

HOW DO YOU MEAN IT, CISG?  
- APPLYING THE CISG MORE “21<sup>ST</sup> CENTURY”-WAY

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**Abstract**

In December 2015 a very thought-provoking conference took place in Zagreb under the egis of the Zagreb University and the UNCITRAL. The national reporters’ scientific results on the national use of the CISG rules showed that the expectation of “autonomous interpretation” based on CISG Article 7 is still a thing to work on. Admitting that the CISG is one of the most successful “product” of the UNCITRAL, and being aware of the fact that a possible modification of the text is almost impossible under the recent circumstances, the experts should work on alternative ways to move towards a better understanding of the text and improve global jurisdiction. The Hungarian result showed that a great obstacle is the unawareness of the international case law among the national judges (not talking about arbitrators here!), so in 2016 the Széchenyi István University announced a program with the support of the Ministry of Justice to ease the uniform interpretation. This program is focusing on the problematic issues and articles of the CISG (remedies, interest, fundamental breach, notification in time), and the goal is to work as a model for counties who are facing with the same problems.

**Keywords:**

*CISG, uniform interpretation, language obstacles, Article 7.*

**I. Introduction**

The purpose of the CISG (United Nations Convention on Contracts for the International Sale of Goods) is to provide a modern, uniform and fair regime for contracts for the international sale of goods. Thus, the CISG contributes significantly introducing certainty in commercial exchanges and decreasing transaction costs. At the time of writing this study<sup>2</sup>, 85 contracting states are involved in this unification, including the most important trading partners of the world: USA, China, Japan, Russia, Germany, Australia. Although, some important countries are missing: from the EU Great-Britain, Portugal and Malta did not join the Convention so far, India and many African countries are also not on the list of contracting states.

The drafters of the CISG took special care in avoiding the use of legal concepts typical of a given legal tradition, and this method results from a deliberate choice to ensure that the Convention would promote harmonization of substantive law by the largest number of States, regardless of their legal tradition<sup>3</sup>. Schwenger points out that the CISG achieved a symbiosis of common law and continental law, which will once more furnish jurists involved with sales law with the uniform language that is needed to pose questions and provide solutions<sup>4</sup>. As Flechtner says, the goal of the drafters was to create uniformity in the rules for international sales, in order

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<sup>2</sup> Manuscript closed on 4th January 2017.

<sup>3</sup> UN: UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, New York, 2012 (hereafter: Digest 2012). ix. p.

<sup>4</sup> Schlechtriem & Schwenger: Commentary on the UN Convention on the International Sale of Goods (CISG), Oxford University Press, 2010. p. 6.

to supplant the complex and difficult-to-predict system that subjected international sales to the varying provisions of national sales laws<sup>5</sup>.

During the formation and adoption of the CISG, Hungary was striving to play an active role in the unification of law right from the early sixties. Hungarian legal scholars and academics, based upon a century-old sophisticated legal culture, were never willing to accept the idea and reality of a divided world and their country's isolation behind what was called the Iron Curtain<sup>6</sup>. This was all the same by the other countries of the so-called "Visegrad-Four Countries" (V4)<sup>7</sup>, and as a proof of this, these countries joined the CISG among the first ones. The Convention entered into force on 1st January 1988 in Hungary, in the Czechoslovakia on 1st April 1991, the Czech Republic and Slovak Republic succeeded to the convention as of 1st January 1993. In Poland it came into force on 1st June 1996, so at least the Polish legal system is having more than 20 years of experience so far. These countries share almost the same (or at least very similar) legal tradition, as all based on the German law. It is not a surprise, that these countries are facing similar problems with the interpretation of the CISG articles<sup>8</sup>. With this I only want to sign that the difficulties occur in the Hungarian practice are not unique in this area. In spite of the time far enough for getting the experience, one may feel that in practice the CISG is not favored for the contracting parties. According to the statistics of the UNCITRAL, in the CLOUT database there are only few cases reported from this area, although the contracting states are among the first ones to ratify the Convention.

## **II. Empirical research on the jurisdiction of the CISG in Hungary**

In 2015 with a questionnaire sent directly to the most significant international law firms, to the Hungarian National Chamber of Attorneys and to the Győr-Moson-Sopron County Chamber of Attorneys the process of drafting and entering of international sales contracts has been examined. Altogether 20 questionnaires were sent directly to major law firms, and through the Chambers approximately 150 attorneys has been asked to answer. As a result, 35 documents arrived until 31st August, 2015 from the whole country, among this 12 were the result of the directly requested offices, and 23 through the Chambers' request. At the same time, a parallel research has started in the judicial field. This way 150 questionnaires were sent directly to the Courts in Hungary, and parallel the National Office of the Judiciary sent the questionnaire via email to the heads of the Courts. From July to December of 2015, 49 questionnaires arrived with appraisable content. As the arbitration in commercial disputes is traditionally dealt by the Arbitration Tribunal attached to the Hungarian Chamber of Commerce and Industry, resident in Budapest, I also sent the questionnaire to the judges working here, and got only 1 answer back, but this one has clearly showed the difference between the state court's routine and the arbitration experiences. During 2015 and 2016 the judgements and arbitration awards from Hungary has been overviewed to get a wide insight of the practice of application of the CISG.

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<sup>5</sup> Harry M. Flechtner: The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and other Challenges to the Uniformity Principle in Article 7(1) *Journal of Law and Commerce*, 1998/17. 187-217. 187.p.

<sup>6</sup> J. Martonyi: Introduction. In: *Thirty-five Years of Uniform Sales Law: Trends and Perspectives Proceedings of the High Level Panel held during the Forty-eighth Session of the United Nations Commission on International Trade Law Vienna*, 6 July 2015. United Nations, New York, 2015.

<sup>7</sup> The Visegrad Group (also known as the "Visegrad Four" or simply "V4") contains of the Czech Republic, Hungary, Poland and Slovakia, which group reflects the efforts of the countries of the Central European region to work together in a number of fields of common interest within the all-European integration.

<sup>8</sup> I base this statement on the similar researches made in these countries during 2015, and were presented in Zagreb, on the international conference "35 Years of CISG – Present Experiences and Future Challenges" 1st December 2015.

One result of the research was that many times CISG is an “accidental” part of the sales contract, as many contracts contains the clause that in case of any debates between the parties the Hungarian law should be applied, which – naturally – contains the CISG. In this case the parties are not necessary aware of the fact that an international treaty has been incorporated to their contractual relation.

While an exclusion can have proper legal reasons based on well-considered facts and interests, it is reported in the international literature, that is often rather a “habit”<sup>9</sup>. The questionnaire also included a part on exclusion of certain legal regimes in the contracts, and the major law firms (dealing with more than 10 international sales contracts in a year) reported to exclude CISG from the following reasons.

Figure 1.  
Reasons of excluding the CISG

<b>“Do you used to exclude the use of certain state’s law or any other legal orders or conventions for the disputes?”</b>	<b>Reasoning or comment on exclusion</b>
“I exclude CISG for the request of the client”	<i>Comment:</i> “Fundamentally I have positive experiences. The Convention is easy to use for a continental lawyer, the Hungarian and foreign language (basically German) commentary literature is useful help. But at the same time during the civil procedure nor the judges nor the clients realize the need for applying the regulations of CISG, they have to be noticed on this fact during the process.”
“I exclude CISG.”	<i>Reasoning:</i> “In case of international sales contract in many concrete cases it is favorable for the seller using only the Hungarian law. Without direct excluding of the Vienna Convention it must be applied, and as the Convention do not govern all relevant field, in disputes this doubles the applicable laws what may lead to a confusion in the judgement”. <i>Comment:</i> “The main problem of the Convention is the lack of uniform application which is the result of the phenomena that the national courts interpret the Convention based on national laws.”
“I exclude CISG almost all the time”	<i>Reasoning:</i> “The Convention is not accepted in the international practice for many reasons, almost every time the applicability is excluded”
“I exclude CISG”	<i>Reasoning:</i> “The application of the CISG is internationally rare”

<sup>9</sup> For the United State’s practice see: Martin F. Koehler: Survey regarding the relevance of the United Nations Convention for the International Sale of Goods (CISG) in legal practice and the exclusion of its application (October 2006). Available: <http://www.cisg.law.pace.edu/cisg/biblio/koehler.html> (as on 4th January 2017). A perfect international comparison is available by Lisa Spagnolo: Green Eggs and Ham: The CISG, Path Dependence, and the Behaviourial Economics of Lawyer’s Choices of Law in International Sales Contracts. Journal of Private International Law, 2010/2. pp. 417-464.

“If the client is the seller, I exclude CISG”	<i>Reasoning:</i> “The Hungarian civil law is more in favor of the seller in particular situations.”
“The clients expressing the will for excluding the CISG”	<i>Comment:</i> “Despite of the fact that the Convention’ regulations are clear, the Courts have inconsistent practice of interpretation, or simply do not use the Convention though it is mandatory in the process.”

As we can see some of the legal representatives feel that there is no uniform or consistent interpretation of the CISG in Hungary, or even sometimes knowledge of the CISG and its mandatory application for international sales contracts. The research also identified the phenomena of being totally unaware of the presence of the CISG among the judicial board. Among the 49 answers coming from judges who are dealing with at least 1 case a year on international commercial law, 32 (which means 65,3% of the answerers) has never met the CISG during his/her practice! This result is shocking. It is even more that, if we take into consideration the fact that (living in the 21<sup>st</sup> century) hundreds of cases are available in full or in forms of abstracts on the internet. Here I would like to highlight the efforts of UNCITRAL<sup>10</sup> and Pace Law School<sup>11</sup> on publishing as much cases as possible, but we can also mention several national compilations on national case law<sup>12</sup>. So the basic problem is for sure not the accessibility of scientific materials, we should search the answer elsewhere.

Lisa Spagnoli summarizes among the CISG-familiarity issues that it is a combination of three elements determining the learning costs of a lawyer in a particular jurisdiction: (1) educational coverage and imperative (2) extent of dispute work exposure and (3) whether the domestic law has been influenced by the CISG. Let’s see the case of Hungary: for (1): we can say that the CISG is a mandatory course under the subject of “Private International Law” in every law school of the country. In this aspect, Hungary has got some hope for the future. But for element (2) we are facing a lack of frequent dispute work: only one commentary with relevant case law cited has been published on the CISG in 2006<sup>13</sup>, and ever since only one or two scholars<sup>14</sup> are writing sometimes on the subject of international sales law. As for element (3) of Spagnoli we have to see that the Hungarian civil law has its roots in the Roman law, and during its formation basically influenced by the German and Austrian legal tradition, namely by the BGB and the ABGB. It is also agreed, that Italian and French legal influence also can be detected in our private law.<sup>15</sup> We also have to consider when examining the international influence on the Hungarian civil law that the EU it’s mandatory regulations on the field of international private law has also formed the codification process<sup>16</sup> started in the late 1990’s, and ended in a new Hungarian Civil Code. When examining the similarities and differences in regulation the sales contract in the CISG and the Hungarian Civil Code we have to make difference in the case law

<sup>10</sup> Especially the CLOUT collection, which is well-designed, easy to use platform.

<sup>11</sup> A unique collection of case law and scientific articles are also available. I believe that this site (<http://iicl.law.pace.edu/cisg/cisg>) is the role model for every institution working on international commercial law issues.

<sup>12</sup> Eg: CISG France, founded by Prof. Claude Witz ([www.cisg.fr](http://www.cisg.fr)), and CISG Slovakia, a database created by the Department of International Law and European Law at the Faculty of Law of the Trnava University in cooperation with Institute of International Commercial Law at the Pace University School of Law. ([www.cisg.sk](http://www.cisg.sk))

<sup>13</sup> Sándor, Tamás – Vékás, Lajos: Nemzetközi adásvétel. HVG ORAC, Budapest, 2006.

<sup>14</sup> Mostly Sarolta Szabó is publishing researches, her best known book is: Szabó, Sarolta: A Bécsi Vételi Egyezmény, mint nemzetközi lingua franca – az egységes értelmezés és alkalmazás újabb irányai és eredményei. Pázmány Press, Budapest, 2014., and the author of this research is try hard to promote the CISG.

<sup>15</sup> Ádám Boóc: Észrevételek az új Polgári Törvénykönyv tervezetéhez nemzetközi magánjogi szempontból. In: Polgári Jogi Kodifikáció, 2008/3., pp. 3-8. 3.p.

<sup>16</sup> Gábor Palásti: Közrendi, imperatív, kógens és diszpozitív szabályok. In. Magyar Jog, 2006/2. pp. 65-77.

before and after the new Hungarian Civil Code, Act V of 2013, came into force on 15<sup>th</sup> March, 2014. The Commentary on the new Hungarian Civil Code has referred to the CISG as follows: “Despite of the straightening of sales contract as a fundamental contract type the regulation cannot be unified on it as Hungary is contracting party of the CISG. In cases where the CISG is applicable, the Hungarian Civil Code must be set aside. Although the Civil Code aspired to implement the effective regulations of the CISG, it could not be the goal to introduce regulations perfectly fitting to international sales law to be applied for national sales contracts. The duplicity stays: Hungarian Civil Code for national sales contracts, and the Convention as autonomous law for international sales contracts”<sup>17</sup> According to the codifiers upper note, the regulation is expressly divided from the international influence of the CISG. This way, we can say Hungary failed the third criteria of Spagnoli as well.

### III. Language obstacles of uniform interpretation

I made an analysis on the CLOUT database setting the language issues in front. The CISG has been made on 6 official languages: Arabic, Chinese, English, French, Russian and Spanish, and among these the English, the German and the Spanish are spoken more frequently on international field of commerce. If we collect the countries from which the most referred cases came from, we see an interesting picture in comparison with the law-level language speaking counties like the V4.

Figure 2.  
Number of cases in the CLOUT by countries and languages<sup>18</sup>

Official language	Country	Number of cases on CLOUT
	Germany	218
	Austria	63
	Switzerland	100
	USA	121
	Canada	161
	Great-Britain and Northern Ireland (not even contracting parties of the CISG)	16
	Australia	50
French	France	75
Spanish	Spain	126
	Hungary	15
	Poland	26
	Check Republic	3
	Slovakia	2

The fact that the Convention is also available in Spanish, as one of the six official United Nations languages, facilitates interpretation of the Convention even for Latin American countries, in the majority of which the language is Spanish, and helps to create a uniform case

<sup>17</sup> Osztovits, András (szerk): A Polgári Törvénykönyv magyarázata. Vol. II. 1702.p.

<sup>18</sup> As published on the UNCITRAL website on 4th January, 2017.

law, which will not be enjoyed by those countries of the Americas that have not yet adopted the Convention<sup>19</sup>.

I would like to highlight German and English because one other reason, which is the available scientific literature. Most of the materials written on CISG and its jurisprudence or interpretation is basically in English or German<sup>20</sup>. Here we have arrived to the next level of obstacles: the lack of knowledge of the relevant case law. Although in the previous point I highlighted that the internet makes hundreds of cases available, but most of these cases are published or available in English, so the language issues occur here: not only should a lawyer/judge/arbitrator be familiar with another language, but he/she must be familiar with another language's legal terminology. And here we have reached the point of the disadvantage of the different legal cultures. As Harry M. Flechtner is analyzing in one of his work, the legal instruments are not easy to translate<sup>21</sup>, and even more difficult between different legal traditional backgrounds. Should we blame our judges when their failing this challenge? I do not think so. According to the official statistical report of the Hungarian National Office for the Judiciary in county Győr-Moson-Sopron under the 19 judges dealing with civil law 4866 cases has been started in 2015, which means (proposing an equal working pressure on them) every single judge has seen 256 cases in a year, more than 21 new cases in a month. And they have reported in 2015 that in a year they meet 1-5 international commercial cases. Is it a surprise that they do not have the time (and/or the motivation) to follow the international case law on CISG, or read the relevant international legal literature?

Among the language issues we should mention, that in Hungary nobody can get a diploma (not even a bachelor's degree) without at least one foreign language exam (both oral and written) with medium level. In Hungary the most frequently spoken languages are German and English (how lucky, we could believe according to the literature of the CISG...). To sum up: all of our judges in Hungary have – at least an official paper on – language knowledge, so theoretically this should not be an obstacle for reaching the relevant literature. Theoretically.

#### **IV. Measures to make for a more uniform interpretation and better understanding of the CISG**

If we are looking at the court decisions from the V4 countries (not taking into consideration the arbitration courts, which are different in many aspects), most of them simply do not cite any international case law, nor international literature while applying the CISG in a case. This leads to the sad fact, that Article 7 (1)'s mandatory rule of autonomous and international interpretation of the Convention will remain a mere principle. According to the upper mentioned empirical survey among the reasons of lack of knowledge on international case law the Hungarian judges mentioned the absence of domestic (i.e. Hungarian language) literature on the subject. We should admit that it is not an application condition for a domestic judge to be perfect English- or German-speaking (or reading) one, so it is not obvious to require from a judge being up-to-date with the international case law. However, we should find a resolution

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<sup>19</sup> Ana Elizabeth Villalta Vizcarra: United Nations Convention on Contracts for the International Sale of Goods. In: Thirty-five Years of Uniform Sales Law: Trends and Perspectives Proceedings of the High Level Panel held during the Forty-eighth Session of the United Nations Commission on International Trade Law Vienna, 6 July 2015. United Nations, New York, 2015. 29-38.p. p.35.

<sup>20</sup> Without being biased, I would like to set the Schlechtriem & Schwenger commentary as a perfect example of the two dominant languages of scientific literature. This well-known and repeatedly updated commentary is published also on these two languages. See the German version: Schlechtriem & Schwenger: Kommentar zum Einheitlichen UN-Kaufrecht. Verlag C.H. Beck, München - Helbing Lichtenhahn Verlag, Basel, 6. edition, 2013.

<sup>21</sup> Harry M. Flechtner: The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and other Challenges to the Uniformity Principle in Article 7(1). Journal of Law and Commerce 1998/17. pp. 187-217.

for this issue. As a good example, in the Netherlands there is a helping guide for the judges, so called “*Procureur-Generaal*”. The *Procureur-Generaal* or his deputies the *Advocaten-Generaal* (Advocates General) deliver an advisory opinion (*Conclusie*) in all civil cases decided by the judge of the case. These advisory opinions play an important role in the development of the case law by the judges.<sup>22</sup> I see this solution as a best practice for national judiciary system, which should be highly recommended for contracting states. In the Hungarian system we can see a kind of version of this institution in the position of “high consultant of the Curia”, but this position only exists on the highest level of the judicial system. But cases occur first on the lower levels, so a solution can be to introduce these positions to lower courts as well.

The Széchenyi István University Faculty of Law and Political Sciences got a 10-month-funding from the Ministry of Justice of Hungary to start building a national database of the CISG cases – in Hungarian. This is the first time that an institution has a goal of collecting and translating (at least a part of) the existing case law on international sales. Part of the project is to publish relevant scientific literature in Hungarian as well. While creating this database the role model is the Pace Law School Institute of International Commercial Law and its method of dealing with the different issues of international commerce<sup>23</sup>. We believe that with publishing the relevant case law in Hungarian would enable the judicial staff to be more aware of the relevant interpretation issues.

Another key element to enhance the autonomous interpretation of the CISG is the legal education. When facing with the problem of the application of the CISG in the United States, several scholars got to the same point: if we want to be more familiar with the Convention, we should start with the education<sup>24</sup>. Dodge states, that teaching the CISG for USA students is fun, “because the CISG is different from both the common law and the UCC, and those differences provide wonderful opportunities to question the rules of contract law that we have grown so used to”<sup>25</sup>. But finding an ideal balance for international law subjects are not easy. Fatima Akkadaf raised the next question in 2001, which is still opened: “If international law is imperative, how do we ensure that students receive it? She suggested to start including international and comparative law on the American bar examinations<sup>26</sup>. Although she declared this as a utopia for the United States, I deeply believe that this must be a reality for the contracting state’s law schools – not for the bar exams, but for the bachelor and master courses as well. How do we expect the proper use of the mandatory international conventions if we do not teach them properly for graduating lawyers? In this field I also believe that the UNCITRAL itself has got steps to take: for making the CISG more user-friendly, it has to be promoted for teachers, lecturers at the law schools as well. In my opinion it would be great to have teaching materials for CISG, and these materials can be a result of an international cooperation between scholars interested in international sales law. As a lecturer for more than 10 years now, I am sure that many of my colleagues has his/her own “best practice” for make this subject and the Convention more familiar with the students – so why not share the experience with each other?

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<sup>22</sup> Sonja A. Kruisinga, *The Impact of Uniform Law in National Law: Limits and Possibilities – CISG and Its Incidence in Dutch Law*, vol. 13.2 *Electronic Journal Of Comparative Law*, (May 2009), p. 7, <<http://www.ejcl.org/132/art132-2.pdf>>. The institution is mentioned by the national report on CISG by Viola Heutger: *National report of the Netherlands. International Conference “35 Years of CISG – Present Experiences and Future Challenges”*, Manuscript, 2015. p. 10-11.

<sup>23</sup> See it here: <http://iicl.law.pace.edu/cisg/cisg> (as on 4th January 2017)

<sup>24</sup> see eg. Kina Grbic: *Putting the CISG Where It Belongs: in the Uniform Commercial Code*. *Touro Law Review*, 2012/29. pp. 173-203. or William S. Dodge: *Teaching the CISG in Contracts*, *Journal of Legal Education*, 2000/1. Vol. 50. pp. 72-94.

<sup>25</sup> Dodge op.cit. p 94.

<sup>26</sup> Fatima Akkadaf: *Application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) to Arab Islamic Countries: Is the CISG Compatible with Islamic Law Principles?*, *Pace International Law Review*, 2001/1. (Vol. 13.) p.4.



The Faculty in Győr is making the first step: we will publish our ways of teaching including teaching materials on the CISG in Hungarian, and plan to do the same in English for ERASMUS students.

We are also facing the problem of generational challenges. Not only we have to present our work and make it available in Hungarian: we have to do it on the “21<sup>st</sup> century way”. Student of today’s law schools are seeking for a different kind of education: less front presentations and lectures and more group work, more “learning-by-doing”, so the new teaching materials must fit to their new ways of learning as well<sup>27</sup>. The expectations of the new generations include “educational technology” available, so creating online educational tools are one step towards getting more young law students (future lawyers) to get to know the CISG better.

According to the Tao Te King “a journey of a thousand miles begins with a single step”. The Széchenyi István Faculty of Law and Political Sciences, Department of Public and Private International Law is making this first step these days. We truly believe that promoting the CISG has to start with the legal education, and efforts must be made to translate the international case law to Hungarian language to make it available for practicing lawyers and judges. The goal of unanimous and international interpretation of the CISG in Hungary (and I think in many countries) will remain a dream unless we fulfil at least two criteria of Lisa Spagnoli: educational coverage and extension of dispute work exposure.

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<sup>27</sup> There are so many literature on the „y-generation”, and on „z-generation” and their special needs and preferences, here I only mention refer to an interesting research on Gen-Z’s expectations on higher education: Barnes & Noble College: Getting to Know Gen Z – Exploring Middle and High Schoolers’ Expectations for Higher Education. Available here: <http://next.bncollege.com/wp-content/uploads/2015/10/Gen-Z-Research-Report-Final.pdf> (as on 4th January, 2017)



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