
A Case Study on Vietnam

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INTRODUCTION

1. Overview of Thesis’s Topic
The United Convention on Contracts for the International Sale of Goods (CISG), since the day it came into force in 1980 has been under the scrutiny of scholars around the world. This is evinced by a colossal reservoir of writing in discussion of the Convention. Some scholars praise the Convention for its tremendous success. Others hold a pessimistic view about what CISG would achieve. While the late Prof. Schlechtriem is a strong supporter of CISG, the late Prof. Rosett criticized this Convention to no end. It is intriguing to see how a Convention so widely accepted by many countries is put at two ends of a spectrum in scholars’ views. With this speculation in mind, I create this thesis with a humble aim to measure the success of CISG.

One way to evaluate the success of CISG is to examine whether it fulfills its own goals. Therefore, this thesis strives at measuring the success of CISG by examining to what extent the Convention has fulfilled its objectives. In short, this thesis will evaluate the success of CISG in terms of whether it creates a uniform sales law, increases legal certainty, reforms domestic laws and reduces transaction costs. This general assessment will then be further analyzed through a case study on Vietnam.

The reason for selecting Vietnam to do a case study is because Vietnam, along with other developing countries, is the new focus of CISG. It is interesting to see how the Convention would perform its goal in the context of its newly targeted country. I also hope that through this case study, other possible success and limitations of CISG when applied in a specific context would reveal themselves. In addition, as Vietnam is the latest member state of CISG, there have been only a few writings discussing CISG and Vietnam. Hence, I wish to contribute something to the collection of writing on Vietnam.

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Despite the fact that I am deeply inspired by Prof. Rosett, I have to disagree with his approach in aforementioned remark about CISG. Over the course of researching for this thesis, I discovered that it is perhaps not proper to take an extreme approach in assessing any instruments within the field of International Commercial law, which includes CISG. It should be borne in mind that such a convention is created on a broader scale; therefore it could never be as specific and detailed as some domestic laws. Furthermore, because of its internationality, there is always some sort of compromise over the course of drafting this Convention so that it could be ratified by as many countries as possible. This explains why CISG is much like a neutral law in a practical sense.\(^5\)

Therefore, I strive to take a neutral view when assessing the success of CISG. Sides will not be taken as I do not mean to severely criticize the Convention by mainly focusing on what it fails to do.

2. Demarcation of Thesis

Due to limited wording, this thesis will not provide an assessment on each provision of CISG. It cannot address CISG rules in details. Only relevant provisions will be discussed in order to illustrate certain arguments presented.

Within the realm of this thesis, I am only capable of measuring the success of CISG by discussing the Convention’s performance in these key areas: CISG as a uniform law, increasing legal certainty, reforming domestic laws and reducing transaction costs. Other possible success of CISG will not be addressed.

3. Structure of Thesis

This thesis entails 3 Chapters. In the first Chapter, I will present with the objectives and structure of CISG. In the second Chapter, I will attempt to measure the success of CISG in examining to what extent it has attained the goals mentioned in Chapter 1. This assessment will then be applied in a case study on Vietnam in Chapter 3.

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CHAPTER I: OBJECTIVES AND STRUCTURE OF CISG

This Chapter strives to provide the most general overview of the goals of CISG. I will also quickly assess the structure of CISG because it has an impact on how the Convention attains of its own goals.

1. Objectives of CISG.

The main objective of CISG is to create a uniform sales law. It is made clear in the Preamble where it states that the objective of this Convention is to “adopt uniform rules which govern contracts for the international sale of goods”. This objective reflected the renowned idea of having a transnational commercial law that led to the emergence of lex mercatoria in the Middle Ages. Not until the 20th century did the new law merchant materialize and lex mercatoria was revised into a set of rules that “could facilitate the growth of cross-border trade by virtue of its international character”. The rationale behind the desire to have a uniform international sales law is explicable. As parties to an international contract have the tendency to prefer their own domestic laws or the laws that benefit them the most, there will be conflicts in selecting the substantive governing law. A set of uniform law is, therefore, believed to solve this problem.

Prior to CISG, there had been an attempt to generate the new law merchant. The most prominent ones were the Uniform Law on the International Sale of Goods (ULIS) which came into effect in 1964 and the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF) which came into effect in 1971. However, these Conventions are often remarked as having “limited success” in unifying the intricate and bountiful world of sales law. In 1980, the United Nations Commission on International Trade Law (UNCITRAL) created CISG in another attempt to generate a new set of rules that unifies international sales law. In order to attain this goal, CISG “seeks to substitute one sales law for the many and

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6 Ibid. 1
8 Clayton P. Gillette, Advanced Introduction to International Sales Law (Edward Elgar Publishing Limited, 2016), 5
9 Ibid.
diverse national legal systems that exist in the field of sales.”12 This objective was more than once reiterated by American Courts.13

As noted by Felemegas, a uniform law brings about great benefits.14 It provides parties to a contract with greater certainty when it comes to their rights and obligations.15 In other words, a set of uniform law would help increase legal certainty when commercial actors partake in cross-border transactions. This is believed to be a goal of CISG.16

Another goal of CISG is to reduce transaction costs in contracting internationally.17 CISG seeks to simplify international transactions in order to remove “legal barriers and promote the development of international trade.”18 With that, transaction cost is expected to drop. As a matter of practice, commercial actors would rather spend less expense on negotiating contracts.19 Instead, they prefer to utilize that expense to perform the contracts.20 Hence, reducing transaction cost might be the most practical goal of CISG.

The Convention, as its rules cover many issues of commercial contracts ranging from formation of contracts to substantive matters such as obligations of the seller and passing of risk21, is also believed to become a catalyst for domestic law reforms.22 This is due to the fact that States, after adopting the Convention tend to amend their domestic laws so that they are in compatibility with CISG.

With the aforementioned objectives, CISG appears to be a leap towards a utopia world of international sales laws as Professor Fletcher (sarcastically perhaps) suggested in his CISG song for the Willem C. Vis Moot Contest 2013. He wrote:
“So now there is a treaty when I buy or sell afar.

12 Ibid. 6, 4
14 Ibid. 12
15 Ibid.
17 Ibid.
18 Ibid. 12
19 Ibid. 8, 2
20 Ibid.
21 See more Part II and III of CISG.
I can deal with folks from everywhere, from Arles to Zanzibar.

The goods I buy are always fine, and my buyers never sue.

I hardly need a lawyer — yes, my life's perfection true!

Because we have that CISG.

There's no risk in international sales far as the eye can see”23

It will be further examined over the course of this paper to reveal to what extent CISG has fulfilled these objectives. Such an assessment will help measure the success of CISG.

2. Structure of CISG

CISG entails 101 articles and is structured in a rather classic manner. Part I of the Convention stipulates how the Convention is applied. Article 1(1), which should be considered the backbone of this part clearly sets out that CISG is to be applied in case there is a “contract of sales of goods” concluded between parties “in different states” that are “contracting States” or “when the rules of private international law lead to the application of the law of a Contracting State.” Prof. Schelchtriem and Ferrari both praise the simple prerequisites in determining the scope of application of CISG.24

In order to have an overall idea of the scope of CISG, Article 1 needs to be read in conjunction with Article 2, Article 3 and Article 4 of the Convention.25 Article 2 and Article 3 narrow down the scope of CISG by excluding certain sales contracts.26 Interestingly, Article 4 excludes validity of contract as a matter of concern under CISG.27 The purpose of this specific exclusion is to preserve validity as a matter of domestic laws.28 This is because “validity” is assumed to reflect “important social values” that could supersede party autonomy in

23 See more at http://www.law.pitt.edu/academics/cile/cisgsongpage
24 Ibid. 22
This point of view is reaffirmed by the Appellate Court Köln (Provincial Court of Appeal, Germany). See more at http://cisgw3.law.pace.edu/cases/940826g1.html
25 UNCITRAL Digest of Case Law on CISG 2012 (UNCITRAL Digest), 2
26 See more Article 2 of CISG
27 See more Article 4 of CISG
contracting. The fact that CISG restricts its scope of application by excluding validity of contract would hinder its goal as a uniform law. This will be further elaborated in the second Chapter.

Part II of CISG mainly deals with formation of contracts. The Drafting panel must have been very attentive as they put together 10 provisions to solely deal with the matter of offer and acceptance. Needless to say, these basic elements are of paramount importance and they are always deserving of careful assessment. It is because substantial issues only matter when a contract is legally formed. One remark could be made that this part of CISG seems to be very much inspired by Common Law as it focuses solely on the basic principle of Offer, Acceptance and Contractual intent without taking into consideration other elements of contract that are regarded in many civil law systems such as legal capacity or the legal cause of parties when enter into a contract.

Part III of CISG contains all the provisions on substantial matters of a contract including obligations of the seller, passing of risk as well as provisions common to the obligations of the seller and of the buyer. This part is considered the real “sales law” of CISG as it touches upon substantive matters of contract law.

CISG ends with Part IV, which deals with the matter of acceding, ratification as well as making reservations to the Convention.

In terms of structuring and language, CISG has been applauded for being logical and simple. Particularly, Ziegel wrote:

“The CISG provisions are logically arranged and, on the whole, the drafting style is lucid and the wording simple and uncluttered by complicated subordinating clauses. One does not have to be a sales expert to grasp the general sense of the Convention even on a first reading.”

This might contribute to how CISG attains its goal in certain aspects that will be elaborated in Chapter 2. However, it is worth noting that what Ziegel referred to in the aforementioned

comment is the style, not the content of CISG’s text. To put it simply, the text of CISG could be simple but at the same time containing ambiguous rules or vague terms in parts. Due to this, CISG’s fulfilment of its own goals would be hindered. Chapter 2 will discuss this issue more thoroughly.
CHAPTER 2: MEASURING THE SUCCESS OF CISG

CISG, dubbed as the “greatest legislative achievement aimed at harmonizing private commercial law”\(^{32}\), has long been appraised by renowned scholars in the field of International Commercial Law for its tremendous success.\(^{33}\) Though it is undeniable that CISG has attained a lot of success, it takes a careful assessment in order to demonstrate to what extent CISG really fulfils its goal.

This Chapter will generally examine CISG’s success as a uniform sales law, in increasing legal certainty, inspiring the law reforms of its contracting parties, and reducing legal costs.

1. CISG as a Uniform Sales Law?

As discussed in Chapter 1, the main goal of CISG is to bring about uniformity in international sales law. At first sight, it seems that CISG has done a good job in creating a transnational commercial law. This is due to the fact that the Convention is widely accepted by many countries. CISG currently has 84 member states in total.\(^{34}\) Nines leading trade nations have ratified CISG, except for the United Kingdom.\(^{35}\) Some big names are China, Brazil, Japan and the United States. This number, while not as staggering as when compared to other conventions like the New York Arbitration Convention\(^{36}\), more or less showcases the success of CISG in unifying international sales law. It is not an exaggeration to say that none of its predecessors had attained the same achievement.

ULIS and ULF, which are often regarded as “antecedents to CISG”\(^{37}\) have solely nine member states. They are mostly Western Europe countries.\(^{38}\) As a result, these two Conventions are

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\(^{34}\) See more at [http://www.cisg.law.pace.edu/cisg/countries/cntries.html](http://www.cisg.law.pace.edu/cisg/countries/cntries.html), last accessed 14.05.2016


The New York Arbitration Convention has been ratified by 149 states. Note that unlike the New York Arbitration Convention, which deals with recognition and enforcement of arbitral awards, CISG governs substantive issues of commercial contracts. This might explain why some countries are more hesitant in adopting CISG.


\(^{38}\) Ibid. 36, 33
believed to fail in unifying international sales laws.\textsuperscript{39} This remark, though holds true, seems rather harsh for the conventions so early born yet had to carry a massive role of bringing together an intricate and bountiful world of international sales laws. In defense of ULIS and ULF, the conventions, to a certain degree, had succeeded as uniform laws at the time they entered into force. In the context of post-war trade recovery in the late nineteenth century when ULIS and ULF were released, most trade in the world is “intra-trade”\textsuperscript{40} and not as globalized as nowadays. The Western European countries were much more likely to trade with one another while the Soviet Union as well as other communist countries that have now become some of the biggest traders were extremely hesitant in international trading. Hence, having the Western European countries, especially Germany - one of the biggest economies at that time ratify the conventions should at least be considered a success. Even though ULIS and ULF should be deemed successful at unifying sales laws at the time they came into force, this success seems rather minor when compared to CISG.

Though the number presented above more or less conveys some success that CISG has achieved so far in unifying sales law, it is not sufficient to conclude that the Convention has attained its goal as a uniform sales law. Further examination will demonstrate that due to the non-uniform interpretation of its own text and other issues, the goal as a uniform sales law of CISG is possibly harmed.

1.1 Non-Uniform Interpretation of CISG
In order to attain the goal as a uniform sales law, the drafters of CISG make sure that uniformity lies within the text of the Convention itself.\textsuperscript{41} However, having a uniform set of rules does not necessarily ensure the uniformity of a Convention. Rather, uniformity lies at the application of such rules in practice.\textsuperscript{42} CISG can only ensure uniformity in international


\textsuperscript{40} Andrew G. Terborgh, The Post-War Rise of World Trade: Does the Bretton Woods System Deserve Credit?, Working Paper No. 78/03 (2003): 3

\textsuperscript{41} Bruno Zeller, CISG and the Unification of International Trade Law (Routledge-Cavendish, 2007), 27

sales law if its original text is “interpreted by the domestic tribunals in a uniform manner” and “the same tribunals adopt a uniform approach to the filling of gaps in the law”. Bearing this in mind, CISG entails guidance to interpretation of its text in Article 7(1) so as to prevent deviating interpretations of domestic courts. Three interpretative standards are set out, which are the internationality of the Convention (i), uniformity in its application (ii) and the observance of good faith in international trade (iii). The assessment below will demonstrate that Article 7(1) does not work in ensuring uniformed interpretation of CISG. Therefore, its goal as a uniform sales law is hindered.

i. The international character of the Convention

The interpretation of international conventions usually gets muddled at the domestic level. National courts, whether planning it or not are oftentimes under the influence of national domestics laws over the course of interpreting a Convention. If this happens in interpreting CISG, the internationality of the Convention would be harmed. Hence, Article 7(1) is construed by scholars to mean that the interpretation of CISG must not be conducted based on domestic laws but rather “autonomously”. Domestic courts are not entitled to utilize concepts of national laws, as well as the national interpretative techniques in interpretation of CISG. This notion is adopted by many courts and tribunals. In RJ & AM Smallmon v. Transport Sales Limited and Grant Alan Miller, the High Court of New Zealand found that

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43 Ibid.1, 5
44 Ibid.
“the Convention must be applied and interpreted exclusively on its own terms”, and “recourse to domestic case laws is to be avoided.” 49

However, Article 7(1) seems incapable to bind all courts and tribunals with a consistent manner in interpreting CISG. In practice, many courts and tribunal took a divergent approach and interpreted CISG in light of their own domestic laws. It is especially the case with American Courts and tribunals when they interpret CISG on the basis of the Uniform Commercial Code (UCC). In Hanwha Corporation v. Cedar Petrochemicals Inc., the Court relied on UCC to interpret the CISG. 50 More particularly, in Chicago Prime Packers, Inc. v. Northam Food Trading Co, the Court, after emphasizing that CISG must be interpreted by its international character, went against this manner and decided that jurisprudences interpreting Article 2 of the UCC may be used to interpret CISG. 51 In another case, an American tribunal interpreted the term “commercially reasonable substitute” in Article 79 of CISG based on the provision on excuse in the UCC and related jurisprudences. 52 Of the same opinion, the Supreme Court of Austria, in interpreting Article 27 of CISG, makes reference to a commentary on the Austrian Commercial Code. 53 Aforementioned rulings demonstrate that certain courts and tribunals permit, if not encourage reference to the domestic laws in interpreting CISG. This goes against the “autonomous” standard set out in Article 7(1) of the Convention. Yet these decisions are still enforced and cited by later jurisprudences. This evinces that the inclusion of Article 7(1) is not sufficient to ensure autonomous interpretation of CISG. With that, the Convention ceases to excel as a uniform sales law.

53 Austria 24 May 2005 Supreme Court, http://cisgw3.law.pace.edu/cases/050524a3.html
Ibid. 45, 253.
Despite the fervent aspiration of the Drafting panel for CISG to be interpreted in an autonomous manner; Ferrari contends otherwise. He argues that certain concepts in CISG are much appropriately interpreted in light of domestic laws. Among which is the concept of “private international law” rules (PIL rules) in Article 1(b). Ferrari stresses that PIL rules vary from states to states; hence what CISG actually refers to in Article 1(b) is the domestic conception of the phrase. With that, CISG cannot always be interpreted autonomously.

ii. Uniformity in the application of CISG

Uniformity in the application of CISG could only be achieved if courts and tribunals take into consideration foreign decisions pertaining to CISG. However, in practice, courts adopt different approaches when it comes to making references to foreign case law. Many courts and tribunals expressly support the application of foreign jurisprudences to ensure uniformity in applying CISG. An Italian court held that foreign case law have a “persuasive value and should be taken into account by judges and arbitrators in order to promote uniformity in the interpretation and application of the CISG as requested by its Article 7(1)”.

It is worth noting that though this decision seems to be in favor of adopting foreign case laws by domestic courts, the use of non-mandatory language suggests that adopting foreign case laws lies with the good will of courts or tribunals. The Court also noted that foreign rulings have a non-binding effect. On the contrary, an American court, after concluding that there hardly was any relevant American case law pertaining to certain provisions of CISG, went ahead and interpreted the Convention on its own terms instead of looking into foreign case laws. This evinces that some domestic courts and tribunals do not hold foreign rulings of much value. With that, uniformity in interpreting CISG is not ensured.

iii. The observance of good faith in international trade

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54 Ibid. 45, 249
55 Ibid.
56 Ibid. 24
59 Ibid. 51
Article 7(1) also puts forth “good faith” as the guiding principle in interpretation of CISG. The concept of good faith is remarked as a controversial issue of CISG. It stems from the fact that this principle does not have the same weight in different legal cultures. In civil law countries, a judge is often driven by the principle of good faith while ruling a contractual dispute. On the contrary, English contract law, as well as many Common law systems, does not have the principle of good faith. This explains why this principle had raised major debates in the drafting stage. Delegates from Common Law countries opposed the inclusion of good faith on the basis that it was a “moral exhortation which should not be given the status of a legal obligation binding on contracting parties.” The Civil Law delegates, on the other hand support the inclusion of good faith principle because it is a “norm of conduct widely recognized as necessary in international trade”. Such an inclusion would also help ensure that the contracting parties to the Convention act accordingly.

As observed by Komarov, many domestic court rulings have recognized good faith as a manner in which CISG should be interpreted in. However; she notes that the analysis of these rulings suggests that uniformity in the interpretation of this rule of the Convention is not achieved.

Interestingly, the principle of good faith in Article 7(1) is subject to different interpretations of courts, tribunals and scholars as well. Some are of the opinion that this principle reaches beyond Article 7(1) and looms over other substantive issues in CISG. A long list of case law suggests that principle of good faith is viewed by Courts and Tribunals as a general principle of CISG. Particularly, A Hungarian arbitration is of the view that good faith is a “standard

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61 Ibid. 36, 87
64 Ibid.
65 Ibid.
66 Ibid. 62
67 Ibid.
68 See more See Oberlandesgercht Celle, Germany, 24 July 2009 http://cisgw3.law.pace.edu/cases/090724g1.html; Rechtbank Rotterdam, the Netherlands, 25 February 2009, http://cisgw3.law.pace.edu/cases/090225n1.html; Tribunal of International Commercial Arbitration
for contract performance” subject to CISG.69 Another tribunal applies the principle of good faith in Article 7(1) to settle a dispute over partial cancellation of the contract provided in Article 51(1) of CISG.70

In the academic world, there has been an ongoing debate about the principle of good faith in CISG. While Prof. Schlechtriem argues that good faith "should amount to a general principle" of CISG71, other scholars hold a contrary view.72 To weigh in, Schlectriem’s comment seems at odds with the fact that “good faith” is only mentioned in Article 7(1) of CISG, hence should only apply to interpretation of the Convention.73 Furthermore, if CISG is to be read as a “compromise between Common law and Civil law” then perhaps, the good faith principle should only be construed as a tool to interpret CISG, not a general principle.

The divergent views on how to construe the principle of good faith in CISG as well as the fact that Courts and Tribunals take opposite stances in interpreting the Convention seem to suggest that perhaps a provision guiding contracting states towards unified interpretation is not the ultimate solution to ensure that CISG is applied uniformly. Ironic as it is, Article 7(1), being a provision providing guideline on interpretation of CISG, is subject to interpretation of different courts and tribunals itself. Scholars also weigh in and provide with contrasting views. With that, there hardly is a uniform way of interpreting CISG. While there is no common Supreme Court superior to the domestic courts of CISG’s contracting states, there seems to be no means to ensure uniform interpretation.74 This poses as a great threat to the achievement of CISG’s goal as a uniform sales law.

72 For further discussion on this debate, see Ibid. 69, 333-353
74 Ibid. 35, 467
1.2 Other Issues

Apart from the issue of non-uniform interpretation of CISG, other issues may also hold the Convention back from achieving its goals as a uniform sales law.

First is the exclusion of validity of contract out of its scope of application. Prof. Schlechtriem noted that this exclusion covered numerous issues from capacity of persons to agency, mistakes voiding a contract and the like. By doing this, CISG lends full force to domestic laws. As argued by Hartnell, this hinders the goal of CISG as a unifying sales law. CISG is created with a desire to promote uniformity through eliminating the reference to PIL rules. It certainly does not do its job if whenever the matter of validity of contract arises, the domestic court or arbitral tribunal would have to refer to the principle of private international law to get the puzzle solved.

Second, it is doubtful if CISG succeeds at unifying international sales law because the Convention is usually excluded as applicable law to cross-border contracts. As observed by Spagnolo, parties, especially American ones, quite often choose to opt out of CISG. In a survey targeted at practicing attorneys, it shows that 64.8% of respondents excluded the CISG principally or preponderantly. This startling number suggests that uniform sales law is not necessarily preferred over national laws when parties contract internationally. The fact that CISG is often excluded also hinders the achievement of its goal as a uniform sales law.

Furthermore, as a matter of practice, not all domestic Courts are CISG-friendly. Some Courts deliberately ignored the application of CISG even in cases it is the applicable law. Particularly, in Nova Tool & Mold Inc. v. London Indus., Inc., the Court, despite the

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75 Article 4 of CISG
76 Ibid. 2, 788
77 See more chapter I of this thesis
78 Ibid. 28, 5
79 Note that validity of contract is a crucial issue in contract law. It often comes first in a contractual dispute. The courts often review the validity of contracts before settling any contractual disputes. In practice, validity of contract is also challenged by lawyers as a defense for breach of contract. As CISG does not govern this matter, there are chances that its rules would hardly get to apply to many contracts in dispute that are already invalid by virtue of domestic laws.
acknowledgement that CISG might apply to the contract in dispute, decided the case on the basis of Canadian law.\textsuperscript{83} It is unclear how CISG succeeds as a uniform law when its application is ignored by Courts even in case the Convention governs the contract in dispute.

2. **CISG to Increase Legal Certainty?**

Legal certainty is a principle that a rule of law must be clear and precise and that it must provide those that are subject to it the possibility to foresee how that rule applies in litigation.\textsuperscript{84} As argued by Cuniberti, legal certainty in an international context could be harmed when it is difficult to determine the governing law of the contract or when governing law is unclear and imprecise.\textsuperscript{85} He further asserts that in the context of international contract law, it is hard to define which legal certainty is referred to.\textsuperscript{86} This statement is ambiguous and seems to be in contrast with the view of other scholars that legal certainty happens in a contractual dispute when a party is not confronted with a law that was hardly foreseeable and is not really understandable.\textsuperscript{87}

Lord Mansfield in Vallejo v. Wheeler stated that “the great object” of commercial transactions “should be certainty: and therefore, it is of more consequence that a rule be certain, than whether the rule is established on way or another.”\textsuperscript{88} It could be construed from this ruling that legal certainty includes two aspects, the certainty that one rule will be chosen, not any other rules and the certainty in how that rule is applied. From the perspective of parties to a contract, legal certainty is attained when they could anticipate the rule that will be applied once a dispute arises. Legal certainty is also attained when they could anticipate how that rule applies.

In order to assess whether CISG truly helps increase legal certainty in the context of international contracts, two questions need answering. First, does the application of CISG make it easier to determine the governing law of the contract? Second, is the content of CISG clear and precise enough for parties to apply it without any confusion? The answers to these questions will shed light on whether CISG succeeds in increasing legal certainty.

\textsuperscript{83} Nova Tool & Mold Inc. v. London Indus., Inc., No. 97-GD-41311 Ontario Court (General Devison) 1 December 1988
\textsuperscript{84} Paul Heinrich Neuhaus, Legal Certainty Versus Equity in the Conflicts of Laws, 28 Law & Contemporary Problems (1963): 795
\textsuperscript{85} Gilles Cuniberti, Is the CISG Benefitting Anybody?, Vanderbilt Journal of Transnational Law (2006), 1515
\textsuperscript{86} Ibid.
\textsuperscript{87} Ingeborg Schwenzer and Pascal Hachem, The CISG - Successes and Pitfalls, American Journal of Comparative Law 57 (Spring 2009): 464
\textsuperscript{88} Fidelma White, Commercial Law (Thompson Round Hall, 2002), 12
2.1 Application of CISG

It is of common view that the application of different national laws impairs legal certainty when contracting internationally. Therefore, the application of CISG would help increase legal certainty in international contracts. This view is true to a certain degree, especially when parties fail to select a governing law. As CISG applies automatically to contracts that fall within its scope of application, should a dispute arise, parties can easily anticipate that the Court or arbitral tribunal will apply CISG to settle the dispute. Felemegas argues that the examination of whether CISG helps increase legal certainty has to be done in comparison with "the results brought about by the principle of private international law." This statement will be demonstrated more clearly in the legal hypothesis below.

This hypothesis includes two scenarios. The first one is when parties fail to choose the governing law and CISG applies automatically because the contract falls within the scope of the Convention. The alternative scenario is when parties fail to select the governing law but CISG does not apply because both or none of the contracting parties come from countries that are not members of CISG.

In the first scenario, if both parties to such a contract have ratified CISG, it is automatically applied as the governing law. The Court or tribunal that has jurisdiction over the dispute does not have to resort to the PIL rules. Instead, they will apply CISG as the governing law. This means that even at the early stage of signing the contract, parties could already anticipate that when a dispute happens, CISG will be the law that the Court or arbitral tribunal invoke to settle the dispute. Zeller argues that predictability in the context of cross-border

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89 Ibid. 1, 1
90 Ibid. 85, 1514
91 Ibid. 1, 4
92 See more Article 1 of CISG
93 UNCITRAL Digest, 4
transactions is “intrinsically connected” to the question of choice of law. CISG, as the automatic applicable law would therefore help enhance legal certainty.

In the alternative scenario, if both parties are not members of CISG, it is apparent that the convention does not apply as the governing law. When a dispute arises, the court or arbitral tribunal will have to select the applicable law. In practice, parties are still capable of negotiating which law will govern the contract at this stage. While this is a possible option, parties to a disputed contract are usually of opposing positions in this phase, which makes it hard for them to compromise and agree on one governing law. Moreover, once the dispute is already revealed, parties, especially sophisticated ones with helpful assistance of lawyers are most likely to aim at choosing the law that may benefit them the most in settling the dispute. Therefore, to have parties on the same page at this stage is never an easy task.

In case parties to the contract could not agree on which law to choose, the court or the arbitral tribunal that has jurisdiction over the case will have to select the applicable law. This is a complicated step because they would have to invoke the conflicts of law principle to determine which law governs the contract. The conflicts of law principle are oftentimes both unpredictable and complex especially in the context of international commercial contracts.

To illustrate, it is a matter of practice that different courts apply different conflict of law rules in determining the applicable law to a disputed contract. With that, parties to a contract might find it hard to predict which conflict of laws will be resorted to by the adjudicators. In Karachi Gas Co., Ltd v H Issaq, the conflict of rules referred to was the “most closely connected” to the contract rules. On the other hand, in Radia v Transocean (Uganda) Ltd, the applicable law

95 Bruno Zeller, CISG and the Unification of International Trade Law (Routledge-Cavendish, 2007), 27
96 Note that parties could opt out of CISG at the time of concluding a contract. This will be discussed further down below.
97 See more Jospeh J. Darby in C.M. Biamca and M.J. Bonell, Commentary on the International Sales Law - The 1980 Vienna Sales Convention, 222 http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?Article=1697&context=gjicl last accessed 14.05.2016 “Absent the choice of law/choice of forum clause, the contract would pro tanto then be governed by whatever law a court or arbitration tribunal found to be applicable.”
99 Ibid. 85
was chosen by lex loci contractus.\textsuperscript{100} This demonstrates that applying PIL rules to identify the law of a contract is oftentimes unpredictable.

As for the complexity of conflict of law rules in the context of international contracts, the “most closely connected” rule will be singled out and addressed.\textsuperscript{101} This is the approach that English and American laws take in determining the proper law of the contract.\textsuperscript{102} Rome I Regulation, just like the Rome Convention which it had superseded also adopts the “most closely connected” approach in principle.\textsuperscript{103} This rule might be troublesome in the context of cross-border transactions as international contracts often entail different parts that are executed in different places. To illustrate, assume a sales contract of goods signed between A as the seller and B as the buyer. The products at hand contain parts that are manufactured in other countries and assembled in country X. They are then shipped to A by a shipping company from country Y so that A could later sell to B. The products were delivered late and non-conforming due to the faults in certain parts that were produced in other places. A contractual dispute arises between A and B regarding late delivery and non-conformity of goods. How can a Court or Tribunal, by virtue of the “most closely connected” rule, navigate in choosing the law to govern this dispute? In this case, it seems that they might have a hard time trying to identify which law is “the most connected” to this contract. Should it be the law of the country that A as a seller has its habitual residence? Or should it be the law of country X where the products were assembled? It may not be an exaggeration to say that in an international context, such contracts are manifold. Parties might struggle anticipating the governing law that will be chosen. Legal certainty would therefore decrease.

The hypothesis above shows that by applying CISG, legal certainty increases in case parties fail to select the governing law of the contract. However, it is of worthy note that CISG only applies to contracts between parties from different countries that are members to the Convention. Therefore, it would only help to tremendously increase legal certainty when the

\textsuperscript{101} See more Article 4(1) of The Convention  
\textsuperscript{103} Ibid., 246}
convention is adopted by all countries in the world. This seems to be an unlikely possibility in the near future.

Cuniberti, while not opposing the idea that CISG increases legal certainty in case parties do not select the governing law argues that if parties to a contract do not give sufficient concern about legal certainty to the point where they fail to select the governing law, legal certainty is definitely of no worthy value to them. A convention that helps increase legal certainty has to be of no good use for these parties. This statement seems presumptuous because the reason behind parties’ failure to negotiate the applicable law is not always negligence. Many contracts involve unsophisticated parties that are not well-versed with the issue of governing law. At the time of negotiating a contract, they do not know or cannot foresee that the inclusion of a choice of law clause would help increase predictability in the future when a dispute arises. CISG would help create a safety net for these parties in contracting internationally. They would not have to worry about the governing law of the contract when CISG automatically applies.

Furthermore, the application of CISG would also help increase legal certainty in case a dispute of a contract is subject to the jurisdiction of a Court of a country but the applicable law is the law of another country. Felemegas is of the same opinion when he emphasized that the benefit of CISG in increasing legal certainty manifests when it is compared with the results when one applies an unfamiliar system of domestic laws. This statement is lucidly demonstrated through a legal hypothesis created by Spagnolo. Accordingly, “if a court from country X determines it has jurisdiction and proceeds to apply the law of country Y, the outcome will not be as expected by a client choosing law Y. This is of particular concern if X is a nation with a less developed or different legal system. If the CISG governs the contract, then the obligation of courts in X, Y and Z is the same: to apply the CISG as uniform international law”. While admitting that this hypothesis does not propose that the outcomes when applying CISG are “utopian or perfectly predictable”, Spagnolo notes that in comparison with any other alternative choice of law, CISG is more uniformly applied. Zeller

105 Ibid. 85
107 Ibid. 91
108 Ibid. 106
came to the same conclusion after examining 40 American case laws in which foreign laws are applied. Accordingly, in 36 cases, the Court had wrongfully applied foreign laws. In light of this assessment, he concludes that the application of foreign law is “always fraught with danger as outcomes are rarely consistent especially in the common law system”. Therefore, CISG provides more predictable outcomes for international sales than any choice of domestic sales law.

2.2 Content of CISG

The application of CISG may suggest that it helps increase legal certainty in case parties fail to include a choice of law provision in the contract. However, application on its own does not ensure legal certainty. Its content is also important because in case the text of CISG gives way to ambiguousness, the convention would not help increase legal certainty. On the contrary, it would do the exact opposite. An assessment of CISG will demonstrate that due to the ambiguity in its text, CISG at some parts creates legal confusion, hence, diminishes legal certainty instead of increasing it.

i. Article 6

As a convention that bears a non-mandatory nature, CISG allows parties to exclude its application. According to Article 6 of CISG, parties may exclude the Convention's application totally or partially. Parties can also derogate from certain provisions of the Convention. This provision is to ensure party autonomy in contracting internationally. While it certainly promotes party autonomy, the application of this provision brings a lot of legal confusion to contractual parties in practice.

The text of Article 6 does not make clear how parties can exclude the application of CISG. It does not specify if parties have to explicitly do so in the choice of law clause or merely

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109 Ibid. 95
110 Ibid.
111 Ibid.
113 See more Article 6 of CISG
See more reference to this principle in the decision of the Federal Supreme Court of Germany in CLOUT case No. 229, [http://cisgw3.law.pace.edu/cases/961204g1.html]
referring to another domestic law as the governing law is sufficient. Jurisprudences do not seem to shed light on this matter as courts and tribunals take extremely different views.

Some courts and tribunals are of the view that only an explicit exclusion of CISG would suffice\(^\text{115}\). Particularly, the District Court of Utrecht applied the law of Netherlands as the contract in dispute entailed a provision that excluded the application of the CISG.\(^\text{116}\) A tribunal went a great length in ruling that a clause explicitly excluding CISG is necessary even if that clause is solely an incomplete draft\(^\text{117}\).

From these jurisprudences, it seems that a choice of law clause simply not mentioning CISG or deliberately referring to a domestic law is inadequate to exclude the application of CISG. In the choice of law clause, parties have to explicitly exclude CISG as the applicable law or it will automatically apply. In Easom Automation Systems, Inc. v. Thyssenkrupp Fabco, Corp., the Federal District Court of Michigan reiterated that in order to opt out of CISG, it is insufficient to merely include a choice of law provision stating that a domestic law governs. The court applied CISG to the contract at hand despite the existence of a written purchase order that contained a choice of law clause designating Canadian law.\(^\text{118}\)

On the contrary, other courts and tribunals take an opposite view and conclude that implicit exclusion of CISG is permitted as long as the intent to exclude the Convention is clear and real.\(^\text{119}\) A Swiss Court held that a “tacit exclusion of the Convention either partially or totally is equally possible”\(^\text{120}\). An implicit exclusion is generally accepted where parties to a contract choose the law of a non-Contracting State to govern their contract or where they have agreed


\(^{116}\) Netherlands 15 April 2009 Rechtbank [District Court] Utrecht [http://cisgw3.law.pace.edu/cases/090415n1.html](http://cisgw3.law.pace.edu/cases/090415n1.html).

\(^{117}\) Serbia 17 August 2009 Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce [http://cisgw3.law.pace.edu/cases/090817sb.html](http://cisgw3.law.pace.edu/cases/090817sb.html).


\(^{119}\) Oberlandesgericht Linz, Austria, 23 January 2006 [http://cisgw3.law.pace.edu/cases/060123a3.html](http://cisgw3.law.pace.edu/cases/060123a3.html); CLOUT case No. 904, Tribunal Cantonal du Jura, Switzerland, 3 November 2004 [http://cisgw3.law.pace.edu/cases/041103s1.html](http://cisgw3.law.pace.edu/cases/041103s1.html); BP Oil v. Empresa, U.S. Court of Appeals (5th Circuit), United States, 11 June 2003, [http://cisgw3.law.pace.edu/cases/030611u1.html](http://cisgw3.law.pace.edu/cases/030611u1.html); CLOUT case No. 605, Oberster Gerichtshof, Austria, 22 October 2001, [www.cisg.at/1_7701g.htm](http://www.cisg.at/1_7701g.htm).

For more jurisprudence, see UNCITRAL Digest, 34

\(^{120}\) Switzerland 3 November 2004 Appellate Court Jura [http://cisgw3.law.pace.edu/cases/041103s1.html](http://cisgw3.law.pace.edu/cases/041103s1.html).
to certain contractual conditions that are incompatible with CISG. The Court also noted that the parties' choice in favor of a domestic law signified that they had the specific intention to refer to that law, hence excluding the application of CISG. In Rheinland Versicherungen v. Atlarex, after citing foreign courts’ decisions, the Court concluded that exclusion of CISG “may occur tacitly”.\textsuperscript{121}

The unclear text of Article 6 as well as contradictory rulings of courts and tribunals pertaining to this provision seems to create a great dose of legal confusion. This might lead to the diminishing of legal certainty as at the time of contracting, parties may overlook CISG and opt for a domestic law with anticipation that once a dispute arises, the applicable law would certainly be the domestic law chosen. On the contrary, when a dispute arises in actuality, courts or arbitral tribunals might apply the CISG instead because parties do not include an express exclusion of CISG in the choice of law clause. With this, legal certainty would decrease.

\textbf{ii. Article 92}

Article 92 of CISG gives members the right to make reservations to certain parts of CISG. This Article is praised for giving contracting states the flexibility they need when acceding to CISG.\textsuperscript{122}

The problem with this provision is that it does not carry in itself the ultimate effect of a reservation. Due to its text, there are chances that CISG still applies even in parts that members have made their reservations.

Article 92 does not make clear that parties are not bound by the parts with which they have made a reservations. Instead, members that have made reservations are treated as non-contracting states. Therefore, CISG does not apply by virtue of Article 1(1)(a).\textsuperscript{123} However, this does not necessarily exclude the application of CISG in parts that contracting parties have made reservation. As the State that makes reservation under Article 92 is now treated as non-contracting state, the legal relationship between two parties from different contracting states turn into one that involves a contracting state and a non-contracting state. In this situation, Article 1(1)(b) is of relevance. Accordingly, PIL rules will be resorted to. If the PIL rules of the forum lead to the law of the contracting State that did not make Article 92 declaration, the

\begin{flushleft}
\textsuperscript{121} Rheinland Versicherungen v. Atlarex, Italy 12 July 2000 District Court Vigevano, \url{http://cisgw3.law.pace.edu/cases/000712i3.html} \\
\textsuperscript{122} Rolf Knieper, Celebrating Success by Accession to CISG, Journal of Law and Commerce 25 (2005-06): 478 \\
\textsuperscript{123} See more Article 92 of CISG
\end{flushleft}
Part excluded will still apply.\textsuperscript{124} This is true even in case the forum is located in a State that has made a declaration under Article 92.\textsuperscript{125} In Elinette Konfektion Trading v. Elodie, the Eastern Appellate Court of Denmark decides to apply Part II of the CISG even though Denmark had made a reservation upon ratification, declaring that it would not be bound by Part II of the CISG. The court relied on Article 1(1) (b) of CISG and invoked the PIL rules of the forum which was Article 3(2) of the 1955 Hague Convention on the Law Applicable to Contracts for the International Sale of Goods. This provision led to the application of French Law. As France did not make any reservation pertaining to Part II of CISG, this part still applied to the contract in dispute despite the fact that Denmark had made a reservation.\textsuperscript{126}

As concluded by Ferrari, the reservation made under Article 92 is “limited insofar as there will be instances where the CISG will still prevail over the law of the reservation State”.\textsuperscript{127} This will create more legal uncertainty as parties will contract accordingly to the domestic laws with an acknowledgement that CISG rules do not apply due to certain reservations made. However, when a dispute arises; CISG is actually the law that applies even to parts that parties exclude when they ratify the Convention.

iii. Article 90 of CISG

Article 90 of CISG which deals with the issue of potential conflict of conventions allows courts to apply other rules of law beyond CISG despite the Convention being the governing law of a contract. In its own words, Article 90 states that the CISG “does not prevail over any international agreement which has already been or may be entered into and which contains provisions covering the matters governed by this Convention [...]”. The text of Article 90 suggests that the priority that CISG gives over other international agreements is not limited to ones that have already been entered. Instead, this provision extends to other agreements that might be signed in the future. This seems to create legal uncertainty to a great extent as contractual parties, at the time of contracting, are certainly incapable of foreseeing which international agreement that contains provisions covering the matters governed by CISG might be entered into in the future. Once a dispute arises, the international agreement prevails

\textsuperscript{125} Ibid.
\textsuperscript{126} Franco Ferrari, The Eastern Appellate Court of Denmark 23 April 1998 Eastern Appellate Court
\textsuperscript{127} Elinette Konfektion Trading v. Elodie, Denmark 23 April 1998 Eastern Appellate Court
\textsuperscript{128} Franco Ferrari, PIL and CISG: Friends or Foes (XII Levha Publishing Co., Istanbul, 2012), 85
\textsuperscript{129} http://www.cisg.law.pace.edu/cisg/biblio/ferrari.html#*
over CISG as the applicable law with parties unable to anticipate it at the time the contract was signed.

Ferrari goes on to criticize Article 90 as creating more legal uncertainty other than erasing it. The reason for this statement is because Article 90 is not very clear about what sources of law would have to be taken into account. The Convention is also silent on the relationship between CISG and those legal sources. This ambiguousness has given rise to various disputes. One of which is whether the international agreements referred to in this Article must be agreements on substantive law or whether agreements on private international law can also prevail over the CISG. Furthermore, it is not clear from the text of Article 90 if the international agreements that prevail over CISG must be multilateral or bilateral. Article 90, therefore, seems to create more legal uncertainty as to which rules will govern the contract in case of conflict between CISG and other international agreements.

3. CISG to Reform Domestic Laws?

CISG is often believed to be leaving its marks on various domestic sales laws. It influenced the New Civil Code of Netherlands. The German Schuldrechtsreform (Reform of the law of obligations) is also subject to the strong impact of the CISG. So is the ongoing reform of the Japanese Civil Code. The drafters of The New Code of Obligations of China admit that CISG is an inspiration for the creation of a new domestic sales law in China. The reform of Estonian Law of Obligations is also stimulated by CISG. Many countries have not only enacted CISG as the law governing cross-border transactions but also incorporated the

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128 Ibid. 124, 319
129 Ibid.
130 Ibid.
Some authors suggest that only multilateral treaties would prevail over CISG. See more Fritz Enderlein et al., Internationales Kaufrecht 286 (1991); ibid. 128. However, Russian tribunals are of the view that bilateral agreement would also displace CISG in case of conflicts. See more Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, Russian Federation, 14 April 1998 http://cisgw3.law.pace.edu/cases/980414r1.html; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, Russian Federation, 2 October 1998 http://cisgw3.law.pace.edu/cases/981002r1
132 Ibid.
133 Hiroo Sono, Japan’s Accession to the CISG: The Asia Factor, Pace International Law Review 20 (Spring 2008): 108
convention in its own domestic sales law.\textsuperscript{136} The Scandinavian countries are the most distinctive examples.\textsuperscript{137}

Moreover, CISG also has an impact as a role model for other regional legal instruments. It has become the model for the first set of the Principles of International Commercial Contracts (PICC) in 1994, as well as the Principles of European Contract Law (PECL) in 1999. CISG also inspires EU Member States to adopt the concept of conformity of goods in their own sales laws.\textsuperscript{138}

Due to this, scholars in non-contracting countries might have high hopes that CISG would bring about law reform to the domestic sales laws, especially in developing countries where sales laws are not advanced. However, it is of worthy note that countries accede to CISG for various reasons, not necessarily because the provisions in the Convention are of high quality. The fact that countries reform their domestic sales law in accordance with CISG does not equate to the Convention being superior to internal laws quality-wise, and that it would bring about positive change to domestic laws. In a way, this “reform” happens as a result of accession to CISG. After ratifying CISG, the contracting states are under an obligation to either introduce the Convention as the governing law of international sales of goods or to codify its provisions and incorporate them in their domestic laws.\textsuperscript{139} Therefore, the fact that contracting states have conducted law reforms in compatibility with CISG does not suffice to conclude that the Convention would bring positive change to the domestic laws of uncontracting States after accession. Instead, the content and quality of the Convention should be assessed to reveal whether CISG helps reform domestic laws of its member states.

Cuniberti argues that “the drafters of CISG have borrowed numerous, if not most, solutions from the existing national law of various legal traditions”.\textsuperscript{140} The mere fact that one rule is preferred by the drafters and added to the text of CISG does not mean that it is superior in terms of quality to other rules.\textsuperscript{141}

\textsuperscript{136}Ibid.
\textsuperscript{138}Ibid. 35, 461
\textsuperscript{139}This depends on whether the country in question is monist or dualist or a compromise of both.
\textsuperscript{140}Ibid. 85, 1518
\textsuperscript{141}Ibid.
In addition, some scholars are of the view that CISG rules are ambiguous.\textsuperscript{142} Prof. Rosset attributes this flaw to the fact that the process of drafting the Convention is a compromise between drafters from more than 50 states representing various legal backgrounds.\textsuperscript{143} A rule drafted by a sub-group of drafters might be incorporated in CISG as an exchange for the inclusion of another rule preferred by the other sub-group.\textsuperscript{144} This leads to the Convention containing clauses with indefinite legal terminology\textsuperscript{145} or provisions that even leading participants in the drafting process cannot explain.\textsuperscript{146} Furthermore, in order to reach a compromise, drafters of CISG have the tendency to “draft a vague provision that can be read in different ways.”\textsuperscript{147} Jurisprudences pertaining to CISG do not seem to help interpret these vague provisions in a uniform way. Courts and tribunals oftentimes take different views when interpreting and applying these vague terms. For instance, in interpreting “reasonable time” in Article 39, Courts and tribunals take various stances ranging from four days being a reasonable time to four months being unreasonable.\textsuperscript{148} Because of this, legal confusion is created when the legislators of contracting states refer to CISG as the basis for internal law reform. It is unlikely that a Convention containing ambiguous provisions would contribute to increasing the quality of domestic laws.

In addition, CISG lacks provisions on many substantive issues. As already argued, CISG is silent on the matter of validity of contract. Article 4 limits the scope of the Convention as only governing the formation of contracts of sale and the rights and obligations of the seller and the buyer arising from such a contract. This statement narrows down the scope of CISG to the point it impliedly excludes other issues of contract law. CISG does not contain provisions concerning unconscionability, duress, capacity, mistake as well as problems of products liability\textsuperscript{149}, inflation and other supervening events, tender and conformity of goods, and any

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\textsuperscript{143} Ibid. 85, 1516
\textsuperscript{144} Ibid. 142
\textsuperscript{145} Ibid. 81, 55
\textsuperscript{146} Ibid. 142
\textsuperscript{147} Ibid. 85, 1519
\textsuperscript{149} For more discussion on “reasonable time”, see Camilla Baasch Andersen, Reasonable Time in Article 39(1) of the CISG - Is Article 39(1) Truly a Uniform Provision? \texttt{http://www.cisg.law.pace.edu/cisg/biblio/andersen.html}
another topic “which has been the subject of mandatory national legislation”. Many day-to-day contractual issues such as pre-contractual and post-contractual liability, defects in consent, validity of individual clauses and standard terms, gross disparity, burdensome obligations, exclusions and limitation of liability clause are also left out by the Convention. It is unclear how CISG could attain its goal in reforming domestic laws when it lacks numerous provisions pertaining to issues of crucial importance in contract law.

4. CISG Helps Reduce Transaction Costs?

CISG is believed to minimize transaction costs, which is the cost of negotiating, drafting and implementation of contracts in the context of contracting internationally. This is based on an assumption that cross-border transactions would entail more cost than domestic ones. The cost incurring from these transactions are mostly the cost to bargain the applicable law as well as the learning effect when both parties need to learn a neutral domestic law which is chosen as the governing law or when one party needs to learn the domestic law of the other party when it is chosen as the applicable law. CISG would help reduce the transaction cost because of two reasons. First, as CISG is applied automatically as the governing law, parties will not have to pay for negotiating the applicable law. Second, CISG as the applicable law would reduce the cost of learning of different domestic sales law.

When parties negotiate the applicable law, the cost incurring is mostly the expenses of lawyers to advise parties on which law that they should choose as the applicable law. The cost incurs from the learning effect is the cost to translate statutes as well as other legal texts, such as court decisions and scholarly writings, into the language used in the Court that has jurisdiction. Moreover, parties may also have to pay for the acquisition of expert opinions in proving foreign laws in domestic courts, which could be very expensive.

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150 Ibid. 142
153 Ibid. 8, 2
155 Ibid. 85, 1519
156 Ibid.
157 Ibid.
In a way, the application of CISG contributes to the goal of reducing transaction costs.\(^{159}\) As CISG is the automatically applicable law, parties would not have to pay for lawyers for their assistance in choosing the applicable law that would benefit both parties to a contract. As for the learning effects, the cost for this would reduce also because CISG is easily accessible. The text of this Convention is translated into six languages. Alongside, 2,500 published court decisions and arbitral awards, and 6,500 academic publications are made available online.\(^{160}\) Furthermore, as noted in Chapter 1, the wording of CISG is fairly simple.\(^{161}\) The Convention offers a “logical, coherent and comprehensive framework for working through quite complex legal issues that can develop in negotiating and implementing cross-border sales” that could be comprehended by parties to contractual disputes.\(^{162}\) Therefore, if CISG applies to an international contract, the learning cost would decrease, in comparison with the learning cost that a party must pay in order to learn an unfamiliar domestic law. The example of CISG application in the US should be taken into consideration. As observed, the Convention helps lower transaction costs for American businesses in cross-border commerce because it is easier to access to CISG in its official English language.\(^{163}\) The Convention also reduces problems of proof of foreign laws in US Courts.\(^{164}\)

However, the quality of the governing law should also be taken into consideration to determine whether the transaction cost is reduced in case CISG applies. The fact that the content of CISG does not ensure, if not diminish legal certainty would hinder the reduction of transaction costs when CISG applies.

Furthermore, as argued by Cuniberti, legal sophistication is the key factor in determining whether CISG would benefit in reducing the transaction costs in the context of contracting internationally.\(^{165}\) For unsophisticated parties, they may oftentimes not be aware of the importance of the governing law of the contract, hence putting little to no effort in negotiating the choice of law clause in a contract. Furthermore, within the course of contracting,

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\(^{160}\) Ibid; See more [http://www.cisg.law.pace.edu/cisg/text/caseschedule.html](http://www.cisg.law.pace.edu/cisg/text/caseschedule.html)

See also Ibid. 158, 457

\(^{161}\) See more Chapter 1 of this thesis


\(^{163}\) Note that this is only true in countries where the language used in courts is English.


\(^{165}\) Ibid. 85, 1520
unsophisticated parties often negotiate without lawyers.¹⁶⁶ For these parties, the cost of contracting in an international context would not be much higher than when they enter in domestic contracts.¹⁶⁷ As unsophisticated parties are not well-concerned with the applicable law, no cost of learning effects would incur. Therefore, an international sales law like CISG is of little to no value to these parties in terms of reducing the transaction costs.

To conclude, the assessment above demonstrates that to a certain degree, CISG does contribute to increasing legal certainty, becoming the role model for many domestic sales laws and reducing transaction costs. However, due to its own flaws, CISG does not perfectly fulfill its goal in creating a uniform law. Certain issues also pose as a threat to CISG’s fulfilment of its goals in increasing legal certainty, inspiring law reform and reducing transaction costs. With that, CISG ceases to become the ultimate international sales law.

¹⁶⁶ Ibid.
¹⁶⁷ Ibid, 1521
CHAPTER 3: A CASE STUDY ON VIETNAM

Chapter 2 has strived to provide a fair assessment on what CISG has achieved and has not. In this Chapter, the success and pitfalls of CISG will be reflected through a case study on Vietnam, its latest contracting state.

It is of worthy note that each country has its own legal system as well as a unique legal environment. Therefore, the assessment on how CISG attains its goals should be done on a case-by-case basis. Furthermore, as a matter of practice, how Vietnamese Courts apply law is unpredictable at most, and the legal system of Vietnam has not reached it maturity yet. This may affect how CISG performs in increasing legal certainty, reforming domestic laws and reducing transaction costs in the context of Vietnam. To put it simply, the assessment made in Chapter 2 was general. In applying it to the specific case of Vietnam, some aspects might differ. For example, due to the unpredictability, if not faultiness of applying laws by Vietnamese judges, CISG might help increase legal certainty in Vietnam more than it would normally do in other countries.

1. The Vietnamese Situation

CISG has been on the radar of the Vietnamese government for quite some time. Vietnamese scholars have fervently expressed their support for CISG and urge the government to accede to the Convention. On 29 December 2015, Vietnam officially ratifies CISG. With this, it becomes the eighty-fourth State Party to the Convention. CISG will officially enter into force in Viet Nam on 1 January 2017.

Right after the ratification of CISG, Vietnamese scholars have praised the government for making the right decision. The accession to CISG is considered a “legal platform” for Vietnamese enterprises in contracting internationally. Professor Sono even compared this accession to the WTO accession. However, the author of this thesis is of the opinion that

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168 It is relevant to recall here the famous statement of Vietnamese Former Chief Justice Trinh Hong Duong. He said: ‘ở ta [...] án dân sự xử thế nào cũng được’ ([In Vietnam], [...] a judge can decide a civil case as however he/she wants). This demonstrates the unpredictability in applying laws in the judiciary system of Vietnam.


due to inherent differences in the legal instruments of WTO and CISG and how they apply in actuality, it is skeptical that CISG would bring about huge success to Vietnam as what WTO has done.

First, WTO laws are much more specific and detailed with an impressive body of legal instruments and jurisprudences. The jurisprudences of WTO are consistent and oftentimes contributory to each other. On the other hand, CISG is merely a Convention on its own and the number of case laws is still considered scarce by some scholars.\(^{174}\) It is not to mention that the jurisprudences of CISG sometimes bear a contradictory nature.\(^{175}\) Furthermore, WTO has its own Dispute Settlement Body as well as an appeal system.\(^{176}\) This system serves as the “Common Court” that CISG lacks in order to ensure that the rules are applied in a uniform manner. These inherent differences may result to very different application of WTO and CISG rules. Therefore, at this early stage, it is hard to assert whether CISG would succeed as much as WTO accession in Vietnam.

2. CISG’s Impacts on Vietnam

2.1 CISG helps increase legal certainty?

i. Increase legal certainty for Vietnamese parties

First and foremost, CISG helps increase legal certainty for Vietnamese enterprises when they enter into cross-border transactions. Castellani notes that developing countries are made of small and medium sized enterprises that have limited access to expert legal advice when drafting cross-border contracts.\(^{177}\) This is exactly the case in Vietnam where small and medium sized enterprises make up 80% of the economy.\(^{178}\) Most Vietnamese enterprises, especially those that operate in the agricultural sector are unsophisticated parties. These enterprises oftentimes overlook the inclusion of the choice of law clause in their contract. As


\(^{175}\) See more Chapter 2 of this Thesis.


\(^{178}\) Việt Nam Tham Gia Công Ước Viên 1980 về Mua Bán Hàng Hóa Quốc Tế (CISG): Lợi ích và hạn chế. (Vietnam’s Acession to CISG – Benefits and Shortcomings), Vietnam Chamber of Commerce and Industry (VCCI) http://www.google.no/url?sa=t&rct=j&q=&esrc=s&source=web&cd=6&ved=0ahUKEwjp6Ov_y5jMAhVIEIoKHa d1AuwQfgg9MAU&url=http%3A%2F%2Fwww.trungtamwto.vn%2Fsites%2Fdefault%2Ffiles%2FVietnam%2520t ham%2520gia%2520Cong%2520vo%2520Vien%2520%2520Loi%2520ich%2520va%2520han%2520che%2520-%2520Ths.Nguyen%2520Trung%2520Nam.doc&usg=AFQjCNjEB3zcUs6mREPiY3T3Ln8tCFlg&sig2=aH4nLxFABrc6C3TT3Ulw&cad=rjt
argued in Chapter 2, CISG creates a safety net for these companies. In contracting with foreign parties, they would not need to worry about the governing law. As long as CISG applies automatically to the contract and the PIL rules are not resorted to, they may as well predict the legal outcome once a dispute arises.

CISG would also help increase legal certainty for Vietnamese parties because there exist cases where CISG applies to contracts signed between Vietnamese and foreign parties even before Vietnam ratifies the Convention. This is due to the application of Article 1(b) of CISG. As many Vietnamese trade partners are now members of CISG, there is even a higher chance that CISG would apply to contracts between them and Vietnamese parties.

Jurisprudences, though scarce also demonstrate that even when Vietnam had not ratified CISG yet, the Convention was still applied by Vietnamese courts and tribunals. In a case regarding a contract signed between a seller from Liechtenstein and a buyer from Vietnam, the arbitral tribunal at issue decides to apply CISG as the governing law because both parties agreed to it even though Vietnam was not a member of CISG at that time. Standing out is another decision of the ICC Tribunal. The case regards a contract signed between a Vietnamese seller and a French buyer. The contract in dispute did not include a choice of law clause but made references to Incoterms and UCP 500. The Tribunal, in determining the applicable law, did not resort to the PIL rules but concluded that such references evinced the intent of both parties to have the contract governed by international trade usages and customs. The Tribunal, therefore, applied the CISG to the contract. Note that Incoterms and UCP500 are popular sets of rules that are widely used in contracts between Vietnamese and foreign parties. ICC is prestigious and its jurisprudences are often cited. Hence, there is a high chance that other tribunals would follow the ICC Tribunal in ruling that CISG applies even if Vietnam did not accede to CISG. More notably is a case involving a contract that was signed between a Vietnamese buyer and a Singaporean seller. Despite the applicable law being Phap lenh Hop Dong Kinh Te 1989 (Ordinance on Commercial Contracts 1989), The Court referred to numerous provisions in CISG to settle the dispute at hand without providing any

180 Quyết định số 4, trong: VCCI, Danida, Các quyết định trong tài quốc tế chọn loc (NXB Tư pháp, 2007), 34. (Decision No. 4, VCCI and Danida, Selected Arbitration Decisions (Tu Phap Publishing House, 2007), 34)
182 Ng Nam Bee v. Cong ty Thuong mai Tay Ninh, People's Supreme Court, Appeal Division in Ho Chi Minh City, Vietnam, 05 April 1996 http://www.unilex.info/case.cfm?pid=1&do=case&id=350&step=FullText.
183 This is the main legislation that governs commercial contracts at the time being. It had expired and is now replaced by the Commercial Law of Vietnam.
legal reasoning. This ruling, regardless of its faultiness, demonstrates that there is possibility that CISG would apply even if Vietnam is not a member of the Convention.

CISG, by virtue of becoming a part of Vietnamese laws, will be familiarized by Vietnamese commercial actors. With that, they could anticipate how the rules apply even in case courts or tribunals select CISG as governing law despite the contract specifying otherwise. Increase of legal certainty would follow.

ii. Increase legal certainty for foreign parties

Due to the distinctive feature of Vietnam’s legal system, the entry into force of CISG would also help increase legal certainty for foreign enterprises when they contract with Vietnamese enterprises.

As a matter of practice, in contracting with Vietnamese partners, foreign parties tend to prefer their own law or a neutral law. However, they are caught up in a dilemma of wanting to select Vietnamese courts as the adjudication forum of the disputes.

This preference is due to the shortcoming of the Vietnamese legal system in recognizing and enforcing rulings of foreign courts and arbitrations. In Vietnam, recognition and enforcement of foreign verdicts are restricted.184 As observed by Vietnamese lawyers, only a few verdicts issued by foreign Courts have been recognized in Vietnam.185 Even in the unlikely event that these verdicts are considered by Vietnamese courts, the process is tedious and time consuming.186 It would take four to six months for the Court to finalize the process and decide if they recognize or enforce a foreign ruling.187

Similarly, recognition and enforcement of arbitral awards in Vietnam is also a puzzle unsolved. It is a matter of practice that numerous arbitral awards have been rejected enforcement or set aside by Vietnamese courts. There is various legal reasoning behind these decisions, but the most frequent one is based on the ground that foreign arbitral awards violate

184 Article 343.1 of the Civil Procedure Code (the CPC”) of Vietnam clearly states that Vietnamese Courts only consider recognition of judgments and decisions issued by courts in countries that have entered into a judicial agreement in this regard with Vietnam. To date, there are mostly socialist countries that have such an agreement with Vietnam. Vietnamese Courts would also consider recognition of judgments and decisions of foreign courts whose recognition and enforcement is specifically provided for under Vietnamese laws. To date, there has been no such provision in any Vietnamese legislations.


186 See more Article 353.1 of the CPC

187 See more Article 354.1 of the CPC
Vietnamese laws. With that, foreign parties are prompted to resort to Vietnamese courts as the adjudicator of a contractual dispute.

By settling a dispute in Vietnamese courts but choosing a foreign law, foreign parties are exposed to a great dose of legal uncertainty because application of foreign law by Vietnamese Courts is often unpredictable at best. Wrongful application is inevitable. This might be due to the differences between foreign laws and Vietnamese ones. For instance, a Vietnamese judge would be likely to apply English contract law wrongfully due to the fact that it is dissimilar to Vietnamese contract law.

The application of CISG will help increase legal uncertainty in this scenario. As CISG will become the law of Vietnam, foreign parties could select it as the applicable law and have the contractual dispute settled in Vietnamese courts. As CISG will become the law of Vietnam, Vietnamese Courts are more likely to apply it in the right way compared to when they apply foreign laws. This is exactly the hypothesis created by Spangalo that was discussed in Chapter 2 of this thesis.

Furthermore, the application of CISG would help increase legal certainty for foreign parties more than it normally does due to the fact that in Vietnam, judges have the tendency to refuse the application of foreign laws in settling contractual disputes. They are likely to overlook the choice of law clause expressly designating a governing law and apply Vietnamese law even when such application is apparently false in nature. This might be due to the fact that party autonomy is a relatively new and unfamiliar doctrine in Vietnamese laws. In Sadaco v. Bao Minh Insurance Co., despite the existence of a choice of law clause specifying English law as the governing law, the Economic Court of Ho Chi Minh City and later the Supreme Court decided to apply the CC to the contract without providing any legal reasoning. CISG, as it is now a part of Vietnam’s legal system, will contribute to certainty in a sense that even in the most unpredictable event that Vietnamese Courts choose the Vietnamese law as the applicable

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190 Ibid. 163
law despite the choice of law clause stating otherwise, it is still the rule of the Convention that apply, not any Vietnamese law that is oftentimes unfamiliar to foreign parties.

The assessment above demonstrates that CISG would help increase legal certainty for both Vietnamese and foreign parties to a contract. However, as matter of practice, many contracts in Vietnam are standardized with a fixed choice of law clause resorting to a certain law. These are contracts in technical trading sectors in which standard contracts have been a common practice. They may also be contracts concluded by sophisticated parties represented by lawyers well-versed with certain contract laws. The application of CISG would somehow decrease legal certainty for parties to these contracts. Note that parties to these contracts can explicitly opt out of CISG.191

iii. Possible confusion might lead to the decrease of legal certainty
It is of worthy note that some legal confusion CISG created that had been examined in Chapter 2 might manifest when CISG enters into force in Vietnam. If this happens, legal certainty is expected to decrease. Confusion created by Article 6 and 90 are easily to manifest over the course of applying CISG in Vietnam. Since Vietnam did not make any reservations, confusion created by Article 92 will not be a problem.

2.2 CISG to reform Commercial Law of Vietnam?
CISG to inspire law reform in Vietnam - perhaps this is the goal of CISG that Vietnamese scholars give the most care. Nguyen Thi Minh Hang, a renowned Vietnamese scholar, along with numerous fellow authors, anticipates that CISG would perform well in “perfecting” Vietnam’s domestic sales law.192 It is skeptical how CIGS would do so due to numerous issues discussed below.

i. CISG to complicate the legal framework in Vietnam
It is of worthy note that up until now, Vietnam has already had other legislations governing international sales of goods contracts. The Commercial Law of Vietnam (the CL), besides governing domestic commercial contracts, extends its scope of application to international contracts as well.193 On top of that, the Civil Code (the CC) is also deemed to be governing

191 See more Chapter 2 of this Thesis.
192 Ibid. 172
193 Article 1 of the CL
international contracts.\textsuperscript{194} There are also numerous decisions and degrees issued by the government to further elaborate the CL and CC. This means that an international contract in Vietnam is already subject to multi layers of domestic legislations.\textsuperscript{195} As CISG is ratified, it will soon become another source of law that governs international commercial contracts in Vietnam. This addition seems to complicate the legal framework of Vietnam, which is already complicated.

ii. Similarities between CISG and Vietnamese Law Pose a Question on Law Reform

Vietnamese scholars mostly argue that despite the fact that the CL has only come into effects for 10 years, numerous provisions are already old–fashioned.\textsuperscript{196} Many provisions in Vietnamese contract laws are ambiguous, which renders the laws flawed.\textsuperscript{197} CISG will therefore help to amend, if not “perfect”\textsuperscript{198} the commercial legislations of Vietnam. They further argue that the Convention has a lot of provision that are similar to those in the CC and CL.\textsuperscript{199} This is a flawed argument.

CISG indeed has a lot of similarity with Vietnamese laws. For instance, the CC and CISG both take the same approach that formation of contracts requires offer and acceptance.\textsuperscript{200} These similarities are due to the fact that the drafters are inspired by CISG when they drafted Vietnamese domestic laws.\textsuperscript{201} It is unclear how CISG would bring about law reform when it shares a lot of similarities with Vietnamese laws.

An assessment of CISG and Vietnamese laws shows that there are merely minor technical differences, mostly in provisions regarding breach of contract. It is worth noting that these differences are not by any means staggering.\textsuperscript{202} Small amendments for the sake of consistency with CISG should not be considered a law reform.

\textsuperscript{194} According to Article 2, the CC applies to “civil relations involving foreign elements”. “Civil relations” is determined as including trade activities. Therefore, a contract signed between a Vietnamese party and a foreign one is a “civil relation involving foreign elements”, hence subject to the scope of application of the CC.

\textsuperscript{195} If the contract specifies Vietnamese laws as the applicable law.

\textsuperscript{196} MưOrNull Năm Thị Hạnh Luật Thương Mại: Còn nhiều rủi ro cho doanh nghiệp, (10 years after the CL came into force: Many Risks for Businesses), http://baophapluat.vn/thi-truong/10-nam-thi-hanh-luat-thuong-mai-con-nhieu-rui-ro-cho-thuong-nhan-232885.html

\textsuperscript{197} Ibid.

\textsuperscript{198} See more Nhũng lợi ích của việc Việt Nam gia nhập CISG (Benefits of Vietnam’s accession to CISG) http://www.trungtamwto.vn/vandedacbiet/cong-uoc-vien/nhung-loi-ich-cua-viec-viet-nam-gia-nhap-cisg

\textsuperscript{199} Ibid. 172

\textsuperscript{200} See more Article 390 of the CC and Article 15 of CISG.


\textsuperscript{202} Phan Thị Thanh Thủy, So sánh các quy định về trách nhiệm do vi phạm hợp đồng
The first difference between Vietnamese domestic laws and CISG is terminology. In CISG, there is no terminology such as “civil liability for breach of civil obligations” like in the CC or “trade sanctions” in the CL. Instead, CISG incorporates the term “remedies for breach of contract”. Despite the difference in terminology, they bear the same notion. Such a small difference could hardly lead to a law reform in Vietnam.

There is also a slight difference in remedies for breach of contract between CISG and CL. CL includes a special remedy in the name of assets liens in trading logistics contract. It is worth noting that there is no ground to remark that due to this specific “sanction”, the Vietnamese law is flawed. Furthermore, as a matter of practice, assets lien might be a useful remedy for breaching logistic contracts. Therefore, it is unclear whether this specific remedy is in need of eradicating and such an action would reform the CL.

In addition, Article 79 of CISG also includes failure by a third party as an exemption for failure to perform obligations under the contract. The CC, like the CL, has no provision on this matter. This could lead to Vietnamese legislators adopting this provision as a new addition to the regulations on international contract of Vietnam. Though such an adoption is inarguably a change, it, by all means, should not be considered a “reform”.

iii. Interpretation of CISG as a Hindrance to Law Reform

It is relevant to recall here that due to the vagueness in many provisions of CISG, the interpretation of its text is of paramount importance when Vietnamese legislators seek to look at the Convention as a model for domestic law. One example is the term “impediment” as a requirement for exemption of breach of contract in Article 79 of CISG. There is no specific definition for this term in the text of CISG, leaving ample room for foreign courts and tribunals to interpret it.

Some courts take a strict view of what constitutes an “impediment”. Accordingly, an impediment must be an unmanageable risk or a totally exceptional event, such as force
majeure, economic impossibility or excessive onerousness.”

On the other hand, a much more lenient view is taken by other Courts and tribunals. A German Court rules that the non-existence of means to prevent or detect a lack of conformity in the goods may as well be considered an “impediment” to exempt failure in performing contractual obligations.

Another tribunal went a great length in ruling that the manufacture of defective goods by a third party, which in the case is a seller’s supplier, sufficiently constitutes an “impediment” within the meaning of Article 79. These different approaches might create confusion for Vietnamese legislators when they seek to “reform” Vietnamese laws.

Interestingly, the CL also incorporates a provision regarding exemption of contractual liability. Accordingly, failure to perform contractual obligations is exempted when a force majeure event occurs or the breach is “committed by one party as a result of the execution of a decision of a competent state agency.” One question is posed. Should Vietnamese legislators understand the term “impediment” as to include the two requirements set out in the CL?

It may seem clear that force majeure constitutes an “impediment”. As for breach of contract caused by the execution of a decision of a competent state agency, the problem gets quite complicated. One could assume that in determining if this criterion sufficiently constitutes an impediment, Vietnamese legislators would seek assistance from available case law of CISG. This does not seem to help since CISG jurisprudences pertaining to this matter provide different approaches. A Bulgarian tribunal suggests that a prohibition on exports by the seller’s country may constitute an “impediment”. According to this award, the execution of a decision of a competent state agency” could therefore be considered an “impediment”. However, according to another ruling, it seems unclear if a decision of a competent agency would constitute an “impediment”. In Malaysia Dairy Industries Pte. Ltd. v. Dairex Holland BV, the District Court's-Hertogenbosch of the Netherlands rejects the claim that Singaporean

See more CLOUT case No. 166 Schiedsgericht der Handelskammer Hamburg, Germany, 21 March, 21 June 1996 http://cisgw3.law.pace.edu/cases/960321g1.html.


Article 294(1)(b) of the CL

Article 294(1)(d) of the CL

import regulations on radioactivity in food could be relied on to exempt the seller from performance of contract due to the fact that the seller knew about the regulations at the time of concluding the sales contract. In this verdict, the Court failed to address if the regulation itself constitutes an “impediment”. Taking into account these jurisprudences, it seems that Vietnamese legislators are not provided with sufficient guidance on how to amend the domestic laws accordingly to Article 79(1) of CISG.

One could assume that the question above is easy to answer. Vietnamese legislators should keep Article 249(1) of the CL intact as it does not seem to contradict with most jurisprudences pertaining to Article 79 of CISG. However, it is worth noting that several rulings of Courts and Tribunals make clear that Article 79 prevails over certain national doctrines of “impediment”. A German court found that Article 79 of CISG prevailed over similar national doctrines in German law. An Italian Court is of the same view when they rule that Article 79 displaces the doctrine of Aeccesiva onerosità sopravvenuta (Supervening Excessive Onerousness) in Italian law. “The execution of a decision of a competent state agency” set out in the CL could be considered a national doctrine of “impediment”. Therefore, according to CISG’s jurisprudences, Article 79 of CISG will prevail and displace it.

Furthermore, if Vietnamese legislators decide to neglect Article 79 of CISG and keep intact Article 249(1) of the CL, they will be interpreting CISG through a domestic lens. This would go against the autonomous manner in interpreting the Convention set out in Article 7(1) of CISG. Therefore, in reforming the CL, Vietnamese legislators would have to seek to interpret the term “impediment” in accordance with CISG jurisprudences, which will lead to a deadlock as discussed above.

The term “impediment” is one among those that are moot in CISG. Courts and tribunals have taken, and will keep taking different views when it comes to interpreting them. This poses a

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215 Decision of the District Court Aachen, Germany 14 May 1993 http://cisgw3.law.pace.edu/cases/930514g1.html
217 See more discussion on autonomous interpretation of CISG in Chapter 2.
difficulty for Vietnamese legislators when they seek to reform Vietnamese law in accordance with CISG. With that, it is doubtful if the Convention would succeed in “perfecting” Vietnam’s legal framework on sales contracts in Vietnam as many Vietnamese scholars have suggested.

iv. CISG has no room for further amendment

As an international Convention, CISG has no room for further development of its rules while domestic laws are subject to amendments. This is another shortcoming of CISG and supposedly a challenge to CISG’s attainment of its goal in Vietnam.

Ziegel expresses this concern through a statement that CISG “contains no mechanism for updating its provisions” while in the context of ever-growing commerce; some provisions of CISG are already out of date as they have been ratified in 1980. An example is provisions related to electronic or computer-based contracts. Even in case there is a possibility to amend CISG, it would be a long process as such amendment needs to be agreed by 80 members. There will be constant debates as well as pushes-and-pulls just like when the Convention was drafted. By acceding to CISG, Vietnam is committed to a set of law that would hardly change. This might be an issue given the growing and ever-changing legal environment of Vietnam, which manifests through constant amendments in Vietnamese laws. Because of this, one cannot help but wonder how CISG would attain its goal to reform domestic law in Vietnam.

2.3 CISG Helps Reduce Transaction Costs?

As argued in Chapter 2, CISG would help reduce transaction costs in negotiating the applicable law. CISG would also reduce the cost of learning of different domestic sales law.

CISG would help reduce the costs for negotiating the applicable law for Vietnamese parties because they will not have to pay for lawyers to advice on which law should be chosen. However, Chapter 2 of this thesis also discusses that CISG might not help unsophisticated parties to reduce the costs in negotiating applicable law in the contract because they do not pay much to begin with. This seems to be in line with the situation in Vietnam where small

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219 Ibid.
and medium-sized enterprises hardly pay for negotiating a contract with foreign parties. Therefore, it is doubtful that the entering into force of CISG would help decrease legal cost for these parties.

As for the costs in learning different domestic laws, it is true that as Vietnam has acceded to CISG, Vietnamese parties would only have to learn the Convention once and for all. This would reduce the learning cost in comparison with when they have to learn other domestic laws for each transaction. Furthermore, Vietnamese parties would not have to pay to prove a foreign law in Vietnamese courts.

However, it is worth noting that the official legal language in Vietnam is Vietnamese. This distinguishes Vietnam from the example of CISG in the US in Chapter 2 because Vietnamese parties would still have to translate CISG’s jurisprudences and scholarly writings into Vietnamese even in case CISG applies. Legal cost is not deducted in this sense.

To conclude, this Chapter has sought to reaffirm general assessments made in Chapter 2 regarding CISG’s fulfilment of its goals. Further issues also reveal themselves due to the distinctive legal system and legal environment of Vietnam. Because of the apparent unpredictability and faultiness in applying foreign laws by Vietnamese judges, CISG would help increase legal certainty more than it normally does in other contexts. As for legal reform, the already-complicated legal framework of Vietnam will be a challenge to CISG’s performance of its goal. In addition, interpretation of CISG will also pose as a great threat to how well the Convention would reform Vietnamese laws. The ever-changing legal environment of Vietnam might also be an issue that hinders CISG in reforming Vietnamese laws.
CONCLUSION

1. Summary of Thesis

A preliminary assessment of CISG would suggest that the Convention has contributed to creating a uniform sales law, ensuring legal certainty, inspiring law reform as well as reducing transaction costs. Due to the fact that it has been ratified by numerous countries, including big traders, CISG manifests itself as a successful Convention, especially within the realm of unifying international sales law. However, at a closer look, the aura of CISG seems to diminish quite a bit.

CISG has not attained its first goal as a uniform sales law. This is due to the diverging interpretation of the Convention. Despite the existence of Article 7(1) as the guideline for a uniform interpretation, Courts and Tribunals keep taking different, if not opposite stances in interpreting the Convention, hence significantly hindering CISG’s achievement as a uniform sales law. Furthermore, as CISG does not cover many aspects of sales law, hence lending full force to the PIL rules, one cannot help but wonder how CISG manages to succeed as a uniform sales law.

As for legal certainty, the application of CISG would help increase it, especially in case parties fail to select the governing law. CISG also helps increase legal certainty because domestic courts are more likely to apply its rules in the right way when compared to foreign laws. This manifests more clearly in the case study on Vietnam. It shows that in such a legal system where the application of foreign law is either faulty or refused, the application of CISG would help increase legal certainty more than it usually does in other advanced systems.

On the other hand, the content of CISG seems to hold it back from achieving the goal to increase legal certainty. This is due to the ambiguity in Article 6, Article 92 and Article 90 of the Convention. In contractual disputes where these provisions are invoked, legal certainty would significantly be harmed.

With respect to law reform, perhaps it is too presumptuous to conclude that CISG has attained its goal in reforming domestic laws on the basis that many countries have amended their laws so that they are compatible with CISG. Instead, the quality of the Convention is to be looked at. An assessment on the quality shows that it is unclear whether CISG rules are superior to domestic ones. The fact that CISG lacks provisions on numerous contractual issues poses a big question on how the Convention would help reform domestic sales laws. Through the case
study of Vietnam, it shows that different interpretation of CISG taken by courts and tribunal will also pose as an obstacle when the legislators of contracting states seek to conduct law reform accordingly with CISG. With that, the goal of CISG to reform domestic laws is not fully achieved.

CISG seems to work in reducing transaction costs due to the fact that materials pertaining to the Convention are easily accessible. The structure of CISG is logical and its text is simple. This helps reduce the learning costs in contracting internationally. Furthermore, the cost of proving foreign laws in domestic courts would also be deducted. However, because CISG does not ensure, if not diminish legal certainty in parts; reduction of transaction costs would possibly be hindered.

This thesis has strived to demonstrate that CISG has undeniably attained some success. However, there are still holdbacks that keep it from being the ultimate international sales law. There will always be that “but” when one assesses the success of CISG. Just like how this thesis is written, CISG seems to increase legal certainty in particular cases but it does not due to certain aspects. Whether Prof. Fletcher meant it or not when he (heartily) sang that because we had that CISG, there was no risk in international sales far as the eye can see, I have to disagree with this remark. CISG is not a perfect Convention. It has not fully attained its own goals. Perhaps, unifying international sales law is an attractive idea yet a challenging one, too challenging for a Convention like CISG.

2. Possible limitations of the Thesis

The first limitation is that this thesis only discusses the Convention in terms of being a uniform sales law, increasing legal certainty, reforming domestic laws and reducing transaction costs. With that, readers might not be provided with a view on how CISG performs in other aspects such as boosting international trade.

The second limitation of this thesis is perhaps the assessment made in the third Chapter is mostly assumption. This is due to the fact that CISG has not entered into force in Vietnam yet. However, this assumption is based on the observance and knowledge of the Vietnamese legal system and legal environment.

It is worth noting that this is a non-exhaustible list of possible limitations based on my subjective point of view.

221 See more Chapter 1.
BIBLIOGRAPHY

CASE LAW

2. Appellate Court Köln (Provincial Court of Appeal, Germany). See more at http://cisgw3.law.pace.edu/cases/940826g1.html
13. CLOUT case No. 605, Oberster Gerichtshof, Austria, 22 October 2001, www.cisg.at/1_7701g.html
20. District Court Schaffhausen, Switzerland 27 January 2004; http://cisgw3.law.pace.edu/cases/040127s1.html
31. ICC Arbitration Case No. 8502 of November 1996,  
   http://cisgw3.law.pace.edu/cases/968502i1.html
32. Italy 31 March 2004 District Court Padova,  
   http://cisgw3.law.pace.edu/cases/040331i3.html
35. Malaysia Dairy Industries Pte. Ltd. v. Dairex Holland BV, Rechtbank's-Hertogenbosch, 02.10.1998, Netherlands,  
36. Mitias v. Solidea S.r.l., Tribunale di Forli (District Court),  
   http://cisgw3.law.pace.edu/cases/081211i3.html
37. Netherlands 15 April 2009 Rechtbank (District Court) Utrecht,  
   http://cisgw3.law.pace.edu/cases/090415n1.html
38. Ng Nam Bee v. Cong ty Thuong mai Tay Ninh , People's Supreme Court, Appeal Division in Ho Chi Minh City, Vietnam, 05 April1996,  
40. Nuova Fucinati v. Fondmetall International, Tribunale Civile di Monza, Italy, 14 January 1993,  
   http://cisgw3.law.pace.edu/cisg/wais/db/editorial/weitzmann930329i3.html
41. Oberlandesgercht Celle, Germany, 24 July 2009,  
   http://cisgw3.law.pace.edu/cases/090724g1.html
42. Oberlandesgericht Linz, Austria, 23 January 2006,  
   http://cisgw3.law.pace.edu/cases/060123a3.html
43. Quyết định số 4, trong: VCCI, Danida, Các quyết định trọng tài quốc tế chọn lọc (NXB Tư pháp, 2007), 34. (Decision No. 4, VCCI and Danida, Selected Arbitration Decisions (Tu Phap Publishing House, 2007), 34
51. Switzerland 3 November 2004 Appellate Court Jura, http://cisgw3.law.pace.edu/cases/041103s1.html
**BOOKS**

3. Fidelma White, Commercial Law (Thompson Round Hall, 2002)


JOURNAL ARTICLES


WEBSITE ARTICLES


10. Việt Nam Tham gia Công ước Viên 1980 về Mua Bán Hàng Hóa Quốc Tế (CISG): Lợi ích và hạn chế (Vietnam’s Acession to CISG – Benefits and Shortcomings), Vietnam Chamber of Commerce and Industry (VCCI), http://www.google.no/url?q=&source=web&cd=6&ved=0ahUKEwip6Ov_y5jMAhViEJoKHad1AuwQFgg9MAU&url=http%3A%2F%2Fwww.trungtamwto.vn%2Fsites%2Fdefault%2Ffiles%2FVietnam%2520tham%2520gia%2520Cong%2520%2520uoc%2520Ths.Nguyen%2520Trung%2520Nam.doc&usg=AFQjCNGjEB3zcUs6mREP4iY3T3Ln8tCFLg&sig2=aH4nLxFABrc6C3STT3Ulqw&cad=rjt last accessed 14.05.2015

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