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Comparative Law on the Contract of the International Sales of Goods

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Abstract: The study provides a perspective on the configuration and history of the international sale of goods contract in European states, highlighting the main challenges generated by the adaptation of national legal systems to the UN Convention on the International Sale of Goods (Vienna, 1980). The analysis covers both theoretical aspects, referring to the "lex mercatoria" and the historical evolution of commercial relations, and especially on those of a practical nature, being sprinkled with elements of jurisprudence for a better visualization of the configuration of legal systems at the European level in relation to the international sale of goods. The international sale of goods is now perhaps the world's most frequently concluded trade contract in 2018, with global exports estimated at $19,468.14 billion, 12 times more than 10 years ago in 2008 when they were worth $16,149.3 billion. For example, the revenue from international food sales in 2022 amounted to USD 9,070,722 million and the market is on an upward trend, expected to grow by about 5, 29%. Interestingly, however, in terms of food retailing, at a private level, even during the pandemic period, the share of purchases made online was significantly low, accounting for only 7.8% of total sales. In the following we will present the international legal perspective on the international sale of goods, focusing on examples from each continent.

Keywords: negotiations; the obligation of good faith; bona fides; the precontractual stage

European Perspective Dominated by the French and German Systems

At European level, two legal systems stood out between the 18th and 20th centuries (Chianale, 2016, p. 30), and it was these that influenced the legal world in civil matters, particularly in contractual matters, so it is no surprise that European countries also adopted the vision offered by these national systems as a model for the international sale of goods: the French and German systems.

In France, the transfer of ownership in the case of the sale of goods was based on a contract concluded by the contracting parties (Chianale, 2016, p. 30), by contract is

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understood "*negotium*", as a manifestation of will to carry out a legal transaction. This system based on the transfer of ownership on the basis of the binding force of the contract has been in place in France since before the adoption of the French Civil Code in 1804, which enshrined this principle. French doctrine also mentions the effects of the contract and the importance of the Latin principle *pacta sunt servanda,* which has governed and continues to imbue commercial and civil relations with force. In this respect, French doctrine has noted since 1607, through A. Loysel, the importance attached to contractual obligations, pointing out that "*On lie les boeufs par les cornes et les hommes par les mots" (* Loysel A., *Institutions coutumières* (1607), apud (Dalhuisen, 2016, p. 211) *("As oxen are bound by their horns, so men are bound by the word given").* Beyond the metaphorical expression that manages to touch on the essence of the principle of the binding force of the contract, the customs recognizing this principle were taken up by the French legislator, so that in the French Civil Code the binding force of contracts is reflected in numerous legal provisions, of which the most relevant in the field of sale are art. 1.138 and art. 1.583 of the French Civil Code, which deals with the performance of obligations under contracts of sale, R. J. Pothier (Chianale, 2016, p. 30) played an important role in illustrating these concepts even before their inclusion in the Napoleonic Civil Code. The traditional French legal view (Dalhuisen, 2016, p. 211), as Jan Dalhuisen calls it, is also reflected in Article 1.354 of the French Civil Code, which states that "*Agreements (conventions) validly made between the parties have the force of law between the contracting parties*" ("*Les Conventions légalement formé estiennent lieu de loi à ceux qui les ont faites*" (Dalhuisen, 2016, p. 211).

This strongly binding view of the contract was adopted by Quebec, which, in its first Civil Code of 1866, known as the *Code civil du Bas-Canada*, largely adopted the French view of the contract of sale. Under Anglo-Saxon legal influences, the Quebec legislator, in the Civil Code of Quebec of 1994, delimited the transfer of ownership of the property from the other subsequent legal effects. A good example is the delimitation between the transfer of ownership and the transfer of risk, stating that, even after the transfer of ownership, the seller will continue to bear the risk of loss of the property until the time of its transfer to the buyer (Chianale, 2016). As the Romanian Civil Code was drafted in the spirit of the Quebec Civil Code, the legal provisions on the performance of obligations in general and sale in particular are similar, the national Civil Code also taking over both the principle of the binding force of the contract, expressly set out in Article 1.270 of the Civil Code, under the suggestive marginal title of *the binding force of the contract,* and the delimitation of the transfer of ownership from the other legal effects produced by virtue of the contract of sale.

It is less well known that even the Sales of Goods Act of 1893 (Chianale, 2016) (SOGA 1893), passed by the Parliament of Great Britain and Ireland, considered a stand-

alone common law model, was a transposition of the French legal perspective on the sale of goods, with the Act regulating the transfer of ownership, the identification of the property and the determination of the price. The French view has also been embraced, through SOGA 1983, but with strong English influences in countries outside the European continent, such as Australia, New Zealand, Singapore, Hong Kong, India and Nigeria (Chianale, 2016).

In Germany, the transfer of ownership is inextricably linked to the acceptance of the property, unlike the French approach, where the transfer of ownership operates with the agreement of the parties to conclude the sales contract (Chianale, 2016). Thus, the performance of the obligation to hand over the goods is not subsequent and subsequent to the transfer of ownership, but even a *sine qua non* for the fulfillment of the seller's main obligation.

The autonomy of the German legal system was viewed critically in its own national doctrine (Rheinstein, 1935, p. 232), which considered the domestic legislative approach to be far removed from the European legal vision. In 1924, Hermann Issay even spoke of an *Isolation of German legal thought*, in a pamphlet dedicated to young German lawyers, in which he criticized the exacerbated pragmatism and lack of leaning towards legal philosophy beyond what the text of the law conveys.

With the intensification of foreign trade, the German legal community turned its attention to the legal systems of the countries with which Germany traded, with Ernst Rabel, through the Kaiser Wilhelm Foundation, playing an important role on the road to legal unification. At the head of one of the Foundation's two international law institutes, the Institute of International Private Law, Rabel revolutionized the German legal system in the field of international trade, providing legal support to practitioners in commercial matters, collecting relevant case law and gradually compiling documentation reports[1], thus being a national forerunner of what we today call legal advice on international trade law. Without elaborating too much on Ernst Rabel's contribution to the legal development of international trade in 20th century Germany, it is worth recalling his 1936 work (vol. I) entitled *DasRecht des Warenkaufs*[2] ("The *Right to Buy Goods"*) and later developed in *The Rabel Draft*, which formed the basis of the Hague Convention (1955) on the Law Applicable to the International Sale of Goods (DiMatteo, 2014).

[1] Zeitschrift fir auslandisches und internationales Privatrecht/Review of Foreign and International Private Law (1926 ff.); Zeitschrift fir auslandisches öffentliches Recht und Völkerrecht/Review of Foreign Public Law and International Law (1929 ff.); Abhandlungenzumauslandischen und internationalen Privatrecht; Abhandlungenzumausl Ulndischenifentlichen Recht und Vö1kerrecht apud. (Rheinstein, 1935, p. 245).

[2] Kröll S., *German Country Analysis: Good Faith, Formation, and Conformity of Goods* in (DiMatteo, 2014).

The German regulations attached great significance to the moment of receipt of the goods, so that once the buyer had received the goods, both the transfer of ownership from the seller to the buyer (Chianale, 2016) and the extinguishment of the seller's contractual liability for defects in the goods sold (Rheinstein, 1935, p. 249)took place.

Although it is true that the German legal vision is more rigid to European legislative influences, the German model has proved effective and has been taken up by states throughout Europe, such as Sweden, Spain, Greece, or the former socialist states, including Estonia, Lithuania, Latvia, Slovenia, Slovakia and the Czech Republic (Chianale, 2016).

In Austria, the German model has been closely followed, with national private law courts, including the Supreme Court, frequently citing decisions from German case law in disputes concerning the enforcement of sales contracts[1]. This does not make the Austrian legal system one based on judicial precedent, as is the case in other countries, such as the U.K., where national courts are not only oriented towards previous case law, but are even bound by it. As the German doctrine is more thorough on the international sale of goods, as Larry DiMatteo has noted, there are frequent citations of well-known German doctrinaires such as Peter Schlechtriem, Ingeborg Schwenzer or Ulrich Magnus in Austrian court decisions (DiMatteo, 2014, pp. 309-310).

With a similar system of private law, Austria is in line with the German perspective both in the frequency of recourse to the interpretation and concrete application of the principle of good faith and in the rigidity of the free and imaginative interpretation of legal texts. As regards the application of the principle of good faith, the Austrian courts have been more reserved than the German courts in that they have confined themselves to examining the principle of good faith in the cases before them, assessing whether the parties have rebutted the presumption of good faith by reference to their conduct in performing their obligations. Thus, the national courts have assumed the role of verifying, by reference to reasonable standards, whether the parties to the contract have taken reasonable care in the proper conduct of the legal relations between them, for example by checking whether the stipulated deadlines for the performance of certain obligations or for the notification of non-conformity of goods purchased (DiMatteo, 2014, pp. 309-310) have been respected.

Although criticisms of the inflexibility of the interpretation of the law have been directed in particular at the German legal system (Rheinstein, 1935, p. 232), the way in which some of the contractual principles are applied has proved to be more flexible in this legal system than in the Austrian one. For example, in German case law, the principle of good faith has been raised by practitioners to the level of a

[1] Faber W., *The CISG in Austria* in (DiMatteo, 2014, pp. 309-310)

contractual standard through the interpretation of the law, and has even become a source of additional obligations for the contracting parties[1]. German practice has been courageous in applying this principle even beyond the extent necessary for a simple understanding of how the contractual obligations were performed, the controversial Oberlandesgericht Hamburg case being relevant in this respect[2]. Thus, the German courts have ruled that good faith must be verified as a condition in its own right and not only as a secondary condition for determining contractual fault[3].

Seen from another perspective, the rigidity of the Austrian legal system with regard to the extensive interpretation of autonomous concepts used in international conventions has a major advantage, with a desirable economic impact: the predictability (DiMatteo, 2014, pp. 309-310) of case law. Thus, with a well-reasoned

[1] Ebke W., Steinhauer B., *The Doctrine of Good Faith in German Contract Law*, in (Beatson & Friedmann, 1995, p. 171; Keinath, 1997, p. 48).

[2] Oberlandesgericht Hamburg, February 28, 1997, CISG-Online No. 261, apud. Kröll S., *German Country Analysis: Good Faith, Formation, and Conformity of* Goods in (DiMatteo, 2014)

[3] In Oberlandesgericht Hamburg, on 12 October 1994, a German seller entered into a sales contract with a CIF (*cost, insurance and freight*) clause with an English buyer, committing himself to sell him molybdenum iron from China.

Subsequent to the conclusion of the contract, on 20 October, by fax, the seller informed the buyer that his supplier was asking a triple price and asked the buyer to adjust the price, which the buyer rejected four days later, also by fax. From the discussions, the parties were unable to reach an agreement, despite the fact that the buyer offered an additional period of time for the performance of the obligation while accepting iron-molybdenum of a lower quality but at the price contracted with the seller.

As the seller failed to perform the contract on time, citing a price increase imposed by its supplier, the buyer contracted with a third party to supply molybdenum iron at a price higher than that agreed in the previous contract with the German seller. Rejecting the seller's offers of compensation and in order to recover its losses in full, the buyer sued the seller, claiming payment of the difference in price which it had incurred as a result of the contract with a third party.

Raising the issue of good faith, the seller has shown that it has not expressly refused to perform the obligation, but only that it is objectively unable to perform it within the time limit and that it has asked for additional time to negotiate with the supplier. In its analysis of the seller's good faith, the Court held that it was not necessary for the party to have expressly refused to perform the obligation, since mere non-performance by the last agreed deadline (the buyer had granted it an additional period for performance) reflected contractual fault, all the more so since the CIF clause requires performance of the obligation by the date stipulated by the parties. As regards the impossibility of performance of the seller's obligation, the Court held that neither force majeure nor Article 79 of the CISG Convention was applicable, as long as there were numerous suppliers of molybdenum iron on the market and the seller was able to contract with them.

Also interesting in terms of the analysis of hardship is the fact that in its reasoning, the Court established that the seller had to perform its obligation in the manner contractually agreed with the buyer, even though the price of the molybdenum iron had increased threefold, given that the transaction was highly speculative.

The decision is available at http://www.cisg-online.ch/content/api/cisg/display.cfm?test=261, accessed 14 June 2021.

logic and clear and pre-established patterns, strongly influenced by the German doctrine from which Austrian practice draws inspiration (DiMatteo, 2014, pp. 309-310), the national courts in Austria succeed in establishing a constant and predictable jurisprudence that offers stability and confidence to traders, who find a major advantage in national legislative and jurisprudential stability when carrying out international economic activities.

Italy was one of the original group of countries to sign the Vienna Convention on the International Sale of Goods from the outset, in 1981, and ratified it without reservation, making its provisions part of the national body of law. While the recognition and adoption of the CISG took place easily, with the Italian legislator embracing the ideology of unification of sales provisions, the actual implementation of the Convention's provisions in case law has been slow.

The Italian paradox is that although Italy was one of the first countries to sign the Convention on the International Sale of Goods, national courts continued for a long time to refer to national law prior to the entry into force of this treaty (GISG 1980). Thus, in resolving disputes falling within the jurisdiction of the Vienna Convention (1980), judges frequently used the Italian Civil Code, an aspect also noted in the literature[1]. Relevant in this respect are the cases of the Pretura Tribunale di Parma-Fidenza (24 November 1989[2]) and the Tribunale di Padova (11 January 2005[3]), in which the courts referred primarily to the provisions of the Italian Civil Code, pointing out that failure to comply with the provisions of the Civil Code also reflects a breach of the provisions of the Convention.

However, the case of Nuova Fucinati v. Fondmetall International (14 January 1993) is famous in Italian case law on international trade law, in which the Court of Monza held that the Vienna Convention on the International Sale of Goods was not applicable to the sales contract in question because, on the one hand, the parties had expressly agreed to choose Italian law and, on the other hand, because the buyer was established in Sweden, which had not ratified the Convention at the time the contract was concluded. In the Court's reasoning, it was pointed out that, even if the seller was established in Italy, where the Convention had been ratified as early as 1988, that could not make up for the fact that the other contracting party - the buyer

[1] Ferrante E., *Thirty Years of CISG: International Sales, 'Italian Style'*, The Italian Law Journal no.1/2019, pp. 99-100. In the same sense, see Ferrante E. in DiMatteo L.A., *op. cit.*

[2] Pretura Tribunale di Parma-Fidenza 24 November 1989, *Diritto del commercio internazionale*, p. 441 (1995), apud. Ferrante E., *Italy* in (DiMatteo, 2014, p. 400): "*We focus our attention on the seller's partial performance. The seller's non-performance is a fundamental breach of contract according to Article 49(1) (a)*".

[3] Court of Padua 11 January 2005, *Rivista di dirittointernazionaleprivato e processuale*, p. 791 (2005), apud Ferrnate E., *Italy* in (DiMatteo, 2014, p. 400): "*The issues converge in this sense under either the criteria followed in the application of the rules of the Civil code or the criteria expounded in Article 3 of the CISG*".

- was established in a State in which the Convention was not applicable at the time the contract was concluded. As regards the choice of Italian law, the Court of First Instance pointed out that, following the agreement of the parties, the applicability of the Vienna Convention was excluded, since Article 1(1) (b) of the Vienna Convention was not applicable. (1)(b) of the Convention provides that the conflict of law's provisions do not apply where the law governing the contract is chosen by agreement of the parties[1].

Although famous, the case of Fucinati v. Fondmetall International has been widely criticised (Ferrari, 2001, pp. 401-403)[2] for the way in which the court interpreted Article 1 of the Vienna Convention (1980) by excluding its application. Without elaborating on issues relating to the scope of the CISG in the section on comparative law, we point out that the basis of the criticism in Fucinati v. Fondmettal International is that the Italian court was quick to exclude the applicability of the Vienna Convention, even though the mere indication of the law in the contract does not *per se* lead to the exclusion of the Convention (Ferrari, 2006, p. 25).

[1] Carbone S., *Art 100. Nuove leggi civili commentate*, 1989, p. 349. See also Edoardo *Ferrante, Italy* in (DiMatteo, 2014, p. 399).
[2] Edoardo Ferrante*, Italy* in (DiMatteo, 2014, pp. 399-400) apud (Ferrari, 2006, p. 25).

In the meantime, under the influence of a constant European jurisprudence[1], including in arbitration matters[2], Italian courts have reoriented themselves[3], both in view of the fact that they have abandoned the conception that judgments are incomplete if they do not primarily refer to the Civil Code (DiMatteo, 2014), and in view of the fact that they have followed the practice of courts which have ruled that it is not self-evident that the parties, when choosing the applicable law, have waived the possibility of applying the provisions of the Vienna Convention.

In Denmark, the 1980 Vienna Convention on the International Sale of Goods has been ratified with reservations in respect of Article 92 of the Convention, which deals with the formation of the contract. As a result, the applicable legal rules on the formation of the contract had to be sought in Danish national law, which in turn led

[1] Hof van Beroep Gent, (Belgium, 17 May 2002), available at http://cisgw3.law.pace.edu/cases/000830g1.html; Bundesgerichtshof (Germany, 25 November 1998), published in Transportrecht-Internationales Handelsrecht, 1999, p. 18; Kantongericht Nidwalden, (Switzerland, 3 December 1997), published in Transportrecht-Internationales Handelsrecht, 1999, p. 10; Bundesgerichtshof (Germany, 25 June 1997), available at http://www.cisg-online.ch/cisg/urteile/277.htm; Oberlandesgericht München (Germany, 9 July 1997), available at http://www.cisgonline.ch/cisg/urteile/281.htm;Cour de Cassation (France, 17 December 1996) available at http://www.cisg-online.ch/cisg/urteile/220.htm;Landgericht Kassel (Germany, 15 February 1996) published in Neue Juristische Wochenschrift Rechtsprechungs-Report, 1996, p. 1146. Oberlandesgericht Hamm, (Germany, 9 June 1995), published in Recht der Internationalen Wirtschaft 1996, p. 689: Arrondissementsrechtbank Gravenhage (Netherlands, 7 June 1995), available at http://www.unilex.info/case.cfm?pid=1&do=case&id=154&step=FullText, Oberlandesgericht München, (Germany, 8 February 1995), available at http://www.cisg-online.ch/cisg/urteile/142.htm; Oberlandesgericht Köln, (Germany, 22 February 1995) published in Praxis Privat und Verfahrensrechts, 1995, p. 393; OberlandesgerichtKoblen, (Germany, 17 September 1993) published in Recht der Internationalen Wirtschaft 1993, p. 934; Oberlandesgericht Düsseldorf (Germany, 8 January 1993), published in Recht der Internationalen Wirtschaft 1993, p. 325. Case law taken from (Ferrari, 2006, p. 26).

[2] Schiedsgericht der Handelskammer Hamburg (Germany, 21 March 1996), *published in Monatsschrift* für DeutchesRecht, 1996, p. 781; Court of Arbitration of the Hungarian Chamber of Commerce and Industry, (17 November 1995), *available at*http://www.unilex.info/case.cfm?pid=1&do=case &id =217 & step =FullText; Court of Arbitration of the International Chamber of Commerce, Arbitral Award No. 8324, 1995, *published in* Journal du Droit International 1996, p. 1019; Court of Arbitration of the International Chamber of Commerce, Arbitral Award No. 7844, 1994, *published in* ICC Court of Arbitration bulletin 1995, p. 72; Court of Arbitration of the International Chamber of Commerce, Arbitral Award No. 7565, *published in* ICC Court of Arbitration bulletin 1995, p. 64. Case law taken from (Ferrari, 2001, p. 26)

[3] For example, to the effect that Italian courts no longer necessarily refer to domestic law when applying the CISG Convention, see Corte di Appello di Milano, December 11, 1998, published in *Rivista di diritto internazionale privato e processuale*, 1999, p. 112, available at http://cisgw3.law.pace.edu/cases/981211i3.html apud Ferrante E., *Italy* in (DiMatteo, 2014)

to uncertainty[1] as to how the Convention should be applied by reference to the rules of domestic law.

The situation was uncertain, both in Denmark and in the other Scandinavian countries such as Sweden and Finland, which also adopted the Vienna Convention (1980) with reservations to Article 92, to the extent that in 2012 the ICC International Chamber of Commerce had to ask them to withdraw their reservations made when ratifying the Convention[2]. In the same year that the ICC requested the withdrawal of the reservations to Art. 92 CISG, Denmark complied and the Danish Parliament decided to withdraw those reservations concerning the formation of the contract for the international sale of goods (Gregesen, 2023). Following this decision, the legal configuration on the formation of the sales contract was to change, as the CISG rules differed fundamentally from those in Danish law on the formation of the sales contract.

The major and notable differences between the conventional and the Danish national legal mechanism concern when an offer becomes effective and when an offer can be revoked. Thus, whereas under the Danish Contract Law the offer became effective when it reached the offeror, in the Vienna Convention (CISG 1980) the offer was considered effective as soon as it reached the addressee. Revocation of an offer under the Danish Contracts Act shows that revocation of the offer can take place if the revocation reaches the offeree before the offer reaches the offeror, whereas the CISG shows that revocation of the offer can only take place if the revocation reaches the offeror before the offeror accepts the offer, and furthermore, if the offer is irrevocable, it cannot be revoked at all.

Without pointing out other differences between the Danish legal system and that of the Vienna Convention (1980), we also tend to look to the other Scandinavian states, which have expressed reservations about some of the Convention's provisions and ratified the Convention with reservations. It is worth noting that of all the Scandinavian states, although some doctrinal opinions make the observation that it is more of a Nordic state (Magnus, 2012, p. 196), Iceland was the only one to ratify the Vienna Convention in its entirety without making any reservations[3].

Asked why all Scandinavian states have expressed the same reservation in ratifying the Vienna Convention, refusing to adopt it in its entirety and vehemently rejecting the implementation of Article 92 of the Convention in their national legislation, the answers come from a historical perspective. Of course, we will not go into every

[1] Ramberg J., *The Nordic Countries* in (DiMatteo, 2014)
[2] Lookofsky J., *CISG Case Law in Scandinavia*, in *CISG Part II Conference, Stockholm, September 4-5, 2008*, Stockholm Centre of Commercial Law publ. 11 (Stockholm, 2009), p. 57, apud Ramberg J., *The Nordic Countries* in (DiMatteo, 2014).
[3] Ramberg J., *The Nordic Countries* in (DiMatteo, 2014, p. 414; Magnus, 2012, p. 196).

single reservation made by the member states of the Convention, which have reserved the possibility of not implementing one or more of the provisions of the Vienna Convention (1980), but in this particular situation of the Scandinavian countries, we believe that a brief analysis is in order given that they are the only states that have refused the provisions of Article 92 of the CISG.

As to why ***Denmark, Finland, Sweden and Norway*** have refused to implement Article 92 of the Vienna Convention on the International Sale of Goods in national law, this is strongly based on the obvious difference between the provisions of their national laws and the provisions of the Convention. Full adherence to the Convention rules would have proved cumbersome and difficult to implement, as most of the rules on contract formation (Gregesen, 2023) differed and involved contradictory practices (Magnus, 2012). Apart from this main reason, there were other reasons why the Scandinavian States expressed reservations about adopting the Vienna Convention in its entirety, including both the fact that differences in the way the contract was formed were likely to create confusion and distortions, a point emphasized in Norwegian doctrine[1], and the fact that in the light of the Vienna Convention, with its contrasting provisions to national ones, the question might arise as to the validity of the way in which sales contracts were concluded[2] and the way in which the price was determined[3].

As to the reason why all Scandinavian countries have made reservations to Article 92 of the Convention, we believe that this is the uniform legislative situation in which all the countries of the peninsula find themselves. The strong commercial ties were translated into close and constant legislative cooperation (Magnus, 2012, p. 198), which resulted in the Nordic Sales Act (Magnus, 2012, p. 198) of 1905 and the Nordic Contracts Act 1915 (Magnus, 2012, p. 198). The stable and functioning legislative system prior to the Vienna Convention meant that the latter was not sufficiently attractive for the Scandinavian states to adopt it in its entirety, preferring

[1] Kotz D., *VerkäuferpflichtenundRechtsbehelfe des Käufers im neuennorwegischenKaufrecht vom 13. Mai 1988 Nr. 27 imVergleichzum UN-Kaufrechtvom 11. April 1980 (CISG)* (1997), p. 29 et seq., p. 155 et seq.; *Lookofsky* in (Ferrari, 2003, p. 101) apud (Magnus, 2012, p. 197); The *Norwegian Odelstings proposjon* Nr. 80, 1986/87, p. 145, apud (Magnus, 2012).

[2] Danish Justitsministeriet, Lovforslag (til International kobelov) Nr. 35, 6 October 1988, p. 76; The Swedish Proposition 1986/87:128, p. 88 et seq. apud (Magnus, 2012, p. 198); Johannsen, *Der Vorbehalt der skandinavischenStaatengemäß Art. 92 CISG vor dem Hintergrund des Vertragsschlussrechtsimdeutschen, skandinavischen und UN-Kaufrecht* (2003)/ Johannsen, The reservation of the Scandinavian states according to Art. 92 CISG against the background of the right to conclude a contract in German, Scandinavian and UN sales law (2003) 43, pp. 43 et seq. apud (Magnus, 2012, p. 198)

[3]*The Norwegian Odelstings proposjon* Nr. 80, 1986/87 Ann. 5 n. III.1, IV (on Art. 14 CISG), apud (Magnus, 2012, p. 198)

to maintain their pre-Convention legislation, even if it differed markedly from the conventional provisions.

In Estonia, the Vienna Convention on the International Sale of Goods was also ratified with reservations, Estonia signing the Convention on 1 October 1994[1], and 10 years later withdrawing its reservations made upon ratification of the CISG (DiMatteo, 2014). At the same time, the other Baltic States became members of the Convention, ***Latvia*** acceding in 1998[2], and ***Lithuania*** in 1991, but in some opinions[3] only in 1996. The jurisprudence of the Baltic States in the application of the Vienna Convention (1980) has been clearly less than that of the other European states, and it is telling that, as of 2008, Lithuania had not registered a single case in English in which the CISG had been applied (Torgans, 2008).

In a study[4] looking at the applicability of the Convention in the Baltic States ***(Estonia, Lithuania, Latvia), Ukraine and Belarus***, it was stated that in these countries, although the Convention is recognised, its applicability in practice is relatively low, and in cases where it is nevertheless applied, the solutions are the same as if national law had been applied. Last but not least, it has been criticised that, although the Vienna Convention should have been applied exclusively, the courts have also had recourse to national law in the resolution of cases, basing their decisions both on the Convention and on national laws, when in fact they should have decided solely on the basis of the provisions of the Convention (DiMatteo, 2014).

The same problem of combining the legal provisions of the Vienna Convention (1980) with those of national law has been noted[5] in the Balkan Peninsula, where cases under the Vienna Convention are fewer than in Western Europe[6], but just as varied and complex, involving the formation, modification, interpretation of sales contracts, nonconformity of goods, exemption from liability and damages (DiMatteo, 2014).

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[1] KritzerA.H., CISG Database (Pace), Estonia, September 7, 2004, http://www.cisg.law.pace.edu/cisg/countries/cntries-Estonia.html, apud. TadasKlimas, *Baltic States, Belarus, and Ukraine* in (DiMatteo, 2014)

[2] Klimas T., *Baltic States, Belarus, and Ukraine*, in (DiMatteo, 2014)

[3] Institute of International Commercial Law at Pace Law School, Kritzer A. H. CISG Database (Pace), Lithuania, January 22, 1998, available at http://www.cisg.law.pace.edu/cisg/countries/cntries-Lithuania.html apud. Tadas Klimas, *Baltic States, Belarus, and* Ukraine in (DiMatteo, 2014)

[4] Klimas T., *Baltic States, Belarus, and* Ukraine in (DiMatteo, 2014).

[5] For example, Aluminium Case (Serbia), in Djordjevi´c M., Pavi´c V., *The CISG in Southeastern* Europe in (DiMatteo, 2014).

[6] Djordjevi´c M, Pavi´c V., *The CISG in Southeastern* Europe in (DiMatteo, 2014).

The concurrent application of the provisions of the Convention with the provisions of national laws is also reflected in the case law of South-East European countries[1], as has also been the case in other European countries, such as Italy and Denmark, as mentioned above.

In Romania, the Vienna Convention on the International Sale of Goods was adopted on 6 March 1991[2], entering into force about a year later on 1 June 1992. As Romania has ratified the Convention without reservations, the provisions of the CISG (1980) have been incorporated into national law and have full legal effect in respect of international contracts for the sale of goods. Although, as in the case of the other Balkan states, Romania has not rushed to apply the Vienna Convention, as evidenced by the relatively small number of arbitral awards[3] in which the Convention has been the legal basis, Romania has successfully succeeded in joining the ranks of the signatory states and applying the provisions of the Convention correctly, with a certain degree of autonomy, also referred to in the literature[4].

It should be noted that, although the beginnings of the application and interpretation of the Convention were slow to say the least, given that in 2011, twenty years after Romania joined the CISG, there was only one case at the international level where the Convention was applied by the Romanian courts (DiMatteo, 2014). However, this reflection is not a true one, since there have been numerous cases[5] in which Romanian arbitral courts have settled disputes under the CISG, only that they were either not published or not translated into the languages of international circulation, being almost paradoxical that, in disputes with an

[1] Mineral water and wooden pallets case (Serbian FTCA Award No. T-25/06, November 13, 2007, available at http://cisgw3.law.pace.edu/cases/071113sb.html.) and Medicaments case (Serbian FTCA Award No. T-25/06, November 13, 2007, available athttp://cisgw3.law.pace.edu/cases/071113sb.html.), in Djordjevi´c M., Pavi´c V., *The CISG in Southeastern Europe*, in (DiMatteo, 2014, p. 423).

[2] Law No 24 of 6 March 1991 on Romania's accession to the United Nations Convention on Contracts for the International Sale of Goods published in the Official Gazette No 54 of 19 March 1991.

[3] Electronic Library on International Commercial Law and the CISG, available at http://www.cisg.law. pace.edu/cisg/text/casecit.htm (accessed December 15, 2011), apud. Milena Djordjevi´c and Vladimir Pavi´c, *The CISG in Southeastern Europe,* I (DiMatteo, 2014).

[4] Djordjevi´c M., Pavi´c V., *The CISG in Southeastern* Europe in (DiMatteo, 2014).

[5]Arbitral Award No. 201/2003 (unpublished), Arbitral Award No. 230/2003 (unpublished), Arbitral Award No. 26/2004 (unpublished), Arbitral Award No. 67/2004 (unpublished), Arbitral Award No.207/2004 (unpublished), Arbitral Award No. 325/2004 (unpublished); Arbitral Award No. 330/2004 (unpublished), Arbitral Award No. 160 of 15 August 2003 (unpublished), Arbitral Award No. 73/2003 (unpublished), Arbitral Award No. 242/2004 (unpublished), Arbitral Award C.A.B. No. 68 of 22 March 2004 (unpublished), in (Şandru, 2016, p. 98).

element of foreignness, the case law existed but did not go beyond the borders of the country.

Over time, the case law has been substantially enriched, with Romanian courts even managing to overcome the trend that most European states have had in terms of combined application of treaty provisions with those of domestic law. Thus, in a decision[1] of the Bucharest Court of Appeal, the court ruled that the provisions of the Vienna Convention (1980) are exclusively applicable, pointing out that the obligations of the parties to the sales contract are laid down in the body of the Convention and that the provisions of national law (Şandru, 2016, p. 98) are inapplicable. The fact that the Romanian courts have in some cases referred to the provisions of domestic rules does not make this a mixed application of legal provisions, but rather a facet of the fact that, once the Convention has been acceded to, it can be considered as domestic law in a case, the court even pointing out that with the choice of Romanian law, the application of the Vienna Convention (1980) was also implicitly[2] chosen, since it had been ratified in full and without reservations by Romania prior to the conclusion of the contract of sale.

Without elaborating on how the Romanian national courts have understood to apply and interpret the Convention, as this subject will be dealt with later in this paper, we would also like to mention the fact that over time, in domestic case law, the Convention has been attributed both the rank of *lex mercatoria* (Şandru, 2016, p. 98) and the status of an element of authority (Şandru, 2016, p. 102). The application of the CISG has thus acquired so many meanings that it has even become a point of comparison, with one case showing that the provisions of the Convention are preferable to domestic law on the international sale of goods[3].

[1] C.A.B., Arbitral Award no. 166/2010, unpublished, in (Şandru, 2016, p. 98).

[2] In the C.A.B. arbitral award no. 68 of 22 March 2004 (unpublished), the court points out that in view of "*the provisions of Article 53 et seq. of the 1980 Vienna Convention on the International Sale of Goods, to which Romania is a party and which constitutes Romanian law of sale-purchase, the defendant shall be ordered to pay the sum of (...) by way of remainder of the* price", in (Şandru, 2016, pp. 98-99). See also C.A.B, Arbitral Award no. 28 of 21 February 2003, no. 51 of 31 March 2003: "*In such a situation, having regard to the provisions of art. 64 of the Vienna Convention on the International Sale of Goods, which is the Romanian law of international sale, the defendant shall be obliged to pay the sum of (...) by way of price*", and with reference to art. 53 et seq.: Arbitral Award no. 201/2003, no. 230/2003, no. 26/2004, No. 67/2004, No. 207/2004, No.325/2004; No. 330/2004, Art. 54 et seq., Arbitral Award No. 160 of 15 August 2003, Art. 59 CISG: Arbitral Award No. 73/2003, Arbitral Award No. 242/2004 (unpublished), in (Şandru, 2016, pp. 98-99)

[3] C.A.B., Arbitral Award no. 191/2010 (unpublished), in (Şandru, 2016, p. 103).

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