4 Aspects of the 1980 Vienna Convention on Contracts for the International Sale of Goods (CISG)*

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4.1 Introduction

This paper addresses three topics: (i) the application of the United Nations Convention on Contracts for the International Sale of Goods ('CISG' or 'Vienna Convention')[1] by a judge or an arbitrator in Brazil; (ii) some of the key differences between the Convention and the Brazilian Civil Code; and (iii) the solutions adopted by the Convention which have already been used as grounds for court decisions in Brazil.

First, I would like to underline the importance of international rules, which are instruments conceived specifically for international commerce. Because of this, they are the most suitable option to meet the needs of parties engaging in international commercial transactions.

The difficulty that comes from the lack of knowledge of this set of rules is transitory, especially in the countries that have not ratified the Convention. We are all now witnessing the rise of a new transnational legal culture,[2] in which young and brilliant scholars engage in illuminating and thought provoking discourse, which ultimately is leading to a more global understanding of the legal concepts discussed herein.

However, despite strong efforts to promote uniformity, it would be unreasonable to expect that divergences between legal systems will simply disappear overnight. To the contrary, as evidenced by the voluminous catalogue of widely varied decisions and scholarly writings from different countries, resolution of these differences will take time.

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1 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG), available at: <www.cisg.law.pace.edu/cisg/text/treaty.html>.

2 A. Prujiner, 'Comment utilizer les principes d'UNIDROIT dasn la pratique contractuelle' (2002) 36(2) *Revue Juridiche Thémis*, p. 561.

In the sphere of the transnational business law, one must highlight three relevant bodies of law: the 1980 Vienna Convention; the UNIDROIT Principles of International Commercial Contracts[3] (1st edition – 1994; 2nd edition – 2004; 3rd edition – 2010), which express general principles regarding international transactions, uniform usages and practices observed in international commerce,[4] and the new *Lex Mercatoria*,[5] which is the resurgence of the law used by the merchants in the Medieval Age. This is law crafted by the businessmen themselves, without legislative intervention. It is a set of rules intended to uniformly regulate, beyond the States' political unity, business relationships established within a single economic unity of markets.[6]

4.2 Application of the Vienna Convention

4.2.1 The first point of discussion is the Vienna Convention's scope of application, and there are several relevant provisions to consider for this issue. CISG Article 1(1)(a) applies the Convention to contracts for the sale of goods between parties whose respective places of business are located in different States. Article 1(1)(b) provides that when the rules of private international law result in the application of the law of a CISG Contracting State, the Convention will apply.[7]

One must also consider Law 9.307/1996, which is commonly known as the Brazil Arbitration Act. This Act recognizes the principle of party autonomy in the selection of the applicable law. Article 2, §1 therein states that "[t]he parties may freely choose the rules of law that shall be applied to the arbitration proceeding, since it does not violate good morals and public policy." Similarly, *Introductory Law to the Norms of Brazilian Law*

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3 The UNIDROIT Principles of International Commercial Contracts are promulgated by the International Institute for the Unification of Private Law. The Principles were first published in 1994, and have since undergone two subsequent revisions; one in 2004, and another more recently in 2010. The third edition was formally adopted at the 90th session of the UNIDROIT Governing Council. Additional information on the specific revisions made in the third edition, as well as the full text of the Principles, may be found at <www.unidroit.org/publications/513-unidroit-principles-of-international-commercial-contracts>.

4 J. Oviedo Albán, 'Derecho uniforme del comercio internacional: los principios de UNIDROIT para los contratos comerciales internacionales', *Derecho Comercial y de las Obligaciones: revista de doctrina, jurisprudencia, legislación y práctica* (2003) 36(200/204) p. 681.

5 *See* M.F. Somensi, 'As inovações introduzidas pela Lei n.° 9.307/96 relativamente à escolha da Lei do Contrato Internacional', in V.M. Jacob de Fradera & L.G.M. Moser (eds.), *A compra e venda internacional de mercadorias: estudos sobre a Convenção de Viena de 1980* (Atlas, São Paulo, 2011) p. 99 (defining the *Lex Mercatoria* as "a set of general principles and customary rules spontaneously applied, or created to the international commerce, without reference to a specific domestic legal system.") The Incoterms, widely used in international sales contracts, in fact are derived from the *Lex Mercatoria*.

6 V.M. Jacob de Fradera, 'A saga da uniformização da compra e venda internacional: da lex mercatoria à Convenção de Viena de 1980', in V. Fradera & L.G.M. Moser 2011, *supra* note 5, pp. 1-21.

7 *See* Decree No. 8.327 of 16 October 2014, which is Brazil's domestic implementing legislation for the CISG, available at <www.planalto.gov.br/ccivil_03/_Ato2011-2014/2014/Decreto/D8327.htm>.

(Decree n° 4.657/1942, *cf.* Law n° 12.376/2010): "Art. 9° In order to qualify and govern obligations, the law of the country where they are constituted will apply [...] § 2° The obligation resulting from an agreement is considered to be constituted in the place of residence of the proponent.

Bearing these rules in mind, the Convention may apply to contracts concluded *before* the Convention entered into force in Brazil (on 1 April 2014). For example, pursuant to CISG Article 1(1)(b), if the law of another country is applicable, and this country is a Contracting State, then the Convention will apply. Therefore, if Brazilian international private law rules direct the application of, say, French law, then since France is a Contracting State the Convention would by default apply. As one noted scholar explains:

> If the law of France, a Contracting State, is appointed, the Convention will apply and not the French Civil Code, as applicable law of these international transactions, once the substantive rules of the Convention are part of the domestic law of the Contracting State.[8]

Similarly, in arbitration proceedings, the Convention will apply to disputes arising from contracts in which the parties have agreed to apply the law of a CISG Contracting State. The CISG will also apply to disputes subject to arbitration if the Convention is the law directly chosen by the parties in their agreement.

For contracts concluded *after* the Convention entered into force, the Convention's provisions will apply to all contracts for the sale of goods that are concluded between parties whose places of business are in different Contracting States, unless specifically excluded.[9]

In other words, if one party's place of business is located in Brazil and the other is abroad and also in a Contracting State, then the Convention applies. If the other place of business is not in a Contracting State, the Convention will still apply if Brazilian Law is applicable pursuant to Article 9 of the Introductory Law, or pursuant to the rules of private international law of the other State.

4.2.2 Those who support party autonomy argue that the parties must be free to choose the law applicable to an international contract. In Brazil, however, Article 9 of the Introductory Law forbids such choice. This rule is uniquely suitable to such transactions, as it prevents possible exploitations by those who have greater bargaining power.

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8 P.K. Aymone, 'A regulação do mérito da arbitragem mediante a utilização das regras internacionais de comércio: uma possibilidade decorrente da Lei Brasileira de Arbitragem e um paradoxo frente à LICC/42?' in V. Fradera & L.G.M. Moser 2011, *supra* note 5, p. 62.

9 *See* CISG Art. 6: "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."

However, the Convention's preference for party autonomy is made clear in Article 6 thereof, which provides that contracting parties may exclude the Convention's application to their agreement, or may alternatively choose to derogate from any of its provisions.

Similarly, Article 2, paragraph 1 of the Brazil Arbitration Act provides that "parties may freely choose the rules of law that shall apply to the dispute, subject to good morals and public policy." This rule must be interpreted in harmony with the provisions of Article 9 of the Introductory Law.

4.2.3 There are two types of situations in which the rules of international private law will not lead to the application of the Convention. The first is when the parties have opted out the Convention pursuant to CISG Article 6. The second is when one party is located in a Contracting State which has entered a reservation as to the effect of Article 1(1)(b), such as the United States and China. Such reservation limits the application of the Convention only to those cases in which both parties are from Contracting States.[10]

4.2.4 For the Convention to apply, the contract in question must involve the sale of goods. However, the CISG offers no definition or guidance on what is and is not properly classified as a 'good'. The (arguably) most predominant interpretation defines this term to include moveable and tangible objects that are sold in commercial transactions. Some examples include automobiles, machines, computer software, fruits, and books, among others. It is this author's opinion that oil and gas fall within this concept of goods as well.[11]

While no clear definition of the term 'goods' is provided, Article 2(a) does provide some specific exclusions, including goods bought for personal, family or household use, (unless the seller did not know about that use). The concept of 'consumer sale' provided by Brazil's Consumer Protection Code (CPC) is broader than that of the CISG. Under the CPC, a consumer is every civil or legal person that acquires or makes use of the good or service as a final user. It is understood that the CISG intended to exclude consumer sales from its scope, irrespective of the definition offered by different domestic laws. Thus, in a consumer sale as defined under domestic criteria, the Consumer Protection Code applies (if Brazilian Law is otherwise applicable), which incidentally is more favourable to the consumer. Nevertheless, the final exclusions of CISG Article 2(a) must always be taken into account.

This provision dictates that the Convention does not apply to contracts for the sale of stock, shares, negotiable instruments, money, currency, ships, vessels, aircrafts, electricity,

10 A. de Oliveira Giffoni, 'A Convenção de Viena sobre Compra e Venda Internacional de Mercadorias e sua utilidade no Brasil' (1999) 38(116) *Revista de Direito Mercantil, Industrial, Econômico e Financeiro* pp. 167-170.

11 The author notes that, although some scholarly debate exists as to the propriety of applying the Vienna Convention to commodities transactions, such debate is beyond the scope of this paper.

or to contracts related to real estate. Other excluded items include industrial inventions, licenses, brands, trademarks and 'know-how'.

4.2.5 While the contract must cover a sale of goods in which the parties have their places of business in different States in order for the Convention to apply, there is no corollary requirement that the goods themselves be physically carried from one State to the other for the sale to be deemed 'international'. The internationality of the contract is based solely on the location of the parties' respective locations.

However, as with the term 'goods', the CISG similarly lacks any definition as to what will count as a 'principal place of business' for purposes of determining whether or not a contract is sufficiently international in nature. Although this was discussed during the drafting of the Convention, no agreement was reached.

Nonetheless, there are two commonly accepted ways to interpret this phrase: (i) as every establishment with a certain degree of duration and stability and certain independence to conduct its business; and (ii) as the place where contracts are habitually concluded, and not the physical establishment from where the businessman conducts his business.

In Germany, it was held that, when dealing with the application of the Hague Convention:

> [T]he place of business is where the centre of the business activity directed to the participation is located, which links the contracting party to the State where the business is conducted, provided the party has autonomous power.[12]

In Brazil, the definition of place of business is provided in Article 1.142 of the Civil Code, which states that a group of assets organized for the activity of a company by an entrepreneur (individual) or by a business company. Both concepts are different and, thus, the one provided by the Convention must prevail.

The concept of internationality also depends on which element of connection is chosen: the place of the conclusion of the contract, nationality, place of business, place of performance of the contract, place of delivery, etc. The Vienna Convention of course prefers the place of business as the element of connection, as opposed to the nationality of the contracting parties.[13] As stated by Leonardo Aquino:

> The international contract is the one which the significant and relevant elements are not located in the same legal system, hence, the international contract is a

12 Oviedo Albán 2003, p. 688.

13 L.G. Aquino, *A cláusula de* hardship *no contrato internacional*, 2003. 204 f. Dissertação (Mestrado em Ciências Jurídico-Empresariais). Faculdade de Direito da Universidade de Coimbra, Coimbra, 2005. p. 38.

> binding agreement, settled upon two or more opposed statements of intention, yet perfectly harmonized, which aim to establish an uniform regulation over the parties' interests, as long as the circumstances surrounding its conclusion remain unchanged, and which the significant and relevant elements are not located in the same legal system.[14]

4.2.6 Michael Will has prudently noted that the CISG "is filled with gaps and holes, such as a Swiss cheese."[15] Part of this is due to the fact that, during the drafting of the Convention, there was an unwillingness to touch upon some sensitive issues and, thus, some external gaps were left. External gaps are those which result from specific subjects being impliedly or expressly excluded from the convention, such as, *e.g.*, contracts regarding electricity.[16] The other reason is because, despite several attempts, the delegates could not reach an agreement on some issues. The most illustrative example of this is the absence of an agreed upon interest rate in Article 78 of the Convention.

Internal gaps result from the fact that the Convention covers some issues, but does so without sufficiently addressing them. To fill these gaps, one must first resort to the general principles of the Convention as per Article 7. In the absence of such principles, the law that is otherwise applicable pursuant to the rules of private international law should be considered.

Michael Will discusses a case involving a dispute over the applicable statute of limitations: on one hand, a limitation period of one year was provided for in Article 210 of the Swiss Code of Obligations; on the other hand, CISG Article 39(2) established a limitation period of two years. Neither of the parties were located in countries that were signatories of the 1974 United Nations Convention on the Limitation Period in the International Sale of Goods, with the amendments of 1 August 1988, which establishes a limitation period of four years. When faced with a gap, one must first refer to CISG Article 7(2); guidance is found in the general principles on which the Convention is based, or, in the absence of such principles, in conformity with the applicable law under the rules of private international law.[17]

According to Will, "since no one has so far succeeded in extracting from the Convention general principles regarding limitation period" the law applicable by virtue of the rules of

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14 *Id.*, p. 44.

15 M.R. Will, 'Preenchimento de lacunas na Convenção de Viena sobre Compra e Venda Internacional de Mercadorias: conflito entre prescrição e prazo para reclamação' (2002) 22 *Revista da Faculdade de Direito da Universidade Federal do Rio Grande do Sul* p. 529 (Edition in honour of Professor Franz August Gernot Lippert).

16 *See* CISG Arts. 2-5.

17 *Id.*

private international law governs this question. The Swiss Court applied Swiss law, and thus the indicated one year limitation.[18]

In Germany, there is a rule that sets the limitation period as six months from the moment the buyer notifies the seller of the non-conformity of the goods, which notice, at least with respect to an international sale, is provided for by the Convention.

In Brazil, there are several limitation periods. The Superior Court of Justice has held that a limitation period of ten years applies to claims for damages arising from a breach of contract.[19] This extensive period is quite contrary to the rationale of the Convention, which does not provide anywhere near as long of a timeframe to notify an opposing party of such claims. As such, it seems only logical to conclude that the limitation period of two years should be applied instead, given that Article 39(2) expresses a general principle (speedy settling of conflicts) to assist in this internal gap-filling situation.

4.2.7 Somewhat relatedly, the Convention does not impose any liability on the parties during the pre-contractual or negotiations period. There is an internal gap regarding the rules governing negotiations, which must be filled by resorting to the general principles of the Convention. In this case, the most relevant of these is the good faith principle, found in Article 7(1). Failing this, one must look at the otherwise applicable law pursuant to the rules of private international law.[20]

To apply the good faith principle already in the negotiations, as a rule of conduct upon the parties, gives rise to the following criticism: the parties may withdraw themselves from the negotiations knowing that they can be held liable.[21] In my opinion, this argument fails. When necessary, the businessman will keep the previous negotiations. Since a party could be held liable, it will be careful not to raise overestimated or illegitimate expectations. This conduct of loyalty must be respected before, during, and after the contract, being it domestic or international. It is not reasonable to set aside the principle of good faith during the negotiations.

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18 *Id.*

19 *Lei No. 10.406 de 10 de Janeiro de 2002* (BCC), Art. 205: "*A prescrição ocorre em dez anos, quando a lei não lhe haja fixado prazo menor.*" (English translation: "The limitation period shall be ten years, when the law has not provided a shorter period.") The full text of the BCC is available at: <www.planalto.gov.br/ccivil_03/leis/2002/L10406.htm>.

20 Maristela Basso and Letícia Martins agree with this extension. *See* M. Basso & L. Martina, 'Responsabilidade civil nas negociações preliminares: boa-fé, deveres anexos e relações negociais', in O.L. Rodrigues Junior, G. Mamede & M.V. da Rocha (eds.), *Responsabilidade civil contemporânea: em homenagem a Sílvio de Salvo Venosa* (Atlas, São Paulo, 2011) p. 280. *See also* F.A. Pignatta, 'Controvérsias em torno do campo de aplicação da Convenção de Viena de 1980: o caso da teoria da culpa in contrahendo', in Fradera & Moser 2011, *supra* note 5, p. 40 ("It is against the best interpretation to bind the parties to good faith principle only after the offer and not already during the negotiations.") *See also* Ap. Civ. 591.017.058, 1991, 5ª. Câmara; and Ap. Cível 591.028.295, 1991, 5ª. Câmara (applying domestic law and basing pre-contractual liability on the principle of good faith).

21 Pignatta 2011, p. 38.

4.2.8 Among the matters excluded from the scope of the Convention, such as legal capacity and agency, I would add validity, 'lack of cause', and the objective impossibility of the contract.

It should be noted, however, that the Convention does not refrain from dealing with *every* aspect of contractual validity. For example, if a domestic rule is based on the disparity between the parties, and since the Convention is based on the principle of equality between the parties, such a domestic rule of validity cannot contravene the principles of the Convention.[22] Further, it must be pointed out that the Convention governs the formation of the contract in its objective perspective and its formal requirements.[23] (arts. 11, 12, 14 – 24).

Rawach also states that, since the Convention fully covers the formation of the contract, applying another law to the validity issues creates '*une forme de dépeçage*' ('a form of butchering').[24]

4.3 DIFFERENCES BETWEEN THE LEGAL REGIMES

4.3.1 The first lecture I delivered in Brazil regarding the Convention was in Porto Alegre at an international event hosted by the Law Faculty of the Federal University of Rio Grande do Sul, which was presided by Professor Clóvis Couto e Silva. Therein, I dealt with the issue of avoidance of the contract under the provisions of the Convention. That lecture was later reproduced in writing.[25]

According to the Convention, avoidance of the contract occurs upon the declaration of avoidance from the aggrieved party to the breaching party.[26] In Brazil, there are two possible ways to rescind a contract due to a defaulting party's breach: without a judicial proceeding, when there is an express contractual provision in this regard;[27] and within a judicial proceeding, as it is traditionally done.[28]

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22 E. Rawach, 'La validité des clauses exonératoires de responsabilité et la Convention de Vienne sur la vente internationale de marchandises' (2001) 53(1) *Revue Internationale de Droit Comparé* p. 144.

23 *See* CISG Arts. 11, 12 & 14-24.

24 Rawach 2001, p. 145.

25 R.R. de Aguiar Júnior, 'A Convenção de Viena (1980) e a resolução do contrato por incumprimento' (1994) 10 *Revista da Faculdade de Direito da Universidade Federal do Rio Grande do Sul* pp. 7-21.

26 *See* CISG Arts. 36, 49 & 64.

27 BCC Art. 474: "*A cláusula resolutiva expressa opera de pleno direito; a tácita depende de interpelação judicial.*" (English translation: "The express termination clause operates as of right; the implicit clause depends on juditial intervention.")

28 BCC Art. 475: "*A parte lesada pelo inadimplemento pode pedir a resolução do contrato, se não preferir exigir-lhe o cumprimento, cabendo, em qualquer dos casos, indenização por perdas e danos.*" (English translation: "The aggrieved party may terminate the contract, if it does not prefer to require specific performance, retaining in any case the right to claim damages.")

In principle, pursuant to the Convention, if it is impossible for the buyer to make restitution of the goods, then it cannot avoid the contract.[29] In Brazil, there is no express provision in this regard. However, BCC Article 474 can be interpreted to require that, when there is an express provision of avoidance, the buyer must be able to make restitution in order to resort to avoidance.

Pursuant to the CISG, the existence of a fundamental breach, as defined by Article 25 thereof, is a prerequisite for resort to the remedy of avoidance.[30] Article 46(2) allows the buyer to demand the delivery of substitute goods only if the seller's failure to perform constitutes a fundamental breach. Article 70 addresses the concept of fundamental breach with respect to the passing of risk, and it allows the anticipatory breach if it is clear that the other party will commit a fundamental breach of contract.[31]

There is a fundamental breach of contract when the breach results in such detriment to the other party so as to substantially to deprive it of what it is entitled to expect under the contract,[32] unless the party in breach

> proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences.[33]

In any event, the key issue to consider in this regard is the substantial deprivation of the non-breaching party's expectations under the contract.

The CISG treats avoidance as a remedy of last resort, and thus a contract can only be avoided under exceptional circumstances. This comports with the Convention's principle of preservation of the contract in international business. Not every breach or non-performance will trigger the right of avoidance: there must be harm that rises to the level established by CISG Article 25.

Under Brazilian law, there is a general rule for non-performance (Articles 389 and 394 of the Civil Code). However, there is no corresponding qualification of breach of contract under Brazilian law. The BCC does require that the breach must be qualified with the lack of interest of the creditor in order for him to terminate the contract due to the debtor's non-performance. This understanding comes from a joint reading of BCC Articles 474

29 CISG Art. 82.

30 CISG Arts. 49(1)(a) & 64(1)(a).

31 For a more in depth discussion of this issue, *see* E. Grebler, 'Violação essencial dos contratos no âmbito da CISG: uma regra controvertida', in C. Finkelstein, J.B. Vita & N. Casado Filho (eds.), *Arbitragem internacional: UNIDROIT, CISG e direito brasileiro* (Quartier Latin, São Paulo, 2010) p. 207.

32 CISG Art. 25.

33 CISG Art. 79(1).

(express termination clause) and 475 (judicial termination), together with Articles 389[34] (default) and 395 (if the performance becomes useless to the creditor, he can reject it). Hence, in Brazil, termination can be declared when there is a permanent default, meaning that either the performance has become impossible, or a late performance would be of no interest or use to the creditor. When there is an express termination clause, however, the breach will only trigger the termination of the contract if the breach is economically relevant, being the judge allowed to evaluate the gravity of the economic detriment. This is quite distinct from what happens in other countries.

4.3.2 Under the Convention, an aggrieved party has up to two years to give notice of any breach of contract. Nonetheless, there is no limitation period to avoid the contract. In Brazil, the aggrieved party does not need to undertake any preliminary procedure before the breach claim. Also, there is no limitation period for avoiding the contract, which would be a case of forfeiture of the rights themselves. As was similarly argued above with respect to internal gaps, the period of two years should also be applied on the right to bring claims. If Brazilian law is applicable, the limitation period of four years for actions seeking the annulment of a contract due to validity issues[35] should apply by analogy. The general limitation period is ten years.[36]

4.3.3 CISG Article 36 sets forth one single regime addressing the delivery of non-conforming goods, whether with manifest or latent non-conformities. Remarking on Article 36 of the Convention, Professor Calvão da Silva stated:

> The Convention proceeds to the merger of the warranty against defects and the common sanctions under the duty of delivery. In fact, it holds the seller liable for any lack of conformity which exists at the time the risk passes to the buyer, even though the lack of conformity becomes recognizable only after the passing of risk – likewise any lack of conformity which occurs after the time

34 BCC Art. 389: "*Não cumprida a obrigação, responde o devedor por perdas e danos, mais juros e atualização monetária segundo índices oficiais regularmente estabelecidos, e honorários de advogado.*" (English Translation: "In case of failure to perform, the party in breach is obliged to pay damages, plus interest and monetary update pursuant to the official rates, and attorney's fees.")

35 BCC Art. 178: "*É de quatro anos o prazo de decadência para pleitear-se a anulação do negócio jurídico, contado: I – no caso de coação, do dia em que ela cessar; II – no de erro, dolo, fraude contra credores, estado de perigo ou lesão, do dia em que se realizou o negócio jurídico; III – no de atos de incapazes, do dia em que cessar a incapacidade.*" (English translation: "The limitation period to set aside a contract is four years, commencing: I – in case of coercion, the day that said coercion ceases; II – in the case of error, deceit, fraud upon creditors, imminent danger or harm, on the date on which the contract was entered into; III – in the case of persons who lack capacity, upon the day the lack of capacity ceases.")

36 BCC Art. 205, *supra* note 19.

indicated in the preceding paragraph and is due to a breach of any of his obligations (art. 36.2).[37]

A conforming good is generally understood as one that is appropriate for the use for which it is sought. If there is a special use, there is a special rule.

The Convention imposes on the buyer the duty to examine the goods and give notice of any lack of conformity within a reasonable time.[38] This notice must be done within two years from the time of receipt of the goods.[39] In Brazil, there is no such requirement.

The BCC, however, provides two regimes addressing the issue of defective goods. Article 441 deals with latent defects, and allows the right to terminate or demand price reduction.[40] Article 394 provides the general rule for breach of contract due to a manifest defects in the goods.[41]

In the draft of the new Commercial Code, latent defects as well as manifest defects are under the same regime, even though they are subject to different deadlines. Both of them allow the buyer to avoid the contract, restore the goods and send back what has been paid, or to demand a price reduction. The party has ten days from the delivery of the non-conforming goods or, in the case of latent defects, from the day the non-conformity becomes recognizable, to assert its rights.[42]

The draft of the new Commercial Code favours the termination of the contract as a consequence of the non-performance. Under the Convention, however, all the non-performance hypotheses are encompassed in the concept of non-conformity, dealing with each one of them in separate articles.[43] The CISG permits a buyer to set an additional period of time for performance by the seller of its obligations.[44] If the buyer is the one in breach, the seller also has the same right to set an additional period.[45] This additional period must be of a reasonable length. In Brazil, there is no such equivalent provision.

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37 J.C. da Silva, *Responsabilidade civil do produtor*, Almedina, Coimbra 1999, p. 272.

38 CISG Arts. 38(1) & 39(1).

39 CISG Art. 38.

40 BCC Art. 441: "*A coisa recebida em virtude de contrato comutativo pode ser enjeitada por vícios ou defeitos ocultos, que a tornem imprópria ao uso a que é destinada, ou lhe diminuam o valor.*" (English translation: "The goods delivered upon a bilateral contract can be rejected due to latent defects, which make them unfit for their intended use, or devaluate them.")

41 BCC Art. 394: "*O usufrutuário tem direito à posse, uso, administração e percepção dos frutos.*" (English translation: "The buyer that does not pay the price and the seller that refuses to receive it on the date, manner and place provided in the law or otherwise agreed by the parties are in default.")

42 *See* BCC Art. 336. *See also* L.E. Fachin & C.E.P. Ruzyk, 'Regime de vícios das mercadorias na compra e venda mercantil no Projeto do Código Comercial: análise comparativa com o Código Civil e com a CISG', in F.U. Coelho, T.A.R. Lima & M.G. Nunes (eds.), *Reflexões sobre o Projeto de Código Comercial* (Saraiva, São Paulo, 2013) p. 259.

43 *See* CISG Arts. 35-40, and Art. 41 *et seq.*

44 CISG Art. 47.

45 CISG Art. 63(1).

Relatedly, CISG Article 71 allows a party to withhold performance in the case of anticipatory breach. Under Brazilian law, there is a similar exception for when there is doubt about the possibility of performance by the debtor.[46]

4.3.4 Article 79 of the Convention regulates the exemption from liability when the failure to perform is due to an impediment beyond the parties' control. It has been said that

> [t]he idea of this article is to embrace every case in which the debtor cannot be held liable for its non-performance, when it has not in any extent caused it.[47]

In Brazil, Articles 317,[48] 478,[49] and 480[50] of the Civil Code consider the undue burden a determinant ground for revision or termination of the contract.

Although the UNIDROIT Principles are distinct in nature from the Convention, reference is nonetheless appropriate to them here. The Convention is a classical international treaty signed between States, and as such has the full effect of law.[51] The Principles, however, apply through an opt-in mechanism, and are often under review (currently in the third edition). The Convention cannot be modified without the approval of the member States. Also, the UNIDROIT Principles are all aimed at international contracts, whilst the Con-

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46 BCC Art. 477: "*Se, depois de concluído o contrato, sobrevier a uma das partes contratantes diminuição em seu patrimônio capaz de comprometer ou tornar duvidosa a prestação pela qual se obrigou, pode a outra recusar-se à prestação que lhe incumbe, até que aquela satisfaça a que lhe compete ou dê garantia bastante de satisfazê-la.*" (English translation: "If after the conclusion of the contract one of the parties has suffered a substantial economic loss able to deprive or make doubtful its ability to perform its obligation, the other party may suspend its own performance until the former has complied with its obligation or provided adequate assurance.")

47 Aquino, *supra* note 13, at p. 162.

48 BCC Art. 317: "*Quando, por motivos imprevisíveis, sobrevier desproporção manifesta entre o valor da prestação devida e o do momento de sua execução, poderá o juiz corrigi-lo, a pedido da parte, de modo que assegure, quanto possível, o valor real da prestação.*" (English translation: "When, due to unpredictable reasons, there is a manifest disparity in the value of the obligation between the moment it was agreed upon and the moment it is due, the judge upon the party's request may adjust it, as far as possible, to its true value.")

49 BCC Art. 478: "*Nos contratos de execução continuada ou diferida, se a prestação de uma das partes se tornar excessivamente onerosa, com extrema vantagem para a outra, em virtude de acontecimentos extraordinários e imprevisíveis, poderá o devedor pedir a resolução do contrato. Os efeitos da sentença que a decretar retroagirão à data da citação.*" (English translation: "In contracts of continuous or long-term performance, if the obligation of one of the parties is under an undue burden, the counter party having an extreme advantage, due to unforeseeable and outstanding events, the debtor may request the termination of the contract. The effects of the decision that terminates the contract will be retroactive up to the date of the summons.")

50 BCC Art. 480: "*Se no contrato as obrigações couberem a apenas uma das partes, poderá ela pleitear que a sua prestação seja reduzida, ou alterado o modo de executá-la, a fim de evitar a onerosidade excessiva.*" (English translation: "If in the contract only one party undertakes obligations, it may demand a reduction or alteration of its obligation, in order to prevent an undue burden.")

51 L. Gama Junior, '*Hardship* nos contratos internacionais: o papel revigorante dos Princípios do UNIDROIT na evolução da Convenção de Viena' (2010) 11 *Revista Trimestral de Direito Civil*, p. 212.

vention applies only to the sale of goods. These distinctions notwithstanding, Article 6.2.2 of the UNIDROIT Principles addresses the concept of undue burden, and provides that

> There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished.

There is international case law denying the application of the undue burden concept to contracts governed by the Convention. Regardless of these decisions, it seems that the more appropriate interpretation is one that gives CISG Article 79 a broader breadth of application.

Like the undue burden concept, another important element in business law is the 'hardship clause'. As stated by Lauro Gama Junior, in his excellent book on the UNIDROIT Principles:

> The hardship as defined in art. 6.2.2, is characterized: – for a general condition: the occurrence of events that fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished; and four additional conditions (a) the events occur or become known to the disadvantaged party after the conclusion of the contract; (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; (c) the events are beyond the control of the disadvantaged party; and (d) the risk of the events was not assumed by the disadvantaged party.[52]

The hardship clause is intended to "allow the contract to adapt to the important changing circumstances, even resorting to a forced alteration if needed, aiming to restore the contractual equilibrium".[53] Parties must evaluate the impact of such clause with respect to termination of the contract.[54]

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52 L. Gama Junior, *Contratos internacionais à luz dos princípios do UNIDROIT 2004: soft law, arbitragem e jurisdição* (Renovar, Rio de Janeiro, 2006) p. 365.

53 Prujiner 2002.

54 "According to Olavo Batista, the objective of the hardship clause is the revision of the agreement in order to prevent the unwinding of the contract. In other words, the goal of the clause is attached to the renegotiation of the terms of the contract to create new conditions that enable its due performance, despite the changing scenario. The applicable criteria of this revision mechanism might be subjective, objective, or a combination of both, or take equity into account. According to Bruno Oppetit, the hardship clause cannot be taken as a revision clause. The hardship is essentially different from a normal revision clause, which generally limits

The hardship clause gives rise to a duty to renegotiate the contract when the contractual equilibrium is threatened due to external events that could not have been foreseen by the parties, where such events have altered the contract's economic and financial balance to the detriment of one of the parties. This mechanism again reflects the CISG's preference for preservation of the contract.

Of note, strict impossibility is not a requirement in such cases. The increase of the costs of performance, or the decrease in value of the counter party's obligation, are each independently sufficient.[55]

There is no hardship clause in the Convention. Article 79 would appear to be the most appropriate place in the CISG for such clause, however hardship is not mentioned in this provision. This is yet another gap in the Convention. Importantly, this issue is addressed by the UNIDROIT Principles in Articles 6.2.1 through 6.2.3 thereof. These rules may very well apply to contracts governed by the Convention, pursuant to a joint reading of CISG Articles 7(2), 50, and 79. Gama Junior rightfully understands that Article 7 of the Convention allows the use of the UNIDROIT Principles to fill this gap.[56]

4.3.5 Under the Convention, an aggrieved party is entitled to interest when the party fails to pay the price or any amount of sum due.[57] Notably, no fixed sum or rate is found in the text of the Convention, nor are any criteria or guidelines for making such determinations provided.

In the absence of a rule providing for an interest rate, arbitrators must resort to the rules of private international law. In ICC Case 7153 of 1992, the arbitrators applied the law of the place of payment, since the *lex loci* did not fix an interest rate. The arbitrators looked into the parties' previous behaviour and decided on a 12% per year rate.[58]

In Brazil, contracting parties are free to agree on the applicable interest rate. In cases where the parties fail to agree on these issue, or alternatively where the law determines that the right of interest applies, then Article 406 of the BCC provides that the applicable interest rate is the one "applicable to tax payments due to the National Treasury." This rate (SELIC) is fixed by the National Monetary Council (CMN), and may be used in private relations according to the Superior Court of Justice (STJ).

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the extent of the revision, and from a *force majeure* clause, which enumerates the events that may be considered impediments" (AQUINO, Leonardo Gomes. *A cláusula de* hardship *no contrato internacional.* 2003. 204 f. Dissertação (Mestrado em Ciências Jurídico-Empresariais). Faculdade de Direito da Universidade de Coimbra, Coimbra, 2005. p. 86).

55 Gama Junior 2010, p. 207.

56 *Id.*

57 CISG Art. 78.

58 E. Zerbini, '*Lex mercatoria* e praxes comerciais entre as partes na Convenção de Viena sobre a venda internacional de mercadorias', in C. Finkelstein, J. Vita & N. Casado Filho 2010, *supra* note 31, p. 224.

There is no general rule in the Convention as to when the period to calculate interest begins. Article 84 provides that if the seller is bound to refund the price, he must also pay interest on it, from the date on which the price was paid. This should be viewed as indicative of the 'spirit' of the Convention, and accordingly interest should be calculated from the date of the non-performance for contracts governed by the CISG.

In Brazil, the rules on this point create some confusion: (i) BCC Article 394 states that the buyer falls into arrears if it does not pay the price due in the time, manner, and place provided in the law or contracted for between the parties; (ii) Article 397 states the party which fails to timely perform a positive and liquidated obligation falls *ipso jure* into arrears from the moment the obligation was due; (iii) Article 397 states that when the parties fail to agree on a specific date of performance, the party in breach does not fall *ipso jure* into arrears, subject to extrajudicial or judicial intervention; (iv) Article 398 establishes that for obligations resulting from an unlawful act, the debtor falls into arrears from the occurrence of the unlawful fact; and (V) Article 405 states that interest is to be calculated from the moment of the summons.

In the case of non-performance, interest is calculated from the moment of the default. Hence, in Brazil, I consider the four following situations: First, regarding positive and liquidated obligations, the party falls into arrears from the default, which is also the date from which interest is calculated. Second, regarding positive and liquidated obligations without a fixed date of performance, the party in breach also falls into arrears from the default, however interest is calculated from the date of extrajudicial or judicial intervention. Third, in contractual liability claims or in all other cases where there is not a positive and liquidated obligation, the party also falls into arrears from the default, though the interest is calculated from the date of the summons, pursuant to BCC Article 405 of the Civil Code.[59] Last, in tort claims due to unlawful acts, the date on which the party falls into arrears (Article 398 of the Civil Code),[60] as well as the date from which interest is calculated, are both the date of the occurrence of the unlawful act giving rise to such claim.[61]

4.3.6 One of the main critiques of the Convention is the fact that it makes use of numerous vague concepts. Nevertheless, as observed by Marina de Carvalho, the Convention is no more vague than most of its domestic counterparts.[62] With respect to Brazilian law, the

59 BCC Art. 405: "*Contam-se os juros de mora desde a citação inicial.*" (English translation: "The interest is commuted from the summons.")

60 BCC Art. 398: "*Nas obrigações provenientes de ato ilícito, considera-se o devedor em mora, desde que o praticou.*" (English translation: "Regarding obligations derived from unlawful acts, the debtor falls into arrears since the said act took place.")

61 *Superior Tribunal de Justiça* (Brazil), *Súmula 54*, available at: <www.stj.jus.br/SCON/sumulas/doc.jsp?livre=@num=%2754%27>.

62 M.A.E. de Carvalho, 'A CISG, o seu objetivo harmonizador e seu contexto jurídico', in Finkelstein, Vita & Casado Filho 2010, *supra* note 31, p. 312.

aforementioned critique is inapposite, as the Civil Code of 2002 has several vague clauses which, rather than hindered, have in fact helped in the application of the Code.

As to the interpretation of the contract, the Convention has two rules: the mutually known intentions of the parties (Article 8(1)); and the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances (Article 8(2)). The former has a subjective nature, while the later, an objective one. In any case, Article 8(3) is another objective rule, and requires that due consideration is to be given to all relevant circumstances.

As to Article 112 of the Brazilian Civil Code,[63] the (manifest) intention of the parties prevails. It is subjective in nature, and for this reason the rules of the Convention are better suited for interpretation of commercial agreements.

It is important to note that, when ascertaining the appropriate interpretive principles, the international character of these contracts must be considered, and as such purely domestic interpretations are inappropriate. In other words, the principles must be understood and applied in accordance with the system established by the Convention, and not that of the Civil Code. In this sense, it is useful to analyze case law reports from foreign courts and international arbitral tribunals.

Professor Véra Fradera has examined a decision from an Italian Court: "The rule created in the international panorama is part of the Italian law, nevertheless, it cannot be interpreted by the domestic law (Italian Court of Appeals, 1968)."[64]

Likewise, in the French doctrine:

> *D'après la règle générale selon laquelle l'interprétation de la Convention doit se faire entênant compte de son caractère international, il résulte par-dessus tout que les interprètes ne peuvent en aucune façon recourir à des techniques employés sous l'emprise des lois nationales.*[65]

However, this does not mean that constitutional principles can be set aside (specifically Article 170 of the Brazilian Constitution), such as the principles of social function of the property, free competition, and consumer protection (when applicable).

The good faith principle is yet another vague and potentially problematic concept of the Convention: is this just an instrument for the interpretation of the conduct of the

63 BCC Art. 112: "*Nas declarações de vontade se atenderá mais à intenção nelas consubstanciada do que ao sentido literal da linguagem.*" (English translation: "In statements of will, the associated intention should prevail over the literal meaning of the wording used.")

64 V.M.J. de Fradera, 'A noção de contrato na Convenção de Viena de 1980 sobre venda internacional de mercadorias' in Finkelstein, Vita & Casado Filho 2010, *supra* note 31, p. 359.

65 F. Ferrari, 'Interprétation uniforme de la Convention de Vienne de 1980 sur la vente internationale' (1996) 48(4) *Revue Internationale de Droit Comparé* p. 829.

parties, or does it instead create rules of conduct that compel specific behaviours from the contracting parties? This is not a new issue:

> *La question qu'il convient de se poser est de savoir comment interpréter ce compromis: la bonne foi est-elle significative uniquement en vue de l'interprétation de la Convention ou l'est-elle également pour ce qui concerne le comportement des parties?*[66]

Some authors argue that it is impossible to impose complementary duties on the parties. "The good faith principle is restricted to the scope of interpretation. It does not have the outreach envisaged under Roman based legislations[.]"[67]

Under German and Brazilian laws, the good faith is considered a rule of conduct. As a matter of fact, this principle will actually *always* create a rule of conduct. Even if it is only used in an interpretative role, and therefore instrumental, in order to evaluate the party's conduct, it will be necessary to make a connection with a rule of conduct established in accordance with good faith. Hence, good faith can only function as a rule of conduct, because any interpretation relying upon the good faith principle will always be made in accordance with the understanding of this principle held by the interpreter himself. Thus, it seems correct to conclude that

> under the scope of the CISG, the good faith has the same control over the parties' behaviour in the international transaction. This control has its origin in the application of the principle of good faith, adopted by *lex mercatoria*.[68]

Véra Maria Jacob de Fradera quotes Ghestin on this issue, saying:

> The good faith principle conveys not only a state of mind, the knowledge or the lack of it of a fact, but also a reference to the usages, to a moral rule of behaviour. It translates a behaviour demand that may be adjacent to the general principle of liability.[69]

Therefore, the question becomes: does the non-performance of the rule derived from the good faith principle allow termination of the contract?

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66 *Id.*, p. 837.

67 P.B.G. da Fonseca, 'O Brasil perante uma nova perspectiva de direito mercantil internacional' (1998) 341 *Revista Forense* pp. 193-211. Available at: <www.cisg.law.pace.edu/cisg/biblio/fonseca.html>.

68 Fradera 2011, p. 15.

69 *Id.*

The answer is affirmative, as Article 7 of the Convention must be interpreted in a way that ensures the respect of the good faith principle, both to the main obligation and to ancillary or secondary ones imposed by good faith. In other words, the breach of an important ancillary obligation to the economy of the contract, which obligation derives from the good faith principle, may itself be cause for avoidance.

Another concept subject to this criticism is the principle of reasonableness, which was a contribution from American law to the Vienna Convention. Although it is not expressed, it is in fact one of the main principles of the CISG. 'Reasonable' means common sense; it is what is perceived as right and adequate in certain circumstances, in a given moment, and in a given community. It is conduct that, under those specific circumstances, falls within the concept of something rational, balanced, prudent, and wise.[70] In this sense, the doctrine of Judith Martins-Costa is elucidating:

> The standard of reasonableness translates common sense. It represents what is taken in a certain community, certain circumstances and certain moment (be it national, cultural, professional or any other) as rational, balanced, prudent or sensible.[71]

4.4 INFLUENCE OF THE CONVENTION IN BRAZIL

I would like to conclude with some cases that have influenced Brazilian doctrine and jurisprudence; cases that have adopted solutions brought by the Vienna Convention, without express rule in our domestic law.

I refer first of all to the performance of a substantial part of the party's obligation as grounds to prevent the termination of the contract.[72] Secondly, I would highlight the duty

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70 L.B. Timm & L.G.M. Moser, 'Aplicação da CISG no Brasil: possibilidades jurídicas e incentivos econômicos', in C. Finkelstein, J. Vita & N. Casado Filho 2010, *supra* note 31, p. 279.

71 H.H. Martins-Costa, 'Os princípios informadores do contrato de compra e venda internacional na Convenção de Viena de 1980' (1995) 32 *Revista de Informação Legislativa* p. 123

72 Insurance. Non-performance by the insured. Failure to pay the last instalment. Substantially performed. Termination. The Insurance Company cannot unwind an insurance contract due to failure to pay the last instalment, due to three reasons: a) it has always received delayed payments, which was provided in the contract, being inadmissible for it to refuse only when the accident occurs; b) the insured has substantially performed the contract, its failure being insufficient grounds to terminate the contract; c) the termination of the contract must be judicially requested, only then it will be possible to evaluate the extent of the non-performance and whether it is sufficient to terminate the contract. Granted (*Superior Tribunal de Justiça*, REsp n. 76.362/MT, Quarta Turma, ac. de 11.12.1995);
Statutory lien. Search and seizure. Failure to pay the last instalment. Substantial performance. The performance of the financing agreement, with the failure to pay only the last instalment, does not entitle the creditor to resort to search and seizure action, instead of claiming the payment of the default instalment. The substantial performance of the contract by the debtor does not entitle the creditor to request the termination of the contract, unless there is a common loss of interest regarding the contract, which is not the case at hand.

of the buyer to take measures to mitigate damage.[73] The Superior Court of Justice has ruled that the aggrieved party should have to make reasonable efforts to replace the non-conforming good, in order to mitigate the damage. Lastly, I would note the concept of anticipatory breach of contract.[74]

Here, the last instalment was even judicially consigned. When the creditor's behaviour overlooks the aforementioned facts and requests a search and seizure warrant with an interim measure for repossession, he does not fulfil the requirements of good faith. Motion denied. (*Superior Tribunal de Justiça*, REsp n. 272.739/MG, Quarta Turma, ac. de 1°.2.2001);
See the case law reports drafted by the STJ Secretariat, available at: <www.stj.jus.br.portal_stj/publicação, de 9.9.2012>.

73 *Cf.* J.R. de Castro Neves, *Direito das obrigações* (GZ, Rio de Janeiro, 2008) p. 397.

74 TJRGS, na RJTJRGS, 97/397. *See* A.M.V. Terra, *Inadimplemento anterior ao termo* (Renovar, Rio de Janeiro, 2009) p. 53 *et seq.*

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