ΕΛΛΗΝΙΚΗ ΔΗΜΟΚΡΑΤΙΑ
Εθνικόν και Καποδιστριακόν Πανεπιστήμιον Αθηνών
ΙΔΡΥΘΕΝ ΤΟ 1837

ΝΟΜΙΚΗ ΣΧΟΛΗ

ΕΝΙΑΙΟ ΠΡΟΓΡΑΜΜΑ ΜΕΤΑΠΤΥΧΙΑΚΩΝ ΣΠΟΥΔΩΝ
ΚΑΤΕΥΘΥΝΣΗ: Διεθνών και Ευρωπαϊκών Σπουδών - Δημόσιο Διεθνές Δίκαιο
ΠΑΝΕΠΙΣΤΗΜΙΑΚΟ ΕΤΟΣ: 2018 – 2019

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The UN Convention on Contracts for the International Sale of Goods under the Law of Treaties

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Αθήνα, 30/09/2019

INDEX OF ABBREVIATIONS

App	Application
Cf	Confer
CISG	United Nations Convention on Contracts for the International Sale of Goods[1]
e.g.	*exempli gratia* (for example)
ECHR	International Court of Human Rights
ECJ	European Court of Justice
EU	European Union
ICJ	International Court of Justice
Ibid.	*ibidem* (in the same place)
edn	Edition
et al	*et aliii* (and others)
etc	*et cetera* (and so forth)
et seq.	*et sequens* (and following)
ICSID	International Center for Settlement of Investment Disputes
i.e.	*id est* (that is)

[1] A/CONF. 97/18 (1980).

ILC	International Law Commission
n	note
No	number
para(s)	paragraph(s)
PCA	Permanent Court of Arbitration
UK	United Kingdom
UN	United Nations
US	United States
UNCITRAL	United Nations Commission on International Trade
v	*versus* (against)
VCLT	Vienna Convention on the Law of Treaties[2]
Vol	Volume
WTO	World Trade Organization

[2] 1155 U.N.T.S 331 (1969).

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INTRODUCTION

The present paper seeks to demonstrate the relevance of the law of treaties to the United Nations Convention on Contracts for the International Sale of Goods (hereinafter "CISG").[3]

As Dörr put it, the law of treaties constitutes the "backbone of the international legal order".[4] The rules of the law of treaties are codified in the Vienna Convention on the Law of Treaties (hereinafter "VCLT").[5] The VCLT, particularly, is an international agreement that establishes rules and procedures regarding the general operation of international treaties; their entering into force, amendment, termination, interpretation. It is, for this reason, known as the "treaty on treaties".[6] Already in 1949, the International Law Commission (hereinafter "ILC") started codifying recognized customary rules of the law of treaties, which were ultimately incorporated in the VCLT that entered into force in 1980.[7] In this sense, the role of the VCLT in determining the function of international treaties is decisive.

The rules that the VCLT includes are residual.[8] This means that, firstly, the VCLT provides flexible tools for dealing with challenges in the conclusion of treaties, but it is ultimately left upon States to decide on the procedural and substantive content of their agreements. Secondly, that the VCLT is *lex generalis* to the international agreements it governs, serving as gap-filling mechanism for matters not regulated by *lex specialis*.[9]

The CISG, on the other hand, is an international agreement that establishes a uniform text of law governing international sales of goods. It particularly applies to contracts of sale of goods between parties whose places of business are in different States, either when the States are Contracting States or when the rules of private international law point to the application of the law of a Contracting State.[10] The CISG represents the goal of the United Nations (hereinafter "UN")

3 *The United Nations Convention on Contracts for the International Sale of Goods*, United Nations Convention on Contracts for the International Sale of Goods (adopted 11 April 1980, entered into force 1 January 1988) 19 ILM 668 (1980) (hereinafter "CISG").

4 Dörr O, Schmalenbach K, *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2018) Preface.

5 *Vienna Convention on the Law of Treaties*, 1155 U.N.T.S 331 (1969) (hereinafter "VCLT").

6 Aust A, *Modern Treaty Law and Practice* (2nd edn, Cambridge University Press 2013) 11.

7 Klabbers J, The Concept of Treaty in International Law (Kluwer Law International 1996) 4; Cannizzaro E, *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press 2011) 5; Dörr, Schmalenbach (n 2) Preface.

8 Aust (n 4) 7; Villiger M E, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff 2009) 5.

9 Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law 2006 para 15; ILC Guide, paras 17-8; Gazzini T, *Interpretation of International Investment Treaties* (Oxford and Portland 2016) 124, who recognizes this principle as aiding tool to literal interpretation under article 31 VCLT.

10 CISG, article 1.

Commission on International Trade (hereinafter "UNCITRAL") to efficiently promote the development of international trade by harmonizing the rules that govern international business transactions.[11] The final text of the CISG was adopted in 1980 by the 1980 Vienna Diplomatic Conference. In 1988, the CISG entered into force, initially for eleven countries. To date, 92 States have ratified the CISG.[12]

The CISG is divided into four main parts. Part one contains rules regarding its sphere of application and a number of general provisions. Part two deals with the formation of international contracts of sale of goods, while part three with the obligation of the parties in a contract of sale as well as the remedies that are to be provided in case of breach of contract. Lastly, part four includes the final clauses dealing with the CISG's entering into force and termination, as well as the permissible reservations and declarations.

The CISG forms "international agreement concluded between States",[13] and thus falls under the scope of the VCLT. At first sight, one may take by surprise this remark. Because even though the CISG is "international agreement" whose operation is regulated by rules of public international law, it in fact regulates matters of private international law. In other words, while in most cases international treaties set forth rights and obligations between Contracting States, the CISG deals with legal relations between private parties.[14] Arguably, the protection of individuals is ensured by a number of international treaties, such as Investment Agreements, which aim at the investors' protection, as well as Human Rights treaties. Yet these types of treaties impose clear and precise obligations on Contracting States; for instance, to treat investors in a fair and equitable manner or take positive measures to ensure the individuals' human rights respectively.

However, the fact that the CISG deals primarily with private parties' rights and obligations in no way means that Contracting States do not have obligations towards each other. The CISG stipulates that "when a State ratifies, accepts, approves or accedes to this Convention […], this Convention […] enters into force in respect of that State". In addition, it provides that "this Convention applies to contracts of sale of goods between parties whose places of business are in different States".[15] *Ergo*, the CISG definitely impose a specific obligation on Contracting States; to bring their domestic law in conformity with its provisions. By non-complying with this duty, the CISG Contracting States will violate their obligations under international law. Because, under

[11] Cantora M, *The CISG after Medellin v Texas: Do U.S. Businesses Have It? Do They Want It?* (2008) Journal of International Business and Law 111, 112.

[12] Pace Database, available at

[13] VCLT, article 2(a).

[14] Basedow J, *Uniform Private Law Conventions and the Law of Treaties* (2006) HeinOnline 73, 732.

[15] CISG, article 1.

the *pacta sunt servanda* principle, the CISG Contracting States must perform all of their obligations in good faith.[16]

The above brief analysis aims at demonstrating that the law of treaties applies to international agreements as per articles 1 and 2(a) VCLT regardless of their content. In consequence, the fact that the CISG primarily aims at the unification of private international law, does not exclude the VCLT's application. Rather, the VCLT remains always on the background by laying down obligations, customarily established, that all States must comply with.

Against this backdrop, the present paper is separated in three Chapters. The first one seeks to demonstrate that the CISG meets all the requirements for a treaty to fall under the scope of the VCLT. It is a written agreement between States that is governed by international law.

The second Chapter refers to the issue of the CISG's interpretation. The CISG, specifically, includes its own interpretative clause in article 7. However, this does not exclude the application of the interpretation rules and principles that the VCLT provides for. Quite to the contrary, articles 31 – 33 VCLT are employed for the following purposes; firstly, to supplement the interpretative clause of the CISG, which does not contain the means that are provided under the customary interpretation rules. Secondly, to construe the broad – and thus vague – notions that are mentioned in the CISG's interpretative clause itself. Because should the meaning of the terms referred to in article 7 CISG are not clear, they cannot even more be used as interpretation tools.

The third and last Chapter addresses certain issues arising out of the Final Part of the CISG. This part of the CISG is related to the CISG's entering into force and termination, as well as to reservations and interpretative declarations. Again, the CISG applies as *lex specialis*, but the law of treaties provides solutions to matters that the CISG does not address and are thus disputed as to their application. For instance, it is examined whether the CISG may be terminated as a consequence of its material breach by a Contracting State. Practically, this would mean that should a Contracting State not abide by its obligation to apply the CISG, another Contracting State may suspend its operation – or even terminate it – by also non-adjusting its domestic legislation or non-applying it through its own national courts. Since the CISG is a law-making treaty that provides for private parties' rights and obligations, it is deduced that it generates "integral" obligations to

[16] The *pacta sunt servanda* principle is established under the law of treaties, in article VCLT, article 26; *South China Sea Arbitration (The Republic of the Philippines v The People's Republic of China)* (Case No 2013-19) (Award) (2016) (PCA) paras 1171, 1196; *Teinver SA, Transportes de Cercanías SA and Autobuses Urbanos del Sur SA v Argentine Republic* (ICSID Case No ARB/09/01) (Award) (2017) para 447; *Vattenfall AB and others v Federal Republic of Germany (ICSID Case No ARB/12/12)* (Decision on the Achmea Issue) (2018) paras 155-156; *Mobil Investments Canada Inc v Canada (ICSID Case No ARB/15/6)* (Decision Jurisdiction and Admissibility) (2018) para 165; *Chevron Corporation (USA) and Texaco Petroleum Corporation (USA) v Republic of Ecuador (Case No 2009-23)* (Second Partial Award on Track II) (2018) (PCA) paras 7.83-4, 7.106.

be performed by all parties.[17] As such, assuming that a material breach could be established, a party "specially affected" by the breach would invoke this breach as ground for suspending or terminating the CISG.[18]

What is also examined under the last Chapter is the CISG's regime regarding reservations and interpretative declarations. The CISG provides for certain permissible "declarations" and prohibits the formulation of reservations not provided for in its text. The gaps that the CISG contains are filled by virtue of the VCLT and the ILC Guide to Practice on Reservations to Treaties. On this basis, solutions are provided as to the interpretation, application and effect of reservations, as well as to whether interpretative declarations are permissible under the CISG based on the "object and purpose" formula that is employed under the law of treaties.

[17] For the matter regarding the CISG's classification as "law-making" treaty, see supra Chapter I, A,2; Dörr, Schmalenbach (n 2) 1261; ILC Report of the ILC on the Work for its Second session, Vol II, *Yearbook of the International Law Commission* (1963) UN doc A/CN.4/107 para 128.

[18] VCLT, article 60(2)(b).

I. The CISG under the law of treaties regime

A. The CISG as "international agreement" in the sense of articles 1 and 2(a) VCLT

Articles 1 and 2(1)(a) VCLT cumulatively lead to the conclusion that the CISG falls under the scope of the VCLT. In particular, as per article 1, the VCLT applies to "treaties between states".[19] The definition of the "treaty" is set forth in article 2(1)(a) as "an international agreement concluded between states in written form and governed by international law".[20] This definition demonstrates that the "treaty" is a generic term, encompassed in the "agreement" within the meaning of article 2(1)(a).[21] The CISG meets all the aforementioned requirements, that are examined one by one in the present chapter.

First and foremost, the CISG constitutes "international agreement". As already stated, the term "agreement" is wider than the term "treaty", and includes also titles such as "Convention", "Accord", "Protocol" etc.[22] An international agreement particularly consists of two elements; "communication" between the states, either verbal or written, and regulation "future behavior", that is regulation of the parties' legal relations.[23] Additionally, this agreement shall be "international", which means that binding legal obligations are to be established *internationally*.[24] By contrast, an international agreement does not include agreements that fall within a state's domestic sphere or under its domestic law.[25]

The CISG fulfills the requirements of "international agreement"; it is a Convention, *i.e.* an agreement that establishes binding legal obligations internationally, in the sense that obliges Contracting State to comply with the duties stemming from the CISG. In other words, Contracting

[19] The 1969 Vienna Convention on the Law of Treaties (VCLT), article 1.

[20] VCLT, article 2(1).

[21] *Aegean Sea Continental Shelf (Greece v Turkey)* (Jurisdiction) (1978) ICJ Reports 3 para 95; *Obligation to Negotiate Access in the Pacific Ocean (Bolivia v Chile)* (Merits) General List No 153 (2018) (ICJ) para 116; Dörr O, Schmalenbach (n 2) 29; Klabbers 2011 (n 5) 37; Villiger (n 3) 77.

[22] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* (Preliminary Objections) (1926) ICJ Reports 331 para 30; *Customs Régime Between Austria and Germany* (Advisory Opinion) (1931) Series A/B no 41 (PCIJ) para 47; *South China Sea Arbitration* (n 14) para 214; *Maritime delimitation in the Indian Ocean (Somalia v Kenya)* (Preliminary Objections) (2017) ICJ Reports 3 para 42.

[23] *Aegean Sea Continental Shelf (Greece v Turkey)* (n 19) para 57; Klabbers J, *The Concept of Treaty in International Law* (Kluwer Law International 1996) 302.

[24] [Emphasis given]; *Frontier Dispute (Burkina Faso v Mali)* Judgment (1986) ICJ Reports 554 para 34; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)* (Jurisdiction and Admissibility) (1995) ICJ Reports 112 paras 26–7; see general *Aegean Sea Continental Shelf* (n 19); Klabbers 2011 (n 5) 77; Villinger (n 6); ILC Report of the ILC on the Work for its Fourteenth session, Vol II, Yearbook of the International Law Commission (1962) A/CN.4/SER.A/1962/Add.l para 32.

[25] *Ibid.*

States have the public international law obligation to bring their domestic law in conformity with the CISG by enforcing it through their national courts.[26]

The second requirement for a treaty to fall under the scope of the VCLT is related to its form; the agreement at stake shall be "written".[27] This condition was imposed after the ILC's recommendation "in the interests of clarity and simplicity".[28] This form proves the existence of the parties' consent and safeguards that their real intention be upheld.[29] Hence, the CISG being consisted of a written text that it is notably deposited in the Secretary- General of the UN,[30] meets this given requirement.

Moreover, the scope of the VCLT is limited to agreements that are "concluded between states".[31] The VCLT does not define the notion of the "state", but terms such as "negotiating state",[32] "contracting state"[33] and "third state"[34] refer to a central notion of "state".[35] Fitzmaurice broadly defined "state" as "an entity consisting of a people inhabiting a defined territory, under an organized system of government, and having the capacity to enter into international relations binding the entity as such, either directly or through some other state".[36] Another definition formulated by Brierly was that of "a member of the community of nations".[37] Similarly, there is no particular meaning of the term "concluded"; the conclusion of an agreement takes place when the states express their indefinite intention to be bound by it,[38] represented by the duly authorized

[26] Basedow (n 12) 737; See also on this matter McNair L, *The Law of Treaties* (Oxford University Press 1986) 79 et seq.

[27] VCLT, article 2(1)(a). see *Case T-257/16 (NM v European Council)* (Order of the General Court) (2017) Curia (Court of Justice of the European Union) para 26.

[28] Dörr, Schmalenbach (n 2) 34; Klabbers 2011 (n 5) 48; Aust (n 4) 19; Villinger (n 6) 79.

[29] Aust (n 4) 19, Klabbers 2011 (n 5) 49; *Aegean Sea Continental Shelf* (n 19) para 56; *Anglo-Iranian Oil Cotnpany case (United Kingdom v Iran)* (Preliminary objections) (1952) ICJ Reports 93 para 112; *US v Gonzalez* (1985) 11th Circuit 781 (US Court of Appeals).

[30] The 1980 UN Convention on Contracts for the International Sale of Goods (CISG), article 89.

[31] VCLT, article 2(1).

[32] VCLT, article 2(1)(e).

[33] VCLT, article 2(1)(f).

[34] VCLT, article (2)(1)(h).

[35] Klabbers 2011 (n 5) 48; Aust (n 4) 18; ILC Report of the ILC on the Work for its Seventheenth session, *Yearbook of the International Law Commission* (1965) A/CN.4/SER.A/1965/Add.l 11; Nascimento e Silva, *The 1969 and the 1986 Conventions on the law of treaties: a comparison* in Rosenne S, Dinstein Y, Tabory M, *International law at a time of perplexity: essays in honor of Shabtai Rosenne* (Dordrecht, Nijhoff 1989) 461-463.

[36] ILC Report of the ILC on the Work for its Tenth session, *Yearbook of the International Law Commission* (1958) A/CN.4/115 para 55.

[37] ILC Report of the ILC on the Work for its Third session, *Yearbook of the International Law Commission* (1951) A/1858 (A/6/9) paras 74-5.

[38] Arts. 11 – 17 VCLT; *Nauru Anglo-Iranian Oil Company case (United Kingdom v Iran)* (Preliminary objections) (1952) ICJ Reports 93 para 112; *Certain phosphate lands in Nauru (Nauru v Australia)* (Preliminary objections) (1992) ICJ Reports 240; O'Connell D, *International Law* (2nd edn Vol I 1970) 440.

person to this end.[39] The CISG is indeed concluded between states; until 9 May 2019, 92 states have ratified this given Convention.[40]

Lastly, to fall under the scope of the VCLT, treaties must be "governed by international law".[41] As Barton pointed out in the relevant Report of the ILC, "international law" means "public international law".[42] The requirement that the agreement is governed by international law entails that the body of law applicable to the execution and interpretation of a treaty, *i.e.* to all matters pertaining to its validity, binding force, effect, application and termination shall be the sources of law enumerated in article 38 ICJ.[43] Essentially, this requirement aims at differentiating between international agreements that are governed by public international law and those regulated by a state's national system albeit them being concluded between states.[44] This requirement also indicates the intention of the parties to establish international legal obligations rather than non-legally binding statements.[45] For example, as the ILC pointed out during its 485th Meeting, agreements between states concerning commercial matters, such as the purchase by one state of property of another state, may be governed by the domestic law of the site of the property.[46] Should Contracting States do not explicitly or implicitly designate national law as the "proper law" of their agreement, it is presumed that the latter is governed by international law, regardless of its content.[47] This is accordingly the case with the CISG, which is a multilateral treaty that does not provide for any domestic law to govern it but rather establish the legal obligations that are binding on Contracting States. For this reason, the issues referring to its validity, effect, interpretation application and termination are governed by public international law.

B. The classification of the CISG as international treaty

[39] VCLT, article 7; see also *Qatar v Bahrain* (n 5) para 35; Villinger (n 6) 78.

[40] Pace Database, available at: http://www.cisg.law.pace.edu.

[41] VCLT, article 2(1)(a).

[42] ILC Report of the ILC on the Work for its Fourteenth session, Vol II, *Yearbook of the International Law Commission* (1962) A/CN.4/SER.A/1962/Add.l 162.

[43] Dörr, Schmalenbach (n 2) 35; Cannizzaro (n 5) 670.

[44] Dörr, Schmalenbach (n 2) 35; Villinger (n 6) 80; Klabbers 2011 (n 5) 54; Gerald, Fitzmaurice, ILC Report of the ILC on the Work for its Fourteenth session, Vol II, *Yearbook of the International Law Commission* (1962) A/CN.4/SER.A/1962/Add.l.

[45] Klabbers 2011 (n 5) 56; ILC Report of the ILC on the Work for its second part of its Seventeenth and Eighteenth session, Vol II, *Yearbook of the International Law Commission* (1966) A/CN.4/SER. A/1966/Add. 1 189.

[46] ILC Report of the ILC on the Work for its Thirtieth session, Vol I, *Yearbook of the International Law Commission* (1959) A/CN.4/SER. A/1959 33.

[47] Dörr, Schmalenbach (n 2) 37; Delaume R D, *The Proper Law of Loans Concluded by International Persons* (1962) (American Journal of International Law) 63 76.

1. The CISG as multilateral and universal treaty

International treaties are first and foremost classified according to laterality, *i.e.* to the number of Contracting States that is involved, as "bilateral" and "trilateral", whose meaning is self-explanatory, "plurilateral", that are commonly open to a certain number of parties due to their particular subject matter or geography,[48] and "multilateral" or, otherwise called, "collective", where neither numerical nor geographical limitations exist.[49] Another classification of international treaties is that according to geography, as universal and regional.[50] The CISG is multilateral treaty, ratified by 94 states, and universal, since it involves parties from all parts of the world, without geographical restrictions.[51]

2. The CISG as law-making treaty

The distinction between "contractual" (*traités - contrats*) and "law-making" (*traités - lois*) treaties was first introduced by McNair.[52] This distinction is related to each treaty's content and purposes but it is mainly of academic interest.[53] Contractual treaties, on the one hand, are treaties of reciprocal, "synallagmatic" character, whose content is primarily related to obligations and rights that are established between Contracting States or involve legal transactions between them.[54] They may regulate political issues, such defense and cooperation, or economic matters, diplomatic relations, settlement of international disputes etc.[55]

48 For example, North American Free Trade Agreement (adopted 17 December 1992, entered into force 1 January 1994) 34 ILM 289.

49 Dörr, Schmalenbach (n 2) 31.

50 *Ibid*., Gamble J K, Kolb J B, *Multilateral treaties: An assessment of the concept of laterality* (1980) Loyola of Los Angeles International and Comparative Law Review 25, 27. e.g. 1983 Agreement for Cooperation in Dealing with the Pollution of the North Sea.

51 Pace Database, available at: https://iicl.law.pace.edu/printmail/30180).

52 McNair (n 24) 723; Dörr, Schmalenbach (n 2) 31.

53 Dörr, Schmalenbach (n 2) 30, 32; Pellet in Zimmerman A, Tams C J, *The Statute of the International Court of Justice: A Commentary* (3rd edn, Oxford University Press 2019) 689; Malanczuk P, *Akehurst's Modern Introduction to International Law* (7th edn, Routledge 1997) 36.

54 McNair (n 24) 723; Dörr, Schmalenbach (n 2) 1036; Carreau D, Marella F, *Droit International* (11th edn Pedone 2012) 149; ILC Report of the ILC on the Work for its Second session, Vol II, *Yearbook of the International Law Commission* (1963) UN doc A/CN.4/107 1006; Gardiner R, Treaty Interpretation (2nd edn Oxford International Library 2017) 239; Pellet in Zimmerman, Tams (n 51) 747; Malanczuk (n 51) 36; McLachlan *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention* (2005) International and Comparative Law Quarterly Vol 5 No 2 279.

55 Anderson D H, *Law-Making Processes in the UN System: Some Impressions* (1998) Max Planck Yearbook of the United Nations Law 23, 24.

By contrast, law-making treaties are exception of the reciprocity principle;[56] they are not based on "synallagma" but rather establish "interim obligations" that are binding on all ratifying parties, including also private parties.[57] The treaties of this kind have thus normative character or "quasi-statutory function".[58] In its General Comment 24, the Human Rights Committee emphasized on the law-making nature of human rights treaties, as well as of environmental and arms control treaties, based on the fact that these types of treaties *benefit persons* within the Contracting States' jurisdiction.[59] Additionally, treaties that aim at the unification of private law are in principle law-making treaties, since the contracting states are under the obligation to bring their internal law in line with the content of the treaty.[60] Other examples of law-making treaties are those with private international law content, as well as those regulating specific areas of law, such as public health or labor rights.[61] Accordingly, the CISG is classified as law-making treaty. As its purpose is the unification of private international law, as well as it regulates private international law matters regarding the international sale of goods and establishes rules for individuals, such as the rights and obligations of the buyer and seller and the allocation of risk.

3. The CISG as self-executive treaty

a. The meaning of self-executive and non-self-executive treaties

The matter of "self-executing" and "non-self-executing" treaties refers to the direct or not implementation of international treaties in national legal systems.[62] It is closely related to the

[56] UN HRC General Comment No 24, *Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant* (1994).

[57] *North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* Judgment (1969) ICJ Reports 3 para 114; D' Amato A, *Treaties as a Source of General Rules of International Law* (2011) Harvard International Law Journal Vol 3 7, 9; Emmanuel G T, *Le droit international comme ordre juridique* (Presses Universitaires de France 2016); Tams J C, Tzanakopoulos A, Zimmerman A, Richford A E, *Research Handbook on the Law of Treaties* (Edward Elgar 2014) 40; Mahoney C J, *Treaties as Contracts: Textualism, Contract Theory, and the Interpretation of Treaties* (2007) Yale Law Journal 826, 834; Brolmann C M, *Law-Making Treaties: Form and Function in International Law* (2009) Nordic Journal of International Law No 74 383; Klabbers J, *How to Defeat a Treaty's Object and Purpose Pending Entry into Force: Toward Manifest Intent* (2001) HeinOnline 285, 286.

[58] Dörr, Schmalenbach (n 2) 397; Roucounas E, *Uncertainties Regarding the Entry into Force of Some Multilateral Treaties* (1998) K Wellens International Law: Theory and Practice 179, 184.

[59] [Emphasis given UN HRC General Comment No 24, *Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant* (1994) para 8.

[60] Basedow (n 12) 737.

[61] Dörr, Schmalenbach (n 2) 1261.

[62] Bianchi A, *International Law and US Courts: The Myth of Lohengrin Revisited* (2004); Dalton R E, *Judicial Enforcement of Treaties: Self-Execution and Related* Doctrines (2006) Georgetown University Law Center 442751

concept of "monism" and "dualism";[63] "monism" describes legal systems where, directly after the ratification process is fulfilled, the treaty acquires the force of municipal law and is thus directly applicable within the national legal order by national courts and authorities.[64] "Dualism" describes legal systems where international treaties are not directly equitable to domestic law; their application must be authorized by additional national act(s), such as parliamentary ratification.[65] Examples of dualist legal systems are the US, Britain and Scandinavian countries, where international law texts are applied by national courts only after their transformation into national statutory law.[66]

Scholars have tried to generalize the criteria for the determination of the character of an international treaty as self-executive or not.[67] Particularly, the parties' intention and the treaty's object and purpose are decisive on whether the treaty in question requires implementing legislation before its entering into force.[68] Both of them are reflected in the language of the treaty, either explicitly or implicitly, the wording of the preamble, and the drafting history.[69] For instance, the existence of mandatory, present-tense provisions is indicative of the treaty's self-executive character.[70] In addition, the conferral of rights on private parties without the need of implementing legislation is also typical characteristic of self-executive treaties.[71]

Even in dualist legal systems, there is a strong presumption in favor of self-execution of international treaties.[72] The US Constitution, for instance, declares treaties to be the "supreme law

European Journal of International Law 751, 757; Swaine E T, *Taking Care of Treaties* (2008) Columbia Law Review331, 333; Sloss D L, *Executing Foster v Neilson: The Two-Step Approach to Analyzing Self- Executing Treaties* (2012) 301 Harvard International Law Journal 311; Enabulele A O, Okojie E, *Myths and Realities in Self-Executing Treaties* (2016) African Journal Online, Vol 10 No 1 2.

63 Malanckuz (n 35) 330.

64 Agusman D D, *Sefl-executing and non-self-executing treaties: What does it mean?* (2014) Jurnal Hukum International 320, 323.

65 See general *Islamic Republic of Iran v Boeing* Co (1985) 9th Circuit 771 (US Court of Appeal); Vázquez C M, Manuel C, *Laughing at Treaties* (1999) Georgetown Law Faculty Publications and Other Works 995, 2173-2174; Swaine (n 46) 353; Dörr, Schmalenbach (n 2) 485; Enabulele, Okojie (n 60) 146.

66 Sarcevic P, Volken P, *International Sale of Goods: Dubrovnik Lecures* (1986) 1 Oceana Publications 9; Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties* (2008) Georgetown University Law Center 601, 603.

67 Agusman (n 48) 332; Kelsen H, *Principles of International Law* (The Lawbook Exchange 2003) 401-447.

68 See general; *Clark v Allen* (1947) Justia US Court (Supreme Court of the US) para 331; *Medellín v Texas* (2008) Cornell Legal Information Institute (Supreme Court of the US); *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory* (*Danzig*) (Advisory Opinion) (1933) Series A/B no 44; Malanckuz (n 35) 332; Cantora (n 9) 112.

69 Kelsen (n 51) 436-8; Bradley C A, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law* (1997) Georgetown Law Journal 479, 523.

70 *Clark v Allen* (n 66) paras 503-8; see general *Asakura v City of Seattle* (1924) Justia US Court (Supreme Court of the US), 265.

71 *United States v Verdugo-Urquidez* (1939) 9th Circuit 1991 (Supreme Court of the US) para 17.

72 Bradley, *International Law in the U.S. Legal System* (1st edn, Oxford University Press 2015) 44; *Medelin v Texas* (n 52) p 8.

of the land".[73] This means that treaties are presumptively enforceable, in similar fashion as constitutional and statutory provisions are.[74] This perspective is in line with the *pacta sunt servanda* principle, being enshrined in article 26 VCLT and constituting fundamental principle in international law,[75] according to which "a treaty in force is binding upon the parties to it and must be performed by them in good faith".[76] In any case, the law of the treaties compels that "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".[77] Therefore, the invocation of the non-self-executive character of a treaty, if any, as a justification for not abying by it, would incompatible with the above principles.

b. The appearance of the notion of self-executive and non-self-executive treaties: different approaches

The distinction between self-executive and non-self-executive treaties was firstly appeared in *Foster v Neilson*,[78] where US Supreme Court was called on to determine the effect of the Treaty of Amity, Settlement and Limits on private land titles. [79] This Treaty provides that all grants of land "shall be ratified and confirmed to the persons in possession of the lands".[80] Based on this phrase, the Court decided that this Treaty was non-self-executive, on the grounds that legislative implementation was required before it could be equivalent to national law.[81] Judge Marshall particularly underlined that the US Constitution declares a treaty to be the law of the land, and thus

[73] The Consitution of the United States, article VI.

[74] Vazquez (n 50) 601.

[73] Hyland R, *Pacta Sunt Servanda: A Meditation* (1994) Virginia Journal of International Law 404, 405; *Nuclear Tests Case (New Zealand v France)* (Jurisdiction and Admissibility) (1974) ICJ Reports 457 para 49; *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* (Judgment) (2012) ICJ Reports 99 para 138; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)* (Merit) (2015) ICJ Reports 665 para 141; *Husayn (Abu Zubaydah) v Poland (App No 7511/13)* (2014) ECHR para 358; *Sidabras and others v Lithuania (App Nos 50421/08 and 56213/08)* (2015) (ECHR) para 73; *Abu Zubaydah v Lithuania (App No 46454/11)* (2018) (ECHR) para 220; *Al Nashiri v Romania (App No 33234/12)* (2018) (ECHR) para 198; *GmbH v Hauptzollamt Krefeld Helm Düngemittel (Case C-613/12)* (Judgment) (2014) (EUCJ) para 6; *Osorio Rivera and Family Members v Peru (C No 274)* (Preliminary objections, Merits, Reparations and Costs) (2013) Inter-American Court of Human Rights Series para 30; *Electrabel S.A. v Republic of Hungary* (ICSID Case No ARB/07/19) (Decision on Jurisdiction, Applicable Law and Liability) (2012) para 4.125; *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v Argentine Republic* (ICSID Case No ARB/03/19) (Award) (2015) para 24.

[76] VCLT, article 26.

[77] VCLT, article 27.

[78] Dörr, Schmalenbach (n 2) 486; Agusman (n 48) 322; Enabulele, Okojie (n 60) 2.

[79] *Foster & Elam v Neilson* (1829) Lexis 405 (Supreme Court of US) para 253.

[80] 1819 Treaty of Amity, Settlement, and Limits Between the United States of America and His Catholic Majesty, article 8.

[81] *Foster & Elam v Neilson* (n 75) para 255.

equivalent to an act of the legislature, without the need of any legislative provision; but when the instrument in question "import(s) a contract", under which the parties engage to perform a particular act, the treaty is considered political and must be "executed before it can become a rule of the court". [82] Yet in another case,[83] the Marshall's Court, considering the Spanish version of the above provision included in the Treaty of Amity, Settlement and Limits, took a different view; it held that even though it is indeed stipulated that a future legislative act shall take place,[84] it may be imported that the treaty shall be ratified and confirmed "by virtue of the instrument itself".[85] Hence, contrary to *Foster v Neislon,* the Treaty of Amity, Settlement and Limits was held as self-executive in *US v Percheman*.

The debate regarding the notion of self-execution revived in *Medellin v Texas*, where the Texas Court rejected the implementation of the *Avena* judgment issued by the ICJ.[86] In the latter case, it had been held that the US breached the Vienna Convention on Consular Relations by failing to notify the Mexican consular office of the conviction, sentence to death, and detention of 51 Mexican nationals, including Medellin.[87] As such, the US had the obligation to provide "review and reconsideration" of those convictions and on death row.[88] Yet, the Texas Court denied implementing the ICJ judgement, on the grounds that it was not directly enforceable and thus non-binding domestic law "unless Congress has enacted statutes implementing it or the treaty itself conveys an intention that it be self-executing and is ratified on that basis."[89]

The European approach regarding the notion of self-executive and non-self-executive treaties is reflected in *Danzig*, issued by the PCIJ.[90] The dispute concerned a Treaty between them for the regulation of work conditions for officials employed by the Polish Railways Administration in Danzig. The question before the PCIJ was whether individuals could pursue private claims based on this given Treaty before the courts of *Danzig*.[91] The PCIJ held that even though a treaty cannot, as such, create direct rights and obligations for individuals, such a right can be established

[82] *Ibid*.

[83] *US v Percheman* (1832) Justia US Court (Supreme Court of the US).

[84] *Ibid*, 88-89.

[85] *Ibid*.

[86] *Medellin v Texas* (n 52) p 9.

[87] *Avena and Other Mexican Nationals (Mexico v United States of America)* (Judgement) (2004) ICJ Reports para 153 (4) and (5); *see also Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (Mexico v United States)* (Judgment) (2009) ICJ Reports 3*;* Bradley, (n 58) 45.

[88] Agusman (n 48) 323.

[89] *Medellin v Texas* (n 52) pp. 8-27.

[90] *Jurisdiction of the Courts of Danzig* (Judgement) (1928) PCIJ Series B 15 p. 15-19; Enabulele, Okojie (n 60) 14; Iwasawa, *The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis (1986) Virginia Journal of International Law* 627, 650.

[91] *Jurisdiction of the Courts of Danzig* (n 72) 16.

if it was intended by the parties.[92] And in interpreting the treaty in question, it concluded that the "wording and general tenor" evince that the treaty's provisions are directly applicable as between the officials and the Administration of the Polish Railway.[93]

c. Conclusion: The CISG as self-executing treaty

The CISG is clearly self-executing treaty.[94] By virtue of article 99(2), the CISG "enters into force […] following the expiration of twelve months after the date of deposit of tenth instrument of ratification, acceptance, approval or accession". Article 1 also stipulates that the CISG "applies […] when the States are Contracting States or when the rules of private international law lead to the application of the law of a Contracting State".[95] The wording of these provisions indicates that the CISG directly binds the contracting states upon signature, ratification, acceptance, approval or accession. The list of the four options by which the CISG enters into force is written as being exclusive. Besides, the scope of application of the CISG is regulated by the CISG itself in articles 1 and 4; it applies *per se* to sales of goods where the parties' places of business are in different states and the countries are parties to the CISG.[96] Thus, the CISG is in any event directly applicable regardless of the ratifying state's legal system and constitutional structure.

The interpretation of the aforementioned provisions under the interpretative rule of the CISG, article 7, also leads to this conclusion. Article 7 CISG stipulates that "in interpreting this Convention, regard is to be had to its international character".[97] Within this context, it should be deduced that the drafters had in mind that the CISG, as multilateral treaty involving contracting

[92] *Ibid*. 18.

[93] *Ibid*.

[94] See general *Delchi Carrier Spa v Rotorex Corp* (1995) 2nd Cir 71 (Supreme Court of the US); Speidel R E, *The Revision of UCC Article 2, Sales in Light of the United Nations Convention on Contracts for the International Sale of Goods* (1995) Northwestern Journal of International Law and Business 165, 166; Candora (n 52) 41; Bailey J E, *Facing the truth: Seeing the Convention on Contracts for the International Sale of Goods as an Obstacle to a Uniform Law of International Sales* (1999) Cornell International Law Journal 273, 282; Gillet C P, Walt S D, *The UN Convention on Contracts for the International Sale of Goods: Theory and Practice* (Cambridge University Press, 2nd ed., 2016) 1-23; Blair H A, *Hard Cases Under the Convention on the International Sale of Goods: A proposed taxonomy of interpretative challenges* (2011) 269 Duke Journal of Comparative and International Law 288; Chang-fa L, *Treaty Interpretation Under the Vienna Convention on the Law of Treaties* (Springer 2017) 140.

[95] CISG, article 1.

[96] CISG, articles 1 and 4.

[97] Art. 7(1) CISG.

states with multiple legal systems, is to be directly and *per se* applicable as domestic law in the states' national systems.[98]

This conclusion is also drawn by both the intention of the parties and the CISG's object and purpose, as manifested within its language and drafting history.[99] Indeed, in the sixth session of the UNCITAL Working Group, it was decided that the CISG will be applicable to international sales of contracts of goods "without the need of parallel legislation".[100] For this reason, it was drafted in a manner that this agreement be clear; indicatively, almost all of its provisions are in present-tense. This has been said to be criterion of self-executing treaties.[101]

The nature of the CISG as self-executed treaty is further corroborated by its subject matter. The CISG regulates the substantive law governing the international sale of goods between private parties. The conferral of rights upon individuals and protection of contract rights without the need of implementing national legislation are typical characteristic of self-executive treaties. [102] On this basis, the PCIJ in *Daznig* held that the provisions of the *Beamtenabkommen* Treaty can be litigated by individuals because the terms of the Treaty constitute part of the parties' contract of service.[103] Particularly with regard to the CISG, in *Bread v Pruitt*, the Court held that it is self-executing treaty "in that it provides rights for individuals […] and does not merely list the responsibilities of the signing parties".[104] The protection of private rights under the CISG is in any case established, since the terms of the CISG are incorporated in the parties' contracts of sale of goods.

II. Determining the role of the VCLT in the CISG's interpretation

A. The interpretation clause of article 7 CISG

The CISG comes with its own rule for its interpretation, article 7(1), which provides as follows:

98 Candora (n 52) 116.

99 *Ibid*.; Bailey (n 92) 282.

100 [Emphasis given]; UN Report of the Sixth Session of the Working Group, *UNCITRAL Yearbook* Vol VI (1975) A/CN.9/100 (E.76.V.5), 49-62; see also Bailey (n 92) 282; see general Sarcevic, Volken (n 50).

101 Supra Chapter I.B.3.

102 *Delchi Carrier Spa v Rotorex Corp* (n 76), concerning the Convention for the International Sale of Goods); *Breard v Pruitt* (1998) 4th Circuit (Supreme Court of the US) 615, p. 662; see general *United States v Verdugo-Urquidez* (n 69) 939; Bailey (n 92) 282.

103 *Daznig* (n 52) p 21.

104 *Breard v Pruitt* (n 83) p 662.

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

As such, article 7(1) establishes autonomous interpretative criteria based on "internationality", "uniformity" and "good faith". The second paragraph of article 7 does not deal with interpretation but rather with "gap-filling". It particularly prescribes that questions regarding matters governed but not expressly settled by the CISG are to be settled in conformity with the general principles on which it is based and, in case of such principles being absence, in accordance with the law applicable by virtue of the rules of private international law.[105]

The present Chapter examines and analyzes the elements that article 7 consists of and distinguishes between the tools that are used for the CISG's interpretation and those that only deal with gap-filling. In this regard, it is argued that article 7(2) does not deal with the interpretation but rather with the application of the CISG provisions. The reason that both of them fall under the ambit of article 7 is that the treaty's interpretation and application, albeit the same, are closely related to each other.[106]

Beginning with article 7(1), the reference to the "international character" means that the CISG is to be treated as an autonomous body of law, *i.e.* interpreted and applied independently from any national law.[107] The international character of the CISG has been underlined in many cases, where it has been stated that the terms included in the CISG shall *not* be interpreted in the light of the meaning that is traditionally attached to them within a particular legal system, but

[105] CISG, article 7(2).

[106] Gourgourinis A, *The Distinction between Interpretation and Application of Norms in International Adjudication* (2011) Journal of International Dispute Settlement Vol 2 31, 57; see UN GA Report of the Study Group of the International Law Commission on the issue of *Fragmentation of International Law: Difficulties arising from the diversification and expansion of International Law* (2006) (A/61/10) para 23, where the ILC noted that "although a tribunal may only have jurisdiction in regard to a particular instrument, it must always *interpret* and *apply* that instrument in its relationship to its normative environment – that is to say 'other' international law".

[107] Bailey (n 92) 287; see general Bonell M J, *International Uniform Law in Practice – Or Where the Real Trouble Begins* (1990) The American Journal of Comparative Law Vol 38 865; Lookofsky J, *The 1980 United Nations Convention on Contracts for the International Sale of Goods* (2000) International Encyclopaedia of Laws-Contracts 1, 50; Brand R, Ferrari F, Flechtner H, *The Draft Uncitral Digest And Beyond Cases, Analysis And Unresolved Issues in the U.N. Sales Convention* (Sellier European Law 2003) 140; Ferrari F, *Uniform interpretation of the 1980 Uniform sales law* (1994) Georgian Journal of International Law 183, 200; Gebauer, Uniform Law, General Principles and Autonomous Interpretation, 683; Di Matteo A, *International Sales Law: A Global Challenge* (Cambridge University Press 2014) 80; WethmarLemmer M, *Regional harmonisation of international sales law via accession to the CISG and the importance of uniform interpretation of the CISG* (2014) De Jure Pretoria Vol 47 No 2 2, 3; Ryan L S, *The Convention on Contracts for the International Sale of Goods Divergent Interpretations* (1995) Tulane Journal of International and Comparative Law 99, 100.

rather within the context of the CISG itself.[108] In this regard, matters regulated in the CISG, such as the meaning of the terms "validity", "goods", "contract of sale", "conformity of the goods", "place of business" is understood in the light of its own rules, principles and standards.[109]

The notion of the "international character" of the CISG goes hand in hand with the need to promote its "uniform application".[110] For this to be achieved, courts and tribunals are required to take due regard of foreign rulings when interpreting the CISG.[111] The persuasive, albeit non-binding, authority of foreign decisions has been referred to by numerous courts and tribunals.[112] Importantly, the notion of uniformity encompasses the concept of precedent in the CISG.[113] Yet, there are no indications that the CISG establishes binding precedent on foreign decisions, according to neither the common law principle of *stare decisis* nor the civil law principle of

[108] [Emphasis given]; See general *CLOUT case No 271* (1999) Pace Database (Bundesgerichtshof); CLOUT *Case No 4505/2009* (2009) Pace Database (Polimeles Protodikeio Athinon); *CLOUT case No. 138 (Delchi Carrier SpA v Rotorex Corp)* (1997) Pace Database (US Court of Appeal); *CLOUT case No 1256* (Smallmon v Transport Sales Ltd) (2011) Pace Database (New Zealand Court of Appeal); *CLOUT case No 842* (2005) Pace Database (Tribunale di Modena); *CLOUT case No 747* (2005) Pace Database (Oberster Gerichtshof); *CLOUT case No 774* (2005) Pace Database (Bundesgerichtshof); Lisa M Ryan (n 105) 100.

[109]see general *CLOUT Case No 40552 (Agri sas di Ardina Alessandro & C v Erzeugerorganisation Marchfeldgemüse GmbH & Co KG)* (2004) Pace Database (Tribunale di Padova); *CLOUT Case No 867 (Mitias v. Solidea SrL)* (2008) Pace Database (Tribunale di Forli) para 55; *CLOUT Case No C A545/2010 (RJ & AM Smallmon v Transport Sales Limited and Grant Alan Miller)* (2011) Pace Database (Court of Appeal of New Zealand), considering only valid an interpretation based upon case law and scholarly writing on the CISG in regard to art 35; Viscasillias P P, *Interpretation and gap-filling under the CISG: contrast and convergence with the UNIDROIT Principles* (2017) Uniform Law Review Vol 22 4,5; Orlandi C G, *Procedural Law Issues and Uniform Law Conventions* (2000) Uniform Law Review 23,24; Kroll in Kroll/Mistelis/Viscasillias (n 107) para 12.

[110] Article 7 CISG.

[111] Commentary on the Draft Convention on Contracts for the International Sale of Goods, Official Records (1979) UN Doc A/CONF.97/5; *UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods* (2012) (hereinafter "CISG Digest") 42; Honnold J O, *Uniform Law for International Sales under the 1980 United Nations Convention* (1999) Kluwer Law International 109, 115; Bailey (n 92) 292; Lookofsky (n 105) 49; Ferrari (n 105) 205; Blair H A, *Hard Cases Under the Convention on the International Sale of Goods: A Proposed Taxonomy of Interpretative Challenges* (2011) Duke Journal of Comparative and International Law Vol 21 269, 271; see general Flechtner (n 105) 197.

[112] *CLOUT case No 1021 (Milk packaging equipment case)* (2008) Pace Database (Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce), where it was expressly stated that "foreign judicial practice [. . .] should be taken into consideration for the purpose of achieving uniform application of the Convention, pursuant to article 7(1) of the Convention"; see general *CLOUT case No 1029* (2009) Pace Database (Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce*); CLOUT Case No 1:09-CV-547-TWT (Innotex Precision Limited v Horei Inc et al)* (2009) Pace Database (US District Court); *CLOUT Case No CIV-2009-409-000363 (RJ & AM Smallmon v Transport Sales Limited and Grant Alan Miller)* (2010) Pace Database (High Court of New Zealand).

[113] Bailey (n 92) 293.

jurisprudence constante.[114] The task of taking due regard of previous decisions has been made easier by Case Law On UNCITRAL Texts (CLOUT)[115] and other CISG case law databases.[116]

Article 7(1) also requires the "observance of good faith" in the interpretation of the CISG process. This principle emphasizes the high standards of behavior that parties are expected to act with in international transactions.[117] *Ergo*, good faith is a tool on the basis of which the CISG provisions are interpreted in a way that their application leads to reasonable and equitable solutions.[118]

On the other hand, article 7(2) provides that:

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

This provision deals situations governed by the CISG but not expressly settled in.[119] Notably, it does not refer to matters excluded from the scope of the CISG by virtue of articles 4 and 5, *i.e*. the validity of the contract, the effect that the contract may have to the goods sold, and the liability of the seller for death or personal injury caused by the goods.[120] It rather refers to *preater legem* gaps, namely issues covered but not expressly resolved by the CISG.[121] As a first step, the CISG

[114] *Ibid*; Bonell in Bianca C M, Bonell M J, Borrera G J, *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (Giuffre 1987) 72; Kritzer A H, *Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods* (1995) Cornell Review of the Convention on Contracts for the International Sale of Goods (1995) 147, 187; Wethmar Lemmer (n 105) 3. For the meaning of "stare decisis" and "jurisprudence constant" see Bjorklund A K, *Investment Treaty Arbitral Decisions as Jurisprudence Constante* (2008) UC Davis Legal Studies Research Paper Series 265, 267; Paulsson J, *International Arbitration and the Generation of Legal Norms: Treaty Arbitration and International Law* (2006) Transantional Dispute Management 1, 17.

[115] Case Law on UNCITRAL Texts, CLOUT system, available at https://uncitral.un.org/. See also Brand R, Ferrari F, Flechtner H, *The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the U.N. Sales Convention* (Sellier European Law Publishers 2003).

[116] UNILEX, developed by the Centre for Comparative and Foreign Law Studies in Rome, published by Transnational Publishers (New York), available at: http://www.unilex.info. It is currently edited by Prof Bonell; Pace Law School Institute of International Commercial Law Website, Pace Database, available at: http://www.cisg.law.pace.edu; CISG-ONLINE, available at: http://www.cisg-online.ch. It is currently edited by Prof Ingeborg Schwenzer of the University of Basel, Switzerland.

[117] Bailey (n 92) 295.

[118] *CLOUT case No 595* (2004) Pace Database (Oberlandesgericht) para 25; see general *CLOUT case No 802* (*Improgess GmbH v Canary Islands Car, SL and Autos Cabrera Medina, SL)* (2008) Pace Database (Tribunal Supremo); Bonell (n 105) 69; Ferrari (n 105) 210; WethmarLemmer (n 105); Janssen A, Meyer O, *CISG Methodology* (2009) Uniform Law Review Vol 14 417, 443.

[119] CISG, article 7(2).

[120] Brand/Ferrari/Flechtner (n 105) 149; Bonell (n 105) 75.

[121] Brand/Ferrari/Flechtner (n 105) 150.

establishes an "intro-interpretation" with respect to interpretation issues or gaps that are "internal", *i.e.* that can be resolved within the context of the CISG itself. To this end, solutions are to be sought within the context of the CISG, in accordance with the general principles upon which it is based.[122]

Examples of these principles are the following; "party autonomy", which permits the parties to derogate from CISG provisions or completely exclude the application of the CISG,[123] "full compensation" for losses in the event that a breach occurs,[124] "freedom of form", by vir which the modification or termination of the contract, as well as the notice of non-conformity may be in oral form.[125] In addition, the CISG is permeated by the "*favor contractus*" principle, pursuant to which the interpreter must adopt approaches that lead to the contract being safeguarded,[126] as well as the "*pacta sunt servanda*" principle,[127] the criterion of "reasonable test" for the parties' behavior in international trade,[128] as well as the "mitigation of damages" principle on the basis of which the party that provoked damage shall bear minimize the latter to the extent that it is possible.[129] In a significant number of decisions, it has been held that the CISG integrates also a general principle regarding the place where monetary obligations may be performance. In specific, article 57 provides that, absent an agreement to the contrary, the price is to be paid at the seller's place of business.[130] Accordingly, it has been held that since no relevant provision regarding damages exists in the CISG, damages shall be also payable at the seller's place of business, by analogy of article 57.[131] Essentially, "good faith" constitutes also a general principle upon which the CISG is based.[132] Based on good faith, there are several cases where parties have been ordered to pay

[122] CISG Digest 109; Viscasillias (n 107) 15.

[123] *CLOUT Case No 4505/2009* (2009) Pace Database (Polimeles Protodikio Athinon); Brand/Ferrari/Flechtner (n 105) 160; Ferrari (n 105) 223; Honnold (1999) (n 109) 59; *CLOUT case No 608 (Al Palazzo Srl v Bernardaud di Limoges SA)* (2002) Pace Database (Tribunale di Rimini);

[124] *CLOUT Case No 40552* (n 107); Di Matteo L A, Dhooge L, Greene S/ Maurer V, *The Interpretative Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence* (2004) Northwestern Journal of International Law and Business 299, 319; Berman P S, *The inevitable legal pluralism within universal harmonization regimes: the case of the CISG* (2016) Uniform Law Review Vol 21 23, 30; Lassila L, *General Principles and Convention on Contracts for the International Sale of Goods (CISG) – Uniformity under an Interpretation Umbrella* (2017) Russian Law Journal Vol 5(2) 113, 120.

[125] *CLOUT case No 176* (1996) Pace Database (Oberster Gerichtshof); CISG Digest (n 109) 43.

[126] *CLOUT Case No 50181T (Macromex Srl v Globex International Inc*) (2007) Pace Database (International Centre for Dispute Resolution of the American Arbitration Association); Viscasillias (n 107) 17; see general Keller B, *Favor Contractus: Reading the CISG in Favor of the Contract* (2008) FS Kritzer 247.

[127] Viscasillias (n 107) 17.

[128] Ferrari (n 105) 80.

[129] *CLOUT case No 608* (n 121); 608 Brand/Ferrari/Flechtner (n 105) 166.

[130] *CLOUT Case No 11074* (2008) Pace Database (Amtsgericht [District Court] Sursee).

[131] *Ibid*.

[132] Ferrari (n 105) 213; Bonell (n 105) 80*; CLOUT Case No 13W48/09* (2009) Pace Database (Oberlandesgericht Celle of Germany); *CLOUT Case No BH6416 (Fresh-Life International BV v Cobana Fruchtring GmbH & Co, KG)* (2009) Pace Database (Rotterdam District Court); *CLOUT Case No 95/2004* (2005) Pace Database (Tribunal of International

damages due to their conduct being "contrary to the good faith principle".[133] Manifestations of the good faith principles are also "estoppel" and "venire contra factum proprium" principles.[134]

On the other hand, matters that the CISG does not govern at all, that has been called as "external gaps", are resolved by virtue of the rules of private international law, which lead to the application of either domestic law or other uniform law conventions.[135] This gap-filling method may be employed only *ultima ratio* in order for the uniform character of the CISG to be preserved.[136] One form of private international law that may be used to interpret the CISG are those set forth in the UNIDROIT Principles of International Commercial Contracts (hereinafter "UPICC").[137] The UPICC have been formulated by a Working Group consisted of a group of scholars representing various countries, in order to provide solutions to special requirements of international commercial contracts.[138] Since the UPICC are based upon similar general principles to the CISG, such as the party autonomy, the good faith, and the informality principles, their using as a means of interpretation of the CISG is an effective way to ensure uniformity and internationality.[139]

What is notable at this point is to distinguish between the "interpretation" of the CISG according to the tools of article 7(1) and "application" of either general principles upon which the CISG is based or the law applied pursuant to the rules of private international law for the filling of gaps. In the first case, the interpreter seeks to define or shed light on the meaning of the terms in

Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry); *CLOUT Case No 127/2005 (Kolmar Petrochemicals Americas, Inc v Idesa Petroquímica Sociedad Anónima de Capital Variable)* (2005) Pace Database (Primer Tribunal Colegiado en Materia Civil del Primer Circuito).

133 *CLOUT case No. 154 (SARL BRI Production Bonaventure v Société Pan African Export)* (1995) (Cour d'appel de Grenoble).

134 Viscasillias (n 107) 17; Lookofsky (n 105) 50; Herber in Schlechtriem/Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)* (Oxford University Press 4th Ed. 2016) 63.

135 CISG, article 7(2); Viscasillias (n 107) 15; Ferrari (n 105) 215.

136 *CLOUT Case No 50181T (Macromex Srl v Globex International Inc)* (2007) Pace Database (International Centre for Dispute Resolution of the American Arbitration Association); *CLOUT Case No KG-A40/3057-01 (DB Gas and Oil ApS v. JSC Novoil)* (2001) Pace Database (Federal Arbitration Court for the Moscow Region); Bonell (n 105) 83; Andreason R N, *MCC-Marble Ceramic Center: The Parol Evidence Rule and Other Domestic Law Under the Convention on Contracts for the International Sale of Goods* (2001) Brigham Young University Law Review 351, 375; Kotrusz J, *Gap-Filling of the CISG by the UNIDROIT Principles of International Commerial Contracts* (2009) Uniform Law Review 4th edn para 1.3.

137 Garro A M, *The Gap-Filling Role of the UNIDROIT Principles in International Sales Law: Some Comments on the Interplay between the Principles and the CISG* (1995) Tulane Law Review 1149, 1152; Quinn J P, *The Interpretation and Application of the United Nations Convention on Contracts for the International Sale of Goods* (2004) International Trade and Business Law Review 221, 230.

138 *CLOUT Case No 2319* (2002) Pace Database (Arbitration Institute of Netherlands); *CLOUT Case No 2004/07* (2004) Pace Database (China International Economic and Trade Arbitration Commission); Quinn (n 137) 230; *CLOUT Case No C070289N (Scafom International BV v Lorraine Tubes SAS)* (2009) Pace Database (Hof van Cassatie); Garro (n 137) 1152; Burton S/Eisenberg M, *Contract Law, Selected Source Materials Annotated (Selected Statutes)* (West Academic Publishing 2017) 25.

139 Garro (n 137) 1152; Burton (n 138).

question.[140] By contrast, the purpose of application is to give effect to the meaning that has been attached to treaty terms pursuant to their interpretation.[141] The differentiation between interpretation and application was touched upon in *Kasiliki-Sedudu*, where the ICJ observed that an agreement referring to "rules and principles of international law" authorizes the Court to not only *interpret* but also *apply* those rules and principles.[142] Similarly, in *Mavromatis*, it was underscored that the general rules of international law are to "applied as such" rather than interpreted.[143]

In essence, article 7(2) CISG differs from article 31(3)(c), according to which together with the context, any relevant rules of international law applicable in the relationships between the parties shall be considered in interpretation of treaties.[144] Thus, article 31(3)(c) being part of the General Rule of article 31 VCLT is used for the interpretation of treaty terms; the relevant rule of international law, be it treaty, custom or general principle of international law,[145] is used for the meaning of the term in question to be clarified, and does not apply directly, *per se*.[146] Conversely, article 7(2) prescribes that existing gaps are to be resolved by directly applying general principles upon which the CISG is based or the applicable law that the rules of private international law lead to. In the aforementioned example with the gap regarding the place of business where damages are to be paid,[147] article 57 that deals with the place where the price is paid, applies directly. There is no term that is interpreted; instead, article 57 is put in application by analogy.

B. The relation between the General Rule of interpretation and article 7 CISG

The CISG establishes its own self-contained regime dealing with interpretation, in article 7(1). This rule is *lex specialis* to the General Rule of interpretation enshrined in article 31 VCLT. The *lex specialis derogat lex generalis* principle is a judicial technique which suggests that when

140 Gourgourinis (n 104) 57.

141 *Ibid*.

142 [Emphasis given]; *Kasikili-Sedudu Island (Botswana v Namibia)* (Judgment) (1999) ICJ Reports 1045 para 91.

143 *Mavrommatis Palestine Concessions (Greece v Britain)* (Judgment) (1924) PCIJ Reports Series B No 3 31, 16.

144 VCLT, article 31(3)(c).

145 *Sabeh El Leil v France (App No 34869/05)* (2011) (ECHR) para 48; *Giuliani and Gaggio v Italy (App No 23458/02)* (2011) (ECHR) para 182; Linderfalk (n 198) 177; Pauwelyn, Joost, *Conflict of Norms in Public International Law* (Cambridge: CUP, 2003) 254; Marceau G, *Conflicts of Norms and Conflicts of Jurisdiction: The Relationship Between the WTO Agreement and MEAs and Other treaties* (2001) Journal of World Trade, Vol 35 1081, 1087.

146 Gourgourinis (n 104) 49.

147 See supra Chapter I.C.2.i.

two or more norms regulate the same subject-matter, the more specific norm prevails.[148] This principle derives from the fact that most of general international law is *jus dispositivum*, in the sense that parties may establish specific rights or obligations governing their relationship.[149] In the *North Sea Continental Shelf*, indicatively, it was stated that "rules of international law can by agreement be derogated from […] as between particular parties".[150]

The *lex specialis* principle constitutes general principle of international law and is often applied by legal literature and jurisprudence.[151] However, the application of *lex specialis* does not exclude the possibility of the relevant general law to apply when a matter is not regulated by special law.[152] Rather, in line with the systemic integration principle, reflected also in article 31(3)(c),[153] the *lex generalis* serves as gap-filling mechanism.[154] This is even more so when it comes to international customary law, whose "continuing validity"[155] cannot be contested. Indicatively, in *Gabcikovo Nagymaros*, even though the ICJ held that international legal relationships are above all governed by agreements that have been formulated as *lex specialis*, it underlined that parties are in any case "bound by rules of general international law".[156] Similarly, in *Nicaragua*, it was underlined that in such cases, "customary law continues to exist and apply".[157] The Iran – US States Claims Tribunal underlined in *Amoco International Finance* that the Treaty of Amity as *lex specialis* principle prevails over *lex generalis*, namely customary international law.

148 Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law 2006 para 5; Musa S N, *The Fragmentation of International Law: Contemporary Debates and Responses* (2016) The Palestine Yearbook of International Law XIX 177, 205.

149 *North Sea Continental Shelf* (n 55) 71; see general *Right of Passage over Indian Territory (Portugal v India)* (Judgement) (1960) ICJ Reports 6; Musa (n 146) 205; Gourgourinis (n 104) 285.

150 *North Sea Continental* (n 55) 71.

151 *Ibid.*; *Legal Consequences for States of the Continued Presence of South African Namibia (South West Africa) notwithstanding Security Council Resolution* (Advisory Opinion) (1971) ICJ Reports 1971, para 49; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) (1996) 1CJ Reports 226 para 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) (2004) ICJ Reports 136 para 106; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Rwanda) (DRC v Uganda)* (Judgement) (2005) ICJ Reports 6 paras 216-7; Thirlway H, *The Law and Procedure of the International Court of Justice 1960-1989* (British Yearbook of International Law 1990) 104-6; Gourgourinis A, *Lex Specialis in WTO and Investment Protection Law* (2010) German Yearbook of International Law 579, 585; Borelli S, *The (Mis)Use of General Principles of Law: Lex Specialis and the Relationship between International Human Rights Law and the Laws of Armed Conflict* (2015) Ius Gentium, Vol 46 265.

152 Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law 2006 para 15.

153 ILC Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law 2006 paras 17-8; Gazzini (n 7) 187; Fitzmaurice, Olufemi, Merkouris, *Treaty Interpretation and the VCLT: 30 Years on* (Brill 2010) 57.

154 Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law 2006 para 15.

155 Dörr, Schmalenbach (n 2) 15.

156 *Case Concerning the Gabcikovo-Nagymaros Project (Hungary v Slovakia)* (Judgment) (1997) ICJ Reports 7 para 132.

157 *Certain Activities Carried Out by Nicaragua in the Border Area*) (n 73) para 179.

But this does not render the latter irrelevant. Quite to the contrary, the rules of customary international law are used "to fill in possible *lacunae* of the Treaty and […] to aid interpretation and implementation of its provisions".[158]

The relationship between *lex specialis* and *lex generalis* is pertinent to the challenges posed by the "fragmentation of international law", *i.e.* the diversification of international legal norms.[159] The ILC worked on this issue to suggest ways and means of dealing with fragmentation and issued its "Conclusions", where it devotes a whole part to the relationship between specific and relevant general law.[160] There, it confirmed, *inter alia*, that "the application of *lex specialis* do not extinguish the relevant general law", which remains valid and fully applicable in situations not provided for by the latter.[161] Against this background, it underscores that treaties constitute *lex specialis* "by reference to the relevant customary law and general principles".[162]

In light of the above, the fact that article 7 CISG is *lex specialis* to 31 VCLT by no means entail that it excludes the application of the latter. First of all, as analyzed above, *lex specialis* applies in conjunction with *lex generalis* instead of excluding its application. Second of all, article 31 VCLT reflects customary rule of international law,[163] and thus its application, at least residually, cannot be excluded. The customary nature of article 31 VCLT was essentially underlined in *Kasikili/Sedudu Island*,[164] where the ICJ held that this provision was used for the interpretation of the Treaty between Germany and the UK that had entered into force eighty years previously, albeit the VCLT's non-retroactive nature.[165] On the top of that, neither Botswana or

158 *Amoco International Finance Corporation v. The Government of the Islamic Republic of Iran, National Iranian Oil Company, National Petrochemical Company and Kharg Chemical Company Limited (IUSCT Case No. 56)* (1987) (Iran-US Claims Tribunal) 222.

159 Gourgourinis (n 104) 583.

160 ILC Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law 2006 para 14.

161 *Ibid*., para 252(2).

162 *Ibid*., para 251(9).

163 *North Sea Continental Shelf cases* (n 55) para 72; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970) (Advisory Opinion) ICJ Reports 6 para 94; *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (Judgement) (1986) ICJ Reports, para 272; *Oil Platforms (Iran v United States)* (Preliminary Objections) (1996) ICJ Reports 812 para 23; *Japan-Taxes on Alcoholic Beverages (WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R)* (1996) (WTO Appellate Body) 10; *Kasikili/Sedudu Island* (n 140) para 18; *Case C-344/04 (International Air Transport Association and European Low Fairs Airline Association) (Judgement)* (2006) ECJ para 40; Aust (n 4) 11; Gardiner (n 52) 193; Dörr, Schmalenbach (n 2) 523; Fitzmaurice, Olufemi, Merkouris (n 151) 57 seq. For the formation of international custom see general Kyriakopoulos G D, *Formation of International Custom and the Role of Non-State Actors* in Pazartzis P, Gavouneli M, *Reconceptualising the Rule of Law in Global Governance, Resources, Investment and Trade* (Hart Publishing 2016).

164 *Kasiliki/Sedudu* (n 140) para 18.

165 *Ibid.*; *Ambatielos Case (Greece v United Kingdom)* (Jurisdiction) (1952) ICJ Reports 28, 19; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Judgment) (2012) ICJ Reports 422 paras 100, 2, 4; *Mesa Power Group, LLC v Government of Canada* (Case No 2012-17) (Award) (2016) (PCA); *GSB v Switzerland (App No 28601/11)* (2015) (ECHR) para 65; *Janowiec and others v Russia (App Nos 55508/07 and 29520/09)* (2013)

Namibia were parties to the VCLT. Yet, the ICJ declared the General Rule of interpretation applicable on the grounds that it reflects customary law.[166]

Besides, as the ILC underlined, the VCLT provides the framework on the basis of which fragmentation may be restricted.[167] Thus, article 7 CISG is neither an opt-out provision nor a derogation from 31 VCLT; rather, the VCLT rules on interpretation remain always on the background when it comes to the CISG's interpretation. At the end of the day, the use of the VCLT rules for the interpretation of the CISG contributes to achievement of uniformity, which is the ultimate goal of the CISG, as well as part of "*the very alphabet of customary international law*".[168]

Since customary international law is universally valid, all CISG Contracting States will interpret and apply it based on the same rules instead of resorting to domestic methods of interpretation. For this reason, interpreting treaties by means of customary international law promotes the harmonious, uniform application of law. This was further reiterated in *Ex Parte Adan*, where the House of Lords stated that the Refugee Convention must be given an autonomous and international meaning "derivable from the sources […] in articles 31 and 32 VCLT, and without taking color from distinctive features of the legal system of any individual contracting state".[169]

C. Employing the interpretation tools of VCLT in the context of the CISG

1. General Remarks

(ECHR) para 128; *Mu ibabi v Serbia (App 34661/07)* (2016) (ECHR) para 96; *Case C-613/12 (Gennaro Currà and thers v Bundesrepublik Deutschland, joined party: Repubblica italiana)* (Judgment) (2012) (ECJ) para 3; *Renée Rose Levy and Gremcitel S.A. v Republic of Peru (ICSID Case No ARB/11/17)* (Award) (2015) paras 146-7; *Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v Kingdom of Belgium (ICSID Case No ARB/12/29)* (Award) (2015) paras 167,8, 189; *Aaron C Berkowitz, Brett E Berkowitz and Trevor B Berkowitz (formerly Spence International Investments and others) v Republic of Costa Rica (ICSID Case No UNCT/13/2)* (Interim Award, Corrected) (2017) para 215; *Kichwa Indigenous People of Sarayaku v Ecuador (C No 172)* (Merits and Reparations) (2012) Inter-American Court of Human Rights Series para 36; *Osorio Rivera and Family Members v Peru* (C No 274) (Preliminary objection, merits, reparations and costs) (2013) Inter-American Court of Human Rights Series para 29; *African Commission on Human and People's Rights v Republic of Kenya (App No 006/2012)* (2017) para 62; Bjorge E, Cameron M, *Landmark Cases in Public International Law* (Hartt Publishing 2017).

166 *Kasiliki/Sedudu* (n 140) para 18.

167 Case C-344/04 (n 161) para 19.

168 Gardiner (n 52) 34.

169 *Secretary of State for The Home Department, Ex Parte Adan R v Secretary of State for The Home Department Ex Parte Aitseguer* (2000) European Database of Asylum Law (UK Court of Appeal) para 477.

The interpretation rules and principles of the law of treaties are pertinent to the CISG's interpretation in two aspects. Firstly, as supplementary means to article 7 CISG; even though the CISG contains specific interpretation rule, both the general interpretative rule enshrined in article 31, and articles 32 and 33 VCLT are employed for matters not regulated in article 7 CISG.[170] Secondly, as interpretation rules to article 7 CISG itself; its – admittedly - vague terms cannot be used for their own interpretation.[171]

With regard to the CISG's Final Provisions, including reservations and interpretative declarations, the issue of interpretation becomes more complex. For, on the one hand, the Final Provisions of the CISG, included in Part IV, deal exclusively with the obligations of the Contracting States towards each other.[172] They are not involved at any point with the obligations of the parties to a contract for the sale of goods. As such, it has been argued that the interpretation provision of the CISG calls for a more "flexible approach" by introducing notions such as "international principles" and "uniformity", which is not appropriate for interpreting the obligations of Contracting States.[173] Yet, on the other hand, article 7 CISG does not distinguish between the CISG's different parts. It refers to the interpretation of the "Convention", *i.e.* the entire Convention, including its final clauses. After all, the relation of article 7 CISG with the VCLT's interpretation rules is supplementary; therefore, the VCLT provisions will unavoidably be used for the interpretation of the CISG's Final Provisions and the obligations of States, and *vice versa*. The purpose of article 7 CISG for the achievement of the CISG's uniformity and international character is not limited to the provisions that regulate the rights and obligations of private parties. Because the application, which will follow the interpretation,[174] of the CISG will in any case have effect to individuals.

2. The VCLT interpretation provisions as supplementary to article 7

[170] Zeller B, *Four-Corners: The Methodology for Interpretation and Application of the UN Convention on Contracts for the International Sale of Goods* (2003) Pace Database para 44; Kotrusz (n 134) 124; Basedow (n 12) 741.

[171] Basedow (n 12) 743.

[172] Zeller (n 168) 110; Honnold (2009) (n 109) 135, where it is stated that "Rules of interpretation in the 1969 Vienna Treaty are pertinent to the obligations under the 1980 Sales Convention that the Contracting States undertake to each other but are not pertinent to the rules relating to the mutual obligations of the parties to the contract of sale"; Ferrari (n 105) 741.

[173] Zeller (n 168) 111.

[174] On the matter of the distinction between interpretation and application, see general Gourgourinis (n 104); see also Report of the International Law Commission Fifty-eighth session (2006) GA Official Records Sixty-first session Supplement No 10 (A/61/10), where ILC noted that "although a tribunal may only have jurisdiction in regard to a particular instrument, it must always *interpret* and *apply* that instrument in its relationship to its normative environment – that is to say 'other' international law".

a. The CISG in the light of article 31 VCLT

Article 31 VCLT sets forth the General Rule of Interpretation,[175] which essentially reflects a "single rule" on interpretation.[176] It stipulates that:

"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended."

From this single rule basic directives may be derived, that are related to the following needs; to consider the ordinary meaning of the terms and analyze them in the context of the entire text, to examine the terms included in light of the treaty's object and purpose, as well as to have recourse to the *traveaux preparatoires* and scholarly writings as last resort. This procedure of interpretation prescribed for all international conventions is perfectly compatible with the procedure described in article 7 CISG.[177] These directives are examined one by one in this chapter.

[175] See, among others, *Fábrica de Vidrios Los Andes, C.A. and wens-Illinois de Venezuela, C.A. v Bolivarian Republic of Venezuela (ICSID Case No ARB/12/21)* (Award) (2017) para 302; *Mera Investment Fund Limited v Republic of Serbia (ICSID Case No ARB/17/2) (Decision on Jurisdiction) (2018)* paras 121-2; *Mobil Investments Canada Inc. v Canada* (n 14) paras 158-60; *UP (formerly Le Chèque Déjeuner) and C.D Holding Internationale v Hungary (ICSID Case No ARB/13/35)* (Award) (2018) para 236; *The Matter of Ingabire Victoire Umuhoza v Republic Of Rwanda (App No 003/2014)* (2018) para 66; Tokas M, *Hanging in the Balance: The Prohibition of Protectionism in Article III and XX of the GATT 1994 in light of the "inherent balance" theory* (2019) Indian Journal of International Economic Law 196, 217; Gourgourinis A, *After Achmea: Maintaining the EU Law Compatibility of Intra-EU BITS Through Treaty Interpretation* (2018) European Investment Law and Arbitration Review Online 282.

[176] Dörr, Schmalenbach (n 2) 541; Cannizzaro (n 5) 165.

[177] Chang-fa (n 92) 146.

The notion of "good faith" as stands in the VCLT, required throughout the interpretation process, is examined in Part D of this Chapter.

i. The "ordinary meaning"

The first step of the interpretation process is the determination of the ordinary meaning of the term in question. The ordinary meaning is the "regular, normal, customary" meaning of a term, which may be found not only in dictionaries but also other sources of definition.[178] This method of interpretation is otherwise defined as textual interpretation.[179] As the ICJ put it in *Kasikili/Sedudu Island*, the ordinary meaning of the term in question is found by reference to "the most commonly used criteria in international law and practice, to which the parties have referred".[180] For instance, in *EC – Biotech*, the WTO Panel has considered an Explanatory Note to the Biosafety Protocol on Biological Diversity as a rule of international law for the purpose of interpreting the ordinary meaning of terms included in the SPS Agreement.[181] This means that the ordinary meaning of a term may be found in many sources, even non-binding legal documents that reflect the parties' agreement as to the meaning of the term in question.

For the determination of the ordinary meaning of the terms included in the CISG, the UPICC can be of great essence. The UPICC incorporate general principles and guidelines that apply to international commercial contracts.[182] They particularly summarize international practices regarding international business transactions, and, as such, reflect *lex mercatoria*; *lex mercatoria* is a transnational body of legal principles and rules that emerges from practice and usages in international trade.[183] For this reason, as it is expressly stated in their preamble, the

178 Dörr, Schmalenbach (n 2) 581; Gardiner (n 52) 183; *Competence of the General Assembly for the Admission of a State to the United Nations* (Advisory Opinion) (1950) ICJ Reports 57 63; *Eastern Airlines Inc v Floyd* (1999) Justia 499 (US Supreme Court) 537; *Case concerning Avena and other Mexican* (n 85) para 45; *Kasikili/Sedudu Island* (n 140) para 30.

179 Mc Dougal M S, Lasswell H D, Miller J C, *The Interpretation of International Agreements and World Public Order* (1994) Martinus Nijhoff Publishers 1, 10; Cannizzaro (n 5) 169; Aust (n 4) 235; Popa L E, *The Holistic Interpretation of Treaties at the International Court of Justice* (2018) Nordic Journal of International Law 249; Mc Rea, *The search for meaning: continuing problems with the interpretation of treaties* (2002) Victoria U Wellignton Law Review 199, 212; Dörr, Schmalenbach (n 2) 541; McDougal M S, Lasswell H D, and Miller J C, *The Interpretation of International Agree- ments and World Public Order* (1994) Martinus Nijhoff Publishers 1, 10.

180 *Kasikili/Sedudu Island* (n 140) paras 21, 27.

181 *EC – Customs Classifications of Frozen Boneless Chicken Cuts (WTO/ DS269/R, WTO/DS286/R) (2005)* (WTO Panel) para 194*; EC – Measures Affecting the Approval and Marketing of Biotech Products (WT/DS291-3/R) (2006)* (WTO Panel) para 158; See also *European Communities — Customs Classification of Frozen Boneless Chicken Cuts* (WT/DS269/RO) (2006) (WTO Panel) paras 7.220, 3.

182 2016 UNIDROIT Principles (UPICC), Preamble.

183 Berger K P, *The Lex Mercatoria (Old and New) and the TransLex-Principles* Translex Law Research para 48.

UPICC may be used "to interpret […] international uniform law instruments", since they "serve as model for […] international legislators".[184] Notably, the UPICC and the CISG contain a number of identical provisions.[185] As Professor Bonell states, "cases where the [CISG] depart from the [UPICC] are exceptional".[186] Their consideration thus may be of essence in determining the ordinary meaning of CISG terms.

The possibility for *lex mercatoria* or other non-binding instruments to be considered in the process of determining the ordinary meaning of a term has also been supported by Gazzini, who argues that "it would be over-formalistic to exclude from the process of interpretation *lex mercatoria*".[187]

After all, the seeking of the "regular" meaning of a term in "international law and practice" is perfectly in line with article 7 CISG, which requires that the CISG shall be interpreted in a uniform manner and in accordance with their international character; this "uniform" and "international" element is first of all to be found to the ordinary meaning of the term itself. For instance, the meaning of good faith is set forth in the UPICC in more precise manner than in the CISG.

Below, it is provided an example, which shows that the employment of the UPICC to determine the meaning of certain CISG provisions may be of essence, related to the term "impediment" of article 79 CISG. Pursuant to this provision, a party is not liable for failure to perform, *i.e.* not obliged to pay damages, if that failure was due to an "impediment" beyond his/her control. The process of determining whether the term "hardship" is encompassed by the term "impediment" is an interpretation rather than application of article 79 CISG. Therefore, article 31(1) VCLT not only supplements 7(2) CISG but also takes precedence over the latter, which is employed for only matters "not expressly settled" in the CISG. Applying article 31(1) VCLT in article 79 CISG, the UPICC will be used in addition to the CISG's context to shed light on the term "impediment". The provision of the UPICC that concerns non-performance due to "impediment" beyond a party's control is to be "read together with the Principles dealing with hardship";[188] The UPICC indeed provide for hardship as a situation due to which the parties can seek relief through renegotiation and, should this fail, through the remedy of adaptation, in Chapter

184 UPICC, Preamble.

185 For instance, the provisions regarding non-performance, UPICC Chapter 7 Section 2.

186 Bonell M J, *An International Restatement of Contract Law: The Unidroit Principles Of International Commercial Contracts* (Transnational Publishers 3rd edn 2005) 305-6.

187 Gazzini (n 7) 214.

188 UPICC, article 7.1.7, Comment 3. See also Chapter 6 of the UPICC that deals with hardship.

6.[189] It could therefore be deduced that, as with the UPICC, the parties to the CISG also intend for the term "impediment" to address also situations of hardship. If the "impediment" is interpreted in a way that it also covers hardship, the "exemption from liability" is accordingly narrowed down so that it also includes adaptation except from the relief from paying damages as remedy.

Another example of relevant to the CISG rules of international law are the Principles of European Contract Law. These principles have been recognized as "principles on which the CISG is based".[190] As such, relevant rules and principles included in the Principles of European Contract Law can be of essence when interpreting the meaning of the CISG terms. The Principles of European Contract Law reflecting soft-law are not binding upon all parties to the CISG, but this does not affect the possibility of them to be considered in the sense of Article 31(1) VCLT, on the basis of the second approach with regard to the interpretation of "the parties". Yet, even if a narrow interpretation of said provision is adopted, and thus "all parties" must be "bound" by the relevant rules to be used, there is still room for the Principles of European Contract Law to be used under article 31(1) VCLT; since many of these principles constitute general principles of law, they can certainly be of essence as rules "applicable between the parties". Such principles are "the duty of good faith" and "the duty to cooperate".[191]

Hence, for the determination of the meaning of terms included in the CISG terms, the UPICC constitute point of reference regarding the ordinary meaning of the term in question.

ii. The "context"

For the process of treaty interpretation, a literal interpretation of the term in question does not suffice; a systematic interpretation is also required to confirm the ordinary meaning of the term.[192] In the ICJ's words, treaty terms "obtain their meaning from the context they are used".[193]

189 UPICC article 6.2.3(4).

190 *CLOUT Case No 20050210* (2005) CISD Database (Netherlands Arbitration Institute); Di Matteo (n 105) 95.

191 The Principles of European Contract Law (2002) Section 2, articles 1.201 – 2. For the duty of good faith and the duty to cooperate as general principles see *Lake Lanoux Case (France v Spain)* (1957) Reports on International Arbitral Awards (Arbitral Tribunal) para 281; Nollkaemper A, Plakokefalos I, *The Practice of Shared Responsibility in International Law* (Cambridge University Press 2017) 86; Nollkaemper A, Jacobs D, *Shared Responsibility in International Law: A Conceptual Framework* (2013) Michigan Journal of International Law 359, 368–369.

192 Dörr, Schmalenbach (n 2) 543.

193 *Competence of the International Labour Organization in regard to International Regulation of the Conditions of Labour of Persons Employed in Agriculture* (Advisory Opinion) (1922) PCIJ Series B 23. The same opinion was later adopted by the ICJ in *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization* (Advisory Opinion) (1960) ICJ Reports 1960 158; *Golder v United Kingdom (App No 4451/70)* (1975) (ECHR) paras 29, 34,5.

This means that the ordinary meaning of a term acquires importance should it be confirmed by the "context" of the treaty, and there are no reasons leading away from this conclusion.[194]

The examination of the "context" requires examination of the preamble of the treaty, which describes its objectives and purposes,[195] annexes, as well as agreements and instruments associated with the conclusion of the treaty.[196] The terms "agreement" and "instruments" are broad enough so that they do not need to bear any specific form.[197]

"Agreements" that fall under article 31(2)(a) VCLT can be final acts, protocols of signature, explanatory notes and reports that form part of the treaty's preparatory work.[198] The weight of such agreements is significant for determining the treaty's context since they aim at clarifying matters not explicitly addressed in the main body of the treaty. For this reason, such documents are considered as part of the general rule of interpretation, rather than admitted as a supplementary means of interpretation as "preparatory work" material.[199] The term "instruments" referred to in article 31(2)(b) VCLT is to be interpreted broadly.[200] It thus covers, among others, documentation such as interpretative declarations, since they are associated with the treaty's conclusion, *i.e.* the process of its ratification. The relevance of interpretative declarations was also identified by the ILC in its Guide on Practice on Reservations to Treaties, despite the fact that it expressed doubts as to the admissibility of interpretative declarations under article 31.[201]

Consequently, when considering the context of the CISG, the CISG text must be examined in its entirety. As such, the interpreter will, *inter alia*, examine the preamble of the CISG, which sufficiently sets the framework upon which the CISG is based, as well as it sheds light on its object and purpose. In particular, according to its preamble, the CISG aims at the "development of

194 Gardiner (n 52) 185; *Arbitral Award of 31 July (Guinea-Bissau v Senegal)* (Order) (1989) ICJ Reports 1989 para. 82.

195 *Asylum (Colombia v Peru)* (Judgement) (1950) ICJ Reports 1950, 282; *Rights of Nationals of the United States of America in Morocco* (1952) ICJ Reports 176, 196; *Border and Transborder Armed Actions (Nicaragua v Honduras) (Jurisdiction and Admissibility)* (1988) ICJ Reports 106 para 97; *Canada—Term of Patent Protection WT/DS170/AB/R (2000) (WTO Appellate Body)* para 59.

196 Article 31(2); *Oil Platforms* (n 161) para 47; Gardiner (n 52) 180–181.

197 Gardiner (n 52) 185, 241.

198 Sinclair I, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester University Press 1984) 129 - 30; Gardiner (n 52) 239; Dörr, Schmalenbach (n 2) 551.

199 *Case Concerning Border and Transborder Armed Actions* (n 193) 229; Gardiner (n 52) 186.

200 Gardiner (n 52) 242; Linderfalk U, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Springer 2007) 142.

201 Addendum to Report of the International Law Commission Sixty-third session (2011) UN General Assembly Official Records, Sixty-sixth Session, Supplement No. 10, A/66/10/Add.1, Guideline 4.7.1, commentary para 24.

international trade on the basis of equality and mutual benefit", the promotion of "friendly relations among States", and the "removal of legal barriers in international trade".[202]

The CISG also incorporates "Complementary Texts" that are useful in its interpretation in the sense of article 31(2)(a) and (b). Particularly, the CISG is supplemented by the Limitation Convention, that establishes uniform rules regarding the period of time within which a party of a contract for the international sale of goods must initiate legal proceedings.[203] The CISG is also complemented by the Electronic Communications Convention.[204] On this basis, contracts and other communications exchanged electronically are valid and equal to traditional paper-based documents.[205] As stated in the CISG text, the Electronic Communications Convention promotes the accurate interpretation of the CISG with respect to the use of electronic communications.[206] For instance, terms such as "communication" and "writing" should be interpreted to include electronic communications.[207]

In sum, a contextual interpretation of the CISG, which is unavoidably employed for the determination of the terms included in it, but not embodied in its interpretative clause, is therefore to be made in conjunction with article 31 VCLT.

iii. The "object and purpose"

In determining the context of a treaty, guidance is provided by the treaty's "object and purpose", as stipulated in the final words of article 31(1) VCLT, whereby the teleological function of the interpretative rule is introduced. The "object" refers to the treaty's substantive content, the rights and obligations established by it, while the "purpose" is related to its general outcome that the parties aim to achieve.[208] In practice, however, the "object and purpose test" is combined in one test; the treaty should be interpreted in line with its *telos*.[209]

202 CISG, Preamble.

203 CISG, para 38.

204 CISG, para 39.

205 *Ibid*.

206 *Ibid*.

207 *Ibid*.

208 Dörr, Schmalenbach (n 2) 546.

209 Dörr, Schmalenbach (n 2) 546; *Rights of Nationals of the United States of America in Morocco* (n 193) para 196; *Asylum Case* (n 193) para 282; *Case of Baldeón García v Peru* (C No 174) (Merits, reparations and costs) (2006) Inter-American Court of Human Rights Series para 83.

The object and purpose of the treaty is drawn by many elements, such as the preamble, the title or general clauses of the treaty, or a combination of them.[210] In some cases, comparison with other treaties with similar content takes place for the purpose of the treaty's interpretation.[211] In *Oil Platforms*, for instance, the ICJ in determining the object and purpose of the Treaty of Friendship between Iran and the US, examined as a starting point its preamble, and then compared it with other types of treaties of friendship.[212]

Importantly, the teleological function enshrined in the "object and purpose test" incorporates the principle of effectiveness, according to which treaty terms should be interpreted in a manner that promotes the aim of the whole treaty.[213] The otherwise called *ut res magis valeat quam pereat* or *effet utile*, consistently upheld by the jurisprudence, has been said to be fundamental in interpretation of treaties.[214] The principle of effectiveness is employed for the interpretation of not only international treaties, but also of international contracts as part of the *lex mercatoria*.[215] In this context, it is also used by the CISG jurisprudence with respect to international contracts for the sale of goods; in cases that there are doubts about the meaning of a contract term, the interpretation that renders the contract effective should be preferred.[216] Yet, with respect to the interpretation of the CISG itself, this principle is neither mentioned nor derived by article 7. This gap is thus filled by article 31 VCLT, which is consistent with the CISG spirit.

iv. The "subsequent agreement"

Article 31(3) VCLT provides that, together with the context, it shall be considered any subsequent agreement, as well as any subsequent practice in the application of the treaty that establishes agreement of the parties with respect to its interpretation. Both subsequent agreement

210 Dörr, Schmalenbach (n 2) 546; *Bank of New York v Iran, Bank Markazi Case No A28* (2000) Iran-US Claims Tribunal Reports 5 para 58.

211 Dörr, Schmalenbach (n 2) 546.

212 *Oil Platforms* (n 161) para 27.

213 *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* (Judgement) (1990) ICJ Reports 1990 para 37; see general *Territorial Dispute* (n 161); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment)* (2007) ICJ Reports 43 para 24; *Asian Agricultural Products Ltd v The Republic of Sri Lanka* (ICSID Case No ARB/87/3) (1991) 106 et seq; Gardiner (n 52) 211; Dörr, Schmalenbach (n 2) 545.

214 *Lighthouses Case (France v Greece)* (Judgment) (1934) PCIJ Series A/B No 62, 27; *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (n 20) para 66; *Territorial Dispute (Libyan Arab Jamahiriya v Chad)* (Merits) (1994) ICJ Reports 6 paras 51-52; *Aegean Sea Continental Shelf* (n 19) para 52.

215 McMeel G, *The Construction of Contracts: Interpretation, Implication, and Rectification* (3rd edn, Oxford University Press, 2011) 167.

216 Berger K P, *The Creeping Codification of the Lex Mercatoria* (Wolters Kluwer 2nd edn 1999) 162.

and subsequent practice establish objective evidence of the parties' common understanding as to the meaning of the treaty.[217] For this reason, they represent an authentic interpretation, which is of significant weight in the interpretation process.[218]

The "subsequent agreement" of article 31(3)(a) differs from the "agreement" of article 31(2)(a) VCLT in that it is made "subsequently", *i.e.* a certain time after the conclusion of the treaty. In addition, while the "agreement" must be simply related to the treaty, the "subsequent agreement" refers to the interpretation and application of the treaty's provision.[219] Lastly, article 31(3)(a) VCLT requires that the agreement be made by "all" the parties; this requirement is not imposed under 31(2)(a) VCLT.

An example of "subsequent agreement" in the context of the CISG is the "V.89-53886 Explanatory Note of the UNCITRAL Secretariat on the United Nations Convention on Contracts for the International Sale of Goods"; this document was issued in June 1989, one year after the CISG entered into force, and provides clarifications as to the CISG's scope of application and interpretation, such as that all Contracting States, "*including domestic courts and arbitral tribunals*, are admonished to observe [the CISG's] international character and to promote uniformity in its application and the observance of good faith in international trade."[220] This Explanatory Note may be used as "subsequent agreement" in the sense of article 31(3)(a), albeit non-official legal document.

v. The "subsequent practice"

Of paramount importance in treaties' interpretation process is "any subsequent practice in the application of the treaty that establishes the agreement of the parties regarding its

[217] ILC Report on the work of its Sixty-fifth session (2013) General Assembly Official Records Sixty- eighth Session, Supplement No. 10 (A/68/10), Chapter 4 para 4 ILC Report of the ILC on Work for its Sixteenth session, Vol II, *Yearbook of the International Law Commission* (1964) A/CN.4/SER.A/1964/ADD.1 58; *Kasikili/Sedudu Island* (n 140) para 49, the Court also noted that it had itself frequently examined the subsequent practice of the parties in the application of that treaty, giving as examples*: Corfu Channel (United Kingdom of Great Britain and Northern Ireland v Albania)* (Judgment) (1949) ICJ Reports 25; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)* (Advisory Opinion) (1962) ICJ Reports 157, 160–61, and 172–75; *Military and Paramilitary Activities in and against* (n 161) paras 36–47; *Arbitral Award Made by the King of Spain* (Judgment) (1960) ICJ Reports 206–7; *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* para 19; *Temple of Preah Vihear (Cambodia v Thailand)* (Judgment) (1962) ICJ Reports 33–35.

[218] [Emphasis given]; *Kasikili/Sedudu Island* (n 140) para 49; *Methanex Corporation v United States of America* (UNCITRAL Case) (2005) para 19; ILC Report of the ILC on Work for its Seventeenth and Eighteenth session, Vol II, *Yearbook of the International Law Commission* (1966) Vol II, A/CN.4/SER.A/1966/Add.l para 14.

[219] Dörr, Schmalenbach (n 2) 553; Gardiner (n 52) 218.

[220] UNCITRAL Secretariat on the United Nations Convention on Contracts for the International Sale of GoodsV.89-53886 (June 1989) para 13, available at https://www.cisg.law.pace.edu/cisg/text/p23.html.

interpretation". The notion of "practice" is made up of external behavior by which an international law subject communicates what it accepts as the meaning of a particular treaty provision.[221] The WTO Appellate Body defined the meaning of subsequent practice as "concordant, common and consistent" sequence of acts or pronouncements that demonstrates the implied agreement of the parties as to the treaty's interpretation.[222]

The subsequent practice shall establish "the agreement of the parties", namely their acceptance, either explicit or tacit. This means that the absence of disagreement suffices for the "agreement" in the sense of article 31(3)(b) to be manifested.[223] A case on point is *Soering*, where the ECHR interpreted article 3 ECHR in the light of Protocol 6 as "subsequent agreement".[224] On this basis, it held that article 3 ECHR does not as such prohibit the death penalty, since Protocol 6 "as subsequent agreement, shows that the intention of the parties […] was to allow each State to choose when to undertake such an engagement".[225]

The term "parties" does not connote that all parties must individually perform such practice.[226] In fact, the word "all" included in the initial draft of the VCLT was removed for this exact reason; to avoid the misunderstanding that all parties must be engaged in "practice".[227] For the purpose of interpretation, the following, *inter alia*, are taken into account as "practice"; judicial rulings, practices of UN organs and other international organizations including courts and tribunals, as well as other bodies established to promote the interpretation of a particular treaty are covered by the term "practice".[228]

The CISG's interpretation on the basis of "subsequent practice" is one of the main methods employed for interpreting the CISG provisions. This is so because the use of subsequent practice in the CISG's interpretation is very much in line with the aim of promoting uniformity in the

[221] *Case of Soering v The UK* (App No 14038/88) (1989) European Database of Asylum Law (ECHR) para 103; *Request for Interpretation of the Judgment in the Case Concerning the Temple of Preah Vihear (Cambodia v Thailand)* (Judgment) (2013) ICJ Reports 281 para 75; ILC Report of the ILC on Work for its Sixteenth session, Vol II, Yearbook of the International Law Commission (1964) A/CN.4/SER.A/1964/ADD.1 para 13; Dörr, Schmalenbach (n 2) 556.

[222] *Japan-Taxes on Alcoholic Beverages* (n 161) 12–13; *Chile-Price Band System and Safeguard Measures Relating to Certain Agricultural Products* (WT/DS207/AB/R) (2002) (WTO Appellate Body) paras 213–14. See also Sinclair (n 196) 137; Gardiner (n 52) 256; Linderfalk (n 198).

[223] Dörr, Schmalenbach (n 2) 560; *Kasikili/Sedudu Island* (n 140) para 63; *Use of Nuclear Weapons* (n 73) para 27.

[224] *Soering v United Kingdom* (n 36) para 103.

[225] *Ibid*.

[226] Dörr, Schmalenbach (n 2) 557.

[227] Cf ILC Draft Articles on the Law of Treaties with commentaries (1966) Vol II, *Yearbook of the International Law Commission*, Commentary to article 27 para 15.

[228] *Competence of the General Assembly for the Admission of a State to the United Nations* (n 9); *Certain expenses of the United Nations* (Article 17, paragraph 2, of the Charter) (Advisory Opinion) (1962) ICJ Reports 151, 160; Gardiner (n 52) 259; Dörr, Schmalenbach (n 2) 559. See for See, for instance, human rights treaty bodies that monitor implementation with human rights treaties, see website of UN Human Rights, Office of the High Commissioner, available at: https://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx.

CISG's application. As mentioned above, the interpretation and reasoning of previous judgements, *i.e.* their "practice", are in principle followed by international courts and tribunals.[229] What also constitute "subsequent practice" in the context of the CISG are the opinions of the CISG Advisory Council, an independent body of experts with primary purpose to issue opinions relating to the interpretation and application of the CISG.[230] The CISG Advisory Council is commonly referred to by legal literature and jurisprudence as source of interpretation.[231]

This part of article 31 VCLT goes hand in hand with that of article 7 CISG that requires taking due regard of the "international character" and the "need to promote uniformity in its application". One could argue that recourse to article 31 VCLT in respect to the "subsequent practice" interpretation rule would be of no essence in the context of the CISG, which contains a very similar provision that also opts for consistency in its application. Admittedly, these provisions overlap at that point with regard to their purpose. Still, however, what these provisions prescribe is different. On the one hand, article 7 CISG obliges courts and tribunals to take account of previous judgements where the same issue had been in question.[232] This means that courts and tribunals shall in principle not deviate from previous rulings should there are no reasons leading to that. Conversely, what article 31(3)(b) VCLT stipulates is that, for determining the meaning of treaty terms, any "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" may provide an answer. The starting point for the interpreter with regard to article 7 CISG is to consider the meaning that has been already attached in a treaty term by other courts and tribunals and, should this be possible, not deviate from that meaning in applying the CISG. By contrast, in the case of article 31(2)(b) VCLT, the interpreter *may* seek assistance, together with the context of the treaty, to how this treaty is subsequently interpreted by the parties to the treaty.

In consequence, the answer to the question whether the specific rule of article 31 VCLT with regard to "subsequent practice" is of essence in establishing the meaning of terms contained in the CISG may be negative, on the following grounds; based on the aforementioned analysis, the interpreter of the CISG will embark the interpretation process by reference to previously established interpretation of a certain term, as *lex specialis* Therefore, the "practice" of the parties as to the interpretation of the term in question is to be examined at a first stage, and thus no room for the application of article 31(3)(b) may be left.

229 See supra, Chapter II, A; See also Article 7(1) CISG, which refers to "the need to promote uniformity in the its application".

230 Di Matteo (n 105) 95; CISG-AC website, available at: https://www.cisgac.com/.

231 Di Matteo (n 105) 95; Kroll/Mistelis/Viscasillas (n 107) 1089.

232 Bailey (n 92) 292; Lookofsky (n 105) 49.

However, the function of article 31(3)(b) may not be underestimated when applying article 7 CISG. Because the "uniform" practice, *i.e.* the practice with regards to the application of the CISG, must be sought may by reference to tools provided for determining the "subsequent" practice under the VCLT; for instance, by reference to the "concordant, common and consistent sequence" formula by virtue of which, as previously reiterated, the explicit or implied agreement of the parties regarding the interpretation of a treaty is sought.

In light of the above, article 31(3)(b) VCLT is not *per se* applicable in interpreting the CISG, since the practice of CISG Contracting States is to be sought pursuant to article 7 CISG, which takes precedence as *lex specialis*. However, the tools provided under *lex generalis* to establish the "practice" of Contracting States may be of essence in CISG's interpretation.

vi. The "relevant rules of international law applicable in the relations between the parties"

Except for the subsequent agreement and practice that be observed in interpretation process together with the context, regard is to be had to "any relevant rules of international law applicable in the relations between the parties". Article 3(3)(c) serves for both the clarification of the meaning of a given term or provision and the filling of a gap in the treaty that is interpreted.[233]

The *raison d'être* of this provision was clearly formulated by the ICJ in *Namibia*; "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation".[234]

First of all, the term "rules" is broad enough to encompass a wide variety of instruments that can be pertinent to a treaty' s interpretation.[235] These rules may thus be established by other treaties, general rules of customary international law, and general principles of law in the sense of article 38(c) IJC Statute.[236] For instance, the WTO Appellate Body in interpreting article XX

[233] Gazzini (n 7) 211.

[234] *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (n 20) para 53.

[235] See general *EC – Customs Classifications of Frozen Boneless Chicken Cuts (WTO/DS269/AB/R, WTO/DS286/AB/R, AB-2005-5)* (2005) (WTO Appellate Body)*; EC – Customs Classifications of Frozen Boneless Chicken Cuts* (WTO/ DS269/R, WTO/DS286/R) (2005) (WTO Panel) para 194; *EC – Measures Affecting the Approval and Marketing of Biotech Products* (n 179) paras 7.67.

[236] *Case of Al-Adsani v the UK (App No 35763/97)* (2001) (ECHR) para 60; *Case of Pini et al v Romania (App No 78028/01 and 78030/0)* (2004) (ECtHR) para 139; *Case of Siliadin v France (App No 73316/01)* (2005) (ECHR) paras 85–87; *Case of Askarov v Turkey (Nos 46827/99 and 46951/99)* (2005) (ECHR) para 111; *Case of Sørensen and Rasmussen v Denmark (App Nos 52562/99 and 52620/99)* (2006) (ECHR) para 72; *Case of Demir and Baykara (App No 34503/97)* (2008) (ECHR) paras 69–73; *Case of Rantsev v Cyprus and Russia (App No 25965/04)* (2010) (ECtHR) paras 273–282; *Case of Bankovic et al v Belgium et al (App No 52207/99)* (2001) (ECHR) para 57; *Case of Cudak v Lithuania (App No 15869/02)* (2010) (ECtHR) para 56; Linderfalk (n 198) 177; Pauwelyn, Joost, *Conflict of Norms in Public International Law* (Cambridge: CUP, 2003) 254; Marceau G, *Conflicts of Norms and Conflicts of*

GATT referred to the good faith principle as general principle of law on the basis of article 31(3)(c) VCLT.[237] Similarly, in *EC – Biotech*, the precautionary principle reflecting customary law was taken into account as relevant rule of international law applicable in the relations between the parties.[238]

Essentially, the scope of the "rules" is not limited to binding instruments but it may also include non-binding ones, such as soft-law instruments.[239] According to the Black's Law Dictionary, the word "rule" means "an established and authoritative standard or principle, a general norm mandating or guiding conduct or action in a given type of situation".[240] Thus, the meaning of the term itself does not require that rules be binding.

The relevant rules to be used for the treaty's interpretation shall also be "applicable in the relations between the parties".[241] The word "applicable" is in principle construed as referring to legally binding rules.[242] For instance, the WTO Panel in *EC – Biotech* explained the meaning of the term "applicable" by reference to the sources of public international law and considered "other rules of international law for the purpose of determining the 'ordinary meaning' of a term" rather than as "relevant rule applicable in the relations between the parties".[243] In practice, however, non-binding rules are also used for the interpretation of treaties under certain circumstances.[244] Indicatively, the ECtHR in interpreting the ECHR takes into consideration non-binding instruments of Council of Europe organs, such as recommendations and reports by various independent commissions, and even the non-binding EU Charter of Fundamental Rights.[245] Likewise, in *Iron Rhine Arbitration*, it was stated that interpretation may be affected by

Jurisdiction: The Relationship Between the WTO Agreement and MEAs and Other treaties (2001) Journal of World Trade, Vol 35 1081, 1087; Merkouris P, *Article 31(3)(c) vclt and the Principle of Systemic Integration: Normative Shadows in Plato's Cave* (Koninklijke Brill Nijhoff Vol 17 2015), 21; Dörr, Schmalenbach (n 2) 562; Cf Schwarzenberger G, *The Fundamental Principles of International Law* (1955) Recueil des Cours de l'Académie de droit international Vol 87 195, 220; Sinclair (n 196) 139.

237 *United States - Import Prohibition of Certain Shrimp and Shrimp Products (WT/DS58/AB/R)* (1998) (WTO Appellate Body) paras 157-8.

238 *EC – Measures Affecting the Approval and Marketing of Biotech Products* (n 179) paras 7.76–7.89.

239 *Ibid*.

240 Garner B A, *Black's Law Dictionary* (2019 edn Thomson West) 1446.

241 VCLT, article 31(3)(c).

242 Dörr, Schmalenbach (n 2) 567.

243 *EC – Biotech* (n 179) para 158.

244 Dörr, Schmalenbach (n 2) 565.

245 Dörr, Schmalenbach (n 2) 563; *Case of Demir and Baykara* (n 234) paras 74-5; *Case of Al-Adsani v United Kingdom* (n 234) para 60*; Case of Christine Goodwin v United Kingdom (App No 28957/95)* (2002) (ECtHR) para 100; *Case of Sørensen and Rasmussen* (n 234) para 74; *Case of Eskelinen et al v Finland* (App No 63235/00) (2007) (ECtHR) para 60; *Case C-63/09 (Axel Walz v Clickair SA)* (2010) (ECJ) para 27; *Report No 43/10 (Mossville Environmental Action Now v United States)* (2010) Global Health and Human Rights Database (IACHR) para 43.

instruments that are not binding, especially when it is not clear what "rules", "principles" or "soft-law" means, as it happens in the fields of environmental law.[246]

In fact, a restrictive interpretation of the term "applicable" to the extent that it only encompasses binding rules on the parties would be incompatible with the *effet utile* principle, which requires that treaty terms be interpreted in a manner that gives effect to the existence of the whole treaty.[247] The *raison d'être* of this part of the general interpretation rule is to provide extrinsic material of the parties' intention and objectives when a solution cannot be reached under a certain treaty term. For this intention to be deduced, non – binding instruments can also be of legal relevance.

Article 31(3)(c) VCLT requires that the rules to be used for the purpose of a treaty's interpretation must be "relevant". The indefinite wording of the term "relevant" indicates that the interpreter has wide discretion to determine the relevance of the rules.[248] A general – yet again non-specific – criterion is that of "close connection"; the external material to be brought for a treaty's interpretation shall refer to similar legal or factual subject-matter and provide solutions to similar issues.[249]

Another issue with regard to article 31(3)(c) arises from the reference to the "parties"; it is disputed whether "all parties" or "only the parties to the dispute" are required to be bound by the rules. According to the first approach, the reference to "the parties" seems to suggest a restrictive interpretation; for a rule to be relevant in the sense of article 31(3)(c), all parties must be bound by it.[250] Admittedly, given that only one meaning is to be attached in each specific treaty term,[251] it would be incongruous to allow an *ad hoc* interpretation depending on the parties between which each specific dispute arises. In that regard, the WTO Panel rejected the argument of EU to interpret the WTO Agreements in the light of "other" rules of international law, non-binding on all parties to the WTO. It particularly explained that the rules to be taken into account according to article 31(3)(c) VCLT are "those which are applicable in the relations between the WTO members".[252]

[246] *Award in the Arbitration regarding the Iron Rhine (Ijzeren Rijn) Railway between the Kingdom of Belgium and the Kingdom of the Netherlands* (2005) Reports of International Arbitral Awards 35 (PCA) para 58; See also *Case of Demir and Baykara v Turkey* (n 234) para 78; Gardiner (n 52) 309.

[247] *Asian Agricultural Products Ltd v The Republic of Sri Lanka* (n 211) 106 et seq; Gardiner (n 52) 211; Dörr, Schmalenbach (n 2) 545.

[248] Villiger (n 3) 433.

[249] Merkouris (n 48) 23; Gardiner (n 52) 260; Linderfalk (n 198) 178.

[250] *EC – Biotech* (n 179) paras 7.68–7.71; *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft (WT/DS316/AB/R)* (2011) (WTO Appellate Body) para 845; *Oil Platforms* (n 161) para 29; *Guinea-Bissau v Senegal* (n 192) paras 47–51; Villiger (n 3) 435.

[251] See Linderfalk (n 198), who seeks to determine "*the* correct meaning" of a treaty term 33 et seq. [emphasis given].

[252] *EC – Biotech* (n 179) para 7.68.

But there are also other reasons leading to the conclusion that the international rules are relevant for "all parties". Article 31(3)(c) is an expression of the "systemic integration" principle that, in the words of the ILC, seeks to safeguard that "international obligations are interpreted by reference to their normative environment", so that "coherence and meaningfulness" be given to the process of interpretation.[253] On this basis, the WTO Appellate held that a "not all parties to the dispute" interpretation is incompatible with a consistent and harmonious approach to the interpretation of WTO law.[254]

However, the second approach, which suggests that article 31(3)(c) concerns only the parties to the dispute,[255] is more compatible with both a systematic interpretation and the object and purpose of the VCLT. A systematic interpretation indeed indicates that should the drafters have intended that the relevant rules of international law be applicable between *all* parties, they would have stated so explicitly, as they did with other VCLT provisions, such as the exact above paragraph of article 31 VCLT, which refers to "all parties".

An "only the parties to the dispute" interpretation is even more appropriate in cases of "bilateral interpretation structure", *i.e.* in "synallagmatic" rather than "*erga omnes*" treaties. In such cases, the treaty is interpreted and applied in the light of other obligations established only between the two parties.[256] After all, article 31(3) itself specifies the normative value of the relevant international rules in the interpretation process; it requires that, together with the context, other material shall be "taken into account". This wording does not entail neither that the extrinsic material provides binding interpretation on treaty terms nor that it is directly applied to parties that are not involved with the dispute.

As with every international treaty, article 31(3)(c) VCLT is of high importance in interpreting the CISG. As demonstrated above, resourcing to other principles or law is a commonly method used in the CISG regime by virtue of article 7.[257] Nevertheless, the invocation of external to the CISG principles is not provided for purposes of interpretation but rather for gap – filling

[253] ILC Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law 2006 paras 410 – 80; *Oil Platforms* (n 161) para 41; see general McLachlan (n 52) 279; Fitzmaurice, Olufemi, Merkouris (n 151) 18.

[254] *EC and certain member States – Large Civil Aircraft* (n 248) paras 844-845.

[255] *Dispute concerning Access to Information under Article 9 of the OSPAR Convention (Ireland v the United Kingdom)* (Final Award) (2003) International Legal Materials Vol 42 (2003) (PCA) paras 105-116.

[256] McNair (n 24) 723; McLachlan (n 52) 279; Dörr, Schmalenbach (n 2) 1036; Carreau D, Marella F, *Droit International* (11th edn, Pedone 2012) 149; ILC Report of the ILC on the Work for its Second session, Vol II, *Yearbook of the International Law Commission* (1963) UN doc A/CN.4/107 1006; Gardiner R (n 52) 239; Pellet in Zimmerman, Tams (n 51) 747; Malanczuk (n 51) 36.

[257] CISG, article 7(2).

purposes.[258] By contrast, article 31(3)(c) VCLT prescribes that material other than the CISG text itself can be useful in the interpretation process. It is thus on this basis that relevant external rules are employed for the CISG's interpretation.

At this point, it is notable to examine whether the UPICC or the Principles of European Contract Law, which are soft-law instrument reflecting *lex mercatoria*, can also be used in terms of article 31(3)(c) as additional means to the CISG's context for its interpretation. The issue that arises here is whether the UPICC and the Principles of European Contract Law meet the requirements set forth in article 31(3)(c) so that they can be invoked on this basis. Particularly, it shall be examined whether these rules are "rules applicable in the relations between the parties". It could be argued since they are not legally binding instruments but reflect *lex mercatoria* cannot constitute "rules" within the sense of article 31(3)(c) neither as general principles of international law nor as customary international law. Because customary international law is formed by the *state's*[259] practice and *opinion juris*, contrary to *lex mercatoria* that emerges from practice and usages in international trade,[260] as established by *private parties*[261] engaging in commercial transactions.

A relevant field where it has been argued that *lex mercatoria* may be of essence in determining the meaning of terms is international investment law. It has particularly been argued that while *lex mercatoria* reflects international business custom and, as such, seems not relevant to public international law, the "wide reference to 'international law' in article 31(3)(c) VCLT and the tripartite of investment arbitration including a non-State element does not preclude taking into account non-traditional sources of international law".[262]

After all, *lex mercatoria* is not exclusively created by commerce but constitutes also state-based law.[263] Even though at a first stage *lex mercatoria* is formed by trade practices and business customs, it is then codified in international instruments, such as the UPICC and the CISG. States are thus involved in the foundation of these practices by entering in international agreements that incorporate practice of *lex mercatoria* and, at a later stage, are required to enforce their provisions through their national courts. *Ergo*, the process of *lex mercatoria*-making does not involve only

[258] See supra Chapter II.A.

[259] Emphasis given.

[260] (n 183).

[261] Emphasis given.

[262] Gazzini (n 7) 217; Cf Gazzini.

[263] See general Mazzacano P, *The Lex Mercatoria As Autonomous Law* (2008) Comparative Research in Law and Political Economy Vol 4.

private parties but also states. For these reasons, *lex mercatoria* has been regarded as a "third, autonomous legal system besides domestic laws and public international law".[264]

In light of the above, both UPICC and the Principles of European Contract Law can be considered for the CISG's interpretation on the basis of article 31(3)(c).

b. The CISG in the light of article 32 VCLT

Article 32 VCLT sets forth the supplementary means of interpretation that are employed for the following purposes; to confirm the meaning deriving from the application of article 31 or to determine the meaning of a treaty term when the interpretation pursuant to article 31 leaves the meaning ambiguous or obscure or leads to manifestly absurd or unreasonable results.[265] Particularly, Article 32 provides as follows:

> "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31 :
>
> (a) Leaves the meaning ambiguous or obscure; or
>
> (b) Leads to a result which is manifestly absurd or unreasonable."

The supplementary means of interpretation that are explicitly mentioned in article 32 are the preparatory work of the treaty and the circumstances of its conclusion. However, the means listed are not exclusive but rather indicative, as the term "including" declares.

The "*traveaux preparatoires*" include all documents that are relevant to the drafting history of the treaty, as long as they are accessible to the interpreter.[266] These vary from drafts, conference records, commentaries and minutes to diplomatic exchanges between at the negotiation stage.[267]

[264] See general Goldman, *La Lex Mercatoria dans les Contrats et l'Arbitrage International: Réalités et Perspectives* (1979) Clunet 475; Goldman, *Nouvelles réflexions sur la lex mercatoria* (1993) Études de Droit International en L'Honneur de Pierre Lalive 241.

[265] *Iron Rhine Arbitration* (n 244) para 48; *RSM Production Corporation v Grenada (ICSID Case No ARB/05/14)* (Award) (2009) para 386; *European Communities-Customs Classification Of Certain Computer Equipment (WT/DS62/AB/R, WT/DS67/AB/R and WT/DS68/AB/R)* (1998) (WTO Appellate Body) para 86; **PCA** *Arbitration Between the Republic of Croatia and the Republic of Slovenia (Croatia v Slovenia) Final Award (Case 2012-04)* (2017) (PCA) para 1074*; Fábrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A. v Bolivarian Republic of Venezuela (ICSID Case No ARB/12/21)* (Award) (2017) paras 291, 6; *Artavia Murillo v Costa Rica (Preliminary Objections, Merits, Reparations and Costs) (C No 257)* Inter-American Court of Human Rights Series (2012) para 193.

[266] Dörr, Schmalenbach (n 2) 575.

[267] See *Kasikili/Sedudu Island* (n 140) para 46; *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (n 20) para 69; *The bilateral exchange between the parties was considered inconclusive in Maritime*

Such documents manifest the parties' common intention and understanding as to the meaning of the treaty provisions.[268]

The "circumstances of the conclusion of the treaty" refer to any material related to the preparation of the treaty. Aust suggests that a treaty with the same subject matter adopted before or after the treaty that is interpreted may qualify as supplementary means.[269] It has been also held that practice which does not qualify as "subsequent practice" in the sense of article 31(3)(b), for example because it was not practice of the parties but of international bodies, may be used as supplementary means for the treaty's interpretation.[270] That was, for example, the case in in *EC – Chicken Cuts*, where the WTO Appellate Body held that documents, events or practice followed subsequent to the conclusion of the treaty may be useful to reveal the parties' intention at the time of the conclusion.[271] It thus considered the customs classifications practice of the European Union "as practice subsequent to the conclusion of the WTO Agreement for interpreting the latter" in the sense of article 32 VCLT.[272]

The historical method of interpretation is widely used by courts and tribunals to shed light on the meaning of the CISG provisions according to the intention of the drafters.[273] In the light of the obligation to promote uniformity of the CISG's application, international jurisprudence regarding the CISG is elevated to one of the most important interpretation methods. The Pace Database explicitly refers to article 32 VCLT as supplementary means of interpretation including the drafting history of the treaty.[274] As Honnold puts it, "when difficult issues of interpretation are at stake […] the CISG's preparatory work can be decisive".[275] The *traveaux preparatoires* of the CISG consists of UNCITRAL Committee Reports, UNCITRAL Yearbooks, Conference

Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain) (Jurisdiction and Admissibility) (1995) ICJ Reports 6 para 41; *Iron Rhine Arbitration* (n 244) para 45.

268 *Kasikili/Sedudu Island* (n 140) para 46.

269 Aust (n 4) 245.

270 Dörr, Schmalenbach (n 2) 575.

271 *EC – Chicken Cuts* (n 179) para 305.

272 *Ibid*.

273 *CLOUT Case No 13U51/93* (1994) Pace Database (Oberlandesgericht Frankfurt); *CLOUT Case No 2319* (2002) Pace Database (Netherlands Arbitration Institute*); CLOUT Case No 01-3402, 02-1867, 02-1915 (Zapata Hermanos Sucesores v Hearthside Baking Co)* (2002) Pace Database (US Circuit Court of Appeals); *CLOUT Case No 41 O 111/95* (1995) Pace Database (Landgericht [District Court] Aanchen); Schlechtriem W, Schwentzer I, *Commentary on the UN Convention on the International Sale of Goods (CISG)* (4th edn, Oxford University Press 2016) 63-4.

274 Pace Database, Pace Law School Institute of International Commercial Law, available at: https://cisgw3.law.pace.edu/cisg/linkd.html.

275 Honnold, *Uniform Laws for International Trade* (1995) Internatioanl Trade and Business Law Journal 1995 5, 8.

Proceedings, Secretariat Commentary, as well as Working Papers submitted by several Working Groups,[276] which are available at the Pace Databases and websites.[277]

The following example as to the use of the CISG's preparatory work for its interpretation is related to the aforementioned issue of whether hardship is included in the term "impediment" of article 79 CISG. The drafting history of article 79 is invoked by scholars and jurisprudence that reject the inclusion of hardship in the "impediment" which exempts parties from liability; when interpreting article 79 CISG in the light of article 32 VCLT, situations of hardship are excluded from its scope.[278] The drafting history of the CISG indeed reveals that the word "impediment" was selected to narrow down the scope of article 79 to cases where performance was not possible at all.[279] To this end, the Norwegian proposal to broaden its scope was rejected by the Working Group in its 11th Meeting.[280] Hence, the intention of the drafters was to not address events of hardship as impediments beyond a party's control that exempts it from liability. This example indicates that the VCLT provides the legal basis for resorting to the preparatory work of the CISG as subsidiary means of interpretation.

c. The CISG in the light of article 33 VCLT

Article 33 VCLT provides guidelines for the interpretation of treaties that are authenticated to more than one language. The diversification of different languages in a single treaty is chosen for the sake of convenience, especially in multilateral treaties, in order for their direct implementation to take place by national courts and authorities.[281] The process of authentication is set forth in article 10 VCLT as a procedural stage before the treaty is concluded.[282]

[276] Gillet C P, Walt S D (n 92) 15.

[277] (n 274).

[278] CLOUT Case No C.07.0289.N (Scafom International BV v Lorraine Tubes SAS) (2009) Pace Database (Hof van Cassatie); Flechtner H, *Flechtner H, The Exemption Provisions of the Sales Convention, Including Comments on "Hardship" Doctrine and the 19 June 2009 Decision of the Belgian Cassation Court (2011) Belgrade Law Review 289*, 305; Bianca C M, Bonell M J, Borrera G J, *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (Giuffre 1987) 593.

[279] CISG Advisory Council Opinion No 7, *Exemption of Liability for Damages Under Article 79 of the CISG*, available at: https://www.cisg.law.pace.edu/cisg/CISG-AC-op7.html.

[280] *Ibid*.

[281] Dörr, Schmalenbach (n 2) 592.

[282] VCLT, article 10.

Pursuant to article 33(1), unless the opposite is provided, the general rule of equal authority applies;[283] the treaty has the same authority in each language.[284] Similarly, the presumption of identical meaning is established in article 33(3), on the basis of which "the terms of the treaty are presumed to have the same meaning in each authentic text".[285] In case of divergency of meanings that cannot be resolved under paragraphs 1 and 2 of article 33, a solution shall be sought under the rules set forth in articles 31 and 32 VCLT.[286] Indicatively, if the treaty has been negotiated and drafted in one language, more weight is attached to that language.[287] This is the case, for instance, with the 1995 Dayton Agreement that is negotiated in English, but its text is equally authentic in Bosnian, Croatian and Serbian; in case of ambiguity, the English text prevails.[288] Accordingly, the CISG is equally authentic in Arabic, Chinese, English, French, Russian and Spanish.[289] It has been held, however, that more reliance is given to the English and, secondarily, the French version, since "English and French were the official languages of the Conference and the negotiations were predominantly conducted in English".[290] Again, this line of argumentation has been established in accordance with the law of the treaties.

3. The vicious circle of interpretation: Employing the VCLT interpretation provisions to interpret the CISG's interpretation clause

By incorporating article 7(1), the CISG establishes its own system for the interpretation of its provisions. This system, however, is not self-sufficient, since light shall be shed on the meaning of the rules and principles enshrined in article 7(1) itself. The elements composing article 7 are indefinite and vague, so that they have been characterized as "pious wishes".[291] As such, they have failed to provide sufficient guidance as to the application of article 7 in the interpretation of the CISG.[292] At the same time, the application of a conventional regime for the interpretation of its

283 Dörr, Schmalenbach (n 2) 593.

284 VCLT, article 10.

285 VCLT, article 33(2); Dörr, Schmalenbach (n 2) 598.

286 VCLT, article 33(4). See, for instance, *Case of France v Commission (C-327/91)* (1994) (ECR) I-3641 paras 33–35.

287 Aust (n 4) 254.

288 Dörr, Schmalenbach (n 2) 594.

289 CISG, article 101; CISG, Part Four, Final Clauses.

290 *CLOUT case No 4C.198/2003/grl* (2003) Pace Database (Bundesgericht of Switzerland); see also CISG Digest (n 109) 43.

291 Andersen B, Mozzota F, Zeller (n 168) 850, 851.

292 Bailey (n 92) 291.

own provisions could not provide any solutions as to the meaning of the elements it consists of, especially should these elements be not themselves clear as to their meaning.

For these reasons, as with every interpretation clause applying to the interpretation of the treaty it is included in,[293] article 7 CISG is to be interpreted by the General Rule and its supplementary one.[294] As an example regarding the application of articles 31 and 32 VCLT to the interpretation of such interpretation clauses, Dörr mentions the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea.[295] This Convention, notably, includes exactly the same interpretation clause to the CISG.[296]

Against this background, it is indicated below that the meaning which have been attached to the elements of article 7(1) CISG has been deduced on the basis of the General Rule and the supplementary means of interpretation. The "good faith" element is analyzed in separate Chapter, together with its relationship with the "good faith" notion under the law of treaties.[297] The concepts of article 7(2) are not examined in the present Chapter; as it was reiterated above, this provision is not interpretative clause but rather gap-filling provision. Thus, for its interpretation, both article 7(1) and the VCLT apply cumulatively.

Article 7(1) CISG underlines "the need to promote uniformity" in the application of the CISG. Even though the uniformity principle is central to the CISG,[298] article 7(1) does not adequately establish its precise meaning. Employing article 31 VCLT to this end, one should first resort to the ordinary meaning of the term, which is to be found by reference to the "regular, normal, customary" meaning of a term. In this regard, dictionaries and other sources of definition may be of essence.[299] The word "uniform", as explained in Black's Law Dictionary, declares "a lack of variation, identical or consistent".

This meaning is to be also examined by the "context", as well as the "object and purpose" of the CISG, in the light of the good faith principle.[300] The object and purpose is clearly reflected in the Preamble; the CISG aims at the removal of legal barriers in international trade by

293 Dörr, Schmalenbach (n 2) 537.

294 CISG Digest (n 109) 43; Honnold J O, *Uniform Law for International Sales under the 1980 United Nations Convention* (2009) Kluwer Law International 4th edn 92, 109.

295 Dörr, Schmalenbach (n 2) 537.

296 2009 UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2008, article 2.

297 See supra II.D.

298 CISG Preamble; Honnold 2009 (n 292) 93.

299 Dörr, Schmalenbach (n 2) 542; Gardiner (n 52) 164; *Eastern Airlines Inc v Floyd* (n 176) 537; *Case concerning Avena and other Mexican Nationals (Mexico v USA)* (Judgment) (2004) ICJ Reports 12 para 84.

300 VCLT, article 31.

compromising the different social, economic and legal systems of state-parties to the CISG in a single instrument. A contextual interpretation evinces that the "need to promote uniformity" goes hand in hand with the promotion of the "international character" of the CISG, referred to in the very same provision.

Together with the context, account shall be taken on any "subsequent practice" in the application of the CISG that establishes the parties' agreement regarding the interpretation of its provisions. Decisions of courts and tribunals, as well the opinions of the Advisory Council can be considered as subsequent practice.[301] On this basis, the "need to promote uniformity" has been interpreted and applied in the sense that courts and tribunals are required to render decisions that are compatible with existing rulings.[302]

The reference to "international character" in article 7 is to be construed in according manner. Both the ordinary meaning, and the context and the object and purpose of the CISG lead to the interpretation of the "international character" in the sense that the CISG is to be interpreted and applied independently from national legal concepts, in an autonomous manner.[303] In this regard, the interpreter is mandated to construct CISG as a Convention with an international dimension. This conclusion is further reiterated by the legislative history of the CISG, which is also taken into account on the basis of article 32 VCLT. Particularly, the Secretariat Commentary to the 1978 draft, representing part of the CISG's *traveaux preparatoires,* states that "national rules on the law of sales of goods are subject to sharp divergencies in approach and concept. Thus, it is especially important to avoid differing constructions of the provisions of this Convention by national courts".[304] In light of the above, the General Rule and the supplementary means of interpretation have primary role in construing article 7(1) CISG.

[301] ICJ Competence for Admission (n 38) 9; ICJ Certain Expenses (n 44) 160; Gardiner (n 52) 259; Dörr, Schmalenbach (n 2) 559; See supra Chapter II.C.2.a.iii.

[302] *CLOUT case No T-8/08* (2009) Pace Database (Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce); *CLOUT Case No (CIV-2009-409-000363) (RJ & AM Smallmon v Transport Sales Limited and Grant Alan Miller)* (2010) Pace Database (High Court of New Zealand); Commentary on the Draft Convention on Contracts for the International Sale of Goods, Official Records, UN Doc. A/CONF.97/5 (1979); CISG Digest (n 109) 42; Bailey (n 92) 292; Lookofsky (n 105) 49; Ferrari (n 105) 205; Blair H A, *Hard Cases Under the Convention on the International Sale of Goods: A proposed taxonomy of interpretative challenges* (2011) Duke Journal of Comparative and International Law Vol 21 269; Honnold (1999) (n 121) 109; Flechtner H, *The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and Other Challenges to the Uniformity Principle in Article 7(1)* (1998) 17 Journal of Law and Commerce 187, 195.

[303] Bailey (n 92) 287; Lookofsky (n 105) 50; Brand, Ferrari, Flechtner, (n 105) 140; Bonell in Bianca, Bonell (n 112) 73; WethmarLemmer (n 105) 3; Ryan (n 105) 100.

[304] Commentary on the Draft Convention on Contracts for the International Sale of Goods prepared by the Secretariat (1978) UN DOC. A/CONF. 97/5 para 1.

D. The construction of "good faith in international trade" of article 7(1) CISG in the light of the good faith principle as established by the law of treaties

Article 7(1) requires "the observance of good faith in international trade" in the interpretation of the CISG. Similarly, by virtue of article 31 VCLT, a treaty shall be interpreted "in good faith". As the wording of both provisions stipulates, good faith must be considered in the whole process of interpretation. The notion of good faith in international law is fundamental, yet there is no specific definition of it.[305] Importantly, good faith must be considered in the whole process of interpretation, as the phrases "observance of good faith" and "in the light of good faith"[306] respectively stipulate.

In general, good faith has been variously defined as "reasonableness", "fairness", "morality", "equality", "spirit of solidarity".[307] Even though the general notion of good faith is the same in the context of both the CISG and the law of the treaties, the phrase "good faith in international trade" differs from "good faith" as in that it refers to a particular field where good faith applies and, as such, represents particular aspects. In consequence, good faith under article 7(1) CSIG is *lex specialis* to the general good faith principle.

This Chapter examines, firstly, the general notion of good faith under the law of treaties and, secondly, how good faith is understood "in international trade". Lastly, it is explained that, since article 7(1) CISG is construed in the light of article 31 VCLT, the term "good faith in international trade" is interpreted "in the light of good faith". According to this interpretation, answer is provided to the following question; whether good faith in the context of the CISG binds not only Contracting States but also private parties.

Regarding, firstly, the law of the treaties, good faith has both general and specific application. In its general function, prescribed in article 26 VCLT, it requires that obligations established under treaties are binding and must be performed "in good faith".[308] This provision reflects the *pacta sunt servanda* principle, which is also based on good faith.[309] In essence, good

[305] Bonell in Bianca, Bonell (n 112) 69.

[306] Sinclair (n 196) 120.

[307] Hillman R A, *Policing Contract Modifications under the UCC: Good Faith and the Doctrine of Economic Duress* (1979) 64 Iowa Law Review 849, 877; Dörr, Schmalenbach (n 2) 541; Bailey (n 92) 287; Lookofsky (n 105) 50.

[308] Gardiner (n 52) 170.

[309] VCLT, article 26; *South China Sea Arbitration (The Republic of the Philippines v The People's Republic of China)* (n 14) paras 1171, 1196; *Teinver SA, Transportes de Cercanías SA and Autobuses Urbanos del Sur SA v Argentine Republic* (n 14) para 447; *Vattenfall AB and others v Federal Republic of Germany* (n 14) (2018) paras 155-156; *Mobil Investments Canada Inc v Canada* (n 14) para 165; *Chevron Corporation (USA) and Texaco Petroleum Corporation (USA) v Republic of Ecuador* (n 14) paras 7.83-4, 7.106.

faith has been recognized as "one of the basic principles governing the creation and performance of legal obligations, whatever their source".[310] In its specific application, good faith forms part of the General Rule of interpretation set forth in 31 VCLT.[311] In its application to the interpretation of treaties, it is well-established that the concept of good faith is based on a "standard of reasonableness".[312] For instance, in *Nicaragua v USA*, the ICJ stated that in the cases where treaties do not regulate the duration of their validity, good faith requires that a "reasonable" time for withdrawal or termination is required.[313]

From the good faith principle arises also the principle of effectiveness, which is also linked with a contextual interpretation according to the treaty's object and purpose.[314] The *effet utile* principle requires giving full effect to the treaty provisions.[315] As the WTO Appellate Body expressly recognized, the principle of effectiveness is "a fundamental tenet of treaty interpretation flowing from the general rule of interpretation set out in article 31 [VCLT]".[316]

In the context, now, of the CISG, good faith acquires a particular meaning, as it pertains to a specific field, international commerce. The notion of good faith under article 7(1) CISG is closely related to the observance of reasonable commercial standards of "fair-dealing", *i.e.* the standard of behavior that parties must have towards their counterparty, and fair play.[317] Since good faith under article 7 CISG is linked to international trade, it also requires that the CISG's interpretation will not result in a party being in a position of taking unfair advantage towards another party in the context of a commercial transaction.[318] As with the law of the treaties, this standard is determined on the basis of the "reasonableness test".[319]

An example where good faith was applied for the CISG's interpretation is a case issued by a German court. The court particularly examined the relationship between articles 48, regarding

[310] *Nuclear Test Case* (n 73) para 49; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)* (Judgement) (1999) ICJ Reports 1999 para 38.

[311] Gardiner (n 52) 170.

[312] Dörr, Schmalenbach (n 2) 541; Gardiner (n 52) 177.

[313] *Military and Paramilitary Activities in and against Nicaragua* (n 161) para 63; Dörr, Schmalenbach (n 2) 548.

[314] *Territorial* (n 212) 22.

[315] *Lighthouses Case (France v Greece)* (n 212) 27; *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (n 20) para 66; *Territorial Dispute (Libyan Arab Jamahiriya v Chad)* (n 312) paras 51-52; *Aegean Sea Continental Shelf* (n 19) para 52.

[316] *Japan - Taxes on Alcoholic Beverages* (n 161) 12.

[317] Felemegas J, *An International Approach to the Interpretation of the UN CISG* (1980) as Uniform Sales Law 3, 9; Gillet/Walt (n 92) 16; Zeller (n 168) 47; Keily T, *Good faith and the Vienna Convention on Contracts for the International Sale of Goods* (1991) Trans-Lex Online 15, 16.

[318] Kroll, Mistellis, Viscasillias (n 107) 134.

[319] Gillet, Walt (n 92) 55; Di Matteo (n 105) 319; Lookofsky (n 105) 50; Schlechtriem, Schwenzer (n 271) 63; Zeller (n 168) 52.

for the seller's remedy for failure to perform and avoidance of the contract, and 49, which provides for the buyer's right to avoid of the contract, and held that article 49 prevails over 48 when the non-conformity of the goods amounts to fundamental breach.[320] The *rationale* of this conclusion is drawn in the basis of good faith.[321] In another case, good faith was applied for the construction of article 26 CISG. According to this provision, "a declaration of avoidance of the contract is effective only if made by notice to the other party". The court held, however, that when a seller has "unambiguously and definitely" declared that he/she will not perform their obligations, requiring notice of avoidance would be contrary to good faith.[322]

A fundamental dispute arising from the reference to good faith in article 7(1) is whether the good faith principle, which is pertinent to the interpretation of the CISG, must also be considered in interpreting statements or other conduct of parties. On the one hand, it is argued that good faith is only pertinent to the interpretation of the CISG itself, and not to the parties' intention.[323] In support of this position, the reference to good faith is only made in the interpretation clause of the CISG, it was the drafters' intention to not burden the parties with obligations not explicitly regulated from the CISG.

On the other hand, it is maintained that the reference to the "observance of good faith in international trade" is also necessarily relevant to parties to sale contracts individually, albeit the reference to good faith being found only in article 7(1).[324] According to this position, good faith is reflected in many CISG provisions and constitutes one of the general principles upon which the CISG is based.[325] Examples of CISG provisions that manifest the good faith principle are article 16(2)(b) CISG, by virtue of which an offer is irrevocable "if it was unreasonable for the offeree to rely upon the offer being held open and the offeree has acted in reliance of this offer", as well as articles 37 and 46 that establish the right of the seller to cure non-conformities of the goods.

The CISG's drafting history does not provide assistance in the above dispute; the preparatory work reveals that the drafters incorporated the good faith principle in article 7(1) as a "compromise" between (a) those who supported the inclusion of a provision imposing directly on

[320] *CLOUT Case No 2 U 31/96* (1997) Pace Database (Oberlandesgericht of Munich).

[321] Zeller (n 168) 237.

[322] *CLOUT case No 7U2959/04* (2004) Pace Database (Oberlandesgericht of Munich).

[323] Brand, Ferrari, Flechtner (n 105) 151.

[324] *CLOUT Case No Vb94124* (1995) Pace Database (Arbitration Court of the Chamber of Commerce and Industry of Budapest); *CLOUT Case No HG 930634/O (T SA v R Établissement)* (1998) (Handelsgericht of Zurich); Brand, Ferrari, Flechtner (n 105) 139; Bonell (n 105) 69; Felemegas (n 315) 46.

[325] *CLOUT case No HG 930634/O* (n 322); Honnold (n 292) 100.

the parties the obligation to act in good faith and (b) those who argued that such a provision would lead to uncertainty, since good faith has no fixed meaning.[326]

As with all elements of article 7 CISG, the "observance of good faith in international trade" is construed in the light of article 31 VCLT. Interpreting the phrase "observance of good faith in international trade" in light of the CISG's object and purpose and of good faith, as the General Rule of interpretation prescribes, the second thesis should be supported; good faith must be considered in construing conduct or statements of parties. First of all, the Preamble of the CISG, indicative of the CISG's objectives and aims, refers to the notions of "equality" and "mutual benefit", that are in line with not only the State-parties' but also the individuals' duty to act in good faith. Hence, it has a substantive role in establishing guiding for the interpreter.[327]

Moreover, the construction of the CISG provisions in the light of good faith leads to the establishment of specific conduct or duties that are ultimately binding upon individuals. Thus, since good faith is used as means of interpretation for the various obligations established by the CISG provisions, it also implies the parties' duty to also act in good faith. In other words, the substance of the provisions that are interpreted according to good faith, such as those regulating the buyer's and seller's obligations, directly applies to the parties' relationship.

The conclusion that good faith is also pertinent with private parties was formulated, indicatively, in *Bonaverture v Societe Pan African Export*.[328] There, the seller had demanded proof of destination of the goods that were to be sent to South America and Africa.[329] However, not only did the buyer not respond to the seller's request, but also during the second delivery, the goods were sent to Spain.[330] The Court found that the buyer's behavior to disregard its contractual obligation to inform the seller for the destination of the goods constituted a fundamental breach of contract.[331] It also ordered the buyer to pay damages for "abuse of process", due to its conduct being "contrary to the principle of good faith laid down in article 7 CISG".[332]

326 Honnold (n 292) 99; 1980 Vienna Diplomatic Conference, Summary Records of Meetings of the First Committee, 5th meeting (1980).

327 Torsello M, *Reservations to international uniform commercial law conventions* (2000) Uniform Law Review Vol 230, 271.

328 *CLOUT Case No 93/3275 (SARL BRI Production Bonaventure v Société Pan African Export)* (1995) Pace Database (Cour d' Appelle Grenoble); Di Matteo L A, Dhooge L, Greene S, Maurer V, *The Interpretative Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence* (2004) Northwestern Journal of International Law and Business 299, 414; Zeller (n 168) 237.

329 *CLOUT Case No 93/3275* (n 321).

330 *Ibid.*

331 *Ibid.*

332 *Ibid.*

A further example of the binding for the individuals effects deriving from good faith is the *venire contra factum proprium* principle, which means that advantage cannot be taken from behavior that is incompatible with a party's previous conduct. Indicatively, it has been held that a seller was estopped from raising the defense that notice of non-conformity according to articles 38 – 39 CISG was not timely given.[333] This was so because the seller had behaved in such a way that created the impression to the buyer that he/she would not raise the defense.[334] The tribunal held that even though *venire contra factum proprium* was not expressly settled by the CISG, it formed a general principle deriving from good faith, and thus binding upon parties.[335]

Finally, an interpretation of "the observance of good faith in international trade" so as the duty to act in good faith binds also the parties to sale contracts is in accord with the *effet utile* interpretation. For effect to be given to all CISG provisions, good faith is fundamental not only as interpretation tool but also as means on the basis of which private parties must comply with their duties stemming from good faith.

In sum, in providing solutions to questions related to article 7 CISG, the law of treaties is not only useful but also necessary. Even though good faith pertaining to international trade is a specific aspect of good faith, it is also based on similar principles and notions. Lastly, good faith constitutes a fundamental principle in international law[336] that is binding on not only states but also private parties.

III. The Final CISG Provisions under the law of treaties

A. Entering into force – or the easy part

Part IX of the CISG includes the final clauses that are devoted to issues such as the CISG's entering into force, permitted reservations and declarations, and denunciation of the Convention. This Part of the CISG is specifically concerned with the obligations that Contracting States have to each other, and not with the regulation of private parties' rights and obligations. Therefore, it is beyond doubt that it is governed by the respective VCLT provisions.[337] Once again, however, the

[333] CLOUT Case No SCH-4318 (1994) Pace Database (Vienna Arbitral Tribunal).
[334] *Ibid*.
[335] *Ibid*.
[336] Aust (n 4) 179.
[337] Zeller (n 168) 110.

nature of the CISG as international treaty that does not impose rights and obligations upon Contracting States but only upon individuals, results to certain consequences regarding the VCLT's application.

Beginning with the matter of the CISG's entering into force, as the VCLT stipulates, a treaty enters into force in such manner and upon such date it may provide. In the CISG, this issue is regulated in detail in articles 91 and 99 – 101 CISG. In brief, the CISG is open for signature by all States and subject to ratification, acceptance or approval by the signatory States.[338] The instruments of ratification, acceptance or approval are to be deposited with the Secretary-General of the UN.[339] Essentially, the meaning of the terms "ratification", "acceptance" or "approval" is laid down in the VCLT, as "international act" whereby a State "establishes its consent to be bound" on the international plane".[340] The procedure that must be followed to this end is also set forth in the VCLT.[341]

In sum, the CISG applies as *lex specialis* for the matters regulated in it regarding its entering into force and termination, as well as the regime of reservations. For issues not settled in the CISG, the VCLT is employed to fill the gaps.

B. Denunciation, suspension and termination – or the difficult part

As it is established by the law of treaties, the suspension, termination or denunciation of a treaty or the withdrawal of a party may take place only as result of the application of the provisions of such treaty or the VCLT.[342] In principle, a treaty is not subject to denunciation or withdrawal when it does not include any provision regarding its termination neither provide for denunciation or withdrawal, unless such possibilities are intended to exist or are implied by the nature of the treaty.[343] This provision is an expression of *pacta sunt servanda* principle, since it puts into place a rebuttable presumption against denunciation or withdrawal, so that the parties' existing

338 CISG, article 91(1), (3).

339 CISG, article 91(4).

340 VCLT, article 2(b).

341 VCLT, articles 11, 14-16.

342 VCLT, article 42.

343 VCLT, article 56. See *Case T91/10 (Lucchini SpA v European Commission)* (Judgment) (2014) (CJEU) paras 112-4, 136, 145.

agreement be upheld to the extent possible.[344] But at the same time, it preserves States' freedom to be entitled, on the basis of sovereignty, to suspension or withdrawal in certain cases.[345]

In this context, the CISG's termination, denunciation or withdrawal from it may occur as result of the application of either the CISG or the VCLT, for matters that the CISG does not deal with. The CISG provides for the possibility of denunciation in article 101, which prescribes that a Contracting State may denounce the CISG by formally notifying the depositary in writing. The term "denunciation" declares a unilateral act by which a party seeks to terminate its participation in a treaty.[346] While both "denunciation" and "withdrawal" refer to the unilateral act by which a party seeks to terminate its participation in a treaty, the former normally refer to bilateral, while the latter to multilateral treaties.[347] Hence, the term "withdrawal" would be more appropriate for the case of the CISG, which is a multilateral treaty. Notably, to date no arbitral awards or court decisions regarding the CISG's denunciation have been identified.[348]

In stark contrast to denunciation, the CISG does not pertain to neither other ways of its termination nor suspension. The meaning of a treaty's "suspension" denotes the temporary cessation of its operation, *i.e.* the temporary release of the parties from their obligation to perform the treaty.[349] On the other hand, "termination" refers to the permanent cessation of the treaty's operation.[350]

The VCLT provides for several ways by which the operation of a treaty may be suspended. According to article 57, a treaty may be suspended for all parties either in conformity of the treaty provisions or, in the absence of such provisions, at any time by consent of all Contracting States after consultation with each other.[351] In contrast with article 57, which does not distinguish between bilateral and multilateral treaties, article 58 VCLT refers to suspension of a multilateral treaty between certain parties. This provision concerns treaties with bilateral structure, *i.e.* treaties that operate on the basis of reciprocity by regulating bilateral legal relationships.[352] Dörr gives as

[344] Dörr, Schmalenbach (n 2) 967.

[345] Dörr, Schmalenbach (n 2) 967; Corten O, Klein P, The Vienna Conventions on the Law of Treaties (Oxford University Press 2011) 500; Aust, *Treaties: Termination* (2006) Max Planck Encyclopedia of Public International Law para 18.

[346] Aust (2006) (n 343) para 1.

[347] *Ibid*.

[348] CISG Digest (n 109) 436.

[349] Dörr, Schmalenbach (n 2) 991; Cameron I, *Treaties: Suspension* (2006) Max Planck Encyclopedia of Public International Law para 13; Aust (2006) (n 343) para 27.

[350] VCLT, article 72(1).

[351] VCLT, article 57.

[352] Dörr, Schmalenbach (n 2) 997; See Draft Articles on the Law of Treaties with commentaries, Yearbook of International Law, Vol II (1966) para 1.

an example in that regard treaties concerning diplomatic agents, which regulate relationships between the sending and the receiving State.[353] Particularly, when suspension is to take place between certain parties only, it occurs temporarily and by the respective parties' agreement, under the condition that such a possibility is provided for or not excluded by the treaty, as well as does not deprive the other parties of their rights under the treaty and is not contradictory to the treaty's object and purpose.[354]

The nature as well as the object and purpose of the CISG would not permit its suspension by virtue of article 58 VCLT. Specifically, the CISG, as a as law-making international treaty that regulates relationships between private parties, generates obligations that need to be integrally performed by all parties.[355] This means that the relations between its Contracting States cannot operate in a bilateral, reciprocal basis. In addition, the CISG aims at the development of international trade, primarily by promoting its uniform application in international level. This is also reiterated by the fact that the CISG provides for only denunciation as way of termination. Should the parties intend for also suspension to be possible, they would have incorporated an explicit provision to this end. As such, the CISG's suspension and thus its non-application by courts and tribunals in cases concerning international contracts of sale would clearly undermine its purpose. On these grounds, the CISG could not be suspended on this basis.

Another way of a treaty's suspension or termination is that set forth in article 60 VCLT, which deals with the suspension or termination of a treaty's operation as a consequence of its breach. Pursuant to this provision, a material breach of a multilateral treaty entitles the other parties to suspend its operation.[356] The breach is "material", *inter alia*, in case of violation of a provision essential to the accomplishment of the object and purpose of the treaty.[357] The ILC chose the term "material" rather than "fundamental" to broaden its scope and not limit it to cases where the violation concerns primary purposes of the treaty.[358] However, even though a treaty's breach may pertain to other than its central provisions, such breach must be material to trigger the application

[353] Dörr, Schmalenbach (n 2) 997.

[354] VCLT, article 58.

[355] For the matter regarding the CISG's classification as "law-making" treaty, see supra Chapter I.B.2.; ILC Report of the ILC on the Work for its Second session, Vol II, *Yearbook of the International Law Commission* (1963) UN doc A/CN.4/107 para128.

[356] VCLT, article 60(2).

[357] VCLT, article 60(3); *Military and Paramilitary Activities in and against Nicaragua* (n 161) para 178; *Gabcikovo-Nagymaros Project* (n 154) paras 96, 7, 108; *Namibia Case* (n 20) para 96-7; *Rainbow Warrior (New Zealand v France) (Arbitration Tribunal) (1990) 82 ILR 499;* paras 74-5; *Application of the Interim Accord of 13 September 1995 (The Former Yugoslav Republic of Macedonia v Greece)* (Judgment) (2011) ICJ Reports 644 paras 117-9, 123, 162; *Arbitration Between the Republic of Croatia and the Republic of Slovenia (Croatia v Slovenia) (Case 2012-04)* (Partial Award) (2016) paras 204, 6, 7, 12-15, 18, 25; *Opinion 2/15 of the Court (Free Trade Agreement between the European Union and the Republic of Singapore)* (Full Court) (2017) (ECJ) para 161.

[358] Draft Articles on the Law of Treaties with Commentaries, Yearbook of International Law Vol II (1966) para 9.

of article 60 VCLT, in the sense that the provision that has been violated is vital for the treaty's execution.[359] The materiality of the treaty provisions is to be determined by objective criteria and on the basis of the reasonableness.[360] As example of material breach, Aust refers to the theoretical case of violation of the 1993 Chemical Weapons Convention in case that international inspections be prohibited.[361] This is on the grounds that the inspection regime established under this Convention is key-means of its existence.[362]

Against this background, a treaty may be suspended or terminated as a consequence of its material breach in the following cases; when the other parties unanimously agree to suspend it or terminate it,[363] when a specially affected party invokes the material breach to suspend or terminate the treaty between itself and the defaulting State,[364] or when any other party than the defaulting State invokes the breach, should the treaty is of such character that a material breach of its provisions radically changes the position of every other party with respect to further performance of its obligations.[365]

The above classification established under article 60 VCLT with regard to the parties that are entitled to invoke a treaty's suspension or termination due to its material breach is related to the typology of obligations under international law. The lit. a of paragraph 2 refers to treaties with bilateral structure or, in other words, treaties that, albeit multilateral, can be "bilateralized" on the basis of the reciprocity principle.[366] This type of treaties generate obligations that are commonly referred to as "synallagmatic", since they establish a mutual interchange of benefits between the parties.[367] Indicatively, the 1961 Vienna Convention on Diplomatic Relations or the 1994 WTO Agreement are reciprocal treaties.[368]

[359] *Ibid*.; Aust (n 4) 225; *Namibia Case* (n 20) para 94; 40ICJ Gabčíkovo-Nagymaros Project (n 154) para 106.

[360] Dörr, Schmalenbach (n 2) 1024.

[361] Aust (n 4) 295.

[362] *Ibid*.

[363] VCLT, article 60(2)(a).

[364] VCLT, article 60(2)(b).

[365] VCLT, article 60(2)(c).

[366] Simma B, Bilateralism and Community Interest in the Law of State Responsibility *in* Dinstein Y, *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Martinus Nijhoff Publishers 1989) 822; Sicilianos L A, *The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility* (2002) European Journal of International Law 1127, 1133.

[367] ILC Report of the ILC on the Work for its Tenth session, Vol II, Yearbook of the International Law Commission (1958) A/CN.4/115 27. The typology of obligations was primarily introduced by the International Court of Justice in its advisory opinion concerning Reservations to the Genocide Convention, see *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (n 211) 23. See Simma B, Tams C J, *Article 60 in* Corten, Klein (n 343) 1363.

[368] Dörr, Schmalenbach (n 2) 725.

Secondly, paragraph b applies with regard to treaties where each State is entitled to their observance by all parties.[369] According to the ILC, this part of article 60 is of essence with regard to multilateral treaties of law-making character.[370] The non-observance of treaty obligations by one party renders the other parties "specially affected" States". For this reason, the obligations that this type of treaties established are mentioned as "integral" obligations.[371]

Lastly, paragraph c refers to treaties establishing "interdependent" obligations, *i.e.* disarmament and nuclear-free zone treaties, where the material breach by one party frustrates the basis of the existence of the entire treaty regime.[372] In other words, in such types of treaties, the observance of obligations by all States is necessary condition for the performance of the other States.[373]

In contrast with the above provisions, in the fifth paragraph of Article 60 it is stipulated that suspension or termination of a treaty is strictly prohibited in the case of "provisions relating to the protection of the human person contained in treaties of a humanitarian character."[374] The purpose of this provision is, essentially, to protect individuals from a potential reaction of negative reciprocity by a State that was a victim of material breach.[375]

Reverting back to the case of the CISG, the question that is posed at a first stage is whether the CISG may be breached by its Contracting States, since, in principle, it does not impose obligations upon States but only upon private parties. The States' obligation that is generated with regards to the CISG derives from its character as self-executive treaty, which requires its direct implementation in national legal systems.[376] Accordingly, the CISG's character as self-executive treaty requires that its Contracting States apply the CISG through their national courts,[377] in cases where the law chosen by the parties to an international contract of sale of goods is either a national law that has *verbatim* adopted the CISG or a national law including the CISG. Consequently, the

369 *Ibid*. 1039.

370 Draft Articles on the Law of Treaties with commentaries, Yearbook of International Law, Vol II (1966) para 7.

371 Dörr, Schmalenbach (n 2) 725.

372 Dörr, Schmalenbach (n 2) 1040.

373 ILC commentary to article 42 of the 2001 Articles on Responsibility of States for Internationally Wrongful Acts paras 4–5; ILC Report of the ILC on the Work for its Tenth session, Vol II, *Yearbook of the International Law Commission* (1958) A/CN.4/115 para 128.

374 VCLT, Article 60(5).

375 Dörr, Schmalenbach (n 2) 1046.

376 Bianchi A, *International Law and US Courts: The Myth of Lohengrin Revisited* (2004) European Journal of International Law Vol 15 751, 753; see general Dalton R E, *Judicial Enforcement of Treaties: Self-Execution and Related* Doctrines (2006) European Journal of International Law 757; Swaine E T, *Taking Care of Treaties* (2008) Columbia Law Review 331, 343; Sloss (n 60) 311; Enabulele, Okojie (n 60) 2.

377 See supra Chapter I.B.3.iii.

violation of the CISG by a Contracting State would take place in cases where the national courts of that State do not apply the CISG as they have to.

Even if a breach of the CISG by a Contracting State can be established, it does not suffice to trigger the application of article 60 VCLT. For, should other Contracting States intend to invoke their right to suspension or termination due to the CISG's breach, they must also prove that this breach is material. This means that they should not only prove that the Contracting State in question breached the CISG due to its non-implementation by its national courts, but also that this breach is material in the sense that the CISG's object and purpose is defeated. As the ICJ clearly stated in *Gabcikovo-Nagymaros Project*, "only a material breach of the treaty itself, by a States Parties to that treaty, [...] entitles the other party to rely on it as a ground for terminating the treaty. The violation of other treaty rules or of rules of customary international law may justify the taking of certain measures, including countermeasures, by the injured State, but it does not constitute a ground for termination under the law of treaties".[378] Given that the threshold of materiality is considerably high, it could not be met by the refusal of implementing the CISG by national courts.

At a later stage, and assuming that a "material" breach can indeed be proven, for instance by the unjustifiable non-implementation of the CISG on a permanent basis, it arises the issue whether another Contracting State may terminate or suspend the CISG's application according to article 60 VCLT. Practically, this would mean that should a Contracting State not abide by its obligation to apply the CISG, another Contracting State may suspend its operation – or even terminate it – by also non-applying it through its own national courts. For the application of article 60 VCLT to the CISG, the classification of the latter as "synallagmatic", "integral" or "interdependent" is required. Comparably to other law-making treaties, such as those with private international law content, as well as those regulating specific areas of law, for example public health or labor rights,[379] the CISG regulates private international law matters regarding the international sale of goods and establishes rights and obligations for individuals. It is therefore deduced that the CISG generates obligations that need to be integrally performed by all parties; otherwise its *raison d'être* would be undermined.[380]

In sum, it should be noted that the threshold of materiality is set such highly that of the breach could be established only theoretically – at least to date – and in very remote cases. This is the reason why it has never been accepted that material breach is indeed established, despite it

[378] *Gabčíkovo-Nagymaros Project* (n 154) para 106.

[379] Dörr, Schmalenbach (n 2) 1261.

[380] ILC Report of the ILC on the Work for its Tenth session, Vol II, *Yearbook of the International Law Commission* (1958) A/CN.4/115 para 128.

having been invoked as ground for terminating international treaties.[381]Should, however, be demonstrated that a Contracting State materially breached the CISG, the other States will be entitled to invoke the material breach as ground for suspending the operation of the treaty or terminating it in the relations between itself and the defaulting State as "specially affected" States according to article 60(2)(b).

C. The application of the law of treaties to the CISG's regime of reservations

1. General remarks

The CISG authorizes Contracting States to formulate reservations and declarations regarding certain matters, in articles 93 – 97. The application of the CISG provisions as to reservations is based on the law of treaties. Against this background, this Chapter seeks to provide answer in certain matters regarding the interpretation and application of reservations and interpretative declarations under the CISG in the light of the law of treaties. Before that, a brief analysis of the law of treaties provisions regarding reservations is provided, since the CISG's reservation regime operates against this framework. As a preliminary matter, it should be noted that the VCLT provisions with regard to reservations are supplemented by the ILC Guide to Practice on Reservations to Treaties.[382]

The meaning of "reservation" is set forth in article 2(d) VCLT; it denotes a "unilateral statement […] made by a State […], whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State". Article 19 VCLT introduces the assumption[383] that, in principle, reservations may be formulated should they are not impermissible on the grounds laid down in this provision. When a treaty authorizes only specific reservations, the formulation of reservations not included in the authorized ones are prohibited.[384] This rule is also included in the CISG, which provides in article 98 that that "no reservations are permitted except those expressly authorized in [the CISG]".

[381] *Rainbow Warrior (New Zealand v France) (Arbitration Tribunal) (1990) 82 ILR 499;* paras 74-5; *Application of the Interim Accord of 13 September 1995 (The Former Yugoslav Republic of Macedonia v Greece)* (Judgment) (2011) ICJ Reports 644 paras 117-9, 123, 162; *Arbitration Between the Republic of Croatia and the Republic of Slovenia (Croatia v Slovenia) (Case 2012-04)* (Partial Award) (2016) paras 204, 6, 7, 12-15, 18, 25; *Gabčíkovo-Nagymaros Project* (n 154) para 106.

[382] 2011 ILC Guide to Practice on Reservations to Treaties. See also the Commentary on the 2011 ILC Guide to Practice on Reservations to Treaties.

[383] Dörr, Schmalenbach (n 2) 256; Villinger (n 6) 290; Corten (n 343) 432.

[384] VCLT, article 19

From the definition of "reservation" as set out in the VCLT, which refers to the formulation of reservations "when signing, ratifying, accepting, approving or acceding to a treaty", it may be implied that States are excluded to formulate reservations after having expressed the consent to be bound by a treaty. However, exception to this implication is the case where the parties have agreed otherwise.[385] State practice also provides that "late reservations" are permissible when the other Contracting States does not raise objections to the reservation.[386] This practice has been enshrined in Guideline 2.3.1 of the ILC Guide to Practice on Reservations to Treaties, on the basis of which "unless the treaty otherwise provides, a State or an international organization may not formulate a reservation to a treaty after expressing its consent to be bound by the treaty except if none of the other Contracting Parties objects to the late formulation of the reservation."[387] In this regard, the CISG permits the Contracting States to formulate certain reservations "at any time",[388] while others only at the time of "signature, ratification, acceptance, approval or accession".[389] Consequently, the permission of late reservations under the CISG is perfectly compatible with the law of treaties.

Moreover, unless otherwise agreed, reservations that are expressly authorized by a treaty do not require subsequent acceptance by the other Contracting States.[390] This is also the case with the CISG, which lays down all reservations that are permissible.[391] The legal effect of reservations for the reserving State is that they modify the provisions of the treaty to which the reservation relates to the extent of the reservation.[392]

The VCLT provides also for the possibility of formulating reservations with regard to another party.[393] These reservations modify the relations of the reserving State with only the State

[385] See Dörr, Schmalenbach (n 2) 257, who brings as example the article 10 para 1 of the 1999 International Convention on Arrest of Ships, UN Doc A/CONF.188.6, which stipulates that "[a]ny State may, at the time of signature, ratification, acceptance, approval or accession, or at any time thereafter, reserve the right to exclude the application of this Convention to any or all of the following […]".

[386] ILC Report of the ILC on the Work for its Fifty-third session, Vol II, *Yearbook of the International Law Commission* (2001) Vol II, A/CN.4/SER.A/2001/Add.1 paras 184–189.

[387] 2011 ILC Guide to Practice on Reservations to Treaties. See also the Commentary on the 2011 ILC Guide to Practice on Reservations to Treaties, Guideline 2.3.1.

[388] CISG, articles 94, 95, 96.

[389] CISG, articles 92, 93.

[390] VCLT, article 20.

[391] CISG, article 19(c).

[392] VCLT, article 21; see also Villinger (n 6) 300, who comments that the reserving state is exempted *vis-à-vis* the accepting State from the provisions of the treaty to which the reservation relates.

[393] VCLT, article 21.

to which the reservation relates.[394] In other words, the reservation remains *res inter alios acta*.[395] The relativity of the legal effects of reservations was confirmed by the ICJ in *Reservations to Genocide Advisory Opinion*, stating that "as no State can be bound by a reservation to which it has not consented, […] in the ordinary course of events such decision will only affect the relationship between the State making the reservation and the objecting State".[396] The relativity of reservations is also explicitly referred to in the relevant CISG provision, which provides for "reciprocal unilateral declarations".[397] The reservations that have been made on this basis modify only the relations between the States concerned.

Essentially, the meaning of reservations must be clearly set out, so that vague reservations be avoided.[398] Accordingly, the Human Rights Committee formulated the following requirement in its General Comment No 24; "Reservations must be specific and transparent, so that […] other States Parties may be clear as to what obligations […] have or have not been undertaken".[399] Dörr refers to many examples of vague and non-specific reservations.[400] *Inter alia*, he refers to the Indonesian domestic law reservation to the Convention on the Rights of the Child, to which many countries objected due to the general nature of the reservation.[401]

In the context of the CISG, the formulation of unclear reservations is implicitly prohibited under article 98 CISG, which provides that "no reservations are permitted except those expressly authorized in [the CISG]".[402] An example of unclear declaration is the Armenian declaration.[403] When depositing the instrument of accession to the CISG to the Secretary General of the UN, Armenia filed the following declaration; "Pursuant to Article 94 [of the CISG], the Republic of Armenia declares that the Convention shall not apply to contracts of sale where the parties have

394 *Ibid*.

395 Villinger (n 6) 301l; ILC Report of the ILC on the Work for its Fifty-third session, Vol II, *Yearbook of the International Law Commission* (2001) Vol II, A/CN.4/SER.A/2001/Add.1para 19.

396 *Genocide Advisory Opinion* (n 211) 10; *Nuclear Tests* (n 73) 253; see general *Belilos v Switzerland (App No 10328/83) (1988)*.

397 CISG, article 98.

398 See Dörr, Schmalenbach (n 2) 271;

399 UN HRC General Comment, *Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant* para 19. A similar approach was taken by the ECHR in Temeltasch v Switzerland (Case 9116/80) (1983) DR 120 (EC Committee Human Rights), 150.

400 Dörr, Schmalenbach (n 2) 272.

401 *Ibid*., where a reference to Canadian constitutional system is made with respect to "legislative jurisdiction on environmental assessment that is divided between the provinces and the federal government". Specifically, "the Government of Canada in ratifying this Convention, makes a reservation in respect of proposed activities (as defined in this Convention) that fall outside of federal legislative jurisdiction exercised in respect of environmental assessment." Multilateral Treaties Deposited with the Secretary General (n 144) Vol III 678 (ch XXVII.4).

402 Schroeter U G, *Backbdone or Backyard of the Convention* (2008) FS Kritzer 425, 449.

403 Schroeter (n 400) 449.

their places of business in the Republic of Armenia".[404] The wording of Armenia's declaration derogates from that of article 94 CISG, and thus its meaning remains uncertain. The practical consequences of this lack of clarity did not arise because Armenia withdrew its declaration before the CISG entered into force for Armenia as per article 97 CISG.

Lastly, the procedure regarding reservations as well as their entering into force are stipulated in articles 23 and 24 VCLT respectively, with which article 97 is in line; reservations must be in writing and formally notified to the depositary, withdrawal of reservations can take place at any time provided that it is in writing form and submitted to the depositary.[405]

The conclusion that is drawn from the above analysis is that the VCLT applies to the CISG as in any international treaty also with regard to reservations. The CISG applies in the cases where, as *lex specialis,* includes specific provisions as to reservations, which are notably in line with the regime established under the law of treaties. For matters that the CISG does not deal with, the respective VCLT provisions are employed.

2. The permissive reservations under the CISG: An overview

In principle, no reservations are allowed under the CISG, except from those expressly authorized by it.[406] The permissive reservations are provided for in articles 92 – 96 CISG. All of them result to the exclusion or modification of the legal effect that certain CISG provisions have in their application, as per article 2(d) VCLT. The partial or entire exclusion of the CISG's applicability affects the statutes of "Contracting State" in the sense of article 1 CISG as to the excluded parts.[407] In this Chapter, the provisions enumerated in the CISG are examined one by one.

Firstly, article 92 CISG authorizes State-parties to opt-out of Part II or Part III of the CISG. Accordingly, State-parties are entitled to exclude the Part concerning the formation of the contract, as well as the Part regarding the Sale of Goods, which includes, *inter alia*, the obligations of the

[404] UN Treaty Collection, International Trade and Development (Chapter X), available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10.

[405] CISG, article 97. See also *Case Concerning Right of Passage over Indian Territory* (n 147) 146, where it was stated that "[...] A State accepting the jurisdiction of the Court must expect that an Application may be filed against it before the Court by a new declarant State on the same day on which that State deposits with the Secretary-General its Declaration of Acceptance"; *Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v Nigeria)* (n 308) para 31.

[406] CISG, article 98.

[407] Torsello (n 325) 93.

seller and buyer, the payment of the price, the remedies for the breach of contract, the effects of avoidance.

Article 94 CISG incorporates the "Federal-State" clause,[408] according to which federal States, *i.e.* States with two or more territorial units and different systems of law apply in each unit, can extend the CISG's application to one or more units by submitting the relevant reservation.[409] A declaration to this effect had initially been made by Canada upon its accession to the CISG. Canada declared that the CISG would extend to Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland, Nova Scotia, Ontario, Prince Edward Island and the Northwest Territories, and *a contrario* and *expressio unius est exclusion alterius*[410] excluded its application to Quebec and Saskatchewan, and then to Yukon. Yet, by notices submitted subsequently to the UN, the application of the CISG extended to all of its territories, and thus all of them are now considered "Contracting States".[411]

A further category of reservations is the one set forth in article 94 CISG, which enables Contracting States to exclude the whole or partial application of the CISG to sales between parties whose places of business are established in States having "same or closely related" legal rules on matters governed by the CISG.[412] This exclusion is accomplished with either joint or reciprocal unilateral declarations.[413] To date, such reservations have been made by Denmark, Finland, Iceland, Norway and Sweden.[414] The notion of "same or closely related legal rules" is vague, since no clarifications are provided as to its meaning.[415] For this reason, this phrase is to be interpreted by virtue of both article 7(1) CISG and articles 31 – 32 VCLT.

Moreover, pursuant to article 95 CISG, States may declare that they will not be bound by article 1(1)(b). The latter provision concerns the CISG's application when the rules of private international law lead to the application of the law of a Contracting State. Thus, the reservation of article 95 acquires importance only in such a case, and not in cases where the parties to contracts

408 Date-Bah S K, *The United Nations Convention for the International Sale of Goods 1980: Overview and Selective Commentary* (1979) Ghana Law Review 50, 52.

409 CISG, article 93(1).

410 ILC Report of the ILC on the Work of its Fifty-third Session, *Yearbook of the International Law Commission* (2001) Vol II, A/CN.4/SER.A/2001/Add.1 para 220. Aust (n 4) 220; Gazzini (n 7) 155; *Life Insurance Claims (United States v Germany)* (1924) 7 Reports of International Arbitral Awards 1 (Mixed Claims Commission) 111; See also *Austrian Airlines v Slovak Republic (UNCITRAL case)* (2019) para 128, where the Tribunal held that "although [*expressio unius exclusion alterius*] principle is not explicitly mentioned in articles 31 and 32 VCLT, […] it may be relevant in the framework of the contextual interpretation of the scope of article 31(1) VCLT";

411 Pace Database, available at https://www.cisg.law.pace.edu/cisg/countries/cntries-Canada.html.

412 CISG, article 94.

413 *Ibid*.

414 Pace Database, available at https://www.cisg.law.pace.edu/cisg/countries/notables.html.

415 Torsello (n 325) 95.

of sale of goods are located to States that are Contracting States. In the latter case, the CISG directly applies by virtue of article 1. Hence, should a dispute between a party of a Contracting State that has made an article 95 reservation and a party of a non-Contracting State arise, domestic conflict of law rules apply. In case that the conflict of law rules lead to the application of the law of the party located to the reservation State, it is disputed whether the CISG applies; according to one position, the CISG is applicable since the requirements of article 1(1)(b) are met,[416] while others maintain that it is not applicable because of the State's pertinent reservation.[417] Should an interpretation according to the second position is adopted, the reserving State will be considered as non-Contracting State for the cases where the CISG would be applicable on the basis of article 1(1)(b).[418] However, since the scope of this provision is highly controversial, it is examined in separate Chapter.[419] The following States have proceeded to the reservation of article 95 CISG; Czech Republic, the People's Republic of China, Saint Vincent and Grenadines, Singapore, Slovakia and the US.[420]

Lastly, article 96 reservation concerns Contracting States whose legislation mandates that contracts of sale be included or evinced in written form. Such Contracting States may declare in accordance with article 12 that the conclusion, modification or termination of a contract, as well as any offer, acceptance or any other indication of intention are required to be made in writing. *A contrario*, it could be argued that a State whose legislation imposes no writing requirements on sales contracts is precluded from making the reservation of article 96.[421] Both the explicit reference to articles 11 and 29 and Part II of the CISG in article 96 and the legislative history of the CISG indicate that the possibility of States to impose writing requirement, contrary to the freedom-from-form principle that permeates the CISG, is limited to the formation of the contract itself.[422] Upon ratification of or accession to the CISG, the following countries have made the reservation of article 96; Argentina, Belarus, Chile, China, Estonia, Hungary, Latvia, Lithuania, Paraguay, the Russian Federation and Ukraine.

416 *CLOUT Case No 17U73/93* (1993) Pace Database (Oberlandesgericht Dusseldorf).

417 *CLOUT Case No 208* (Zheng Hong Li Ltd Hong Kong v Jill Bert Ltd. Swiss) (1999) Pace Database (Supreme Court of the People's Republic of China); *CLOUT case No 616 (Impuls v Psion-Teklogi)* (2002) (US District Court, Southern District of Florida); *CLOUT Case No C05-1195C* (Prime Start Ltd v Maher Forest Products Ltd) (2006) (US District Court).

418 Torsello (n 325) 98.

419 See infra Chapter III.C.3.

420 Pace Database, available at www.uncitral.org/uncitral/en/uncitral_texts/sale_ goods/1980CISG_status.html.

421 Flechtner (n 105) 196.

422 See United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980, Official Records, Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committee (1981) 20; CISG Digest (n 109) 428.

3. The reservation of article 95 CISG: The current debate and the proposed solution

As demonstrated above, the subject-matter of article 95 CISG reservation is the CISG's applicability on the basis of article 1(1)(b), according to which the CISG "applies to contracts of sale of goods between parties whose places of business are in different States […] when the rules of private international law lead to the application of the law of a Contracting State". *Ergo*, article 95 enables States to exclude their obligation under public international law to apply the CISG by virtue of article 1(1)(b).[423]

The application of this provision has led to the question whether the CISG is applicable in case that the private international law rules result to the applicability of the domestic law of a Contracting State, and thus to the applicability of the CISG, or whether this possibility is excluded on the basis of article 95 reservation, which excludes also the applicability of the domestic law of a Contracting State. This matter becomes even more complex when assuming that two parties to a contract of sale of goods have chosen the CISG as the law applicable to their contract either *per se* or because they have selected the domestic law of a CISG Contracting State. In such a case, should party autonomy prevail or should the application of the CISG be precluded? This issue has been considered as the "most challenging to understand" comparing to the other CISG's reservations.[424]

The application of article 95 CISG has acquired great practical importance the first years following the CISG's entering into force, mainly because this reservation had been used by the US and the People' s Republic of China, whose influence in international trade is undeniably significant.[425] With the number of Contracting to the CISG States being increased, the CISG in most cases applies by virtue of article 1(1)(a), which requires that both parties to contracts of sale of goods be located in Contracting States to the CISG.[426] Still, however, the importance of the aforementioned issue regarding the application of article 95 remains. Because from the way this provision will be interpreted, it will ultimately be determined which law is applicable to the case in question.

[423] CISG Advisory Council Opinion No 15 *Reservations under Articles 95 and 96 CISG* para 3.7, available at http://www.cisg.law.pace.edu/cisg/CISG-AC-op15.html.

[424] *Ibid*. para 3. 6.

[425] *Ibid*. para 3.2.

[426] *Ibid*.

To demonstrate the complexity and disagreement over this issue, the following examples from jurisprudence are employed. On the one hand, in a case issued by a German Court, it was decided that the CISG would apply despite Czech Republic's reservation of article 95 CISG, since its application had been agreed by the parties to the contract of sale.[427] Likewise, another German Court held that the CISG be applicable to the parties' contract despite the Contracting State's declaration of article 95.[428] The case concerned one party located in German and one in the US. When the parties' contract of sale was concluded, only the US was a CISG Contracting State. Therefore, since Germany had not yet ratified it, the CISG could not apply by virtue of article 1(1)(a). Despite the fact that the US had made use of article 95 declaration, the Court, in determining the applicable law by virtue of the German conflict of law rules, held that Indiana law was applicable. This ruling, however, was highly criticized, *inter alia*, by Professor Schlechtriem for failure to exclude the application of the CISG.[429] He particularly stated that the CISG could apply as US Sales Law only pursuant to article 1(1)(a), *i.e.* only if both parties had their place of business in CISG Contracting States.[430]

Conversely, in *Tokyo Chiho Saibansho*, the Court unanimously denied the application of the CISG in cases where it would apply on the basis of article 1(1)(b), namely where the parties are from a Contracting State and a non-Contracting State, should the Contracting State have made an article 95 reservation.[431]

For determining the meaning of article 95 CISG, and in particular of the phrase "will not be bound" by article 1(1)(b), both article 7(1) CISG and 31 and 31 VCLT must be used.[432] The CISG's interpretative clause cannot provide answer in that regard neither on the basis of "uniformity", since there is no harmonious interpretation of said provision by scholarly writing and jurisprudence nor on the basis of the "international character" of the CISG because this issue is in any case not involved with any domestic law interpretation. A "good faith" interpretation points to the exclusion of the applicability of the law of an article 95 CISG reserving State; the reason why an article 95 reserving State files such reservation is to limit its application to only cases where both parties to the international contract of sale are CISG Contracting State. An interpretation that would permit the CISG's application, despite the Contracting State's opposite

427 *CLOUT Case No 280* (n 410).

428 *CLOUT Case No 17 U 73/93* (n 414).

429 Schlechtriem, *Commentary on Oberlandesgericht Düsseldorf: Guide to UN Convention* (1994) Kluwer, Case Commentaries 3.

430 *Ibid*.

431 *CLOUT Case No 1997-wa-19662 (Nippon Systemware Kabushikigaisha v O)* (1998) Pace Database (District Court of Tokyo).

432 See supra Chapter II.B.

declaration that is entitled to make, would undermine the purpose of article 95 CISG. This approach is also in line with an effective interpretation of article 95 CISG, which stems from article 31 VCLT, in the notion of either "good faith" or "object and purpose";[433] such an interpretation gives effect to article 95 CISG. After all, in cases where a Contracting State has made use of article 95 reservation, the conflict-of-law rules would normally not point to the law of the reserving State as the most appropriate one. Rather, due to that reservation, the application law of the reserving State should be precluded as non-appropriate forum.

4. Distinguishing reservations from interpretative declarations

Reservations must be differentiated from interpretative declarations. As with the reservations, unless it is not prohibited by the treaty, States or international organizations may formulate interpretative declarations.[434] While reservations exclude or modify the legal effects of certain provisions, interpretative declarations constitute an element that must be considered in the interpretation process, and are not binding *per se*.[435] The determination of whether a unilateral statement is a reservation or interpretative declaration shall be made in accordance with good faith, the ordinary meaning to be given to its terms, and the intention of the author in light of the treaty to which it pertains.[436] The meaning of interpretative declarations as well as the method for determining their distinction from reservations are laid down in the ILC's Guide to Practice on Reservations to Treaties. "Interpretative declaration" particularly means a unilateral statement made by a State or an international organization, whereby the latter purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions.[437]

Importantly, an interpretative declaration must be approved by a State or an international organization and, to the extent possible, indicate the grounds on which it is formulated by the means of "express agreement".[438] The approval requirement is in line with article 31(3)(a) VCLT, which prescribes that together with the context, "any subsequent agreement between the parties

[433] *Lighthouses Case (France v Greece)* (n 184) 27; *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (n 20) para 66; *Territorial Dispute* (n 184) 51-52; *Aegean Sea Continental Shelf* (n 19) para 52.

[434] 2011 ILC Guide to Practice on Reservations to Treaties (hereinafter "ILC Guide to Practice on Reservations") para 3.5.

[435] Dörr, Schmalenbach (n 2) 240; Aust (n 4) 127.

[436] Guide to Practice on Reservations paras 1.3.1., 2.9.1.

[437] *Ibid*. para 1.2.

[438] *Ibid*. para 2.9.1.

regarding the interpretation of the treaty" shall be taken into account.[439] For this reason, in interpreting the treaty, account should be given to not only the interpretative declaration but also the approval or opposition to the latter.[440] In general, no presumption of approval or opposition to an interpretative declaration does exist, and silence with respect to the latter cannot be considered as approval.[441]

5. Examining the possibility of formulating interpretative declarations under the CISG regime

The CISG neither allows nor excludes the possibility of formulating interpretative declarations explicitly. The answer on whether the CISG allows for interpretative declarations to be formulated shall be determined by its object and purpose, which is to be given in the light of articles 7(1) CISG and 31 and 32 VCLT.[442] From a contextual interpretation of the CISG, in accordance with article 31(1) VCLT, it could be maintained that interpretative declarations are prohibited under the CISG. Specifically, article 98 CISG prescribes that "no *reservations* are permitted except those expressly authorized".[443]

In that regard, it has been argued that interpretative declarations are prohibited as being incompatible with article 7(1), which requires the observance of uniformity in interpreting the CISG.[444] This position is based on the argument that interpretative declarations will result in CISG provisions being interpreted in different ways rather than uniformly. The answer to the question whether interpretative declarations are compatible with article 7(1) CISG is not only a matter of their validity – or invalidity; a State's formulation of a non-permitted interpretative declaration that is incompatible with article 7(1) CISG may lead to the international responsibility of that State for not complying with its obligations arising out of the CISG (not for formulating the interpretative declaration, which "does not engage the international responsibility of the State"[445]). In fact, since the CISG constitutes international treaty,[446] it establishes international obligations

[439] *Ibid*. para 2.9.1; Commentary on 2011 ILC Guide to Practice on Reservations to Treaties; VCLT, article 31(3)(a).

[440] ILC Guide to Practice on Reservations para 4.7.1.

[441] *Ibid*. para 2.9.8, 2.9.9.

[442] See Chapter II for the issue of the CISG's interpretation in the light of the law of treaties. *Reservations to Genocide* (n 211) para 2; Sinclair (n 196) 53.

[443] [Emphasis given]; CISG, article 98.

[444] Schroeter (n 400) 455; Ferrari (n 105) 251; Torsello (n 325) 117; Basedow (n 12) 735.

[445] ILC Guide on Reservations to Treaties para 3.3.1.

[446] See supra Chapter I.

for its Contracting States. And by non-complying with their international obligations, States commit internationally wrongful act that entails their international responsibility.[447] The non-performance of a treaty cannot be justified on the basis of a State's internal law, as per article 27 VCLT.[448] In this sense, the interpretative domestic legislation cannot be invoked as a ground to justify the failure to perform a treaty.[449]

Against this backdrop, the matter of permissibility or not of interpretative declarations under the CISG regime acquires great importance. Based on the principle of permissibility of interpretative declarations unless otherwise provided for,[450] the CISG must be construed as allowing the formulation of interpretative declarations, in light of good faith and in accordance with its object and purpose.[451] Not only such a possibility is not precluded in the CISG, but also the Explanatory Note by UNCITRAL, included in the CISG and shedding light on its interpretation,[452] refers to "reservations and *declarations* that are permitted", leaving thus the margin to interpret the CISG as allowing for interpretative declarations.[453] After all, the formulation of interpretative declarations pertaining to the CISG should be permitted in the light

447 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts, articles 1,2.

448 See Case of the *SS Wimbledon (United Kingdom, France, Italy & Japan v Germany)* (Judgment) (1923) PCIJ Reports Series A No 1, 29; *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory* (n 66) 24; *Case Concering Eletronica Sicula S.P.A. (ELSI) (United States of America v Italy)* (Judgment) (1989) ICJ Reports 15 para 73; *Questions relating to the Obligation to Prosecute or Extradite* (n 163) para 113; *ECE Projektmanagement International GmbH and Kommanditgesellschaft Achtundsechzigste Grundstücksgesellschaft mbH & Co v Czech Republic (Case No 2010-5)* (Award) (2013) (PCA) para 4.748-9; *Jeronovi s v Latvia (App No 44898/10)* (2016) (ECHR) para 34; *Berkovich and others v Russia (App Nos 5871/07, 61948/08, 25025/10, 19971/12, 46965/12, 75561/12, 73574/13, 504/14, 31941/14, and 45416/14)* (2018) (ECHR) para 112; *Case of Abu Zubaydah v Lithuania (App No 46454/11)* (2018) (ECHR); *Ecuador Limited v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (ICSID Case No ARB/08/6)* (Decision on the Remaining Issues of Jurisdiction and on Liability) (2014) para 198; *Vigotop Limiteed v Hungary (ICSID Case No ARB/11/22)* (Award) (2014) paras 325, 7; *Venezuela Holdings B.V. and others (formerly Mobil Corporation and others) v Bolivarian Republic of Venezuela (ICSID Case No ARB/07/27)* (Award) (2014) para 225; *Caratube International Oil Company LLP and Devincci Salah Hourani v Republic of Kazakhstan (ICSID Case No ARB/13/13)* (Decision on the Claimants Request for Provision Measures) (2014) para 121; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v Republic of Ecuador (ICSID Case No ARB/06/11)* (Decision on Annulment) (2015) para 84; *Venezuela Holdings B.V. and others (formerly Mobil Corporation and others) v Bolivarian Republic of Venezuela (ICSID Case No. ARB/07/27)* (Decision on Annulment) (2017) paras 161-2; *Veliz Franco et al v Guatemala (C No 277)* (Preliminary objections, Merits, Reparations and Costs) (2014) Inter-American Court of Human Rights Series para 180; *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection* (OC-21/14) (Advisory Opinion) (2014) Inter-American Court of Human Rights Series A No 21 paras 51, 145; *Gender identity, and equality and non-discrimination with regard to same-sex couples. State obligations in relation to change of name, gender identity, and rights deriving from a relationship between same-sex couples* (interpretation and scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights) (OC-24/17) (Advisory Opinion) (2017) Inter-American Court of Human Rights Series A No 24 para 139 para 108.

449 Schroeter (n 400) 457.

450 For the issue of permissibility of declarations see Dörr, Schmalenbach (n 2); Guide to Practice on Reservations para 3.1.4.

451 VCLT, article 31.

452 See supra Chapter II.C.2.ii.

453 Emphasis given.

of the *de minore a maius* principle;[454] since reservations upon certain matters are allowed, interpretative declarations upon the same matters cannot reasonably be excluded.

Regarding, now, the particular issue of whether an interpretative declaration is allowed under article 7(1) CISG, an *ad hoc* examination is required. To this end, the interpretative declaration of the Federal Republic of Germany regarding article 95 CISG will be employed as an example. In specific, when acceding to the CISG, the Government of the Federal Republic of Germany declared that "Parties to the [CISG] that have made a declaration under article 95 are not considered contracting States within the meaning of [article 1(1)(b) CISG]. Accordingly, there is no obligation to apply […] this provision when the rules of private international law lead to the application of the law of a Party that has made a declaration to the effect that it will not be bound by subparagraph (1)(b) of article 1 of the convention". The nature of this declaration as interpretative declaration rather than reservation is deduced by its last sentence, whereby Germany clarifies that it "makes no declaration under article 95".[455]

With this declaration, the Federal Republic of Germany clarifies that the CISG does not apply in cases where Contracting States have made use of the article 95 reservation. As such, it seeks to provide answer to a highly disputed issue regarding the application of article 95 CISG when the conflict of law rules point to the application of a CISG Contracting State. Considering the disagreement regarding the interpretation of article 95 CISG, which does certainly not promote the uniform interpretation of the CISG, declarations such as that of the Federal Republic of Germany elucidate the meaning of the CISG provisions and ultimately contribute to the achievement of uniformity. Consequently, the interpretative declaration of Germany cannot be considered incompatible with article 7(1) CISG because it fully complies with the CISG's object and purpose, be it the uniform interpretation of its provisions.

However, even though Germany's declaration is in line with article 7(1) CISG, its validity is contested because of its non-approval by any State or international organization, as public international law requires.[456] Contrary to what would be the case with reservations,[457] this silence cannot be interpreted as approval of the declaration, and thus this given interpretative declaration can have no legal effect.[458] Remarkably, the fact that Germany's declaration has been submitted

454 Da Silveira, *Trade Sanctions and International Sales: An Inquiry into International Arbitration and Commercial Litigation* (2014) International Arbitration and Commercial Litigation 330, 334.

455 Schroeter (n 400) 452.

456 Pace Database, available at https://www.cisg.law.pace.edu/cisg/countries/cntries-Germany.html.

457 VCLT, article 20(5).

458 Ziegel J, *Canada Prepares to Adopt the International Sales Convention* (1991) Canadian Business Law Journal 1, 11; Schroeter (n 400) 455; Torsello (n 325) 117.

to the UN depositary does not render the declaration valid. Because as article 77 VCLT prescribes, the functions of the depositary are limited to keeping the texts of the treaty and the relevant documents and to ensuring that the procedural requirements regarding their form are duly met.[459] The depositary is thus not empowered to decide upon the validity of the submitted documents.[460] In sum, by formulating the aforementioned interpretative declaration, the Federal Republic of Germany has not acted in violation of public international law. Yet, it is deprived of any legal effect because of its non-approval.

In light of the above, interpretative declarations are allowed under the CISG, as its text itself provides for, to the extent that they are compatible with its object and purpose. The fulfillment of the latter requirement is to be determined in a case-by-case analysis, depending on the content of each interpretative declarations.

[459] VCLT, article 77.

[460] Schroeter (n 400) 455; Mc Rae D M, *The Legal Effects of Interpretative Declarations*, British Yearbook of International Law (1978) Vol 49 155, 171.

CONCLUDING REMARKS

The foregoing analysis addressed the relation between the CISG and the law of treaties as reflected in the VCLT. Admittedly, applying the VCLT to the CISG represents certain specific features due to the nature of the CISG as international instrument that deals with private law issues. This fact, however, does not preclude the VCTL's application, since the requirements of the CISG as international treaty to fall under the scope of the VCLT are met. These requirements are in no way associated with the substantive content of international treaties.

The first Chapter demonstrated that all the requirements for the CISG to constitute "international agreement" and fall under the ambit of the VCLT are met. Yet, as reiterated in the next two Chapters, the substantive provisions of the CISG do have effect in the application of the VCLT provisions with regard, indicatively, the issue of interpretation. In principle, international treaties are interpreted on the basis of the General Rule of interpretation and its supplementary one.[461] By contrast, the CISG contains its own tool for its interpretation, which deviates from the interpretation process that is by default established with respect to international treaties; in construing the CISG, the interpreter must primarily seek to promote internationality and uniformity in the CISG's application.

That the CISG embodies its own interpretative clause does not preclude the application of the General Rule of interpretation and the other rules and principles established under the law of treaties. Rather, articles 31 – 33 VCLT have two main functions in the context of the CISG; firstly, they supplement article 7 CISG for the interpretation of the CISG. They indicatively provide guidance as to the determination of the "ordinary meaning" of a term, which is the "regular, normal, customary" [462] use of the term in question. In this context, the UPICC may be used to shed light on the ordinary meaning of the CISG. The UPICC reflect international practices regarding international business transactions, and, as such, constitute *lex mercatoria*. For this reason, as it is expressly stated in their preamble, the UPICC may be used "to interpret […] international uniform law instruments". Especially in the context of the CISG, where the "depart from the [UPICC is] exceptional",[463] the UPICC can provide significant assistance for establishing the ordinary meaning of a term. Additionally, the VCLT provides the legal basis for resorting to the preparatory

[461] VCLT, articles 31, 32.

[462] Dörr, Schmalenbach (n 2) 581; Gardiner (n 52) 183; *Competence of the General Assembly for the Admission of a State to the United Nations* (Advisory Opinion) (1950) ICJ Reports 57 63; *Eastern Airlines Inc v Floyd* (1999) Justia 499 (US Supreme Court) 537; *Case concerning Avena and other Mexican* (n 85) para 45; *Kasikili/Sedudu Island* (n 140) para 30.

[463] Bonell M J, *An International Restatement of Contract Law: The Unidroit Principles Of International Commercial Contracts* (Transnational Publishers 3rd edn 2005) 305-6.

work of the CISG as subsidiary means of interpretation, which is a rather common practice in interpreting the CISG.

The second function of the VCLT in the interpretation of the CISG is related to the "vicious circle of interpretation", as referred to in the present paper. Even though the CISG establishes its own system for the interpretation of its provisions, this system is not self-sufficient. The elements composing article 7(1) are indefinite and vague, so that they have been characterized as "pious wishes".[464] As such, before making use of article 7(1) CISG, light shall be shed on the meaning of the rules and principles enshrined in article 7(1) itself. The determination thus of the meaning of the elements included in the interpretation clause of the CISG will be guided by the law of treaties.

Essentially, the CISG is a uniform statute, which, as such, is destined to create uniform private law that must be adopted by the Contracting States' legal systems. Simultaneously, the CISG is an international treaty governed by sources of public international as set forth in article 38 ICJ Statute, in the sense that the Contracting States' obligation to adjust their legislation by adopting and applying the CISG is dealt with by virtue of public international law. In similar fashion, the entitlement of Contracting States to denounce the CISG or terminate it due to its material breach, if any, is based on the respective VCLT provisions; in case of material breach, the "specially affected" States will be entitled to suspend or terminate the CISG by virtue of article 60(2)(b) VCLT.

Lastly, the CISG establishes specific provisions regarding reservations by authorizing Contracting States to formulate reservations as long as the latter are explicitly prescribed in the CISG text. It also establishes specific procedure that Contracting States must follow for formulating reservations. However, for issues such as the interpretation, acceptance and validity of reservations, the VCLT applies as *lex generalis*. Likewise, since the CISG does not pertain to the issue of "interpretative declarations" but only refers to "declarations" within, most probably, the meaning of "reservations", the issues arising in that regard will be settled by reference to the VCLT.

In a nutshell, as Mann stated, the VCLT is "one of the principal points [where] private and public international law meet".[465]

[464] Andersen B, Mozzota F, Zeller (n 168) 850, 851.

[465] Mann F A, *Uniform Statutes in English Law* (1999) The Law Quarterly Review 376, 377.

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ΔΗΛΩΣΗ ΠΕΡΙ ΜΗ ΠΡΟΣΒΟΛΗΣ ΔΙΚΑΙΩΜΑΤΩΝ ΠΝΕΥΜΑΤΙΚΗΣ ΙΔΙΟΚΤΗΣΙΑΣ

Δηλώνω υπεύθυνα ότι η διπλωματική εργασία, την οποία υποβάλλω, δεν περιλαμβάνει στοιχεία προσβολής δικαιωμάτων πνευματικής ιδιοκτησίας σύμφωνα με τους ακόλουθους όρους τους οποίους διάβασα και αποδέχομαι:

1. Η διπλωματική εργασία πρέπει να αποτελεί έργο του υποβάλλοντος αυτήν υποψήφιου διπλωματούχου.

2. Η αντιγραφή ή η παράφραση έργου τρίτου προσώπου αποτελεί προσβολή δικαιώματος πνευματικής ιδιοκτησίας και συνιστά σοβαρό αδίκημα, ισοδύναμο σε βαρύτητα με την αντιγραφή κατά τη διάρκεια της εξέτασης. Στο αδίκημα αυτό περιλαμβάνεται τόσο η προσβολή δικαιώματος πνευματικής ιδιοκτησίας άλλου υποψήφιου διπλωματούχου όσο και η αντιγραφή από δημοσιευμένες πηγές, όπως βιβλία, εισηγήσεις ή επιστημονικά άρθρα. Το υλικό που συνιστά αντικείμενο λογοκλοπής μπορεί να προέρχεται από οποιαδήποτε πηγή. Η αντιγραφή ή χρήση υλικού προερχόμενου από το διαδίκτυο ή από ηλεκτρονική εγκυκλοπαίδεια επιφέρει τις ίδιες δυσμενείς έννομες συνέπειες με τη χρήση υλικού προερχόμενου από τυπωμένη πηγή ή βάση δεδομένων.

3. Η χρήση αποσπασμάτων από το έργο τρίτων είναι αποδεκτή εφόσον, αναφέρεται η πηγή του σχετικού αποσπάσματος. Σε περίπτωση επί λέξει μεταφοράς αποσπάσματος από το έργο άλλου, η χρήση εισαγωγικών ή σχετικής υποσημείωσης είναι απαραίτητη, ούτως ώστε η πηγή του αποσπάσματος να αναγνωρίζεται.

4. Η παράφραση κειμένου, αποτελεί προσβολή δικαιώματος πνευματικής ιδιοκτησίας. **5.** Οι πηγές των αποσπασμάτων που χρησιμοποιούνται θα πρέπει να καταγράφονται

πλήρως σε πίνακα βιβλιογραφίας στο τέλος της διπλωματικής εργασίας .

6. Η προσβολή δικαιωμάτων πνευματικής ιδιοκτησίας επισύρει την επιβολή κυρώσεων. Για την επιβολή των ενδεδειγμένων κυρώσεων, τα αρμόδια όργανα της Σχολής θα λαμβάνουν υπόψη παράγοντες όπως το εύρος και το μέγεθος του τμήματος της διπλωματικής εργασίας που συνιστά προσβολή δικαιωμάτων πνευματικής ιδιοκτησίας. Οι κυρώσεις θα επιβάλλονται, ύστερα από γνώμη της τριμελούς εξεταστικής επιτροπής με απόφαση της Συνέλευσης της Σχολής, και μπορούν να συνίστανται στον μηδενισμό της διπλωματικής εργασίας (με ή χωρίς δυνατότητα επανυποβολής), τη διαγραφή από τα Μητρώα των μεταπτυχιακών φοιτητών , καθώς και την επιβολή πειθαρχικών ποινών, όπως η αναστολή της φοιτητικής ιδιότητας του υποψήφιου διπλωματούχου.

Επιπλέον, παρέχω τη συναίνεσή μου, ώστε ένα ηλεκτρονικό αντίγραφο της διπλωματικής εργασίας μου να υποβληθεί σε ηλεκτρονικό έλεγχο για τον εντοπισμό τυχόν στοιχείων προσβολής δικαιωμάτων πνευματικής ιδιοκτησίας.

Ημερομηνία Υπογραφή Υποψηφίου

30/09/2019