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ACCESSION OF BRAZIL TO THE CISG: A FIRST ANALYSIS ON
THE APPLICATION OF THE CONVENTION BY THE BRAZILIAN JUDGE

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1 INTRODUCTION: ACCESSION OF BRAZIL TO THE CISG – WHAT WILL CHANGE?

What legal changes will the incorporation of the CISG in the Brazilian legal system bring? This seems to be the central concern of lawyers who accompanied the process of the Convention's approval by the Brazilian National Congress, which culminated on 19 October 2012 with the Legislative Decree n. 538.¹ According to this Decree 'the text of the UN Convention on the International Sale of Goods (CISG), established in Vienna on 11 April 1980 under the auspices of the UNCITRAL, is hereby approved'.² Subsequently, on 4 March 2013, Brazil deposited its instrument of accession with the Secretary-General of the United Nations, thus becoming the 79th State Party to the

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¹ Brazilian House of Representatives website, available at: <http://www2.camara.leg.br/legin/fed/decleg/2012/decretolegislativo-538-18-outubro-2012-774414-convencao-137911-pl.html>. (free translation by author).

² Legislative Decree n. 538, *Ibid*.

Convention. As a consequence of that, the CISG will enter into force in Brazil on 1 April 2014. Then, the only remaining step in order for it to produce effects internally is the promulgation and publication of an executive decree.

But, even before the definitive incorporation of the CISG, Brazilian judges could – and can –, in some limited situations, apply it to contracts for the international sale of goods.³ The application of the Convention in these cases, however, is based on Brazilian private international law (PIL) rules rather than on CISG's provisions on applicability, which Brazilian judges are clearly not bound to apply before its definitive incorporation. By way of illustration, one can imagine a hypothetical case involving a sale of goods proposed by a party residing in France⁴ to another residing in Brazil, with no determination of applicable law by the parties. In this case, the Brazilian judge would be prompted to apply the CISG under Art. 9⁵, § 2^o,⁶ of the Law of Introduction to the Rules of Brazilian Law (LINDB – Decree-Law n. 4,657).⁷

Besides the possibility to be deemed applicable by Brazilian judges under the LINDB, the CISG also could be appointed as the substantive applicable law by parties to arbitrations seated in Brazil, even before its definitive incorporation into the country's legal system⁸. This would be acceptable due to Art. 2, §§1^o and 2^o, of the Brazilian Arbitration Law (Law n. 9,307/96), which allows parties to choose the rules of law or equity, general principles, uses and customs or international trade rules as the law applicable to the arbitration. Likewise, arbitrators already could and can directly apply

³ See Giffoni, A. de O., "A Convenção de Viena sobre Compra e Venda Internacional de Mercadorias e sua utilidade no Brasil" (1999) 116 *Revista de Direito Mercantil, Industrial, Econômico e Financeiro* 168) "Brazilian judges, when required to do so, will apply the Convention as a result of the rules of private international law". The same opinion is supported by the findings of the Viçosa Federal University Law School working group on the CISG: "By analysing Brazilian legislation and case law made available by the working group, which undertook a careful study, it was possible to detect that the Brazilian private international law rules, especially Art. 9, § 2^o, of the LICC [Introductory Law to the Civil Code], make it fully possible to determine the law of a State Party to the Convention as the applicable law. In these cases, the fact that Brazil has not ratified the Convention yet matters little, because Brazilian private international law rules themselves require the application of that law". (Vieira, I. de A., Silva, M. A. L. da, and Leão, A. P., "Direito Uniforme sobre a compra e venda internacional de mercadorias: convergências e divergências em sua aplicação" (2007) 35 *Revista de Direito Bancário e do Mercado de Capitais* 151 (free translation by author).

⁴ The Convention entered into force in France in January 1988.

⁵ Art. 9. "The law of the country in which obligations are constituted shall apply to characterise and govern the obligations" (free translation by author).

⁶ "§ 2. "An obligation resulting from a contract is deemed to have been constituted in the place in which the proponent resides" (freetranslation by author).

⁷ The Introductory Law to the Civil Code (LICC – Decree-Law n. 4,657 of 4 September 1942) was renamed the LINDB in 2010, with no further material changes.

⁸ See Giffoni, A. de O., *A Convenção de Viena, supra* fn 3, at pp. 169-170 "[I]n international sale of goods contracts that stipulated the Convention as applicable, there is no doubt that private arbitration is the safest route. The waiver of the parties from judicial courts prevents the emergence of questions about the validity and efficacy of the option for the Convention. Law n. 9,307/96 [...] established the principle of party autonomy for arbitrations seated in Brazil, in its Art. 2, § 1^o" (free translation by author).

the CISG to contracts for international sale of goods involving a Brazilian party and where parties have not stipulated the applicable substantive law any time those arbitrators consider the Convention to be the most appropriate law to the contractual relationship, and as long as this *voie directe* is at least authorized by the arbitration rules governing the proceedings.⁹

Furthermore, the fact that a foreign arbitral award applied the Convention in a dispute involving a Brazilian party did not pose an obstacle to its recognition and enforcement in Brazil – on grounds of public policy – even before the internalization of the CISG. In this respect, the *Superior Tribunal de Justiça* (Superior Court of Justice – STJ)¹⁰ in 2009, while judging the SEC n. 3035/FR,¹¹ recognized the applicability of the CISG in a case seeking the recognition of an award rendered in an international arbitration involving a Brazilian company. The parties in that arbitration had elected "Swiss substantive law" as applicable to the merits.¹² In her prevailing opinion, Minister Nancy Andrighi held that the limited scope provided to the Brazilian judge in recognizing a foreign award does not allow him to decide, in place of the foreign arbitrator, on the interpretation of the expression "Swiss substantive law".¹³ She further held that the inclusion of the CISG – in force in Switzerland since 1 March 1999 – in the concept of "Swiss substantive law" *did not offend* the limits of the

⁹ About the *voie directe*, cf. Art. 21(1) of the new ICC Rules, Art. 28(1) of the ICDR/AAA Rules, and Art. 35(1) of the UNCITRAL Arbitration Rules. See also Dolinger, J. and Tiburcio, C., "Direito Internacional Privado – Arbitragem Comercial Internacional" (2003) *Renovar, Rio de Janeiro* 100-1, stating "currently, in the absence of choice by the parties, arbitrators have complete freedom to set the law to be applied to the merits of the question, without relying on the rules on applicable law of the place of arbitration or any other place, as can be seen from examining the rules transcribed above [London Court of International Arbitration (1985), Art. 13; AAA (1993), Art. 29; WIPO (1994), Art. 59; ICC (1998), Art. 17]" (free translation by author); and Silberman, L. and Ferrari, F., "Getting to the Law Applicable to the Merits in International Arbitration and the Consequences of Getting it Wrong" in Ferrari, F. and Kröll, S. (eds), *Conflict of Laws in International Arbitration*, 2011, Sellier, Munich, at pp. 294-5, stating that "[m]any recent domestic arbitration statutes and rules have eliminated the necessity of using conflict of laws analysis to ascertain the applicable law. Instead, arbitrators may directly apply the substantive law, 'thus avoiding the complicated mechanisms of private international law' that require various steps [...]. For example, Art. 17 of the ICC Arbitration Rules provides that the arbitral tribunal shall apply the 'rules of law which it determines to be appropriate'. Even prior to promulgation of the latest version of the ICC Arbitration Rules, the French CCP and the Dutch CCP had adopted this same approach, providing that the arbitral tribunal may resolve the dispute in accordance with the rules of law it considers appropriate. In giving the arbitrators the authority to decide the case in accordance with the 'rules of law' it considers appropriate, the arbitration statutes and rules allow the arbitral tribunal to once again look beyond a national system of rules, even where the parties do not expressly direct them to do so".

¹⁰ The *Superior Tribunal de Justiça* (STJ) is the highest court for non-constitutional matters, charged with harmonizing the interpretation of federal laws by the state and regional federal appellate courts. It also has original jurisdiction over recognition of foreign judicial and arbitral awards.

¹¹ STJ, Special Court, Reporting Judge Minister Fernando Gonçalves, Foreign Contested Sentence (SEC) n. 3035/FR, judged on 19 August 2009, unanimous decision.

¹² *Ibid.* p 2.

¹³ *Ibid.* p 15.

arbitration clause or the rules of *Brazilian public policy* for purposes of the recognition of the arbitral award. She also stated that the *same principle* applies for the argument that the *CISG had not been adopted by Brazil*¹⁴.

In the final analysis, given that in some cases, as illustrated above, the CISG already could be applied by Brazilian judges and to Brazilian parties, what will change with its incorporation in our legal system? Besides the effect of becoming part of the Brazilian material law, the answer for this question lays on the legal hypothesis and criteria the Brazilian judge will be bound to rely on while determining the applicability of the Convention. While before the incorporation of the CISG the Brazilian judge was only supposed to apply it by following our PIL rules, after its incorporation he will be bound to observe the legal hypothesis and criteria the CISG establishes for its own application. Let us see which hypotheses and criteria are these.

2 HYPOTHESES OF APPLICATION OF THE CISG BY BRAZILIAN JUDGES

2.1 APPLICATION OF THE CISG RATIONE TEMPORIS BY BRAZILIAN JUDGES AND THE PROCESS OF INTERNALIZING THE CISG IN THE BRAZILIAN LEGAL SYSTEM

Article 1(1)(a) of the CISG provides for the *direct* or *automatic application* of the CISG – *i.e.*, before considering the forum's conflict of laws rules – by the judges of a Contracting State¹⁵ when faced with a dispute involving 'contracts of sale of goods between parties whose places of business are in different States'.¹⁶

Therefore, as of the moment the CISG is definitively internalized in the Brazilian legal order, the Brazilian judge will have to directly apply the CISG in the absence of a choice of law clause to a contract for the international sale of goods where one of the parties has its place of business in Brazil and the other party has its place of business in any other Contracting State¹⁷ – or also to a contract between parties whose places of business are located in any two different Contracting States other than Brazil. With respect to the direct application of the CISG by Brazilian judges, it is worth recalling

¹⁴ See Prof. Lemes, S. M. F., "Homologação de sentença arbitral estrangeira. Lei aplicável. Convenção das Nações Unidas sobre a Compra e Venda Internacional de Mercadorias (CISG)" (2010) 24 *Revista de Arbitragem e Mediação* 196 who is of the opposite opinion: "[The] arbitral award, by applying a rule contained in an international convention not in force in Brazil, violates a constitutional precept and cannot be accepted in the internal ambit, due to affront to Brazilian public policy, as established in Art. 39, II, of Law 9,307/1996 and Art. V, 2, b, of Decree 4,311/2002 (New York Convention)" (free translation by author). Prof. Selma Lemes' position was submitted as a legal opinion by the Brazilian party in SEC n. 3035, but it did not prevail, as can be seen from the final decision of STJ on the case.

¹⁵ Given that this article does not bind judges from Non-Contracting States.

¹⁶ CISG, art. 1(1)(a). "(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States: (a) when the States are Contracting States".

¹⁷ A complete and updated list of all States Parties to the Convention is available at: <http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html>.

that

*[o]f the 15 main destinations of Brazilian exports, only the UK and Venezuela are not parties to the Convention. On the import side, of the 15 leading countries sending products to Brazil, only Taiwan, India, and Nigeria are not bound by the CISG*¹⁸.

This indicates the importance that the direct application of the Convention is likely to assume for Brazilian judges.

On its turn, Art. 1(1)(b), once the CISG is incorporated into the Brazilian legal system will strengthen the obligation of Brazilian judges to apply the Convention to 'contracts of sale of goods between parties whose places of business are in different States [...], when the rules of private international law lead to the application of the law of a Contracting State'.¹⁹ This comes to be its *indirect application*.

The emergence of the former obligation (direct application) and strengthening of latter (indirect application), however, will only operate as of the conclusion of the process of internalizing the Convention in our legal system. It is therefore relevant to examine when, in the internal sphere, the CISG can be considered definitively incorporated in the country's legal system so that it becomes mandatory for Brazilian judges, and when, in the international sphere, it will take effect in relation to Brazil.

The "script" for internalizing international treaties in the Brazilian legal system²⁰ indicates that the step of approval by the National Congress (Brazilian Federal Constitution, art. 49, I) starts with a message from the Executive and ends with the publication of a legislative decree. The next step is an international action taken by the President, which can have two forms. If Brazil signed the original text of the treaty, that action will have the form of a *ratification*, which can consist of an exchange of notes (in the case of bilateral treaties), or of a deposit of the ratification instrument (for multilateral treaties) with the international organization under whose auspices the treaty was formulated. In turn, if Brazil was not a signatory to the treaty, that presidential action will be called an *accession*, with the same effects as the ratification's. Finally, for the treaty to produce effects internally – and in the case of the CISG, to bind Brazilian judges to its own applicability criteria – the promulgation and publication step must occur, by means of which the President promulgates and sends for publication an executive decree containing the entire text of the treaty in

¹⁸ Dantas, A. and Abbud, A., "Brasil rumo à harmonização das regras aplicáveis aos contratos internacionais de compra e venda de mercadorias" (2012) 39 *BM&A Review* 1.

¹⁹ CISG, Art. 1(1)(b). "(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States: [...] (b) when the rules of private international law lead to the application of the law of a Contracting State".

²⁰ See Prof. Tiburcio, C. "Fontes do Direito Internacional: os Tratados e os Conflitos Normativos", in Tiburcio, C. (ed.), *Temas de Direito Internacional*, 2006, Renovar, Rio de Janeiro, at pp. 5-8.

Brazilian Portuguese.²¹

In the international sphere, the text of the CISG itself determines when it will enter into force in respect of a determined State. A combined reading of Arts. 99(2) and 91(3) and (4) shows that the CISG will enter into force in relation to Brazil on the first day of the month following the expiration of twelve months after the date of deposit of its instrument of accession²² with the Secretary-General of the UN. Put in concrete terms, given that Brazil deposited its instrument of accession on 4 March 2013, in the international sphere the CISG will enter into force in respect of Brazil on 1 April 2014.

In the internal sphere, as explained, international treaties take effect in Brazil as of their *promulgation* and *publication*. In the case of the CISG, this started with Message no. 636, of November 2010, by means of which the Ministry of Foreign Relations sent the Convention to Congress. The resulting Legislative Decree Bill (PDL) n. 222/2011 was approved by the House of Representatives, in March 2012 and the renumbered PDL n. 73/2012 was approved by the Senate in October 2012, causing the promulgation of Legislative Decree n. 538. All that remains, then, is that the CISG is promulgated and published by executive decree.²³

Moreover, Brazilian judges will also have to observe Art. 100, especially in the first months or even years after the internalization of the Convention or when the case before them involves a party whose place of business is located in Brazil or in another recently ratifying or acceding country. According to Art. 100, the CISG only applies to the *formation* of the contract when the proposal for concluding the contract occurs on or after the date when the Convention *enters into force*²⁴ in relation to *both*

²¹ In Carmen Tiburcio's words: "this [script] is a *praxis* since the times of the Empire, despite the absence of a specific legal provision in this sense for treaties". She continues to refer to the question in a footnote, stating that "[i]n Brazil, Art. 1 of the Introductory Law to the Civil Code is applied by analogy, which requires publication for laws to enter into force". *Ibid.*, at p. 7 (free translation by author).

²² See Vieira, I. de A., *L'applicabilité et l'impact de la Convention des Nations Unies sur les Contrats de Vente Internationale de Marchandises au Brésil*, 2010, Presses Universitaires de Strasbourg, Strasbourg, at p. 58 affirming that "due to internal mechanisms for the accession to international treaties in Brazil, this country is supposed to *accede* to the Vienna Convention. In fact, the Brazilian delegation present in the diplomatic conference did not have the special powers required for the signature of the Convention. The *ratification* would have been possible if the text had been signed by Brazil on the occasion of the diplomatic conference of April 1980 or until September 30, 1981, the deadline for its signature before the UN. [Therefore] Brazil can *accede* to the Convention, but not *ratify* it" (free translation by author).

²³ As can be concluded, the dates of the entering into force of the CISG in the international (1 April 2014) and internal (date to be established in executive decree) spheres in respect of Brazil may vary. Bearing this in mind, Prof. Carmen Tiburcio recommends that Brazilian authorities fix the date for the entering into force of the Convention in the internal sphere (in the executive decree) as the same that is already established for its entering into force in the international sphere. See Tiburcio, C., "Vigência dos tratados: atividade orquestrada ou acaso?", available at: <<http://www.conjur.com.br/2013-jul-04/vigencia-interna-internacional-tratados-atividade-orquestrada-ou-acaso>>.

²⁴ In the light of a systematic interpretation of the Convention, I believe that the expression "enters into force" used in this article refers to the entering into force in the international sphere, as referred in CISG

Contracting States referred to in subparagraph (1)(a) or the *Contracting State* referred to in subparagraph (1)(b) of Art. 1. Likewise, the CISG will only apply to the *rights and obligations* of the buyer and the seller of the contracts *concluded* on or after the date when the Convention enters into force in relation to both Contracting states referred to in Art. 1(1)(a) or the Contracting State referred to in Art. 1(1)(b).

In brief, Brazilian judges will be required to apply the CISG under its Art. 1(1)(a) or (b) as of the date the Convention is *promulgated* and *published* by means of an executive decree,²⁵ provided this is on or after 1 April 2014, *i.e.* on or after the first day of the month that ends the period of twelve months counted from the date Brazil deposited its accession instrument with the UN Secretary-General (arts. 99(2) and 91(3) and (4)). Besides this, Brazilian judges will also have to observe the provisions of Art. 100.²⁶

2.2 APPLICATION OF THE CISG RATIONE MATERIAE BY BRAZILIAN JUDGES

Concerns that Brazilian lawyers might have over the changes the imminent internalization of the CISG in Brazil will bring could be, to a large extent, attenuated by a clear understanding of the precise subject matters to which the CISG will potentially be applied. The material scope of the CISG does not cover all contracts, not even all international contracts, or all aspects of international contracts for the sale of goods.

It is also important to clarify here that there are no doubts about the absolute respect

Arts. 99(2) and 91(3) and (4), *i.e.*, on the first day of the month following the expiration of twelve months after the date of deposit of its instrument of accession with the Secretary-General of the United Nations.

²⁵ Given that, before the aforementioned promulgation and publication, the Convention may not produce effects internally (in the Brazilian legal order), and thus does not bind the Brazilian judge to observe its own applicability criteria.

²⁶ One can imagine a hypothetical case where a Brazilian judge, after the CISG enters into force in Brazil, analyzes an international contract for the sale of goods between a party with its place of business in Brazil and another with its places of business in France (where the CISG entered into force in January 1988). The offer and conclusion of this agreement occurred in November 2012 (when the CISG was in full force in France but not yet in Brazil). The contract was proposed by the French party and did not contain any stipulation on the applicable law. Therefore, to determine the applicable law, the Brazilian judge would first consult Art. 1(1)(a) of the CISG. In November 2012, however, the CISG was not in force in Brazil, so the requirement of Art. 100 that it be in force "in both Contracting States" is *not* satisfied for its application, based on Art. 1(1)(a), to the *formation* of the contract or the *rights and obligations* arising therefrom. Noting this, the Brazilian judge would then follow Brazilian PIL rules to determine the law applicable to the contract, as per Art. 1(1)(b) of the CISG. In this case, Art. 9, § 2°, of the LINDB would call for the application of French law (law of the place where the proponent resides), *i.e.* the CISG. And Art. 100, in this case, would support the application of the Convention to that contract because when the CISG comes to be applicable under Art. 1(1)(b), Art. 100 only requires that it is in force "in the Contracting State" to which the forum's PIL rules directed the applicable law.

the Convention preserves for the will of the parties.²⁷ Therefore, when there is a *clear, unequivocal and affirmative*²⁸ agreement of the parties excluding the application of the CISG to their contract, that agreement will have to be respected, even if the Convention would otherwise be applicable.²⁹

Therefore, a joint reading of Arts. 1(1), main section,³⁰ and 4, main section,³¹ leads to the conclusion that the CISG materially applies to (a) the *formation* of contracts of international sale of goods and (b) the *rights and obligations* of the seller and the buyer emerging therefrom. The Convention itself contains specific provisions both on the formation (Arts. 14-24) and the obligations of the seller and buyer (Arts. 30-65 and 71-88). So, in this essay's following sections, a tripartite analysis of the definition of *contracts for the international sale of goods* – which is in the Convention's title and is the essential object of its application under Art. 1(1) – will be undertaken.

Before proceeding, it is very important to point out that just like all the other provisions, notions, and terms employed in the CISG, the following notions, provisions, and terms of the CISG that delineate its field of material application must be interpreted within the uniform and autonomous terminology of the Convention,³² and not in light of domestic law concepts.

²⁷ Article. 6. "The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions."

²⁸ According to several decisions, vague indications by the parties regarding the applicable law do not suffice in order to exclude the application of the CISG. For example, a clause stating that the applicable law is the one of State X, when State X is party to the Convention, would not be a sufficient reason not to apply the CISG to that contract. For more details and cases addressing this topic, see UNCITRAL Digest of CISG Article 6, at pp. 33-4.

²⁹ These observations address party autonomy to *exclude* application of the CISG, a situation expressly regulated by the first part of Art. 6. The recognition of party autonomy to opting-in for the CISG as the applicable law even if outside the sphere of application determined by the Convention itself, is another question. In Iacry de Aguiar Vieira's words, citing Franco Ferrari: "Le texte conventionnel ne règle pas la question de savoir si la Convention de Vienne peut être désignée directement comme *lex contractus* ou si les parties peuvent la rendre applicable alors même qu'elle ne le serait pas, notamment dans les cas où les conditions de son application ne sont pas remplies". Vieira, I. de A., *L'applicabilité et l'impact de la Convention*, *supra* fn 22, at p. 204. Therefore, the solution for this second question would depend on what the forum's private international law says regarding recognition of parties' autonomy to choosing the applicable law in general. For a range of Brazilian scholars' opinions and Brazilian courts' decisions, under the LINDB (1942), see Araujo, N. de, *Contratos Internacionais: Autonomia da Vontade, Mercosul e Convenções Internacionais*, 2009, Renovar, Rio de Janeiro, at pp. 108-120; and Vieira, I. de A., *L'applicabilité et l'impact de la Convention*, *supra* fn 22, at pp. 142-6.

³⁰ CISG, Art. 1(1). "This Convention applies to contracts of sale of goods between parties whose places of business are in different States [...]."

³¹ CISG, Art. 4. "This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. [...]."

³² See Magnus, U. "Autonome Auslegung bedeutet, daß die Begriffe des CISG aus sich selbst heraus zu interpretieren sind. Ein Rückgriff auf das nationale Recht des Anwenders oder auf bestimmte nationale Begriffe oder Verständnisse verbietet sich. Gleiches gilt für die Qualifikation" in von Staudinger, J. (1836-1902), Magnus, U. and Martinek, M. (eds), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch, mit Einführungsgesetz und Nebengesetzen*, v. 2, 2005, Sellier-de Gruyter, Berlin, at p. 171.

2.2.1 "CONTRACTS OF SALE"

Although the Convention does not contain a direct definition in this respect, the concept can be inferred from a joint reading of Arts. 30 and 53. In simple terms, by determining the obligations of the seller, Art. 30 provides that seller is required to deliver the goods,³³ the respective documents and to transfer the property in the goods. In turn, Art. 53, in defining the buyer's obligations, provides that buyer must pay the price of the goods and take delivery of them. In a few words, under the CISG, contracts of sale of goods can be defined as *agreements by which goods are exchanged for a sum of money*.

This broad concept encompasses different kinds of sales transactions. This is the case of sales involving the carriage of goods (Arts. 31(a) and 67), of sales entered into after the seller has provided to the buyer a sample or model of the good (Art. 35(2)(c)), and of sales in accordance with specifications made by the buyer (Art. 65),³⁴ among others.

Moreover, according to Art. 3, contracts for the supply of goods to be manufactured or produced can also be considered contracts of sale, but only if the party that orders those goods *does not* supply a substantial part of the components or materials necessary to manufacture or produce the final product. According to the same provision, but from a negative standpoint, contracts will not be considered as sales of goods when the preponderant part of the seller's obligations consists in the supply of labor or other services.

Finally, as already briefly mentioned, the CISG *does not* apply to all aspects of contracts that fully meet the definition of its subject matter. Besides those more generic constraints extracted from Arts. 1(1), main section, and 4, main section, according to which the sphere for application of the Convention is limited to the *formation* of the contract and to the *rights and obligations* of the buyer and seller resulting therefrom, the Convention's text also contains a series of other provisions that impose further limits on its scope of incidence.

This is exactly the case of Art. 4 according to which the CISG *does not apply* in certain circumstances.³⁵ Subsections (a) and (b) of Article 4 state that the CISG does not apply: (a) to the *validity* of the contract or of any of its provisions, and (b) to the

³³ This is a difference between the essential elements of sale contracts in the CISG and in Brazilian law. In the CISG, delivery is an essential element to complete the sale, while in Brazilian law, delivery is part of the nature, but not of the essence, of a sale contract, which essentially only requires the seller to transfer ownership of the good (Civil Code, Art. 481).

³⁴ Schwenzer, I. and Hachen, P., "Article 1" in Schwenzer, Ingeborg (ed), *Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods*, 2010, Oxford University Press, New York, at pp. 31-2.

³⁵ Unless otherwise expressly provided in other provisions of the CISG. Article 11, *e.g.*, refers to the validity of the contract while addressing the principle of freedom from requirements as to form.

effect which the contract may have on the property in the goods sold.³⁶ Additionally, Art. 5 states that the Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person.³⁷

In sum, the CISG applies to the contract formation and the rights and obligations of the parties, governing the *existence* and, to a large extent, the *effectiveness* of contracts for the international sale of goods. The *validity*, however, – which is also a “filter” for the elements that determine the existence of a contract³⁸ – rests outside the material scope of the CISG. This matter is left to the applicable law according to the forum’s PIL rules. On this matter, the Brazilian judge must act cautiously in case of a contractual relationship governed by the CISG where Brazilian PIL leads to the application of Brazilian law to the validity of the contract. In these cases the Brazilian judge must take care to avoid a hypertrophied application of the principle of objective good faith (Art. 187, Civil Code), or of the social function of contracts (arts. 421 and 2035, sole paragraph, Civil Code), in the analysis of the validity of the contract (Art. 166, VII, Civil Code). That is to say, care must be taken so that the application of the CISG will not be distorted or even rendered impossible by an inappropriate recourse to Brazilian domestic rules on contract validity.

2.2.2 “GOODS”

The CISG also does not expressly define what “goods” are for the purposes of its application. But it is possible to obtain a definition in general terms from the opinion of specialists, according to which “goods” must be understood as *moveable and tangible things at the moment of delivery*.³⁹

³⁶ CISG, Art. 4. “This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with: (a) the validity of the contract or of any of its provisions or of any usage; (b) the effect which the contract may have on the property in the goods sold.”

³⁷ CISG, Art. 5. “This Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person.”

³⁸ See Junqueira, A., *Negócio jurídico: existência, validade e eficácia*, 2002, Saraiva, São Paulo, at p. 42, stating, on the matter of the validity of contractual transactions under the Brazilian law, that: “[s]ince [...] human will is allowed to set, on a large scale, the content of declarations [...] and since the effects are imputed to the declaration according to its content, it is evident that an attempt must be made to prevent the occurrence of declarations resulting from impaired will, or not corresponding to the exact awareness of reality, or resulting from violence imposed on the declarant, etc. The law, in establishing the requirements for transactions to enter the legal world with entirely regular formation, is determining the requirements for their validity. Validity is hence the quality that the transaction must have to enter the legal world, consisting of being in accordance with the legal rules (“being regular”). Validity is, as word’s suffix indicates, a *quality* of an existing transaction. “Valid” is an adjective that classifies the contractual transaction as having been formed according to the legal rules” (free translation by author).

³⁹ Honnold, J. O., *Uniform Law for International Sales under the 1980 United Nations Convention*, 2009, Kluwer Law International, Alphen aan den Rijn, at pp. 55-6; Mistelis, L., “Article 1” in Kröll, S., Mistellis, L., and Perales Viscasillas, P. (eds), *UN Convention on Contracts for the International Sale of*

Reported cases⁴⁰ involving the CISG demonstrate that this term includes goods with different shapes, new or used, inanimate or animate, and even not in a solid state. The objects of contracts for the sale of goods governed by the CISG have included things such as used cars⁴¹, propane⁴², a pony,⁴³ rabbit,⁴⁴ and even circus elephants.⁴⁵

On the other hand, from the general definition of “goods” it can be concluded that the Convention *does not* apply to sales of real estate or of documents that consubstantiate debts or obligations.⁴⁶ The case law on the CISG on this matter indicates that it applies neither to the sale of shares of a limited liability company⁴⁷ nor to assignment of receivables.⁴⁸

Goods, 2011, C.H. Beck – Hart – Nomos, Munich, at p. 31. In a broader point of view, Joseph Lookofsky seems to be of the opinion that “goods” only need to be moveable (but not also tangible). He states that “there is good reason to understand the CISG notion as broadly as possible, so as to cover all moveable and not just “corporeal” - things. For this and other reasons, most commentators argue that the Convention should at least apply to sales of standard computer programs (software), even though the intangible content of a tangible (compact or floppy) disk is protected by an intangible property right”. See Lookofsky, J. “The 1980 United Nations Convention on Contracts for the International Sale of Goods”, in Blanpain, R. (ed), *International Encyclopaedia of Law*, 2000, Kluwer Law International, The Hague, at p. 37. See also Schwenzer, I. and Hachem, P., “Article 1” in Schwenzer, I. (ed.), *Schlechtriem & Schwenzer, supra* fn 34, at p. 35 stating that ““goods” are first of all – at the time of delivery – moveable, tangible objects. [...] Although it is not always necessary that goods be corporeal, they must be moveable at the time of delivery. It is sufficient for them to become moveable as a result of the sale (for example, minerals or growing crops) or that, although intended by the buyer to be subsequently attached to real estate, they are nevertheless moveable at the date of delivery”.

⁴⁰ Cf. UNCITRAL digest of CISG Article 1, at p. 7.

⁴¹ Germany, *Oberlandgericht Köln*, judged on 21 May 1996 (*Used car case*), available at: <<http://cisgw3.law.pace.edu/cases/960521g1.html>>.

⁴² Austria, *Oberster Gerichtshof*, judged on 06 February 1996 (*Propane case*), available at: <<http://cisgw3.law.pace.edu/cases/960206a3.html>>.

⁴³ Denmark, *København Byret*, judged on 19 October 2007 (*Pony case*).

⁴⁴ Italy, *Tribunale Padova*, judged on 11 January 2005 (*Ostrozniak Savo v. La Faraona soc. coop. a.r.l.*), available at: <<http://cisgw3.law.pace.edu/cases/050111i3.html>>.

⁴⁵ France, *Cour d’appel de Paris*, judged on 14 January 1988 (*Société Productions S.C.A.P. v. Roberto Faggioni*), available at: <<http://www.unilex.info/case.cfm?pid=1&do=case&id=278&step=FullText>>.

⁴⁶ Cf. Honnold, J. O., *Uniform Law for International Sales, supra* fn 39, at p. 55.

⁴⁷ Hungary, Arbitration Court of Budapest Chamber of Commerce and Industry, judged on 20 December 1993 (*Shares of stock case*), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases/2/931220h1.html>. The case states that: “[t]he [seller] requested the arbitral court to ascertain whether a valid contract had been concluded between the [seller] and the [buyer] for the sale of shares in a Hungarian limited liability company. Both the country of the [seller] and that of the [buyer] were States Parties to the CISG. The arbitral court distinguished between the sale of goods and the sale of rights and held that the CISG was not applicable since the contract at issue dealt with the sale of rights and thus did not fall within the ambit of the CISG (article 1(1)(a) CISG)”.

⁴⁸ Germany, *Oberlandgericht Hamm*, judged on 08 February 1995 (*Socks case*), available at: <http://cisgw3.law.pace.edu/cases/950208g3.html>. The case states that: “[t]he German [buyer] ordered several times large lots of socks from an Italian manufacturer [seller]. Four contracts were concluded in the Italian language, the [buyer] being represented by its Italian agent. The [seller] delivered the socks

Article 2 further determines that the CISG *does not* apply to sales (a) of goods bought for personal, family or household use,⁴⁹ (b) by auction; (c) on judicial execution; (d) of stocks, securities, negotiable instruments or money; (e) of ships, vessels, hovercraft or aircraft; and (f) of electricity.

Beyond more intricate interpretive questions that can be raised about these matters expressly excluded from the application of the CISG,⁵⁰ it can be concluded that, based on the CISG itself, when one of them is involved, the CISG will not apply and the judge will have to rely on complementary domestic law, applicable according to the forum's PIL rules.

2.2.3 "INTERNATIONAL"

For the CISG to apply to a given contract, whether based on Art. 1(1)(a) or (b), it is also necessary that the parties' *places of business* are located in different States. This is where the "internationality element" lies, or, in other words, this is the territorial

and sent four invoices in Italian to the [buyer]. Before payment, the [seller] assigned its payment claims to [seller's assignee], an Italian bank, and gave notice to the [buyer]. The assignment notice was in French and English. Despite the notice, the [buyer] who understood only little English and no French paid to the [seller], against whom bankruptcy proceedings were instituted shortly afterwards. The [seller's assignee] claimed (second) payment from the [buyer]. [...] The court further found that the [seller's assignee] was entitled to payment from the [buyer] according to article 53 CISG since it had effectively acquired the relevant claims by assignment. *Noting that assignment is not regulated by the CISG, and that, therefore, its preconditions and effects must be decided according to the rules of private international law, the court, applying German private international law, found that Italian law was applicable*".

⁴⁹ Unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use. About Art. 2(a) see Magnus, U., "Das UN-Kaufrecht – bereit für die nächste Dekade" (2004) 4 *Zeitschrift für Europäisches Privatrecht* 886-7, stating: "Zweck der art. 2 lit. a ist es, bei Verbraucherkäufen den Schutz des Käufers/Verbrauchers nicht zu verkürzen, den vielfach besondere nationale Bestimmungen anordnen. [...] Wenn sich der Verbraucher dagegen so geriert, dass der Verkäufer den Kauf eine berufliche oder geschäftliche Transaktion halten musste, dann ist in der Sicht der Konvention der besondere Schutz des Verbrauchers nicht mehr gerechtfertigt. Der Verbraucher ist dann im Grundsatz wie ein professioneller Kaufmann zu behandeln. Ihn trifft vor allem die Rügeobliegenheit der art. 38/39 CISG. Entscheidend ist damit der erkennbare Verwendungszweck der Ware. [...] In der internationalen Gerichtspraxis wirft die Anwendung der art. 2 lit. a CISG in der überwiegenden Zahl der einschlägigen Fällen keine Problem auf".

⁵⁰ See Perales Viscasillas, P., "Article 7" in Kröll, S., Mistellis, L., and Viscasillas Perales, P. (eds), *UN Convention on Contracts for the International Sale of Goods*, supra 39, at pp. 133-4, stating that "[t]hese express exclusions raise several issues of interpretation in certain instances. First, some of the matters excluded are subject to exceptions that open the door for their inclusion within the CISG, such as consumer transactions under Art. 2(a), or the exclusions listed in Art. 4 (a),(b). Second, some of these exclusions are open to divergent interpretations due to the use of uncertain terms, such as the meaning of "preponderant part" in Art. 3(2). [...] [S]cholars and case law open the door for different interpretations that may result in the application of the Convention. [...] For example, although the reason for excluding the sales of ships, vessels, hovercraft or aircraft from the Convention is clear (Art. 2(e), registration requirement in domestic law means that they are treated as immovables), the interpretation of scholars and case law on the specific words therein may vary from total exclusion to partial inclusion depending on the weight, size, or navigability of the object".

scope of application of the Convention.

According to Francisco Pignatta, the choice of the CISG's drafters to associate the internationality to the notion of parties' *places of business* in different States was not arbitrary. Among the many other possible criteria available – such as the nationality of the parties, the fact the parties proposed or concluded the contract from different States, the fact the goods would be delivered in a territory different than the one of their origin, among others – the drafters chose to associate internationality with the notion of place of business based on a practical reason. In his words, "[i]n the majority of international commercial transactions, the place of business is what determines the real connection with a determined legal system. In the ambit of trade, it is the criterion that is best adapted to reality".⁵¹

On this matter, Art. 1(3) makes it clear that in determining the internationality that leads to the application of the CISG, 'neither the *nationality* of the parties nor the civil or commercial character of the parties of the contract shall be taken into consideration'.⁵² It thus remains to analyse what is meant by parties' *places of business*.

Synthesising notions developed bit-by-bit in the body of decisions on the CISG,⁵³ and based on the need to elaborate that concept autonomously – since the CISG does not expressly do so – Pascal Hachem and Ingeborg Schwenzer so formulated their opinion regarding the concept of place of business: 'In line with the general view, a "place of business" exists, if a party *uses it openly* to participate in trade and if it displays a certain degree of *duration, stability, and independence*'.⁵⁴

According to the authors, a mere branch office or subsidiary company, if they have those characteristics, can be considered a place of business. Hence, there is no need for the place of business to be the main center of a party's business activities;⁵⁵ nor does a place of business need to have an *independent* legal personality.⁵⁶ Therefore, in line with the words of Art. 10(1), if the subsidiary is more closely related to the

⁵¹ Pignatta, F., "Comentários à Convenção de Viena de 1980 – Artigo 1" (2011), available at: <www.cisg-brasil.net>, at p. 4. Further on this point, the author also states, based on an auxiliary interpretation of Art. 6(4) of the UN Convention on the Use of Electronic Communications in International Contracts, of 23 November 2005, that "[f]or this reason also, when the contract is concluded by electronic means, the location of the server cannot by itself determine the place of business. It is necessary to have a factor that determines the real (as opposed to the virtual) parties' places of business". *Ibid.* (free translation by author).

⁵² CISG, Art. 1(3). "Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention."

⁵³ See UNCITRAL Digest of CISG Art. 1, at p. 4.

⁵⁴ In Schwenzer, I. (ed.), *Schlechtriem & Schwenzer Commentary*, supra fn 34, at p. 37 (emphasis added).

⁵⁵ *Ibid.*, at pp. 37-8.

⁵⁶ *Ibid.*, at p. 38.

contract and its performance, then it will be the place of business that must be considered, not the company's headquarters. In the same line of reasoning, it is possible for the CISG to apply automatically to a contract of sale of goods between a parent company and its subsidiary⁵⁷ or between subsidiaries of the same parent company, as long as they are located in different Contracting States.

If there is any doubt about what can be considered the place of business in cases where a party has more than one place of business, Art. 10(1) provides that the determination must rest on that with the 'closest relationship to the contract and its performance.'⁵⁸ The same provision also clarifies that this relationship must be determined in view of the circumstances known to or contemplated by the parties at any moment before or at the conclusion of the contract.

In its turn, Art. 10(2) brings a subsidiary orientation, to cover exceptional cases where one party does not have a place of business. This exception will not render the Convention inapplicable. Instead, it will require use of the residual criterion of "habitual residence" to determine the territorial scope of application of the Convention.⁵⁹

Finally, Art. 1(2) also states, for the CISG to be applicable, that the international nature of the contract must be *apparent* to both parties⁶⁰. In other words, the CISG may only be applied, under Art. 1(1)(a) or (b), when the fact that the parties have places of business⁶¹ in different States *appears* from the contract, the dealings between the parties, or the information disclosed by them before or at the moment of concluding the contract.

3 COMPETENCE TO JUDGE CASES IN WHICH THE CISG IS POTENTIALLY APPLICABLE

Although this question still deserves a more detailed analysis by Brazilian lawyers, it is reasonable to affirm that Brazilian *state courts* (and not the federal ones) will be the competent to judge cases where the application of the CISG is cogitated.

⁵⁷ *Ibid.*

⁵⁸ CISG, Art. 10(1). "For the purposes of this Convention: (a) if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract."

⁵⁹ CISG, Art. 10(2). "For the purposes of this Convention: [...] (b) if a party does not have a place of business, reference is to be made to his habitual residence." Besides all that, when faced with the possibility to apply the CISG, judges must also bear in mind Arts. 90, 92, 93, and 94, which also prescribe certain limitations to the application of the Convention even in cases where all other requirements for its application have been met.

⁶⁰ See Hachem, P. and Schwenzer, I., "Article 1" in Schwenzer, I. (ed), *Schlechtriem & Schwenzer Commentary*, *supra* fn 34, at pp. 38-9, 43-6.

⁶¹ Or habitual residences, if the case falls under Art. 10(b). *Ibid.*, at p. 44.

Granted, art. 109, III, of the Brazilian Federal Constitution attributes competence to the federal courts to judge cases based on treaties or contracts between the Brazilian State and foreign States or international organizations.⁶² But, as argued by Carmen Tiburcio, the determination of federal courts' jurisdiction by this constitutional provision depends not only on "higher interests of the Nation"⁶³ to be justifiable, but also, and especially, on the preponderance of the international effects of the underlying treaty.⁶⁴ In analyzing the question of which international treaties should fall under the jurisdiction of the federal courts according to Art. 109, III, of the Brazilian Federal Constitution, Carmen Tiburcio stresses the importance and practical utility of distinguishing between so-called law-treaties (those aimed at creating legal rules, *i.e.* at establishing objective law⁶⁵) and contract-treaties (those that have greater relevance in the international arena, consubstantiating dealings between States⁶⁶). And based on this distinction, the author concludes that 'the federal courts are only competent in the latter case'⁶⁷, *i.e.*, to judge cases based on contract-treaties.

As regards the CISG, it has a special character that sets it apart from typical contract-treaties. It does have rules directly aimed at the conduct of the Contracting States, essentially expressed in Part IV (Final Provisions, with rules on the deposit of instruments, signing, ratification, reservations, denunciation, etc.). But its Parts I, II and III (corresponding to about 80% of the Convention) basically dictate rules whose subjects are private parties to international sale of goods contracts, not States. From this standpoint, it much more closely fits under the notion of a law-treaty than that of a contract-treaty.⁶⁸

⁶² Brazilian Federal Constitution, Art. 109, III. "The federal judges have the competence to trial: [...] III – cases based on a treaty or a contract between the Union and a foreign State or international organization" (free translation by author).

⁶³ Tiburcio, C., "A Competência da Justiça Federal em matéria de Direito Internacional – notas sobre o art. 109, III, da Constituição Federal" (2006) 15 *Revista de Direito do Estado* 261. In her words: "[T]he competence of the federal courts will only be justified when the international character of the commitment overrides its internal effects".

⁶⁴ In Marcelo Caetano's words: "the tendency is to consider that federal judges have jurisdiction over questions [...] that result from international treaties, conventions or contracts *that involve higher interests of the Nation* (such as political crimes or crimes against the organization of labour or resulting from strikes). [...] In all these cases what is at stake is the interest of the Brazilian State, the Brazilian Nation considered in its unity" Caetano, M., *Direito Constitucional*, 1987, v. 2, Forense, Rio de Janeiro, at p. 431 (emphasis added) (free translation by author).

⁶⁵ Tiburcio, C., "A Competência da Justiça Federal em matéria de Direito Internacional – notas sobre o art. 109, III, da Constituição Federal", *supra* fn 63, at p. 261.

⁶⁶ *Ibid.*, at p. 260.

⁶⁷ *Ibid.*, at p. 268.

⁶⁸ See for further reference Lukowicz, D., *Divergenz in der Rechtsprechung zum CISG: auf dem Weg zu einer einheitlichen Auslegung und Anwendung?*, 2001, Lang, Frankfurt am Main, at p. 13, stating: "[a]lledings *handelt es sich beim CISG – im Gegensatz zu seinen Vorgängern – um ein rechtsetzendes Übereinkommen ("law making treaty")*".

Put differently, the overwhelming majority of cases under the CISG before Brazilian courts is likely to involve the formation of contracts, the rights and obligations resulting therefrom, or whether the CISG should even apply. In all these hypotheses, the internal effects of the Convention are clearly preponderant. And, there does not seem to be any practical reasons⁶⁹ or a higher interest of the Nation by which these cases, just because they involve an international convention, should be under the federal courts' competence. Therefore, it seems very reasonable to conclude that Brazilian *state courts* should have original jurisdiction over cases in which the CISG is potentially applicable.

4 CONTROL OVER THE ADEQUATE APPLICATION OF THE CISG BY BRAZILIAN JUDGES OR THE POSSIBLE APPEAL AGAINST INADEQUATE INTERPRETATION OR APPLICATION OF THE CISG BY BRAZILIAN JUDGES

As Camila Baasch Andersen observed, 'procedurally, courts will consider the interpretations of uniform law from a foreign source to be foreign law'.⁷⁰ And this, according to her, will last until national courts acknowledge uniform law as a separate discipline, and recognize that its application should thus be accompanied by the duty to consider precedents from other jurisdictions that apply the same uniform law.⁷¹

Therefore, although Brazilian higher courts have not yet developed a consolidated position on the suitable procedural remedies to appeal decisions where uniform law is not applied uniformly⁷² – i.e., with no consideration to its international origin and

⁶⁹ On the impracticality of taking all questions involving any international treaty to our federal courts, Carmen Tiburcio can be cited once again: "[c]urrently, nearly any question can be based on an international treaty [...]. To admit that by mere invocation [of an international treaty], the jurisdiction passes to the federal courts would make their work impossible, transforming the federal judiciary in practice into a residual forum – a role today exercised by the state courts". *Ibid.*, at pp. 261-2 (free translation by author).

⁷⁰ The full citation is: "[P]rocedurally, courts will consider the interpretations of uniform law from a foreign source to be foreign law [...]. Until uniform law is acknowledged universally in courts as a separate discipline, and this idea is embraced by the application of a duty to look to uniform precedents, this difference will solely be academic. The theory of the need to use CISG precedents is one thing. What the courts, tribunals and counsel actually choose to do is another issue entirely". Andersen, C. B., *Uniform Application of the International Sales Law: Understanding Uniformity, the Global Jurisconsultorium and Examination and Notification Provisions of the CISG*, 2007, Kluwer Law International, Alphen aan den Rijn, at p. 57.

⁷¹ *Ibid.*

⁷² On the silence of Brazilian courts (and the possible causes for that) regarding the adequate interpretation of uniform law, Renata Fialho states that: In a case law search by keywords at the sites of the STF [Federal Supreme Court] and STJ [Superior Tribunal of Justice], I did not find any decision that was methodologically relevant for the purposes of this thesis, referring to uniformity as an objective or to autonomy as a method for interpretation of international treaties. [...] There must be an explanation for this. One can imagine that because such conventions are still relatively recent in the Brazilian legal order, there have not yet been many cases in which their application has been necessary. This argument, however, is not convincing. A more likely reason is the gap in the [Brazilian] legal writings on international conventions on uniform law and its autonomous methodology. Indeed, judges cannot be

character – there has been a pronouncement on the applicable appeal against the misapplication of foreign law. It is likely that the Brazilian courts will be at least inclined to follow the same line of reasoning regarding the CISG, which like foreign law is not of a purely domestic genesis.

In Extraordinary Appeal⁷³ n. 93.131/MG, judged in 1981, the *Supremo Tribunal Federal* (Federal Supreme Court – STF) expressly recognized that foreign law applied by a Brazilian judge, by force of our private international law, is equated with Brazilian federal legislation for the effect of the admissibility of Extraordinary Appeals.⁷⁴ In this precedent, the justices of the Second Panel unanimously followed the opinion of the reporting justice, Minister Moreira Alves, who, citing Tito Fulgêncio, held that:

*when Brazilian law on conflict of laws refers to a foreign law, it is not enough (for it to be respected) that it is applied in any manner. It is necessary that it is applied precisely. When this is violated, there can be no bar on an appeal to the highest court in the land.*⁷⁵

As explained by Jacob Dolinger,

*[a]ccording to the Brazilian Constitution in force at the time of the case – the Constitution of 1969 – it was reserved for the Supreme Court to decide, through an extraordinary appeal, decisions [that] [...] gave to federal law an interpretation diverging from that given by another court or by the Supreme Court itself.*⁷⁶

expected to adopt a vanguard line in their decisions when part of the foundation of their decisions and their own convictions, inspired by studies in specialized schools and courses, do not have a theoretical correspondence" Fialho, R., *A interpretação pelo juiz nacional de convenções internacionais de direito uniforme*, 2009, Doctoral Thesis presented to the Law School of the Universidade de São Paulo, supervised by Prof. Dr. Paulo Borba Casella, São Paulo, at pp. 157-9 (free translation by author).

⁷³ "Extraordinary appeal" (*recurso extraordinário*) is the name of the most common appeal to the Brazilian Federal Supreme Court.

⁷⁴ STF, 2nd Panel, Extraordinary Appeal n. 93.131-7/MG, Reporting Justice Minister Moreira Alves, judged on 17 December 1981, unanimous decision, stating in headnote: "Equating of foreign law, applied in Brazil, to Brazilian federal legislation, for the effect of admissibility of extraordinary appeals. Giving in payment. legal subrogation. Portuguese Civil Code (arts. 592, 593 and 837). No bar to the applicability of article 9 of the Introductory Law to the Civil Code. Divergent jurisprudence not demonstrated. A foreign law, applied by force of a provision of Brazilian private international law (in the present case, article 9 of the Introductory Law to the Civil code), is legally equated as Brazilian federal legislation for the effect of admissibility of extraordinary appeals. No occurrence, in the case, of giving in payment (*datio in solutum*) and legal subrogation. Denial of application of articles 837, 592 and 593 of the Portuguese Civil Code. Extraordinary appeal admitted for consideration and granted" (free translation by author).

⁷⁵ *Ibid.*, at p. 49.

⁷⁶ Dolinger, J., "Aplicação, Prova e Interpretação do Direito Estrangeiro: um Estudo Comparado de Direito Internacional Privado" (1996) 5 *Revista de Direito Renovar* 45.

Currently, pursuant to Art. 105, III, c, of the 1988 Brazilian Federal Constitution, the STJ (as opposed to the STF) has jurisdiction to judge, through the mechanism of the *special appeal* (as opposed to the *extraordinary appeal*) cases judged by regional federal appellate courts or state appellate courts when the appealed decision *gives to a federal law an interpretation different from that attributed by another court*.⁷⁷ By combining that Supreme Court decision with the current constitutional order, the proper appeal when a decision applies foreign law in light of sources other than those of that specific law is the *special appeal* to the STJ.

Accordingly, it is reasonable to assume that the *special appeal* to the STJ, as set forth in Art. 105, main section, of the Brazilian Federal Constitution, will be the proper route to appeal decisions that do not adequately interpret or apply the CISG. The reason is that it is plausible that law from non-domestic genesis (covering both foreign law and uniform law) will be equated with federal law for purposes of admitting an appeal to obtain uniform application (currently, special appeal).

5 CONCLUSION: SOME OTHER PRACTICAL EFFECTS OF THE CISG INTERNALIZATION IN THE BRAZILIAN LEGAL SYSTEM

Always within the temporal and material scopes of its application, the first and most evident effect of the definitive incorporation of CISG, as briefly mentioned, is the fact it will become part of the Brazilian material law. Therefore, due to its specificity in respect of contracts for the international sale of goods, the rules contained in the Convention will overlap the rules of Brazilian purely domestic law on this matter.

In other words, before the incorporation of the CISG, when private international law rules – either Brazilian or of another jurisdiction – indicated Brazilian law as the applicable, this reference was to be understood as appointing to our domestic law, especially the rules on purchase and sale agreements contained in the Civil Code (arts. 481-532). After the CISG is fully internalised, by contrast, this same determination will not lead to our law of domestic origin, but instead to the rules of the CISG. This is how the typical effect of uniform law will be materialized, which consists, in the words of Jean-Paul Niboyet, ‘in substituting the substantive law of the State Parties for a common substantive, uniform legislation’.⁷⁸

⁷⁷ Brazilian Federal Constitution, Art. 105, III, c. “The Superior Court of Justice has the competence to: [...] III – judge, on special appeal, the cases decided, in a sole or last instance, by the Federal Regional Courts or by the courts of the states, of the Federal District and the Territories, when the decision appealed: [...] (c) confers upon a federal law an interpretation different from that which has been conferred upon it by another court.” (free translation by author).

⁷⁸ The original quote is: “Le principe de l’uniformité en matière de traités est trop connu pour que nous ayons besoin d’insister sur sa contexture. Il consiste à remplacer le droit matériel des États signataires par une législation matérielle commune, bref uniforme”. Niboyet, J.-P., “La notion de réciprocité dans les traités diplomatiques de droit international privé” (1935) 52 Recueil des Cours 316). *I.e.*, “The uniformity principle as respects [international] treaties is too well known to require that we insist in its

Another effect of this internalisation, triggered by the work of Brazilian judges and legal scholars, will be the *continuing* development or modernization of purely domestic private law principles, in light of the inspirations brought by the CISG. Continuing, as stressed, because this effect has already been noticeable long before the impending internalization of the CISG, notably in a series of decisions that, in analyzing purely domestic disputes, have referred to provisions and notions of the Convention, such as the duty to mitigate the loss (art. 77)⁷⁹, the idea of fundamental breach of contract (art. 25)⁸⁰ or the anticipatory breach of contract (art. 72)⁸¹, to better understand or to fill gaps in Brazilian private law. Besides our judges, Brazilian legal scholars have also been finding inspiration in the CISG. Examples of this are Statements⁸² n. 169⁸³ (inspired by Art. 77 of the CISG) and n. 409⁸⁴ (inspired by Art. 9 of the CISG), approved at the Civil Law Meetings held by the Federal Justice Council,

contexture. It consists in substituting the substantive law of the State Parties for a common substantive, uniform legislation” (free translation by author).

⁷⁹ See STJ, 3rd Panel, Special Appeal n. 758.518/PR, Reporting Judge Vasco Della Giustina, judged on 17 June 2010. In this decision, Judge Vasco Della Giustina affirmed that a creditor who does not act diligently as respects the debtor’s non-performance in fact violates his own duty to mitigate the loss. He added, citing Véra Jacob de Fradera, that the duty to mitigate the loss as prescribed in the CISG can also be deducted from the 2002 Brazilian Civil Code, art. 422, which dictates that the parties must conclude as well as perform contracts by observing the (objective) good faith principle. Based on this, the judge denied to the creditor the payment of damages referring to the time (7 years) while he remained silent as respected the fact that the debtor was in possession of the debtor’s property but failing to pay to him the installments of an agreement for the sale of that property.

⁸⁰ See STJ, 4th Panel, Special Appeal n. 72.739/MG, Reporting Judge Minister Ruy Rosado, judged on 1 March 2001. In this decision, Judge Rosado traced a parallel between the concepts of fundamental breach of contract (art. 25, CISG) and substantial performance (2002 Brazilian Civil Code). He states that the extinction of the contract by default of the debtor is only justified when the arrears causes the creditor harm of such extent that he no longer is interested in receiving the consideration owed, because the economics of the contract have been affected. Based on this, the judge expressly held that using the partial default of a reduced importance in the economics of the contract to dissolve the transaction violates the principle of substantial performance, admitted in the Brazilian law and enshrined in the CISG.

⁸¹ See São Paulo State Court of Appeal, 4th Private Law Chamber, Appeal n. 379.981-4/0, Reporting Judge Ênio Zuliani, judged on 24 April 2008. In this decision, Judge Ênio Zuliani mentions article 72 of the CISG in transcribing an excerpt from an article written by Pablo Malheiros da Cunha Frota on *exceptio non adimpleti contractus*. That passage explains that the mentioned *exceptio* also covers the hypothesis of anticipatory breach of the contract, as set forth in the referred CISG article, by means of which one party may declare the contract avoided before the date set for performance, if it becomes evident that the other party will commit a fundamental breach of the contract.

⁸² These Statements (*Enunciados*), once approved in the Civil Law Meetings held by the Federal Justice Council, serve as non-binding guidelines for courts, as statements of a consolidated legal position or opinion.

⁸³ *Ibid.* stating that “[t]he principle of objective good faith shall cause the creditor to avoid the aggravation of his own loss” (free translation by author).

⁸⁴ *Ibid.* stating that “[j]uridical transactions shall be interpreted in conformity not only with good faith and the usages of the place in which they are concluded but also with any practices habitually established between the parties” (free translation by author).

both proposed by Prof. Véra Fradera.⁸⁵

In the final analysis, as discussed through this essay, an important practical effect that the incorporation of the CISG will bring is the fact that, from now on, Brazilian judges will be bound to apply the CISG according to the legal hypothesis and criteria the Convention establishes for its own application. Therefore, it is of the utmost importance that not only our judges but also potential parties to cases governed by the CISG to be placed before our judges understand very precisely the scope of its application.

⁸⁵ For further details, see Fradera, V., "A contribuição da Cisg (Convenção de Viena sobre os Contratos de Compra e Venda Internacional) para a atualização e flexibilização da noção de contrato no direito brasileiro" (2012) 34 *Revista de Arbitragem e Mediação* 47-51; see also Vieira, I. de A., "A adesão do Brasil à Convenção de Viena de 1980: harmonização ou modernização do direito interno de compra e venda?" (2012) 33 *Revista de Arbitragem e Mediação* 20-2.