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Basic Structures and General Concepts of the CISG as Models for a Harmonisation of the Law of Obligations

1. Some preliminary remarks

The United Nations Convention on Contracts for the International Sale of Goods (CISG) has become a tremendous success story, unexpected even by its staunchest supporters. To date, 65 countries have ratified, accepted, or approved this convention¹, among them most of the great trading nations of the world except Japan and England. Thousands of cases decided by state courts or arbitration tribunals are reported upon via electronic databases² or in legal journals; voluminous commentaries in several languages, such as English, Swedish, Polish, and German, have analysed the provisions of the convention in light of cases considered, and the contributions by legal writers to law periodicals, journals, anthologies, etc. are so numerous that it is impossible to keep track. Tens of thousands of law students all around the world are instructed in international sales law, and many become experts on the CISG by participating in the annual Willem C. Vis moot competition.

This overwhelming success has many causes, not least among them the high quality of the CISG and the craftsmanship of its drafters, who over the long ‘gestation period’ of this Uniform International Sales Law worked on it and fine-tuned its provisions and solutions in consideration of extensive comparative analyses of domestic sales laws. In this process, they took into account many critical contributions of academics and practitioners as well as of governments and international organisations such as the International Chamber of Commerce, which were published or otherwise addressed to them in the course of the elaboration of the

¹ See, as of 1 July 2005, Office of Legal Affairs, Treaty Section, United Nations, NY. Available at: http://www.uncitral.org/uncitral/en/uncitral_texts/sale/_goods/1980CISG_status.html.

² See also CLOUT, UNILEX, at <http://www.cisg-online.ch/>.

convention. Thus, they proved false the claims sometimes made that the convention was the product of theoreticians lacking contact with the reality of international trading.³ And this — i.e., the high quality of the CISG — may also explain its success in an area additional to its direct application to cross-border sales: its indirect influence as a model for other international, regional, or domestic developments and reforms of sales laws and, more generally, the law of obligations. To this I would like to devote the following tentative observations.

2. International and regional unification or harmonisation of law

The CISG has left its imprint on a number of international projects for the unification or harmonisation of rules in the field of commercial and general contract law. Basic concepts of the CISG have influenced the development of international or regional projects of unification and harmonisation on two levels. Firstly, the prerequisites for application in its Articles 1–7 have repeatedly been used as a model. Secondly, its substantive law provisions on the contractual relations of the parties to an exchange contract in general and its provisions concerning sales contracts in particular had a noticeable influence on such projects.

In international conventions, draft conventions, and model laws for certain cross-border contracts, the first threshold is always the prerequisites for application. While CISG predecessors ULIS and ULFIS⁴ had set up a rather complicated system of requirements for application of uniform law, the CISG in its Art. 1 (1) (a) uses very simple prerequisites — namely, that the parties have their places of business in different (contracting) states; in addition, Art. 1 (1) (b) of the CISG allows application if the conflict of law rules of the forum determine the law of a contracting state to be applicable law.⁵ This has proved to be quite workable, and the basic prerequisite of ‘internationality’ that the parties have their places of business in different states as the main, if not the sole and decisive, ‘trigger’ for applying a uniform law has since been used frequently — e.g., in Art. 3 of the UN Convention on the Limitation Period in the International Sale of Goods (1974) as amended by the Protocol of 11 April 1980; in the 2001 Convention on the Assignment of Receivables in International Trade in its articles 1 (1), 3 in the drafts for an instrument on the carriage of goods, and 2 (place of receipt for carriage and place of delivery in different states); or Art. 1 (3) (a) of the Model Law on International Commercial Arbitration of 1985.

Uniform law provides at first only verbal uniformity, and there is always a great danger of, in the application and/or interpretation of a uniform law, practitioners and legal writers paying only lip service to the uniform law, reading and applying it in a manner in keeping with their domestic law.⁶ Article 7 of the CISG offers several safeguards to prevent a ‘re-nationalization’ of international uniform law by, firstly, stating directives for its interpretation⁷ and, secondly, providing for gap-filling.⁸ These, too, have become almost standard clauses for international instruments — e.g., in Art. 7 of the Limitation Convention (*supra*), Art. 6 (1) of the 1983 (Geneva) draft Convention on Agency in the International Sale of Goods, Art. 4 (1) of the UNIDROIT

³ This is a criticism often voiced in countries that have not yet completed ratification, such as the UK, in order to justify this abstention (cf. A. Mullis, *Avoidance for Breach under the Vienna Convention: A Critical Analysis of Some of the Early Cases*. – M. Andreas, N. Jarborg (eds.). *Anglo-Swedish Studies in Law*. Lustus Forlag 1998, p. 326 *et passim*).

⁴ See Note 11.

⁵ I shall omit here the possibility of a reservation under Art. 95 of the CISG, which, if actualised — as, e.g., by the USA and China — could make matters more complicated since, with the great number of contracting states, Art. 1 (1) (b) and the consequences of declaring a reservation under Art. 95 have lost some of their importance and difficulties.

⁶ See also, as an example, the Spanish case of the court of first instance (*Juzgado de primera instancia*) Tudela of 29 March 2005 (No. 1016 at <http://www.cisg-online.ch>), starting with a statement that the CISG applies to the case, then going on to apply provisions of the Spanish Civil Code; for an extensive treatment with many more examples of cases respecting foreign judgements as persuasive authority, thus preserving uniformity of interpretation and application of the CISG, see C. B. Anderson, *The Uniform International Sales Law and the Global Jurisconsultorium*, www.cisg-online.ch/cisg/The_Uniform_Sales_Law_and_the_Global_Jurisconsultorium.pdf, sub 2: *The Genesis of the CISG — a Phoenix of the Scholarly Global Jurisconsultorium*.

⁷ Art. 7 (1) of the CISG states three directives for interpretation of the convention: that regard is to be had (a) for the international character of the convention, thus ensuring autonomous interpretation; (b) for the need to promote uniformity in its application, thus ensuring the persuasive authority of precedents; and (c) for observance of good faith, thus ensuring the influence of international trade practices. For details, see my comments in P. Schlechtriem, I. Schwenzer (eds.), *Commentary on the UN Convention on the International Sale of Goods (CISG)*, second edition. Oxford: Oxford University Press 2005, Art. 7, paras. 10–18; C. B. Anderson (Note 6), sub 5: *The Importance of International Case Law (with further references) et passim*.

⁸ Art. 7 (2) CISG provides that, as a first step, a gap should be filled by uniform rules derived from principles on which the convention is based; as a second step (only), recourse is to be had to the domestic law determined by the conflict of laws rules of the forum (for details, see also P. Schlechtriem (Note 7), Art. 7, para. 27 *et passim*).

Convention on International Factoring of 1988 (Ottawa), Art. 6 (1) of the UNIDROIT Convention on International Financial Leasing of 1988 (Ottawa), Art. 7 (1) of the 2001 UN Convention on the Assignment of Receivables in International Trade, and Art. 5 of the Convention on International Interests in Mobile Equipment (Cape Town Convention) of 2001.

In the context of my paper, the effects of the substantive law provisions of the CISG on projects of international or regional — in particular, European — projects of unification or harmonisation of the law are especially interesting, and I shall sketch out in brief but a few of them.

The UNIDROIT Principles of International Commercial Contracts, published in a second, enlarged edition in 2004 by the Rome Institute for the Unification of Private Law⁹, are closely interwoven with the development of a uniform sales law through its final form, for it was there in Rome at the UNIDROIT Institute that the idea was conceived in the 1920s¹⁰ to add to the then-ongoing endeavours to unify or harmonise the law of negotiable instruments and cross-border transport in a uniform law instrument for international sales, an idea that bore fruit in 1964 in the form of the so-called Hague Uniform Sales Law Conventions¹¹, which, while in themselves not becoming a success, for only nine states ratified them, did become the basis for the later work of UNCITRAL and its final result, the CISG. So, both the UNIDROIT Principles and the Uniform Sales Law were drawn from the same well, and there was also some identity of drafters, for a number of experts who had worked on the CISG later joined UNIDROIT's working teams.¹² Thus, it is little wonder that the key solutions and central concepts of the CISG and the UNIDROIT Principles are closely related, and that they look very similar, particularly if compared with rules and codification of domestic sales laws.

The so-called Principles of European Contract Law, published in three parts — in 1995 (I), 1999 (I and II), and 2003 (III) — by a private group of scholars that grew from the small circle assembled around the founder of this project, Copenhagen's Professor of Commercial Law Ole Lando (and, therefore, was long known as the Lando Commission), to a group quite impressive in both scholarship and numbers¹³, also show similarities with the core solutions of the CISG, although, like the UNIDROIT Principles, they cover a wider area of the portion of law that Europeans tend to qualify as the law of obligations and tend to address more details, not always avoiding the risks of provisions that are too detailed. Nevertheless, the 'European Principles' have become a basis and framework for further attempts on the European level — in particular, the work of the Study Group on a European Civil Code, founded and chaired by Professor Christian von Bar of Osnabrück, Germany, and now entrusted by the EC Commission to draft a Common Frame of Reference for a European Contract Law.¹⁴

Regarding these European projects, it seems that the influence of the CISG is especially visible and strong in Europe, an impression that is further corroborated by the famous EC Directive 1999/44/EC of 1999 of the European Parliament and of the Council 'on certain aspects of the sale of consumer goods and associated guarantees', which in its definition of the 'conformity of goods' has taken its cues from the CISG¹⁵ and, thereby, introduced this key concept into the legal sales law systems of member states when they implemented the directive (see *infra* at 3).

But it must also be mentioned here that OHADA¹⁶, the Organisation of 27 African States, striving for a harmonisation of trade law equivalent to the EC's harmonisation, promulgated Uniform Rules for Contracts that obviously followed the model of the UNIDROIT Principles¹⁷ and, thusly, though indirectly, the CISG model.

⁹ The first edition was published in 1994 by the International Institute for the Unification of Private Law (UNIDROIT).

¹⁰ Concerning this early development, see O. Riese. – *RebelsZ* 1965 (29) 2, p. 1 et seqq.; E. von Caemmerer. – *RebelsZ* 1965 (29), p. 101 et seqq.; P. Schlechtriem. *Commentary on the Convention on the International Sale of Goods*, second edition. Oxford: Oxford University Press 2005, Introduction; C. B. Amdersen (Note 6), *sub* 2: The Genesis of the CISG — a Phoenix of the Scholarly Global Jurisconsultorium.

¹¹ Convention Relating to a Uniform Law on the International Sale of Goods, and Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods of 1 July 1964; the texts of the Uniform Sales Law ULIS and the Uniform Law on Formation ULFIS were annexed to these conventions.

¹² It is also worth remembering that work on the UNIDROIT Principles by a special working group had begun in 1980 (see the introduction to the first edition), when hope for the success of the Sales Law Conventions was very low. It could well be assumed that the founders of the UNIDROIT Principles project were also motivated by the desire to preserve the great treasure of comparative law solutions that went into the sales-related projects.

¹³ See the preface to part III, published as parts I and II by Kluwer Law International. The Hague, London, New York, pp. xiii, xv, *et passim*.

¹⁴ For details, see the contribution to this volume by Ch. von Bar, Working together Towards a Common Frame of Reference.

¹⁵ Openly conceded in the first draft of this directive of 1996, KOM (1995), p. 520, and in the response of the EC Commission to the proposals of the Parliament of 19 January 1999, KOM (1999) p. 16.

¹⁶ *L'Organisation pour l'Harmonisation en Afrique du Droit des Affaires* was founded by a treaty signed on 17 October 1993.

¹⁷ See M. Fontaine. *Le projet d'Acte uniforme OHADA sur les contrats et les Principes UNIDROIT relatifs aux contrats du commerce international*. – *Uniform Law Review* 2004 (262) 2, p. 253 *et passim* with details on OHADA itself, its member states, and the project of uniform contract rules.

3. Influence of the CISG on domestic sales and contract laws

The CISG has influenced the developments and reform of domestic laws through several channels, an obvious one being the implementation of EC directives — e.g., the Sale of Consumer Goods Directive mentioned in the preceding para. 2, which in its use of certain concepts, such as that of conformity, was given form by the CISG.

Some countries have enacted the CISG not only as their law for cross-border sales but also as their domestic sales law. The Scandinavian countries are the examples that are best known, although there are some differences in their respective implementations. While Sweden and Finland introduced the CISG alongside domestic sales laws based on the CISG, Norway enacted just one sales law — Kjøpsloven — for both international and internal sales.^{*18} Norway is not the only example of a nation implementing the CISG both as an international convention and as its domestic sales law — and, lacking codified rules on the general law of obligations, thereby provisions on breach of contract and the obligee's remedies in general. The Tokelau Islands, so far a trust territory of New Zealand in the South Pacific, which will gain independence in 2006, enacted the CISG in 2004 as a sales law both for international and for domestic sales, along with some supplementation to make it a basic set of rules for contracts in general.^{*19}

Although not as obvious, the influence of the Uniform Sales Law on new codes or on the reform of old codes might be even more important in the long run for the thesis to be advanced here that the CISG has become a kind of common sales law of the world, for the law of obligations has undergone a process of reform in many countries around the globe and the CISG and other uniform law projects have had a noticeable influence on these developments.

This is most obvious in the former socialist states, which, in the process of transforming and restructuring their societies and economic systems to accommodate democratic and market-oriented Western-style systems, also reformed and re-codified their legal systems. The CISG model was one of those considered, compared, and weighed, especially in countries that had implemented it already — or were to implement it — as their international sales law, and the Estonian Law of Obligations Act (LOA) is a noteworthy example. Since 10 of these former socialist states have become members of the European Union and had to implement the European *acquis* — i.e., the legal rules of the EU enacted as regulations, directives, etc. — they had also to implement the Directive on the Sale of Consumer Goods mentioned above, thereby instantiating another 'channel of influence' of the CISG.

But the transformation of former socialist states and their accession to the EU is but one instance of the CISG's influence on the reform and development of domestic laws in the field of sales, and contractual relations in general. Besides the countries mentioned above under 2, which have introduced the CISG as their domestic sales law and, thereby, as a general part of the law of contractual obligations, there are other countries that have reformed their law of (contractual) obligations either as part of a general civil code or in a code of the law of obligations, taking uniform law into account. The 'old' Hague Sales Laws ULIS and ULFIS^{*20} have already influenced the New Netherlands Code Civil (Nieuw Wetboek) and its Book 6 on the Law of Obligations enacted on 1 January 1992.^{*21} The German *Schuldrechtsreform* (reform of the law of obligations), which was begun in the 1980s, was from the very beginning (i.e., the thorough and lengthy expert opinions submitted to the German Ministry of Justice and, in particular, the opinions on sales and on *Leistungsstörungen* (breach of obligations) by Ulrich Huber) but also in the Draft of the *Schuldrechtsreformkommission* (Commission on the Reform of the Law of Obligations) of 1984 strongly influenced by the uniform laws ULIS and ULFIS and later influenced by the CISG, an influence that could be preserved despite later revisions by more tradition-minded members of the second reform commission.^{*22} Of course, in Germany, too, the implementation of the Consumer Goods Directive strengthened the CISG-influenced features of the new law.

But the influence reaches beyond the borders of Europe: If one analyses the New Code of Obligations of China, one finds many legal concepts and institutions familiar from the CISG, and the similarities are con-

¹⁸ For details — and criticism of this — see J. Lookofsky. *Understanding the CISG in Scandinavia*, second edition. Copenhagen 2002, para. 1; J. Lookofsky. *The Scandinavian Experience*. — F. Ferrari (ed.). *The Uniform Sales Law. Old Issues Revisited in the Light of Recent Experiences*. Milan 2003, pp. 95–127.

¹⁹ It replaced the 19th-century SGA (Sales of Goods Act) of English provenance.

²⁰ *Supra*, under 2.

²¹ See also A. S. Hartkamp. *Verbindenissenrecht*. Deel 1. Deventer: Kluwer 2004, p. 20 in regard to impossibility.

²² As to this reform and its history, see W. Rolland in L. Haas, D. Medicus, W. Rolland, C. Schäfer, H. Wendland. *Das neue Schuldrecht*. Munich: C.H. Beck 2002, p. 2 *et passim*; P. Schlechtriem. *International Einheitliches Kaufrecht und neues Schuldrecht*. — B. Dauner-Lieb, H. Konzen, K. Schmidt (eds.). *Das neue Schuldrecht in der Praxis*. Carl Heymanns Verlag 2003, pp. 71–86.

firmed by a comparative analysis of Chinese law and the CISG, as was undertaken recently in the Chinese edition of this author's book on 'Internationales UN-Kaufrecht'.²³ This is no accident, for the drafters of the new Chinese law admittedly used the CISG — which the People's Republic of China was one of the first states to implement, in 1988 — as a source of inspiration.

To evaluate the impact of the CISG on projects of unification and harmonisation as well as on domestic contract law, however, one has to examine concrete rules and solutions for concrete issues. This can be done only by analysing certain key concepts in several systems.

4. Key concepts as reflected in the provisions on remedies

The law of contracts can best be characterised and understood by its remedies in case of breach of contractual obligations. Although continental European tradition emphasises the rights and obligations of the parties, their interdependence in the case of exchange contracts, and their respective weight in the contractual web (i.e., the distinction of 'main' and 'ancillary' obligations etc.), the real test is always the consequences of breach in whatsoever a form, be it non-performance, late performance, or malperformance of the contract. Obligations and remedies in the event of their breach are, however, dependent on the degree of party autonomy granted by the respective legal systems; where, as in case of the CISG under its Art. 6 and a number of other provisions, almost all codified rules are default rules — that is, rules applicable if the parties have not agreed on other terms for their contractual relations — additional remedies, or limitations of remedies, can be established by the parties, an example being penalties or disclaimers in case of breach. These cannot be reported and compared here, but party autonomy in itself is a major point. Here, obviously, an important distinction is that involved in separating business-to-business (B2B) contracts from those with consumers and similar non-business parties. But party autonomy in the projects and legal systems considered here was not introduced by or on account of the CISG but, rather, as a rule based on the same policies as the CISG. Its mention here is intended only to remind the reader that the similarities of remedies to be elaborated upon here are only those of legal or other black-letter provisions.

Breach of contract can trigger various remedies, but the two most important are 'avoidance' (or: termination, rescission, cancellation) of the contract and damages for its breach. I shall use the terminology of the CISG, although it has been rightly observed that 'avoidance' might lend itself to misunderstandings.

4.1. 'Avoidance' on account of breach of a contractual obligation

A party aggrieved by a breach of its contract often wants to extricate itself from the contract in order to be free to conclude other contracts to secure the same interest. Although the idea of getting out of a contract impaired by breach can be found in all legal systems, the details in domestic systems have shown a great variety of technical solutions.²⁴ Three issues have to be considered: First among these is that of the requirements for an avoidance, second is the means to achieve avoidance, and third is the matter of the consequences of avoidance.

Although, as G. Treitel observed in his important comparative law analysis concerning the remedies in case of breach, avoidance as the most severe deviation from the basic principle of *pacta sunt servanda* requires a breach of some seriousness, this was only partially the case, for all legal systems of Roman law heritage knew the *actio redhibitoria* in one or the other form — i.e., the buyer's right to avoid the contract even in cases of minor defects in the goods. English law allowed and still allows, under the so-called perfect tender rule, rejection of goods not fully in conformity with the contract such as in the end results in termination of the contract even in cases of minor non-conformities.²⁵ The CISG, on the other hand, does indeed allow avoidance only in cases of very serious breach, for which it coined the concept of fundamental breach and tried to define it in Art. 25. Balance between the interests of the promisee aggrieved by a breach in getting

²³ Internationales UN-Kaufrecht, third edition. 2005; the Chinese edition of this book, by Li Huang, will be published in 2005 by Peking University Press. It compares all provisions of the CISG with their counterparts in the Chinese Law of Obligations.

²⁴ See G. Treitel. Encyclopedia of Comparative Law, Vol. VII. Tübingen: J.C.B. Mohr 1976, Chapter 16, sec. 161; still informative is E. Rabel. Recht des Warenkaufs, Vol. 1 19 – Vol. 2 19.

²⁵ Concerning this and US law in comparison to CISG Advisory Council CISG opinion No. 5 (reporter Ingeborg Schwenzer), see [http://www.cisg-online.ch/publications, sub No. 2.2](http://www.cisg-online.ch/publications_sub/No.2.2).

out of the contract and the interests of the promisor in breach in keeping the contract going, if possible, is struck by the institution of an additional period of time for performance, the lapse of which allows avoidance even in cases of non-serious breaches, with the exception of non-conformity.²⁶ It gives the obligor in breach a second chance to 'save' the contract if performance and saving of the contract is possible at all, and it prevents the waste of economic resources that almost always follows from a breakup of contractual relations and the unwinding of performances necessitated thereby. This system of first having a high threshold for avoidance and secondly incorporating an additional period of time (i.e., a 'second chance' for the obligor in breach, often called by its German name 'Nachfristsystem' on account of it having its legal origin in the German Civil Code (the former §§ 325 and 326, now 323 and 326 of the BGB) and the Swiss Code of Obligations (OR arts. 107 and 108) but also in mercantile practice) has proved to be very attractive and can be found in the UNIDROIT Principles in arts. 7.3.1 and 7.1.5; in the Principles of European Contract Law in Art. 9:301 and Art. 8:106 (3); and in the domestic laws influenced by this basic concept of the CISG, such as the Scandinavian laws, the Estonian LOA in § 116 (1), (2) (avoidance in case of fundamental breach) and in para. 5 in connection with § 114 (additional period of time), and the Chinese Contract Law in § 94 No. 1 (fundamental breach as non-performance on account of supervening events) and No. 3 (additional 'reasonable' period of time). Likewise, the notion of an anticipatory breach, in particular by repudiation, being the most 'fundamental' breach, as regulated in Art. 72 (1) and (3) of the CISG, has taken hold in the legal systems (re-)codified under the influence of the CISG — e.g., in § 323 (2) No. 1 of the German BGB, § 94 No. 2 of the Chinese Contract Law, or § 117 of the Estonian LOA. Of course, there are many variations, related to, e.g., partial performance or breach of instalment contracts, in the definition of 'fundamental breach' etc., but nevertheless there is a common core familiar to all jurists in the countries having introduced the CISG and the twins 'fundamental breach' and 'additional period of time' as prerequisites for avoidance in case of breach in implementing the CISG and/or these concepts as part of their domestic contract law. So, if I have to negotiate with a Chinese lawyer over a contract gone sour and perhaps, therefore, terminated, we shall speak the same conceptual language and can concentrate on the facts and the evidence.

Avoidance is brought about under the CISG by a unilateral declaration ('notice') on the part of the party aggrieved by the breach to the other party (Art. 26 of the CISG). This, too, deviates from many domestic laws not (yet) influenced by the CISG, notably the systems based on the French *Code Civil*, which require that a *résolution* (avoidance) of a contract be effected by a court decision. But it has become the standard instrument to terminate a contract in the event of breach — e.g., in Art. 7.3.2 of the UNIDROIT Principles, Art. 9:303 (1) of the European Principles, § 96 of the Chinese Contract Law, and §§ 188 (1) and 195 (1) of the Estonian LOA, among other laws. It has the obvious advantage of achieving a clear termination of the contract at once and without lengthy litigation, although, of course, such litigation may follow nevertheless if the party in breach contests the existence of the prerequisites for an effective declaration of avoidance.

Finally, there is remarkable innovation in the consequences of an avoidance — i.e., in the rules on unwinding a contract avoided on account of breach: often and traditionally (e.g., in the Italian Civil Code but also in the English Law Reform (Frustrated Contracts) Act of 1943) avoidance is regarded as a kind of invalidation of the contract resulting in an unwinding of performances under rules of unjust enrichment law. This has unwelcome side effects, for one needs ancillary rules in order to secure, or explain, the 'survival' of contract provisions on the settlement of disputes, via arbitration clauses, jurisdiction clauses, and the like. A more modern approach holds that, in essence, an avoidance keeps the contract as a framework intact, extinguishing only the main obligations to perform and reversing them insofar as performances have already taken place, thus resulting in contractual restitution claims (Art. 81 (1) and (2) of the CISG). This, basically, was followed in Articles 7.3.5 and 7.3.6 of the UNIDROIT Principles, in Art. 9:305-9:309 of the European Principles — although with some disputable variations²⁷ — and in the national codes mentioned above under 3.2.2 — e.g., in §§ 188 (2) and (3); 189; and 195 (1), (2), and (5) of the Estonian Law of Obligations Act. Again, the advantage of communicating in the same legal language (i.e., using the same basic concepts) is obvious: if, say, a contract between an Estonian and a Chinese trader is terminated on account of breach, there can be no serious dispute concerning the validity of an arbitration clause in the contract, regardless of avoidance, and even if there is a controversy over the application of the CISG, clauses on the settlement of disputes are clearly unaffected by the breach and the ensuing avoidance.

²⁶ For details, see I. Schwenzer (Note 25), *sub* No. 3.2.

²⁷ See also the critical analysis by Coen. *Vertragsscheitern und Rückabwicklung — Eine rechtsvergleichende Untersuchung zum englischen und deutschen Recht, zum UN-Kaufrecht sowie zu den Unidroit-Principles und den Principles of European Contract Law*. Berlin: Duncker & Humblot 2003, p. 253 *et passim*.

4.2. Damages

The most important remedy in the event of breach of a contract is a claim for damages. This under the CISG rests on three pillars:

1. the prerequisites of liability and excuses,
2. calculation of damages, and
3. limitation of recoverable losses (the ‘foreseeability test’).

Two of these — both the limitation of recoverable losses by the so-called foreseeability rule and prerequisites and excuses — have found their way into the projects and domestic legislation previously mentioned, while the calculation of damages caused by breaches concerning cross-border sales poses problems specific to international trade and, therefore, is less suited for generalisation in the field of law of contractual obligations.^{*28}

Claims for damages are triggered by a breach of an obligation arising from a contract. Since this is universally so, it would be preposterous to claim that the CISG had influenced the development of contract law rules in international or domestic projects. But it is the possibility of excuses, ‘negative prerequisites’ of liability, where the CISG and its Art. 79 (1) had a recognisable influence. First of all, it avoided the theoretical schism of systems basing liability on fault and those basing it on mere breach, by clearly defining the circumstances that the party in breach can raise as an excuse. This, of course, has led to diverging dogmatic interpretations, our English colleagues suspecting that the fault principle had entered through the back door of the excuses under Art. 79 (1) of the CISG^{*29}, while (German) scholars suspected seeing the devil’s cloven hoof of strict contractual liability. But the basic policy underlying this excuse of, in essence^{*30}, impediments beyond control (i.e., *force majeure*) has proved to be so attractive that it is to be found in the excuse provisions of the UNIDROIT Principles (in Art. 7.1.7) and the European Principles of Contract Law (Art. 8:108) as well as in some of the new reform codes, such as in § 117 (2) of the Chinese Contract Law or § 103 (2) of the Estonian LOA.^{*31}

All legal systems have to cope with the problem of remote damages caused by breach of a contractual obligation or a non-contractual duty. Often, qualifications of the causal nexus between the first violation of an obligation or duty are used, but corresponding terms like ‘direct or indirect’ or ‘too remote’ are just verbal vessels for the gut feeling of the judge or arbitrator applying them. The CISG uses a test of ‘foreseeability’ as a concept for limiting recoverable losses. This is a misleading term, however, and it may be misunderstood in several ways. First of all, almost every event is imaginable and, therefore, foreseeable. If it is taken literally, almost no limitation could be achieved. Secondly, the problem of limitation of damages in case of contractual liability is quite different from the problem in cases of extra-contractual liability. In the case of contractual liability, it is, as the well-known and oft-reported history of the limitation rule and the concept of risks in the contemplation of the parties show, a consequence of an assumption of foreseeable risks in concluding a contract, while unforeseeable risks are not assumed by the contracting obligor and, therefore, have to lie where they fall.^{*32} The UNIDROIT Principles use the same concept (see Art. 7.4.4), as do the European Principles in Art. 9:503, the Estonian LOA in § 127 (3), and the Chinese Contract Law in its § 113. Unfortunately, the German reform legislators did not deal with and amend the provisions on damages, but the concept of the protective reach of obligations incurred is based on the same policy and leads to the same results.

²⁸ Cover transactions as under Art. 75 CISG are less frequent outside sales, and so are ‘current prices’ as used in Art. 76 of the CISG as a calculating factor.

²⁹ See also B. Nicholas. Prerequisites and Extent of Liability for Breach of Contract under the UN-Convention. – P. Schlechtriem (ed.). *Einheitliches Kaufrecht und nationales Obligationenrecht*. Baden-Baden: Nomos 1987, p. 287.

³⁰ The excuse is, of course, more differentiated than can be explained here; e.g., the counter-exception of foreseeability of an impediment beyond control is based on the policy of assumption of risks foreseen and not disclaimed in the contract.

³¹ But it must be added that the Estonian LOA provided for liability based on fault for certain contracts, too; see § 104 defining the levels of culpability.

³² The counter-exception to the exception of an excuse in Art. 79 (1) that the party in breach is liable despite an impediment beyond his control, if and insofar as the impediment was reasonably foreseeable at the time of conclusion of the contract and, nevertheless, was not disclaimed in the contract, is based on the same policy of holding someone liable for reasonably foreseeable risks as has been assumed by conclusion of the contract.

5. Price reduction

Price reduction in cases of non-conforming goods, as provided for in Art. 50 of the CISG, has a bad reputation in common law countries as a typical legacy of Roman law, the *actio quanti minoris*. The great Allan Farnsworth, one of the fathers of the CISG and the UNIDROIT Principles, once remarked, in one of the first conferences presenting the results of the Vienna UN conference (i.e., the CISG): ‘We don’t understand it and we don’t like it’³³, explaining that his (the US) delegation swallowed this concept only as a compromise. But one should have reminded him that his colleague John Honnold, another of the founding fathers of the Uniform Sales Law, in an influential article published in 1949, dealing with the unwelcome effects of the perfect tender rule (the right of the buyer to refuse goods or documents on account of the slightest deviation from conformity), pointed out in the context of the revision of the, then, US SGA that it was a mercantile practice of long standing in common law countries that the buyer instead of rejecting tendered goods not fully conforming could only reduce the price.³⁴ Price reduction is just one instance of adjusting the value relation of performance and counter-performance — the relation of the value of the goods to the price the buyer accepted paying, a relationship on which the parties had based their agreement — to the non-conformity of the goods, thereby avoiding not only rejection but also disputes over liability for damages, and it is no surprise that this instrument was accepted in the European Principles 9:401³⁵ as well as in the modern contract codes of countries whose previous sales law system already had the remedy of price reduction, while the UNIDROIT Principles, on the other hand, have no comparable rule. But being a tool for the adjustment of contracts, the European Principles have to be lauded for extending the remedy to all exchange contracts and other instances of malperformance not in conformity with the contract, a model followed by, e.g., the Estonian LOA in § 112, which allows price reduction in the event of any ‘defective performance’.

I have to stop here in order not to exceed the space allowed to me. What I have sketched out as examples is just the beginning, and more extensive probing would reveal many more examples of concepts in the CISG that have influenced international and domestic developments, thus resulting in a *lingua franca* of legal concepts used and understood all over the world and, thereby, facilitating legal communication immensely. Otherwise — i.e., if domestic laws with no concepts common to both parties and their counsel had to be used in a legal dispute — help would be required from interpreters, comparative law experts, and other auxiliaries, increasing the costs considerably and often out of proportion to the sums involved in the litigation. Thus, if a trader from the Tokelau Islands has bought goods from a Scandinavian exporter, some dispute arises from this contract, and the matter is to be tried in Tallinn under Estonian Law on account of a jurisdiction + choice of law clause, the parties and their counsels at least speak the same legal language for pinpointing the issue, which in the end might have to be tried by a court or an arbitration tribunal.

³³ E.A.Farnsworth. Rights and Obligations of the Seller. – The 1980 Vienna Convention on the International Sale of Goods. Schweizerisches Institut für Rechtsvergleich (ed.). Zürich: Schulthess 1985, p. 81 *et passim* at p. 105.

³⁴ J. Honnold. Buyer’s Right of Rejection — A Study in the Impact of Codification Upon a Commercial Problem. – U. Pa.L.Rev. 1949 (97), pp. 457–481.

³⁵ But it is telling to read in the comments that ‘this Article generalises the remedy provided by the *actio quanti minoris*’.