

when such delivery to the carrier happens at that place.⁹⁶ Probably, the most controversial provision in Chapter IV concerning the passing of the risk is Article 68, which provides:

The risk in respect of goods sold in transit passes to the buyer from the time of the conclusion of the contract. However, if the circumstances so indicate, the risk is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents embodying the contract of carriage. Nevertheless, if at the time of the conclusion of the contract of sale the seller knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller.

This provision has been criticised by some on its incompatibility with the practice of documentary sale mechanism.⁹⁷ This attack focuses primarily on the sale by CIF (Cost, Insurance, Freight) terms where usually the risk “passes from the time of shipment”.⁹⁸ Yet, Article 68 provides the risk to pass upon the conclusion of the contract. Commentators have argued that those who raised this criticism were ignorant of the second sentence of Article 68 which provided for “the retroactive passage of risk”.⁹⁹

- 1.26** If the sale of goods does not involve the carriage of goods, then the general provision on the passage of risk is provided for in Article 69 upon the taking over of the goods by the buyer or when the goods are placed in the buyer’s disposal.
- 1.27** The CISG then provided in Article 79 a long list of exceptions for the failure to perform. This provision does not raise much complication in practice¹⁰⁰ and hence it will no longer be discussed here.
- 1.28** In the case of failure to perform by either party which does not fall within the exceptions, the other party will be entitled to remedies which the CISG provides for a wide range of them: avoidance, additional time for performance and a right to cure, specific performance, reduction of price, interests in arrears, and damages.¹⁰¹

⁹⁶ See Article 67 of the CISG.

⁹⁷ Goode, Kronke, and McKendrick (n 21) para 8.94. For the documentary sale mechanism, see Sarah Dromgoole and Yvonne Baatz, “The bill of lading as a document of title” in Norman Palmer and Evan McKendrick (eds), *Interests in Goods* (LLP, 2nd ed 1998) 547, 569–570. See also McKendrick (eds), *Goode on Commercial Law* (Penguin Books, 2nd ed 2010) 223–224, 1033–1042.

⁹⁸ *Ibid.* See also McKendrick (n 97) 1045.

⁹⁹ *Ibid.*, para 8.94.

¹⁰⁰ *Ibid.*, para 8.88.

¹⁰¹ See Carr (n 26) 82–89.

The effects of a remedy of avoidance are elaborated in Article 81. In general, to attract such harsh remedy, the breach must be a “fundamental breach”.¹⁰² This is defined in Article 25:

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

The concept of fundamental breach has sparked debates among academics and practitioners alike.

To constitute a fundamental breach, an innocent party must suffer “detriment”. Such detriment should be understood as “monetary injury or harm, or of a consequential harm” and this has to be determined on each circumstance in each case.¹⁰³ Its determination has to be made with reference to the innocent’s party “justified contractual expectations”.¹⁰⁴ So, it does not refer to the quantum or the extent of harm or loss caused to the innocent party. Instead, it refers to “the interest which the contract and its individual obligations have created” for the innocent party.¹⁰⁵ Hence, the fundamental breach can occur even if the innocent party has not yet suffered any loss or the loss is only expected to happen in the future or perhaps the loss will not happen at all.¹⁰⁶ An example could be the contracts that agreed the time of delivery being an essential feature. Non-delivery on that could lead to a possible avoidance of the contract based upon fundamental breach “regardless of the actual damage suffered by the buyer as a result of the delay in delivery.”¹⁰⁷ Once the innocent party proves that there has been a detriment to his justified contractual expectations, there is then a shift in the burden of proof to the party who is purportedly in breach of the contract to establish whether there was a foreseeability of loss on his part

¹⁰² Article 49 of the CISG provides:

(1) The buyer may declare the contract avoided: (a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract...

Likewise, Article 64 provides:

(1) The seller may declare the contract avoided: (a) if the failure by the buyer to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract...

¹⁰³ Andrew Babiak, “Defining fundamental breach under the United Nations Convention on Contracts for the International Sale of Goods” (1992) 6 *Temp Int’l & Comp LJ* 113, 120.

¹⁰⁴ Franco Ferrari, “Fundamental breach of contract under the UN Sales Convention — 25 years of Article 25 CISG” (2006) 25 *JL & Com* 489, 496.

¹⁰⁵ Schwenger (n 70) 428.

¹⁰⁶ *Ibid.*, 428–429.

¹⁰⁷ *Ibid.*, 429.

or on the part of the hypothetical prudent person of the same kind.¹⁰⁸ However, Article 25 is silent on the point of time to determine such foreseeability. The majority of commentators and courts appear to suggest that this should be the time for conclusion of the contract.¹⁰⁹ Ferrari is also in support of this view explaining that “the fundamental character of the breach relates to the legitimate expectations ‘under the contract’ ... [a]llowing for communications made after the conclusion of the contract to become relevant would permit a unilateral modification of the balance of the parties’ interests as out in the contract, which is hardly appropriate.”¹¹⁰

- 1.31** Articles 47¹¹¹ and Article 63¹¹² provide for extension of time for performance for the seller and the buyer alike.¹¹³ The seller has the right to cure under Article 37.¹¹⁴
- 1.32** The right to demand specific performance is provided to both the seller and the buyer — Article 46 and Article 62, respectively.¹¹⁵ Again, these will not be discussed any further here viewing the provisions do not raise much problem.
- 1.33** The right to reduce the price is given to the buyer in the event of the non-conformity of goods in Article 50.¹¹⁶ Again, this does not present much problem which deserves discussion here.
- 1.34** Article 78 concerning interests in arrears however leads to much discussion on its interpretation. It provides: “If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74.” This has led to the issuance of the CISG-AC Opinion No 14.¹¹⁷ In this Opinion, the Advisory Council highlighted that the purpose of Article 78 is to deal with “compensating losses of the creditor and putting the creditor in the same position as if timely payment has been made.”¹¹⁸ This is supported by the structure of the CISG that this

¹⁰⁸ Babiak (n 103) 121.

¹⁰⁹ Schwemzer (n 70) 434–435.

¹¹⁰ Ferrari (n 104) 500.

¹¹¹ Article 47(1) of the CISG: “The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations.”

¹¹² Article 63(1) of the CISG: “The seller may fix an additional period of time of reasonable length for performance by the buyer of his obligations.”

¹¹³ Carr (n 26) 84.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*, 84–85.

¹¹⁶ *Ibid.*, 86.

¹¹⁷ CISG-AC Opinion No 14, Interest under Article 78 of the CISG, Rapporteur: Professor Doctor Yeşim M Atamer, Istanbul Bilgi University, Turkey. Adopted unanimously by the CISG Advisory Council following its 18th meeting, in Beijing, China on 21 and 22 October 2013. http://www.cisgac.com/file/repository/CISG_Advisory_Council_Opinion_No_14.pdf accessed 14 May 2019.

¹¹⁸ *Ibid.*, para 3.5.

Article 78 is placed right below a group of provisions dealing with damages.¹¹⁹ So, the Advisory Council observed that the actual purpose of this Article 78 is to compensate the creditor for “the time value of money”.¹²⁰ Hence, while this provision is silent on the interest rate, in attempting to draw the general principles from the CISG as per the method in Article 7, the interest rate should be referred to the rate of the creditor’s place of business because “[s]ince in the vast majority of the cases it can be assumed that the creditor would invest the money at its place of business, or take a loan at this place to refinance its business, the interest rate at this very place should be decisive...”¹²¹ The interest can be charged even the amount of damages is yet to be determined by the courts or the tribunals.¹²²

Articles 74–77 set out the law on remedies of damages. The CISG-AC produced the CISG Opinion No 6 explaining the calculation of damages in Article 74¹²³ and the CISG Advisory Council Opinion No 8 explaining the calculation of damages under Articles 75 and 76.¹²⁴ Readers are invited to refer to explanations herein.

4. WHAT IS NEXT?

While not all issues were discussed in the previous part, those points which were examined have revealed that the application of the CISG is clouded with complications. It is not the attempt of this edited collection to offer solutions to all vexed issues surrounding the CISG. Instead, the essays that form this collection attempt to critique some important aspects of the CISG as outlined above. This book is arranged in four themes. The first theme consisting of Chapters 2–4 offering critiques on the core principles of the CISG. The second theme running from Chapters 5–9 offering national perspectives of the CISG. The third theme consisting of Chapters 10–12 addressing intersectionality of the CISG with other branches of law. Last, but not least, the fourth theme comprising Chapters 13 and 14 aims at raising discussion of the possible reform or amendment or expansion of the CISG so to make it suit contemporary commercial environment.

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*, para 3.35.

¹²¹ *Ibid.*

¹²² *Ibid.*, para 3.10.

¹²³ CISG-AC Opinion No 6, Calculation of Damages under CISG Article 74: Rapporteur: Professor John Y Gotanda, Villanova University, School of Law, Villanova, Pennsylvania, USA. Adopted by the CISG-AC at its Spring 2006 meeting in Stockholm, Sweden. http://www.cisgac.com/file/repository/CISG_Advisory_Council_Opinion_No_6.pdf accessed 16 May 2019.

¹²⁴ CISG-AC Opinion No 8, Calculation of Damages under the CISG Articles 75 and 76. Rapporteur: Professor John Y Gotanda, Villanova University School of Law, Villanova, Pennsylvania, USA. Adopted by the CISG-AC following its 12th meeting in Tokyo, Japan, on 15 November 2008. http://www.cisgac.com/file/repository/CISG_AC_Opinion_8_English.pdf accessed 16 May 2019.

- 1.37 In Chapter 2, Felemegas discusses the foundational feature of the CISG — the gap-filling rule relating to interpretation as articulated within Article 7. Emphasising upon the fidelity to “international character” with regard to its interpretation, he nevertheless noted the divergent gap-filling within Article 7(2) as evidence in the practices of different states. Tracing the legislative history of the provision, he suggests an alternative approach to gap-filling based upon the concept of internationality and on generally acknowledged international principles that form the bulwark of the Convention.
- 1.38 Tsang discusses the place of the Convention as the governing law in China, arguably an important country for international commerce. Adopting the comparative perspective, the author discusses the practice of the Chinese courts with regard to non-state law, limited as it is, to identify the applicability and challenges of adopting the Convention as a governing law, and especially regarding the incorporation of part of the Convention as terms of the contract.
- 1.39 Dispute resolutions mechanisms have been an important contributor to the understanding and interpretation of the Convention. However, unlike various instrumental instruments that established specialised tribunals, the Convention allowed its application and interpretation through national courts and tribunals. Mathew attempts a comparative analysis of the approaches adopted by the courts (of contracting and non-contracting countries) and arbitral tribunals of dispute resolution and culls out the principles and elaborations evolved by courts that could be utilised for dispute resolution in different jurisdictions.
- 1.40 An important aspect that occupied much discussion space within the literature on the Convention is the concept of good faith, a foundational characteristic impacting a contract and its performance. Zhao discusses the concept of good faith in the context of the Convention and the practice of this principle within civil law, especially with regard to the General *Principles* of the Civil Law of the People’s Republic of China. The chapter includes a discussion on the legislative provisions related to good faith enacted within the General Provisions of the Civil Law 2017.
- 1.41 This collection of essays has important contributions from jurisdictions less reported within the literature of the Convention, presented as a theme titled “National Perspectives on CISG”. Vargas Weil discusses the position of the Convention in Latin America, especially the reasons that have facilitated its adoption in a few jurisdictions in the region. He also discusses the motives that undermine the effective application of the Convention by state courts of the region. The author hopes that the contribution could present some lessons for the future efforts for the unification of private law in Latin America and other regions of the global south.

- Sooksripaisarnkit attempts to forecast the place of the CISG in the context of the anticipated International Civil Law Act in Australia (for implementing the Hague Convention on Choice of Court Agreements). Noting Australia’s accession to the Convention and the subsequent implementation through state legislations, the author attempts to understand the compatibility of the CISG regime with the new statute, especially with regard to non-state law and the interpretation surrounding it in both the regimes. 1.42
- Continuing with the exploration of less reported jurisdictions implementing the Convention and its law, the next chapter turns the focus on Vietnam, a recent state party to the instrument. Speaking about the limited circumstance of the implementation, Du discusses the advantages for Vietnam that motivated the accession to the Convention and the challenges arising from its translation into the law of the country. 1.43
- The next essay by Bordaçahar and Massun discusses the experience of Argentina in working the Convention. The authors characterise this experience as a slow but significant shift from historical wariness towards greater acceptance of, and awareness of the need for, a uniform commercial legal system. Discussing the provisions of the Civil and Commercial Code 2012 for its alignment with the CISG regime and generally, with the developments in international commercial law, the author discusses the roadblocks faced in acceptance of foreign court orders and awards when applying the Convention, resulting in concerns related to achieving uniformity. The authors also highlight an important concern that is often perceived as inherent to the Convention — the practice of opting out of CISG for fear of subjecting their cross-border contracts to the unknown or unfamiliar law, as prevalent in Argentina. 1.44
- Australia’s experience with the CISG as the applicable law is the subject of the next essay within the theme of intersectional perspectives. Using the Australian implementation as a case study, Hayward a multidisciplinary study of the intersections with private international law and consumer law. Characterising Australia’s experience as polarised and hence “curious case”, the author begins with tracing Australia’s presence and role in the drafting process and the constructive engagement of Australian legal academia with the Convention. Commenting on intersectionality, the author observes that Australia’s consumer demonstrates a particularly sophisticated understanding of the Convention, and of its scope. The essay also discusses Australia’s Convention case-law for its not so effective engagement with the instrument’s international nature, and terms it as falling victim to homeward-trend-style reasoning. 1.45
- The next essay in this theme deconstructs the law and its practice for reflections on internationality, uniformity, and good faith. Joan analyses the success of the 1.46

example, have no legislative provisions on good faith obligations. In England and Wales, good faith has “played only a small part in the case law, and has now shown in practice any meaningful content”.² In Australia, good faith has had a tentative foothold. The concept’s existence is derived from contractual terms.

In Australia a coherent and predictable body of jurisprudence has developed around the simply expressed obligation in trade and commerce not to engage in conduct that is misleading or deceptive or likely to mislead or deceive. Likewise, in New South Wales a similarly coherent body of cases has developed around the [Australian] Contracts Review Act 1980, which authorises the court to vary or set aside non-business contracts that are “unjust”.³

The USA, however, has included good faith in few of its statutes.

(b) Civil law countries

- 5.06** In civil law countries, good faith applies to the interpretation of the CISG and governs the rights and duties of the contractual parties as well. Notably in the French and German legal systems, good faith has been well established as an overriding principle in contract law. However, it should be noted here in spite of its long and chequered history — especially in Germany and France, the term lacks uniform understanding among countries. For instance, the French *bonne foi* and the German *Treu und Glauben* shared the same origin, but different interpretation and application do exist.
- 5.07** This varied understanding among diverse legal systems, even amongst the civil law countries, could be because “good faith” invokes “fairness” and “moralities” to some extent, and thus is impacted by the culture and legal system of each country.
- 5.08** There is, however, a general universal point beyond any disagreement, a business does not continue to prosper if it behaves disreputably and in an unfair manner. It is also understood that businesses are driven by economic reasons and therefore act to protect their interest. Problems, therefore, arise from the intersection of these two modes of behaviour and whether good faith is the principle by which this intersection is found.

² Michael Bridge, “Good Faith, the Common Law, and the CISG,” (2017) 22(1) *Unif L Rev* 98.

³ Oxford University Obligations Group, Some Reflections on Good Faith in Contract Law, February 2012, https://www.monash.edu/_data/assets/pdf_file/0019/141085/good-faith-as-in-contract-law-oxford.pdf

3. A CLOSE LOOK AT CISG IN CHINA

(a) Governing laws

China, owing to its German, Japanese and Russian law influences, is traditionally part of the civil law legal system. Article 4 of the PRC General Principles of the Civil Law (GPCL) required that civil activities (including commercial contracts) follow the principles of voluntariness, fairness, equal pay and good faith. In the PRC Contract Law of 1999,⁴ good faith has been included as an overriding principle, extensively. For instance, Article 6 specified that “The parties shall observe the principle of good faith in exercising their rights and performing their obligations.”

5.09

The 1964 Law has been updated and enriched with detail and reenacted as the General Provisions of the Civil Law 2017.⁵ Chapter 1 entitled “Basic Provisions” stipulates governing principles which could be characterised as “overriding principles”.⁶ Article 7 specified,

5.10

Civil subjects engaged in civil activities [including commercial contracts]⁷ shall abide by the principle of good faith, uphold honesty and fulfil their commitments.⁸

Another example of law reform on good faith is the PRC Law on the Laws Applicable to Foreign-Related Civil Relations 2010.⁹

(b) Contract validity: written or not?

While depositing the instrument of ratification on 11 December 1986, China announced two reservations: first, disagreement with the expansion of the scope of application of the Convention, agreeing only to the Convention’s application to contractual parties from state parties to the Convention; second, disagreement to the CISG provisions on conclusion, modification and termination of the contract, by requiring that contracts of international sales of goods should be written. Due to the lack of legislation governing electronic

5.11

⁴ PRC Contract Law of 1999 came into effect on 1 October 1999, http://www.gov.cn/banshi/2005-07/11/content_13695.htm

⁵ PRC General Provisions of Civil Law 2017 came into effect on 1 October 2017, <https://www.chinacourt.org/law/detail/2017/03/id/149272.shtml>

⁶ General Provisions of Civil Law of 2017, Articles 1–12. (Emphasis added).

⁷ General Provisions of Civil Law of 2017, Article 7.

⁹ PRC Law on the Laws Applicable to Foreign-Related Civil Relations 2010, effective since 4 January 2010, http://www.gov.cn/flfg/2010-10/28/content_1732970.htm

signature and communications until 2004, “written” only meant being written in paper until the enactment of the PRC Electronic Signature Law of 2004.¹⁰

- 5.12 Two points should be noted in this context. First, the second reservation has been withdrawn in 2013. Second, the PRC Electronic Signature Law of 2004 also governs electronic communications, particularly under its Chapter 2, Articles 4–12.¹¹
- 5.13 In January 2013, the Chinese Government notified the Secretary-General of the United Nations its intention to withdraw the statement on the “Convention on Contracts for the International Sale of Goods of the United Nations” that China is not bound by Article 11 of the Convention and the content of Article 11.¹² This withdrawal is effective since then.
- 5.14 This withdrawal also unified different forms required for domestic and international sales of goods contracts. Before this withdrawal, China treated domestic and international sales of goods contract differently under PRC law: the former is a “simple contract” with no legal requirements as to the form; the latter is a “special contract” requiring a written form according to the PRC Economic Contract Law Involving Foreign Interests, 1985¹³ and its accompanying Judicial Interpretation issued by the Supreme People’s Court,¹⁴ and particularly in paper-based form and signed by the contracting parties.
- 5.15 In terms of the use of electronic communications, CISG is also supplemented by the 2005 United Nations Convention on the Application of Electronic Communications in International Contracts.¹⁵ “Communication” or “written” under CISG should be interpreted to include electronic communication. China has signed it on 6 July 2006 but it has not yet been ratified by China.¹⁶ Thus, it is worth noting that the governing law in China on electronic signature and communications is still the 2004 law, instead of the 2005 UN Convention.

¹⁰ PRC Electronic Signature Act of 2004, http://www.npc.gov.cn/wxzl/wxzl/2004-10/20/content_334609.htm

¹¹ *Ibid.*

¹² China Withdraws “Written Form” Declaration Under the United Nations Convention on Contracts for the International Sale of Goods (CISG), January 2013. <http://www.unis.unvienna.org/unis/pressrels/2013/unisl180.html>

¹³ PRC, Foreign Economic Contract Law of 1985.

¹⁴ Response of the Supreme People’s Court to Certain Questions Concerning the Application of the Foreign Economic Contract Law of 1987, effective from 19 October 1987, repealed by the Contract Law of 1999.

¹⁵ UNCITRAL, http://www.uncitral.org/uncitral/zh/uncitral_texts/electronic_commerce.html

¹⁶ UNCITRAL, http://www.uncitral.org/uncitral/zh/uncitral_texts/electronic_commerce/2005Convention_status.html

4. EMPIRICAL STUDY OF CASES INVOKING CISG HEARD BY COURTS IN CHINA

The CISG is guided by the purpose of promoting uniformity in international sales law. Article 7 of the CISG sets out a guideline to the interpretation under which regard is to be had to the CISG’s international character, the need to promote uniformity in its application, and the observance of good faith in international trade. Uniform application primarily means that arbitral tribunals and courts should apply the Convention to cases in which the CISG is the proper law to be observed. Therefore, the author conducted an empirical study on judgments in China which invoked the CISG. 5.16

More specifically, the author employed a database — “China Judgements Online” (“Judgments Database”)¹⁷ — which is administered by the Supreme People’s Court of China and publishes judgments online. It was launched in 2013 and contains judgments delivered by all courts in China and some previous judgments as well. Thus, this database seems to be the most comprehensive database. All figures and calculations in this empirical research below considered judgments were last accessed by the author on 30 November 2018. 5.17

The search keywords “the CISG” on the Judgments Database¹⁸ returned a total of 202 cases, which referred to or mentioned the CISG. Among these cases, 98 directly invoked the CISG as the authority of law the judgments relied on. The author analysed these 98 judgments by grouping them on criteria as showed in the figures below. 5.18

The 98 cases have been grouped into four categories according to the hierarchy of the courts which deliver the judgment (Figure 1). At the apex, the Supreme People’s Court (the highest court in China) handled 3 cases, the 32 Higher People’s Courts (at provincial level) handled 19 cases,¹⁹ various Intermediate People’s Courts (at municipal level, inferior to the Higher People’s Court) handled 57 cases, and County/District courts (at county or 5.19

¹⁷ China Judgements Online, <https://wenshu.court.gov.cn/>

¹⁸ *Ibid.*

¹⁹ In China, regarding the province or province equivalent, including 23 provinces (namely, Hebei, Shanxi, Jilin, Liaoning, Heilongjiang, Shaanxi, Gansu, Qinghai, Shandong, Fujian, Zhejiang, Taiwan, Henan, Hubei, Hunan, Jiangxi Province, Jiangsu Province, Anhui Province, Guangdong Province, Hainan Province, Sichuan Province, Guizhou Province, Yunnan Province), 4 equivalent-to-Province municipalities (Beijing, Shanghai, Tianjin, and Chongqing), and 5 autonomous regions (namely, Inner Mongolia, Xinjiang Uygur, Ningxia-Hui, Guangxi Zhuang, Tibet). Apart from above-mentioned 32 provinces/its equivalent, there are 2 other special administrative regions that are also province equivalent: Hong Kong Special Administrative Region and Macao Special Administrative Region; however, because PRC law does not apply in Hong Kong and Macao, they are not analysed in this chapter.

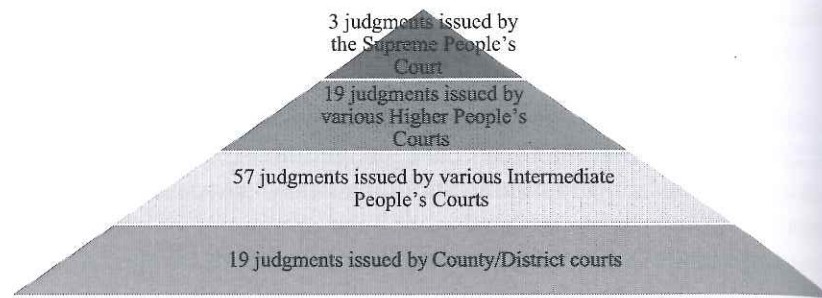


Figure 1: Overview of the existing cases on CISG

Source of data: Chinese Judgements Online; figure compiled by the author.

below levels) handled 19 cases. As shown in Figure 1, the majority of cases relied on the CISG were handled by the Intermediate People's Courts, rather than the County/District courts or the Higher People's Courts. The reason for this phenomenon might be two: first, Articles 17–20 of the PRC Civil Procedural Law of 2017 provide that the Intermediate People's Courts and the Higher Court act as the trial court if the case has a significant impact in the administrative region where the court is based, and cases involving in "international" trade and sales of goods usually related to goods worthing a huge amount of value; second, the involvement of foreign-related elements and foreign law, including the CISG, makes the law more complex, and judges serving at these levels of courts are more experienced in this type of cases.

5.20

Travelling through the judgments invoking the CISG and good faith issued by the Supreme Court and by Higher People's Courts, they were further subgrouped through tracing which court issued such judgment (Figure 2). As mentioned, there are 32 Higher People's Courts, one each in a province (or province equivalent). Figure 2 shows the province in which a judgment was issued by the Higher People's Court of that province. As seen, the Supreme Court issued 3 judgments; it is noting that the Zhejiang Provincial Higher People's Court had issued 39 judgments, and the Shandong Provincial Higher People's Court issued 11 judgments, the Guangdong Provincial Higher People's Court also issued 11 judgments, and the else Higher People's Courts issued a much less number of judgments; the reason for a large number of judgments invoking the CISG in the three provinces — Zhejiang, Shandong and Guangdong — is probably because these regions have been playing an active role in China's import and export trade of goods.

5.21

The decisions on the Judgments Database belonged to the time period 2008–2018 (Figure 3). Fewer judgments between 2008 and 2010 invoking CISG have

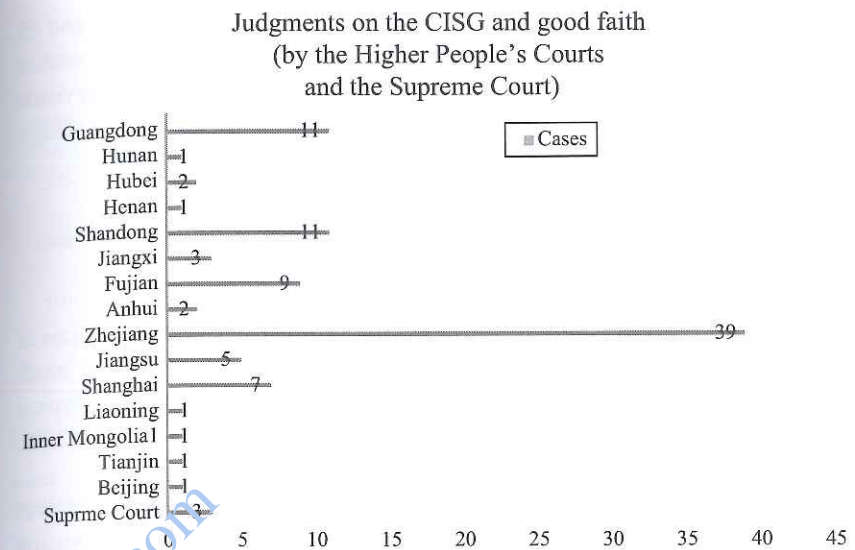


Figure 2: Breakdown of judgments considering the geographical factor

Source of data: Chinese Judgements Online; figure compiled by the author.

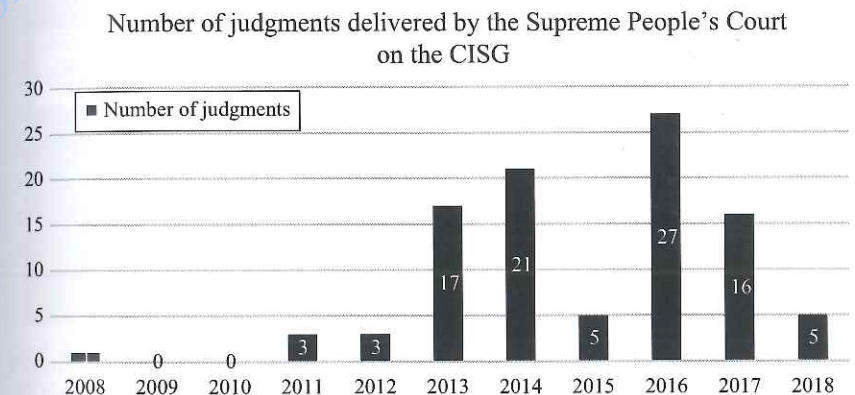


Figure 3: Breakdown of judgments by the year of the decision

Source of data: Chinese Judgements Online; figure compiled by the author.

been found (Figure 3) for different reasons: for 2008, the author estimates the reason could be that fewer judgments were input into the Judgments Database in 2008 when the Database was launched jointly by the Chinese Government and the Supreme Court; however, for 2009 and 2010, there were no judgments mentioning the CISG possibly because, according to the author, the disputes were resolved at lower court level and therefore did not reach the Supreme People's Court.

- 9.18 If the place of delivery of the goods (ie the place of performance of the most characteristic obligation) would have been Argentina — rather than a foreign country —, such contract would have seen the *pesification* of any foreign currency obligation. It can be argued that uniformity is not promoted when a CISG contract with an Argentine buyer and a Free on Board (FOB) Incoterm(s)²² is excluded from a mandatory currency conversion; while the same CISG contract but with Delivered Duty Paid (DDP)²³ Buenos Aires instead is subjected to a mandatory currency conversion such as *pesification*.

3. INTEREST RATE APPLICABLE TO INTERNATIONAL SALE OF GOODS DISPUTES

- 9.19 Closely tied to the issue of the currency of payment is that of the interest applicable to any amount in arrears.²⁴ And while Article 78 of the CISG entitles a party to request interest on any sum the other party is in arrears for, it notably does not provide for the applicable interest rate.²⁵
- 9.20 Argentine courts have generally been favourable towards granting market interest rates for any amounts in arrears resulting from international commercial contracts. Nevertheless, the interests rates either allowed or applied by Argentine courts have varied widely.
- 9.21 In *Elastar v Bettcher*, a Court of First Instance gave effect to a contractual provision that granted the seller an 18.5% annual interest rate on a sum denominated in US dollars.²⁶ In addition, the *Elastar* Court found that when parties expressly state that the price shall be paid at a later date (eg, 180 or 360 days after delivery), but fail to include the payment of interest, interest should nevertheless accrue in favour of the seller. According to the *Elastar* Court, this is because the accrual of interest in long-delayed-payment sales — notwithstanding the parties' silence — is a “widely known and observed international trade usage” under Article 9(2) of the Convention.²⁷
- 9.22 Similarly, in the context of a bankruptcy proceeding, a 12% default interest rate on a US dollar sum was considered in accordance with “international

²² Free on Board; see International Chamber of Commerce, *ICC Guide to Incoterms 2010* (ICC Services 2011) 171ff.

²³ Delivered Duty Paid; see International Chamber of Commerce (n 22) 149ff.

²⁴ Garro and Zuppi (n 11) 269–270.

²⁵ *Ibid.*, 247; Schlechtriem and Butler (n 11) para 317; Peter Huber and Alastair Mullis, *The CISG: A New Textbook for Students and Practitioners* (Sellier 2007) 358.

²⁶ *Elastar Sacifia v Bettcher Industries Inc* Docket No 50,272 (20 May 1991) (National Commercial Court of First Instance No 7).

²⁷ *Ibid.*, para 4.

business practices”, when the parties had already agreed on a 9% interest rate as a means of financing the sale of goods.²⁸ In another bankruptcy case, which also referenced “international business practices”, a 10% interest rate on a US dollar sum was recognised as the prevailing “prime rate” at the time.²⁹

By contrast, in *Pinturas Industriales v Química Chromabyt* the Court of Appeals substantially upheld a judgment ordering a buyer to pay 6% interest rate on a US dollar sum.³⁰ While the Court acknowledged that foreign CISG cases provided for disparate interest rates, the Court was of the opinion that there was a tendency to apply the statutory interest rate provided by the law that — according to the rules of private international law³¹ — governed the CISG contract. 9.23

In addition, as concluded by commentators,³² in *Pinturas Industriales v Química Chromabyt* it was asserted that Article 78 requires no proof of actual damages by the party claiming interest. If a sum is in arrears, according to the Court of Appeals, CISG presumes that the claiming party is entitled to interests as damages.³³ However, the Court of Appeals rejected the claimant's request for the compounding of interest, based on the fact that Article 78 did not provide for compound interest, nor did Argentine law for the case at hand.³⁴ 9.24

It should be noted that the *Pinturas Industriales* Court reversed the prior decision only in regards as to the moment that the interest would accrue. A prior case had decided that interest should only accrue from the moment that the debtor was put on notice of default, rather than from the moment the debt was in arrears.³⁵ That decision by the Court of Appeals drew a dissent, and was 9.25

²⁸ *Bermatex SRL s concurso preventivo* Docket No 56,179 (6 October 1994) (National Commercial Court of First Instance No 10) s.10.

²⁹ *Águila Refractorios SA s concurso preventivo* (23 October 1991) (National Commercial Court of First Instance No 10) s.4.

³⁰ *Pinturas Industriales SA v Compañía Química Chromabyt SA* (6 September 2016) (National Commercial Court of Appeals Chamber D) s.5. See also *Compañía Manufacturera Manisol SA v Menini Hermanos SRL* Docket No 41,101/2009 (5 September 2018) (National Commercial Court of Appeals Chamber A) s.IV.5.3 (“[T]he defendant's appeal should be granted, and, therefore, the appealed judgment should be modified with respect to the applicable interest rate [of 7%], which shall be reduced to 6%.”) (unofficial translation).

³¹ CISG Article 7(2).

³² CISG Advisory Council, Opinion No 14: Interest under Article 78 CISG (2013) para 3.35; Alejandro M Garro and Alberto L Zuppi, “El cómputo de intereses en la Convención de Viena de Compraventa Internacional de Mercaderías (CISG)” (2011) 2 *Rev de Dcho Comercial del Consumidor y de la Empresa* 196, s.IV; Fernando Pantaleón Prieto, “Artículo 78” in Luis Díez-Picazo (ed), *La compraventa internacional de mercaderías. Comentario a la Convención de Viena* (Civitas 1998) 630.

³³ *Pinturas Industriales SA v Compañía Química Chromabyt SA* (Court of Appeals) (n 30) s.4.

³⁴ *Ibid.*, s.5, referring to Civil and Commercial Code, Article 770. See also *Marby SA v Thyssen Krupp Stahlunion GMBH* (17 April 2008) (National Commercial Court of Appeals Chamber C) s.4.e.

³⁵ *Ecotune (India) Private Ltd v Cencosud SA* Docket No 94,114 (7 October 2010) (National Commercial Court of Appeals Chamber F).

subject to some criticism, since it is from the time that the debt is in arrears that the creditor is deprived of the funds it expected to receive, regardless of when the debtor is put on notice.³⁶

4. LETTERS OF CREDIT AND THE PAYMENT OF THE PRICE

- 9.26 In *Amaravathi Textiles v Cencosud* and *Ecotune (India) v Cencosud* the issue of payment through letters of credit was addressed.³⁷ In both cases, Cencosud, the Argentine buyer, arranged for payment to be effected through a letter of credit issued by an Argentine bank. In the midst of the 2001–2002 economic crisis, the bank in question faced serious financial problems and eventually had to close. But before doing so, pursuant to the letter of credit, the bank debited the price from Cencosud's bank account. However, the bank never transferred the funds to the Indian sellers.
- 9.27 Thus, Cencosud found itself having the price deducted from its bank account, and yet not having effected payment under the contracts. The Indian sellers commenced proceedings in Argentina demanding payment of the price.
- 9.28 In both *Amaravathi* and *Ecotune*, the Court of First Instances understood that the contracts were exempted from the mandatory *pesification* applicable to foreign-currency obligations governed by Argentine law.³⁸ According to Argentina's conflict of laws rule, which provides for the law of the place where the most characteristic obligation is performed,³⁹ Indian law would be applicable in *Amaravathi* and *Ecotune*. As foreign-law governed contracts, they were exempted from the mandatory *pesification* established by Decree No 212/2002.
- 9.29 However, India is not a signatory to CISG, and so CISG would be inapplicable. The Court of Appeals held that — except for the purposes of *pesification* — the contract was considered to be governed by Argentine law (including CISG by virtue of its Article 1(1)(b)), since the Indian sellers pleaded for — and Cencosud tacitly acknowledged — its application.⁴⁰ The Court of Appeals did

³⁶ *Ibid.*, (Judge Tevez, dissent); Garro and Zuppi (n 32) 196.

³⁷ *Amaravathi Textiles v Cencosud SA* Docket No 51,345 (23 December 2008) (National Commercial Court of First Instance No 23); *Ecotune (India) Private Ltd v Cencosud SA* Docket No 94,114 (13 November 2009) (National Commercial Court of First Instance No 9); *Amaravathi Textiles v Cencosud SA* Docket No 51,345 (30 December 2009) (National Commercial Court of Appeals Chamber C); *Ecotune (India) Private Ltd v Cencosud SA* (Court of Appeals) (n 35).

³⁸ *Amaravathi Textiles v Cencosud SA* (Court of First Instance) (n 37) s.III; *Ecotune* (Court of First Instance) (n 37) s.VI.

³⁹ Civil Code (Law No 340, as amended), Articles 1209–1210.

⁴⁰ *Amaravathi Textiles v Cencosud SA* (Court of First Instance) (n 37) s.III.i; *Ecotune (India) Private Ltd v Cencosud SA* (Court of First Instance) (n 35) s.IV.a.

not directly address this apparent contradiction between classifying the same contracts as “foreign” for one purpose, and as “domestic” for another.

On the issue of payment through letters of credit, the Court of First Instance and the Court of Appeals in *Amaravathi* and *Ecotune* agreed that Cencosud had not performed its payment obligation — notwithstanding the withdrawal of the price from Cencosud's bank account. In addition, relying on Article 78 of the CISG, Cencosud was ordered to pay simple interest at a 7% rate on the amount in arrears. In both cases, the Indian sellers' requests for compound interest, calculated according to Indian law or Indian market practice, were rejected. 9.30

5. PROOF OF NON-CONFORMITY OF GOODS

A set of decisions on the non-conformity of goods showed a tendency by Argentine courts to resort to domestic legislation in order to decide certain issues governed but not settled by the CISG. In particular, Argentine courts have ruled that under CISG the type of proof required to establish the goods' non-conformity was to be determined by the Argentine Commercial Code. 9.31

In *Mayer v Onda Hofferle*, an Argentine seller delivered charcoal to a German buyer at an Argentine port. Once the goods were shipped and delivered to Germany, the buyer claimed that the charcoal was “too humid” and thus unusable for its intended purpose. To support its claim, the German buyer submitted a witness statement, and a lab analysis performed by a German company.⁴¹ 9.32

The Court of Appeals, however, ruled that while the CISG contains detailed rules regarding the sellers' obligation to deliver the goods of the type, quantity and quality agreed by the parties, the Convention does not contain any provision nor general principle as to how the non-conformity of goods must be proven. Therefore, to decide on the type of proof required to claim the goods' non-conformity, the Court resorted to Argentine law, the domestic law applicable by virtue of Article 7(2) of the CISG.⁴² 9.33

At the time, the Argentine Commercial Code provided that any defects in the goods delivered had to be verified by an expert jointly appointed by the parties (or — in the absence of agreement by the parties — by a judge).⁴³ 9.34

⁴¹ *Alejandro Mayer v Onda Hofferle GmbH & Co* (24 April 2000) (National Commercial Court of Appeals Chamber E) ss.II, III.

⁴² *Ibid.*, s.III.

⁴³ Commercial Code (Law No 2,637, as amended), Article 476. The Commercial Code has since been replaced by the Civil and Commercial Code, which reflects the same solution; see Civil and Commercial Code, Article 1157.

Because the German buyer had failed to submit as evidence a report from a jointly appointed expert, the Court of Appeals found that the non-conformity of the charcoal had not been proven.

9.35 It should be noted that the Court of Appeals reached the same conclusion even in the CISG cases where an Argentine buyer had failed to follow the procedure established by the Commercial Code.⁴⁴ In *Bedial v Paul Muggenburg and Co*, the Court rejected the Argentine buyer's claim of non-conformity because, *inter alia*, the expert report required by the Commercial Code had not been submitted. This is despite the fact that an Argentine government agency had tested a sample of the mushrooms delivered to Bedial, and had found them not suitable for human consumption.⁴⁵

9.36 By contrast, in a more recent case, *Bravo Barros v Martínez Gares*, the Court of Appeals signalled it might be willing to broaden the evidence of non-conformity it would admit for the CISG cases. At first, the Court of First Instance summarily rejected the Argentine buyer's non-conformity claim due to the lack of the required expert report, which it deemed "irreplaceable".⁴⁶ On appeal, although the non-conformity claim was ultimately rejected, the Court of Appeals reviewed in great detail the CISG's provisions on non-conformity, and faulted the Argentine buyer for failing to give the required notice to the seller within a reasonable time. Finally, the Court of Appeals concluded:

It is also true that, as expressed by the a quo judge, the Convention does not expressly regulate the procedure to verify the differences in quality in the goods delivered, however, *the directives* [the CISG] *provides regarding the way in which one should proceed are clear* [...].⁴⁷

9.37 Another recent judgment, *Manisol v Menini*, regarding a sale of shoe soles, similarly decided not to give any relevance to a Colombian buyer's failure to comply with the jointly appointed-expert report required by Argentine law.⁴⁸ Though the Argentine seller raised the lack of the expert report as a defence,⁴⁹ the Court of Appeals found that the report issued by a Colombian industry lab

⁴⁴ *Bedial SA v Paul Muggenburg and Co GMBH* 1993-C La Ley 157 (31 October 1995) (National Commercial Court of Appeals Chamber C); *Cerveceria y Maltería Paysandú SA v Cerveceria Argentina SA* (27 November 2002) (National Commercial Court of Appeals Chamber E).

⁴⁵ *Bedial SA v Paul Muggenburg and Co GMBH* (Court of Appeals) (n 44) para 4.h.

⁴⁶ *Carlos Manuel del Corazón de Jesús Bravo Barros v Salvador Martínez Gares* (8 September 2006) (National Commission Court of First Instance No 15) s.4.C.

⁴⁷ *Carlos Manuel del Corazón de Jesús Bravo Barros v Salvador Martínez Gares* (21 May 2007) (National Commission Court of Appeals Chamber A) s.IV.1 (unofficial translation, emphasis added).

⁴⁸ *Compañía Manufacturera Manisol SA v Menini Hermanos SRL* (Court of Appeals) (n 30).

⁴⁹ *Ibid.*, ss.I.2, III.

centre was sufficient to establish the lack of conformity since the Argentine buyer had failed to object to such report in due course.⁵⁰

The Court of Appeals' emphasis in *Bravo Barros v Martínez Gares* on the buyer's failure to follow the steps provided by the CISG, rather than on the lack of compliance with the evidentiary requirements set by Argentine law, together with the *Manisol* decision, could be a first step towards a greater reliance on CISG by Argentine courts to decide matters of proof of non-conformity, in line with the requirement under Convention's Article 7(1) of having due regard to the CISG's international character and the need to promote uniformity in its application.

9.38

6. LIMITATION PERIODS AND CISG

It is generally understood that the CISG does not address the issue of limitation periods (also known as statute of limitations or prescription) applicable to a claim arising out of a CISG contract.⁵¹ On this topic, Argentine courts have taken the approach that limitation periods are a substantive issue that must be decided according to the domestic law applicable to the CISG contract. It should be noted that Argentina is a signatory to the 1974 New York Convention on the Limitation Period in the International Sale of Goods (the Limitation Convention),⁵² although this treaty has only been ratified by a limited number of states.⁵³

9.39

In *Asi (Chile) v Montecoman* the courts recognised and described the approach Argentine courts would generally follow in relation to the law governing limitation periods, before deciding to reach a different solution.⁵⁴ Similarly to other civil law jurisdictions,⁵⁵ in Argentina limitation periods are considered a matter of substantive — and not procedural — law.⁵⁶ Instead, in common law jurisdictions, limitation periods are considered to be a matter of procedure and thus are normally held to be governed by the law of the forum.⁵⁷

9.40

⁵⁰ *Ibid.*, s.IV.4.

⁵¹ Schlechtriem and Butler (n 11) para 347; Huber and Mullis (n 25) 29; John O Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (Kluwer, 3rd edn 1999) s.254.2.

⁵² Law No 22,488; Argentina has also ratified the 1980 Protocol, see Law No 22,765.

⁵³ Schlechtriem and Butler (n 11) para 162; Huber and Mullis (n 25) 29; Ingeborg Schwenzer, Pascal Hachem, and Christopher Kee, *Global Sales and Contract Law* (Oxford University Press 2012) para 51.13.

⁵⁴ *Asi (Chile) SA v Montecoman SA* (17 February 2012) (National Commercial Court of First Instance No 14); *Asi (Chile) SA v Montecoman SA* (Court of Appeals) (n 6).

⁵⁵ Carolina D Iud, "Compraventa Internacional de Mercaderías y Prescripción de las Acciones" (2013) 261 *Rev de Dcho Comercial y de las Oblig* 359, s.I.

⁵⁶ Civil and Commercial Code, Article 2671.

⁵⁷ Ingeborg Schwenzer and Simon Manner, "The Claim Is Time-Barred": The Proper Limitation Regime for International Sales Contracts in International Commercial Arbitration" (2007) 23(2) *Arbitration International* 293, 296.

14.04 In particular, UNCITRAL prepared and adopted the UNCITRAL Model Law on Electronic Commerce (MLEC)⁴ and the UNCITRAL Model Law on Electronic Signatures (MLES).⁵ Having been adopted in more than 70 states, the MLEC is by far the most adopted text in its field,⁶ and the principles underpinning it are widely recognised as the pillars of global electronic commerce law. The MLES has been enacted in more than 30 states where it provides a flexible yet secured legal framework for electronic identification and authentication.

14.05 Building on those Model Laws, in 2005 UNCITRAL finalised the United Nations Convention on the Use of Electronic Communications in International Contracts (e-CC),⁷ which is the first and only treaty enabling the use of electronic communications in international trade. The e-CC currently has 11 state parties; moreover, some 20 states have enacted its substantive provisions domestically. The e-CC complements the CISG with both general principles of e-commerce law⁸ and specific provisions on electronic contracting.⁹

⁴ UNCITRAL, Model Law on Electronic Commerce with Guide to Enactment, 1996, with additional article 5 bis as adopted in 1998, New York, 1999 (United Nations Publication Sales No E.99.V.4).

⁵ UNCITRAL, Model Law on Electronic Signatures with Guide to Enactment, 2001, New York, 2002 (United Nations Publication Sales No E.02.V.8).

⁶ Information on the status of adoption of MLEC and MLES is available on the UNCITRAL website. Since enacting jurisdictions do not always communicate the adoption of texts to the UNCITRAL Secretariat, that information may be incomplete.

⁷ United Nations, 2898 *Treaty Series* 3.

For additional information on the e-CC, see A Boss and W Kilian (eds), *The United Nations Convention on the Use of Electronic Communications in International Contracts: An In-Depth Guide and Sourcebook* (Kluwer Law International 2008); D Hettenbach, *Das Übereinkommen der Vereinten Nationen über die Verwendung elektronischer Mitteilungen bei internationalen Verträgen* (Mohr Siebeck 2008); A Davidson, *Social Media and Electronic Commerce Law* (Cambridge University Press 2nd ed 2015) 155; JA Estrella Faria, "Harmonizing the Law of International Electronic Contracting: Adjust the Rules but Don't Rewrite Them" in A Schulz (ed), *Legal Aspects of an E-Commerce Transaction* (Sellier European Law Publishers 2006) 74–98; HD Gabriel, "The United Nations Convention on the Use of Electronic Communications in International Contracts: An Overview and Analysis" (2006) 11 *UnifL Rev* 285; KW Chong and JS Chao, "United Nations Convention on the Use of Electronic Communications in International Contracts: A New Global Standard" (2006) 18 *Sing Ac LJ* 116; J Oviedo Albán, "Convención de las Naciones Unidas sobre la Utilización de Comunicaciones Electrónicas en Contratos Internacionales" (2006) 4(7) *International Law: Revista Colombiana de Derecho Internacional* <https://revistas.javeriana.edu.co/index.php/internationallaw/article/view/14012> accessed 14 January 2019; S Eiselen, "The UNECIC: International Trade in the Digital Era" (2007) 10(2) *PER/PELJ* http://www.puk.ac.za/openncms/export/PUK/html/fakulteite/regte/per/issuepages/2007volume10no2/2007x2x_Eiselen_art.pdf accessed 14 January 2019; SJ Hilberg, "Das neue UN-Übereinkommen zum elektronischen Geschäftsverkehr und dessen Verhältnis zum UN-Kaufrecht — Wegweiser in Sachen E-Commerce?" (2007) 7 *IHR* (Part 1) 12, (Part 2) 56.

A bibliography of UNCITRAL texts relating to electronic commerce, including the e-CC is regularly compiled by the UNCITRAL Secretariat and is available on the UNCITRAL website.

⁸ Those principles are: technology neutrality; functional equivalence; and non-discrimination against the use of electronic means. See paras 14.12–14.22.

⁹ Those rules are described below as part of the uniform law of electronic contracting.

Most recently, UNCITRAL has adopted the UNCITRAL Model Law on Electronic Transferable Records (MLETR),¹⁰ which provides an enabling legislative framework for the dematerialisation of documents and instruments that entitle the holder to the payment of a sum of money or the delivery of goods. **14.06**

To sum up, UNCITRAL has prepared a number of legislative texts dealing with international sales and with electronic transactions that states have widely adopted. The purpose of this chapter is to illustrate how the uniform law of international sale of goods and the uniform law of electronic transactions and signatures may interact to create a modern, efficient and effective legal framework for electronic contracting. **14.07**

2. COMBINING UNIFORM SALES AND ELECTRONIC TRANSACTIONS LAWS

The use of electronic communications in connection with international sales contracts became widespread at the end of the last century. Legal academics initially offered an analysis based on the principle of freedom of form of the contract and on the references contained in the CISG to the use of instantaneous means of communications (eg in Articles 13 and 20 of the CISG).¹¹ They discussed matters such as the use of electronic communications with respect to the declaration requiring the use of the written form (Articles 11, 12 and 96 of the CISG)¹² and to contractual agreements requiring the use of writing, including for amending the contract (Article 29, para 2 of the CISG). At that time, UNCITRAL was developing a significant body of uniform law on electronic transactions and signatures. **14.08**

Several mechanisms ensure the smooth interaction between the uniform law of sales and that of electronic transactions. However, those mechanisms may not have always been sufficiently explained and this may have prevented full awareness of them. Among those mechanisms, Article 20, para 1 e-CC **14.09**

¹⁰ UNCITRAL, Model Law on Electronic Transferable Records, 2017, New York, 2017 (United Nations Publication Sales No E.17.V.5).

¹¹ Additional information on the use of electronic communications and the CISG in JE Hill, "The Future of Electronic Contracts in International Sales: Gaps and Natural Remedies under the United Nations Convention on Contracts for the International Sale of Goods" (2003) 2(1) *Nw J Tech & Intell Prop* <http://scholarlycommons.law.northwestern.edu/njtip/vol2/iss1/1> accessed 14 January 2019; C Ramberg, "Electronic Communications under the United Nations Convention on Contracts for the International Sale of Goods" in P Wahlgren (ed), *Scandinavian Studies in Law* (Jure 2004) Volume 47, 111–130. Professor Christina Ramberg was the rapporteur of the CISG Advisory Council Opinion No 1 "Electronic Communications under CISG" in 2003.

¹² UG Schroeter, "The Cross-Border Freedom of Form Principle under Reservation: The Role of Articles 12 and 96 CISG in Theory and Practice" (2014) 33 *JL & Com* 81.

is prominent as it specifically refers to the CISG as one of the treaties with which the e-CC should operate.¹³ Moreover, Article 7, para 2 of the CISG allows the application of MLEC provisions in conjunction with the application of the CISG when the national law of a jurisdiction that has enacted the MLEC is identified as applicable by private international law rules¹⁴ or when MLEC provisions may be applied as general principles. Furthermore, parties to a contract for international sale of goods may decide to incorporate uniform provisions on electronic transactions in their contract, including by choosing the e-CC, as complemented by national law, or by the law of one of its state parties as the law applicable to the contract.

- 14.10** Since a significant number of states have adopted the CISG and UNCITRAL texts on e-commerce, the existence of a modern and comprehensive body of uniform law on electronic sales contracting may no longer be ignored. The following sections provide an overview of the uniform legislative provisions relevant for the use of electronic communications in conjunction with the CISG. While those provisions are presented together to offer a complete description, caution should be used since they may apply on the basis of different mechanisms. More precisely, as mentioned above, e-CC provisions may apply as a treaty, while MLEC, MLES and MLETR provisions as well as e-CC provisions incorporated in domestic law will apply as such.

3. THE FOUNDATIONS OF THE UNIFORM LAW OF ELECTRONIC TRANSACTIONS

- 14.11** To fully appreciate the interaction between the uniform law of sales and the uniform law of electronic transactions it is first necessary to be acquainted with the fundamental principles of the law of electronic communications. These are the principles of functional equivalence, of non-discrimination and of technology neutrality. These principles provide the foundation for legal provisions that enable the use of electronic means and that apply also to the use of electronic means for contracts governed by the CISG.

¹³ On the relationship between the CISG and the e-CC, P Butler, "The CISG and the United Nations Convention on the Use of Electronic Communications in International Contracts" in I Schwenzler and L Spagnolo (eds), *State of Play: The 3rd Annual MAA Schlechtriem CISG Conference* (Eleven International Publishing 2013) 1–16; S Eiselen, "The Interaction between the Electronic Communications Convention and the United Nations Convention on the International Sale of Goods" in AH Boss and W Kilian (n 7); CH Martin, "The Electronic Contracts Convention, the CISG, and New Sources of E-Commerce Law" (2008) 16 *Tul J Int'l & Comp L* 467; Rosangelina Fontalvo Ramo, *La incorporación de las comunicaciones electrónicas en los contratos de compraventa internacional de mercadería* (2016) 4 *Arx Juris Salmanticensis* 103.

¹⁴ See eg *Olivaylle Pty Ltd v Flottweg AG (No 4)* (2009) 255 ALR 632.

(a) Functional equivalence

The principle of functional equivalence indicates that electronic communications may satisfy the purposes and functions of paper-based documents provided certain criteria are met. Thus, it establishes the equation between requirements for paper-based documents and their electronic equivalents. **14.12**

UNCITRAL texts provide functional equivalence rules for the paper-based requirements of writing (Article 6 of the MLEC, Article 9, para 2 of the e-CC); signature (Article 7 of the MLEC, Article 6 of the MLES and Article 9, para 3 of the e-CC); original (Article 8 of the MLEC and Article 9, para 4 of the e-CC); retention (Article 10 of the MLEC); transferable document or instrument (Article 10 of the MLETR); and possession of a transferable document or instrument (Article 11 of the MLETR). Each provision identifies the functions performed by the requirement in the paper environment and sets forth the conditions to be fulfilled by an electronic equivalent (see also paras 14.27–14.28). **14.13**

In particular, Article 7 of the MLEC, Article 6 of the MLES and Article 9, para 3 of the e-CC are examples of functional equivalence provisions with respect to the use of electronic signatures drafted in technology neutral terms. While the MLEC and the e-CC embrace a minimalist approach, the use of a two-tier model in the MLES gives privileged legal status to electronic signatures that meet additional requirements. **14.14**

(b) Non-discrimination

The principle of non-discrimination against electronic communications establishes that a communication shall not be denied validity on the sole ground that it is in the electronic form (Article 8, para 1 of the e-CC and Article 5 of the MLEC). Of course, an electronic communication may be invalidated on different grounds; for instance, because its author is not sufficiently identified or because it does not meet a functional equivalence requirement. **14.15**

Moreover, the principle of non-discrimination calls for establishing the same requirements for the use of electronic communications and of corresponding paper-based documents. For instance, the law often does not require the signature of paper-based invoices. However, it may require the signature of electronic invoices, and even demand the use of a specific signature technology. In that case, the law discriminates by establishing additional requirements (ie signature or the use of a specific signature technology) in case electronic means are used. **14.16**

The principle of non-discrimination applies equally to information that is not contained in an electronic communication but referred to in that communication **14.17**

(Article 5 bis of the MLEC). Thus, an attachment to an email or a hyperlink in a webpage may satisfy a written information requirement. This principle also covers evidentiary matters by indicating that rules of evidence shall not deny the admissibility as evidence of electronic communications solely due to their electronic nature (Article 9, para 1 of the MLEC).

14.18 Another application of the principle of non-discrimination relates to the use of automated message systems for contract formation; a contract concluded by using automated message systems shall not be denied validity or enforceability on the sole ground that no natural person reviewed or intervened in each of the individual actions carried out by the automated message systems (Article 12 of the e-CC; see also para 14.62).

14.19 The principle of non-discrimination does not require the mandatory use of electronic communications. That use is optional, though agreement to do so may be implied (Article 8, para 2 of the e-CC). Initiating an electronic exchange from an electronic address, indicating the availability of an electronic address (including on paper, eg on a business card or letterhead, or on a website) or designating the preferred electronic address may indicate consent to use electronic communications.

(c) Technology neutrality

14.20 The principle of technology neutrality requires that the law shall not impose the use of or otherwise favour any specific technology. According to that principle parties are free to choose the technology most adequate for their needs, thus balancing security and costs, just like under the principle of the freedom of form they may decide whether to use writing or other form requirements. The principle applies to generic technologies (eg email, Internet, instant messaging, fax), specific software, methods and commercial products (such as .pdf documents signed with PKI-based signature or the use of named software).

14.21 The principle of technology neutrality aims to ensure that the law does not prevent the use of future technologies. If the law were to impose the use of a specific technology, new technologies would not get legal recognition unless the law is amended, which is a time-consuming and resource-demanding process. This could hinder innovation. Moreover, mandating the use of specific technology or methods may hamper technical interoperability and data flows.

14.22 Technology neutrality is often mentioned in preambles and *travaux préparatoires* of legislative texts as a paramount general principle. However, its explicit formulation in a statute is less common (but see Article 3 of the MLES).¹⁵

¹⁵ See also Electronic Transactions Act 2002 of Bangladesh, s.5B.

Technology neutrality is often implemented in UNCITRAL texts by using the notion of “data message”, whose definition is “information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange, electronic mail, telegram, telex or telecopy” (Article 2(a) of the MLEC and Article 4(c) of the e-CC). The various provisions of the MLEC refer directly to the notion of “data message”, while in the ECC “data message” is the building block used to define the fundamental concept of “electronic communication”.

4. THE UNIFORM ELECTRONIC TRANSACTIONS AND SALES LAW

On the basis of the principles discussed above and of other provisions found in UNCITRAL texts, it is possible to examine specific issues that arise from the use of electronic means in connection with international sales contracts. **14.23**

(a) Place of business in an electronic environment

In the CISG, the place of business of the parties is significant both in terms of the Convention’s scope of application and with respect to the formation and performance of the contract. However, the CISG does not contain a definition of that notion (or of any other notion) and its Article 10 deals only with cases when parties have multiple or no place of business. In an electronic environment, defining the place of business may be more challenging than offline and therefore requires additional legislative guidance. Article 4(h) of the e-CC defines the place of business as “any place where a party maintains a non-transitory establishment to pursue an economic activity other than the temporary provision of goods or services out of a specific location”. That definition is in line with the prevailing interpretation of that notion when applying the CISG.¹⁶ **14.24**

Article 6 of the e-CC deals with the actual determination of the place of business. Article 6, para 1 of the e-CC introduces a rebuttable presumption that a party’s place of business is in the location indicated by that party. Article 6, para 2 of the e-CC adopts the same approach of Article 10, para 1(a) of the CISG by indicating that, in case of multiple places of business, the relevant place is the one that has the closest relationship to the contract, having regard to **14.25**

¹⁶ UNCITRAL, *Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods* (United Nations 2016) sub Article 1, para 5; see also AE Butler, “Interpretation of “place of business”: Comparison between provisions of the CISG (Article 10) and Counterpart Provisions of the Principles of European Contract Law” (2002) 6 *Vindobona J Int’l Comm L & Arb* 275, 276.