



MIDLANDS STATE UNIVERSITY

FACULTY OF LAW

CISG ARTICLES 92 AND 96 RESERVATIONS AND GLOBAL UNIFORMITY OF INTERNATIONAL SALES LAW: FAILURE OR SUCCESS THROUGH COMPROMISE?

A dissertation submitted in partial fulfillment of the requirements of a bachelor of laws
honours degree.

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CONTENTS

Declaration.....	iii
Approval Form.....	iv
Dedication.....	v
Acknowledgements.....	vi
Abstract.....	vii
Chapter 1: Introduction.....	1
1.1 Goals of the CISG.....	1
1.2 Compromise nature of the Convention.....	1
1.3 Scope of paper.....	2
1.4 Compromise with special regard to background of Article 92 and 96.....	2
1.4.1 Rationale for the Article 92 compromise provision.....	3
1.4.2 Rationale for the Article 96 compromise provision.....	4
1.5 Problem statement.....	5
1.6 Objectives.....	6
1.7 Methodology.....	7
Chapter 2: Application of the Reservations.....	8
2.1 Rationale for reservations.....	8
2.2 Article 92:.....	8
2.2.1 Application of the provision.....	8
2.2.2 Effects of the reservation.....	9
2.2.3 Case analysis on application of Article 92.....	11
2.3 Article 96:.....	17
2.3.1 Prerequisites of the declaration and duration of application.....	17
2.3.2 Effects of the reservation:.....	18

2.3.2.1 Freedom of Form	18
2.3.2.2 Derogation from provisions	19
2.3.2.3 Form requirements covered	21
2.3.2.4 Universal application	21
2.3.2.4.1 Case analysis on application of Article 96	22
2.4 Conclusion	26
Chapter 3: CISG Goals and the Reservations	28
3.1 Introduction	28
3.2 Goals of the CISG	28
3.3 Standard of Uniformity of the CISG	29
3.4 Whether uniformity has been achieved in light of the compromises	31
3.5 Were the provisions crucial for the current success of the CISG?	35
Chapter 4: Conclusion and recommendations	38
4.1 General Conclusion on whether the compromises have resulted in the failure or success of the Convention	38
4.2 Recommendations	39
Bibliography	42

DECLARATION

I, Ratidzo Makumbe, do hereby declare that this dissertation is the result of my research, except to the extent indicated in the acknowledgements, references and by comments included in the body of the report, and that it has not been submitted in part or in full for any other degree at any other university.

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SIGNATURE

DATE

APPROVAL FORM

The undersigned certify that they have read and recommended to Midlands State University for acceptance a research project entitled: “CISG Articles 92 and 96 reservations and global uniformity of international sales law: Failure or success through compromise? ” ,submitted by Ratidzo Makumbe in partial fulfillment of the requirements of the degree of Bachelor of Laws Honours Degree.

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DEDICATIONS

To my mum and dad, you would have been proud.

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Thank you Lord Jesus for bringing me this far.

Special thanks to my supervisor Mr A. Takawira for his guidance and assistance in coming up with this work.

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ABSTRACT

The CISG is acclaimed world over for its success in unifying international sales law despite the compromises during its drafting. This thesis examines whether the compromises in the Article 92 and 96 reservations have affected the uniformity of the CISG and whether they are still relevant for the success of the Convention today. In conclusion it recommends that the declarations be withdrawn and the Convention be amended to allow for uniformity of the CISG.

CHAPTER 1

INTRODUCTION

1.1 Goals of the CISG

The United Nations Convention on Contracts for the International Sale of Goods (the CISG or the Convention) was sought to bring uniformity to the law which regulates international sales contracts taking into account the different social, economic and legal systems which would contribute to the removal of legal barriers in international trade and promote the development of international trade¹. Such uniformity was not only to be in the text of the CISG but also to be propagated in its interpretation.² Before the inception of the Convention, disputes arising from international commercial sales would be solved under national or regional laws on the sale of goods. The CISG was therefore an attempt to establish one uniform body of law which if ratified by a state would govern sales contracts by parties who carried out business in such states. The CISG to date is the greatest attempt made to unify international sales law with 78 countries being signatories to it.³

1.2 Compromise Nature of the Convention

The CISG's drafting began in 1966 when the United Nations General Assembly established a worldwide representative body, the UN Commission on International Trade Law (UNCITRAL) for promoting progress, harmonization and unification of the law of international trade which was tasked with the drafting of the unified sales law.⁴ In 1980, representatives of 62 states and 8 international organizations met in Vienna to finalise the draft Convention, however, challenges in principles inherent in the different

¹ Preamble of the CISG

² Article 7 CISG

³ Authoritative information on its status can be obtained from the United Nations Treaty Collection at <http://untreaty.un.org/>, on the CISG website at www.cisg.law.pace.edu and on UNCITRAL's website at www.uncitral.org/

⁴ J Honnold *Uniform Law for International Sales under the 1980 United Nations Convention* (2009) 1

legal systems hindered the finality of the document. Main differences were between the common law and civil law jurisdictions, and the socialist systems and western systems.⁵ The drafting history therefore reflects compromises on legal concepts considered important as a way of bringing finality to the draft while to some extent conceding to the interests of State parties which were not prepared to concede certain features and principles of their laws. The result was therefore a CISG with a number of “compromise provisions” in a bid to come up with a document appealing to all parties that negotiated the Convention.

1.3 Scope of Paper

This paper will focus on Article 92 which relates to the exclusion of Parts II or III of the CISG and Article 96 as read together with Articles 12 and 6 pertaining to the writing requirement in international sales contracts. The paper will investigate the compatibility of their compromise nature and the CISG’s goal of global uniformity of international sales law.

1.4 Compromise with special regard to Background of Article 92 and 96

Rossert in describing the drafting process of the CISG states that the majority of delegates representing nations that follow the civil-law tradition, did not suddenly realize the virtues of the common-law approach to contract and commercial transactions, nor did the representatives of states with planned socialist economies suddenly recognize the virtues of free enterprise and the private allocation of risks by contract. The many representatives of poorer and underdeveloped nations did not come to a new appreciation of the plight of the world’s wealthy creditors. It was only after thirty years of hard technical negotiation by experts that worldwide agreement was reached by

⁵ A Rossert ‘Critical Reflections on the United Nations Convention on contracts for the International Sale of Goods’ (1988) 45 *Ohio State Law Journal* 422-460

diplomatic compromise.⁶ The compromise as described by Rossert, among other provisions is also reflected in Articles 92, 96 and 12.

1.4.1 Rationale for the Article 92 compromise provision

The Article 92 declaration allows for a state to declare that it will not apply parts of the Convention which relate to formation of the contract or the rights and obligations of parties. This declaration was made by the four Scandinavian countries namely Denmark, Sweden, Norway and Finland. It was a compromise to allow these states to ratify the Convention without having to do away with domestic laws on formation of sales contracts.

Two arguments were advanced by Scandinavian representatives in support of the Article 92 declarations. First, as regards the revocability of offers, part II rules were described as unduly influenced by the corresponding common law rules. Particularly, Article 16(1) permitting an offeror to revoke an offer prior to acceptance was perceived as something foreign to Scandinavian law.⁷ Second, it was feared that the adoption of CISG Part II which regulates only contract formation, but not contract validity might create uncertainty as to when a binding and valid international sales contract had been made.⁸ These states held their laws on contracts of sale to be sufficient as regards the formation of contracts.

It is important to note that all Article 92 reservations were made to the exclusion of Part II and some states have since withdrawn the reservations. Denmark, Finland, and Sweden completed the necessary formalities at both domestic and international levels.⁹ Therefore, CISG part II entered into force in Finland on 1 June 2012¹⁰, in Sweden on 1

⁶ Rossert (n 5 above)

⁷ N Thomas 'The Continued Saga of the CISG in the Nordic Countries: Reservations and Transformation Reconsidered' *Nordic Journal of Commercial Law Issue 2013#1*, page 4, according to the default rule applicable in Scandinavian domestic law (*Aftaleloven*, in Denmark), every communicated offer is a "firm" offer binding upon the offeror for a reasonable period of time

⁸ J Lookofsky 'Alive and well in Scandinavia: CISG Part II' 18 *Journal of Law and Commerce* (1999) 289-299 available at www.cisg.law.pace.edu/cisg/biblio/lookofsky1.html

⁹ N Thomas (n 7 above)

¹⁰ Journal of the United Nations (30 November 2011) No.2011/230

December 2012¹¹, and in Denmark on 1 February 2013.¹² Norway has begun the process of withdrawing the reservation, Part II will apply in Norway as of 1 November 2014.¹³ Though withdrawals have been made by most of the states which had made the reservation the declaration will be addressed herein as its existence in the Convention paves way for divergent texts of the Convention.

1.4.2 Rationale for the Article 96 compromise provision

The CISG in Article 11 provided that a contract need not be evidenced in writing, this was also reiterated in Article 29 which allows for modification in any form other than in writing. This provision was in line with the laws of Western legal systems and contrary to Socialist legal systems. The freedom of form principle was a controversial issue as the Socialist countries insisted on formal requirements for the making of foreign trade contracts, a basic requirement in their laws.¹⁴ This requirement by the Socialist states resulted in compromise and the inclusion of Article 12 in the Convention.¹⁵ Article 12 states, *“Any provision of Article 11, Article 29 or Part II of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under Article 96 of this Convention. The parties may not derogate from or vary the effect of this Article.”*

Article 12 automatically brought about the Article 96 reservation which was adopted as a compromise solution to resolve difficulties that might be encountered by states willing to ratify the Convention, but whose laws established a mandatory written form for international sales contracts.¹⁶ Article 96 therefore allows a state to make a declaration

¹¹ Journal of the United Nations (26 May 2012) No 2012/102

¹² Journal of the United Nations (4 July 2012) No. 2012/128

¹³ in UNIS/L/198- Norway becomes a party to Part II (Formation of Contract) of the United Nations Convention on Contracts for the International Sale of Goods (CISG), VIENNA, 17 April 2014 (UN Information Service) at <http://www.unis.unvienna.org/unis/en/pressrels/2014/unis198.html>

¹⁴ CISGAC Opinion No. 15, Reservations under Articles 95 and 96 CISG, Rapporteur: Professor Doctor Ulrich G. Schroeter, University of Mannheim, Germany.

¹⁵ U.G. Schroeter:- ‘The Cross-Border Freedom Of Form Principle Under Reservation: The Role Of Articles 12 and 96 CISG In Theory And Practice’ 31 *Journal of Law and Commerce* page 4

¹⁶ J Rajski ‘Article 96’ in Bianca-Bonell Commentary on the International Sales Law, Giuffrè (1987) 658-660.

in line with provisions of Article 12. The two provisions working in tandem also took away party autonomy provided in Article 6.

The reservation authorised by Article 96 is the most popular of the CISG declarations with ten countries initially having made the reservation namely Argentina, Belarus, Chile, China, Estonia, Hungary, Latvia, Lithuania, the Russian Federation and the Ukraine. However, the declaration is currently effective in eight countries: Argentina, Armenia, Belarus, Chile, Hungary, Paraguay, Russia,¹⁷ and Ukraine. Estonia withdrew the declaration on 9 March 2004.¹⁸ Latvia¹⁹ and Lithuania²⁰ similarly withdrew their declarations on 13 November 2012 and 1 November 2012 respectively. In light of the above this paper seeks to investigate whether the goal of uniformity was achieved despite the compromises in Articles 92 and 96 (and 12).

1.5 Problem statement

The Article 92 reservation provides for two texts of the Convention, one providing for the formation of the contract according to unified law and another leaving such formation to the domestic laws of reserving states. This declaration allows for non-uniformity by allowing the Convention to give room to application of domestic laws on formation of contracts and the rights and obligations of parties to CISG governed contracts where a state has made a reservation. The law applicable to a contract between the CISG provisions and domestic law is chosen according to the rules of private international law

The Article 96 reservation allows for a dual and opposing application of the CISG. It safeguards and allows the application of domestic laws relating to writing requirements in sales contracts. This declaration is however at loggerheads with other provisions of

¹⁷ The reservation made by the former U.S.S.R. extends to the Russian Federation in accordance with the principles of state succession; Presidium of the Supreme Arbitration Court of the Russian Federation, 25 March 1997, Resolution No. 4670/96, translated at <http://cisgw3.law.pace.edu/cases/970325r1.html>

¹⁸ CISG Advisory Opinion No.15 (n 14 above) according to Article 97(4) CISG the withdrawal took effect on 1 October 2004.

¹⁹ CISG Advisory Opinion No.15 (n 14 above) according to Article 97(4) CISG the withdrawal took effect on 1 June 2013.

²⁰ CISG Advisory Opinion No.15 (n 14 above) according to Article 97(4) CISG the withdrawal will take effect on 1 June 2014.

the Convention which allow party autonomy and freedom of form as it takes precedence over those provisions.²¹

This paper seeks to investigate whether the rationale behind the provisions and their application allow the achievement of the goal of uniformity in international sales law both in the text and interpretation of the Convention. It will be assessed whether the CISG did not merely ascribe power to domestic laws thereby affecting the basic aspirations of the Convention, and whether despite these compromises the CISG may have succeeded in achieving the desired uniformity of international sales laws.

1.6 Objectives

The aim of this paper is to analyse the effects of CISG Articles 92 and 96 on the goal to achieve uniformity. This will be done through the following :-

- i. To analyse Articles 92 and 96 as compromise provisions and their effect on the Convention's application.
- ii. To make an assessment of how the provisions have been interpreted and applied in contracting states.
- iii. To determine whether their compromise nature has had any impact on the goal to achieve uniformity in the application of the CISG
- iv. To give recommendations on how uniformity can be achieved with little to no differences between states.

1.7 Methodology

²¹ Article 6 provides for party autonomy while Article 11 provides for freedom of form of a contract

The author's research will be based on review of original texts, plenary sessions deliberations, commentaries, peer reviewed scholarly Articles, textbooks, Advisory Council Opinions and cases decided around the world.

CHAPTER 2

APPLICATION OF THE RESERVATIONS

2.1 Rationale for the reservations

The rationale for the declarations was to allow a compromise that would enable jurisdictions that required contracts to be evidenced in writing and those not willing to include Part II or III of the Convention in their laws to contract to the CISG. The practical importance of Articles 12 and 96 CISG is influenced by the high number of contracting states that have made use of the reservation²² and the fact that major trading nations such as China and Russia made use of the reservation²³. Where such major trading nations have made use of the declaration the number of international sales contracts to be affected is higher, putting into consideration the other numerous states which have made use of the declaration. Article 92's significance differs from that of Article 96 in that its inclusion in the Convention was a result of a few states' displeasure with part II of the Convention. It was therefore included for the Scandinavian states and any other which could harbour the same concerns in the future. It is clear that a compromise had to be reached to enable wide application of the CISG through wide acceptance and ratification at its inception and in the future.

2.2 Article 92

2.2.1 Application of the provision

Article 92 (1) allows a state to declare at the time of ratification or accession that it will not be bound by part II or III of the Convention. Where the reservation pertains to part II it accordingly affects the applicability of Articles 14 to 24 on the formation of the contracts. Where part II is excluded a state may apply its domestic laws on the formation of contracts while CISG part I on the sphere of application and part III on

²² 12 states, though it is now effective in 8 countries

²³ CISGAC Opinion No. 15 (n 14 above) paragraph 6.2

rights and obligations under a contract of sale will remain applicable to it. A state declaring that it will not be bound by part II will nevertheless be bound by Article 29 CISG on modification of contracts, as the latter provision is located in part III of the CISG.²⁴ According to Schroeter this raises the question if an agreement under Article 29(1) CISG to modify, supplement or terminate a contract of sale will be subject to Articles 14-24 CISG, or if the reservation has to be read as also covering matters of contract modification.²⁵ In response to the question raised, Schroeter states that the wording of Article 92 CISG militates in favour of the former approach, as does a comparison with the wording of Article 96 CISG, which explicitly speaks of 'article 29, or part II of this Convention.

Part III deals with the substantive rights of the seller and the buyer. If a state is to declare that it will not be bound by part III then the major provisions relating to the rights and obligations of parties will have been removed from the text of the CISG.²⁶ Part I and II of the Convention will only be applied while part III will be replaced by the domestic laws of the reserving state. This changes the CISG significantly as Article 4 states its purpose as governing the formation of the contract and the rights and obligations of the parties to the contract. This implies that the objective of establishing uniform rules of international sales contracts was not achieved from the onset as divergences were created by this declaration.

2.2.2 Effects of the reservation

The effects of Article 92 apply *mutatis mutandis* to reservations relating to Part II and Part III.²⁷ Article 92 (2) provides that a state which has made the reservation is not considered a contracting state within Article 1 (1) (a) in respect of CISG part II and III. Hence, where a dispute arises between parties with places of business in contracting

²⁴U G Schroeter 'Backbone or Backyard of the Convention? The CISG's Final Provisions' available at <http://cisgw3.law.pace.edu/cisg/biblio/> page 439

²⁵ U G Schroeter (n 24 above) page 439

²⁶ No state has made such a declaration therefore there has been no effect on application of the provision, it has not had effect on uniformity of the CISG.

²⁷ These effects were only realised in contracts involving parties from the Scandinavian states as only these made the reservation in respect of part II of the Convention while no reservation has been made in respect of part III.

states, one being a reserving state, part II or III rules will not apply by virtue of Article 1 (1) (a) as the reserving state is not a contracting state in that regard.²⁸

Article 1 (1) (b) however leads to the application of part II or III of the CISG.²⁹ The provision states that the Convention may be applied when the rules of private international law lead to the application of the law of a contracting state. On the basis of this provision where one of the parties is from a contracting non-reserving state and the rules of private international law lead to the application of its laws, part II or III will be applicable to the contract, however, where the rules of private international law lead to the laws of a reserving state its domestic laws will be applicable to the contract.

This position was confirmed in the **ICC Arbitration Case 10274 of 1999**³⁰ where the tribunal remarked, “...Denmark, however, has made a reservation with regard to Part II (Formation of the Contract) of the Convention. Thus, with respect to the issue of the formation of the contracts here in dispute (and only with respect to this issue), the CISG (as part of Egyptian domestic law) is only applicable if Egyptian law applies. The CISG would not be applicable if Danish law applies since Denmark has, as stated above, made a reservation excluding the application of the CISG for issues relating to the formation of contracts.” Danish law was applied to the case according to the rules of private international law. The remarks by the Danish court clearly express the fact that in a case where the rules of private international law lead to a non-reserving state the CISG will apply, while the reserving state’s domestic laws apply where its law is deemed applicable after a choice of law analysis. In the above case Egypt was the non-

²⁸ J Lookofsky ‘Article 92 Declarations - The 1980 United Nations Convention on Contracts for the International Sale of Goods’ at <http://www.cisg.law.pace.edu/cisg/biblio/loo92.html> and in J Lookofsky *Understanding the CISG: A Compact Guide to the 1980 United Nations Convention on the International Sale of Goods* (2008)
United Nations Commission on International Trade Law, UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods (2012) page 436 paragraph 7 available at www.cisg.law.pace.edu/cisg/digest/art06.html

²⁹ J Lookofsky (n 28 above);
H M Fletcher ‘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)’ available at www.cisgw3.law.pace.edu/
;

UNCITRAL Digest of Case Law (n 28 above)
³⁰ available at www.cisgw3.law.pace.edu/cases/990274i1.html

reserving state therefore the court stated that if its laws were deemed applicable then the CISG would be the applicable law while Danish domestic law would apply if the choice of law pointed to Denmark which had a reservation.

Application of part II or III by virtue of choice of law leading to a non-reserving state is however limited where the contracting state has made an Article 95 reservation. Article 95 allows a state to declare that it will not be bound by Article 1(1) (b) of the Convention hence where a state is non-contracting the CISG will not apply. In this instance because an Article 92 reserving state is not a contracting state in relation to part II CISG the CISG cannot apply.³¹

2.2.3 Case analysis of application of Article 92

This part seeks to analyse the manner in which the declaration has been interpreted and applied in reserving and non-reserving states. The differentiation between reserving and non-reserving states is essential to note whether any differences arise in the application of the provision in reserving and non-reserving states and where such differences arise the cause thereof.

2.2.3.1 In reserving states the interpretation of Article 92 reservations has been similar and yielded similar results with courts applying the choice of law analysis to determine the applicable formation of contract laws. The Danish Court of Appeal's decision in **Elinette v. Elodie**³² illustrates application of the reservation by courts in a reserving state. The case involved a Danish seller who sought payment against a French defendant alleged to have purchased goods from him. It was held that the Scandinavian Article 92 declarations will only preclude application of the contract formation rules in CISG Part II in cases where the forum state's rules of private international law point to the law of a Scandinavian CISG state, but the declarations will not preclude application of Part II in those cases where the applicable PIL rules point to the law of a non-Scandinavian CISG State.³³ Part II of the CISG was held to be applicable on the basis

³¹ H M Fletcher (n 29 above)

³² Ugeskrift for Retsvæsen 1998.1092 .L.K.

³³ J Lookofsky (n 8 above)

of Article 1(1) (b) CISG, the conflict of laws rules led to the application of French law, which incorporated the provisions of the CISG in its entirety.

In the **Forestry equipment case**³⁴ the seller had his place of business in Finland and the buyer in Germany. The dispute was based on a sale of goods and concerned damages, avoidance and demand of payment. The court held that the dispute fell within the ambit of the CISG as both states were contracting states, with the exception of part II because of the reservation by Finland. The choice of law was carried out, and according to section 4 of the Finnish law defining the applicable law in international sale of goods, the law of the seller's place of business applied, unless the parties to the contract had agreed on the applicable law. Finnish law was held to be applicable to matters relating the conclusion of the contract.

Both cases place emphasis on the importance of the choice of laws where one of the parties is from a reserving state. Courts in reserving states seem to have grasped the correct application of the CISG pertaining to the Article 92 declaration. The choice of law ensures that there is no inclination towards the laws of the reserving state, but, where the law of a non-reserving state is applicable, it is applied.

2.2.3.2 Non-reserving states have applied the reservation differently where they have been chosen as the forum states. In a case by the **Hungary: Metropolitan Court (21 May 1996)**³⁵ the seller, a Swedish company, sued the buyer, a Hungarian company, requesting payment of price for the goods delivered. The buyer however disputed the existence of a valid contract. The court, noting that the parties had their places of business in different contracting states of the CISG found the CISG to be applicable. Also noting that Sweden had accepted the Convention with a reservation concerning part II the court applied the provisions of the Hungarian private international law and found that Swedish law was applicable with regard to the formation of the contract. Under the Swedish Act No. 28 of 1915, the contract had to be concluded in writing. The

³⁴ Finland 12 April 2002 Turku Court of Appeal available at <http://cisgw3.law.pace.edu/cases/020412f5.html> and <http://www.unilex.info/case.cfm?pid=1&do=case&id=939&step=Abstract>

³⁵ FB Budapest [FB = Fovárosi Bíróság = Metropolitan Court] available at <http://cisgw3.law.pace.edu/cases/960521h1.html>

court found that the contract had in fact been concluded in writing, and, applying the CISG in all other respects, dismissed the defence of the buyer as unfounded and ordered the buyer to pay the price.

Also in **GERMANY: OLG Rostock 27 July 1995**³⁶ the court applied the reservation. The Danish seller had delivered bedding plants to the defendants, German buyers. When the buyers did not pay the invoices, the seller engaged the services of a debt collection agency. However, the debt collection agency was unable to recover from the buyers the sum concerned. The seller's claim for the purchase price and interest as well as for the expenses incurred by the debt collection agency was granted by the lower court. The buyers appealed the decision. The appellate court held that the buyers were bound to pay the purchase price (Article 53 CISG), the CISG being applicable under its Article 1(1) (a), since Denmark and Germany were both contracting states. But, Denmark had made a reservation under Article 92(2) CISG such that it was not bound by part II of the CISG. Therefore, under the German rules of private international law, the formation of the parties' contract was governed by Danish law, according to which a binding contract existed between the parties.

In the **Poultry feed case**³⁷ by the ICC Arbitration Court the Arbitration court applied the ICC Rules of Arbitration (ICC Rules) in determining the law applicable to the dispute. The CISG was held to contain the generally applicable law but with respect to the contract formation, Danish law applied due to Denmark's Article 92 reservation. The court also noted that if Egyptian law were to apply then the CISG formation of contract rules would be applicable. It was held that obligations under the alleged contract and the contractual remedies were generally governed by the CISG, however with regards to issues of formation of the alleged contract Danish law applied as the seller was a Danish party and Denmark is the country which was most closely connected with the contracts in question.

The above cases rightly applied the Article 92 reservation using the rules of private international law to determine the applicable law. The courts were not hesitant to apply

³⁶ UNCITRAL texts (CLOUT) abstract no. 228, also available on www.cisgw3.pace.edu/cases

³⁷ ICC Arbitration Case 10274 of 1999 available on <http://cisgw3.law.pace.edu/cases/990274i1.html>

the domestic laws of the reserving states where that was the applicable law. This proves the difficulty posed by the reservation, that is courts having to apply foreign domestic law. Litigants and the court will have to be knowledgeable in such foreign laws, a disadvantage which also necessitated the drafting of the CISG.

Some courts in non-reserving countries have however treated the reservation differently. In **Valero Marketing & Supply Company v. Greeni Oy & Greeni Trading Oy**³⁸ the plaintiff had brought motion for partial summary judgment against defendants for breach of contract. The case concerned alterations made to the contract by the plaintiff stating that New York law and jurisdiction would apply to their contract. The court held that the CISG did not govern the matter with respect to contract formation and therefore with respect to the effect to be given to plaintiff's confirmation designating New York law. Decision was based on the fact that though Article 19 of Part II of the CISG addresses the addition of terms to a contract, upon ratifying the CISG, Finland declared in accordance with Article 92(1) that it would not be bound by part II of the Convention governing formation of the contract.

Following the decision in **Standard Bent Glass Corp. v. Glassrobots Oy**³⁹ the court stated that because Finland is not a signatory to Part II of the CISG, the CISG does not govern the effect of the choice of law provision contained in Valero's written confirmation. The court interpreted the reservation as automatically cancelling application of the CISG formation of contract rules yet the decision should be reached according to the rules of private international law, in this regard the court erred. It should have been determined whether the domestic law of Finland or US law applied to the formation of contract issues in the case through the rules of private international law. If a choice of law had led to US law then because of the Article 95 declaration made by the US the Uniform Commercial Code would have applied and not the CISG.⁴⁰ Where Finnish law was applicable the domestic law of Finland relating to formation of contracts should have been applied by the court.

³⁸ United States 15 June 2005 Federal District Court [New Jersey] available at <http://cisgw3.law.pace.edu/cases/050615u1.html>

³⁹ 333 F.3d 440, 444 (3d Cir.2003).

⁴⁰H M Fletcher (n 29 above) at note 23

The German court in the **Automobile case**⁴¹ overlooked the Article 92 reservation made by Denmark and applied the Convention to the formation issues. Article 19 CISG was one of the key provisions in the dispute and it was applied without a choice of law analysis as to which law applies. The court held that the Convention was applicable according to Article 1(1)(a) as both parties had their places of business in contracting states and since Germany and Denmark were contracting states the CISG took precedence over the German Civil Code. CISG Article 19 was therefore applied without regard to the reservation made by Denmark. Denmark formation of contract laws could have applied but the court simply applied Article 19 CISG against the dictates of the application of the reservation which requires a choice of law analysis. The German court therefore erred in finding Article 19 CISG applicable.

From the above cases three courts applied the reservation according to the rules of private international law. This shows the consistency in the application of the reservation by most courts which is also the right application. In contrast to these cases **Valero Marketing & Supply Company v. Greeni Oy & Greeni Trading Oy** and the **Automobiles case** are examples of instances where the courts in non-reserving jurisdictions wrongly interpret the Article 92 reservation and apply the CISG outright. A remarkable thing is the fact that the **Automobiles case** and **GERMANY: OLG Rostock 27 July 1995** were both decided by German courts but had different interpretations of Article 92. Such differences in interpretation contribute to the non-uniformity of the CISG.

2.2.3.3 Some forums do not take heed to the CISG reservation's requirements even where it may be applicable. In such cases the reservation is ignored, an interpretation which is incongruous with the Convention since the reservation has to be considered as it forms part of the text of the Convention and cannot be derogated from.

A case in point is **Standard Bent Glass Corp v. Glassrobots Oy**⁴², the case involved a Finnish seller and an American buyer. The court applied the domestic law of the forum (USA) because the parties did not raise the Convention's possible applicability. The

⁴¹GERMANY: Oberlandesgericht Naumburg, Germany, 27 April 1999 available at www.cisgw3.law.pace.edu/cases/990427g1.html

⁴² United States Federal Court of Appeals, 3rd circuit, 20 June 2003

court noting that Finland had declared that it would not be bound by Part II of the Convention and that parties had not raised the Convention's possible applicability, declined to consider whether to, and therefore did not apply the Convention. The court erred in not making reference to the Convention yet it was the applicable law and it also erred by not considering the reservation's effect on the contract. In relation to derogation from Article 96 it has been stated that the justification for this limitation is that private parties cannot derogate from the public international law provisions of the Convention as these provisions address issues relevant to contracting states rather than private parties.⁴³ This same limitation applies to the Article 92 reservation, as it forms part of public international law courts cannot therefore ignore the reservations as they are part of the laws of states.

The court should not have ignored the Convention and reservation even though the parties had not mentioned them, it therefore erred in this aspect. The correct position would have been to consider the CISG as the applicable law since both parties are from contracting states, relating to the formation of contract the Finnish reservation meant part II of the Convention was not applicable hence a choice of law had to be carried out. Where Finnish law was applicable then the domestic law of Finland had to be applied to the contract. If US law applied, because of the US Article 95 declaration the CISG part II would not have applied, but the US Uniform Commercial Code. This is because the US declaration does not allow the CISG to be applied according to the rules of private international law as provided in Article 1 (1) (b).

By not considering the reservation the Convention was wrongly applied by the court. Two texts of the Convention are considered for application where one of the parties to the contract has his place of business in a reserving state, one with the CISG formation of contract rules and the other with the domestic law of the reserving state making the choice of law analysis essential. It is therefore mandatory to apply the choice of law analysis and not the reservation.

⁴³ UNCITRAL Digest of Case Law (n 28 above)

2.3 Article 96

2.3.1 Prerequisites of the declaration and duration of application

The sole requirement for making the reservation is the legal requirement of writing of international sales contracts in the domestic law. Article 96 restricts the making of declarations in accordance with Article 12 to contracting states whose legislation requires all contracts of sale to be concluded in or evidenced in writing.⁴⁴ The declaration may be made at any time that is, not only at the time of signature, ratification, or accession of the interested state to the Convention, but also at any subsequent time.⁴⁵

This is the only declaration which may be made subsequent to ratification. This enables states whose laws may require writing of international sales contracts even after they have ratified or acceded to the Convention to make the declaration. The authorisation to make the declaration after accession is essential for the CISG's application in line with developments in the domestic laws. However a shortfall is presented where the Convention does not state the time periods within which a state may withdraw the reservation when the prerequisites of its application are no longer fulfilled. In instances where the laws of reserving states have changed to accommodate the freedom of form principle, states have been slow in withdrawing the reservation. China is an example, it changed its laws to allow unwritten international sales contracts in 1999 but the reservation remained in place for fourteen years until its withdrawal in 2013⁴⁶. This presents a scenario where the reservation applies yet the requirements are no longer met. The courts are not in a position not to apply the reservation on the basis of the change of law when a state has not withdrawn the reservation.⁴⁷ Such exclusion of the

⁴⁴CISGAC Opinion No 15(n 14 above) paragraph 4.5

⁴⁵J Rajski (n 16 above) paragraph 2.1

⁴⁶ withdrawal came into effect on January 16 2013- CISGAC Declaration No. 2 'Use of reservations under the CISG', Rapporteur Professor Dr. Ulrich G. Schroeter, University of Mannheim Germany , footnote 22

⁴⁷ UNCITRAL Digest of Case Law (n 28 above)

reservation by courts is precluded by Article 97(4) which designates procedures for withdrawing reservations.⁴⁸

2.3.2 Effects of the reservation

The reservation allowed by Article 96 has implications on the application of the Convention in both reserving states and non-reserving states. The effects will be discussed below:

2.3.2.1 Freedom of form

Article 11 establishes the general rule on the form of contracts in the CISG which has been termed the freedom of form principle. Article 11 provides, “*A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses*”, while Article 29 relating to the modification of contracts provides, “*(1) A contract may be modified or terminated by the mere agreement of the parties.*

(2) A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct”

From the provisions, a contract of sale under the CISG need not be in writing and is not subject to any other requirement as to its form. Article 11 also provides that the contract may be proved by any other means, this enables proof of the existence of the contract by different ways e. g conduct of parties, witnesses. Article 29 allows freedom of form in relation to the modification or termination of the contract, allowing for mere agreement between the parties. Article 29 (2) however states that where a contract is in writing and requires modification or termination by agreement to be in writing such modification or

⁴⁸ Withdrawal is through a formal notification in writing addressed to the depositary.
U G Schroeter (n 24 above)

termination may not be in any other form. This position enables the maintenance of single form in relation to formation, modification and termination of contracts.

Where one party to a contract has his place of business in a declaring state its effect is to place a limitation on the applicability of Article 11 and other provisions relating to form in part II of the Convention. In this case all contracts of sale are required to be evidenced in writing, together with their modification, termination and other aspects that pertain to the contract. This provision may not be derogated from by any of the parties under any circumstances. This interpretation was applied by the **Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry**⁴⁹ where it stated that an oral agreement did not have legal force, even had it existed, because by virtue of Article 12 and 96 of the Vienna Convention of 1980 and Article 162 (3) of the Russian Civil Code an agreement, to which a Russian organisation is a party, must be in writing. In **Electrim (Poland) v. Firma Kosmos**⁵⁰ the court confirmed that any modification of contracts to which Russian companies are involved should be in writing because of the Article 96 declaration by Russia.

It should be noted that the declaration only relates to the formation of contracts, their modification or consensual termination e. g. withdrawals, revocations and rejections of offers, acceptances of offers by conduct, declarations fixing a time for acceptance.⁵¹ Not covered by the declaration and subject to the freedom of form principle are communications made in the context of contract performance e.g. declarations of avoidance, notices of non-conformity, declarations of mitigation.⁵²

2.3.2.2 Derogation from provisions

⁴⁹ 16 February 2004, Case Number 107/2002 available at <http://cisgw3.law.pace.edu/cases/040216r1.html>

⁵⁰ Russia 25 March 1997 High Arbitration Court (or Presidium of Supreme Arbitration Court) of the Russian Federation, Ruling No. 6, Resolution No. 4670/96

⁵¹ Bridge M 'Uniform and Harmonised Sales Law: Choice of Law Issues' in J J Fawcett et al *International Sale of Goods in the conflict of laws* (2005) page 981at paragraph 16.137;

CISGAC Opinion 15 (n 14 above) paragraph 4.12

⁵² CISGAC Opinion No 15 (n 14 above) paragraph 4.12

Article 6 allows derogation from the CISG's provisions or exclusion of the Convention as a whole. Article 6 provides, "*The parties may exclude the application of this Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions.*" This provision is of great importance as it guarantees party autonomy in that it grants parties the right to derogate from any of the CISG's provisions, vary the effect of these provisions or the Convention's application where by virtue of them conducting business in contracting states it automatically applies. The rationale for the provision was to grant the freedom to derogate from provisions and allow terms preferred by the parties, it is however made subject by Article 12. Thus, where one party conducts business in a declaring state there can be no derogation from the declaration that requires contracts to be evidenced in writing. This implies that parties may derogate from the application of the Convention as a whole but where it applies they are bound by Article 12 as to form of contract, modification or termination.⁵³

An application of Article 6 without the limitation placed by Article 12 would enable parties to the contract to stipulate that they would not be bound by the reservation relating to form where one of the parties conducts business in an Article 96 reserving state. The significance of the limitation created by Article 12 and the declaration is such that the choice of parties to derogate from the domestic law requirements of writing requirements in international sales contracts is taken away. The justification for the limitation is that private parties cannot derogate from the public international law provisions of the Convention (that is the final provisions of the Convention which include reservations) as these provisions address issues relevant to contracting states rather than private parties.⁵⁴ The limitation of the reservation therefore applies whenever one of the parties conducts business in a reserving state placing a limitation even on the freedom to contract or stipulate the terms of contacts by a party from a non-reserving state.

⁵³ J Honnold (n 4 above) paragraph 129

⁵⁴ UNCITRAL Digest of Case Law (n 28 above)

2.3.2.3 Form requirements covered

Article 96 only covers writing requirements as the reservation derogates only from the provisions of the Convention that permit an agreement in any other form other than in writing.⁵⁵ Accordingly types of form requirements other than writing are not preserved by the Article 96 declaration. In some jurisdictions there are further requirements that accompany the writing requirement on the formation of a contract such as legal provisions requiring registration of sales contracts in a specified public office, authentication by a notary or attachment of stamps.⁵⁶ Where one party to the contract conducts business in a reserving state whose domestic law requires written contracts and other formalities, these requirements will not apply to the contract as the declaration only covers writing. Any other communications not covered in the form of the contract are subject to the Article 11 freedom of form principle notices and can be derogated from according to Article 6 e. g notices.

2.3.2.4 Universal application

The reservation also reduces all other contracting states' obligations to apply the freedom of form provisions where one party to a contract is from a reserving state. This is the universal effect of the declaration in all contracting states.⁵⁷ Universality is based on the wording of the provisions which connect the reservation's effect or application to the place of business of one of the parties to the contract and not to the location of the deciding court.⁵⁸ A minority of scholars hold this view of how the reservation applies. They have stated that the writing requirement always prevails where one of the parties has its place of business in an Article 96 reserving state and therefore becomes uniform law.⁵⁹

⁵⁵CISGAC Opinion No. 15 (n 14 above) paragraph 4.13;
J Honnold (n 4 above) paragraph 129

⁵⁶ J Honnold (n 4 above) paragraph 129;
CISGAC Opinion 15 (n 14 above) paragraph 4.15

⁵⁷ CISGAC Opinion 15 (n 14 above) paragraph 4.14

⁵⁸ CISGAC Opinion 15 (n 14 above) paragraph 4.14

⁵⁹ L. F Del Duca 'Implementation of Contract Formation, statute of Fraud, Parol Evidence, and Battle of forms CISG provisions in Civil and Common Law Countries' , 25 *Journal of Commerce and Law* 133, 138- 139 (2005)

The majority of scholars have however given a different view, which is the application of the choice of law analysis.⁶⁰ According to Mather H, the court must at the outset conduct a choice of law analysis based on private international law principles to determine which state's laws govern contract formation and apply that law to the case.⁶¹ Professor Fletcher states that the reservation authorized by Article 96 changes the text of the Convention by eliminating those aspects of Articles 11 and 29 as well as anything in Part II of the CISG that dispenses with writing requirements, and the reservation has this effect not just in countries making the reservation but also in non-reserving states on a transaction by transaction basis.⁶²

2.3.2.4.1 Case analysis on the application of Article 96

The above two schools of thought on the application of the Article 96 have influenced the interpretation of the provisions by courts and Arbitral Tribunals world over. In assessing how the Article 96 declaration has been applied the cases shall be divided according to these two interpretations of the reservation, first according to the rules of private international law and then according to the universality of the reservation.

2.3.2.4.1.1 In **Hispafruit BV v. Amuyen S.A**⁶³ the CISG was held as applying to the contract of sale where the buyer had its place of business in Netherlands and the seller in Argentina, both states being CISG contracting states. The court held that according to Article 7 CISG, questions regarding matters governed by the CISG, but not expressly settled in it, are to be settled in accordance with the general principles on which the CISG is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law. The applicable law was determined by the rules of private international law of Netherlands and it was

⁶⁰J. M Lookofsky *Understanding the CISG : a Compact Guide to the 1980 United Nations Convention on the International Sale of Goods* (2008);

M Bridge (n 41 above) paragraph 31

⁶¹H Mather :- 'Choice of Law for the International Sales Issues not resolved by the CISG', *20 Journal of Law and Commerce* 155, 167 (2001)

⁶²H M Fletcher (n 29 above)

⁶³*Nederlands Internationaal Privaatrecht*, 2001, No. 27817Rechtbank Rotterdam, Netherlands, 12 July 2001 available at <http://cisgw3.law.pace.edu/cases/010712n1.html>

found to be that of Argentina, hence the contract had to be in writing.

In the case of **J.T. Schuermans v Boomsma Distilleerderij/ Winjnkoperij**⁶⁴ the Article 96 reservation of Russia was observed by the Dutch court but it found that a contract based on an oral offer was valid even though one of the parties had its place of business in Russia an Article 96 reserving state. This was because the forum's rules of private international law pointed to the law of the Netherlands, which required the court to apply the CISG as adopted by the Netherlands. Had the reservation been correctly applied the contract was to be invalid as it was supposed to be evidenced in writing according to the laws of Russia.

In **Adamfi Video v. Alkotók Studiósza Kiszövetkezet**⁶⁵ the Hungarian court held that a Hungarian buyer who accepted an oral offer was bound nonetheless under the CISG, notwithstanding the fact that Hungary made a declaration under Article 96. The court found that German law was generally applicable as regards the question of formal requirements and since German law does not pose writing requirements in connection with the sale of goods, the oral contract entered was binding under the CISG, and the Hungarian Article 96 reservation was irrelevant to the disposition of the case.

In **Russia Arbitration proceeding 125/2003**⁶⁶ the dispute involved a Russian seller and a buyer from Cyprus. In determining the law applicable to the case a choice of law was carried out using the conflict of law norm of the forum. According to the choice of law rules, in the absence of agreement of the parties on the applicable law, in a sales agreement the applicable law is the law of the country where the seller has his domicile or principal place of business. Russian law was therefore held to be applicable and the CISG as it formed part of the law of Russia. In relation to the

⁶⁴ 7 November 1997 Nederlands Internationaal Privaatrecht (1998) No.91 available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/971107n1.html>

⁶⁵ Hungary 24 March 1992 Metropolitan Court available at <http://cisgw3.law.pace.edu/cases/920324h1.html>

⁶⁶ Russia 9 June 2004 Arbitration proceeding 125/2003 <http://cisgw3.law.pace.edu/cases/040609r1.html>

dispute the Tribunal held that if one of the parties to an agreement is a Russian company, according to art. 12 of the Vienna Convention of 1980, alterations of the conditions of the agreement and the understanding proposed by the buyer assumed alteration of the content of the agreement and could only be admissible in written form and could not be proved solely by the testimony of witnesses.

The above cases evidence the application of the reservation according to the choice of law analysis. Where it applies there is no definiteness of which law will apply, hence the form the contract should take is also not clear. Because of such uncertainty the universality of the reservation is a preferred interpretation with a lot of courts using this interpretation.

2.3.2.4.1.2 Universality of the reservation was considered and followed by the **Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry Russia**⁶⁷ in arbitration proceedings between a Russian seller and a buyer from Cyprus. It was held that pursuant to Articles 29 and 96 CISG, any termination of a contract must be done in writing. The modification of the contract was held to be valid and binding on the parties as it was in writing.

In the **Lindane case**⁶⁸ a French buyer entered into a contract with a Chinese seller for the purchase of lindane providing for payment by Letter of Credit. After conclusion of the contract and issuance of the letter of credit the contract was modified four times at the request of the seller. It was held that the modifications were amendments to the original contract and did not create a new one. Had a new contract been concluded as the seller averred, the contract should have been evidenced in writing as China had denounced Articles 11 and 29 according to which the formation, modification and termination of a contract need not to be made in or evidenced by writing. Therefore, the contract had to be concluded in writing.

⁶⁷ 1 December 1995 Arbitration proceeding 22/1995 available at <http://cisgw3.law.pace.edu/cases/951201r2.html>

⁶⁸ China International Economic & Trade Arbitration Commission, People's Republic of China, 31 December 1997 available at <http://cisgw3.law.pace.edu/cases/971231c1.html>

In **Electrim (Poland) v. Firma Kosmos**⁶⁹ court confirmed that any modification of contracts to which Russian companies are involved should be in writing because of the Article 96 declaration by Russia. Also in the case of **Vital Berry Marketing NV v. Dira-Frost NV**⁷⁰ it was held that because of the Article 96 declaration made by Chile oral modification of the contract was not possible, it had to be in writing. In **Case Number 107/2002** by the Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry⁷¹ the action was brought by the a Russian organization which was the seller, against the buyer a USA organization, in connection with non-acceptance of and non-payment for the goods. The tribunal held that an oral agreement on an obligation of the seller would not have legal force because by virtue of Article 12 and 96 of the Vienna Convention of 1980 an agreement, to which a Russian organisation is a party, must be in writing.

The case of **Zhejiang Shaoxing Yongli Pringing and Dyeing Co., Ltd v. Microflock Textile Group Corporation**⁷² addressed the need for written modification of contracts where one party is from an Article 96 reserving state. The parties were from the United States of America and China. The court held that at no time did the plaintiff, in writing, change, modify, waive, or in any way agree in writing to modify the defendant's obligation to pay the outstanding balance owed pursuant to the invoices to reflect a written modification of the parties' eight contracts to permit less than full payment. Any negotiations between the parties for modified payments on the eight invoices were not made in writing, were not evidenced by writing, and did not satisfy the requirements of the Chinese declaration under Article 96 of the CISG. Without any evidence of a written modification the CISG required the court to enforce the invoices as stated without the modifications.

Though the courts' interpretations on application of the Article 96 reservation have

⁶⁹ Russia 25 March 1997 High Arbitration Court (or Presidium of Supreme Arbitration Court) of the Russian Federation, Ruling No. 6, Resolution No. 4670/96 available at <http://cisgw3.law.pace.edu/cases/970325r1.html>;

⁷⁰Rechtbank van Koophandel Hasselt, Belgium 2 May 1995 available at <http://cisgw3.law.pace.edu/cases/950502b1.html>

⁷¹ 16 February 2004, Case Number 107/2002 available at <http://cisgw3.law.pace.edu/cases/040216r1.html>

⁷² U.S. District Court, Southern District of Florida, United States, 19 May 2008 available at <http://cisgw3.law.pace.edu/cases/080519u2.html>;

continually varied and scholars have advanced the reasoning behind their views on the application of Article 96 according to the rules of private international law, it is submitted that the right interpretation of the Article 96 declaration is that stated by the Advisory Council of the CISG relating to the universal effect of the CISG. According to the CISG Advisory Council the making of an Article 96 reservation by one contracting state reduces, not only its own, but all contracting state's obligations to apply the Convention's freedom of form provisions.⁷³ Most of the scholarly writings for the view to use private international law rules date back to before the CISG Advisory Opinion hence their interpretation has been corrected by the Opinion.⁷⁴ It further states that the view expressed by some commentators which calls for the choice of law analysis ignores the wording of Articles 12 and 96 CISG as well as its legislative history and should not be followed.⁷⁵ All the effects of the declaration stated above therefore apply uniformly and universally in all CISG contracting states.

2.4 Conclusion

One aspect that is evident from the case analysis of both provisions is the fact that the two reservations both lead to non-uniformity of the Convention because of the different interpretations. With the Article 92 declaration non-uniformity results from the fact that where the courts ought to apply the rules of private international law some choose to apply the CISG or domestic law without regard to how the reservation is interpreted and applied. The CISG formation rules are not automatically substituted by domestic law where the declaration exists, but some courts have interpreted the reservation in this manner.

As regards Article 96 non-uniformity hailed from the application of the rules of private international law where one could never tell which form the contract had to take because of the two forms which could be applied. Universality of the reservation

⁷³CISGAC Opinion 15 (n 14 above) paragraph 4.14

⁷⁴ The opinion was adopted by the CISG Advisory Council following its 18th meeting, in Beijing, China on 21 and 22 October 2013.

⁷⁵ CISGAC Opinion 15 (n 14 above) paragraph 4.14

encourages some uniformity in the application of the Convention where the declaration exists. Both reservations therefore contribute to the non-uniformity of the Convention due to the different interpretations and application of the reservations by courts.

CHAPTER 3

CISG GOALS AND THE RESERVATIONS

3.1 The success or failure of the CISG emanating from the reservations of the Convention can only be determined with a clear view of what the goals of the CISG are. The provisions will therefore be analysed *vis* the goals of the CISG to determine whether the success of the Convention is still hinged on these provisions and whether they are of necessity in today's application of the Convention.

3.2 Goals of the CISG

The Convention's goal is succinctly stated in the preamble as promotion of uniformity in international sales law resulting in the removal of barriers to international trade. The CISG was an attempt to unify international sales law and avert the occasional challenges that occurred due to the differences between common law and civil law jurisdictions.⁷⁶ The preamble provides, "... ***Being of the opinion that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade***". The goal of uniformity was also reiterated in Article 7 (1) which provides, "(1) *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.*" Uniformity expected is therefore twofold, that is uniformity of rules and uniformity in interpretation. By providing a textually uniform framework for businesses and demanding its uniform application, the

⁷⁶CISG Preamble;
C Spivack 'Of Shrinking Sweatsuits and Poison Vine Wax: A Comparison of Basis for Excuse under UCC S2-615 and CISG Article 79' available at www.cisg.law.pace.edu/cisg/biblio/spivack.html

Convention is supposed to remove barriers to trade that exist in the form of differences between domestic rules.⁷⁷

Though the CISG is clear in its goals, what remains vague is the level of uniformity which had to be achieved. It is essential to establish the standard of uniformity aimed by the drafters of the Convention as this would serve as a yardstick upon which the compromise presented by Articles 92 and 96 would be measured against.

3.3 Standard of Uniformity of the CISG

To determine the standard of uniformity, it is essential to first define uniformity. The need for uniformity is expressly stated in the Convention's preamble and in Article 7 (1) with the preamble talking of adoption of uniform rules while Article 7 states the need to promote uniformity in the interpretation of the Convention, however uniformity is not defined in the CISG itself. For the definition of uniformity reliance is on a dictionary definition and the definitions propounded by scholars. It is defined in Black's Law Dictionary as:

*“Conforming to one rule, mode, or unvarying standard; not different at different times or places; applicable to all places or divisions of a country... A statute is general and uniform in its operation when it operates equally upon all persons who are brought within the relations and circumstances provided for.”*⁷⁸

According to Goldring J uniformity has three requirements, which are, the creation of a single law or text, the uniform application of the given law, and the production of uniform results.⁷⁹ Both definitions imply that the application of the law should be the same; not

⁷⁷ T Neumann (n 7 above) page 1

⁷⁸ Black's Law Dictionary page 1700

⁷⁹ J Goldring 'Unification and Harmonisation of the Rules of Law' (1978) 9 *Federal Law Review* 284

varying in any way and when applied should produce the same results. The definitions insinuate that uniformity is absolute, without any variations in any aspect.

Other scholars are of the view that uniformity is relative. DiMatteo. L favours this standard of uniformity arguing that the success of the CISG should be measured using a standard of relative uniformity or a standard of the lessening of legal impediments to trade.⁸⁰ He further argues that the fact that Article 7 uses the words "*regard is to be had*", instead of using active words like "*establish*" or "*create*," proves that a level of uniformity below absolute is envisaged.⁸¹ Trillet G opined that the use of "*regard*" and "*promote*" in the preamble shows that the drafters of the Convention did not intend to design an absolute uniformity of application of the provisions and the absolute uniformity seems rather to be an idealistic or even a utopian aim.⁸²

In contrast to DiMatteo's assertions Takawira. A argues that if one is to use the purposive approach in interpreting the phrases "*regard is to be had*" and "*establish*" then DiMatteo's argument will be flawed as little difference exists between the two. The use of "*regard is to be had*" as opposed to "*regard may be had*" shows the equally peremptory nature of the obligation which excludes any discretion, to the extent that it clearly points to the need to establish uniformity.⁸³ Takawira further argues that if relative uniformity is applied it will be difficult to determine when it has been achieved, the logical conclusion therefore is to construe the CISG as requiring promotion of uniformity because as a purportedly uniform law, absolute uniformity should be the benchmark against which the CISG is tested.⁸⁴

Despite the arguments for the application of relative uniformity, this paper will focus on the definition of uniformity propounded by Goldring and Takawira. The determination of

⁸⁰L DiMatteo 'The Interpretative Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence' (Winter 2004) 34 *Northwestern Journal of International Law and Business* 299-440.

⁸¹L DiMatteo (n 80 above)

⁸²G Trillet 'Critical assessment of the level of "uniformity" created by the Convention on Contracts for the International Sale of Goods' available at <http://cisgw3.law.pace.edu/cisg/biblio>;

D Fritz *Uniformity in the Application of CISG provisions: A case Analysis on Selected Issues* (2009) ;

H Fletcher (n 29 above) states that the Convention is not a uniform instrument because the uniformity principle is only one interpretative principle among the various others enclosed in Art. 7(1)

⁸³A Takawira 'Departing from mere compromise: Reformulating the remedy of specific performance under the Convention on the International Sale of Goods (CISG) in line with the Convention's underlying goals' (2007) available at www.cisg.law.pace.edu/cisg/biblio/takawira.html

⁸⁴A Takawira (n 83 above)

whether the goal of the CISG was achieved in light of the compromises in Articles 92 and 96 will apply absolute uniformity as it creates a clear yardstick of when the goal can be said to have been achieved. If relative uniformity is applied one cannot tell when the goal has been achieved, it is also unlikely that the drafters of the Convention intended to create almost uniform rules and interpretation, it is therefore reasonable to assume that absolute uniformity was envisaged.

3.4 Whether uniformity has been achieved in light of the compromises

3.4.1 All Article 92 reservations were made to the exclusion of Part II by the four Scandinavian countries (Denmark, Finland, Norway and Sweden), however some have withdrawn the reservations. Denmark, Finland, and Sweden have completed the necessary paperwork at both domestic and international levels.⁸⁵ CISG part II therefore entered into force in Finland on 1 June 2012⁸⁶, in Sweden on 1 December 2012⁸⁷, and in Denmark on 1 February 2013⁸⁸. Before the withdrawals the text of the Convention in force in these countries, omitted eleven provisions found in the version of the CISG in force in States that did not make the Article 92 reservation.⁸⁹ When parties located in Denmark, Finland, Norway or Sweden were involved in a sale within the scope of the Convention, the contract formation rules applicable to the transaction depended on the law applicable under the rules of private international law.⁹⁰

For both part II and III the reserving countries apply their domestic laws in matters concerning the formation of a contract and the rights and obligations of parties. This affects parties from a non-reserving state where the rules of public international law point to the laws of a reserving state. Non-uniformity prevails as non-reserving states on different occasions are called upon to apply texts of the CISG different from those

⁸⁵ T Neumann (n 7 above)

⁸⁶ Journal of the United Nations (30 November 2011) No.2011/230

⁸⁷ Journal of the United Nations (26 May 2012) No 2012/102

⁸⁸ Journal of the United Nations (4 July 2012) No. 2012/128

⁸⁹ T Neumann (n 7 above)

⁹⁰ H M Fletcher (n 29 above)

applicable to them where declarations have been made. In essence the compromise allowing the reservation also allowed with it two texts to be applicable in the CISG as relates to the formation of contracts, one in part II and the other from the domestic laws of the reserving states. These two rules on formation of contracts ensure that uniformity is not achieved. As much as the countries which propagated for the reservation were necessary for its wide acceptance, they hindered accomplishment of the goal as regards formation of contracts.

Part III pertains to the substantive rights of the seller and the buyer. No state has made such a declaration, therefore, since there has been no application of the provision it has not had effect on uniform application of the CISG, but on textual uniformity. If a state is to declare that it will not be bound by Part III then the major provisions relating to the rights and obligations of parties will have been removed from the text of the CISG. Any law of contract has to stipulate the rights and obligations of parties to the contract, to allow such a reservation amounts to short-changing the application of the CISG in matters most crucial to a contract of sale. Just like other declarations, one major problem is that even a party who conducts business in a non-reserving state is bound by the declaration according to the rules of private international law. In theory the rights and obligations of parties are not uniform under the CISG due to the provision for application of domestic law under an Article 92 reservation.

The goal of the CISG was greatly hindered by this reservation which allows application of domestic law in matters most crucial to contracts. The effects of the reservation were stated by the National Committees of International Chamber of Commerce in Denmark, Finland, Norway and Sweden in a proposal to the ICC's Commercial Law and Practice Commission in May 2004 to endorse their initiative to have the Article 92 reservation by the Nordic states withdrawn.⁹¹ One of the reasons cited for the proposal of withdrawal was that it created undue certainty in key areas of international sales regarding offer and acceptance where choice of law provisions are seldom used at the pre-contractual

⁹¹ F De Ly:- 'Sources of International Sales Law: An Eclectic Model' available at www.cisg.law.pace.edu/cisg/biblio/dely.html

stage to solve problems.⁹² Though it may be argued that the reservation has not affected the CISG goal and no longer does because of withdrawals, it is submitted that uniformity of the CISG is not only in interpretation and application but also in its text. The preamble of the CISG clearly states that the purpose of the Convention was an adoption of uniform rules, this was not achieved as there is allowance for domestic law applications. The Convention sufficiently provided for the formation of contracts and the rights and obligations of parties, there was no need for the compromise that drastically changes the CISG.

3.4.2 The reservation in Article 96 changes the text of the Convention by eliminating those aspects of Articles 11 and 29 as well as anything in Part II of the CISG that dispenses with writing requirements and this effect is not just in countries making the reservation, but also in non-reserving countries. Uniformity is not achieved as non-reserving states apply two form provisions, that is, the writing requirement (through the reservation) and the freedom of form principle. The Convention sought to provide uniform rules of international sales law yet it makes states apply two forms of contracts with the reservation's writing requirement having pre-eminence. The CISG Advisory Opinion 15 clarified the law applicable between parties from a reserving and a non-reserving state by stipulating the universality of the declaration's effects. This position however provides for two texts of the CISG being applicable to non-reserving states depending on a transaction. On one hand the text of the CISG applicable where none of the parties to a contract is from a reserving state is one which allows the application of the freedom of form principle. On the other hand the text applicable where there is a party from a reserving state is one which does not allow the freedom of form. Both texts may be applicable to one party depending on where the other contracting party conducts business. This results in non-uniformity of the Convention, uniformity implies one text for all yet the Convention grants two texts for the same parties.

To contribute to the non-uniformity, before the confirmed position of the universal application of the CISG the Convention did not resolve the issue of the law applicable

⁹² De Ly (n 91 above)

where one of the parties conducts business in a non-reserving state. The declaration simply stated that the writing requirement is binding where a state has made a reservation, this did not however state which law was to be preferred where conflict arose between the parties where one is from a reserving state. It was not clear whether courts in non-reserving states were obliged to apply the reservation. This gap in the Convention led to varying interpretations on the effect of the reservation being advanced with some calling for the application of the rules of private international law according to Article 7⁹³ while others favoured the universal application of the reservation.⁹⁴ Without an authority as to the interpretation and application of the provisions different positions were brought forth leaving disputes as to what the drafters of the Convention meant. Resort was usually had to the opinions of the majority of scholars rather than what the Convention meant. An example is the case of **Forestal Guarami S.A v Daros International, Inc**⁹⁵ where the court based its decision on the majority view holding that because it was the view of the majority of scholars it had to be the correct interpretation. These differences because of the gap in the Convention regarding the declaration have led to non-uniform interpretation of the CISG.

Applying the definition of Goldring J which calls for the fulfilment of three requirements, the creation of a single law or text, the uniform application of the given law, and the production of uniform results, the CISG cannot be said to be uniform. First it does not provide a single text but it varies between reserving and non-reserving states giving them provisions which differ in aspects relating to the form of a contract, provisions for formation of contracts and the rights and obligations of parties. Both Articles 92 and 96 result in divergent texts of the CISG in relation to matters they address. Article 92 fails to fulfil the requirement of a single text or law, where the text is not uniform it cannot be said there is uniform application and uniform results. The application of domestic laws of any state which may have made the reservation means the results differ.

⁹³ e.g Mather H and Professor Fletcher, see Chapter 2 paragraph 2.3.2.4

⁹⁴ e. g L F Del Duca and P Schlechtriem

⁹⁵No 08-4488 United States Court of Appeals, Third Circuit, July 21 2010

Secondly the application of Article 96 has not been uniform with different courts applying the Article 96 reservation differently. The third requirement of uniform results proves difficult if not impossible to achieve where the application of the declaration differs. Most cases differ in the results obtained upon application of the reservation, resulting in the non-fulfilment of the third requirement. Overall the reservations mean the Convention applies differently in some aspects amongst the contracting states, and even where properly construed, any reservation to a uniform law Convention by definition reduces the degree of uniformity achieved and may render the Convention's practical application more difficult.⁹⁶

3.5 Were the provisions crucial for the current success of the CISG

3.5.1 The rationale for the reservations discussed in the previous chapter shows why the provisions were necessary.⁹⁷ It was to allow the Convention's ratification by states which wanted to apply this uniform law but without specific provisions which were not in sync with their domestic laws. As much as the compromise was necessary for the wide ratification of the Convention, what was not considered was the practicality of achieving uniform rules and interpretation with the compromises.

A question has arisen as to whether the reservations pose any challenge to current application of the Convention. From the inception of the Convention when most of the declarations were made to date, various changes have occurred in the laws of reserving states which call for their withdrawal. With the Article 92 declaration most states which made the reservation have since withdrawn while Norway is in the process of withdrawing, thus the reservation has no effect on the current success of the application of the CISG. Its effect lies on the uniformity of rules within the Convention itself. The needs of commercial practice support the withdrawal of reservations under the CISG.

⁹⁶U G Schroeter (n 24 above)

⁹⁷ See Chapter 2, paragraph 2.0

For example in the case of the former Scandinavian reservations under Article 92 CISG, the practical problems caused were sufficiently serious for the International Chamber of Commerce (ICC) to intervene by requesting the ICC's National Committees to insist on a withdrawal of the reservation in order to avoid misunderstandings between merchants to the detriment of international trade.⁹⁸

Most states that had made the Article 96 declaration basing on their domestic writing requirement of international sales contracts have since changed their laws to allow unwritten contracts e. g China changed its laws in 1999 to allow oral contracts⁹⁹, neither the legislation of Argentina nor Chile prescribes a mandatory written form for all sales contracts¹⁰⁰, the legal prerequisites for Article 96 CISG reservations have also disappeared in other Article 96 reservation states as in Belarus, Hungary, Lithuania, Russia and Ukraine.¹⁰¹ The need to preserve the possibility to apply domestic rules of form by making a declaration under Article 96 has lost its relevance because almost all Article 96 reservation states no longer impose writing requirements on international sales contracts in their domestic laws.¹⁰² Because of these changes most states have withdrawn their reservations, thus it seems inappropriate to maintain the provision in the Convention as allowing its existence presents non-uniformity in the CISG's text¹⁰³, complicates the Convention's application in practice and threatens its uniform interpretation.¹⁰⁴

⁹⁸ F De Ly (n 91 above)

⁹⁹X Wang and C B Andersen 'The Chinese Declaration against Oral Contracts under the CISG' 8 *Vindobona Journal of International Commercial Law & Arbitration* (2004) 145-164, also available at <http://cisgw3.law.pace.edu/cisg/biblio/>

¹⁰⁰ U.G. Schroeter 'The Cross-Border Freedom Of Form Principle Under Reservation: The Role Of Articles 12 and 96 CISG In Theory And Practice' 31 *Journal of Law and Commerce* page 4

¹⁰¹ U Schroeter (n 100 above) at page 12 ;

N Lapiashvili '*Modern Law of Contracts and Sales in Eastern Europe and Central Asia* (2011) 124;

I Schwenzer et al *Global Sales and Contract Law* (2012), para. 22.01

¹⁰² U G. Schroeter (n 100 above) page 12

¹⁰³ CISG-AC Declaration No 2 Use of Reservations under the CISG. Rapporteur: Professor Dr. Ulrich G. Schroeter, University of Mannheim, Germany. Adopted by the CISG-AC following its 18th meeting, in Beijing, China, on 21 October 2013.

¹⁰⁴ CISG-AC Declaration No.2 (n 103 above)

Though the declarations have been maintained in the Convention the CISG Advisory Council has recommended that newly acceding states should do so without making declarations. The reason for the recommendation was stated as thus, “*Today’s weakening (or altogether vanished) need for the reservations in Articles 92–96 CISG stands in contrast to their continuing detrimental effect upon the Convention’s practical application: Any use of reservations under the Convention inevitably undermines the considerable measure of uniformity that exists and increases the likelihood of confusion regarding the application of the CISG.*”¹⁰⁵ It is therefore clear from the calls for withdrawals that the declarations pose a challenge to the current success of the Convention.

¹⁰⁵CISG-AC Declaration No. 2(n 103 above)

CHAPTER 4

CONCLUSION AND RECOMMENDATIONS

4.1 Whether the compromises have resulted in the failure or success of the Convention

The aim of the research was to investigate whether the rationale behind the reservation provisions and their implications allowed, and still allows the achievement of the goal of uniformity of international sales law, and whether despite the compromises the CISG may have succeeded in achieving the desired uniformity of international sales law. From the observations of the study the reservations of Article 92 and 96 were necessary for the ratification of the Convention by a large number of states. The compromises however resulted in divergent texts of the CISG pertaining to the aspects they relate to. The Article 96 reservation also resulted in different interpretations and application of the Convention. Both reservations have resulted in the failure to accomplish uniformity in international sales law. The desired goal was not achieved as seen by the differences in rules which were meant to be uniform and the divergent interpretations inherent in the application of Article 96 of the Convention. Based on the level of uniformity applied herein the Convention cannot be said to have achieved the desired uniformity.

It has to be acknowledged however that the Convention succeeded in bringing down some legal barriers to international trade as the reservations have not been made by most of the states. Where a contract is between parties where neither is from a reserving state then the Convention applies without any challenges and in such cases there has been uniform application and interpretation of the Convention's provisions. Challenges because of the compromises arise where one party to a contract is from a reserving state. Where the reservation is for Article 92 and the rules of private international law point to a declaring state then the compromise affects uniformity, where the reservation is for Article 96 the application has occasionally resulted in differences in application.

As regards whether the reservations have led to the failure or success of the Convention, it is submitted that they have limited the success of the CISG and resulted in the non-realisation of the goal of uniformity. The success achieved to date relates to the number of states which have ratified the Convention and the instances where it has been applied without the challenges posed by the declarations. In most instances where the declarations have been part of the contention there have been challenges as to their interpretation and application. This applies not only to the Articles 92 and 96 declarations but also other reservations of the Convention. Because of the reservations the Convention cannot be said to have been successful in all matters that it should have, that is ratification by a high number of states from different economies and legal systems, uniformity of rules and uniform interpretation of the Convention.

It has to be noted that the achievement of uniformity was not hindered by the reservations only. Other factors also contributed to non-uniformity and limited success of the CISG such as the textual non-uniformity of the Convention, incorporation of non-uniform domestic law in the Convention and interpretation with the reasoning based on domestic law. The reservations have contributed in a major way to the challenges facing the achievement of uniform laws.¹⁰⁶

4.2 Recommendations

4.2.1 To fully achieve the unification of laws in international sales it is suggested that all the reservations which have been in place be withdrawn by all reserving states in accordance with Article 97 (4) as proposed by the CISG Advisory Council. Most of the compromises were made to allow ratification by most states. The Convention has been successful in that regard as seen by the high number of states which have continued to accede to the CISG. However, complete withdrawal of the reservations is necessary for uniformity to be achieved.. Progress has been made in this aspect with Article 92 almost

¹⁰⁶ H Fletcher (n 29 above)

completely withdrawn at the time of writing¹⁰⁷ while some states have withdrawn their Article 96 reservations.¹⁰⁸ The developments in domestic laws and international sales law and the challenges posed by the reservations all call for the withdrawal of reservations and these cannot be ignored allowing for the maintenance of reservations.

4.2.2 The reservations in Article 92 and 96 no longer serve a purpose as much as they did in 1980 therefore there is no need to maintain the reservations in the Convention itself. In this regard it is submitted that the Convention should be amended to suit the changing times. Unification of rules and text can only be achieved when some of the provisions in the CISG have been removed or amended. Article 12 serves as an example of the provisions which may need to be removed. Article 12 provides that any provision of Article 11, Article 29 or Part II of the Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in an Article 96 reserving state and the parties may not derogate from or vary the effect of the Article. If the declaration in Article 96 becomes redundant the same occurs to Article 12, hence the need to do away with the provision. Because of such provisions amendment of the Convention through a protocol becomes necessary. It is not enough to withdraw the reservations and declare that newly acceding states will not be allowed to make the reservations¹⁰⁹, the laws have to be unified in themselves. Therefore for the uniformity of the text there is need to amend the Convention through a protocol to the Convention.

4.2.3 These two actions will ensure the achievement of uniformity of the CISG and clarify the law which applies in all instances where the CISG is applicable. Traders and legal practitioners alike will be assured of the certainty of the law applicable so long the CISG is the applicable law. It takes away the need to be alert and know in what circumstances the CISG will apply, and to be aware of the reservations which limit the application of the Convention even where parties have chosen it as the applicable law.

¹⁰⁷ Denmark, Finland, and Sweden have completed the withdrawals of the Article 92 reservations while Norway is in the process of withdrawing the reservation.

¹⁰⁸ Estonia, Latvia and Lithuania have withdrawn their article 96 reservations

¹⁰⁹ CISG-AC Declaration No. 2(n 103 above)

There will no longer be a need or coercion to know and apply foreign domestic laws in respect of formation of contracts and form of contracts. The withdrawals and amendment of the Convention will ensure the success of the CISG without limitations, and the fulfilment of the goal of uniformity as envisaged by its drafters

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