castellani, *supra* note 2, at 324–329.

4. Peter Schlechtriem, *10 Jahre CISG – Der Einfluß des UN-Kaufrechts auf die Entwicklung des deutschen und des internationalen Schuldrecht* [*10 Years of CISG – The Influence of the UN Sales Law on the Development of German and International Law of Obligations*], 1 INTERNATIONALES HANDELSRECHT 12, 12 (2001) (Ger.).

5. Marcel Fontaine, *Law Harmonization and Local Specificities – A Case Study: OHADA and the Law of Contracts*, 18 UNIF. L. REV. 50, 62 (2013) (U.K.).

6. *See* LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 99-100 (Martinus Nijhoff ed., 1995); Andreas Paulus, *Whether Universal Values Can Prevail Bilateralism and Reciprocity*, *in* REALIZING UTOPIA: THE FUTURE OF INTERNATIONAL LAW 89, 91(Antonia Cassese ed., 2012); *But see also* Andreas Blüthner, *The Global Compact and the WTO "Trade ands"—Implementing Universal Values in the Globalization Process*, *in* WTO-RECHT UND GLOBALISIERUNG 313 (Martin Nettesheim & Gerald G. Sander eds., 2013).

7. *See* Michael D. Barr, *Lee Kuan Yew and the "Asian Values" Debate*, 24 ASIAN STUD. REV. 309 (2000).

8. JOSIANE CAUQUELIN, PAUL LIM & BRIGIT MAYER-KONIG, ASIAN VALUES: ENCOUNTER WITH DIVERSITY 1 (1998); Surain Subramaniam, *The Asian Values Debate: Implications for the Spread of Liberal Democracy*, 27 ASIAN AFF. 19 (2000).

whether values in the field of mercantile law differ across the globe, and identifies possible consequences for the CISG's model function.

The present paper addresses its topic in five parts. Part II outlines in more detail what "regional specificities" means, before Part III discusses the values reflected in the CISG and whether they are "universal". Part IV subsequently addresses the coexistence between the Sales Convention and diverging regional values and other specificities. In Part V, the article then discusses whether regional divergences from the CISG's model are recommendable. Part VI briefly concludes.

II. REGIONAL VALUES, TRADITIONS AND OTHER SPECIFICITIES

In the context of regional law reforms, the question is regularly raised whether a new law modelled on an international text (such as the CISG) would be suitable for the local environment, culture, circumstances, traditions or other features of the region concerned; in short, regional specificities.[9] Often, it has been argued that regional specificities should or must be taken into account throughout any law reform project.[10]

In discussing this topic, the term "regional" has generally been construed broadly, and the present contribution adopts a similar understanding. Accordingly, "regional specificities" will in the following be employed as an umbrella term covering local circumstances that exist in one or more places or regions throughout the world, irrespective of whether these places are located in the same or neighbouring areas in a

9. Gary F. Bell, *Harmonisation of Contract Law in Asia – Harmonising Regionally or Adopting Global Harmonisations —The Example of the CISG*, 2005 SING. J. LEGAL STUD. 362 (2005); Juana Coetzee, *CISG and Regional Sales Law: Friends or Foes?*, 2 J. L., SOC'Y & DEV. 29, 33-38 (2015); Marcel Fontaine, *The Draft OHADA Uniform Act on Contracts and the UNIDROIT Principles of International Commercial Contracts*, 9 UNIF. L. REV. 573, 577 (2004); Fontaine, *supra* note 5, at 51–52; Han Shiyuan, *Principles of Asian Contract Law: An Endeavor of Regional Harmonization of Contract Law in East Asia*, 58 VILL. L. REV. 589, 591-92 (2013); Bruno Zeller, *Regional Harmonisation of Contract Law: Is It Feasible?*, J. L., SOC'Y & DEV. 85, 92 (2016).

10. René David, *The International Unification of Private Law*, *in* 2 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 27 (Mohr Siebeck & Mouton eds., 1971); Juana Coetzee & Mustaqueem de Gama, *Harmonisation of Sales Law: An International and Regional Perspective*, 10 VINDOBONA J. INT'L COM. L. & ARB. 15, 18 (2006) (Aus.); Coetzee, *supra* note 9, at 35; Fontaine, *supra* note 5, at 51–52; Fontaine, supra note 9, at 577; Han, supra note 9, at 591–592; JAN KROPHOLLER, INTERNATIONALES EINHEITSRECHT: ALLGEMEINE LEHREN [INTERNATIONAL UNIFORM LAW: GENERAL THEORIES] 225 (Mohr Siebeck eds., 1975) (Ger.); Jean Alain Penda Matipe, *OHADA and CISG: Alternatives or Complementary Instruments?*, *in* 35 YEARS CISG AND BEYOND 223 (2016).

geographical sense.[11] "Regional," in other words, is used as an opposite to "global" or "universal."

In order to analyse the matter further, it is necessary to clarify what kind of regional specificities we are talking about.[12] They can be grouped into three categories:

A. Legal Traditions

The first type of regional specificities are legal traditions that often differ from one region to another.[13] To qualify legal traditions as a "regional," specificity is – of course – a gross over-simplification because legal traditions are often created by factors independent from the geographic location as through historical influences that have – according to a long-standing doctrine[14] – resulted in the emergence of "legal families" as notably Common Law and Civil Law, or through religious influences.[15]

Within the context of law reforms modelled on the CISG, legal traditions can at the outset only be a relevant specificity if a certain threshold is applied. If any effect on any legal tradition of a given region would suffice to raise questions, any law reform using international models would be impossible. Law reform by definition means that some existing legal rules will be changed.[16] The question is therefore whether a legal tradition is so important that a deviation from the model has to be considered. The latter is the case where a specific legal tradition amounts to a "regional value," a category to be discussed in more detail below.[17]

---

11. *Compare* KROPHOLLER, *supra* note 10, at 225.

12. Fontaine, *supra* note 5, at 62.

13. Fontaine, *supra* note 9, at 578.

14. David, *supra* note 10, at 32, 49; KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 63-73 (3rd ed. 1996). For a skeptical assessment of this doctrine, *Compare* Peter Schmidt, *The Principles of Latin American Contract Law, with The Background of Latin American Legal Culture: A European Perspective*, *in* THE FUTURE OF CONTRACT LAW IN LATIN AMERICA: THE PRINCIPLES OF LATIN AMERICAN CONTRACT LAW 60 (Rodrigo Momberg & Stefan Vogenauer eds., 2017); *Compare also* HEIN KÖTZ, ABSCHIED VON DER RECHTSKREISLEHRE? ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 495 (1998).

15. Int'l Network to Promote Rule of Law [INPROL], *Intro to Civil Legal Systems: INPROL Consolidated Response* (May 2009).

16. Fontaine, *supra* note 5, at 51 ('…'by definition, unification, or harmonization […] is basically aimed at suppressing'); *See also* Fontaine, *supra* note 5, at 63 (''the very purposes of legal unification and harmonization are to eliminate or attenuate differences – that is, to sacrifice local differences.'').

17. *Infra* Section II.C.

B. Factual and Cultural Circumstances Specific to A Region

A second type of regional specificities are factual circumstances that exist in some regions of the world, but only to a lesser extent or not at all in others. Closely related to factual circumstances are cultural factors, including different regional socio-economic and political environments.[18] When using a rather crude dichotomy between law and facts, cultural factors may even be regarded as a sub-category to factual circumstances, while a definition of culture as "the socially transmitted behaviour patterns, norms, beliefs and values of a given community"[19] would invite a stricter distinction between the two concepts. (In order to avoid misunderstandings, it should be noted that the present contribution takes no position in the discussion about the role of "legal culture" in contemporary comparative law.[20]) In any case, when factual and cultural circumstances specific to a region are taken together, a significant number of features fall into this broad category.

In the context of contract law reform in Africa, regional circumstances of this type that were identified included the high level of illiteracy,[21] the importance of an informal economy,[22] the weakness of legal culture[23] and the prevalence of corruption.[24] Corruption has similarly been mentioned as a phenomenon in other parts of the world.[25] For Asia, scholars have pointed to the concept of "face," due to which "some Asian societies [are] less litigious" in commercial matters and "less likely to have recourse to the courts."[26] For Indonesia as well as other Asian countries, Professor Bell has argued that local merchants have a relational approach to contracts rather than a transactional

18. *See* Sir Basil Markesinis & Jörg Fedtke, *The Judge as Comparatist*, 80 TUL. L. REV. 11, 119-127 (2005) (discussing the impact of these categories in a comparative law context).

19. *See* Jadranka Petrovic, *The Interplay of CISG Cultural, Legal, Historical and Religious Variances and their Impact on the Treatment of the CISG*, 20 VINDOBONA J. INT'L COM. L. 71, 73 (2016) (Aus.)

20. *See* Roger Cotterrell, *Comparative Law and Legal Culture*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 709-737 (Matthias Reimann & Reinhard Zimmermann eds., 2008); David Nelken, *Legal Culture*, *in* ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 480-90 (2nd ed. 2012).

21. Fontaine, *supra* note 5, at 53; Fontaine, supra note 9, at 578, 80; Ole Lando, *CISG and Its Followers: A Proposal to Adopt Some International Principles of Contract Law*, 53 AM. J. OF COMP. LAW. 379, 389 (2005).

22. Roland Djieufack, *Conformity of Goods to the Contract of Sale Under the OHADA Uniform Act on General Commercial Law*, 20 UNIFORM L. REV. 271, 280 (2015).

23. Fontaine, *supra* note 5, at 53–54; Fontaine, *supra* note 9, at 578.

24. Fontaine, *supra* note 5, at 64.

25. *Id.*

26. Bell, *supra* note 9, at 368; *See also* Chianale, *supra* note 3, at 39; Eric A. Feldman, *Law, Culture, and Conflict: Dispute Resolution in Postwar Japan*, *in* LAW IN JAPAN – A TURNING POINT 50 (Daniel H. Foote ed., 2008).

approach, wherein merchants consider the ongoing relationship as more important than the letter of the individual contract.[27]

Factual circumstances that were considered during the drafting of the 1980 Vienna Sales Convention included whether the businesses in a certain country are predominantly producers of complicated, technical goods (like machines), or whether they mainly export bulk commodities and other simple goods[28] – a factor that may influence their technical expertise and thereby the effect that legal inspection and notice requirements as under Articles 38 and 39 of the CISG have for parties from that country.[29]

C. Regional Values in the Area of Commercial Sales: Do They Exist?

This leaves us with a third type of regional specificity, "regional values." In order to be more precise, the question is not whether there *are* any regional values in the different parts of the world: There clearly are.[30] Our present question is more specific: Are there regional values that affect the law of commercial sales contracts?

1. Views Among Scholarly Writers

The question was explored in detail by Professor Fontaine when he prepared a regional law of contracts for the Member States of OHADA, the Organization for the Harmonization of Corporate Law in Africa (Organisation pour l'Harmonisation en Afrique du Droit des Affaires). He concluded that there is no uniquely African feature in the area of contract law.[31]

Professor Han, when writing about the Principles of Asian Contract Law that are currently being drafted, similarly said that there is "not

27. Gary F. Bell, *New Challenges for the Uniformisation of Laws: How the CISG is Challenged by "Asian Values" and Islamic Law*, *in* TOWARDS UNIFORMITY: THE 2ND ANNUAL MAA SCHLECHTRIEM CISG CONFERENCE 11, 17-18 (Ingeborg Schwenzer & Lisa Spagnolo eds., 2011).

28. *See* U.N. Conference on Contracts for the International Sale of Goods, *Official Records: Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committees*, 348 para. 49 (Apr. 11, 1980) [hereinafter *Official Records*].

29. *See infra* Section IV.D.5.; *See also* Fatima Akaddaf, *Application of the United Nations Convention on Contracts for the Sale of Goods (CISG) to Arab Islamic Countries: Is the CISG Compatible with Islamic Principles?*, 13 PACE INT'L L. REV. 1, 13 (2001) ("Economic backwardness can affect the application of the rule of law.").

30. *Compare* David, *supra* note 10, at 49 ("Even the most fervent advocates of the unity of mankind cannot close their eyes to the existence of groups who live and wish to live in different ways. The world is not a fatherland; the communities which form the nations intend to keep their individuality and their own law relative to one another. Their ideal is not, generally speaking, the unification of law on a world scale.").

31. Fontaine, *supra* note 5, at 53.

exactly" any distinguishing Asian feature in their black letter rules,[32] and others have reached the same conclusion for contemporary Asian law(s) of sale.[33]

With respect to Latin American contract laws, it has similarly been held that a black letter rule comparison with their Continental European counterparts would uncover scarcely any fundamental differences, and that their national solutions, if not actually identical, appear as minor variations on common and familiar themes.[34] As a consequence, it has been questioned whether anything will make future Principles of Latin American Contract Law[35] distinctly "Latin American," apart from the origin of their drafters.[36]

Finally, the same could also be said about the European rules for sales contracts as laid down in the European Union's recently abolished draft Common European Sales Law (CESL),[37] albeit for a different reason: the CESL's provisions – at least those designed for contracts between professional parties (or merchants) – showed little or no European specificity because their characteristics were largely shaped by and modelled on the universally accepted rules of the CISG.[38] That does not mean that the defining features of the draft CESL were not "European" – they were, as Western European legal tradition had been an important (arguably the most important) influence when the Vienna

32. Han, *supra* note 9, at 598.

33. Bell, *supra* note 9, at 368; *See also* Bell, *supra* note 27, at 20.

34. Schmidt, *supra* note 14, at 75–76.

35. On the on going work on the Principles of Latin American Contract Law [*Principios Latinamericanos de Derecho de los Contratos*] (PLDC), *see* Alejandro M. Garro, *Contract Law in Latin America: Building of a Latin American Ius Commune on Contract Law*, *in* 35 YEARS CISG AND BEYOND 253, 261-265 (Ingeborg Schwenzer ed., 2016).

36. Schmidt, *supra* note 14, at 91; *See also* Rodrigo Momberg, *Harmonization of Contract Law in Latin America: Past and Present Initiatives*, 19 UNIFORM L. REV. 411, 425 (2014) ("Perhaps the greater challenge for the PLDC is to demonstrate their originality, in the sense that they are not just a mere copy or sub-product of the CISG, the Principles of European Contract Law (PECL), the PICC, or the Draft Common Frame of Reference."); Garro, *supra* note 35, at 265.

37. *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*, (COM 2011) 635 final (Oct. 11, 2011). In late 2014, The European Commission withdrew this proposal; *see Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'Commission Work Programme 2015: A New Start* (COM 2014) 910 final (Annex II) (Dec. 16, 2014).

38. *See* Ole Lando, *CESL or CISG? Should the proposed EU Regulation on a Common European Sales Law (CESL) replace the United Nations Convention on International Sales (CISG)?*, *in* GEMEINSAMES EUROPÄISCHES KAUFRECHT FÜR DIE EU?, para. 2 (Oliver Remien et al. eds., 2012); Schwenzer & Hachem, *supra* note 3, at 462; Willem van den Aardweg, *CESL in Politics – Making European Sales Law: Insights from Brussels*, *in* COMMON EUR. SALES L. MEETS REALITY, 7, 13 (Matthias Lehmann ed., 2015).

Sales Convention's predecessors, the 1964 Hague Sales Conventions,[39] and later the CISG itself were drafted.[40] But due to this earlier development, the CESL's rules were hardly specific to Europe anymore, as the European sales law heritage had effectively been globalized through the 1980 Sales Convention and its subsequent ratification all over the world.[41]

2. Defining the Threshold of A Regional "Value"

Much will, of course, depend on the threshold that is applied when looking for a distinguishing regional feature, or – as it is referred to here – a regional "value." In most contexts, the term "value" has proven notoriously difficult to define in an abstract manner.[42] In public international law, it has been argued that on the normative side, universal values need to be identified by collective decision, not by philosophical speculation.[43] As such, a formal identification of values is usually missing (with the Treaty on European Union being a rare and relatively recent exception; to be further discussed below).[44] The term "value" is often used without any attempt at a prior definition, in both comparative private law[45] and public international law[46] discussions.

The appropriate starting point for attempts at describing the "value" threshold, however vague their outcome, appears to be the purpose for which the threshold is being defined. In the present context, this is the identification of distinguishing regional features in the context of uniform law creation and of law harmonisation through domestic law reforms. In order to qualify as a "regional value" in these related contexts, it is clear that not every legal rule of regional application can suffice.[47] The very

39. Convention Relating to a Uniform Law on the International Sale of Goods, Jul. 1, 1964, 834 U.N.T.S. 107 (entered into force Aug. 18, 1972; Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, Jul. 1, 1964, 834 U.N.T.S. 169 (entered into force Aug. 23, 1972).

40. FRITZ ENDERLEIN & DIETRICH MASKOW, INTERNATIONAL SALES LAW 2 (1992); Gyula Eörsi, *A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods*, AM. J. OF COMP. L. 333, 335 (1983).

41. Michael Joachim Bonell, The CISG, European Contract Law and the Development of a World Contract Law, 56 AM. J. COMP. L. 1 (2008); United Nations Convention on Contracts for the International Sale of Goods, Art. 79, Apr. 11, 1980, 1489 U.N.T.S. 25567. (hereinafter CISG).

42. *See* Ulrich Fastenrath, Subsidiarität im Völkerrecht, 20 RECHTSTHEORIE (Beiheft) 475, 488 note 88 (2002) (Ger.); Andreas L. Paulus, *Jus cogens in a Time of Hegemony and Fragmentation: An Attempt at a Re-appraisal*, 74 NORDIC J. OF INT'L L. 297, 308-09 (2005).

43. Paulus, *supra* note 6, at 91.

44. *See infra* Section III.A.

45. *See e.g.* Markesinis & Fedtke, *supra* note 18, at 108–109.

46. HENKIN, *supra* note 6, at 99–100.

47. *See supra* Section II.A.

purpose of legal unification and harmonization is the elimination or reduction of local differences in law.[48] Against this background, it is submitted that the category of "regional values" can only comprise rules of law that represent or reflect a *defining characteristic* of a given legal system.

Obviously, this test is not a hard and fast rule, but any attempt to be more specific risks becoming bogged down with details and thereby diluting the main thrust of the argument made.[49] In any case, we seem to lack an objective standard by which to measure whether a certain feature constitutes a defining characteristic of a legal system. In a law reform context, it will therefore be the subjective opinion of a national legislator that determines whether a legal rule or principle constitutes a regional "value"; i.e. defining a characteristic of a given domestic law that should be maintained although it differs from an internationally accepted model. The history of the CISG[50] and of domestic law reforms[51] provides us with some past examples.

3. Examples From the Sales Convention's Drafting History

When the 1980 Vienna Sales Convention was drafted, the Common Law States considered their characteristic limits on claims for specific performance to be a fundamental principle of their legal system[52] or of their judicial procedure[53] respectively, given that the idea of a contract conclusion engendering an enforceable duty to perform has traditionally been a notion foreign to the Common Law.[54] This had already been recognized by Ernst Rabel, who remarked on his 1935 Draft of an International Law of Sales[55] that:

> [i]t had but one course to follow in face of the abyss between the Anglo-American and the continental concepts of specific performance. The basic ideas are too far away from each other for a

48. Fontaine, *supra* note 5, at 63.

49. Markesinis & Fedtke, *supra* note 18, at 144.

50. *See infra* Section II.C.3.

51. *See infra* Section II.C.4.

52. Referring to the predecessor of the 1980 Vienna Sales Convention, *see* André Tunc, *Commentary of The Hague Conventions of 1st July 1964 on the International Sale of Goods and on the Formation of Contracts of Sale*, THE HAGUE 1964 42 (1964).

53. *Official Records*, *supra* note 28, at 27.

54. *See* OLIVER WENDELL HOLMES, THE COMMON LAW 301 (1881); E. ALLAN FARNSWORTH, CONTRACTS 840 (2nd ed. 1990) 301; ZWEIGERT & KÖTZ, *supra* note 14, at 479.

55. Ernst Rabel, *A Draft of an International Law of Sales*, 5 U. OF CHI. L. REV. 543, 543 (1938).

> thorough unification. In this one point, the only sound solution was to leave the existing differences untouched.[56]

This advice eventually lead to the adoption of Article 28 of the 1980 Vienna Sales Convention (to be further addressed below).[57]

As a second example, the then Socialist States regarded their writing requirement for sales contracts as indispensable for their planned economies,[58] given that the planning authorities depended on written records of contract conclusions and modifications in order to be able to match the sales transactions made by state enterprises to the government-made plan.[59] For countries with a socialist planned economy, the emphasis was thus on security without surprises, even at the expense of otherwise desirable contracts not coming into being.[60]

A third example is whether a given domestic law treats offers as binding or freely revocable until accepted; the discrepancy between the "offer principle" and the "contract principle" (or "bargain principle") well-known to comparative lawyers.[61] It has been described as a "religious battle of principles"[62] and a conflict between opposing ideologies which themselves rely on value judgments.[63] In Vienna, this discrepancy in approaches resulted in the authorization of the reservation under Article 92 of the CISG, to be discussed in more detail below.[64]

In spite of these examples, occasions on which regional values were invoked at the drafting stage of the Vienna Sales Convention were few and far between. It has *inter alia* been pointed out that, although many Asian countries participated in the drafting work preceding the 1980 Vienna Diplomatic Conference, no reticence based on Asian specificities were ever raised at the diplomatic meetings that led to the CISG.[65] In a similar manner, Professor Schlechtriem summarized his experiences at the United Nations Commission on International Trade Law

---

56. *Id.* at 559.

57. *See infra* Section IV.B.4.

58. On the now defunct Socialist planned economies, *see* RENÉ DAVID & JOHN E.C. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY 273-280 (2nd ed. 1978).

59. *See* Eörsi, *supra* note 40, at 342–343; Ulrich G. Schroeter, *The Cross-Border Freedom of Form Principle Under Reservation: The Role of Articles 12 and 96 CISG in Theory and Practice*, 33 J. L. & COM. 79, 81-82 (2014).

60. Eörsi, *supra* note 40, at 342.

61. *See* ZWEIGERT & KÖTZ, *supra* note 14, at 356–363.

62. Mads Bryde Andersen, *CISG Article 16: A Well-placed Principle in the Law of Contract Formation?, in* THE CISG CONVENTION AND DOMESTIC CONTRACT LAW: HARMONY, CROSS-INSPIRATION, OR DISCORD? 35, 37 (Joseph Lookofsky & Mads Bryde Andersen eds., 2014).

63. *Id.*

64. *See infra* Section IV.B.2.

65. Bell, *supra* note 9, at 367.

(UNCITRAL) and during the deliberations at the Vienna Conference as having "shown that the greatest obstacles to unification do not lie between States with different social and economic systems, but rather between the countries of Western Europe, where each holds convictions, rooted in centuries of legal tradition, about the superiority of its own solutions."[66] Luckily, most of these differences were eventually overcome, demonstrating that divergent legal solutions in the field of commercial law – even if they reach the threshold of diverging "values"[67] – do not have to hinder the creation of uniform law.

4. Examples From Domestic Law Contexts

a. The Fault Principle

In German contract law, a defining characteristic – at least in the eyes of the German legislature – is that liability for damages is based on fault, generally requiring that the debtor has acted either intentionally or negligently. The fault principle that also dominates in other civil law systems influenced by German law[68] or belonging to yet other "legal families,"[69] was famously summarised by Roman law scholar Rudolph Jhering's statement that "it is not loss that makes liable for damages, but fault: A simple sentence, as simple as that of the chemist according to which it is not the light that burns, but the air's oxygen."[70] This traditional characteristic of Germanic legal systems did not stop Germany from ratifying the 1980 Vienna Sales Convention, despite the fact that liability for damages under the CISG is not based on fault.[71] However, when Germany reformed its domestic law of obligations in 2001[72] and took much inspiration from the CISG in this context,[73] the German legislature

66. PETER SCHLECHTRIEM, UNIFORM SALES LAW – THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 115-116 (1986).

67. Castellani, *supra* note 2.

68. E. Allen Farnsworth, *Comparative Contract Law, in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 899, 922 (Matthias Reimann & Reinhard Zimmermann eds., 2008); MATTHIAS SIEMS, COMPARATIVE LAW 62 (2014).

69. On Danish law, *see* Joseph M. Lookofsky, *Fault and No-Fault in Danish, American and International Sales Law: The Reception of the United Nations Sales Convention*, 27 SCANDINAVIAN STUD. L. 109, 111 (1983).

70. RUDOLPH JHERING, DAS SCHULDMOMENT IM RÖMISCHEN PRIVATRECHT 40 (1867) ("Nicht der Schaden verpflichtet zum Schadensersatz, sondern die Schuld. Ein einfacher Satz, ebenso einfach wie der des Chemikers, dass nicht das Licht brennt, sondern der Sauerstoff der Luft.").

71. *See in detail infra* Section III.C.2.

72. *See* REINHARD ZIMMERMANN, THE NEW GERMAN LAW OF OBLIGATIONS: HISTORICAL AND COMPARATIVE PERSPECTIVES (2005).

73. Schlechtriem, *supra* note 4, at 13–18.

nevertheless decided to maintain the fault principle, given that it had yielded convincing results in the past[74] and that German scholars dismissed a strict liability regime as unreasonably harsh.[75] Some have criticized this decision as a German *Sonderweg* in deviation from an accepted international model,[76] while others have pointed out that the theoretical differences between a fault-based and a strict liability regime only rarely result in different outcomes in practice.[77]

In any case, the German example demonstrates that the existence of a regional value alone must not necessarily stand in the way of a unification or harmonization of laws, and that it may well affect the Sales Convention's unification function and its model function differently: For international sales transactions, Germany gave preference to the CISG's unification function over the preservation of the fault principle, thereby putting international uniformity first.[78] For domestic contracts, it maintained its characteristic fault-based liability, limiting the Sales Convention's model function in favour of a divergent regional legal value.[79]

The fault principle was a similar point of discussion when the 1999 Contract Law of the People's Republic of China was drafted, and has been described as one of the most controversial issues in this context.[80] The controversy arose because, on one hand, the draft of the new Chinese Contract Law had been strongly inspired by the CISG,[81] while contractual liability under Chinese law had traditionally been based on fault,[82] insofar inspired by German law. Arguments that were advanced in favour of maintaining fault as an essential element for liability under the new Chinese Contract Law included: (1) that a fault-based approach emphasises the moral underpinnings of contracts and serves to promote

74. Entwurf eines Gesetzes zur Modernisierung des Schuldrechts [Cabinet Draft] D14/6040, Deutscher Bundestag, http://dipbt.bundestag.de/doc/btd/14/060/1406040.pdf (Ger.).

75. *See* Dieter Medicus, *Voraussetzungen einer Haftung für Vertragsverletzung, in* EUROPÄISCHE VERTRAGSRECHTSVEREINHEITLICHUNG UND DEUTSCHES RECHT 179, 187–188 (Jürgen Basedow ed., 2000).

76. FILIPPO RANIERI, EUROPÄISCHES OBLIGATIONENRECHT 775 (3rd ed. 2009).

77. Lookofsky, *supra* note 69, at 111, 137–138; Peter Schlechtriem, *Rechtsvereinheitlichung in Europa und Schuldrechtsreform, in* ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 217, 228-230 (1993).

78. *Id.*

79. Harry Flechtner, *Gedenkschrift In Honor Of E. Allan Farnsworth (1928 - 2005): Article: Article 79 Of The United Nations Convention On Contracts For The International Sale Of Goods (Cisg) As Rorschach Test: The Homeward Trend And Exemption For Delivering Non-Conforming Goods*, 19 PACE INT'L L. REV. 29, 66 (2007).

80. BING LING, CONTRACT LAW IN CHINA para. 8.031 (2002).

81. MO ZHANG, CHINESE CONTRACT LAW: THEORY AND PRACTICE 13 (2006).

82. *Id.* at 291–292.

public morals in the market economy; (2) that the requirement of fault allows reasonable leeway for people to conduct their affairs without having to worry about liability; (3) that the fault principle had been well accepted by the courts and general public in China and had become part of the popular legal consciousness; and (4) that strict liability is at odds with the Chinese civil law tradition.[83] Eventually, the Chinese legislator nevertheless opted for a strict liability approach along the lines of the 1980 Vienna Sales Convention, also for its new domestic law,[84] and Article 107 of the 1999 Chinese Contract Law accordingly makes no reference to the breaching party's fault.[85] While it can therefore be argued that the fault principle ranked as a defining characteristic of the Chinese law of contracts (and therefore a "regional value") until 1999, it has not done so since then, given that China now generally follows the CISG's strict liability standard, although Chinese contract law continues to contain certain fault-based rules[86] (that therefore are exceptions confirming the rule). A similar assessment holds true for other jurisdictions that formerly followed the fault principle and then underwent a CISG-inspired contract law reform, as e.g. Hungary in 2013.[87]

The role of the fault principle in German law on one hand, and in Chinese as well as Hungarian law on the other, indicates that the desirability of maintaining a given regional legal value in light of differing international developments is open to diverging assessments, and that regional values may also change over time.[88] This stands in accordance with the subjective nature of the value concept, as suggested earlier.[89]

b. The Prohibition of Interest

With a view to regional values of religious provenance that apply in a commercial law context, reference has frequently been made to the prohibition of interest under Islamic law *(riba)*.[90] However, opinions

83. LING, *supra* note 80, para. 8.031.

84. ZHANG, *supra* note 81, at 293.

85. LING, *supra* note 80, para. 8.032; ZHANG, *supra* note 81, at 292–293 (with a discussion of the different views among Chinese scholars about this point.).

86. ZHANG, *supra* note 81, at 293.

87. *See* Ádám Fuglinsky, *The Reform of Contractual Liability in the New Hungarian Civil Code: Strict Liability and Foreseeability Clauses as Legal Transplants*, 79 RABEL J. OF COMP. & INT'L PRIV. L. 72, 76-77 (2015) (Ger.).

88. Markesinis & Fedtke, *supra* note 18, at 120–121.

89. *See supra* Section II.C.2.

90. For the drafting history of the 1980 Vienna Sales Convention, see *Official Records*, *supra* note 28, at 223; For legal writings, *see* Kilian Bälz, *Zinsverbote und Zinsbeschränkungen im*

differ as to the practical relevance that *riba* has for commercial transactions,[91] and some authors have accorded it a mere "folkloristic character" where contracts between merchants are concerned.[92] Its compatibility with the 1980 Vienna Sales Convention's rules and values in any case deserves scrutiny, to be conducted further below.[93]

c. The Social Function of the Contract

Another regional legal value can be found in Brazilian contract law and its unique concept of the "social function" of contracts. This concept, sometimes described as a true Copernican revolution in the field of Brazilian private law,[94] has been codified in Article 421 of Brazil's Civil Code of 2003, which reads as follows:

> The freedom of contract shall be exercised according to and within the limits of the social function of the contract.

The mandatory notion of a contract's social function that this provision prescribes creates non-derogable duties of economic solidarity,[95] thereby putting the collective interest above private interests.[96] As a result, the goal of contractual justice in Brazilian law effectively supersedes legal individualism as symbolised by party autonomy, and prevails over the formerly absolute application of the principle of *pacta sunt servanda*.[97] It has been stressed that no contract in

---

internationalen Privatrecht, PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS 306 (Ger.); Bell, *supra* note 9, at 363–364; Bell, *supra* note 27, at 13–14; T.S. Twibell, *Implementation of the United Nations Convention on Contracts for the International Sale of Goods (CISG) under Shari'a Law: Will Article 78 of the CISG Be Enforced When the Forum is an Islamic State?* 9 INT'L LEGAL PERSP. 25, 78-87 (1997).

91. ICC Award 7063/1993, YEARBOOK COMMERCIAL ARBITRATION XXII, 87, 89 (1997) (In the present case, it is clear from the circumstances already referred to that claimant has in fact suffered financial damage as the result of defendant's breaches of contract. We therefore do not consider that there is anything in the doctrine of *riba*, which precludes this Tribunal from awarding it some reasonable compensation for this loss. However, in order to respect the sensitivities of Shari'a law in this field, we do not consider that compensation should be awarded at a commercial rate of interest, but that it should rather be based on a rate which reflects the incidence of annual inflation over the period [at issue]); Akaddaf, *supra* note 29, at 22, 42–46; Twibell, *supra* note 90, at 75-78.

92. Bälz, *supra* note 90, at 309; Akaddaf, *supra* note 29, at 54–56.

93. *See infra* Section IV.B.5.

94. Paulo Nalin, *The Social Function of the Contract and the International Sale of Goods (CISG): The Contribution of Brazilian Law to a Global Debate*, *in* CISG AND LATIN AMERICA: REGIONAL AND GLOBAL PERSPECTIVES 359 (Ingeborg Schwenzer, Cesar Augusto Guimarães Pereira & Leandro Tripodi eds., 2016).

95. *Id*. at 365.

96. Eduardo Grebler, *The Convention on International Sale of Goods and Brazilian Law: Are Differences Irreconcilable?*, 25 J. L. & COM. 467, 470 (2005-06).

97. *Id*. at 470; *see also* Nalin, *supra* note 94, at 359.

Brazil can escape such a social-protective analysis.[98] Scholars are also in agreement that the social function of the contract ranks as a defining characteristic of Brazilian contract law,[99] and Article 2035 of the Brazilian Civil Code explicitly makes its observance a matter of public policy.[100] Doubts that have occasionally been expressed by scholarly writers primarily relate to the concept's unclear contours,[101] but less to its importance in contemporary Brazilian law.[102]

III. VALUES REFLECTED IN THE SALES CONVENTION

Against the background just described, we next turn to the 1980 Vienna Sales Convention. Does the CISG reflect veritable "universal" values?

A. Preliminary Considerations

At the outset, it is not easy to determine which values are reflected in the CISG. The Convention contains no provision similar to Article 2 of the Treaty on European Union,[103] which states:

> The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.[104]

However, it is worth remembering that this provision was only introduced quite recently, namely in 2009 through the Lisbon Treaty.[105] Until then, even the EU existed without a programmatic statement of values.

In contrast, the European Union's so-called Draft Common Frame of Reference (DCFR), an academic text comprising principles,

98. Nalin, *supra* note 94, at 372.

99. Grebler, *supra* note 95, at 470; Nalin, *supra* note 94, at 372.

100. *See* CÓDIGO CIVIL [C.C.] [CIVIL CODE] art. 2035 (Braz.) ("No agreement shall prevail if it is contrary to the public order precepts such as the ones set forth in this Code to ensure the social function of the property and contracts.").

101. *See* Garro, *supra* note 35, at 265; Schmidt, *supra* note 14, at 75.

102. For the application of the 'social function' concept to CISG contracts, *see infra* Section IV.A.1.

103. Oberlandesgericht Köln [OLG] [Appellate Court] Oct. 14, 2002, RECHT DER INTERNATIONALEN WIRTSCHAFT, 300 (2003) (Ger.).

104. Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C191) 1, 31 I.L.M. 253 [hereinafter Maastricht Treaty].

105. Treaty of Lisbon Amending the Treaty of European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Treaty of Lisbon].

definitions and model rules of European private law that was presented by its drafters in 2008–09, but never achieved the force of law, included from the beginning an extensive list of "core aims and the values expressed in them" in its introductory section.[106] The DCFR's interim outline edition published in 2008 listed no less than thirteen fundamental principles in no particular order, namely justice, freedom, protection of human rights, economic welfare, solidarity and social responsibility, promotion of the internal market, preservation of cultural and linguistic plurality, rationality, legal certainty, predictability, efficiency, protection of reasonable reliance, and the proper allocation of responsibility for the creation of risks.[107] Commentators soon criticized this list as containing "a hotchpotch of diverse aims and underlying values which are neither precisely defined individually nor as regards their relation to one another."[108] It was argued that such a conglomeration of disparate factors was hardly helpful for the interpretation of the DCFR's individual rules, particularly since the list was not intended to be exhaustive.[109]

The full and final version of the DCFR published in 2009 then distinguished between two categories of fundamental principles, namely underlying principles and overriding principles. While "underlying principles" were understood as all-pervasive principles within the DCFR that could be detected by looking into the DCFR's model rules and that furnished grounds for arguments about the merits of particular rules, "overriding principles" were described as being generally of a rather high political nature.[110] As overriding principles, the drafters of the DCFR listed the protection of human rights, the promotion of solidarity and social responsibility, the preservation of cultural and linguistic diversity, the protection and promotion of welfare, the promotion of the internal market as well as freedom, security, justice and efficiency.[111]

106. PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW: DRAFT COMMON FRAME OF REFERENCE – INTERIM OUTLINE EDITION para. 22 (Christian von Bar, Eric Clive & Hans Schulte-Nölke eds., 2008).

107. *Id.*

108. Horst Eidenmüller, Florian Faust, Hans Christoph Grigoleit, Nils Jansen, Gerhard Wagner & Reinhard Zimmermann, *The Common Frame of Reference for European Private Law – Policy Choices and Codification Problems,* 28 OXFORD J. LEGAL STUD. 659, 672 (2008).

109. *Id.*

110. PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW, *supra* note 106, para. 22.

111. *Id*. paras.17-22.

B. The Preamble of the Sales Convention

Within the CISG, the most obvious place to look for underlying values may be the Preamble, the only part of the Sales Convention that has been described as containing "general declarations of political principle."[112] The Convention's Preamble encompasses three recitals that *prima facie* appear as an expression of values inherent in the CISG, albeit to a varying degree:

The first recital, stating that the State Parties to the Convention were "bearing in mind the broad objectives in the resolutions adopted by the sixth special session of the General Assembly of the United Nations on the establishment of a New International Economic Order"[113] when they adopted in Sales Convention in 1980, is a reference to the political background of the day. It hardly mirrors a defining characteristic of the CISG as currently applied: The "New International Economic Order" (or NIEO), an intellectual movement of the 1970s and early 1980s,[114] had from the outset had no influence on the commercial sales law rules prepared by UNCITRAL. In 1979, UNCITRAL had received and discussed a report by the UN Secretary-General about the NIEO's potential relevance for the Commission's work,[115] and had concluded that "[t]hese issues and policies are to a great extent of a political and economic nature and cannot be dealt with by a legal body such as the Commission."[116] Against this background, the Preamble's reference to the now obsolete NIEO had never more than a mere political relevance.[117] The less than assertive expression "bearing in mind" further indicates that the drafters viewed the first recital as less important than the following two recitals.[118]

The "removal of legal barriers in international trade" and the promotion of "the development of international trade" referred to in the

112. Malcolm Evans, *Preamble, in* COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 23-25 (Cesare M. Bianca & Michael J. Bonell eds., 1987); *See also* Nalin, *supra* note 93, at 372 (who argues that the CISG's Preamble sets out 'relevant social values for business deals').

113. Evans, *supra* note 112 at 1.

114. Anthony Winer, *The CISG Convention and Thomas Frank's Theory of Legitimacy*, 19 NW. J. INT'L L. & BUS. 1, 9-13 (1998).

115. *New International Economic Order: Report of the Secretary-General: Possible Work Programme of the Commission*, [1979] U.N. Commission on Int'l Trade Law No. A/CN.9/171/1979, para. 2.

116. *Id.* para. 65.

117. ROLF HERBER & BEATE CZERWENKA, INTERNATIONALES KAUFRECHT: KOMMENTAR 2 (1991).

118. Ulrich Magnus, *Wiener UN-Kaufrecht (CISG), in* STAUDINGER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH 59 (2013).

Preamble's second and third recitals indeed sound like fundamental values, as do – maybe even more so – the "development of international trade on the basis of equality and mutual benefit" and the promotion of "friendly relations among States."[119] Together, they almost echo a saying by the French economist *Frédéric Bastiat*, who famously warned in the early 19th century: *"Si les marchandises ne traversent pas les frontières, les soldats le feront"* (if goods don't cross the borders, soldiers will).[120] Upon closer scrutiny, it seems nevertheless doubtful whether the Preamble's last two recitals can contribute much to the search for values reflected in the CISG. This is because the Preamble was only added after the negotiations concerning the Convention's substantive provisions were almost completed, and was adopted without any in-depth discussions.[121] It has therefore been questioned whether the Preamble may at all be taken into account in interpreting the CISG,[122] and the same doubts would apply as far as its use as a short-hand expression of the Convention's underlying values is concerned. More importantly, the Preamble's wording makes clear that it mentions these factors only as extrinsic goals to be achieved through the unification of commercial law,[123] not as values reflected in the Sales Convention's commercial law rules. In the same way, the Preamble affirms in its third recital that the Convention's provisions "take into account the different social, economic and legal systems," but fails to indicate which inspirations were drawn from the various systems world-wide and ended up being reflected in the CISG.[124]

C. Values Reflected in Provisions of and Principles Underlying the Sales Convention

We are therefore left with analysing the Convention's substantive provisions in our attempt to identify values underlying the CISG.

119. Evans, *supra* note 112, at 23.

120. Magnus, *supra* note 118, at 58.

121. *See Official Records*, *supra* note 28, paras. 1-10.

122. JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION (2009) para. 475; Evans, *supra* note 110, at note 3; SCHLECHTRIEM, *supra* note 63, at 38; *Contra* Magnus, *supra* note 118, at 58–59; Winer, *supra* note 114, at 10.

123. *See also* Evans, *supra* note 112, at note 3.1; Magnus, *supra* note 118, at 58.

124. UN Convention on Contracts for the Sale of Goods, *supra* note 1.

1. Values vs. "General Principles" on Which the Sales Convention is Based (Article 7(2) of the CISG)

In doing so, it is helpful to first explore the relationship between general "values" – a term that, as indicated earlier,[125] does in itself not appear in the Sales Convention's text – and the "general principles on which it [i.e. the Convention] is based" explicitly referred to in Article 7(2) of the CISG. Do these two concepts coincide?

It is submitted that the two categories do not completely coincide, but partially overlap. In other words, some of the general principles underlying the 1980 Sales Convention in the sense of its Article 7(2) arguably qualify as general values, while others do not. The reason is the limited purpose for which general principles are identified under Article 7(2) of the CISG: They are merely used in order to fill so-called "internal gaps" in the Convention's written text, i.e. – in the words of Article 7(2) – "[q]uestions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law."[126] The starting point is therefore the existence of a gap in the Sales Convention's text, and not the more general quest for characteristics of a defining nature within the Convention's regime. As a result, it is necessary to distinguish:

Many of the internal gaps identified in the Sales Convention have been filled by general principles derived from individual CISG provisions and extended to related situations. Principles of this type are "general" only insofar as their scope is not limited to one particular provision, but extends to more than one situation covered by the Convention. This approach to gap-filling accordingly shows similarities to a provision's application *per analogiam* known in many domestic legal systems, particularly those of civil law jurisdictions.[127] Examples are the general principle on the lack of influence of official holidays on the computation of periods of time derived from Article 20(2) of the CISG[128] or the general principle establishing the obligee's place of business as the place of

125. *See supra* Section III.A.

126. UN Convention on Contracts for the Sale of Goods, *supra* note 1.

127. Ingeborg Schwenzer & Pascal Hachem, *Article 7, in* COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS para. 31 (Ingeborg Schwenzer ed., 4th ed. 2016).

128. HERBER & CZERWENKA, *supra* note 115, at 110; Ulrich Magnus, *Die allgemeinen Grundsätze im UN-Kaufrecht*, 59 RABEL J. OF COMP. & INT'L PRIV. L. 467, 486-487 (1995) (Ger.); BURGHARD PILTZ, INTERNATIONALES KAUFRECHT para. 2-144 (2008); Schwenzer & Hachem, *supra* note 127, para. 33.

performance for payments that has been based on Article 57 of the CISG.[129] Beyond their gap-filling function, general principles of this kind arguably do not express general values.

Other general principles, in the sense of Article 7(2) of the CISG, express more fundamental characteristics inherent in the Sales Convention, and therefore may reflect "values" of the kind discussed here. Examples are the prevalence of party autonomy over the CISG's default rules,[130] the freedom of form,[131] the equal treatment of the parties and the neutrality of the CISG,[132] the principle *pacta sunt servanda*,[133] and the general principle of upholding contracts *(favor contractus)*.[134] Whether good faith also constitutes a general principle in this sense is a difficult and controversial question. It will be addressed separately below.[135]

In any case, it should be noted that the standards determining whether a certain principle meets the requirements for a gap-filling tool under Article 7(2) of the CISG or expresses a defining characteristic of the Convention in accordance with the "value" definition developed earlier[136] are not the same. Accordingly, the concept of "general principles" on which the 1980 Sales Convention "is based" (Article 7(2) of the CISG) merely accidently coincides with the "value" concept presently investigated.

---

129. *Cour d'appel Grenoble*, THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, http://www.jura.uni-sb.de/FB/LS/Witz/231096v.htm (last visited Sept. 11, 2017); Magnus, *supra* note 128, at 488–489; Florian Mohs, *Article 57*, *in* COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS para. 29 (Ingeborg Schwenzer ed., 4th ed. 2016); PILTZ, *supra* note 128, at para. 2-144; Schwenzer & Hachem, *supra* note 127, para. 35.

130. Magnus, *supra* note 128, at 480; PILTZ, *supra* note 128, para. 2-144; Schwenzer & Hachem, *supra* note 127, para. 32.

131. Magnus, *supra* note 128, at 483; PILTZ, *supra* note 128, para. 2-144; Schwenzer & Hachem, *supra* note 127, para. 32.

132. *See* Schwenzer & Hachem, *supra* note 127, para. 34.

133. Magnus, *supra* note 128, at 480.

134. Oberlandesgericht Köln [OLG] [Appellate Court] Oct. 14, 2002, RECHT DER INTERNATIONALEN WIRSTCHAFT, 300 (2003) (Ger.); Bertram Keller, *Favor Contractus: Reading the CISG in Favor of the Contract*, *in* SHARING INTERNATIONAL COMMERCIAL LAW ACROSS NATIONAL BOUNDARIES: FESTSCHRIFT FOR ALBERT H. KRITZER ON OCCASION OF HIS EIGHTIETH BIRTHDAY 247, 249 (Camilla B. Andersen, Ulrich G. Schroeter eds., 2008); Magnus, *supra* note 128 483; Schwenzer & Hachem, *supra* note 127, para. 35.

135. *See infra* Section III.E.

136. *See supra* Section II.C.2.

2. Values Reflected in Individual Provisions of the Sales Convention

Be that as it may, it is submitted that a few general values have found their expression in the Sales Convention's individual provisions, irrespective of its Article 7(2).

a. Examples

That is most of all true for the prevalence of party autonomy,[137] as expressed in Article 6 of the CISG and many other provisions in the Convention. Another value is the equal balance between the rights and obligations of buyer and seller[138] that creates a proverbial "level playing field."[139] This is demonstrated by the similar structure of the parties' respective obligations and remedies in Part III of the Convention. Furthermore, one could mention the preservation of the bargain made by the parties, as expressed through the principle of full compensation underlying the damages provisions[140] and through the manner of calculating an admissible price reduction under Article 50 of the CISG.[141] The lack of formalisms unsuitable for commercial dealings, as expressed notably in the freedom of form principle of Articles 11 and 29(1) of the CISG, may be seen as a further general value,[142] as is the speedy execution of contracts, as evidenced in particular by the inspection and notice requirements of Articles 38 and 39, but also the time-limits for certain remedies in Articles 49(2), 64(2) and 73(2) of the CISG.

Are the values assembled in this (non-exhaustive) list "universal"? It is submitted that they are indeed, in the sense that these values are acceptable to commercial lawyers and commercial lawmakers from all regions of the world. The Sales Convention's wide-spread ratification by countries from various parts of the globe is a striking testament to this

137. Bernard Audit, *The Vienna Sales Convention and the Lex Mercatoria*, *in* LEX MERCATORIA AND ARBITRATION: A DISCUSSION OF THE NEW LAW MERCHANT 173, 175 (Thomas E. Carbonneau ed., 1998); Lando, *supra* note 21, at 386-388; Ulrich Magnus, *CISG vs. CESL*, *in* CISG VS. REGIONAL SALES LAW UNIFICATION: WITH A FOCUS ON THE NEW COMMON EUROPEAN SALES LAW 97, 99 (2012); Nalin, *supra* note 94, at 372 (providing a more sceptical view).

138. ENDERLEIN & MASKOW, *supra* note 40, at 17; Kröll et al, *supra* note 3, para. 50; Magnus, *supra* note 118, at 60; Schwenzer & Hachem, *supra* note 3, at 476-477.

139. Magnus, *supra* note 118, at 38.

140. Oberster Gerichtshof [OGH] [Supreme Court] Jan. 14, 2002, 7 Ob 301/01t, INTERNATIONALES HANDELSRECHT (Austria); HERBER & CZERWENKA, *supra* note 115, at 331; Magnus, *supra* note 118, at 850.

141. Magnus, *supra* note 118, at 625, 29; Markus Müller-Chen, *Article 50*, *in* COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) para. 8 (Ingeborg. Schwenzer ed., 4th ed. 2016).

142. Lando, *supra* note 21, at 388–89 (On the recognition of the freedom of form principle as a general principle in the sense of Article 7(2) of the CISG see *supra* note 129.).

acceptability. In this context, a given value should not be prevented from qualifying as "universal" by the fact that a few States may or may not fully share it. World-wide uniformity in this respect, as in any other, would be a standard impossible to achieve. Writing about the international unification of laws, Professor David aptly pointed out that "[e]ven the most fervent advocates of the unity of mankind cannot close their eyes to the existence of groups who live and wish to live in different ways,"[143] and that the various communities' individuality make certain differences in law inevitable.[144] The field of human rights confirms this, as even universal human rights are not recognized everywhere in the world.

In respect of the Sales Convention's commercial law values, a lack of acceptance by some States has historically most of all concerned the freedom from form[145] and the speedy execution of contracts enforced by way of time-limits.[146] With a view to the Convention's unification function, this begs the question whether and how the Convention can accommodate such a (limited) non-acceptance by States due to opposite legal values or to other specificities.[147] In contrast, the CISG's model function from the outset leaves model users with ample freedom to deviate from the Sales Convention's rules whenever they regard a particular underlying value as unsuitable,[148] although experience has shown that this legislative freedom is sometimes exercised in a surprising manner.[149]

b. Strict (no-fault) Liability as A Characteristic

Another defining characteristic of the 1980 Vienna Sales Convention is arguably that a party's liability under the Convention is not based on fault, thereby dispensing with a liability requirement that, as mentioned earlier,[150] was and still is prevalent in Germanic jurisdictions. In contrast, the CISG provides for a no-fault (or "strict") liability.[151] This

143. David, *supra* note 10, at 49.

144. *Id.*

145. *See supra* Section II.C.3.

146. *See supra* Section II.B.; *See infra* Section IV.D.5.

147. *See infra* Section IV.

148. *See infra* Section V.B.

149. *See infra* Section IV.D.2. on the decision of OHADA law makers to allow contract terminations only through court decisions and *infra* Section IV.D.5. on the adoption of stricter notification requirements than those of the CISG in OHADA law.

150. *See supra* Section II.C.4.a.

151. Oberster Gerichtshof, *supra* note 140, at 80; ICC-7197/1992, 1028, 1032 (1993), http://cisgw3.law.pace.edu/cases/927197i1.html; Oberlandesgericht München [OLG] [Appellate Court] Mar. 5, 2008, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] (Ger.); Oberlandesgericht

value of the Sales Convention is reflected in Articles 45 and 61 of the CISG, the provisions listing the buyer's and seller's remedies in case of a breach of contract: By not mentioning the requirement of fault, these two provisions indicate that the breaching party's liability is a no-fault liability.[152] In addition, Article 79 of the CISG – the provision governing a breaching party's possible exoneration from liability – can also be seen as an expression of the Convention's no-fault liability principle,[153] because the wording of Article 79 similarly makes no reference to fault.[154]

Given the differing approaches in domestic laws to the fault requirement,[155] it could be doubted whether this value reflected in the Sales Convention is "universal." However, considering both the Convention's past ratification by jurisdictions that use the fault principle in their domestic law, and the increasing number of CISG-inspired domestic law reforms that involved a change from fault-based to no-fault liability,[156] the Convention's no-fault approach – while not universally uniform as such – appears as a defining characteristic that is at least universally acceptable.[157] The drafters of the Sales Convention were well aware of the different positions with respect to the fault principle in various jurisdictions, but, following a pragmatic commercial law approach, dismissed these differences due to their limited practical importance. Professor Eörsi, who served as president of the 1980 Vienna Diplomatic Conference that adopted the Convention,[158] has therefore described Article 79 of the CISG as a "veiled convergence" between strict liability and exculpatory fault-based liability and refers to the respective discussions as a "tempest in a teapot, since there is hardly any practical difference between the two doctrinal approaches in trade practice."[159]

Karlsruhe [OLG] [Appellate Court] Feb. 15, 2016, INTERNATIONALES HANDELSRECHT (Ger.); Magnus, *supra* note 118, at 555.

152. *Official Records*, *supra* note 28, at 37 and 48; Lookofsky, *supra* note 69, at 130.
153. SCHLECHTRIEM, *supra* note 66; Magnus, *supra* note 118, at 909.
154. *Id*.
155. *See* Zweigert & Kötz, *supra* note 14, at 501–504.
156. *See supra* Section II.C.4.a.
157. *See supra* Section III.C.2.a.
158. *Official Records*, *supra* note 28, at 176, 196.
159. Eörsi, *supra* note 40, at 354–355.

c. Exclusive Focus on Buyers' and Sellers' Bilateral Mercantile Relationship

Finally, it is important to note that all of the "values" mentioned above[160] that one may see reflected in provisions of the CISG share one characteristic: They are only concerned with the relationship between the two contracting parties, the buyer and the seller, and only with matters traditionally governed by mercantile law. In contrast, the Vienna Sales Convention does not seem to reflect any values with a view to the contracting parties' relationship with third parties[161] and the communities in which they operate, or – put differently – "non-mercantile"[162] values that concern public goods or public interests.

D. Value-neutral Position of the Sales Convention in Regard of Non-mercantile Values

And indeed, the CISG is indifferent as far as values are concerned that may have their source in political or religious beliefs, in cultural heritage or in community customs, and that may be universal, regional or local in their geographic scope. The Vienna Sales Convention neither welcomes them nor rejects them; it simply takes no position in their matter.[163]

The Chief Justice of Singapore, the Honourable Sundaresh Menon, described this succinctly on occasion of the CISG's 35th anniversary in 2015, when he said: "The distortions of special interests and political considerations are attenuated in the relatively abstracted and value-neutral field of commercial law."[164] And indeed, the CISG was designed as a legal infrastructure suitable for any kind of international trade in goods.[165] Resembling a set of legal railroad tracks, its task is to make the trains of commerce – the contracts of sale – run smoothly and safely. But it does not regulate which goods may be legally transported on the trains, whether trains may run on Sundays or religious holidays or whether a train driver is allowed to enjoy alcoholic beverages while operating the

160. *See supra* Sections III.C.2.a. and b.

161. PETER SCHLECHTRIEM & ULRICH G. SCHROETER, INTERNATIONALES UN-KAUFRECHT, paras. 204-206 (Mohr Siebeck, 6th ed. 2016); Ingeborg Schwenzer & Mareike Schmidt, *Extending the CISG to Non-Privity Parties*, 13 VINDOBONA J. INT'L COM. L. & ARB. 109 (2009) (Aus.).

162. Beth A. Simmons, The Role of Law in International Politics: *Essays in International Relations and International Law*, 95 A.J.I.L. 720, 725 (July 2001).

163. *See also* Nalin, *supra* note 94, at 373.

164. Sundaresh Menon, *Roadmaps for the Transnational Convergence of Commercial law: Lessons Learnt from the CISG*, Presentation Delivered at the Conference on Contracts for the International Sale of Goods (Apr. 23, 2015).

165. UN Convention on Contracts for the Sale of Goods, *supra* note 1.

train. These issues are intentionally left for other rule-makers to address, usually on the domestic or local level.[166]

In adopting such a "value-neutral" position, the CISG is in no way unique, but rather resembles most other commercial laws throughout the world. This becomes particularly clear when we think of the many domestic contract laws that were or continue to be modelled on Roman law: As is well known, the rules of Roman law on sellers' liability for defective goods developed mostly as rules for the sale and purchase of slaves,[167] and any trade in human beings qualifies today as violating truly universally accepted values. Nevertheless, the rules of contract law initially created by the Roman market police for slave markets are not regarded as tainted today in spite of their history[168] - because they remain, as such, value-neutral.

E. Good Faith as A Value Reflected in the Sales Convention?

As a final step, it is worth exploring whether good faith ranks as a "value" reflected in the 1980 Vienna Sales Convention,[169] be it in its provisions or in its underlying principles mentioned in Article 7(2) of the CISG.[170] The question is particularly difficult to answer.

The uncertainty in this respect reaches back to the Convention's drafting stage, throughout which the role that good faith should play within the CISG was highly controversial.[171] The result of the discussions within the UNCITRAL Working Group and at the 1980 Diplomatic Conference in Vienna was the wording of Article 7(1) of the CISG that mentions "the observance of good faith in international trade" as one of the goals that regard is to be had to in the interpretation of the Sales Convention.[172] However, neither Article 7(1) nor any other provision of the CISG speak of good faith as a general principle to be observed by the parties in performing their contract, thereby – it is submitted, intentionally[173] – adopting a position that differs from domestic

166. Keith A. Rowley, *The Law Governing International Sales of Goods*, ABA SEC. OF BUS. L., at 7 (2007).

167. REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION 311-322 (1996).

168. ZIMMERMANN, *supra* note 167, at 327.

169. See also Lando, *supra* note 21, at 392–393.

170. *See supra* Section III.C.1. (On general principles in the sense of Article 7(2) of the CISG).

171. *See* SCHLECHTRIEM, *supra* note 66, at 37–39; *See also* Schwenzer & Hachem, *supra* note 127, para. 3

172. Lando, *supra* note 21, at 392.

173. Michael G. Bridge, *Good Faith, the Common Law, and the CISG*, 22 UNIFORM L. REV. 98, 108 (2017); SCHLECHTRIEM & SCHROETER, *supra* note 161, para. 101.

provisions like § 242 of the German Civil Code,[174] Article 2(1) of the Swiss Civil Code[175] or § 1-304 of the Uniform Commercial Code,[176] which do just that. In doing so, the Sales Convention accommodates the sceptical view held in many common law jurisdictions, notably England, that have traditionally been hostile towards a generally-framed duty of good faith in contract performance.[177] In recent years, this sceptical position may have seemed to have somewhat softened, when the Canadian Supreme Court,[178] followed by one English High Court judge,[179] for the first time acknowledged good faith contractual performance as "a general organizing principle of the common law of contract" which underpins and informs the various rules in which the common law, in various situations and types of relationships, recognizes obligations of good faith contractual performance.[180] However, the English Court of Appeal subsequently rejected this novel approach, pointing to "a real danger that if a general principle of good faith were established it would be invoked as often to undermine as to support the terms in which the parties have reached agreement."[181] For the moment, English law therefore continues to not have quite the same taste as civil law systems for expressly recognizing a principle of good faith in contract law.[182]

Against this background, it is submitted that good faith falls short of being a defining characteristic of the 1980 Vienna Sales Convention, and therefore does not constitute a "value" reflected in the CISG in the sense employed here.[183] Much resembling the controversial discussions during the Sales Convention's drafting history, the role of good faith under the Convention simply remains too unclear and too disputed until this very

174. BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 242, page 38 (Ger.) ("An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration.")

175. SCHWEIZERISCHES ZIVILGESETZBUCH [ZGB], [CIVIL CODE] Dec. 10, 1907, SR 101, art. 2 (Switz.) ("Every person must act in good faith in the exercise of his or her rights and in the performance of his or her obligations.").

176. U.C.C. § 1-304 (1977).

177. *See* Walford v. Miles [1992] 2 AC 128 (Eng.); Mid Essex Hospital Services NHS Trust v. Compass Group UK [2013] EWCA (Civ) 200, [2013] B.L.R 265 (Eng.); Bridge, *supra* note 172, at 105; Farnsworth, *supra* note 68, at 919.

178. Bhasin v. Hrynew, [2014] S.C.C. 71 (Can.).

179. Yam Seng PTE Ltd. v. Int'l Trade Corp. [2013] EWHC (QB) 111, 125 (Eng.); MSC Mediterranean Shipping Co. S.A. v. Cottonex Anstalt [2015] EWHC (Comm) 283 (Eng.).

180. Bhasin, S.C.C. paras. 33, 93; Cottonex Anstalt [2016] EWCA (Civ) 789 para. 97.

181. MSC Mediterranean Shipping Co. S.A. v. Cottonex Anstalt [2016] EWCA (Civ) 789 [45], (Eng.).

182. Bridge, *supra* note 173, at 100, 106

183. *See supra* Section II.C.2.

day. The positions range from those staying true to Article 7(1)'s wording and restricting good faith to just one among a number of goals to be "had regard to" in interpreting the Convention,[184] to others that consider the observance of good faith an obligation of the parties[185] with numerous nuances in between. Similar controversies surround the role of good faith as a possible general principle under Article 7(2) of the CISG.[186] Even if one follows the premise made earlier[187] and accepts that the "value" threshold is not an objective standard, the necessary subjective conviction about good faith ranking as a defining characteristic of the 1980 Sales Convention is arguably lacking both among the Convention's historic drafters and among its current interpreters.

F. Conclusion

In summary, the answer to the opening question in the present paper's title – "Does the 1980 Vienna Sales Convention Reflect Universal Values?" – belongs to the "yes, but" variety: Yes, the Sales Convention does reflect a number of basic values in commercial (or mercantile) law that may well be seen as universally accepted. In line with this assessment, the Convention has been described as elaborating the common law and practices of international sales and the common core of domestic commercial rules,[188] and others have explained the relative ease with which the drafters of the Convention from different backgrounds reached agreement by a universal natural law or universally accepted basic principles of commercial and legal efficiency.[189] But at the same time, the CISG is neutral as far as other values like those arising out of cultural or religious contexts or pertaining to specific public interests (in short: non-mercantile values) are concerned.

---

184. MICHAEL G. BRIDGE, THE INTERNATIONAL SALE OF GOODS para. 10.41 (3d ed. 2013); Bridge, *supra* note 173, at 109–110; Chianale, *supra* note 3, at 32; Nalin, *supra* note 94, at 375; SCHLECHTRIEM & SCHROETER, *supra* note 161, para. 101; Steven D. Walt, *The Modest Role of Good Faith in Uniform Sales Law*, 33 B.U. INT'L L.J. 37, 42-43 (2015).

185. *See* Audit, *supra* note 137, at 189; *CISG vs. CESL*, *supra* note 137, at 99; Kröll et. al, *supra* note 3, para. 25; Bruno Zeller, *Good Faith – Is It a Contractual Obligation?*, 15 BOND L. REV. 215, 228 (2003) (Austl.).

186. Bridge, *supra* note 173, at 113 (Rejecting such a qualification); Walt, *supra* note 182, at 50 (On the relationship between the concepts of values and of general principles under Article 7(2) of the CISG); *See supra* at Section III.C.1.

187. *See supra* Section II.C.2.

188. *See* Audit, *supra* note 137, at 194; *Accord* Christoph Brunner, *Introduction* to UN-KAUFRECHT-CISG para. 1 (Christoph Brunner ed., 2014); Castellani, *supra* note 2, at 325 ('As a result, the CISG is compatible with all legal traditions and economic systems').

189. Amy H. Kastely, *The Right to Require Performance in International Sales: Towards an International Interpretation of the Vienna Convention*, 63 WASH. L. REV. 607, 609 (1988).

IV. DOES THE SALES CONVENTION ACCOMMODATE REGIONAL SPECIFICITIES?

That the 1980 Vienna Sales Convention is mostly "value-neutral" raises the question whether and how the Convention accommodates existing regional specificities that were outlined earlier,[190] including regional values, regional customs and factual circumstances specific to a region. The CISG accommodates many of them in a variety of different ways.

A. Regional Values Concerning Cultural, Religious and Other Non-mercantile Issues

Turning first to regional values we have to distinguish between the regional values that concern cultural, religious and similar (non-mercantile) issues on one hand, and regional values relating to original mercantile (commercial law) matters on the other.

1. Cultural, Social and Religious Limits to Binding Agreements and Article 4(a) of the CISG

The first type of values are primarily accommodated through Article 4(a) of the CISG and its "validity exception."[191] Throughout the drafting history of the 1980 Vienna Sales Convention, the law governing the validity of contracts was recognized as an "important vehicle by which the political, social and economic philosophy of the particular society is made effective in respect of contracts,"[192] which in turn made the adoption of uniform rules difficult.[193] Article 4(a) of the CISG accordingly leaves to domestic law questions like whether a sale of alcohol is legal[194] or whether sales contracts may be validly concluded or executed on religious holidays, thereby giving room to possible regional values. The Sales Convention's validity exception can arguably also accommodate Brazilian law's rules on the social function of contracts addressed earlier,[195] as sales contracts violating these standards are

190. *See supra* Section II.A.C.

191. On the validity exception in Article 4(a) of the CISG, *see* Helen E. Hartnell, *Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods*, 18 YALE J. INT'L L. 1 (1993); Ulrich G. Schroeter, *Contract Validity and the CISG*, 22 UNIFORM L. REV. 47 (2017).

192. UN Secretary-General, *Formation and Validity of Contracts for the International Sale of Goods*, 93 Nos 25-26, A/CN.9/128, annex II (1977).

193. Tunc, *supra* note 52, at 20.

194. Bell, *supra* note 9, at 368; Schroeter, *supra* note 191, at 58.

195. *See supra* Section II.C.4.c.

considered null and void;[196] the Brazilian provisions accordingly contain legal limits to party autonomy[197] that are covered by Article 4(a) of the CISG. Overall, it can be said that Article 4(a) contributes to limiting the Vienna Sales Convention's content to universally acceptable rules.

2. Protection of Consumers and Article 2(a) of the CISG

Another provision through which the CISG accommodates regional values is its Article 2(a), which provides that the Vienna Sales Convention does not apply to most sales of goods bought for personal, family or household use, or – expressed differently – to consumer purchases.[198] This exception to the Convention's scope is important because the degree to which consumers are regarded as the "weaker party" in contractual relations that therefore deserve extra protection differs as much between different regions of the world as the legal tools through which such consumer protection is achieved.[199] The Secretariat's Commentary on the 1978 Draft of the Sales Convention explained:

> A rationale for excluding consumer sales from the Convention is that in a number of countries such transactions are subject to various types of national laws that are designed to protect consumers. In order to avoid any risk of impairing the effectiveness of such national laws, it was considered advisable that consumer sales should be excluded from this Convention.[200]

Because of Article 2(a) of the CISG, the various regional approaches to consumer protection accordingly remain unaffected by the 1980 Vienna Sales Convention, allowing for a peaceful coexistence between the Convention's commerce-focused rules and the strongly policy-inspired rules of consumer law.

196. Nalin, *supra* note 94, at 369–70, 374, 376.

197. *See* Schroeter, *supra* note 191, at 56 (on this definition in more detail).

198. UNITED NATIONS, THE 1980 UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (International Encyclopaedia of Laws - Contracts, Suppl. 2000) (1980).

199. *See* World Bank [WB], *Global Survey on Consumer Protection and Financial Literacy: Results Brief, Regulatory Practices in 114 Economies*, at 4-5, (2013), http://documents.worldbank.org/curated/en/815911468154453508/pdf/887730WP0v10P10rief0CPFL0Box385258B.pdf.

200. *See* UN Conference on Contracts for the International Sale of Goods, *Official Records: Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committees*, 16 para. 3 (Apr. 11, 1980) [hereinafter *Official Records*].

3. "Political" Regional Values and the Sales Convention's Limited Substantive Sphere

In a more general sense, the limited substantive sphere of the Sales Convention also accommodates regional values in an indirect way, simply because the CISG is from the outset not concerned with many of the legal issues that are typically mostly affected by regional values. Among these issues are, for example, questions of human rights, of criminal law, of family law and many others.[201] In this respect, the creation of global uniform law in the area of sales is again helped by the fact that commercial law is a generally non-political,[202] rather technical[203] area of law.

4. Cultural Factors Affecting Contract Interpretation and Article 8 of the CISG

Finally, cultural approaches and traditions that are prevalent in particular regions of the world, but may be unknown in others[204] raise the question whether the interpretation of party declarations and inter-regional contracts concluded under the Sales Convention can accommodate such cultural factors. It is submitted that the rules of interpretation in Article 8 of the CISG are indeed sufficiently flexible for this purpose, and in more than one way.

a. Cultural Factors Influencing A Party's Intent

As the first step in the interpretation process, Article 8(1) of the CISG provides that statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.[205] If the declaring party's intent was influenced by cultural factors, Article 8(1) may accordingly result in these factors affecting the declaration's interpretation. However, the provision's additional requirement – the recipient's positive knowledge or grossly negligent unawareness[206] of the

201. HONNOLD, *supra* note 122, at 84-85

202. *See* Eörsi, *supra note* 40, at 346; Convention Relating to a Uniform Law on the International Sale of Goods, *supra* note 30; *The Reform of Contractual Liability in the New Hungarian Civil Code*, *supra* note 87, at 77, 116.

203. Evans, *supra* note 112, at 3.1.

204. Petrovic, *supra* note 19, at 73-74.

205. UNCITRAL DIGEST OF CASE LAW OF THE UN CONVENTION OF CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, 55 (2012), https://www.uncitral.org/pdf/english/clout/CISG-digest-2012-e.pdf.

206. The standard "could not have been unaware," as mentioned in Article 8(1) of the CISG, has generally been interpreted to mean gross negligence; *See* HERBER & CZERWENKA, *supra* note

declaring party's intent – means that regional cultural factors can only play a role if the declaration's recipient had the necessary degree of awareness of these factors. The mere knowledge that the contracting partner is located in a particular region will be insufficient in this respect; rather, the required awareness has to extend to the cultural factors themselves, as only they enable conclusions about the culturally influenced person's intent.

b. Cultural Factors Influencing the "Reasonable Person" Standard

As a second step, Article 8(2) of the CISG calls for an "objective" interpretation of party statements that, in practice, is significantly more important than the "subjective" interpretation under Article 8(1).[207] Under Article 8(2), "statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances."[208] In a report presented in 1977 to UNCITRAL, the body charged with drafting the Sales Convention, the inter-cultural challenges potentially raised by this provision were summarised as follows:

> It may be suggested that a major difficulty with article 3(3)[209] is that the two parties to the contract are in different situations and consequently two 'reasonable persons,' one in the situation of the buyer and the other in the situation of the seller, might well have the same disagreement over the interpretation of the contract as the parties themselves. While this is also true of two parties within a given country, the problem is accentuated in international transactions. Different ways of doing business, different legal and economic systems and even the possibility of two different texts of the contract (if the contract is in two languages and the translation is inadequate) may render any objective interpretation of the contract impossible.[210]

117, at 52; Martin Schmidt-Kessel, *Article 8, in* COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) paras. 16-17 (Ingeborg Schwenzer ed., 4th ed. 2016); *But see* WOLFGANG WITZ, HANNS-CHRISTIAN SALGER & MANUEL LORENZ, INTERNATIONAL EINHEITLICHES KAUFRECHT 120 (2nd ed. 2016).

207. Schmidt-Kessel, *supra* note 205, para. 20; Donald J. Smythe, *Reasonable Standards for Contract Interpretations under the CISG*, 25 CARDOZO J. INT'L & COMP. L. 1, 10 (2016); WITZ ET AL., *supra* note 206, at 119.

208. UN Convention on Contracts for the Sale of Goods, *supra* note 1.

209. The report concerned Article 3(3) of the UNIDROIT as a draft of a law for the unification of certain roles relating to the validity of contracts of international sale of goods, a draft provision with a wording very similar to Article 8(2) of the CISG.

210. *Formation and Validity of Contracts for the International Sale of Goods*, *supra* note 192, at 105.

Today, the difficulties thus described are somewhat ameliorated by the flexible wording of Article 8(2) of the CISG, as eventually adopted in Vienna. It has been convincingly argued in recent scholarly writing that Article 8(2) with its reference to a "reasonable person" "asks the judge to appreciate cultural norms surrounding the opposing party;"[211] the Vienna Sales Convention thereby allows for cultural extrinsic evidence to be taken into account in interpreting contracts and individual declarations.[212] A condition is that, much like in case of a subjective interpretation under Article 8(1),[213] the cultural norms to be taken into account for this purpose must be recognizable to the other party.[214] This seems only fair, because a party cannot, in general, expect its own cultural surroundings to influence the legally relevant content of contractual declarations, when it chooses to contract with a partner residing in a different cultural environment – that is different only when the contracting partner knew or must have known about the cultural circumstances in the other party's sphere. As long as this implicit requirement is observed, it seems possible not only to take into account cultural factors influencing the declaration's reasonable addressee under Article 8(2) of the CISG (by determining the "reasonable person" standard in according with that person's cultural circumstances),[215] but also cultural factors influencing the party making the statement (in determining the "understanding" that a reasonable person would have of the particular statement).[216]

c. Cultural Factors as Circumstances Relevant for the Interpretation

Finally, Article 8(3) of the CISG clarifies that in determining both the intent of a party (under Article 8(1)) or the understanding a reasonable person party would have had (under Article 8(2)), "due consideration is to be given to all relevant circumstances of the case."[217] The provision goes on to list a number of such circumstances – "the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties" –, but makes clear through its non-exhaustive wording ("including") that other circumstances may also

211. Alexandra Buckingham, *Considering Cultural Communities in Contract Interpretation*, 9 DREXEL L. REV. 129, 157 (2016); *See also* WITZ ET AL., *supra* note 206, at 121.

212. Buckingham, *supra* note 211, at 157.

213. *Id.* at 143-144.

214. *Id.* at 157.

215. Focusing on the addressee only, Smythe, *supra* note 207, at 11; WITZ ET AL., *supra* note 206, at 121.

216. Smythe, *supra* note 207, at 11.

217. *Id.* at 7.

be taken into account.[218] Article 8(3) of the CISG thereby makes the interpretation of party declarations and contracts under the Sales Convention significantly more liberal than under the approach to contract interpretation of some domestic laws (in particular in common law jurisdictions),[219] where the so-called parol evidence rule excludes certain extrinsic material from the interpretation process.[220]

As far as factors of regional culture are concerned, the generous approach enshrined in Article 8(3) of the CISG makes it easy to include them into the interpretation process. This can become relevant in various contexts: For example, it has been pointed out that in Indonesian culture, context is everything and that the relationship between the parties accordingly requires that you do not take the contract's wording out of context.[221] As Article 8(3) of the CISG indicates, the Sales Convention can accommodate such a contextual approach, provided, of course, that the additional requirements laid down in Article 8(1) or (2) are met.[222] In addition, local and regional customs can potentially be given a role in the interpretation process through Article 8(3)'s reference to "usages." This would require an interpretation of the usage concept in Article 8(3) that differs from that used in Article 9(2) of the CISG,[223] because the latter provision only covers usages which in international trade are widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned. It is submitted that it is indeed appropriate to construe Article 8(3) of the CISG in a broader manner, so that it also extends to usages that are merely locally or regionally observed.[224] For once, the wording of Article 8(3) makes no mention of the additional prerequisites listed in Article 9(2).[225] This textual difference reflects the difference between the purposes that both provisions serve: While Article 9(2) of the CISG makes usages directly binding for both parties ("[t]he parties are considered, unless otherwise

218. *Id.* at 7-8.

219. Smythe, *supra* note 207, at 7.

220. *See* Richard Hyland, *CISG Advisory Council Opinion No. 3: 'Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG*, 17 PACE INT'L L. REV. 61 (2005); BRIDGE, *supra* note 184, para. 11.19; Schmidt-Kessel, *supra* note 206, paras. 33-35; 5; Smythe, *supra* note 207, at 7.

221. Bell, *supra* note 27, at 17.

222. Official Records, *supra* note 1, art. 8(3).

223. *See infra* Section IV.C.

224. SCHLECHTRIEM & SCHROETER, *supra* note 159, para. 218; Schmidt-Kessel, *supra* note 205, para. 47; Kröll et. al, *supra* note 3, paras. 29-38 Urs Peter Gruber, *Art. 8 CISG*, *in* 3 MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH para. 20 (7th ed. 2016). *See also* Magnus, *supra* note 126, at 211 ('not free from doubt'). *Contra* WITZ ET AL., *supra* note 206, at 124.

225. UN Convention on Contracts for the Sale of Goods, *supra* note 1, art. 9(1).

agreed, to have impliedly made applicable to their contract or its formation a usage …"), Article 8(3) merely deals with the interpretation of declarations in light of the circumstances of each particular case.[226] This difference leaves sufficient room to also take local and regional usages into account under Article 8(3) of the CISG.

B. Regional Values Relating to Original Commercial Law (Mercantile) Matters

The second type of regional values, those relating to original commercial law (or mercantile) matters, can also be accommodated by the CISG in case they should deviate from the values reflected in the Sales Convention itself.[227] The most far-reaching form of accommodation occurs through the reservations authorized in Articles 92–96 of the Convention.[228] Three of these reservations[229] appear to be relevant for regional values:

1. Regional Harmonization of Commercial Law and Article 94 of the CISG

For the preservation of regional legal values, the most obvious instrument under the Sales Convention is the reservation under Article 94 of the CISG, occasionally also referred to as the "neighbourland clause."[230] Article 94(1) entitles two or more CISG Contracting States "which have the same or closely related legal rules on matters governed by this Convention" to declare that the CISG does not apply to contracts of sale or to their formation where the contracting parties concerned have their places of business in those States, thereby effectively granting preference to regionally unified or harmonized rules over the Sales Convention's global rules.[231] Article 94(2) authorizes the same kind of declaration to be made in relation to States that have not (or not yet) ratified the Sales Convention.

226. SCHLECHTRIEM & SCHROETER, *supra* note 161, para. 218.

227. On the Sales Convention's values, *see supra* Section III.

228. On Articles 92–96 of the CISG, *see* comprehensively Ulrich G. Schroeter, *Reservations and the CISG: The Borderland of Uniform International Sales Law and Treaty Law after Thirty-Five Years*, 41 BROOK. J. INT'L L. 203-255 (2015).

229. *See infra* Sections IV.B.1–3. On a fourth reservation, e.g, the 'federal State clause' in Article 93 of the CISG, *see infra* Section IV.D.3.

230. Stein Rognlien, *The Application of CISG in National Law*, *in* EMPTIO-VENDITIO INTER NATIONES: FESTGABE FÜR KARL HEINZ NEUMAYER 105, 111 (Verlag für Recht & Gesellschaft eds., 1997).

231. UN-KAUFRECHT UND EUROPÄISCHES GEMEINSCHAFTSRECHT, *supra* note 2, at 356–359.

By making the existence of the same or closely related[232] legal rules the sole condition for the reservation's use, Article 94(1) and (2) of the CISG does not explicitly require that the regionally harmonized rules amount to a defining characteristic of the reservation States' laws, and therefore a regional "value" in the sense employed here.[233] However, it indirectly requires the respective States to assess the importance of their regional law in comparison to a globally uniform application of the Sales Convention's rules, because States will only make use of the option given to them by Article 94 of the CISG if they regard their regional rules as sufficiently important.[234] On one hand, any use of the reservation may therefore be seen as an indication that the reserving State subjectively[235] considers the regional rules concerned to be a regional "value." On the other hand, the preservation of the unfettered application of regional uniform law to regional trade itself could be regarded as a value. In any case, it is not surprising that Article 94 of the CISG has been accorded significant importance for the accommodation of regional specificities,[236] although the reservation has until now only been used by and between the five Nordic (or Scandinavian) States Denmark, Finland, Iceland, Norway and Sweden.[237]

2. Non-revocability of Offers and Article 92 of the CISG

Second, if the content of an entire part of the Sales Convention is in conflict with important regional values, Article 92 of the CISG allows a Contracting State to declare at the time of its ratification or accession that it will not be bound by Part II or III of the CISG.[238] The respective part of the Convention is thereby effectively replaced by domestic law

232. On the regrettable vagueness of this term, *see* Ulrich G. Schroeter, *Backbone or Backyard of the Convention? The CISG's Final Provisions*, *in* SHARING INTERNATIONAL COMMERCIAL LAW ACROSS NATIONAL BOUNDARIES: FESTSCHRIFT FOR ALBERT H. KRITZER ON OCCASION OF HIS EIGHTIETH BIRTHDAY 425, 434-35 (Camilla B. Andersen & Ulrich G. Schroeter eds., 2008).

233. *See supra* Section II.C.2.

234. *See* UN-KAUFRECHT UND EUROPÄISCHES GEMEINSCHAFTSRECHT, *supra* note 2, at 355.

235. On the subjectivity of the 'value' notion, *see supra* Section II.C.2. On the role of the reservation States' subjective assessment under Article 94 of the CISG, *Backbone or Backyard of the Convention?*, *supra* note 232, at 432–434.

236. Coetzee, *supra* note 9, at 40; Coetzee & de Gama, *supra* note 10, at 23; Matipe, *supra* note 10, at 229 & 233 (on the potential use of Article 94 of the CISG by the OHADA States); *Backbone or Backyard of the Convention?*, *supra* note 232, at 464-467 (on the potential use of Article 94 of the CISG by the EU States).

237. *See* Joseph M. Lookofsky, *The Scandinavian Experience*, *in* THE 1980 UNIFORM SALES LAW: OLD ISSUES REVISITED IN THE LIGHT OF RECENT EXPERIENCES 109-110 (Franco Ferrari ed., 2003).

238. UN Convention on Contracts for the Sale of Goods, *supra* note 1, art. 92.

applicable by virtue of the conflict-of-laws rules,[239] which may or may not be the domestic law of the reserving State.[240]

Article 92 of the CISG was initially used by four of the Nordic States with respect to the formation of contract rules in Part II of the CISG, also because these States (Denmark, Finland, Norway and Sweden) at that time felt that the CISG's approach to the revocability of offers was unduly influenced by Common law.[241] In particular, the default rule in Article 16(1) of the CISG permitting an offeror to revoke his offer prior to acceptance was perceived as quite foreign to Scandinavian law,[242] although other considerations may also have driven the decision to declare a reservation.[243] More recently, this earlier assessment has apparently changed,[244] and the Nordic States have withdrawn their reservation under Article 92 of the CISG.[245]

3. Mandatory Written Form for Sales Contracts and Article 96 of the CISG

The third reservation of relevance in the present context is Article 96 of the CISG, which allows a Contracting State to declare that the Sales Convention's provisions on freedom of form do not apply where any party to a sales contract has his place of business in the declaring State.[246] The reservation was used by a number of former Socialist States and Latin American States that viewed their domestic form requirements as reflecting so important a value that they wanted to preserve their application.[247] Also some of these reservations have in recent years been withdrawn,[248] but others still remain in force. In addition, Vietnam only

239. Ingeborg Schwenzer & Pascal Hachem, *Article 92*, *in* COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS at 1182-1183 (Ingeborg Schwenzer ed., 4th ed. 2016).

240. On the latter outcome, *see* Joseph M. Lookofsky, *Alive and Well in Scandinavia: CISG Part II*, 18 J. L. & COM. 289, 294-99 (1999); *CISG and OHADA Sales*, *supra* note 3, at 89-91.

241. *See* Lookofsky, *supra* note 240, at 291; Jan Kleineman, *The Nordic Approach to CISG Part II: Pragmatism Wins the Day*, *in* THE CISG CONVENTION AND DOMESTIC CONTRACT LAW: HARMONY, CROSS-INSPIRATION, OR DISCORD 21, 27-28 (Joseph M. Lookofsky & Mads B. Andersen eds., 2014); *See also supra* Section II.C.3.

242. Kleineman, *supra* note 241, at 23; Lookofsky, *supra* note 240, at 291; See also Andersen, *supra* note 62, at 35–36.

243. *See* Kleineman, *supra* note 241, at 23–24.

244. *See id.* at 29.

245. Ulrich G. Schroeter, *The Withdrawal of Reservations under Uniform Private Law Conventions*, 20 UNIFORM L. REV. 1, 7 (2015).

246. UN Convention on Contracts for the Sale of Goods, *supra* note 1, art. 96.

247. Schroeter, *supra* note 59, at 87-88.

248. Schroeter, *supra* note 245, at 2–3; Schroeter, *supra* note 59, at 88-89; Castellani, *supra* note 2, at 313–317.

relatively recently declared a reservation under Article 96 of the CISG when acceding to the Convention in 2015, indicating that a mandatory writing requirement for sales contracts continues to rank as a regional value in some parts of the world.[249]

4. Limits on the Right to Require Specific Performance and Article 28 of the CISG

Yet another provision that may be seen as accommodating a regional value – or, more precisely, a defining characteristic of the legal family of Common Law jurisdictions – is Article 28 of the CISG. It is not a reservation, but rather entitles every court in a CISG Contracting State not to enter a judgement for specific performance unless the respective court would do so under its own law in respect of domestic contracts of sale.[250] In doing so, Article 28 aims at accommodating the traditionally sceptical position of the Common Law towards enforcing specific performance,[251] because the Convention in its Articles 46(1) and 62 generally provides for specific performance as a remedy.[252] While Article 28 of the CISG may at first sight appear as a compromise directed against unification,[253] it in fact favoured it by allowing the 1980 Vienna Diplomatic Conference to continue its work to completion, figuratively saving the bulk of the cargo by throwing only a small part of it overboard.[254]

It is interesting to note that Article 28 of the CISG, in spite of controversial discussions reaching back to the 1964 Hague Sales Convention and its characterization as "a fly in the ointment of the Convention,"[255] has not gained any significant importance in practice. As far as can be ascertained, there is just one single case in which Article 28 of the CISG has, in actual practice, had the effect of precluding a claim for specific performance. This case, a dispute between parties from Russia, Argentina, and Hungary, interestingly was rendered not by a state court, but by an arbitral tribunal sitting in Switzerland, and involved no

249. *Vietnam*, PACE LAW SCHOOL INSTITUTE OF INTERNATIONAL COMMERCIAL LAW (Last Updated Jan. 4, 2017), http://www.cisg.law.pace.edu/cisg/countries/cntries-Vietnam.html.

250. Eörsi, *supra* note 40, at 345.

251. BRIDGE, *supra* note 184, para. 12.48; Eörsi, *supra* note 40, at 346; HONNOLD, *supra* note 122, para. 192.

252. Akaddaf, *supra* note 29, at 39–40; Kastely, *supra* note 189, at 613–616.

253. Kastely, *supra* note 189, at 612.

254. Eörsi, *supra* note 40, at 346.

255. ZWEIGERT & KÖTZ, *supra* note 14, at 485.

Common Law jurisdiction.[256] This indicates that the varying approaches toward specific performance, even if they are regarded as reflecting divergent values in a matter of contract law,[257] lack practical relevance for international sales transactions.

5. Religious Prohibitions of Interest and Article 78 of the CISG

Article 78 of the CISG may be viewed as accommodating a particular regional value of a religious nature, namely the prohibition of interest *(riba)* that exists in a number of Islamic jurisdictions.[258] As is well known, Article 78 gives a legal right to claim interest on sum in arrears,[259] but – at least on its face – leaves the applicable interest rate open. If one construes Article 78 of the CISG as referring to the interest rate determined by the domestic law applicable by virtue of private international law rules (as the majority of courts have done and continue to do),[260] the applicable interest rate is zero whenever an Islamic law prohibiting interest is applicable.[261] Under this construction, a religious prohibition of interest can therefore coexist with the CISG.[262] But this – of course – depends on the interpretation of Article 78 of the CISG that is far from undisputed.[263]

6. Regional Commercial Law Values and the Sales Convention's Limited Substantive Sphere

Finally, the limited substantive sphere of the 1980 Vienna Sales Convention, apart from indirectly accommodating regional values of a non-mercantile nature,[264] may also accommodate certain commercial law values characteristic of a particular region.[265] In East Asia, for example, a creditor's rights of subrogation and of revocation have been identified as

256. Zurich Chamber of Commerce Arbitral Award No. ZHK 273/95, 31 May 1996 (*Soinco v. NKAP*) 23 Y.B. COM. ARB. 128, para. 348 (1998).

257. *See supra* notes 52-54 and accompanying text.

258. *See supra* notes 90-92 and accompanying text.

259. Yesim Atamer, *Opinion No 14: Interest under Article 78 CISG*, 14 INTERNATIONALES HANDELSRECHT 204, 210 para. 3.22 (Ger.) (2014); ENDERLEIN & MASKOW, *supra* note 39, at 310. ("The entitlement to interest under the CISG is, in our view, characterized above all by two features: its normativity and its absoluteness").

260. *See* Klaus Bacher, *Article 78*, *in* COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) para. 34 (Ingeborg Schwenzer ed., 4th ed. 2016).

261. SCHLECHTRIEM & SCHROETER, *supra* note 159, para. 752.

262. See also Akaddaf, *supra* note 29, at 57; Twibell, *supra* note 90, at 78–87.

263. See generally Atamer, *supra* note 259, paras. 3.22–3.44. For authors who assume an incompatibility of Article 78 of the CISG and Islamic law, see Bell, *supra* note 27, at 28; probably also Petrovic, *supra* note 19, at 92; Twibell, *supra* note 190, at 86.

264. *See supra* Section IV.A.3.

265. Coetzee, *supra* note 9, at 35–36.

two common cores of the laws of Japan, South Korea and China (including Taiwan).[266] Since such rights are at the same time neither addressed in the Sales Convention nor in the PECL or the PICC, they have been considered a distinctly Asian contract law feature.[267] The release of claims through a unilateral act (and not, as in European and other Western laws, by way of a contract requiring an agreement of the two parties) has been identified as yet another distinguishing Asian feature.[268]

All of these local and regional contract law features can coexist with the Vienna Sales Convention without causing any frictions because the CISG contains no rules on these issues; thereby leaving them to the applicable domestic law.[269] The same is true for a number of other aspects of general contract law[270] that can accordingly be accommodated through the Sales Convention's limited substantive sphere of application.

C. Regional Customs

A second category of regional specificities, namely regional customs, are guaranteed relevance as 'usages' through Article 9,[271] in particular Article 9(2) of the Sales Convention.[272] The difficulty lies mostly in the restrictive language of Article 9(2) of the CISG, which does not consider each and every regional usage to have implicitly been made applicable to their contract by the parties, but only those usages which in international trade are widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.[273] This requirement is meant to protect parties from different regions from being unduly surprised by the applicability of usages foreign to them.[274]

The requirement has on occasion created difficulties for lawyers from some jurisdictions. An example is Germany, where one often encounters the premature belief that a traditional usage developed under German commercial law – that contracts between merchants can be

266. Han, *supra* note 9, at 598.
267. *Id.*
268. *Id*.
269. UN Convention on Contracts for the Sale of Goods, *supra* note 1, art. 7.
270. *See* ENDERLEIN & MASKOW, *supra* note 40, at 41-42.
271. S.K. Date-Bah, *The Convention on the International Sale of Goods from the Perspective of the Developing Countries in*, LA VENDITA INTERNAZIONALE 23, 27 (1981) (It.).
272. Coetzee, *supra* note 9, at 38; Coetzee & de Gama, *supra* note 10, at 23.
273. Coetzee & de Gama, *supra* note 9, at 23.
274. Malcolm Evans, *Preamble, in* COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 23-25 (Cesare M. Bianca & Michael J. Bonell eds., 1987).; HONNOLD, *supra* note 122, paras. 118–119; Audit, *supra* note 135, at 177.

created or modified by one merchant sending a 'commercial letter of confirmation' to the other merchant, and the other merchant not objecting against the content of the letter in due course *(Vertragsschluss durch Schweigen auf ein kaufmännisches Bestätigungsschreiben)*[275] – is also known and regularly observed in other countries.[276] The better view is that it is not, at least not with scope and effects comparable to those traditionally recognized in German commercial law.[277]

Article 9 of the CISG therefore accommodates regional customs only with respect to contracts concluded within the region that follows the respective custom, but not for contracts with parties from other regions where this custom is insufficiently known. Under a global contract law such as the Vienna Sales Convention, this approach appears reasonable and fair.

D. Factual Circumstances

Finally, factual circumstances that are present in some regions of the world, but less in other regions, are accommodated by the CISG. 'Factual circumstances' in this sense include patterns of behaviour rooted in regional cultural values, "the sociological setting in the different countries that may affect the relevance of the legal rules,"[278] as well as other local specificities.

1. Illiteracy of Merchants and Article 11 of the CISG

For example, the widespread illiteracy in Africa that makes African parties less likely to conclude written contracts[279] is accommodated by Article 11 of the CISG, which provides that contracts of sale need not be

275. Karl Marxen, *Commercial Letters of Confirmation and the CISG*, EUR. J. OF COM. CONT. LAW 17, 18-22 (2014).

276. Oberlandesgericht Köln [OLG] [Higher Regional Court of Cologne] 16 March 1988, 24 U 182/87 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2182, 1988 (Ger.); Volker Holl & Oliver Kessler, *Selbstgeschaffenes Recht der Wirtschaft" und Einheitsrecht – Die Stellung der Handelsbräuche und Gepflogenheiten im Wiener UN-Kaufrecht* ["*Self-Governing Law of the Economy" and Uniform Law - The Position of Trade Customs and Customs in the Vienna UN Sales Law*], *in* RECHT DER INTERNATIONALEN WIRTSCHAFT 457, 459 (1995) (Ger.); Martin Schmidt-Kessel, *Article 9*, *in* COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS para. 31 (Ingeborg Schwenzer ed., 4th ed. 2016).

277. Ulrich G. Schroeter, *Introduction to Articles 14-24*, *in* COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 42 (Ingeborg Schwenzer ed., 4th ed. 2016).

278. See Fontaine, *supra* note 5, at 53.

279. Fontaine, *supra* note 5, at 53; Fontaine, *supra* note 9, at 578, 80; Lando, *supra* note 21, at 389.

concluded in or evidenced by writing and may be proved by any means, including witnesses.

2. Merchants' Reluctance to Have Recourse to Courts and Article 26 of the CISG

That some Asian societies are less litigious, with parties from these societies being less likely to have recourse to the courts,[280] is in turn accommodated by the CISG's decision to have remedies executed by a simple party declaration instead of requiring a court decision, as some domestic laws[281] do for the termination of contracts. Article 26 of the CISG makes this explicitly clear for the remedy of contract avoidance,[282] and commentators have extended this approach to all other remedies under the 1980 Sales Convention by assuming a general principle underlying the Convention (Article 7(2) of the CISG) according to which remedies only take effect if the party using the remedy gives notice thereof to the other party.[283]

The Sales Convention's reliance on party declarations for contract terminations appears as an attractive approach also for regions that suffer from overburdened national judiciaries, as is *inter alia* the case in Western Africa.[284] It is therefore remarkable that the OHADA,[285] when drafting its Uniform Act on General Commercial Law,[286] including a regional law of sales closely modelled on the CISG,[287] nevertheless opted for a contract termination by court declaration only,[288] in line with the

280. Bell, *supra* note 9, at 368; *See also* Chianale, *supra* note 3, at 39; Feldman, *supra* note 26.

281. *See* INGEBORG SCHWENZER, PASCAL HACHEM & CHRISTOPHER KEE, GLOBAL SALES AND CONTRACT LAW 190 (2012).

282. See also, with respect to Article 7.3.2 of the UNIDROIT Principles of International Commercial Contracts that resembles Article 26 of the CISG in this regard, Fontaine, supra note 9, at 582.

283. Schwenzer & Hachem, *supra* note 127, para. 33, (refers to Articles 88(1) and (2) of the CISG in support of this general principle.)

284. *See* Matipe, *supra* note 10, at 232.

285. *See supra* Section II.C.1.

286. *Acte Uniform portant sur le Droit Commercial Général* [*Uniform Act on General Commercial Law*], No. 21 OFFICIAL GAZETTE OF OHADA (Fr.) (15 February 2011). The original version of the Uniform Act had been adopted in 1997; it was subsequently reformed in 2010.

287. Djieufack, *supra* note 22, at 272; Jean René Gomez, *Un noveau droit de la vente commerciale en Afrique* [*A new law of commercial sale in Africa*], RECUEIL PENANT 145, 146 (Fr.) (1998); Etienne Nsie, *La formation du contrat de vente commerciale en Afrique: Analyse du Titre II du Livre V de l'Acte uniforme de l'OHADA relative au droit commercial général* [*The formation of the commercial sales contract in Africa: Analysis of Title II of Book V of the OHADA Uniform Act on General Commercial Law*], RECUEIL PENANT 5, 6 (Fr.) (1999); Ulrich G. Schroeter, *Das einheitliche Kaufrecht der afrikanischen OHADA-Staaten im Vergleich zum UN-Kaufrecht, in* LAW IN AFRICA 163, 166 (2001).

288. Article 281 of the OHADA Uniform Act; *see* Djieufack, *supra* note 22, at 292.

legal tradition of the old French Civil Code.[289] This mandatory involvement of the local courts constitutes an important difference between the Sales Convention and the OHADA commercial sales law.[290] While the OHADA's deviation from the CISG's model may be explained by a preference for a regional legal tradition,[291] it may not completely reflect the factual local specificities.

3. Geographic Situation of Islands and Article 93 of the CISG

In current practice under the 1980 Sales Convention, another type of local factual circumstance is accommodated by Article 93 of the CISG, namely the specific geographic situations of islands. Article 93 of the CISG, a provision commonly referred to as a "federal state clause,"[292] authorizes Contracting States with two or more territorial units (federal States) to declare that the Convention is to extend to only one or more of these units, thereby allowing such a State to exempt certain territories from the Sales Convention's geographic scope.[293] In doing so, the provision's wording makes no specific mention of island territories, nor is its scope in any other way restricted to islands. In present practice, however, it is striking to see that all territorial units that are excluded from the CISG's sphere of application due to Article 93 – the Christmas Island, the Cocos (Keeling) Islands, the Ashmore and Cartier Islands (all territories of Australia), the Faroe Islands and Greenland (territories of Denmark) as well as the Cook Islands, Niue and Tokelau (all territories of New Zealand) – are islands.[294] In practical terms, the Article 93 reservation is accordingly a pure "island reservation."[295] Although the provision does not focus on factual local specificities, but rather on the distribution of legislative competences under the federal State's constitution ("… territorial units in which, according to its constitution, different systems of law are applicable in relation to the matters dealt with

289. Note that in 2016, the French Code civil underwent a fundamental reform of its provisions on the law of contracts through Ordonnance No. 2016-131 of Feb. 10, 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations, Journal officiel de la République française No. 35 of Feb. 11, 2016, Text No. 26. *See* ORDONNANCE NO. *2016-131 (Fr.).* As a result, Article 1224 of the Code civil now allows contracts to be terminated (in CISG terms: avoided) alternatively through party declaration or through court decision.

290. Coetzee & de Gama, *supra* note 10, at 24.

291. *See* on legal tradition as a regional specificity *supra* Section II.A.

292. Johnny Herre, *Article 93*, *in* UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) para. 1 (Stefan Kröll, Loukas Mistelis & Pilar Perales Viscasillas eds., 2011); Schroeter, *supra* note 232, at 432; Witz, Salger & Lorenz, *supra* note 206, at 702.

293. *Backbone or Backyard of the Convention?*, *supra* note 232, at 431-432.

294. *Reservations and the CISG*, *supra* note 228, at 251.

295. *Id.*

in this Convention …"),[296] it can apparently also be used in deference to local or regional particularities of a factual kind, as notably the special geographical situation of islands. The necessary connection is created by the domestic constitution of federal States that often grant a special status to island territories, thereby meeting the requirements of Article 93(1) of the CISG.[297]

4. Reference to "Circumstances" in Various CISG Provisions

Other factual specificities are taken into account in the Sales Convention's application to a particular case because many CISG provisions (as, for example, Articles 8(2) and (3), 10, 18(2), 21(2), 25, 27, 32(2), 33(b), 35(2)(b), 38(1), 46(3), 55, 68, 77, 85 and 86(1) of the CISG) explicitly refer to the "circumstances" of each case in determining a legal standard.

5. Lack of Experience of Buyers in Developing Countries and Article 44 of the CISG

As indicated earlier,[298] the lack of professional and technical experience of buyers in developing countries was a matter of some discussion when the provisions on inspections and notices of non-conformity in Articles 38–44 of the Vienna Sales Convention were drafted. The "debates were characterized, first, by the economic fact that the developing countries mainly export raw materials and agricultural products, i.e., mass products, and import technology and finished goods," and "second, by the awareness of their market's underdeveloped technological and legal condition."[299] In respect of the latter point, it was stressed that Africa in particular had numerous important tradesmen who were illiterate and as a result would have problems with giving a written declaration concerning the non-conformity of delivered goods "within a reasonable time" in accordance with Article 39(1) of the CISG.[300] In addition, it often becomes necessary in African countries to call in foreign experts in order to carry out tests on imported, complicated machinery.[301] Professor Honnold later described the ensuing discussions as "one of the

296. UN Convention on Contracts for the Sale of Goods, *supra* note 1, art. 93.
297. *Ibid*.
298. *See supra* Section II.B.
299. Eörsi, *supra* note 40, at 350.
300. *Id.*
301. Official Records, *supra* note 28, at 335, 348; Date-Bah, *supra* note 271, at 29.

few points where perceptions of differing regional and economic interests came to the fore" during the drafting of the 1980 Sales Convention.[302]

Today, it is recognized that the economic environment in developing countries and their practical realities need to be taken into account when applying the Sales Convention's rules on inspections and notices of non-conformity, as they were eventually adopted in Articles 38–40 of the CISG.[303] The provisions offer a number of avenues for accommodating factual circumstances in developing countries.[304] First, the buyer's location in a developing country and his possible lack of sophistication are an important factor in determining the period for the goods' inspection by the buyer, which has to occur "within as short a period as is practicable in the circumstances".[305] Second, the "reasonable time" for giving notice of non-conformity to the seller may be longer where the buyer comes from a developing country,[306] because a lack of technologies in areas such as transportation or communications would otherwise put such buyers at a severe disadvantage in their ability to comply with Article 39(1) of the CISG.[307]

Finally, Article 44 of the CISG was included in the Convention as an extra escape clause, with the specific aim to protect less experienced buyers in developing countries.[308] The inclusion of Article 44 can be traced back to an initiative of the Asian-African Legal Consultative Committee[309] and serves to ameliorate the severe consequences that a non-compliance with the requirements of Article 39(1) of the CISG has for the buyer, who "loses the right to rely on a lack of conformity of the goods."[310] Article 44 is therefore a compromise between the developed

302. Honnold, *supra* note 122, para. 254.1.

303. Akaddaf, *supra* note 29, at 13.

304. Larry A. DiMatteo, *CISG as Basis of Comprehensive International Sales Law*, 58 VILL. L. REV. 691, 710 (2013)

305. *Id.;* Kröll et. al, *supra* note 3, para. 95. On the frequent reference to 'circumstances' in the 1980 Vienna Sales Convention, see already *supra* at IV.D.4.

306. Abdullah S. Alaoudh, *The Notice Requirement of Article 39 and Islamic Law: Developed vs. Developing Countries*, 26 ARAB L.Q. 481, 485–486 (2012); Kröll et. al, *supra* note 3, para. 14.

307. Richard M. Birch, *Article 44 of the U.N. Sales Convention (CISG): A Possible Divergence in Interpretation by Courts from the Original Intent of the Framers of the Compromise*, 4 REGENT J. INT'L L. 1, 3-4 (2006).

308. Alaoudh, *supra* note 306, at 490; Date-Bah, *supra* note 271, at 30–32; Eörsi, *supra* note 40, at 351.

309. *See* Official Records, *supra* note 28, at 323, 345 (with a reference to discussions within the Trade Law Sub-Committee of the Asian-African Legal Consultative Committee); Birch, *supra* note 307, at 3–4 (See in more detail on the drafting history of Article 44 of the CISG); Anselmo Martínez Cañellas, *The Scope of Article 44 CISG*, J.L. & COM. 261–263 (2005-06).

310. Official Records, *supra* note 28, at 9.

and the developing countries.[311] Accordingly, it is only natural that the buyer's origin and the factual circumstances in the buyer's home country play an important role in the provision's practical application, in particular in assessing the presence of a "reasonable excuse."[312]

Against this background, it is surprising that Article 44 of the CISG later became one of the few provisions not to be included into the OHADA Uniform Act Relating to General Commercial Law,[313] although this Western African regional law of sales was closely modelled on the Vienna Sales Convention.[314] Maybe even more surprising is the fact that Article 229 of the 2010 OHADA sales law deprives the buyer of the right to claim redress in respect of a defect where he does not notify it to the vendor within a year from the date on which the goods were effectively delivered to him. This regional provision therefore cuts off all remedies for hidden defects a mere year after delivery, while its counterpart in Article 39(2) of the CISG contains a significantly more generous cut-off period of two years.[315] The OHADA drafters' decision to halve the Vienna Sales Convention's time-limit is particularly remarkable when one remembers the controversies at the drafting stage of Article 39(2) of the CISG. When the Turkish delegation proposed a reduction of the cut-off period from two years to one year,[316] the delegate for the Western African State Ghana responded that the compromise adopted earlier in the meeting was a package and that it was part of that arrangement that today's Article 39(2) of the CISG, with its two-year time-limit, should remain unchanged.[317] He stressed that the point was of great importance to developing countries, which frequently bought complex machinery, and concluded: "It would be unreasonable to expect a buyer of machinery in a developing country to notify the seller of a defect within one year when machinery not infrequently waited for more than a year before it could be installed."[318] Surprisingly, such a one-year cut-off period is what

311. Birch, *supra* note 307, at 4; Magnus, *supra* note 116, at 539; Schwenzer & Hachem, *supra* note 3, at 475–476.

312. *Compare* Oberlandesgericht Koblenz, 11 September 1998, CISG-online No. 505, (Ger.) (purchase of technical equipment by a Morrocan buyer), *with* Birch, *supra* note 277, at 10 ('However, the court should have given greater deference to the buyer's excuse concerning the customs delay in regards to a possible Article 44 excuse'); Kröll et al, *supra* note 3, para. 20.

313. Matipe, *supra* note 10, at 229-30; Schroeter, *supra* note 287, at 170.

314. Schroeter, *supra* note 287, at 170.

315. Matipe, *supra* note 10, at 230.

316. Official Records, *supra* note 28, at 348.

317. *Id.*

318. *Id.*

regional Western African sales law imposes today.[319] Apparently, the regional circumstances that both Articles 39(2) and 44 of the CISG accommodated in the Vienna delegates' view lacked or have since lost their importance in the OHADA legislators' eyes.

E. Summary

In summary, the 1980 Vienna Sales Convention accommodates regional specificities both through its limited scope and through a number of provisions that provide the CISG with sufficient flexibility to give such specificities their necessary space.

V. ARE REGIONAL DEVIATIONS RROM THE SALES CONVENTION RECOMMENDABLE?

Finally, we turn to the question whether regional deviations from the CISG are recommendable or not. In this respect, it is necessary to distinguish between the CISG's original function, namely its unification function,[320] on the one hand, and its model function on the other hand.[321]

A. Unification Function of the Sales Convention

As far as its original unification function is concerned,[322] it is helpful to remember that the Sales Convention in this function is only concerned with international sales contracts involving parties from more than one jurisdiction (Article 1(1) of the CISG). In cross-border settings of this kind, no party and no domestic legislator can ever be certain that "his" own national or regional law will apply. Accordingly, international transactions by necessity require an openness for legal rules that may differ from the rules familiar from a domestic context – this is the price for dealing internationally. It is this background against which the Sales Convention establishes uniform rules for cross-border contracts, rules that are foreseeable for parties from any Contracting State. As a consequence, regional deviations from the CISG in its unification function are limited to those expressly authorized by reservations (Article 94 of the CISG),[323] and they are few in number. In recent years, even the reservations that some Contracting States had declared have increasingly

319. For a positive assessment of the solution adopted in the OHADA sales law, *see* Djieufack, *supra* note 22, at 289.

320. *See infra* Section V.A.

321. *See infra* Section V.B.

322. *See supra* Section I.

323. *See supra* Section IV.B.1.–3.

been withdrawn,[324] further reducing regional deviations in favour of globally uniform rules.

As a result, it is submitted that regional exceptions from the CISG's uniform rules are only justified in situations in which the respective State would otherwise choose not to ratify the Sales Convention at all. In all other cases, the Convention's uniform rules should be applied as they stand.

B. Model Function of the Sales Convention

The context is slightly different in cases in which the 1980 Sales Convention is used as a model for domestic or regional law reforms. The difference arises most of all from the fact that the new domestic or regional law will not only apply to international contracts with parties from all over the world, as the CISG does, but also – or even primarily – to domestic contracts. Accordingly, there is from the outset more room for taking regional specificities into account by potentially changing certain rules taken from the CISG's model in accordance with regional traditions. In addition, the model function differs from the Sales Convention's unification function by leaving domestic or regional legislators with complete freedom to deviate from the CISG's model however they see fit, given that they are not bound by the Convention through treaty law.

1. Technical Reasons for Deviations

In exercising this legislative freedom, some deviations from the Sales Convention's model rules may be necessary quite independent of the rules' content for reasons of drafting technique. This is notably the case where the CISG is not only used as a model for domestic sales laws, but for contract law regimes that extend beyond the borders of the law of sales by also encompassing other types of contracts.[325] While it is generally agreed that many of the Vienna Sales Convention's provisions are indeed apt not only for sales contracts, but for contracts in general,[326] a model function of this broader kind requires the wording of the CISG's model provisions to be suitably adapted, *inter alia* with categories like

324. See Schroeter, *supra* note 245, at 2–3

325. Chianale, *supra* note 3, at 33.

326. Chianale, *supra* note 3, at 44; Ulrich Drobnig, 'Ein Vertragsrecht für Europa', in Jürgen F. Baur, Klaus J. Hopt & K. Peter Mailänder (eds.), *Festschrift für Ernst Steindorff zum 70. Geburtstag am 13. März 1990* (de Gruyter 1990) 1141 at 1144;) (Enderlein & Maskow, *supra* note 39, at 82; Lando, *supra* note 22, at 380; Magnus, *supra* note 118, at 36; Schroeter, *supra* note 2, at 616–617.

"buyer" and "seller" being substituted by broader terms like "obligor" and "obligee."

A (relatively narrow) example of such deviations for reasons of legislative technique could be found in the 1988 Norwegian Sales of Goods statute.[327] This domestic law covered contracts of sale only, but went beyond the 1980 Sales Convention's personal scope by containing rules that applied to all kinds of sales, such as international and domestic, to contracts between professionals as well as to consumer purchases.[328] A unitary text of this type required changes in wording as well as the addition of chapters that contained rules applicable only to specific types of sales – a somewhat confusing structure that drew harsh critique in scholarly writings.[329]

2. Value-related Reasons for Deviations

Other deviations from the Sales Convention's model rules may be inspired by their incompatibility with regional specificities present in the country (or at least in the perception) of the domestic legislator concerned. Frequently, no deviation will be necessary in such constellations because the Convention's rules themselves are perfectly able to accommodate a significant number of regional specificities, as demonstrated earlier.[330] In addition, legislators often use law reforms as an opportunity to give up traditional (but outdated) domestic rules of law, once described by Ernst Rabel as "awesome relics of the dead past,"[331] in favour of the CISG's modern and internationally accepted solutions. The renouncement respectively restriction of the fault principle in Hungarian and Chinese law[332] are recent examples. In the alternative, domestic lawmakers are free to maintain a given regional value and deviate from the blueprint of the Sales Convention, because its model function involves no obligation to stay true to the model.

---

327. *See* Viggo Hagstrøm, 'CISG: Implementation in Norway, an approach not advisable', *Internationales Handelsrecht* (2006) 246; KAI KRÜGER, *NORSK KJØPSRETT* § 26.1 (4th ed. 1999); Marius Sollund, *'The U.N. Convention on Contracts for the International Sale of Goods*, Article 7(1) – *The Interpretation of the Convention and the Norwegian Approach'*, *NORDIC J. OF COMM. L.* (2007).

328. Sollund, *supra* note 327, at 18.

329. KRÜGER, *supra* note 327, § 26.1.

330. *See supra* Section IV.

331. Ernst Rabel, 'The Hague Conference on the Unification of Sales Law', 1 *AM. J. OF COMP. L.* 58, 61 (1952). See also Honnold, *supra* note 122, at para. 30: 'One may delight in legal antiques and in the patina of ingenious circumlocutions that have had to substitute for fundamental reform but these aesthetics may not be appreciated by a modern merchant and, more especially, by his trading partner from a different legal tradition.'

332. *See supra* Section II.C.4.a.

The question whether the latter option should be chosen depends, of course, mostly upon the importance given to the respective regional specificity. Is it so important that it warrants a deviation from the CISG's well-drafted rules? This is obviously not a simple "yes or no" question, but requires a careful policy assessment by the domestic legislator. A rule of thumb that may be helpful looks to the importance of domestic trade when compared with the international trade of the country concerned: Where many sales contracts are concluded with foreign partners and are therefore often governed by the CISG, it will seem more important to design the domestic sales law that governs the comparatively less important domestic transactions similar to the provisions of the Convention.[333] This is notably true in cases of smaller jurisdictions, where purely domestic trade is often relatively unimportant. For example, Singapore's external trade is three times the size of its GDP, making it one of the most external trade-dependent economies in the world.[334] Singapore would therefore be a jurisdiction where the numbers speak in favour of staying close to the CISG model in a domestic law reform. The world's supposedly smallest economy – the Tokelau Islands, an autonomous territory of New Zealand[335] made up of three small coral atolls with a total of 1,400 inhabitants – did just that in 2004 when it adopted the Vienna Sales Convention and its principles not only for international and domestic sales, but also for contracts in general.[336]

The situation may be different in case of jurisdictions where domestic trade is relatively more important in relation to external trade. Simply speaking, this is more likely to be true in larger jurisdictions that have more trading activity within the country. Where this is the case, deviating from the CISG model in a domestic law reform in order to bring local traditions to bear may make more sense.

Nevertheless, caution is in order. Given that the Vienna Sales Convention is generally acknowledged as achieving an equal balance between the rights and obligations of buyer and seller,[337] and as well as a carefully arranged interaction between the various remedies, introducing

333. For a reference to the optimal reduction of transaction costs in this context *see* Zeller, *supra* note 9, at 93.

334. Bell, *supra* note 9, at 368.

335. Upon its accession to the Vienna Sales Convention in 1994, New Zealand declared in accordance with Article 93(1) of the CISG that the Convention does not extend to Tokelau; *see* Schroeter, *supra* note 228, at 251.

336. *See* Chianale, *supra* note 3, at 34.

337. ENDERLEIN & MASKOW, *supra* note 40, at 17; Kröll et. al, *supra* note 3, para. 50; Magnus, *supra* note 118, at 60; Schwenzer & Hachem, *supra* note 3, at 476-477.

regional features into this structure may cause unintended imbalances.[338] Each domestic and regional legislator should therefore ask itself whether it is wise to disturb a piece of legal infrastructure developed by experts from around the world over the course of many decades, just to add a bit of "local flavour."[339]

VI. CONCLUSION

The present article has tried to demonstrate that the 1980 Vienna Sales Convention does indeed reflect a number of universal values of commercial law, but is intentionally "value-neutral" as far as other more policy-related, non-mercantile values are concerned. It is, however, able to accommodate regional values of the non-commercial-law variety in a number of ways. Against this background, it is appropriate to conclude by once more quoting the Singapore Chief Justice *Menon*, who in 2015 referred to the CISG as "the natural candidate for a common sales law in Asia, whether in its entirety or in modified form."[340] In Asia and elsewhere, the Sales Convention's use as a model for law reforms increases the convergence between international sales law and domestic contract laws, while giving the necessary space to regional specificities.

338. *See also* Henry Gabriel, *The Use of Non-Binding Principles in International Commercial Law*, 17 INT'L TRADE & Bus. L. Rev. 246, 247 (2014).

339. Cautioning against regional deviations from the 1980 Vienna Sales Convention within a future Trans-Pacific Partnership (TPP) Petra Butler, 'The Perversity of Contract Law Regionalization in a Globalizing World', in Ingeborg Schwenzer & Lisa Spagnolo (eds.), *Globalization versus Regionalization* (Eleven International Publishing 2013) 13, 35; for similar positions with respect to sales law harmonization in Asia *see* Bell, *supra* note 9, at 367–368; for Africa *see* Coetzee, *supra* note 9, at 37.

340. Menon, *supra* note 164.