

THE LAW APPLICABLE TO INTERNATIONAL TRADE TRANSACTIONS WITH  
BRAZILIAN PARTIES: A COMPARATIVE STUDY OF THE BRAZILIAN LAW, THE  
CISG, AND THE AMERICAN LAW ABOUT CONTRACT FORMATION

by

Anelize Slomp Aguiar

A thesis submitted in conformity with the requirements  
for the degree of Master of Laws  
Graduate Department of Law  
University of Toronto

© Copyright by Anelize Slomp Aguiar 2011



Library and Archives  
Canada

Published Heritage  
Branch

395 Wellington Street  
Ottawa ON K1A 0N4  
Canada

Bibliothèque et  
Archives Canada

Direction du  
Patrimoine de l'édition

395, rue Wellington  
Ottawa ON K1A 0N4  
Canada

Your file Votre référence  
ISBN: 978-0-494-76198-4

Our file Notre référence  
ISBN: 978-0-494-76198-4

#### NOTICE:

The author has granted a non-exclusive license allowing Library and Archives Canada to reproduce, publish, archive, preserve, conserve, communicate to the public by telecommunication or on the Internet, loan, distribute and sell theses worldwide, for commercial or non-commercial purposes, in microform, paper, electronic and/or any other formats.

The author retains copyright ownership and moral rights in this thesis. Neither the thesis nor substantial extracts from it may be printed or otherwise reproduced without the author's permission.

---

In compliance with the Canadian Privacy Act some supporting forms may have been removed from this thesis.

While these forms may be included in the document page count, their removal does not represent any loss of content from the thesis.

#### AVIS:

L'auteur a accordé une licence non exclusive permettant à la Bibliothèque et Archives Canada de reproduire, publier, archiver, sauvegarder, conserver, transmettre au public par télécommunication ou par l'Internet, prêter, distribuer et vendre des thèses partout dans le monde, à des fins commerciales ou autres, sur support microforme, papier, électronique et/ou autres formats.

L'auteur conserve la propriété du droit d'auteur et des droits moraux qui protège cette thèse. Ni la thèse ni des extraits substantiels de celle-ci ne doivent être imprimés ou autrement reproduits sans son autorisation.

---

Conformément à la loi canadienne sur la protection de la vie privée, quelques formulaires secondaires ont été enlevés de cette thèse.

Bien que ces formulaires aient inclus dans la pagination, il n'y aura aucun contenu manquant.

# Canada

المنارة للاستشارات

“The Law Applicable to International Trade Transactions With Brazilian Parties: A Comparative Study of the Brazilian Law, the CISG, and the American Law About Contract Formation”

Anelize Slomp Aguiar  
Master of Laws, 2011  
Graduate Department of Law  
University of Toronto

**ABSTRACT**

Despite Brazil’s importance in the world economy and its increasing participation in foreign trade, there is considerable legal uncertainty regarding the law applicable to international commercial contracts involving Brazilian parties because Brazilian judicial courts do not respect parties’ freedom to choose the governing law, thus this determination is only made by a judge, according to Private International Law rules of the forum. Applying these rules, this study demonstrates that there are at least three potential legal regimes: the Brazilian law, the United Nations Convention on Contracts for the International Sale of Goods, and a foreign domestic sales law. Making use of the American law as the foreign law, a comparative analysis of these three legal regimes regarding contract formation demonstrates that their approaches are very distinct, and this confirms the legal uncertainty. In order to reduce this problem, three different strategies are proposed to the Brazilian government.

## **ACKNOWLEDGMENTS**

First of all, I would like to thank my professors, particularly Elizabeth Accioly Rodrigues da Costa from Curitiba Law School and Lusiada University of Lisbon, who first encouraged me in exploring legal comparison research and has always supported me academically, Liam Murphy from New York University, whose classes stimulated my thinking about the differences and similarities between American and Brazilian Contract law, Florencia Marotta-Wurgler from New York University, whose teachings provoked my thought about the CISG and the UCC and how they differ from the Brazilian sales law, David Dyzenhaus from University of Toronto, who taught me to think critically about the law, and Karen Knop from University of Toronto, who gently reviewed Section 1 of my thesis and provided very constructive comments. Most thanks should go, however, to my supervisor Catherine Valcke, who taught me comparative law from theory to practice and carefully guided me throughout this thesis with her kindness, patience and knowledge while allowing me the room to work in my own way. I attribute the level of my thesis to her encouragement and advice. One simply could not wish for a better or friendlier supervisor.

I am particularly grateful to my friend Ana Maria Osses for the care with which she read my first draft and for her helpful comments. In addition, I would like to acknowledge the debt I owe to my friends Priscila Zeni de Sa, Luciano Anghinoni, and Juliana Gomes Vingra da Silva for assisting me with scholarly writings on Brazilian law.

Surely, I could not have accomplished this project without Gerson's and Vitoria's concessions in family time and their spiritual support. I dedicate this thesis to both of them.

## TABLE OF CONTENTS

<b>ABSTRACT</b> .....	ii
<b>ACKNOWLEDGMENTS</b> .....	iii
<b>INTRODUCTION</b> .....	1
<b>1. LEGAL REGIMES POTENTIALLY APPLICABLE TO INTERNATIONAL TRADE TRANSACTIONS INVOLVING BRAZILIAN PARTIES</b> .....	4
1.1. PARTY AUTONOMY .....	4
1.1.1. Choice-of-Law Freedom .....	4
1.1.2. Choice-of-Forum Freedom .....	7
1.2. PRIVATE INTERNATIONAL LAW RULES OF THE FORUM .....	10
1.2.1. PIL Rules and the Determination of the Applicable Law .....	10
1.2.2. CISG as the Governing Law .....	12
1.2.3. Contracting State Domestic Law as the Governing Law .....	13
<b>2. COMPARATIVE STUDY OF THE BRAZILIAN LAW, THE CISG, AND THE AMERICAN LAW ON FORMATION OF INTERNATIONAL CONTRACTS FOR THE SALE OF GOODS</b> .....	17
2.1. CONTRACT FORMATION UNDER THE BRAZILIAN LAW .....	17
2.1.1. Legal Tradition and Sources of Law .....	17
2.1.2. Proposal .....	21
2.1.3. Acceptance .....	25
2.1.4. Counter-Offer .....	27
2.1.5. Moment of Contract Formation .....	28
2.1.6. Place of Contract Formation .....	30
2.1.7. Formal Requirements .....	31
2.2. CONTRACT FORMATION UNDER THE CISG .....	32
2.2.1. Legal Tradition and Sources of Law .....	32
2.2.2. Proposal .....	35
2.2.3. Acceptance .....	38
2.2.4. Counter-Offer .....	40
2.2.5. Moment of Contract Formation .....	41
2.2.6. Place of Contract Formation .....	42
2.2.7. Formal Requirements .....	42
2.3. CONTRACT FORMATION UNDER THE AMERICAN LAW .....	45
2.3.1. Legal Tradition and Sources of Law .....	45
2.3.2. Sources of Obligations .....	50
2.3.3. Proposal .....	52
2.3.4. Acceptance .....	56
2.3.5. Counter-Offer .....	59
2.3.6. Moment of Contract Formation .....	61
2.3.7. Place of Contract Formation .....	62
2.3.8. Formal Requirements .....	62
<b>CONCLUSION</b> .....	66
<b>REFERENCES</b> .....	72

## TABLE OF CHARTS

Chart 1 – Application of the Principle of Party Autonomy when Brazilian Parties are Involved .....	10
Chart 2 – Determination of the Applicable Law According to PIL rules of the Forum State .....	11
Chart 3 – CISG Application According to PIL Rules of the Forum State .....	13
Chart 4 – CISG Application under Article 95 Reservation .....	16

## INTRODUCTION

In 2009, Brazil became the world's eighth-largest economy with a nominal Gross Domestic Product (GDP) of US\$ 1.574 trillion<sup>1</sup>. It is the largest economy in Latin America and the second largest in the western hemisphere. As a result of its recent advances in economic development, Brazil is classified by financial analysts as a BRIC country<sup>2</sup>. In addition, Brazil is an active member of several economic organizations, including the World Trade Organization (WTO)<sup>3</sup> and the Southern Common Market (Mercosur)<sup>4</sup>. In 2009, Brazil exported US\$ 153 billion and imported US\$ 127,6 billion, totalling US\$ 281 billion in foreign trade flow<sup>5</sup>. It has been predicted that this volume is likely to grow since Brazil is one of the fastest-growing economies in the world. Brazil's main trading partners include the US, China, Argentina, Netherlands, Germany, and Japan.

Taking into account Brazil's importance in the world economy and its increasing participation in foreign trade, it is relevant for Brazilian nationals trading internationally, as well as for their foreign counterparts, to know in advance which legal regimes their international commercial contracts could be subject to. Certainty with respect to the applicable law reduces transaction costs and allows parties to better manage their risks. Unfortunately, Brazil is among the few countries that do not fully respect the party's right to choose the law applicable to their transactions. Therefore, Brazilian parties and their counterparts may not have an *ex ante* choice of law, particularly if Brazil is the Forum State.

In this event, the determination of the governing law would only be made in a potential lawsuit, by a judge, according to Private International Law (PIL) rules of the forum, adding

---

<sup>1</sup> According to the International Monetary Fund, the World Bank and the CIA World Factbook.

<sup>2</sup> BRIC is an acronym that refers to Brazil, Russia, India, and China. According to Goldman Sachs analysts, by 2050 their combined economies would surpass the combined economies of what are currently the richest countries in the world. For more information, see <http://www2.goldmansachs.com/ideas/brics/book/99-dreaming.pdf>

<sup>3</sup> The WTO is an organization that aims to international trade liberalization. It was created by the Marrakech Agreement in 1995, replacing the General Agreement on Tariffs and Trade (GATT), which commenced in 1948. For more information, see [www.wto.org](http://www.wto.org)

<sup>4</sup> Mercosur is a regional trade agreement between Argentina, Brazil, Paraguay and Uruguay founded in 1991. Venezuela signed a membership agreement in 2006, but it is not yet a full member. Bolivia, Chile, Colombia, Ecuador and Peru have associate member status. For more information, see [www.mercosur.org.uy](http://www.mercosur.org.uy)

<sup>5</sup> BRAZIL, Minister of Development, Industry and Foreign Trade. "Brazilian Trade Balance Consolidated Data 2009", available at [http://www.desenvolvimento.gov.br/arquivos/dwnl\\_1275505327.pdf](http://www.desenvolvimento.gov.br/arquivos/dwnl_1275505327.pdf)

considerable uncertainty to the deal. PIL rules concerning contracts usually point to the law of the seller's or the buyer's place of business; thus, there are at least two domestic laws that could potentially be applied to a contractual dispute. In theory, if one party is from Brazil, Brazilian law would be one of these regimes, and if the other party is a foreigner, her country's law would be the other. However, if the foreign party is from a country that has ratified the United Nations Convention on Contracts for the International Sale of Goods (CISG)<sup>6</sup>, this convention would be a third potentially applicable regime. Taking into account the fact that, to date, the CISG has been ratified<sup>7</sup> by 76 countries<sup>8</sup> including Brazil's main trading partners, there is a reasonable chance that this would be the case.

However, with respect to international contracts for the sale of goods perfected between Brazilian parties and parties from Brazil's two most important trading partners, the US and China, the CISG may be replaced by the American or the Chinese domestic sales laws accordingly. Despite the fact that these countries have ratified the CISG, both of them made a reservation<sup>9</sup> preventing CISG applicability when one or both parties of the contract are not from Member States<sup>10</sup>. As a result, any contract perfected between Brazilian parties and parties from the US or China may face more uncertainty, since there is no consensus regarding the interpretation of this reservation.

Considering the great legal uncertainty experienced by Brazilian parties and their foreign counterparts when buying or selling goods internationally, an analysis of the various legal regimes that may end up being the law applicable to their contractual transactions is of great importance. In addition, a description of how these regimes differ from one another may show either that their differences are not so relevant, which may reduce the unpredictability, at least, with respect to the outcome, or that they are substantial, which may increase the uncertainty.

<sup>6</sup> UN-UNCITRAL. "Convention on Contracts for the International Sale of Goods (1980)", Vienna, 11 April (1980) U.N. Doc. A/CONF.97/18

<sup>7</sup> In this thesis the word "ratify" will be used broadly meaning either "ratify" or "accept", "approve", "accede", and "succeed".

<sup>8</sup> See [http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html) for an updated list of CISG Contracting States.

<sup>9</sup> See Article 95 and Article 1(1)(b) of the CISG

<sup>10</sup> In this thesis, the terms "Member State", "Contracting State" and "Signatory State" will be used interchangeably to mean a state where the CISG is in force. See Articles 99 and 100 CISG for determining conditions under which the CISG would be in force.



The aim of this thesis is to measure this legal uncertainty. Section 1 examines which legal regimes may govern international contractual disputes involving Brazilian parties and their foreign counterparts according to the Principle of Party Autonomy and the use of PIL rules, and the likelihood of these regimes being applied. In section 2, a comparative study is conducted of the Brazilian law, the CISG, and the American law, with respect to the formation of business<sup>11</sup> contracts for the sale of goods, in order to identify the differences between these three regimes. In this section, salient controversial points are compared, such as the similarities and differences between legal systems and sources of law, the common-law “Consideration” objective requirement, rules on proposal, acceptance and counter-offer, the moment and place of contract formation, and also formal requirements.

In this thesis, the Brazilian sales law will be examined in detail, because very little has been written in English about it and foreign parties trading with Brazil may be interested in the information. The CISG was chosen for this comparative study because it is the most relevant treaty governing international commercial transactions<sup>12</sup>. The US domestic law was also selected because the US is now Brazil’s most important trading partner<sup>13</sup>, and, as explained above, the CISG may not be applicable to commercial transactions involving a Brazilian party and an American party, because the US made a reservation on this matter<sup>14</sup>. A full comparison of international commercial contracts regulation would require that both contract formation and the parties’ rights and obligations be covered, since the CISG covers these two topics. However, for reasons of constraints of time and space, this analysis is restricted to “Contract Formation” inasmuch as it is the starting point for the existence of an agreement in any jurisdiction.

---

<sup>11</sup> In contrast to consumer contracts, which will not be discussed in this Thesis.

<sup>12</sup> In comparison to the Uniform Law on the International Sale of Goods (ULIS) and the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULFIS), each of which was ratified by only 9 countries and to other attempts at legal unification in the field of international sales law, the CISG, as far as the number of signatories states is concerned, has registered the most success.

<sup>13</sup> Currently, the United States is Brazil’s major foreign supplier and its second major foreign buyer. Indeed, in 2009, the US sold \$20,183 million in goods to Brazil, representing 15.8% of Brazil’s imports, and bought \$15,740 million in goods from Brazil, equivalent to 10.2% of Brazil’s exports. The 2010 figures may be different since China is replacing the US as Brazil’s major supplier.

<sup>14</sup> Despite the fact that, among Brazil’s major trading partners, the US and China are the only ones that made such reservation, Chinese law was not chosen for this study because Chinese domestic sales law recently underwent reform, modelling itself on the CISG.

# 1. LEGAL REGIMES POTENTIALLY APPLICABLE TO INTERNATIONAL TRADE TRANSACTIONS INVOLVING BRAZILIAN PARTIES

## 1.1. PARTY AUTONOMY

According to Petar Sarcevic, “the principle of party autonomy guarantees that the contracting parties are free to determine the ‘rules of the game’ by dictating the terms of the contract”<sup>15</sup>. Consequently, parties may, by mutual agreement, choose *ex ante* the substantive law of a particular country or an international treaty to regulate their affairs, as well as the tribunal that will solve their prospective contractual disputes, regardless of their relation to that specific law or forum.

### 1.1.1. Choice-of-Law Freedom

The parties’ choice-of-law freedom is the rule in mainly all western, industrialized countries, including the US<sup>16</sup>, countries from the European Union<sup>17</sup>, and countries that have ratified the Inter-American Convention on the Law Applicable to International Contracts (1994 Mexico Convention)<sup>18</sup>. However, some jurisdictions have been refusing to recognize choice of law clauses<sup>19</sup>, Brazil being the most notable example.

The Brazilian PIL rules are contained in the 1942 Introductory Law to the Civil Code (Lei de Introdução ao Código Civil – LICC)<sup>20</sup>, which, in its Article 9, *caput*<sup>21</sup>, establishes that the law applicable to international contracts is the *lex loci contractus*; in

---

<sup>15</sup> SARCEVIC, Petar. “The CISG and Regional Unification” in *The 1980 Uniform Sales Law – Old Issues Revisited in the Light of Recent Experiences*, Franco Ferrari ed., Verona Conference 2003: Sellier European Law Publishers (2003) at 5

<sup>16</sup> Article 1-105 UCC

<sup>17</sup> Article 3 of the Convention on the Law Applicable to Contractual Obligations (1980 Rome Convention). See also Regulation (EC) No. 593/2008 on the Law Applicable to Contractual Obligations, OJ L 177/6. This Regulation replaced the 1980 Rome Convention for contracts concluded after 17 December 2009.

<sup>18</sup> Article 7 of the 1994 Mexico Convention. For an update list of contracting States, see <http://www.oas.org/juridico/English/signs/b-56.html>. Brazil signed this Convention, but did not ratify it.

<sup>19</sup> For a reference to countries that do not acknowledge the Principle of Party Autonomy, see SCHRODER, Jochen & WENNER, Christian. “Internationales Vertragsrecht: Das Kollisionsrecht Der Transnationalen Wirtschaftsverträge”. 2nd ed., Cologne (1998).

<sup>20</sup> Decreto-Lei n. 4.657, 07/04/1942 (Lei de Introdução ao Código Civil)

<sup>21</sup> Article 9, *caput*, LICC reads: “Obligations shall be governed by the law of the country where they were constituted”.

other words, the law where the contract was entered into. However, whenever it is impossible to determine the place where the contract was formed – for instance, if the parties did not meet in person to negotiate and sign the contract (which is, in reality, very common nowadays due to the use of electronic communications in international sales transactions) – Article 9, §2, LICC<sup>22</sup> presumes that the contract was perfected in the offeror’s place of business, which can be either the seller’s or the buyer’s, depending on who, according to the Brazilian law, made the binding acceptance<sup>23</sup>.

Since Article 9 LICC neither expressly allows nor clearly prohibits parties from choosing the law applicable to their commercial transactions, the applicability of the principle of party autonomy in Brazil has been the object of much discussion among Brazilian scholars. The majority argues that choice of law clauses is unenforceable on the basis that Article 9 LICC is a mandatory rule<sup>24</sup>, and that therefore parties to an international contract could not have an *ex ante* free choice of law<sup>25</sup>. Scholars who adopt a moderate position admit that it would be possible for parties to choose the Brazilian law as the law applicable to their contracts if the principle of party autonomy is recognized in the jurisdiction where the contract was entered into<sup>26</sup>. A minority of scholars support the full applicability of this principle in Brazil, reasoning that the 1917 LICC, which was replaced

<sup>22</sup> Article 9, §2, LICC reads: “Contractual obligations are presumed to be constituted at the place where the offeror resides”.

<sup>23</sup> ARAUJO, Nadia. “Direito Internacional Privado: Teoria e Prática Brasileira”. 2<sup>nd</sup> ed., Rio de Janeiro: Renovar (2004), at 322-324

<sup>24</sup> Mandatory provisions have a general purpose, and thus they cannot be altered by the parties’ agreement. In contrast, non-mandatory provisions are not directly related to the social interest, so they can be derogated by the parties’ will. (RODRIGUES, Silvio. “Direito Civil”, vol. 3, São Paulo: Saraiva (2003) at 16)

<sup>25</sup> RODAS, João Grandino. “Elementos de Conexão do Direito Internacional Privado Brasileiro Relativamente as Obrigações Contratuais” in *Contratos Internacionais*, João Grandino Rodas (coord.), 2<sup>nd</sup> ed. Editora dos Tribunais (2002) at 59; ARAUJO, Nadia de. “Contratos Internacionais: Autonomia da Vontade, Mercosul e Convenções Internacionais”, 3<sup>rd</sup> ed. Rio de Janeiro: Renovar (2004) at 118; DINIZ, Maria Helena. “Lei de Introdução ao Código Civil Interpretada”. São Paulo: Saraiva (1994) at 246; CASTRO, Amílcar de. “Direito Internacional Privado”. Rio de Janeiro: Revista Forense (1987) at 433-445; BATALHA, Wilson de Souza Campos. “Tratado Elementar de Direito Internacional Privado”. São Paulo: Revista dos Tribunais (1961) at 192-193; BIERWAGEN, Mônica Yoshizato. “Princípios e Regras de Interpretação dos Contratos no Novo Código Civil”. 3<sup>rd</sup> ed. São Paulo: Saraiva (2007) at 23.

<sup>26</sup> STRENGER, Irineu. “Direito Internacional Privado”. 4<sup>th</sup> ed., São Paulo: Editora LTR (2000) at 658; TENORIO, Oscar. “Direito Internacional Privado”. São Paulo: Livraria Freitas Bastos (1962) at 180-181

by the 1942 LICC, expressly allowed the parties' choice-of-law freedom<sup>27</sup>, and that this principle is essential and cannot be negated by simple omission<sup>28</sup>.

This extensive doctrinal discussion of the recognition of the principle of party autonomy in Brazil has been attributed to the lack of judicial decisions on the issue. Brazilian judicial courts have dealt with the subject only incidentally, tending to a literal interpretation of Article 9 LICC<sup>29</sup>. Moreover, even though parties could travel in order to perfect the contract in the place they want to regulate their affairs or put themselves intentionally in the position of either the offeror or the offeree, Brazilian judicial courts, whenever the contract has to be executed in Brazil, have been willing to apply Brazilian law by invoking the "public order"<sup>30</sup> exception contained in Article 17 LICC<sup>31</sup>. If a Brazilian court finds that the law that would be applicable to a legal dispute as per Article 9 of the LICC violated essential values of the Brazilian legal system – for instance, when one party is weaker than the other and the choice-of-law clause was imposed by the stronger one – it could "trump the LICC's PIL analysis and apply Brazilian law whenever necessary to avoid unconstitutional or inequitable results"<sup>32</sup>.

<sup>27</sup> Article 13 of the 1917 Introductory Law to the Civil Code reads: "Unless the parties have agreed otherwise, obligations shall be governed by the law of the country where they were constituted".

<sup>28</sup> VALLADAO, Haroldo. "Direito Internacional Privado". 3<sup>rd</sup> ed. Rio de Janeiro: Livraria Freitas Bastos (1971) at 363; DOLLINGER, Jacob. "Direito Internacional Privado". Rio de Janeiro: Renovar (2007) at 441; GAMA E SOUZA JR, Lauro da. "Autonomia da Vontade nos Contratos Internacionais no Direito Internacional Privado Brasileiro: Uma Leitura Constitucional do Artigo 9<sup>o</sup> da Lei de Introdução ao Código Civil em Favor da Liberdade de Escolha do Direito Aplicável" in *O Direito Internacional Contemporâneo – Estudos em Homenagem ao Professor Jacob Dollinger*, Carmen Tiburcio & Luis Roberto Barroso (org.), Rio de Janeiro: Renovar (2006) at 599-626

<sup>29</sup> ARAUJO, Nadia. *Ibidem* (2004) at 342-343. However, in the only case decided by the STF concerning the application of Article 9 of the LICC to international contracts, the Court acknowledged that the parties had chosen the British law to regulate their contracts because the legal issue was the efficacy of the extra-contractual relationship between the parties and not the contract itself, the law indicated by Article 9 of the LICC would be the applicable one. As a result, the Court applied the Portuguese law (Recurso Extraordinário n. 93.131-MG, Segunda Turma, Supremo Tribunal Federal, Relator: Min. Moreira Alves (12/17/1981)). Exceptionally, an inferior court expressly recognized the principle of party autonomy (Agravo de Instrumento n. 1.247.070-7, 12<sup>a</sup> Câmara do 1<sup>o</sup> Tribunal de Alçada Cível do Estado de São Paulo, Relator: Artur César Beretta da Silveira (12/18/2003)).

<sup>30</sup> The public order exception is the civil law analogue to the public policy exception familiar to common lawyers. For simplicity, the term "public order" will be used in lieu of "public policy" throughout this thesis.

<sup>31</sup> Article 17 LICC reads: "The laws, acts and judicial decisions from a foreign country, as well as any declaration of will, do not have efficacy in Brazil when they violate the Brazilian sovereignty, the public order and the good customs.

<sup>32</sup> STRINGER, Dana. "Choice of Law and Choice of Forum in Brazilian International Commercial Contracts: Party Autonomy, International Jurisdiction, and the Emerging Third Way", in *Columbia Journal of Transnational Law*, vol. 44, no. 3 (2005) at 975 (footnote 57)

In contrast to the position adopted by the Brazilian judicial courts, if the contractual dispute is to be resolved by an arbitral tribunal, the principle of party autonomy is fully respected and parties can choose the applicable law, unless it violates good customs or the public order, in accordance with Brazilian Arbitration Law<sup>33</sup> and the Mercosur Agreement on International Commercial Arbitration<sup>34</sup>. Therefore, arbitration could be an alternative means of overcoming resistance in Brazil to the principle of party autonomy to choose the applicable law<sup>35</sup>.

### 1.1.2. Choice-of-Forum Freedom

Aside from the arbitration alternative, parties could act strategically by choosing as a Forum State a country that respects the parties' choice-of-law freedom<sup>36</sup>. This principle is the rule in the US<sup>37</sup>, in the European Union<sup>38</sup>, and also in countries that are members of the Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments (1984 La Paz Convention)<sup>39</sup>. Parties from Mercosur's Member States are free to choose the jurisdiction that will solve their contractual disputes, according to the Buenos Aires Protocol on International Jurisdiction in Contractual Matters (1994 Buenos Aires Protocol)<sup>40</sup>.

Despite the fact that Brazil is a member of Mercosur and thus subject to the Buenos Aires Protocol, Brazilian judicial courts, until recently, would give no force to forum selection clauses. According to Nadia Araújo, the courts based their reasoning on a mistaken

<sup>33</sup> Article 2, §1 of the Lei de Arbitragem (Lei n. 9.307, 07/23/96) reads: "The parties may choose the law that will be applicable to their case if there is no violation to good customs and to the public order". See also Agravo 1.111.650-0, Tribunal de Alcada Cível de São Paulo (09/24/2002); and SEC 349-EX, STJ, Relator: Min. Eliana Calmon (03/21/2007)

<sup>34</sup> Article 10 of the Mercosur Agreement on International Commercial Arbitration (Decreto Legislativo n. 265, 12/09/2000) reads: "The parties may choose the law that will be applicable to solve their dispute (...)".

<sup>35</sup> MOROSINI, Fabio. "A Arbitragem Comercial como Fator de Renovação do Direito Internacional Privado Brasileiro dos Contratos" in *Revista dos Tribunais* n. 851, São Paulo: RT (2006) at 63-85

<sup>36</sup> ARAUJO, Nadia. *Ibidem* (2004) at 337

<sup>37</sup> *The Bremen v. Zapata Off-Shore Co.* 407 U.S. 1 (1972); *Carnival Cruise Lines, Inc. v. Shute* 499 U.S. 585, 595 (1991)

<sup>38</sup> Article 17 of 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (1968 Brussels Convention); Article 23 of the Council Regulation n. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.

<sup>39</sup> Article 1, D of 1984 La Paz Convention. For the full text of the Convention, see <http://www.oas.org/juridico/english/Sigs/b-50.html>. Brazil signed the convention but did not ratify it.

<sup>40</sup> Article 4 and 5 of the 1994 Buenos Aires Protocol

interpretation of the Brazilian Civil Procedure Code (Código de Processo Civil - CPC)<sup>41</sup>, which regulates both exclusive<sup>42</sup> and concurrent jurisdiction<sup>43</sup>. The misconception pertains to the interpretation of Article 88 CPC<sup>44</sup>, which lays out some situations in which Brazil has concurrent jurisdiction, such as when the defendant resides in Brazil, or when the obligation has to be performed in Brazil. In several decisions, “Brazilian judges have conceived of their jurisdiction as mandatory rather than discretionary”<sup>45</sup>, setting aside the forum selection clauses and hearing the cases before them. In addition, Brazilian judicial courts have often treated the choice-of-forum and the choice-of-law analyses together, conflating “party autonomy to choose the applicable law” with “party autonomy to choose the forum”<sup>46</sup>, leading to the erroneous presumption that both Brazilian law and Brazilian exclusive jurisdiction should be the norm.

Fortunately, a very recent judicial decision from the Superior Tribunal of Justice (Superior Tribunal de Justiça – STJ), Brazil’s highest federal court for all non-constitutional matters, clarified the interpretation of Article 88 CPC by stating that its concurrent jurisdiction circumstances could be avoided by a legally binding contractual clause<sup>47</sup>. This decision also acknowledged a previous resolution from the Supreme Federal Tribunal (Superior Tribunal Federal – STF), Brazil’s highest constitutional court, which considers valid forum selection clauses in contractual disputes<sup>48</sup>.

Therefore, although Brazilian judicial courts do not respect the parties’ right to choose the law applicable to their international sales of goods contracts, Brazilian parties and their foreign counterparts may select the law to regulate their affairs by selecting a Brazilian arbitration court or a foreign court in a country that recognizes this right as the forum to solve their legal disputes.

<sup>41</sup> Lei n. 5.869, 01/11/73 (Código de Processo Civil)

<sup>42</sup> Article 89 CPC reads: “The Brazilian judiciary has exclusive jurisdiction to hear cases when: I- The lawsuit refers to real state located in Brazil; II- The will is related to property located in Brazil, even if the deceased was a foreigner and resided abroad”.

<sup>43</sup> ARAUJO, Nadia. *Ibidem* (2004) at 340

<sup>44</sup> Article 88 CPC reads: “The Brazilian judiciary has concurrent jurisdiction to hear cases when: I- The defendant, whatever his nationality, is domiciled in Brazil; II- The obligation must be performed in Brazil; III- The case is based on an incident that took place or arised from an action taken in Brazil”.

<sup>45</sup> STRINGER, Dana. *Idem* (2005) at 960

<sup>46</sup> ARAUJO, Nadia. *Ibidem* (2004) at 340

<sup>47</sup> RESP 1.177.915/RJ, Terceira Turma, STJ, Relator: Min. convocado Vasco Della Giustina (04/13/2010).

<sup>48</sup> The STF Sumula n. 335 (12/13/1963) reads: “A contractual forum selection clause is valid”.



Aside from choosing a national domestic sales law to regulate their affairs, parties can opt for the CISG. They can choose this Convention in two ways: by selecting the CISG expressly in their contract, or indirectly, by choosing as the applicable law a law of a Contracting State. Since the CISG is an international convention<sup>49</sup>, after its ratification by a Member State it is internalized in this state as a national law applicable to international commercial contracts. The domestic sales law remains in force, but its application is limited to domestic contracts for the sale of goods. The result is that there are two sales laws within a single legal system.

If the parties want the domestic sales law of that Contracting State instead of the CISG to apply to their contract, they can opt-out of the Convention, as stated in Article 6 CISG<sup>50</sup>. Hence, parties may exclude the CISG entirely or merely replace “individual provisions by rules of standard forms and general conditions that satisfy national prerequisites of validity”<sup>51</sup>. However, in order to do so, the choice-of-law clause “must be carefully drafted”<sup>52</sup>. For example, if the parties’ intention is to adopt the German domestic sales law, they must choose this rule and state clearly that the CISG is excluded. If they only state that the law of Germany is the governing law, the CISG may still apply to contract formation and the parties’ rights and obligations. Nevertheless, as mentioned above, since Brazil has not yet ratified the CISG and Brazilian judicial courts do not recognize the parties’ choice-of-law freedom, whenever the Brazilian judiciary is the Forum State of a

<sup>49</sup> Despite the fact that both uniform legislation and international conventions are methods of legal harmonization, conventions are internalized as national law, whereas uniform laws are not. Thus, their application is optional.

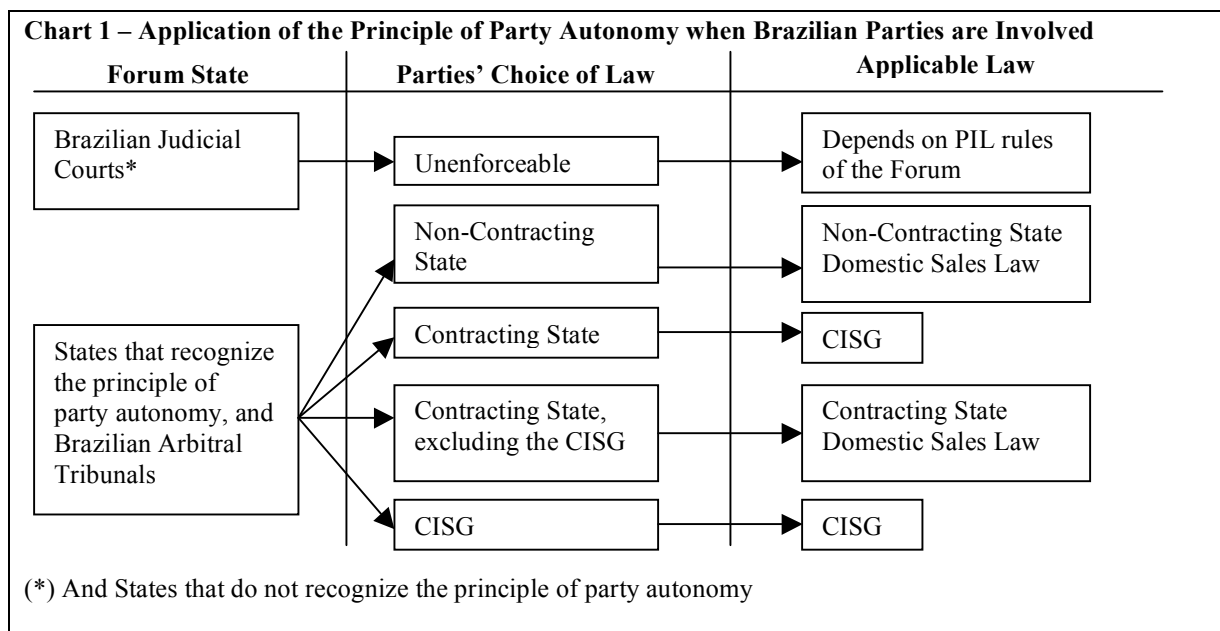
<sup>50</sup> Article 6 CISG reads: “The parties may exclude the application of this Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions”. In practice, parties tend to exclude the application of the CISG in their international commercial contracts even if their countries have ratified the Convention (KOEHLER, Martin F. “Survey regarding the relevance of the United Nations Convention for the International Sale of Goods (CISG) in Legal Practice and the Exclusion of its Application” (2006), available at <http://www.cisg.law.pace.edu/cisg/biblio/koehler.html>). However, the main reasons for this tendency are not related to the Convention itself. In fact, lawyers, who are the ones who draft the contracts, exclude the Convention because they have more familiarity with their domestic law and less acquaintance with the CISG and there is a huge learning cost associated with becoming familiar with the Convention (SCHWENZER, Ingeborg & HACHEM, Pascal. “The CISG – Successes and Pitfalls” in *The American Journal of Comparative Law*, vol. 57, n.2 (2009) at 463-464; SPAGNOLO, Lisa. “A Glimpse Through the Kaleidoscope: Choices of Law and the CISG (Kaleidoscope Part I)” in *Vindobona Journal of International Commercial Law and Arbitration*, 13 (2009) at 157).

<sup>51</sup> SARCEVIC, Petar. (2003) at 5

<sup>52</sup> DIMATTEO, Larry A. “Law of International Contracting”. 2<sup>nd</sup> ed, Kluwer Law International (2009) at 236

contractual dispute, it is uncertain whether the parties' intention to exclude the CISG would be enforceable or not.

The diagram below outlines the application of the principle of party autonomy with respect to international sales contracts involving Brazilian parties:



## 1.2. PRIVATE INTERNATIONAL LAW RULES OF THE FORUM

### 1.2.1. PIL Rules and the Determination of the Applicable Law

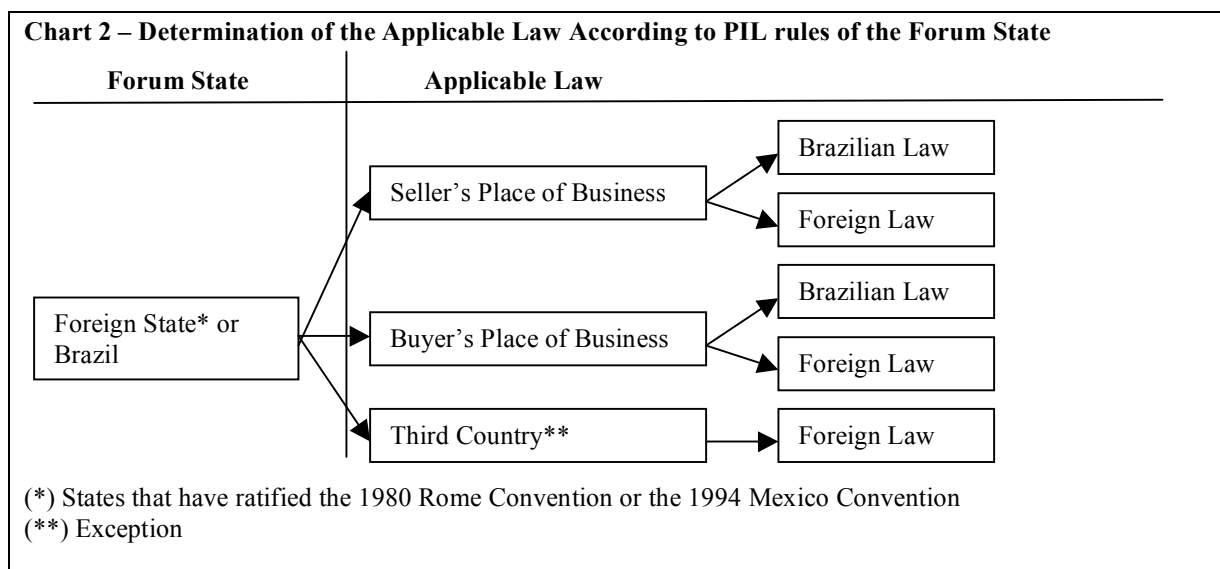
Absent parties' choice of law, the determination of the law applicable to a transaction will be made *ex post*, in the event of a judicial dispute, by a judge, and according to PIL rules of the forum. Usually, PIL rules concerning contracts point either to the law of the seller's or the buyer's place of business. For instance, the 1980 Rome Convention and the 1994 Mexico Convention provide that, if the parties had not selected the law applicable to their contract, the contract will be governed by the law of the State with which it is most closely connected. In particular, the 1980 Rome Convention presumes that a contract is more closely connected to the place where the party who is to effect the performance which is



characteristic of the contract<sup>53</sup>, usually the seller<sup>54</sup>, has her habitual residence or its central administration. As explained above, if Brazil is the Forum State of a judicial dispute, Article 9 LICC provides that the law applicable to an international contract is the law where the contract was entered into. The legal presumption is that the contract was perfected in the offeror's place of business<sup>55</sup>.

Only exceptionally would a third country law govern the dispute (herein referred to as "Third Country Exception"). Regarding the two Conventions mentioned above, if the characteristic part of the contract is performed in a third country (e.g., if the seller outsources components from a foreign supplier), the law of this country regulates the parties' affairs. The same is true with respect to Brazil if the parties concluded the contract in a third country (e.g., during a trade fair).

The following chart summarizes the determination of the applicable law according to PIL rules of the Forum State when Brazilian parties are involved in the transaction:



<sup>53</sup> Article 4 of the 1980 Rome Convention

<sup>54</sup> Usually it is the seller who has to execute the characteristic performance consisting of the transfer of ownership and the delivery of the goods (ICC Court of Arbitration - Paris, Arbitral Award No. 8611/HV/JK (01/23/1997); Landgericht Berlin, n. 102 0 59/97 Germany (03/24/1998)).

<sup>55</sup> Note that neither the two Conventions referred to nor the Brazilian law accepts the doctrine of *renvoi*, by which the PIL rules of one State are applied by the Forum State to solve a PIL problem. According to Article 15 of the 1980 Rome Convention, Article 17 of the 1994 Mexico Convention, and Article 16 LICC, the forum court should consider only the foreign country's substantive law and not its PIL rules.

### 1.2.2. CISG as the Governing Law

As a general rule, the CISG applies to all contracts for the sale of goods between parties whose places of business<sup>56</sup> are in different Contracting States, according to Article 1(1)(a) CISG<sup>57</sup>. If both parties have their places of business in different Contracting States, and if after its ratification the CISG is considered a national law in both Contracting States, as explained above, it would make sense to apply the CISG without resorting to PIL rules of the forum<sup>58</sup> because, presumably, they would point to the law of one of these States. However, as a matter of fact, the CISG governs the transaction even when PIL rules of the forum lead to the application of the law of a third State that is not a Contracting State<sup>59</sup>.

Article 1(1)(b) CISG<sup>60</sup> expands the application of the CISG to situations where one or both parties are not from Contracting States but PIL rules of the forum point to the application of the law of a Contracting State. Despite the fact that Non-Contracting States are not bound to CISG provisions<sup>61</sup>, the result would be the same when the Forum State has not ratified the CISG, as is the case for Brazil. If the solution provided by the Forum State's PIL rules is that the law of a Contracting State is the applicable one, the CISG will govern the transaction because it is that country's law for international commercial transactions.

With respect to Brazil, when only one party is from a Contracting State, the CISG may govern the transaction depending on where the contract was concluded, which could be

---

<sup>56</sup> A point worth attention is that the CISG has chosen the parties' "place of business" instead of their "nationality" to determine its jurisdiction. If the parties have more than one place of business, "the place of business is that which has the closest relationship to the contract and its performance" (Article 10(a) CISG). However, "the fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract" (Article 1(2) CISG).

<sup>57</sup> Article 1(1)(a) CISG reads: "This Convention applies to contracts of sale of goods between parties whose place of business are in different States: (a) when the States are Contracting States".

<sup>58</sup> Although the CISG's ratification reduces the need to resort to PIL rules of the forum, it does not mean that PIL analysis is totally excluded. For more information, see FERRARI, Franco. "CISG and Private International Law" in *The 1980 Uniform Sales Law – Old Issues Revisited in the Light of Recent Experiences*, Franco Ferrari ed., Verona Conference 2003: Sellier European Law Publishers (2003) at 19-55

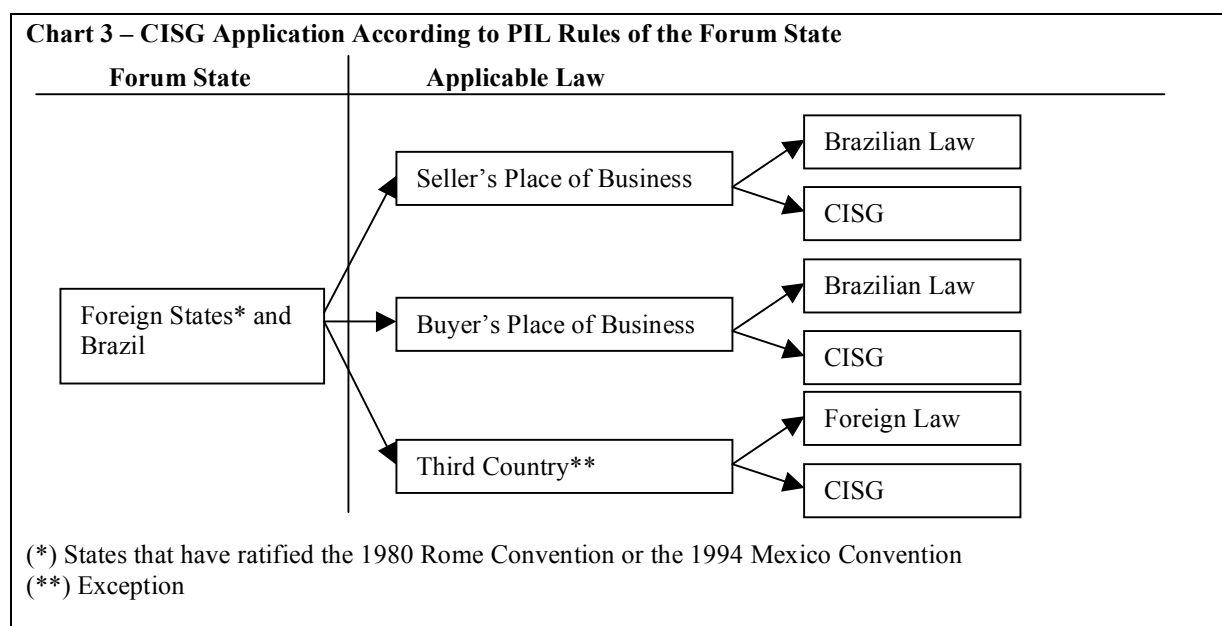
<sup>59</sup> "This result could be defeated only if the litigation took place in a third non-Contracting State, and the rules of private international law of that State would apply the law of the forum" (Secretariat Commentary on subparagraphs (1)(a) and (1)(b) of the 1978 Draft of the CISG, item 6).

<sup>60</sup> Article 1(1)(b) CISG reads: "This Convention applies to contracts of sale of goods between parties whose place 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".

<sup>61</sup> SICA, Lucia Carvalho. "A Convenção das Nações Unidas sobre Contratos de Compra e Venda Internacional de Mercadorias: Estados Nao Signatários e a Situação do Brasil" in *Revista Trimestral de Direito Civil*, ano 8, vol. 31 (2007)

either parties' place of business. If the Forum State is subject to the 1980 Rome Convention or the 1994 Mexico Convention, the CISG may be applied if the contract is more closely connected to a Contracting State, which can also be either parties' place of business. By the same token, when none of the parties are from a Member State, there is no room for CISG application under Brazil's PIL rules or under the two Conventions, but for the Third Country Exception mentioned above.

The chart below elucidates the situations in which the CISG is applied by virtue of PIL rules of the forum to transactions involving parties from Brazil:



### 1.2.3. Contracting State Domestic Law as the Governing Law

One of the reservations a Member-State can make when ratifying the CISG is the one provided by Article 95 CISG<sup>62</sup>. This reservation gives the Member States the option not to enforce Article 1(1)(b) CISG<sup>63</sup>, which provides that the CISG will be the applicable law

<sup>62</sup> Article 95 CISG reads: “Any State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph (1)(b) of article 1 of this Convention”.

<sup>63</sup> The drafters of the CISG included the Article 95 reservation because at the time of the Diplomatic Conference in Vienna many countries heavily criticized Article 1(1)(b) CISG “on the grounds that it excessively restricts the applicability of domestic statutes governing the relationships with foreign parties”. (FERRARI, Franco. *Idem* (2003) at 31). “The idea behind this reservation was the belief that recourse to private international law becomes complex for countries such as the former Czechoslovakia and the German

when PIL rules of the forum refer to the law of a Contracting State, even if one or both parties are not from Contracting States. In fact, only a few Member States, such as the US and China, have made use of this exception.

The practical effects of this reservation are very controversial among Member States, foreign legal writers, and national courts. Particularly when the Forum State is located in a Reservatory State, some authors argue against the application of the CISG to contracts where one or both parties are from Non-Contracting States but the contract is subject to the CISG by virtue of PIL rules of the forum. They argue that the only circumstance in which the CISG could apply is when all parties to the contract are from Contracting States<sup>64</sup>. They support this assertion by pointing to the fact that Reservatory States are only bound to apply the Convention by virtue of Article 1(1)(a) CISG. This is the position of the governments of the US and China and their respective national courts<sup>65</sup>. Other authors affirm that the CISG is only inapplicable when the forum's PIL rules lead to its own law<sup>66</sup>. Consequently, when these rules point to the law of a Contracting State that has not made this reservation, the courts of the Reservatory State should apply the CISG because the CISG is part of the national law of that Contracting State, and not because of Article 1(1)(b) CISG.

A second point of divergence is the application of Article 95 when the PIL rules of a Non-Reservatory Contracting Forum State point to the application of the law of a Reservatory State. Some scholars are of the opinion that the CISG should not be applicable in this situation, because judges from the Reservatory State would not apply the Convention

---

Democratic Republic that had enacted special codes for international trade” (SARCEVIC, Petar. *Idem* (2003) at 8).

<sup>64</sup> RICHARDS, Bradley J. “Contracts for the International Sale of Goods: Applicability of the United Nations Convention” in *69 Iowa Law Review* (1983) at 209-240; GABOR, Francis A. “Stepchild of the New *Lex Mercatoria*: Private International Law from the United States Perspective”, in *8 Northwestern Journal of International Law & Business* (1998) at 538-560; PERALES VISCASILLAS, Maria del Pilar. “El Contrato de Compraventa Internacional de Mercancias (Convencion de Viena de 1980)” (2001), available at <http://www.cisg.law.pace.edu/cisg/biblio/perales1.html>

<sup>65</sup> *Impuls I.D. Internacional, S.L. vs. Psion-Teklogix Inc.*, U.S. District Court (S.D. Fla.) (11/22/2002); *Prime Start Ltd. v. Maher Forest Products Ltd. et al.* 442 F.Supp.2d 1113 (W.D.Wash. 2006) (07/17/2006); *Zheng Hong Li Ltd. Hong Kong v. Jill Bert Ltd. Swiss*, Supreme Court of the People's Republic of China (07/20/1999); CIETAC Arbitration Proceeding (*Medical Equipment Case*) China International Economic and Trade Arbitration Commission (12/24/2004)

<sup>66</sup> FERRARI, Franco. *Idem* (2003) at 32-33; WINSHIP, Peter. *Idem* (1984) at 32

if they were to hear the case<sup>67</sup>. Germany (which is not a Reservatory State) has a more extreme interpretation of Article 95 CISG, according to which Article 1(1)(b) CISG would not be applicable when a Reservatory State is involved<sup>68</sup>. For example, if Germany is the Forum State, one of the parties has its place of business in a Non-Contracting State, and the other in the United States, the CISG will not regulate the parties' affairs. Scholars opposing this interpretation contend that it is unreasonable for two reasons: one, a reservation of this kind made by one State cannot bind another State; and, two, all the conditions for the applicability of the CISG under Article 1(1)(b) CISG would have been fulfilled from the standpoint of the Forum State<sup>69</sup>.

Lastly, legal writers also disagree about the impact of the Article 95 reservation where the PIL rules of a Non-Contracting State lead to the law of a Reservatory State. A conservative view holds that the CISG should not be applied in this situation at all<sup>70</sup>. However, a more liberal position is that the CISG should apply, not based on Article 1(1)(b) CISG, but by virtue of the CISG being part of the applicable foreign law<sup>71</sup>. Unfortunately, there is no case law currently available that supports this view.

The lack of consensus on the interpretation of this reservation certainly generates considerable legal instability, not only for parties but also for courts. Curiously, as a means of reducing the unpredictability in relation to the applicable law when Article 95 CISG is in action, the Dutch legislature created an innovative solution. The Dutch act that internalized the CISG asks foreign courts from Reservatory States to apply this Convention instead of the Dutch Civil Code whenever the law from Netherlands would be applicable as a result of the local PIL rule. Evidently, this proposition is not binding on foreign judges, but it signals that

<sup>67</sup> DORE, Isaak I. "Choice of Law Under the International Sales Convention: A U.S. Perspective", in *American Journal of International Law* 537 (1983) at 538-539; LOOKOFSKY, Joseph. "The 1980 United Nations Convention on Contracts for the International Sale of Goods" in *International Encyclopaedia of Laws – Contracts*, J. Herbots & R. Blanpain ed., Suppl. 29, The Hague: Kluwer Law International (2000) at 1-192

<sup>68</sup> Appellate Court Dusseldorf, Case n. 15 U 88/03 (*Mobile Car Phones Case*) Germany (04/21/2004). In this case, the court applied the CISG because none of the Contracting States had made an Article 95 reservation. However, the court mentioned that the outcome would be different if one of the parties were from a Reservatory State.

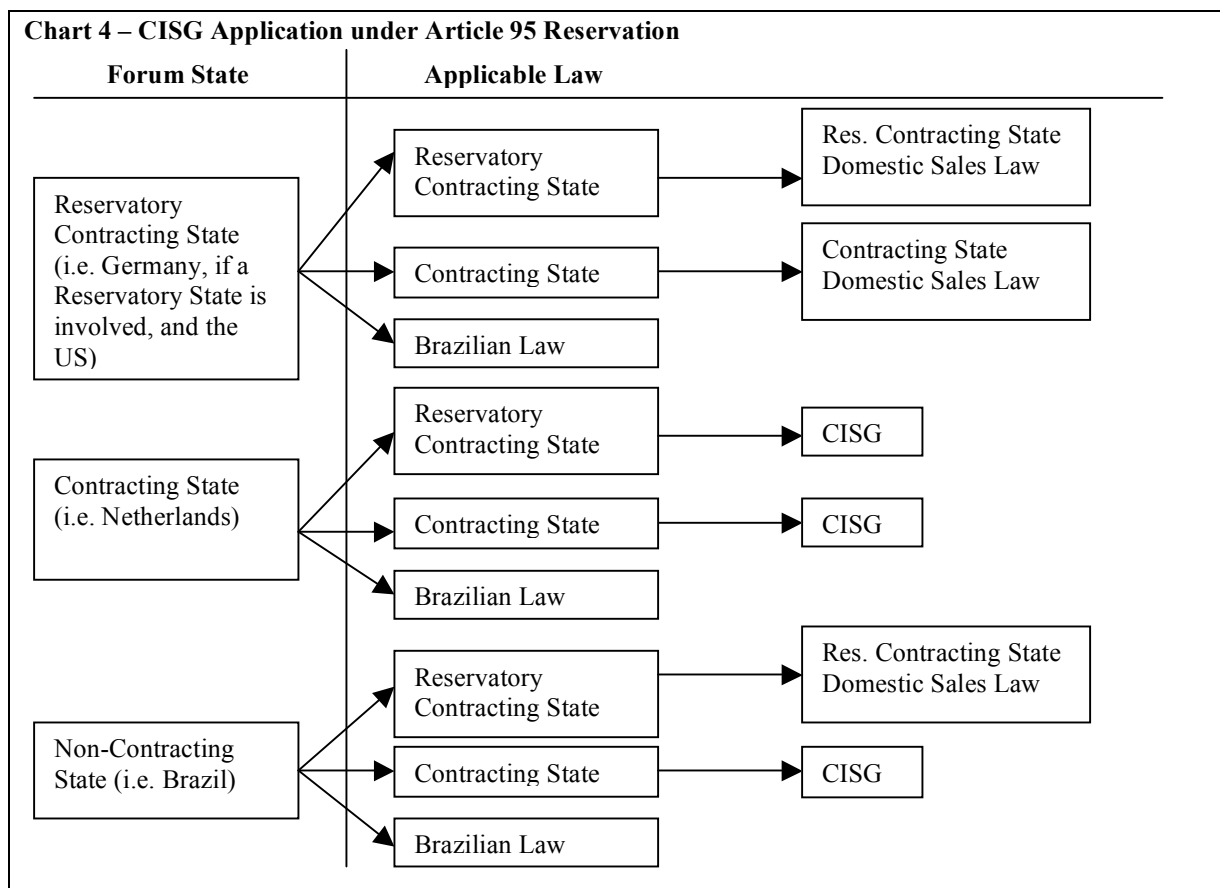
<sup>69</sup> FERRARI, Franco. *Idem* (2003) at 34-35

<sup>70</sup> DORE, Isaak I. *Idem* (1983) at 537-538; PLANTARD, Jean-Pierre. "Un Nouveau Droit Uniforme de La Vente Internationale: La Convention des Nations Unies du 11 Avril 1980" in *Journal de Droit International* 2 (1998) at 321

<sup>71</sup> FERRARI, Franco. *Idem* (2003) at 35-36; PELICHET, Michel. "La Vente Internationale de Marchandises et Le Conflit de Lois" in *Recueil des Cours Academie de Droit International*, vol. 201 (1987) at 38-39

the Dutch legislator favors “a solution which enhances uniformity rather than one that relies on local Dutch law”<sup>72</sup>.

The chart below condenses the above ideas regarding the CISG application under the Article 95 reservation:



<sup>72</sup> DE LY, Philip. "Sources of International Sales Law: An Eclectic Model", at UNCITRAL – SIAC Conference on 25 Years United Nations Convention on Contracts for the International Sale of Goods, Singapore (22 September 2005), available at <http://www.cisg.law.pace.edu/cisg/text/e-text-95.html>

## 2. COMPARATIVE STUDY OF THE BRAZILIAN LAW, THE CISG, AND THE AMERICAN LAW ON FORMATION OF INTERNATIONAL CONTRACTS FOR THE SALE OF GOODS

### 2.1. CONTRACT FORMATION UNDER THE BRAZILIAN LAW

#### 2.1.1. Legal Tradition and Sources of Law

Until 1822, Brazil was a Portuguese colony. Shortly after the proclamation of independence, a law was enacted maintaining the then-current Portuguese law as the law of Brazil<sup>73</sup>. Despite the fact that in Portugal a few years later these same rules were totally modified due to liberal reforms, in Brazil they remained practically untouched until 1916, when the first Civil Code was enacted. The 1916 Code was drafted based on Roman Law and Portuguese Law, and influenced by the codes and institutions of other European countries, especially those of Italy, France, Germany and Switzerland<sup>74</sup>.

In theory, in countries from the civil law system<sup>75</sup>, such as Brazil, all laws must have been previously written and made public; thus, statutes and comprehensive codes represent the main source of law. Civil law judges and lawyers, when confronted with a legal problem, think scholastically and deductively, first looking for the solution in the generalized and systematic statutory enactments. Even unpredictable problems may be solved by the existing statutory provisions, since, in that event, courts may decide on the basis of analogy, general uses and practices, or by applying general principles of law<sup>76</sup>.

In Brazil, the supreme rule is the Federal Constitution<sup>77</sup>, in force since October 5, 1998. The country is organized as a Federative Republic inspired by the North American

---

<sup>73</sup> The "Ordenacoes Filipinas" (Philippine Compilation), published in 1603, and other laws and regulations promulgated by the kings of Portugal up until April 25, 1821.

<sup>74</sup> ALVES, Jose Carlos Moreira. "A Panorama of Brazilian Civil Law from its Origins to the Present" in *A Panorama of Brazilian Law*. Jacob Dollinger & Keith S. Rosenn (ed.) Coral Gables / Rio de Janeiro: University of Miami North-South Center / Editora Esplanada (1992) at 87-105

<sup>75</sup> The *Civil Law* is a legal tradition ultimately derived from a collection of European laws also known as *Corpus Juris Civilis* issued from 528 to 534 by order of Justinian I, Eastern Roman Emperor.

<sup>76</sup> ZWEIGERT, Konrad & KOTZ, Heiz. "An Introduction to Comparative Law". 3rd ed., vol. 1, Oxford University Press (1998) at 69-71; BOGDAN, Michael. "Comparative Law". Springer (1994) at 84.

<sup>77</sup> Constituição da Republica Federativa do Brasil de 1988 (10/05/1988)



model, formed by states, municipalities, and the Federal District<sup>78</sup>. Accordingly, the Brazilian legal system is based on statutes enacted by the appropriate legislative power at the federal, state, and municipal levels, within their respective spheres of authority<sup>79</sup>, and all laws are ultimately subordinated to the Constitution.

As established by the Constitution, the national government has jurisdiction to legislate on the most important and general issues, including civil and commercial matters<sup>80</sup>. In 2002, after twenty-six years of discussion, the Brazilian Congress approved a new Civil Code (Novo Código Civil – CC)<sup>81</sup> that revoked the former 1916 Code as well as the 1850 Commercial Code. The new Civil Code, which entered into force in January 11, 2003, regulates several aspects of the civil life of persons and corporations, such as legal capacity, obligations, contracts and torts. In particular, Title V provides rules regarding “Contracts In General”, Chapter I provides “General Rules”, and Section II provides “Contract Formation”. In addition, there are several other provisions in the Code that complement the specific rules on contract formation. These provisions must also be examined in order to achieve a better understanding of the Brazilian Law.

The main innovation in contract regulation brought by the 2002 Code is the establishment of two general clauses. First, the Principle of Good Faith posits that parties shall observe the principles of honesty and good faith in the conclusion and performance of the contract<sup>82</sup>. Second, the Principle of Social Function of the Contract states that the parties’

<sup>78</sup> However, the division of powers does not function in Brazil as it does in the United States. For instance, “presidential power is grossly exaggerated in Brazil” due to direct elections, the fragility of the political party system, and the lack of prestige of the Legislature and the Judiciary (FERREIRA FILHO, Manoel Goncalves. “Fundamental Aspects of the 1988 Constitution” in *A Panorama of Brazilian Law*. Jacob Dollinger & Keith S. Rosenn (ed.) Coral Gables / Rio de Janeiro: University of Miami North-South Center / Editora Esplanada (1992) at 16-20)

<sup>79</sup> For more information on the legislative spheres of authority, see Articles 22, 23, 24, 25, 30, I and II, and 32, Section 1, of the Federal Constitution.

<sup>80</sup> Article 22, I of the Federal Constitution reads: “The Federal Government has exclusive power to legislate on: I- civil, commercial (...)”.

<sup>81</sup> Lei n. 10.406, 01/10/02 (Código Civil Brasileiro)

<sup>82</sup> Article 422 CC reads: “The parties are obliged to comply with the principles of honesty and good faith, not only when the contract is perfected, but also during its performance”. Note that this provision applies both to the pre-contractual and to the post-contractual phases, according to Enunciado n. 25 of the Jornada de Direito Civil (STJ-CJF) held in Brasília/DF, on setember 2002. For more information on pre-contractual liability, see AGUIAR JR, Ruy Rosado de. “Extinção dos Contratos por Incumprimento do Devedor”. Rio de Janeiro: Aide Editora (1991); and POPP, Carlyle. “Responsabilidade Civil Pré-Negocial: O Rompimento das Tratativas”. Curitiba: Juruá (2002).



freedom of contract is limited by the social function of the property and the contract<sup>83</sup>. In addition, the concepts of gross disparity<sup>84</sup> and hardship<sup>85</sup>, which had long been accepted by Brazilian courts and scholars, were finally introduced in Brazilian statutory law. As a result, “the notion of *contractual justice* superseded legal individualism, formerly the exclusive source of contractual obligations, and now prevails over the absolute application of the ancient principle of the *pacta sunt servanda*”<sup>86</sup>.

Unfortunately, the rules that deal specifically with contract formation are virtually the same as the ones contained on the 1916 Code, elaborated almost a century ago. To be more precise, just one provision was added and none were meaningfully altered<sup>87</sup>. In fact, legislators lost the opportunity to rectify some inaccuracies (inaccuracies that will be pointed out in the following sections) and also to comprise new technological developments such as electronic communications.

Doctrinal teachings in Brazil, like in other civil law countries, are widely treated by judges as a quasi-authoritative source of law, particularly in cases where the legal solution is not obvious on the face of the code<sup>88</sup>. Some scholarly writings even are considered more influential than court decisions.

However, this does not mean that case law is treated as irrelevant. It is true that in civil law countries the general rule is that judges can only apply the already-written statutory law and have no power to create new legal rules. Consequently, judicial decisions are only binding on the parties involved in the particular judicial dispute. Moreover, lower courts are not required to follow previous rulings from higher courts, which may have persuasive

<sup>83</sup> Article 421 CC reads: “The parties’ freedom of contract shall be exercised by virtue of and limited to the social function of the contract”.

<sup>84</sup> Article 157 CC reads: “A lesion occurs when a person, under extreme necessity or due to inexperience, undertakes an obligation manifestly disproportionate to the value of the other party’s obligation”.

<sup>85</sup> Article 478 CC reads: “In contracts of continued or deferred performance, if the obligation of one of the parties becomes excessively onerous, with an extreme advantage to the other party, as a result of extraordinary and unforeseeable events, the debtor may request termination of the contract”.

<sup>86</sup> GREBLER, Eduardo. “The Convention on International Sale of Goods and Brazilian Law: Are Differences Irreconcilable?” in *Journal of Law and Commerce*, Vol. 25 (2005) at 470

<sup>87</sup> The provisions on contract formation are contained in Title V, Chapter I, Section II of the Brazilian Civil Code, specifically from Article 427 CC to Article 435 CC. Among these provisions, only Article 429 CC (about offers to the general public) is a new rule. The others reflect almost exactly the 1916 Civil Code rules. For a comparison (in Portuguese) between the 2002 Civil Code and the 1916 Civil Code, see <http://www2.senado.gov.br/bdsf/bitstream/id/70309/2/704509.pdf>.

<sup>88</sup> According to Dana Stringer, “in fact, Brazilian judges sometimes quote the textual interpretations of esteemed law professors verbatim to dispose of a case” (STRINGER, Dana. *Idem* (2006) at 965)

authority at best, For this reason, case law is considered a “secondary” source of law<sup>89</sup>. This approach contrasts with the common law system, where, basically, judges can make up the law in a case of “first impression” and if a higher court within the same jurisdiction has already dealt with the issue, judges are obliged to follow the precedent decision (doctrine of “stare decisis”). These differences will be more clearly explained in Section 2.3.1. in a discussion of the US legal tradition.

In spite of the fact that Brazil is a civil law country, Brazilian trial judges are not completely unaffected by precedents set by higher courts. A 2004 constitutional reform<sup>90</sup> introduced a similar mechanism to the “stare decisis” called “Sumula Vinculante”. Accordingly, the Supreme Federal Tribunal can, upon motion made by specific authorities or by its own motion, after multiple decisions on constitutional matters, publish legal statements that are binding on the court itself and on all lower courts<sup>91</sup>. These statements comprise the current understanding of the court on the issue and usually are only one sentence long. Up to December 2010, the Supreme Federal Tribunal has issued thirty-one Sumulas Vinculantes.

Although other tribunals can also publish “Sumulas” stating the summary of their understanding on a subject matter, currently, only the court that issued the statement is bound by its own “Sumulas”. Nevertheless, very recently, the Brazilian Senate proposed a Bill to review the Brazilian Civil Procedure Code<sup>92</sup>, making all “Sumulas” binding on lower courts, thus, expanding the rule of precedent. This Bill is still being analysed by the Brazilian National Congress.

---

<sup>89</sup> This fact is an “entirely logical consequence of the Brazilian’s judiciary’s subordinate relationship to the legislative branch” (STRINGER, Dana. *Idem* (2006) at 966), and “Brazil is (...) heir to the civil law tradition in which the doctrine of separation of powers denies the judiciary the ability to make law and refuses to consider judicial decisions as binding precedents” (ROSENN, Keith S. “Civil Procedure in Brazil” in *American Journal of Comparative Law*, vol. 34 (1986) at 513).

<sup>90</sup> Amendment to the Federal Constitution n. 45/2004

<sup>91</sup> Article 103-A of the Federal Constitution reads, “The Supreme Federal Court shall have the power to, by its own initiative or by provocation, by means of a decision taken by two thirds of their members, after reiterated decisions about constitutional matters, approve a summary which, after publication in official gazette, shall have binding effect over the other bodies of the Judiciary Power and over the direct and indirect public administration, at federal, State and municipal levels, as well as proceed to their revision or cancelling, in the manner provided for in law”. See also Article 2 of the Lei n. 11.417 (12/19/2006).

<sup>92</sup> Projeto de Lei do Senado n. 166 (06/08/2010)

### 2.1.2. Proposal

The proposal is the first step towards contract formation. Brazilian scholars define it as a unilateral declaration of will that one party, the promisor or offeror, makes to the other party, the promisee or offeree, looking forward to entering into a contractual relationship<sup>93</sup>. It can be either express (in writing or orally) or tacit (implied on unequivocal actions), as any unilateral declaration of will<sup>94</sup>. Moreover, it can be directed to specific persons or to the general public<sup>95</sup>.

However, in order to be binding, a proposal must be complete and serious<sup>96</sup>. A complete proposal is one that has all the necessary terms to form the contract. Specifically for contracts for the sale of goods, the goods to be sold and the price must be indicated in the proposal<sup>97</sup>. Yet, the goods may be either determined or determinable<sup>98</sup>, and the price may be fixed by an arbiter chosen by the parties, by the market, by indices, or according to the seller's average sales prices<sup>99</sup>.

A serious proposal is one that is made with the intention to be binding in case of acceptance. In a proposal, as in all declarations of will, the real intent of the party making the declaration is more important than the literal meaning of the words expressed by her<sup>100</sup>.

<sup>93</sup> DINIZ, Maria Helena. "Tratado Teórico e Prático dos Contratos", vol. 1, 5<sup>th</sup> ed., São Paulo: Saraiva (2003) at 80; GONCALVES, Carlos Roberto. "Direito Civil Brasileiro - Contratos e Atos Unilaterais", 3<sup>rd</sup> ed., São Paulo: Saraiva (2007) at 51; RODRIGUES, Silvio. Idem (2003) at 70-71; PEREIRA, Caio Mario da Silva. "Instituições de Direito Civil - Contratos", vol. III, Rio de Janeiro: Forense Jurídica (2006)

<sup>94</sup> Article 107 CC reads: "The validity of declarations of will do not depend upon a special form, except when the law expressly requires it".

<sup>95</sup> Article 429 CC reads: "An offer to the public is equivalent to a proposal when it has all its essential requirements, unless if, from the circumstances and the uses, it results otherwise".

<sup>96</sup> CARVALHO SANTOS, João Manuel de. "Código Civil Brasileiro Interpretado, Principalmente do Ponto de Vista Prático", 11<sup>th</sup> ed., Rio de Janeiro: Freitas Bastos (1986) at 60-61; RIZZARDO, Arnaldo. "Contratos". Rio de Janeiro: Forense (2005) at 47; DINIZ, Maria Helena. Idem (2003) at 82; GONCALVES, Carlos Roberto. Idem (2007) at 51-52

<sup>97</sup> Article 482 CC reads: "The purchase and sale, when unconditional, is considered as obligatory and perfected from the time that the parties agree upon the object and price". See also DINIZ, Maria Helena. Idem (2003) at 82; PELUSO, Cezar (et.al.). "Código Civil Comentado, Doutrina e Jurisprudência", 3<sup>rd</sup> ed., Barueri: Manole (2009) at 473; Apelação Cível 70030681324, 20<sup>a</sup> Câmara Cível, Tribunal de Justiça do Rio Grande do Sul, Relator: Jose Aquino Flores de Camargo (10/21/2009); Apelação 99206115776, 30<sup>a</sup> Câmara de Direito Privado do Tribunal de Justiça de São Paulo, Relator: Edgard Rosa (06/16/2010)

<sup>98</sup> See Articles 233 to 246 CC; PEREIRA, Caio Mario da Silva. Idem (2006)

<sup>99</sup> See Articles 485 to 489 CC

<sup>100</sup> Article 112 CC reads: "In declarations of will, the intention rather than the literal sense of the language shall be observed".

However, if the offeror does not intend to be bound by the offer but does not reveal this desire, the proposal is binding, unless the offeree knew about the offeror's true intentions<sup>101</sup>.

According to Article 427, 1<sup>st</sup> part, CC<sup>102</sup>, the proposal binds the offeror<sup>103</sup>. A literal interpretation of this rule would make it plausible for one to conclude that the proposal becomes effective just after its formulation, even though it was not dispatched by the offeror or received by the offeree<sup>104</sup>. However, in accordance with Article 428, IV CC<sup>105</sup>, the offer would be binding only after the offeree has knowledge of it, since a dispatched offer can be withdrawn by the offeror if the withdrawal is received by the offeree before or at the same time she learns about the offer<sup>106</sup>. In this event, both unilateral declarations of will (offer and withdrawal) invalidate each other reciprocally for being contradictory<sup>107</sup>.

Nevertheless, in some situations the law does not consider a proposal obligatory. Article 427, 2<sup>nd</sup> part, CC<sup>108</sup> provides that a proposal is not binding: (i) if it indicates that the offeror had no intention to be bound (for example, if it contains terms such as “nonbinding proposal” or “draft”), which seems coherent in light of the conditions of a binding offer, described above; (ii) depending on the nature of the transaction (for instance, if the offer is directed to several persons and there is a stock limitation, the offeror is not obliged to enter into a contract with everyone that answers the offer, but only with the first ones until all the goods are sold); and (iii) depending on the circumstances of the case. Regarding this last exception, the law gives no additional explanation and scholars diverge on its meaning. This provision may suggest that judges would be free to apply it according to each case<sup>109</sup>, or it

<sup>101</sup> Article 110 CC reads: “The declaration of will survives despite the fact that the declarant had no intention to be bound by his declaration, unless the recipient had knowledge about the declarant's real intent”.

<sup>102</sup> Article 427, 1<sup>st</sup> part, CC reads: “The offer of the contract obligates the offeror (...)”.

<sup>103</sup> DINIZ, Maria Helena. “Curso de Direito Civil Brasileiro”, vol. 3, São Paulo: Saraiva (1997) at 46-49

<sup>104</sup> CARVALHO DE MENDONCA, Manoel Ignácio. “Doutrina e Prática das Obrigações ou Tratado Geral dos Direitos de Crédito”. Curitiba: Typ. E Lith. A Vapor Imp. Paranaense (1908) at 650

<sup>105</sup> Article 428, IV CC reads: “The offer ceases to be obligatory: (...) IV – if, before reply, or simultaneously with it, the proponent's retraction comes to the knowledge of the other party”; *Apelação Cível 590074357*, 5<sup>a</sup> Câmara Cível, Tribunal de Justiça do Rio Grande do Sul, Relator: Ruy Rosado de Aguiar Jr (11/14/1990)

<sup>106</sup> According to the prominent scholar Pontes de Miranda, the recipient learns about the declaration of will when enough time has lapsed for her to become aware of the content of the message if regular means of communication were employed (MIRANDA, Pontes de. “Tratado de Direito Privado”, Campinas: Bookseller (2000), tomo 2 at 457 and 464).

<sup>107</sup> PEREIRA, Caio Mario da Silva. *Idem* (2006)

<sup>108</sup> Article 427, 2<sup>nd</sup> part, CC reads: “(...) if the contrary does not result from the terms of it, or from the nature of the business, or from the circumstances of the case”.

<sup>109</sup> GAGLIANO, Pablo Stolze. “Novo Curso de Direito Civil”, vol. IV, 2<sup>nd</sup> ed. São Paulo: Saraiva (2006) at 87

may refer to the next rule pertaining to a proposal's termination<sup>110</sup>. As a logical statutory interpretation of the Civil Code, the former viewpoint makes more sense<sup>111</sup>.

Even though the Brazilian Civil Code does not expressly regulate revocability of offers, an effective offer would always be revocable by the promisor, even when there is a fixed time for its validity<sup>112</sup>. Taking into account the fact that, under Brazilian law, a contract is a “meeting of wills” and no agreement can be reached between the parties if one of the wills no longer exists, both Brazilian scholars and courts understand that the offeror can cancel an offer until an effective acceptance has been made<sup>113</sup>. Contrariwise, several scholars are of the opinion that the death of the offeror cannot revoke the proposal even though one of the wills is no longer present. In that event, the proposal, as any legal obligation, is transmitted to the offeror's heirs, who would assume the liability for any damage experienced by the offeree<sup>114</sup>.

Despite the fact that Brazilian law admits some kinds of unilateral declarations of will to be irrevocable, it is not clear whether the offeror, by herself and not by force of law, would be able to make an irrevocable offer<sup>115</sup>. However, an offer would be irrevocable if the offeree relies that the proposal would be kept open. In this situation, since the contract was not formed yet, the promisee would have no right to specific performance, but the promisor would be liable for damages suffered by the other party<sup>116</sup>.

<sup>110</sup> CARVALHO SANTOS, João Manuel. *Idem* (1986) at 66; RIZZARDO, Arnaldo. *Idem* (2005) at 49; DINIZ, Maria Helena. *Idem* (2003) at 83; GONCALVES, Carlos Roberto. *Idem* (2007) at 53; NADER, Paulo. “Curso de Direito Civil”, vol. 3, Rio de Janeiro: Forense (2008) at 55; PEREIRA, Caio Mario da Silva. *Idem* (2006)

<sup>111</sup> If Article 427, 2<sup>nd</sup> part, CC deals with situations in which the proposal is not obligatory (and was never obligatory) and Article 428 CC is concerned with proposals that were obligatory (according to Article 427, 1<sup>st</sup> part) but, for any of the authorized reasons, ceased to be mandatory, they cannot be related.

<sup>112</sup> CARVALHO SANTOS, João Manuel. *Idem* (1986) at 76-77; BESSONE, Darcy. “Do Contrato – Teoria Geral”, 4<sup>th</sup> ed., Sao Paulo: Saraiva (1997) at 126-128

<sup>113</sup> MIRANDA, Pontes de. *Idem* (2000), tomo 2 at 476; RIZZARDO, Arnaldo. *Idem* (2005) at 51; Apelação 9940509780, 2<sup>a</sup> Turma Cível do Tribunal de Justiça de São Paulo, Relator: Elliot Akel (02/09/2010)

<sup>114</sup> MIRANDA, Pontes de. *Idem* (2000), tomo 2 at 476; CARVALHO DE MENDONCA, Manoel Ignácio. *Idem* (1908) at 532; MONTEIRO, Washington de Barros. “Curso de Direito Civil, Direito das Obrigações, 2<sup>a</sup> Parte”, 24<sup>th</sup> ed., Sao Paulo: Saraiva (1990) at 14-15; GONCALVES, Carlos Roberto. *Idem* (2007) at 53. In contrast to this position, see CARVALHO SANTOS, João Manuel. *Idem* (1986) at 70.

<sup>115</sup> MIRANDA, Pontes de. *Idem* (2000), tomo 2 at 466

<sup>116</sup> DINIZ, Maria Helena. *Idem* (2003) at 84; RODRIGUES, Silvio. *Idem* (2003) at 71; GAGLIANO, Pablo Stolze. *Idem* (2006) at 87

Regarding offers made to the general public, Article 429 CC<sup>117</sup> expressly provides that they can be revoked if the offer contained such expression and the revocation follows the same means of communication employed in the offer. Since this provision does not state the time limit within which a public offer can be revoked, it is possible to infer that offers made to the general public are revocable anytime until an effective acceptance has been made.

Article 428 CC also refers to other specific circumstances in which a previously binding proposal is terminated and loses its compulsory effect. This rule distinguishes between offers made in the presence of the offeree (*inter praesentes*) and offers made in her absence (*inter absentes*). Interestingly, the law considers as being present persons negotiating over the phone or by similar means of communication in which the acceptance succeeds the offer without any interruption<sup>118</sup> (such as chat rooms, skype®, or teleconference<sup>119</sup>). In contrast, if the parties discuss the terms by mail or any other form of communication without direct and immediate contact<sup>120</sup>, they are viewed by Brazilian Law as absent persons<sup>121</sup>. Article 428, I, II and III CC<sup>122</sup> states that: (i) a proposal made in person without a fixed time for acceptance is terminated immediately if not accepted; (ii) a proposal made to an absent person without a fixed time for acceptance is terminated after a sufficient time has lapsed (the law limits this period to the time necessary for the offeror to be informed about the acceptance, which can vary according to the circumstances of the case); and (iii) a proposal made to an absent person with a fixed time for acceptance is terminated after the pre-determined time has lapsed without acceptance.

<sup>117</sup> Article 429, section 1 CC reads: “The offer is revocable by the same means it was published, provided that this right was expressed in the offer”.

<sup>118</sup> CARVALHO DE MENDONCA, Manoel Ignácio. *Idem* (1908) at 708

<sup>119</sup> For this opinion, see GAGLIANO, Pablo Stolze. *Idem* (2006) at 89 and GONCALVES, Carlos Roberto. *Idem* (2007) at 54. Note that not all scholars share this opinion. For instance, Arnaldo Rizzardo understands that communications by fax and e-mail are made in person (RIZZARDO, Arnaldo. *Idem* (2005) at 50).

<sup>120</sup> The validity of transactions conducted by electronic mail (e-mail) will not be dealt with in this Thesis.

<sup>121</sup> GAGLIANO, Pablo Stolze. *Idem* (2006) at 89; GONCALVES, Carlos Roberto. *Idem* (2007) at 54; PEREIRA, Caio Mario da Silva. *Idem* (2006)

<sup>122</sup> Article 428, I, II and III CC reads: “The offer ceases to be obligatory: I- if, being made without time limit, to a person present, it was not immediately accepted. It is considered also as present a person who contracts by telephone or similar means; II- if, being made without time limit to a person absent, sufficient time has elapsed for the reply to come to the knowledge of the offeror; III- if, made to a person absent, he has not forwarded the reply within the time given (...)”.



Article 428 CC is silent with regard to two other possible situations: (i) a firm proposal that is made in person; and (ii) a rejection of the proposal by the offeree. In relation to the first situation, it would be logical to infer that this kind of proposal should be subject to the same treatment as a firm proposal made to an absent person, which is terminated when the prescribed time has lapsed. It would also be reasonable to conclude that a rejected offer should end after it is dismissed by the offeree. However, since there is no statutory provision on this issue, one could maintain that an offer remains open even after it has been rejected by the offeree, who would still be able to accept the offer at a later time.

### 2.1.3. Acceptance

The acceptance is the second and final step in the process of contract formation. It is defined as a unilateral declaration of will that one party, the offeree, makes to the other party, the offeror, adhering integrally to a previous offer within the time period given<sup>123</sup>.

As a general rule, the acceptance can be express or implied from the offeree's conduct, unless the offeror has required a special form for acceptance<sup>124</sup>. However, in some situations the law presumes that the offeree has accepted the proposal provided that no refusal was received within the stated time. Article 432 CC<sup>125</sup> assumes that an offer is accepted if: (i) the transaction is of a kind that does not usually require express acceptance (for example, if the parties had established a practice in this sense); or (ii) the offeror has released the offeree from having to give an express acceptance. Regarding the first situation, the rule straightforwardly mirrors Article 111 CC<sup>126</sup>, which applies to every unilateral declaration of will. The second situation, on the other hand, has been greatly criticized by Brazilian scholars, who argue that it would allow the offeror to act abusively, binding the

<sup>123</sup> DINIZ, Maria Helena. *Idem* (2003) at 85; GONCALVES, Carlos Roberto. *Idem* (2007) at 56; RODRIGUES, Silvio. *Idem* (2003) at 72; Apelação 992080054845, 25ª Câmara de Direito Privado do Tribunal de Justiça de São Paulo, Relator: Antonio Benedito Ribeiro Pinto (06/10/2010)

<sup>124</sup> See Article 107 CC; MIRANDA, Pontes de. *Idem* (2000), tomo 3 at 194

<sup>125</sup> Article 432 CC reads: "If the business is one of those in which an express acceptance is not customary, or the proponent has dispensed with it, the contract is deemed closed, if the refusal does not arrive in time".

<sup>126</sup> Article 111 CC reads: "Silence is considered acceptance when the circumstances and the uses authorize and an express declaration of will is not required".

offeree without her real acceptance<sup>127</sup>. These scholars prefer to interpret this provision as limited to few situations already accepted by Brazilian society<sup>128</sup>.

Considering that an effective acceptance creates a binding contract between the offeror and the offeree, it binds not only the latter but also the former<sup>129</sup>. As a result, the determination of the moment when an acceptance becomes effective is crucial for contract formation and for the delimitation of the parties' rights and remedies in case of repudiation by either of the parties.

In spite of the relevance of the issue, Brazilian law does not expressly determine the moment an acceptance becomes effective. However, Article 434, *caput*, CC<sup>130</sup> suggests that acceptance would be effective upon its being sent to the offeror. Alternatively, the acceptance would be binding only after it is received by the offeror, since a dispatched acceptance can be withdrawn by the offeree if the withdrawal is received by the offeror prior to or simultaneously with the acceptance, according to Article 433 CC<sup>131</sup>. Brazilian scholars disagree on which approach is the correct one. The whole academic discussion is presented in Section 2.1.5, in an analysis of the moment of contract formation.

Moreover, an acceptance must be timely to be effective. Thus, a proposal has to be accepted before it loses its compulsory effect, in order to hold. If the acceptance reaches the offeror when the proposal has already been terminated, she is not bound to the proposal and, therefore, no contract is formed. In this situation, the late acceptance is considered a counter-offer, as will be explained in Section 2.1.4. However, as stated by Article 430 CC<sup>132</sup>, if the acceptance is sent before the expiration of the time limit, but, for unforeseen circumstances,

<sup>127</sup> NADER, Paulo. *Idem* (2008) at 59; CARVALHO SANTOS, João Manuel. *Idem* (1986) at 110

<sup>128</sup> All scholars who share this opinion give as an example of a situation already accepted by Brazilian society an illustration provided by Clovis Bevilacqua relating to hotel accommodations reservations, which is out of date in light of today's method of online booking (BEVILAQUA, Clovis. "Código Civil Comentado", vol. IV, 2<sup>nd</sup> ed., Rio de Janeiro: Francisco Alves (1924) at 4/246).

<sup>129</sup> DINIZ, Maria Helena. *Idem* (2003) at 85; RODRIGUES, Silvio. *Idem* (2003) at 74; Apelação 991010125168, 20<sup>a</sup> Câmara de Direito Privado do Tribunal de Justiça de São Paulo, Relator: Carlos Vieira Von Adamek (04/06/2010)

<sup>130</sup> Article 434, *caput*, CC reads: "Contracts made between absent persons become perfected from the sending of the acceptance (...)"

<sup>131</sup> Article 433 CC reads: "The acceptance is considered as non-existent, if before it or with it, the retraction of the offeree reaches the offeror". Note that this provision is very similar to Article 428, IV CC related to proposal's withdrawal.

<sup>132</sup> Article 430 CC reads: "If the acceptance, by an unforeseen circumstance, comes late to the knowledge of the proponent, she shall communicate it immediately to the offeree, under penalty of responding for losses and damages".



it does not reach the offeror on time, she must, without delay, inform the offeree of this fact; otherwise she may be liable for any damage suffered by the offeree in reliance on the “agreement”.

#### 2.1.4. Counter-Offer

As mentioned above, an acceptance is only effective if it is made in a timely manner and conforms integrally to the offer. Therefore, a statement that purports to be an acceptance but is made after the time limit for acceptance given by the offeror or that has additional or different terms is considered a counter-offer, according to Article 431 CC<sup>133</sup>. Even an accessory and non-material alteration would disqualify the statement as an acceptance<sup>134</sup>. As a result, it can be said that the Brazilian Civil Code adopts the old common law “Mirror Image Rule”, in which the acceptance must mirror the proposal.

Furthermore, a counter-offer would require a subsequent acceptance by the offeror to form the contract, inverting the positions of the original offeror and offeree<sup>135</sup>. Therefore, the chronological order of communications exchanged by the parties will determine if their responses act as offers or as counter-offers. If the counter-offer is not accepted by the other party, there is no contract, and thus, performance is not required<sup>136</sup>.

In the event that the original offeror does not object to the new terms included in the counter-offer and starts performance, Brazilian courts have understood that the offeror has

<sup>133</sup> Article 431 CC reads: “An acceptance that is tardy, with additions, restrictions, or modifications, amounts to a new offer”.

<sup>134</sup> CARVALHO SANTOS, João Manuel. *Idem* (1986) at 106-110; Apelação Cível n. 589.077.106, 1ª Câmara Cível do Tribunal de Justiça do Rio Grande do Sul, Relator: Tupinambá Miguel Castro do Nascimento (03/06/1990).

<sup>135</sup> DINIZ, Maria Helena. *Idem* (2003) at 87; NADER, Paulo. *Idem* (2008) at 58; COELHO, Fabio Ulhoa. “Curso de Direito Civil”. Vol. 3, São Paulo: Saraiva (2005) at 82

<sup>136</sup> Apelação Cível n. 70012808200, 16ª Câmara Cível do Tribunal de Justiça do Rio Grande do Sul, Relator: Paulo Augusto Monte Lopes (09/28/2005); Apelação n. 992090506307, 29ª Câmara de Direito Privado do Tribunal de Justiça de São Paulo, Relator: Reinaldo Caldas (07/28/2010); Apelação n. 992080054845, 25ª Câmara de Direito Privado do Tribunal de Justiça de São Paulo, Relator: Antonio Benedito Ribeiro Pinto (06/10/2010); Apelação com Revisão 992060488009, 34ª Câmara de Direito Privado do Tribunal de Justiça de São Paulo, Relator: Emanuel Oliveira (06/03/2009)

tacitly agreed with the counter-offer, and, therefore, the contract was formed under the original offeree's terms<sup>137</sup>. This is called by foreign scholars as the "Last Shot Rule".

### 2.1.5. Moment of Contract Formation

The moment a contract is formed is relevant in determining when it becomes binding and when the parties are obliged to perform their contractual commitments; one to pay the price, and the other to deliver the goods. As a consequence, none of the parties would be able to terminate the contract unilaterally, unless by breaching it. In that event, the other party would be entitled to either specific performance or damages<sup>138</sup>.

There are no controversies regarding the moment a contract is formed in cases when the parties are negotiating in person and no fixed term for acceptance was given. Indeed, as stated by Article 428, I CC, since a proposal made in person loses its compulsory effect just after it is made, the offeree has to accept it immediately. As a result, the contract is formed with the acceptance. Notwithstanding, if the parties are not negotiating face to face and there is an interval between the proposal and the acceptance, the determination of the moment a contract is formed becomes highly disputable.

Scholars around the world have developed two opposing theories to explain contract formation among absent parties<sup>139</sup>. The first one is the *Cognition Theory*, which understands that a contractual relationship is only formed when the offeror becomes aware of the offeree's acceptance. In other words, it is necessary that the offeror has read the acceptance letter. Accordingly, the offeree would be able to withdraw the acceptance until that specific moment.

The second is the *Declaration Theory*, which supports the notion that a contract is formed when the offeree declares her acceptance. This theory has three variations. First, the *Declaration Theory in the Strict Sense* states that a contract is formed when the offeree formulates a statement accepting the offer. The problems with this subtheory are that a

<sup>137</sup> Apelação sem Revisão 439680, 8ª Câmara do Extinto 1º Tribunal de Alcada Cível de Sao Paulo, Relator: Narciso Orlandi (10/19/1995); Apelação com Revisão 992020158776, 3ª Câmara do Segundo Grupo do Tribunal de Justiça de São Paulo (Extinto 2º Tribunal de Alcada Cível), Relator: Antonio Ribeiro (12/12/2003)

<sup>138</sup> See Article 461 CPC

<sup>139</sup> For more information, see CARVALHO DE MENDONCA, Manoel Ignácio. Idem (1908) at 715-717; RIZZARDO, Arnaldo. Idem (2005) at 61; DINIZ, Maria Helena. Idem (2003) at 89

contract would be formed even if the offeree never sends her acceptance to the offeror, and the offeree would never be able to withdraw her acceptance after declaring it. Both situations seems very odd. Second, the *Dispatch Theory* (also known as the common law *Mailbox Rule*) supports that contract formation happens when the acceptance is mailed by the offeree. In this situation, the cutoff point for withdrawal would be the act of posting the letter. Last, the *Receipt Theory* sustains that a contract is only formed after the acceptance is received by the offeror, and therefore until that moment the offeree would be able to withdraw her acceptance.

Article 434, *caput*, CC<sup>140</sup> expressly embraces the *Dispatch Theory*, stating that, as a general rule, an acceptance would be effective when sent to the offeror. However, some Brazilian scholars are critical of this rule<sup>141</sup>. In their view, the theory adopted in reality by the Brazilian Law is the *Receipt Theory*. Their understanding is based on a logical statutory interpretation of Article 433 CC, which provides that a dispatched acceptance can be withdrawn by the offeree if the withdrawal is received by the offeror before or simultaneously with the acceptance. Since all contracts are potentially subject to withdrawal, it is plausible to conclude that a contract would only be formed after an acceptance becomes irrevocable, in other words, after the acceptance is received by the offeror. Furthermore, Article 430 CC establishes that an acceptance that was mailed within the fixed time but that, for reasons that were out of the offeree's control, did not reach the offeror on time is not binding if the offeree, without delay, communicates this fact to the offeror. In this situation, the fact that the acceptance was mailed by the offeree within the time limit is irrelevant for contract formation. What matters is the reception of the acceptance by the offeror. The Code only imposes on the offeror the obligation to inform the offeree about the delayed acceptance to avoid the offeree's reliance on the "agreement", in accordance with the General Principle of Good Faith<sup>142</sup>.

<sup>140</sup> Article 434 CC reads: "Contracts made between absent persons become perfected from the sending of the acceptance, except: I- in the case of the preceding Article; II- if the proponent has agreed to await a reply; III- if it does not arrive within the time agreed".

<sup>141</sup> CARVALHO SANTOS, João Manuel. *Idem* (1986) at 121-123; GONCALVES, Carlos Roberto. *Idem* (2007) at 59-60; GAGLIANO, Pablo Stolze. *Idem* (2006) at 95-96

<sup>142</sup> RIZZARDO, Arnaldo. *Idem* (2005) at 57; RODRIGUES, Silvio. *Idem* (2003) at 74-75; GAGLIANO, Pablo Stolze. *Idem* (2006) at 93

In spite of these strong arguments, the majority of Brazilian scholars understand that Article 434 CC is the general rule and that Articles 433 and 430 CC are exceptions within that rule<sup>143</sup>. Therefore, in their opinion, the *Dispatch Theory* would be the norm and the *Receipt Theory* the exception.

### 2.1.6. Place of Contract Formation

The place where the contract was formed is a decisive factor in determining the law applicable to an international contract, as explained in Section 1, as well as the usages and parameters of good faith to be applied when interpreting the contract<sup>144</sup>. Article 435 CC<sup>145</sup> establishes that, unless the parties have agreed otherwise, the contract is presumed to be formed in the place where the proposal was made. This provision is complemented by Article 9, §2, LICC, which presumes that the contract is perfected in the offeror's place of business<sup>146</sup>.

Despite that fact, Article 435 CC and Article 9, §2, LICC contradict Article 434, *caput*, CC and the *Dispatch Theory*. As discussed in Section 2.1.5., Article 434, *caput*, CC provides that the contract is formed when the acceptance is mailed by the offeree. If the contract is formed at that moment, a logical conclusion would be that it is formed in the place where the offeree is located when posting her acceptance. Contrariwise, Article 435 CC and Article 9, §2, LICC assume that a contract is formed elsewhere; specifically, in the offeror's place of business<sup>147</sup>. This analysis of Article 435 CC and Article 9, §2, LICC fortifies the minority's view regarding the Code's adoption of the *Receipt Theory* inasmuch

<sup>143</sup> CARVALHO DE MENDONCA, Manoel Ignácio. *Idem* (1908) at 719; CARVALHO SANTOS, João Manuel. *Idem* (1986) at 114-115; RIZZARDO, Arnaldo. *Idem* (2005) at 63; PEREIRA, Caio Mario da Silva. *Idem* (2006); DINIZ, Maria Helena. *Idem* (2003) at 90; RODRIGUES, Silvio. *Idem* (2003) at 76; NADER, Paulo. *Idem* (2008) at 60; MONTEIRO, Washington de Barros. *Idem* (1990) at 20

<sup>144</sup> Article 113 CC reads: "Legal transactions shall be interpreted according to parameters of good faith and usages from the place where they were perfected".

<sup>145</sup> Article 435 CC reads: "The contract is reputed to be made in the place in which it was proposed".

<sup>146</sup> Agravo de Instrumento 994092880963, 3<sup>a</sup> Câmara de Direito Privado do Tribunal de Justiça de São Paulo, Relator: Egidio Giacoia (12/10/2009)

<sup>147</sup> PELUSO, Cezar et.al. *Idem* (2009) at 473

as it, and not the *Dispatch Theory*, considers the contract formed when the acceptance is received by the offeror, in what can be supposed to be her place of business<sup>148</sup>.

### 2.1.7. Formal Requirements

Pursuant to Article 107 CC, a contract is not subject to any requirement as to form, unless the law expressly provides otherwise. Regarding contracts for the sale of goods, the law does not determine any specific form, unless the parties have agreed otherwise<sup>149</sup>. This means that contracts for the sale of goods can be evidenced not only by a written document but also by confession, witness, presumption and expert opinions<sup>150</sup>.

Nevertheless, the possibility of proving the existence of a contract exclusively with witnesses<sup>151</sup> or presumptions<sup>152</sup> is limited to contracts amounting to no more than ten times the minimum wage in Brazil at the time the contract was entered into. In contrast, a written document signed by the parties proves the existence of an agreement regardless of the amount involved<sup>153</sup>. Importantly, if the document is written in a foreign language, it must be translated to Portuguese to be legally valid in Brazil<sup>154</sup>. These same rules apply to contract modification before or during performance.

Despite the fact that there is no formality for contracts for the sale of goods, arbitration clauses in particular must be in writing, according to Article 4, §1 of the Brazilian

<sup>148</sup> Carlos Roberto Gonçalves sees no problem with Article 435 CC, since he understands that the Civil Code has adopted the *Receipt Theory* (GONCALVES, Carlos Roberto. *Idem* (2007) at 60)

<sup>149</sup> Article 109 CC reads: “Where a contract is executed with a clause to the effect that it shall not be valid without a public instrument, this is of the substance of the act”.

<sup>150</sup> Article 212 CC reads: “Juridical acts, for which a special form is not required, may be proven by means of: I- admission; II- document; III- witness; IV- presumption; V- examination and inspection”; *Apelacao* 991020720096, 23a Camara de Direito Privado do Tribunal de Justica de Sao Paulo, Relator: Jose Marcos Marrone (10/20/2009)

<sup>151</sup> See Article 227 CC, which reads: “Except in express cases, proof exclusively by witnesses is only admitted in contracts the value of which does not exceed ten times the highest minimum wage in the country at the time the contract was concluded”. For instance, in 2010, the minimum wage in Brazil is approximately US\$300.00, according to *Medida Provisória* n. 474 (12/23/2009).

<sup>152</sup> See Article 230 CC, which reads: “Presumptions, except the ones determined by law, will not be admitted in the same situations in which the law excludes witness”.

<sup>153</sup> See Article 221 CC, which reads: “A private instrument, made and signed, or only signed by one who has the free disposition and administration of his property, proves conventional obligations of any value; but its effects, as well as those of the cession, are not operative, with respect to third persons, before transcription in the public register”.

<sup>154</sup> See Article 224 CC, which reads: “Documents drawn up in a foreign language shall be translated into Portuguese, in order to have legal effect in this country”.

Arbitration Law<sup>155</sup> and Article 6 of the Mercosur Agreement on International Commercial Arbitration<sup>156</sup>. These clauses may be included in the contract itself or contained in a separate document that refers to the previous agreement.

## 2.2. CONTRACT FORMATION UNDER THE CISG

### 2.2.1. Legal Tradition and Sources of Law

As mentioned in the Introduction, the CISG is recognized as the most relevant treaty governing international contracts for the sale of goods. One of the reasons why it has achieved such overwhelming success is that it represents the joint effort of several countries over more than fifty years to harmonize international sales laws<sup>157</sup>. Indeed, from 1928, when the first study on commercial laws harmonization<sup>158</sup> began, to 1980, when the final text of the CISG was unanimously approved, there was a significant increase both in numbers and in effective participation by representatives from different legal systems and different socio-economic and political sectors of the world community<sup>159</sup>. There were representatives from the socialist bloc, as well as from developing and developed countries from both the civil law and the common law traditions. Moreover, many academics and practitioners as well as international organizations also contributed to the elaboration of the Convention<sup>160</sup>. This

<sup>155</sup> Article 4, §1 of Lei de Arbitragem reads: “The arbitration clause has to be in writing, included in the contract itself or in a separate document that refers to the contract”.

<sup>156</sup> Article 6, Item 1, of the Mercosur Agreement on International Commercial Arbitration reads: “The arbitral convention must be in writing”

<sup>157</sup> For a general history of the CISG’s background, see WINSHIP, Peter. “The Scope of the Vienna Convention on International Sales Contracts”, in *International Sales: The United Nations Convention on Contracts For The International Sales of Goods*, Nina M. Galston and Hans Smit (eds.), Matthew Bender (1984) at 3-16

<sup>158</sup> In 1928, the International Institute for the Unification of Private Law (UNIDROIT) asked Ernst Rabel to draft a uniform law on international sales of goods, which would provide the foundation for the CISG.

<sup>159</sup> “To be sure, at the Vienna Diplomatic Conference the majority of the sixty-two participating States belonged to the Western hemisphere, equally divided between common law and civil law jurisdictions. Yet, there was also an ample representation of the so-called Eastern or Communist Bloc and an even more numerous presence of “non-aligned” countries of the so-called Third World”. (BONELL, Michael Joaquim. “The CISG, European Contract Law and the Development of a World Contract Law”, in *American Journal of Comparative Law*, Vol. 56, Issue 1 (2008) at 2)

<sup>160</sup> All these contributions “proved false the claims sometimes made that the convention was the product of theoreticians lacking contact with the reality of international trading”. (SCHLECHTRIEM, Peter. “Basic

diversity of points of view and contrasting interests is reflected in the CISG's text, which has no dominant domestic law or legal tradition<sup>161</sup>.

However, due to “considerable differences in the legal traditions and/or in the socio-economic structures of the States participating in the negotiations, some issues had to be excluded from the scope of the CISG at the outset”<sup>162</sup>. The CISG expressly excludes from its coverage several types of sales, such as consumer sales, and contracts in which the preponderant part is the supply of services<sup>163</sup>. In addition, some issues, such as contract validity<sup>164</sup>, property rights and product liability were also left out of the Convention<sup>165</sup>. Consequently, whenever any of these issues emerge in a contractual dispute governed by the CISG, the legal solution shall be provided by the applicable national law, determined according to the PIL rules of the Forum State<sup>166</sup>. In fact, the CISG “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”, as stated by Article 4 CISG.

Furthermore, in order to encourage worldwide adoption, some contentious provisions were included in the CISG but were formulated in vague or ambiguous language or with the reservation that Contracting States could opt out of them. Specifically in relation to Part II, which regulates contract formation, Article 92(1) CISG<sup>167</sup> permits a country to

---

Structures and General Concepts of the CISG as Models for a Harmonisation of the Law of Obligations” in *Juridica International*, vol. 10 (2005) at 27-34)

<sup>161</sup> For more information on this diversity of points of view, see ZWART, Sara G. “The International Law of Sales: A Marriage Between Socialist, Third World, Common, and Civil Law Principles” in *13 North Carolina Journal of International Law and Commercial Regulation* (1988) at 109-128

<sup>162</sup> BONELL, Michael Joaquim. *Idem* (2008) at 3

<sup>163</sup> See Articles 2 and 3(2) CISG

<sup>164</sup> Article 4(a) CISG provides that the Convention does not govern the validity of the contract. The term “validity” is not defined in the text of the Convention. “Presumably it includes any defence that may vitiate the contract under the proper law or laws of the contract because, for example, of lack of capacity, misrepresentation, duress, mistake, unconscionability, and contracts contrary to public policy (ZIEGEL, Jacob S. “Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods” (1981), available at <http://www.cisg.law.pace.edu/cisg/wais/db/articles/english2.html>). However, in some jurisdictions, validity rules may intersect with contract formation rules, such as, for example, formal requirements (See Articles 11 and 29 CISG). When there is a conflict between the CISG rules and the rules on validity of contracts in a national system, the CISG prevails, unless that State had made a reservation in this sense. (SCHLECHTRIEM, Peter. “Vienna Sales Convention 1980 (recent developments) - Developed Countries' Perspectives”, presentation at Conference for International Business Law (Singapore 1992) at 27)

<sup>165</sup> See Articles 4 and 5 CISG

<sup>166</sup> DIMATTEO, Larry A. *Idem* (2009) at 234

<sup>167</sup> Article 92(1) CISG reads: “A contracting state may declare (...) that it will not be bound by Part II of this Convention (...)”.



adopt the rest of the Convention leaving out the rules on contract formation<sup>168</sup>. Among Brazil's major trading partners, none has made such declaration<sup>169</sup>. Additionally, according to Article 6 CISG, parties may "exclude the application of this Convention or (...) derogate from or vary the effect of any of its provisions", including Part II.

With respect to the CISG application by judicial and arbitral tribunals, Article 7(1) CISG requires courts to interpret the CISG in regard to its international character and to the need to promote uniformity in its application<sup>170</sup>. Despite the fact that there is no common supreme court to apply or interpret the Convention and, consequentially, there is no binding precedent, "courts should (not must) follow well-reasoned foreign case law opinions; they are free to disregard foreign cases that demonstrate poor reasoning and those that fail to comply with CISG interpretative methodology"<sup>171</sup>. Nonetheless, there is always a risk that courts will interpret the CISG differently, in particular with a tendency to follow their respective domestic legal traditions, also known as homeward trend<sup>172</sup>.

As a means to achieve consistent interpretation, the UNCITRAL Secretariat published its Commentary on the 1978 Draft of the CISG<sup>173</sup>. Despite the fact that it concerns the 1978 Draft, its provisions are very similar to the 1980 text. The commentary is considered the closest counterpart to an Official Commentary and the most authoritative source one can cite. In addition, foreign legal materials, such as judicial and arbitral courts' decisions and scholarly writings regarding the applicability of the CISG, are easily accessible in English through UNCITRAL and other extensive international databases<sup>174</sup>. Last but not least, the CISG Advisory Council, a private initiative of scholars from various

<sup>168</sup> FARNSWORTH, E. Allan, "Formation of Contract" in *International Sales: The United Nations Convention on Contracts for the International Sale of Goods*, Nina M. Galston and Hans Smit (eds.), New York: Matthew Bender (1984) at 2-4.

<sup>169</sup> Up to December 2010, only Denmark, Finland, Norway and Sweden have made this reservation.

<sup>170</sup> MURRAY JR, John & FLECHTNER, Harry. "Sales, Leases and Electronic Commerce: Problems and Materials on National and International Transactions". Thomson West (2003) at 10

<sup>171</sup> DIMATTEO, Larry A. (et. al). "International Sales Law: A Critical Analysis of CISG Jurisprudence", New York: Cambridge University Press (2005) at 4. Note that foreign decisions do not have a binding effect upon national courts, but they can be used as persuasive authority.

<sup>172</sup> "Homeward trend reflects the fear that national courts will ignore the mandate of autonomous-international interpretations of the CISG in favor of interpretations permeated with domestic gloss". (DIMATTEO, Larry A. *Idem* (2005) at 2-3).

<sup>173</sup> UNCITRAL, Secretariat. "Commentary on the 1978 Draft Convention on Contracts for the International Sale of Goods", UN Doc. A/Conf. 97/5 (03/14/1979).

<sup>174</sup> Such as CLOUT ([www.uncitral.org](http://www.uncitral.org)), UNILEX ([www.unilex.info](http://www.unilex.info)) and the Pace Database on the CISG and International Commercial Law ([www.cisg.law.pace.edu](http://www.cisg.law.pace.edu)).



legal systems which aims at promoting a uniform interpretation of the CISG, issues opinions and provides guidelines in areas of likely diverging approaches<sup>175</sup>.

Since its adoption, the CISG has been considered “a landmark in the international unification process”<sup>176</sup>, and has influenced many legislative reforms on international, regional, and domestic levels<sup>177</sup>. For instance, the CISG served as a model for the UNIDROIT Principles of International Commercial Contracts (PICC), the Principles of European Contract Law (PECL), the Uniform Act Relating to General Commercial Law of the Organization for the Harmonization of Business Law in Africa (OHADA), and the domestic sales of goods acts from Finland, Norway, Sweden, and China<sup>178</sup>.

### 2.2.2. Proposal

The CISG differentiates a proposal from an offer. According to Article 14(1), 1<sup>st</sup> part, CISG, “a proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance”. In other words, under the CISG, an offer is a binding proposal. Proposals can be evidenced by either a statement (express) or a conduct (tacit)<sup>179</sup>, which is the approach in the Brazilian law. However, in contrast to the position of the Brazilian law, proposals directed to the general public are not considered offers but merely invitations to make offers, unless otherwise indicated by the offeror<sup>180</sup>. In addition, the CISG makes no distinction between offers made to present persons and offers made to absent persons, while the Brazilian Civil Code does.

<sup>175</sup> See [www.cisgac.com](http://www.cisgac.com)

<sup>176</sup> BONELL, Michael Joaquim. Idem (2008) at 1

<sup>177</sup> SCHLECHTRIEN, Peter. “25 Years of the CISG: An International Lingua Franca for Drafting Uniform Laws, Legal Principles, Domestic Legislation and Transnational Contracts” in *Drafting Contracts Under the CISG*, Harry M. Flechtner et al. eds., Oxford University Press (2008) at 167, 174 and 177

<sup>178</sup> For more on the CISG’s direct and indirect influence as a role model, see SARCEVIC, Petar. Idem (2003) at 10-15; SCHWENZER, Ingeborg & HACHEM, Pascal. Idem (2009) at 461-463; BONELL, Michael Joaquim. Idem (2008) at 5-26; and SCHLECHTRIEM, Peter. Idem (2005) at 27-34

<sup>179</sup> Article 11 CISG reads: “A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses”.

<sup>180</sup> Article 14(2) CISG reads: “A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal”.

The CISG approach to the parties' intention to be bound is more suitable for international transactions than the Brazilian law approach because the former respects difficulties in communication between foreign parties<sup>181</sup>. According to Article 8(1) CISG, a party's real intent will only be considered "where the other party knew or could not have been unaware what that intent was". If that is not the case, Article 8(2) provides that such intent shall be defined according to what "a reasonable person of the same kind as the other party would have had in the same circumstances". In determining that standard, courts have to give due consideration to all relevant circumstances of the case, including the negotiations, practices established by the parties, and usages.

Several foreign scholars understand the term "sufficiently define" to be problematic<sup>182</sup>. A few national courts consider that a definite proposal must be clear about identification of the goods, quantity, and price<sup>183</sup>, while the majority of courts are content to have quantity and price being merely implied<sup>184</sup>. In fact, several CISG provisions admit that the offer may contain implicit terms<sup>185</sup>. Firstly, Article 14(1), 2<sup>nd</sup> part, CISG deals with implied terms in the offer itself, stipulating that "a proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price"<sup>186</sup>. Secondly, if the offeror has neither expressly nor implicitly fixed or made provision in the proposal for determining the price, Article 55 CISG<sup>187</sup> allows "the price generally charged" to serve as a gap filler<sup>188</sup>. Thirdly, usages and practices which the

<sup>181</sup> ZELLER, Bruno. "Determining the Contractual Intent of Parties under the CISG and Common Law – A Comparative Analysis" in *European Journal of Law Reform* (Kluwer), vol. 4, no.4 (2002) at 629-643

<sup>182</sup> DIMATTEO, Larry A. *Idem* (2005) at 54-59; FARNSWORTH, E. Allan. *Idem* (1984) at 8-10

<sup>183</sup> Helen Kaminski Pty. Ltd. v. Marketing Australian Prods. 1997 US Dist. LEXIS 10630 at 2-3; Viva Vino Import Corp. V. Farnese Vini S.r.l. No. 99-6368, 2000 US Dist. LEXIS 12347

<sup>184</sup> Fauba v. Fujitsu Microelectronik, Cour de Cassation, Paris, 92-16.993 (Apr. 22, 1992); Appellate Court Frankfurt (*Special Screws Case*) 10 U 80/93 (Mar. 4, 1994) (F.R.G.)

<sup>185</sup> DIMATTEO, Larry A. *Idem* (2005) at 54-59

<sup>186</sup> This provision was included in the CISG as a compromise between countries that supported open price offers and those that opposed such offers. The opposing countries viewed unilateral price determination as a disadvantage to the weaker party. Socialist countries objected because a policy of open price offers did not satisfy state planning agency requirements (ZWART, Sara G. *Idem* (1988) at 109-128; ZIEGEL, Jacob S. *Idem* (1981)).

<sup>187</sup> Article 55 CISG reads: "Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned".

<sup>188</sup> Article 55 CISG raises another troublesome issue: *whether the failure of the parties to state a price prevents contract formation*. Professor Farnsworth has the restrictive view that an offer is only valid if it contains some

parties have established between themselves are binding, pursuant to Article 9(1) CISG<sup>189</sup>, and thus, they can also be employed to determine the parties' intent regarding unstated price and quantity<sup>190</sup>. Lastly, the Article 8(2) "reasonable person" test, explained above, may also be used to determine the parties' intent with respect to the missing terms<sup>191</sup>. As a result, even though a proposal does not establish the quantity or the price of the goods these terms can be inferred and the offer can be considered definite under the CISG. Contrariwise, under Brazilian law, quantity and price cannot be implied.

Subsequent to determining whether a proposal is binding under the CISG, it is necessary to ascertain when it becomes effective. Article 15(1) CISG states that it is at the moment "when it reaches the offeree", which means that a statement was communicated orally or delivered personally to the addressee's place of business, mailing address or habitual residence<sup>192</sup>. Consequently, an offer, whether revocable or irrevocable, may be withdrawn by the offeror "if the withdrawal reaches the offeree before or at the same time as the offer", as stated in Article 15(2) CISG. An offeree cannot accept an offer until she has received it, even if she was aware of its existence<sup>193</sup>. This solution is slightly different from the one adopted by Brazilian law, which considers an offer binding when it is communicated to the offeree, as explained above.

---

method of determining the price. Considering that Article 14(1) CISG prevents a contract with an unstated price from being validly concluded, and that Article 55 CISG is only applicable when a contract has already been validly concluded, he asserts that Article 55 CISG cannot fill in the gaps in Article 14(1) CISG. Therefore, Article 55 would only be applicable after the contract is deemed to be enforceable. (FARNSWORTH, E. Allan. *Idem* (1984) at 8-10). In contrast, Professor Honnold understands that Article 55 CISG remedies the lack of price or of a methodology for determining the price. In his opinion, Article 6 CISG and Article 12 allow the parties to vary the effect of any of the convention's provisions, including Article 14(1) CISG price provision. (HONNOLD, John O. "Uniform Law For International Sales", 3<sup>rd</sup> ed., The Hague: Kluwer Law International (1999) at §137.6-154). Honnold's view is supported by the Secretariat's Commentary to Article 14, which states that as long as there is intent to be bound, the law of sales can supply missing terms.

<sup>189</sup> Article 9(1) CISG reads: "The parties are bound by any usage they have agreed and by any practices which they have established between themselves".

<sup>190</sup> *Geneva Pharmaceutical Tech. Corp. V. Barr Labs., Inc. et al.*, 201 F. Supp. 2d 236, 281; *Adamfi Video Production GmbH v. Alkotok Studiosa Kisszovetkezet, FB, Budapest, AZ 12.G.41.471/1991 (03/24/1992) (Hung.)*

<sup>191</sup> *District Court Oldenburg (Egg Case)*, 12 O 2943/94 (Germany) (02/28/1996); *Pratt & Whitney v. Malev Metropolitan Court (Hung.)* (01/10/1992)

<sup>192</sup> Article 24 CISG reads: "For the purpose of this Part of the Convention, an offer, declaration of acceptance or any other indication of intention "reaches" the addressee when it is made orally to him or delivered by any other means to him personally, to his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence".

<sup>193</sup> Secretariat Commentary to Art. 15

Regarding revocability and irrevocability of offers, Brazilian Law and the CISG deal with the issue in a similar way, but the CISG is clearer. According to Article 16(1) CISG<sup>194</sup>, an effective offer is revocable by the offeror until the offeree dispatches her acceptance, and, pursuant to Article 16(2) CISG<sup>195</sup>, an offer is irrevocable if: (i) it indicates this limiting condition (for example, firm offers<sup>196</sup>); or (ii) if the offeree relied on the fact that the offer would be held open, despite the fact that there was no stated time limit.

Finally, similarly to the Brazilian law position, Article 18(2), 2<sup>nd</sup> part, CISG<sup>197</sup> provides that: (i) in general, an oral offer is terminated immediately after it is made; (ii) an indefinite offer is terminated within a reasonable time, taking into account the circumstances of the transaction; and (iii) a firm offer is terminated within the time fixed by the offeror. However, the CISG filled the Brazilian Civil Code's lacuna with respect to termination of an offer by rejection, establishing, in its Article 17 CISG, that "an offer, even if it is irrevocable, is terminated when a rejection reaches the offeror". Consequently, if the offeree rejects the offer, she cannot assent to it later, unless the offeror agrees to it, as will be explained in the next section.

### 2.2.3. Acceptance

As provided by Article 18(1), 1<sup>st</sup> part, CISG, an acceptance is "a statement made by or other conduct of the offeree indicating assent to an offer". Therefore, an acceptance can be either express or implied. Nonetheless, in accordance with Article 18(1), 2<sup>nd</sup> part, CISG, "silence or inactivity does not in itself amount to acceptance", and as a result an offeree may disregard an offer, even if that offer stipulates that acceptance is presumed if no answer to the contrary is received<sup>198</sup>. Regarding the second part of this rule, some scholars<sup>199</sup> argue that

<sup>194</sup> Article 16(1) CISG reads: "Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance".

<sup>195</sup> Article 16(2) CISG reads: "However, an offer cannot be revoked: (a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or (b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer".

<sup>196</sup> Article 20 CISG

<sup>197</sup> Article 18(2) CISG reads: "(...) An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise."

<sup>198</sup> DIMATTEO, Larry A. (et. al). *Idem* (2005) at 52.

the term “in itself” allows silence to be considered acceptance in some cases, particularly if silence is linked with other circumstances such as failure to act in the opposite direction, practices established by the parties, and industry usages. This interpretation of Article 18(1), 2<sup>nd</sup> part, CISG, which is quite similar to the approach of Brazilian law, is supported by several national courts’ decisions<sup>200</sup>.

Under the CISG’s regime, the offeree’s response does not need to match integrally with the offer to constitute an acceptance, unlike the Brazilian Law. As will be better explained in Section 2.2.4, a reply with additional or different terms that do not materially alter the offer is considered an acceptance, unless the offeror, as soon as possible, objects to the discrepancy.

According to Article 18(2), 1<sup>st</sup> part, CISG, an acceptance only “becomes effective at the moment the indication of assent reaches the offeror”. This rule has two ramifications. First, if an acceptance is lost in the mail and never reaches the offeror, it is not effective even though the offeror was aware of the acceptance by other means<sup>201</sup>. Second, an acceptance in transit may be withdrawn by the offeree if the withdrawal reaches the offeror before or concomitantly with the acceptance<sup>202</sup>. However, after an acceptance becomes effective, it cannot be revoked in any event. Article 18(2), 1<sup>st</sup> part, CISG contrasts with the position supported by the majority of Brazilian scholars which is that, as explained in Section 2.1.5, an acceptance becomes effective when it is dispatched by the offeree.

Importantly, only a timely acceptance can be effective. Article 18(2), 2<sup>nd</sup> part, CISG provides that: (i) in general, an oral offer must be accepted immediately; (ii) an indefinite offer must be accepted within a reasonable time; and (iii) a firm offer must be accepted within the time fixed by the offeror. Therefore, late acceptances (statements of assent that reach the offeror when the proposal has already been terminated) are not effective, unless the

<sup>199</sup> DIMATTEO, Larry A. (et. al). *Idem* (2005) at 60-66; HONNOLD, John O. *Idem* (1999) at §164-179

<sup>200</sup> Appellate Court Koln (*Rare Hard Wood Case*), 22 U 202/93, (Germany) (02/22/1994); Hughes v. Societe Technocontact, Cour de Cassation B 95-19.448, 180 P (France) (01/27/1998); Calzados Magnanni v. Shoes General International, Cour d’Appel de Grenoble, 96J/00101 (France) (10/21/1999); Appellate Court Dresden (*Terry Cloth Case*), 7 U 720/98 (Germany) (07/09/1998)

<sup>201</sup> FARNSWORTH, E. Allan. *Idem* (1984) at 14

<sup>202</sup> Article 22 CISG reads: “An acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective”.

offeror, without delay, so informs the offeree<sup>203</sup>. Nevertheless, if the acceptance is sent in due time but, for reasons that are not under the offeree's control, does not reach the offeror on time, the acceptance is effective unless the offeror, without delay, responds to the offeree to the contrary<sup>204</sup>. These rules coincide with the Brazilian law provisions.

#### 2.2.4. Counter-Offer

As under Brazilian Law, under the CISG a late acceptance or a reply that purports to be an acceptance but suggests the possibility of additional or different terms is considered a counter-offer, terminating the first offer and continuing the negotiation<sup>205</sup>. Nonetheless, "in order to avoid absurd situations when a smallest divergence would amount to a new offer"<sup>206</sup>, if these additional or different terms are not material, the reply is seen as an acceptance, unless the offeror, without undue delay, notifies the offeree to the contrary<sup>207</sup>. As a result, the "Last Shot Rule" applies and the minor additions and modifications contained in the acceptance become part of the contract.

Taking into account that Article 19(3) CISG provides a non-exhaustive list of material terms, including "among other things, (...) the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other [and] the settlement of disputes", the prevailing scholarly opinion is that the CISG in fact adopts the

<sup>203</sup> Article 21(1) CISG reads: "A late acceptance is nevertheless effective as an acceptance if without delay the offeror orally so informs the offeree or dispatches a notice to that effect".

<sup>204</sup> Article 21(2) CISG reads: "If a letter or other writing containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror orally informs the offeree that he considers his offer as having lapsed or dispatches a notice to that effect".

<sup>205</sup> Article 19(1) CISG reads: "A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer".

<sup>206</sup> FEIJOS, Andrea. "Battle of Forms Under the Convention on Contracts for the International Sale of Goods (CISG): A Uniform Solution?" in *Vindobona Journal of International Commercial Law & Arbitration*, vol. 11 (2007) at 113-129

<sup>207</sup> Article 19(2) CISG reads: "However, a reply to an offer which purports to be an acceptance but contain additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance".

old common law “Mirror Image Rule” as the Brazilian law does, but with an exception regarding minor differences between the offer and the acceptance<sup>208</sup>.

With respect to material discrepancies, in the event that the original offeror objects to them prior to performance, there is no binding contract, since a deviating acceptance is considered a counter-offer and requires the offeror’s approval to form the contractual relationship. However, if she does not object to these terms and starts performance (for example, by delivering the goods or paying the price), national judges and arbitrators tend to find a valid contract between the parties because performance indicates assent.

In this event, courts would have to determine the terms of the contract. However, previous judicial and arbitral decisions show that questions like these are not easy to resolve. While some courts have found that the contractual terms are the ones contained in the last form exchanged by the parties, applying the same “Last Shot Rule” approach adopted by Brazilian courts<sup>209</sup>, others have applied the less arbitrary and more logical “Knock Out Rule” excluding the conflicting terms provided by the parties and replacing them by the provisions of CISG or of the applicable law<sup>210</sup>. A few other courts arrived at an alternative solution, called the “First Shot Rule”, of ignoring the offeree’s counter-offer terms and upholding the offeror’s proposal terms<sup>211</sup>. “Whichever approach a given court prefers, Article 19 should not be read in isolation from other Convention provisions”<sup>212</sup>.

### 2.2.5. Moment of Contract Formation

Article 23 CISG states that “a contract is concluded at the moment when an acceptance of an offer becomes effective”, which is “the moment the indication of assent

<sup>208</sup> DIMATTEO, Larry A. *Idem* (2009) at 244; LOOKOFISKY, Joseph. “Understanding the CISG”, 3<sup>rd</sup> ed., The Hague: Kluwer Law International (2008) at 58-59; HONNOLD, John O. *Idem* (1982) at 193.

<sup>209</sup> OLG Saarbrücken, 1 U 69/92 (01/13/1992) (Germany); OLG München, 7 U 4427/97 (03/11/1998) (Germany); *Filanto SpA v. Chilewich International Corp.* 789 F. Supp. 1229, 1240 (S.D.N.Y. 1992); ICC Arbitration Case no. 8611 (01/23/1997); *Maggellan Int’l Corp. V. Salzgitter Handel GmbH* No. 99 C 5153, 1999 U.S. Dist. LEXIS 19386 (N.D. Ill. Dec. 7, 1999); OLG Köln 16 U 25/06 (05/24/2006) (Germany)

<sup>210</sup> BGH VIII ZR 304/00 (01/09/2002) (Germany); *Societe Les Verreries de Saint Gobain, SA v. Martinswerk GmbH*, Cour de Cassation, J 96-11.984 (07/16/1998) (France); *Nordgemuse Wilhelm Krogmann, OGH v. Javier Vierto, S.A.*, Tribunal Supremo 3516/1997 (02/17/1998) (Spain)

<sup>211</sup> *ICT v. Princen Automatisering Oss*, Appellate Court’s-Hertogenbosch (11/16/1996) (Netherlands); *ISEA Industrie v. Lu*, Appellate Court Paris (12/13/1995) (France)

<sup>212</sup> LOOKOFISKY, Joseph. *Idem* (2008) at 59



reaches the offeror”, pursuant to Article 18(2) CISG<sup>213</sup>. Therefore, in contrast to the Brazilian law, which, according to the majority of Brazilian scholars, adopts the *Dispatch Theory*, the CISG adopts the *Receipt Theory*<sup>214</sup>, explained in Section 2.1.5.

### 2.2.6. Place of Contract Formation

Even though, under PIL rules in many jurisdictions, the place of contracting is important for determining the applicable law, the CISG has no provision regarding this issue, probably because its applicability depends on the parties’ place of business rather than on the place where the contract is formed. The Secretariat Commentary on Article 23 CISG<sup>215</sup> elucidates that even though this provision concerns the moment at which a contract is concluded, it may be interpreted in some legal systems to be determinative of the place of contract formation. Thus, this issue must be resolved by the national law designated by the forum’s PIL rules<sup>216</sup>.

### 2.2.7. Formal Requirements

According to Article 11 CISG, “a contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form (...)”, unless the parties have establish their own formalities, derogating from or varying the effect of CISG’s provisions, pursuant to Article 6 CISG and the Principle of Party Autonomy.

This means that, absent additional requirements established by the parties, contracts governed by the CISG may be proven by any means, including written agreements, informal

<sup>213</sup> Secretariat Commentary on Article 21 of the 1978 Draft of the CISG (*draft counterpart of Article 23 CISG*) reads: “Article 21 specifically states that which would otherwise have undoubtedly been understood to be the rule, i.e. that the contract is concluded at the moment than an acceptance of an offer is effective [becomes effective] in accordance with the provisions of this Convention. It was thought desirable to state this rule explicitly because of the large number of rules in this Convention which depend on the time of the conclusion of the contract (...)”. Articles 55 and 68 CISG are provisions that depend on this determination.

<sup>214</sup> Editorial remarks (comparative commentary) on Article 23 CISG and its PECL counterparts (2002)

<sup>215</sup> The second part of the Secretariat Commentary on Article 21 of the 1978 Draft of the CISG (*draft counterpart of Article 23 CISG*) reads: “(...) Article 21 does not state an express rule for the place at which the contract is concluded. Such a provision is unnecessary since no provision of this Convention depends upon the place at which the the contract is concluded. Furthermore, the consequences in regard to conflicts of law and judicial jurisdiction which might arise from fixing the place at which the contract is concluded are uncertain and might be unfortunate. However, the fact that article 21, in conjunction with article 16 (*draft counterpart of CISG article 18*), fixes the moment at which the contract is concluded may be interpreted in some legal systems to be determinative of the place at which it is concluded”.

<sup>216</sup> Editorial remarks (comparative commentary) on Article 23 CISG and its PECL counterparts (2002)

correspondence (such as an unsigned fax or an invoice in conjunction with a bill of landing), negotiations, prior or contemporaneous oral agreements, oral testimony, prior course of dealing, the parties' intent and the parties' conduct<sup>217</sup>. Therefore, with respect to evidence of contract formation, the CISG is as informal as the Brazilian Law, both in form and substance.

Likewise, the CISG does not require any particular form for modification of pre-existing commercial contracts before or during the course of performance. As stated by Article 29 CISG<sup>218</sup>, the mere agreement of the parties is enough, unless they have determined, in an earlier written contract, a specific formality such as a "no oral modification" clause.

However, exceptionally, the conduct of a party may preclude her from demanding compliance with the formal requirement if the other party has relied on such conduct. For example, when the parties have made an oral adjustment to the original contract regarding a payment due date, one party cannot insist on the earlier payment schedule, because the other party probably has relied on the oral modification to manage her business' cash flow<sup>219</sup>. Since the other parties' reliance is a condition for this exception to apply, the Secretariat Commentary on Article 29 CISG<sup>220</sup> suggests that where a contract has been partially performed and the parties have agreed to an oral modification, a party who intends to resume

<sup>217</sup> Articles 8, 9 and 11 CISG; DIMATTEO, Larry A. *Idem* (2005) at 38-41; Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories, Inc. et. al, 201 F.Supp.2d 236, 281 (S.D.N.Y. 2002); MCC Marble Ceramic Center, Inc. v. Cerâmica Nuova D'Agostino, S.p.A., 144 F.3d 1384, 1390 n.14 (11th Cir. 1998); Claudia v. Olivieri Footwear Ltd., No. 96 CIV. 8052 (HB) (THK) 1998 U.S. Dist. LEXIS 4586, at \*18 (S.D.N.Y.) (04/06/1998); Handelsgericht [HG] [Commercial Court] 45/1994 (12/05/1995) (Switzerland); Jose Luis Morales y/o Son Export, S.A. de C.V., de Hermosillo Sonora, Mex., Compromex Arbitration proceeding, M/66/92 (05/04/1993) (Mexico)

<sup>218</sup> Article 29 CISG, reads: "(1) A contract may be modified or terminated by the mere agreement of the parties. (2) A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct".

<sup>219</sup> DATE-BAH, Samuel K. "Comments on Article 29 CISG [Modification of Contract] in *Bianca-Bonell Commentary on the International Sales Law*, Millan: Dott. A Giuffrè Editore, S.p.A. (1987) at 240-244. For more examples, see HONNOLD, John O. *Idem* (1999) at 229-235; LG Hamburg 5 O 543 (09/26/1990) (Germany); Appellate Court Leeuwarden (Auto-Moto Styl S.R.O. v. Pedro Boat B.V.) (08/31/2005) (Netherlands)

<sup>220</sup> Secretariat Commentary on Article 27 of the 1978 Draft of the CISG (*draft counterpart of Article 29 CISG*) Example 27A

her original rights for the remainder of the contract must give notice to that effect to the other party. The Brazilian law does not deal with this issue.

With respect to arbitration as well as jurisdiction clauses, the CISG does not provide any particular rule, but other international conventions, such as the New York Convention on Recognition and Enforcement of Arbitral Awards of 1958 (1958 NY Convention), ratified by Brazil and its most important trading partners, the European Union 1968 Brussels Convention, and the Mercosur 1994 Buenos Aires Protocol, do, and may override the CISG, requiring these terms to be in writing<sup>221</sup>.

Importantly, Contracting States whose legislations demand contracts of sale of goods to be concluded in a written form or that prescribe any other requirement as to form, such as “Consideration” in the case of common law countries, can preserve their formal requirements by making an Article 96 CISG<sup>222</sup> declaration. Foreign scholars have provided two diverging interpretations for this reservation<sup>223</sup>. First, formal requirements will always be preserved when one of the parties is from a Contracting State that has made such a reservation. Second, these requirements will only be respected if the Forum State’s PIL principles point to the law of an Article 96 Reservatory Contracting State. This means that contracts concluded with parties whose place of business are in Article 96 Reservatory States may be subject to written requirements. By the same token, contracts concluded with parties from all other Contracting States, even States whose domestic law prescribes any restriction or limitation, will follow the Convention’s rules. Among Brazil’s major trading partners, only Argentina has made such declaration<sup>224</sup>.

Despite the fact that Article 6 CISG and the Principle of Party Autonomy allow parties to derogate from or vary the effect of any CISG provision, and Article 9(1) CISG

<sup>221</sup> DIMATTEO, Larry A. *Idem* (2005) at 39

<sup>222</sup> Article 96 CISG reads: “A Contracting State whose legislation requires contracts of sale to be concluded or evidenced by writing may at any time make a declaration in accordance with article 12 that any provision of article 11, article 29, or Part II of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in that State”.

<sup>223</sup> RAJSKI, Jerzi. “Comments on Article 96 CISG [Final Provisions: Declaration as to Written Form] in *Bianca-Bonell Commentary on the International Sales Law*, Millan: Dott. A Giuffrè Editore, S.p.A. (1987) at 658-660; DIMATTEO, Larry A. *Idem* (2005) at 42-43

<sup>224</sup> Up to September, 2010, Article 96 CISG Reservatory Contracting States list includes also Armenia, Belarus, Chile, Hungary, Latvia, Lithuania, Paraguay, Russia and Ukraine.

provides that parties are bound to any usage or practice which they have established between themselves, parties from Article 96 Reservatory States may not derogate or vary their countries' reservation in order to make formal requirements more flexible<sup>225</sup>.

## 2.3. CONTRACT FORMATION UNDER THE AMERICAN LAW

### 2.3.1. Legal Tradition and Sources of Law

The Common Law system originated in England<sup>226</sup> and expanded into its former colonies, including the United States of America. Although the more general and essential aspects of the English legal tradition, such as the style of legal thought and the role played by the jury in the administration of both civil and criminal justice, were absorbed by the American legal system and have never been displaced, some features were modified as a means to adapt to the New World and others developed apart from its roots, especially after the Revolution<sup>227</sup>. As a result, US law today is a fully autonomous legal system, detached from the English legal system. Moreover, inasmuch as some regions of the US were first colonized by other countries, such as Netherlands, France, and Spain, the law of some states still bears the imprint of such origin. For instance, Louisiana is the only American state that has retained the Civil Law, as against the Common Law in force in the other states.

Clearly, the relevance of case law as a source of authority is the distinctive feature of the Common Law in comparison with the Civil Law system. The essence of the Common Law is that legal rules are made not only by legislators, which is the case of Civil Law countries in general, but also by judges, who apply the law to the facts before them according

<sup>225</sup> Article 12 CISG

<sup>226</sup> The *Common Law* legal system was first advanced by the English kings' judges between 1100-1272 aiming at the creation of a national legal system and the consolidation of royal power through the centralization of the administration of justice. The law they applied was said to be *common* because it supposedly represented the customs of the whole realm. In order not to cause confusion for civil law readers, the term "Common Law" will be used in this thesis to refer only to "the Common Law legal system", and the term "case law" will be used to refer to "the law developed by courts' decisions" (as opposed to statutes). The distinction between "common law" and "equity" will not be discussed here.

<sup>227</sup> VON MEHREN, Arthur Taylor & MURRAY, Peter L. "Law in the United States". 2<sup>nd</sup> ed., New York: Cambridge University Press (2007) at 32-40; FARNSWORTH, Allan E. "An Introduction to the Legal System of the United States", 3<sup>rd</sup> ed., New York: Oceana Publications, Inc. (1996) at 6-12

to the implicit principle of *stare decisis*, which means “to stand by decided matters”<sup>228</sup> and is also called the “rule of precedent”. According to this doctrine, cases dealing with the same material facts should be decided in a similar way, which is fundamental for the system’s integrity, coherence, and predictability. For this reason, in theory, Common Law legal actors think inductively on a case-by-case basis, building their legal argument by delimitating the facts and then searching for legal principles derived from these facts, rather than starting with an abstract rule and determining which factual patterns match within it, as their Civil Law counterparts do<sup>229</sup>.

If there is no previous decision or the judge finds that the case is essentially distinct from the existing previous decisions, she has the authority and the duty to create the law, giving a solution for that individual case. This is called a case of “first impression”. However, this lawmaking is limited to the narrow factual boundaries of the case before her. On the other hand, if there is an earlier decision of the same court or of a higher court whose facts are similar to the case at hand, the judge cannot make up a new law; she must follow the precedent. A decision of a higher court acts as binding authority on the court that made the ruling and on lower courts of the same jurisdiction. As a consequence, only appellate courts’ decisions carry authority, and decisions of the court of last resort have final authority. In addition, rulings of courts from different jurisdictions and of coordinate courts of the same jurisdiction act only as persuasive authority. Despite the fact that courts do not need to follow these decisions, they have to give them high consideration.

Nevertheless, since the rule is that case law must be faithful to the principle behind each decision and not to the decision itself, judges and lawyers can avoid the operation of the *stare decisis* doctrine by utilizing several devices. One such device is the process of “distinguishing”, where the material facts of the precedent case are compared with the material facts of the case at bar. If they differ, the previous decision is not binding<sup>230</sup>. Another device is to characterize the *ratio decidendi*, the part of the case that contains the

<sup>228</sup> From *stare decisis et non quieta movere*, which means “to stand by the decisions and not disturb settled points”. The doctrine of *stare decisis* and the doctrine of precedent will be used in this Thesis interchangeably.

<sup>229</sup> BOGDAN, Michael. *Idem* (1994) at 84; VON MEHREN, Arthur Taylor & MURRAY, Peter L. *Idem* (2007) at 40

<sup>230</sup> “The ability to recognize potential fact distinctions that might dilute or eliminate the precedential force of a prior decision and articulate them in argument or in judicial opinions is an important skill of a common law lawyer or judge” (VON MEHREN, Arthur Taylor & MURRAY, Peter L. *Idem* (2007) at 44).

rule of law on which the judicial decision is based, as mere *obiter dictum*, an incidental expression of opinion that is not essential to the decision<sup>231</sup>. Furthermore, in cases where the precedent was reached by concurrent opinions, the judge can decide among those opinions which one she wishes to follow and ignore the others. Lastly, the judge can simply overrule the precedent decision, understanding that it was wrongly decided or that some relevant conditions or policies have changed<sup>232</sup>.

Despite the importance of case law, legislative enactments have enjoyed primacy as a source of law in the Common Law system, especially after the nineteenth century. Indeed, the increasing complexity of economic and social life intensified the need for government regulation, both at state and federal levels, because “modern regulation would be impossible to effect and implement with the old, pure [case] law method of slowly building rules and principles through authoritative judicial decisions in individual cases”<sup>233</sup>.

Nevertheless, American statutes differ from Civil Law codes in that they are not generalized, systematic statements of established legal rules and principles. In general, they are construed strictly and narrowly, and sometimes arranged in “codes”, which are no more than groupings of legislation about the same issue. A similarity between Civil Law codes and Common Law statutes is that enacted law has supremacy over case law. A legislature has the

---

<sup>231</sup> Since “judges, unlike legislators, have no power to lay down rules for cases that are not before them, (...) what they say on such other matters is not binding” (FARNSWORTH, Allan E. *Idem* (1996) at 54). See also Chief Justice John Marshall’s opinion about *dictum* in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821). However, to determine with precision the holding (*ratio decidendi*) of a precedent decision is a difficult task. “First, even when the result is joined in by all the judges, different strands of reasoning may appear in the opinions of different judges, who are free to explain the decision in their own way and often do. Second, propositions of law are obviously always connected with the facts to which they are declared to be applicable (...) But what facts are essential or most important is neither preordained nor obvious. To some extent the opinion of the court may reveal what facts it considered to be essential, but the opinion will often leave room for disagreements” (HUGHES, Graham. “Common Law Systems” in *Fundamentals of American Law – New York University School of Law*, Allan B. Morrison (ed.), New York: Oxford University Press (1996) at 19).

<sup>232</sup> Since precedents can be changed, it would be reasonable to conclude that judges from the Common Law tradition are free to make new rules. However, their rulings will only become a legal principle if both the decision is not reversed on appeal and other judges support this change in the law applying the new precedent. Surely, the level of support will depend on the rationale given for the change. When judges decide a case they are not only worried about the impact of the ruling on the particular parties, but also on what precedent they want to make, in which direction they want the law to evolve.

<sup>233</sup> HUGHES, Graham. *Idem* (1996) at 14



power to abolish or modify case law, but judicial decisions cannot change statutory law. However, when courts interpret statutory provisions, their rulings have precedential effect<sup>234</sup>.

The supreme Law in the United States is the American Constitution, enacted on September 25, 1789<sup>235</sup>. In contrast to Brazil's federal system, the American federation originated from the voluntary alliance of thirteen sovereign former British colonies<sup>236</sup>; therefore, in order to reach a compromise between the States, the centralized government was granted limited authority, and the residual powers were reserved to the states<sup>237</sup>.

Although Article I, Section 8, of the Constitution enumerates the federal government's legislative powers, some provisions are unclear. As a result, Congress has supported a fair-reaching federal authority availing itself of "the commerce clause"<sup>238</sup> and "the necessary and proper clause"<sup>239</sup>, and most of the US Supreme Court's task for the last centuries was to elucidate the constitutional distribution of federal and state authorities. In summary, the federal legislature has authority to regulate interstate commerce and state legislatures intrastate commerce within each state jurisdiction<sup>240</sup>.

However, interests over interstate and intrastate commerce may sometimes coincide. Thus, some subjects may be regulated by both federal and state statutes. In this event, as a matter of American constitutional law, federal law overrides state law. Examples of federal statutes that preempt state legislation are the Federal Bill of Landing Act, the Carmack

<sup>234</sup> BURNHAM, William. "Introduction to the Law and Legal System of the United States", 2<sup>nd</sup> ed., St Paul: West Group (1999) at 35-38; VON MEHREN, Arthur Taylor & MURRAY, Peter L. Idem (2007) at 14-19

<sup>235</sup> Article VI, Section 2 of the US Constitution reads: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the land; and the Judges in every States shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding". Federal laws and international treaties also have supremacy over other laws, however, both of them are hierarchically inferior to the Constitution.

<sup>236</sup> Note that the former colonies became independent from England in 1781 with the Declaration of Independence. However, they did not organize themselves as a federation from the beginning. The Articles of Confederation, a document from 1781, established a confederation of independent states.

<sup>237</sup> The Tenth Amendment (1791) reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people".

<sup>238</sup> Article I, Section 8, Item 2 of the Constitution reads: "[The Congress shall have Power] To regulate Commerce (...) among the several states". See also *Gibbons v. Ogden*, 22 U.S. I (1824).

<sup>239</sup> Article I, Section 8, Item 18 of the Constitution reads: "[The Congress shall have Power] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof". See also *McCulloch v. Maryland* 17 U.S. (4 Wheat.) 316 (1819).

<sup>240</sup> *United States v. Lopez*, 514 U.S. 549 (1995)



Amendment to the Interstate Commerce Act, the National Consumer Credit Protection Act, and the Magnuson-Moss-Warranty-Federal Trade Commission Improvement Act<sup>241</sup>.

In addition, bearing in mind that there are fifty American states and each one has jurisdiction to regulate commerce within its boundaries, there are fifty different regulations potentially applicable to trade activities in the US. However, state divergence in common law and statutory rules has greatly diminished in the recent years<sup>242</sup>. On the subject of Commercial Law, the American Law Institute (ALI)<sup>243</sup> and the National Conference of Commissioners on Uniform State Law (NCCUSL), in a joint-project for state law harmonization, elaborated the Uniform Commercial Code (UCC), which official text was released in 1958. By 1968, its Article 2 (UCC – Sales), covering contracts of sale of goods, was enacted as legislation by all American states<sup>244</sup>, except Louisiana<sup>245</sup>.

The UCC - Sales departs from the regular American statutes inasmuch it is a very comprehensive code. It covers several aspects of sale of goods, including contract formation, parties' obligations, warranties, methods of payment, title, performance, breach, and remedies. As stated by §2-102 UCC, this Code applies only to transactions in goods. "Goods" are defined as "all things (...) which are moveable at the time of identification to the contract for sale"<sup>246</sup>. Furthermore, both existing and identified goods and future goods can be object of a contract for sale<sup>247</sup>. Regarding "mixed" or "hybrid" transactions, for example, a transaction in which not only goods are sold but services are rendered, case law has supplemented the Code delimitating the relevant boundaries<sup>248</sup>.

<sup>241</sup> RAPSON, Donald J. "Commercial Law" in *Fundamentals of American Law – New York University School of Law*, Allan B. Morrison (ed.), New York: Oxford University Press (1996) at 365-366; WHITE, James J. & SUMMERS, Robert S. "Uniform Commercial Code". 5<sup>th</sup> ed. St. Paul: West Group (2000) at 8

<sup>242</sup> VON MEHREN, Arthur Taylor & MURRAY, Peter L. *Idem* (2007) at 39-40

<sup>243</sup> The ALI is a voluntary organization of judges, law professors and leading practitioners concerned with the improvement and clarification of American law.

<sup>244</sup> In spite of the fact that the UCC - Sales was reviewed in 2003, not a single state has adopted the revised version. Therefore, only the 1958 version of the UCC will be discussed in this Thesis. Furthermore, note that each state's UCC is slightly different; thus, persons doing business in different states must observe individual discrepancies. The same is true for lawyers and legal researchers studying the UCC.

<sup>245</sup> In 1974, the state of Louisiana adopted other parts of the UCC, but not Article 2, preferring to maintain its own civil law tradition on this issue.

<sup>246</sup> §2-105(1) UCC

<sup>247</sup> §§ 2-105(2), 2-106(1), and 2-501(1) UCC

<sup>248</sup> The minority view understands that UCC – Sales should be applied only to the sale of goods aspects of the transaction (*Foster v. Colorado Radio Corp.*, 381 F.2d 222, 4 UCC 446 (10th Cir.1967)). Whereas the majority view applies UCC – Sales only if the "predominant purpose" of the whole transaction was a sale of

Article 1 is also relevant because it sets forth the general principles governing the whole Code<sup>249</sup>. For instance, the UCC expressly embraces the Principle of Party Autonomy, the Principle of Good Faith, and the Principle of Freedom of Contract, limited to the observance of obligations of good faith, diligence, reasonableness and care<sup>250</sup>.

Nonetheless, the UCC does not purport to contain all rules applicable to commercial transactions; in fact, the Code is supplemented by other legal rules<sup>251</sup>, such as case law for interpreting and construing the Code, and the common law of Contracts<sup>252</sup>. In addition, each section of the UCC is supplemented by “official comments” that help in the construction and the application of the Code. Although these comments are not binding because they are not part of the statutory law, lawyers and judges rely heavily upon them and their adoption in judicial decisions has precedential force<sup>253</sup>.

Finally, unlike the Brazilian Civil Code, but like the CISG, “most of the [UCC’s] provisions are not mandatory. The parties may vary their effect or displace them altogether: freedom of contract is the rule. Most commercial law is therefore not in the Code at all but in private agreements, including course of dealing, usage of trade, and course of performance”<sup>254</sup>.

### 2.3.2. Sources of Obligations

Prior to analyzing the American law rules on formation of commercial contracts, it is relevant to this study to explain the sources of obligations under this legal regime for its peculiarities.

---

goods (Loughridge v. Goodyear Tire & Rubber Co., 192 F. Supp.2d 1175 (Colo. 2002); Princess Cruises v. General Electric Company, 143 F. 3d 828 (US Court of Appeal 4th Circ. 1998)).

<sup>249</sup> As of 2010, the majority of states (thirty-five) have adopted the 2001 Revised Version of Article 1, thus, this will be the version studied in this Thesis, except for §1-301, which was not adopted by any state.

<sup>250</sup> §1-105 UCC, and §§1-304 and 1-302 (Revised) UCC

<sup>251</sup> §1-103(b) (Revised) UCC

<sup>252</sup> The sources of the common law of Contracts are case law and the Restatement (Second) of Contracts. The Restatement is a comprehensive statement of general common law contract principles promulgated by the American Law Institute (ALI). The Restatement (Second) of Contracts was published in 1979. While not enacted law itself, the Restatement is an authority with a high degree of persuasion and is often cited and quoted by American courts to justify their decisions.

<sup>253</sup> RAPSON, Donald J. Idem (1996) at 369; MURRAY JR, John & FLECHTNER, Harry. Idem (2003) at 6

<sup>254</sup> WHITE, James J. & SUMMERS, Robert S. Idem (2000) at 8

Within traditional common law, only promises supported by “consideration” are legally binding<sup>255</sup>. Generally, a performance or a return promise that has a sufficient, but not necessarily adequate, value will constitute consideration, as long as it was given in exchange for a promise; in other words, if it was bargained for<sup>256</sup>. Most commercial agreements would qualify for enforcement inasmuch as they involve exchanges (for example, goods exchanged for money). On the other hand, gratuitous<sup>257</sup> and illusory promises<sup>258</sup> would be unenforceable. Consideration, as an objective requirement of manifestation of assent, is unique to the Common Law system<sup>259</sup> and is the main basis for enforcing promises in the US.

Exceptionally, a promise not supported by consideration may be enforceable as a contract if: (i) it was foreseeable to the promisor that the promisee would rely on the promise; (ii) the promisee actually relied on the promise changing her position; and (iii) injustice could only be avoided by enforcing the promise<sup>260</sup>. This doctrine is called promissory estoppel, and it was to some extent embraced by both the Brazilian law and the CISG. As already demonstrated, a revocable offer becomes irrevocable under these two regimes if the offeree has relied on the fact that it would be kept open, and a late acceptance is considered effective if it was sent by the offeree in due time but, due to circumstances beyond her control, reached the offeror after the time limit, and the offeror did not so inform the offeree.

---

<sup>255</sup> Note that, originally in English law, written promises made “under seal” do not require consideration. For more information, see §§95-109, Restatement (Second) of Contracts. However today in America, the presence of a seal has no effect (for example, §2-203 UCC) or, at most, it may give rise to a rebuttable presumption that the requirement of consideration has been met.

<sup>256</sup> §§17(1) and 71-79 Restatement (Second) of Contracts; *Hammer v. Sidway*, Court of Appeals of New York (1891) 124 N.Y. 538, 27 N.E. 256; *Lake Land Employment Group of Akron, LLC v. Columer*, Supreme Court of Ohio (2004) 101 Ohio St.3d 242, 804 N.E.2d 27

<sup>257</sup> In Civil Law countries, a gift can be enforced if it follows certain formalities. In American law, formalities are unimportant.

<sup>258</sup> §77 Restatement (Second) of Contracts; *Mattei v. Hoper*, Supreme Court of California (1958) 51 Cal.2d 119, 330 P.2d 625; *Wood v. Lucy, Lady Duff-Gordon*, Court of Appeals of New York (1917) 222 N.Y. 88 N.E. 214

<sup>259</sup> VON MEHREN, Arthur T. “Civil Law Analogues to Consideration: An Exercise in Comparative Analysis” in *72 Harvard Law Review* 1009 (1959) at 1057-1062

<sup>260</sup> §90 Restatement (Second) of Contracts; *Ricketts v. Scothorn*, Supreme Court of Nebraska (1898) 57 Neb. 51, 77 N.W. 365; *Feinberg v. Pfeiffer Co.*, Saint Louis Court of Appeals, Missouri (1959) 322 S.W.2d 163; *D&G Sout, Inc. v. Bacardi Imports, Inc.*, United States Court of Appeals, Seventh Circuit (1991) 923 F.2d 566

Moreover, in order to prevent unjust enrichment, restitution, under American law, is an alternative basis for recovery even when there has been no promise<sup>261</sup>. The underlying premise is that benefits received through another's loss are unjust and should be restored. However, restitution is not available if the benefit was conferred officiously. Despite the fact that the Brazilian law also regulates unjust enrichment and restitution<sup>262</sup>, the CISG deals with the issue as part of the parties' rights and obligations<sup>263</sup>. Considering that this Thesis aims only to compare contract formation and not the parties' rights and obligations, restitution as a source of obligation will not be discussed further.

### 2.3.3. Proposal

In American law, an offer is a simple communication made by the offeror manifesting her intent to enter into an agreement for the exchange of performances which confers upon the offeree the power to create a contractual relationship between them, often called the "power of acceptance". This manifestation must show enough certainty that the offeree can properly understand that acceptance is all that is necessary to conclude the bargain<sup>264</sup>. It may be made in any manner sufficient to show agreement<sup>265</sup>; thus, it can be either express (written or oral) or tacit (by an act or failure to act)<sup>266</sup>, as in the Brazilian law and the CISG approach.

Accordingly, all acts that do not lead the offeree to believe that she is empowered to close the deal, such as offers that are insufficiently serious and fail to indicate the promisor's intent to be bound (i.e., jests or optimistic statements of opinion)<sup>267</sup>, clear manifestations of

<sup>261</sup> Cotnam v. Wisdom, Supreme Court of Arkansas (1907) 83 Ark. 601, 104 S.W. 164; Callano v. Oakwood Park Homes Corp., Superior Court of New Jersey (1966) 91 N.J.Super. 105, 219 A.2d 332

<sup>262</sup> See Articles 884 to 886 CC

<sup>263</sup> See Article 81 CISG

<sup>264</sup> §24 Restatement (Second) of Contracts; CORBIN, Arthur L. "Offer and Acceptance, and Some of the Resulting Legal Relations" in *26 Yale Law Journal* 169 (1917) at 181-182; GREENBERG, H. "Rights and Remedies Under UCC Article 2", New York: Wiley (1987) at 50

<sup>265</sup> §2-204(1) UCC reads: "A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract".

<sup>266</sup> §§ 4 and 19(1) Restatement (Second) of Contracts; Consarc Corp. v. Marine Midland Bank, N.A., 996 F.2d 568, 570 (2d Cir. 1993); Winston v. Mediafare Entertainment Corp., 777 F.2d 78 (2d Cir. 1985)

<sup>267</sup> Leonard v. Pepsico, 88 F.Supp.2d 116, 129 (S.D.N.Y.1999)

intention not to be bound (i.e., words inviting further discussion or soliciting an offer)<sup>268</sup>, or offers made to the general public (i.e., advertisements and mass mailing)<sup>269</sup>, may prevent contract formation. The first two examples of non-obligatory proposals mirror the positions adopted by both the Brazilian law and the CISG, as explained above. With regard to the last example, on the other hand, Article 429 of the Brazilian Civil Code, unlike the American law and the CISG approaches, which consider that proposals addressed to unspecified persons are not binding, provides that these kinds of proposals are seen as offers provided they contain all the essential requirements. Thus, under the Brazilian legal regime, they may bind the offeror.

Situations in which the offeror's subjective intent differs from the objective meaning of the words expressed by her may be problematic. As already seen, Brazilian law attaches great importance to the real intent of the party making a declaration of will. In contrast, under American law, contract liability is mainly predicated upon a party's objective statement of intention rather than her actual, but unexpressed, individual understanding<sup>270</sup>. Exceptionally, the offeror's subjective intent prevails over the literal meaning of her words when there is some mutual mistake<sup>271</sup> or the offeree knows or has any reason to know about the meaning attached by the other<sup>272</sup>. A party has "reason to know" about the other's intent when she has information from which a person of ordinary intelligence would draw the inference<sup>273</sup>. This is known as the "reasonable person" standard. The CISG provides a middle ground between these two approaches since, under the CISG, both the subjective and the objective intent of the parties may be pertinent, but the subjective interpretation of the

<sup>268</sup> §21 Restatement (Second) of Contracts; *Rose and Frank Company v. J.R. Crompton and Brothers, Limited, and Others*, (1923) 2 K.B. 261

<sup>269</sup> §26 Restatement (Second) of Contracts. However, depending on the language expressed in the offer it may be considered binding. For such situation, see *Fairmont Glass Works v. Crunden-Martin Woodenware Co.*, 106 Ky. 659, 51 S.W. 196 (1899); and *Lefkowitz v. Great Minneapolis Surplus Store*, 86 N.W.2d 689 (Minn.1957)

<sup>270</sup> In Judge Learned Hand's words, "a contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent" (*Hotchkiss v. National City Bank of New York*, 200 F. 287, 293 (S.D.N.Y.1911)). See also *Lucy v. Zehmer*, Supreme Court of Appeals of Virginia, 196 Va. 493, 84 S.E.2d 516 (1954); *Frigalment Importing Co. v. B.N.S. International Sales Corp.*, 190 F.Supp. 116 (1960)

<sup>271</sup> *Raffles v. Wichelhaus*, 2 H.&C. 906, 159 Eng.Rep. 375; *Oswald v. Allen*, 417 F.ed 43 (2d Cir.1969)

<sup>272</sup> §20 Restatement (Second) of Contracts

<sup>273</sup> Commentary to §19 Restatement (Second) of Contracts

parties' intent comes first, and the objective basis will only be applied if the individual standard is not met<sup>274</sup>.

Regarding certainty of the terms of the offer, the American commercial law is much more flexible than the Brazilian law and the CISG. According to §2-204(3) UCC, a contract for sale does not fail for indefiniteness despite missing terms<sup>275</sup>. If a court finds any reasonably certain basis for granting a remedy, the agreement may be considered valid in law. Consequently, the only essential term for an offer to be binding is the quantity of goods<sup>276</sup>. Except for contracts involving unique goods or contracts for the seller's output or the buyer's requirements<sup>277</sup>, a court cannot supply the term if the parties fail to specify quantity, because a sales contract can be for one, two, or one thousand units of the good. If the court cannot give a remedy for breach, then, the contract fails for indefiniteness. With respect to non-essential terms, UCC provisions are used to fill in the gaps in order to facilitate enforcement of incomplete promises. For example, §2-305(1) UCC allows parties, if they so intend, to conclude a contract without determining the price (known as "Open Price Term"). In this situation, the price will be the reasonable price at the time of delivery.

Unlike the Brazilian law, which considers that a binding offer becomes effective after it is communicated to the offeree, but like the CISG, the American law understands that a binding offer becomes effective when it is received by the offeree. Despite this dissimilarity, the consequences of effectiveness are the same under all three regimes; until effectiveness, the offeror is free to change her mind and withdraw from her offer without incurring any liability<sup>278</sup>, but after effectiveness, the offer can no longer be withdrawn, because the offeree has already acquired the ability to bring a contract into existence according to the terms of the offer.

<sup>274</sup> MURRAY JR, John E. "Murray on Contracts", 4<sup>th</sup> ed., Lexis Nexis (2001) at 476; MCC Marble Ceramic Center, Inc. v. Cerâmica Nuova D'Agostino, S.p.A., 144 F.3d 1384, 1390 n.14 (11th Cir. 1998). For a dissenting opinion, see GABRIEL, Henry. "Contracts for the Sale of Goods: A Comparison of Domestic and International Law". New York: Oceana Publications, Inc. (2004) at 51-52.

<sup>275</sup> Note that the rule that applies to other kinds of contracts is less flexible than the UCC. See §33 of the Restatement (Second) of Contracts. However, UCC is very influential and its provisions have been used by courts as inspirational guidance for general Contract Law disputes. See Oglebay Norton Co. v. Armco, Inc, 52 Ohio St.3d 232, 556 N.E.2d 515 (1990).

<sup>276</sup> Official Comment n. 1 to §2-201 UCC

<sup>277</sup> §2-306 UCC

<sup>278</sup> FARNSWORTH, E. Allan. "Contracts". 7<sup>th</sup> ed., New York: Foundation Press (2008) at 147

However, the offeree's "power of acceptance" does not last forever. As a general rule, an offer may be freely revoked at any time until an effective acceptance has been made, even if the offer by its terms purports to be irrevocable, because the offeror is the "master of the offer"<sup>279</sup>. A revocation is only effective after it is received by the offeree; thus, if the acceptance becomes effective prior to the receipt of the revocation by the offeree, the contract is formed<sup>280</sup>. This rule is similar to the Brazilian law, but different from the CISG, which considers as irrevocable an offer that indicates, by any means, that it is irrevocable.

There are three exceptions to this rule of unlimited revocability. First, if the offeror promises not to revoke an offer in exchange for "Consideration" (usually money), an "Option Contract" is formed and the promise is irrevocable until some stated time<sup>281</sup>. Second, written signed offers made by "merchants" to buy or sell goods that promises to be irrevocable, known as "Firm Offers", will indeed be irrevocable for up to three months, regardless of the absence of any consideration<sup>282</sup>. Third, the promisee's reliance on a promise not to revoke her offer may be enforced under the doctrine of promissory estoppel, if that reliance was detrimental to the offeree, foreseeable to the offeror, and reasonable on the part of the offeree<sup>283</sup>. Both the Brazilian law and the CISG contain something like this "reliance" exception; however, only the CISG has a provision similar to the American "option contract" and "firm offers". Nonetheless, the CISG rule is broader than the American rule because, as explained in the previous paragraph, it requires neither

<sup>279</sup> Hoover Motor Express Co. v. Clements Paper Co., 241 S.W.2d 851 (Tenn.1951); Dickinson v. Dodds, Court of Appeals, Chancery Division, 1876, 2 Ch.Div. 463; §42 of Restatement (Second) of Contracts; FARNSWORTH, E. Allan. *Idem* (2008) at 168; KNAPP, Charles L. "Contract Law" in *Fundamentals of American Law – New York University School of Law*, Allan B. Morrison (ed.), New York: Oxford University Press (1996) at 209; CHIRELSTEIN, Marvin A. "Concepts and Case Analysis in the Law of Contracts", 5<sup>th</sup> ed., New York: Foundation Press (2006) at 48-49

<sup>280</sup> Few states, including California, South Dakota, North Dakota and Montana, have statutes which provide that revocations are to be treated in like manner as acceptances (when sent).

<sup>281</sup> James Baird Co. v. Gimbel Bros, Inc., 64 F.2d 344 (2d Cir.1933); §25 of Restatement (Second) of Contracts

<sup>282</sup> §2-205 UCC reads: "An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror". See also WHITE, James J. & SUMMERS, Robert S. *Idem* (2000) at 48-49; MATHER, Henry. "Firm Offers Under the UCC and the CISG", 105 Dickinson Law Review (2000) at 31-56

<sup>283</sup> §87(2) of Restatement (Second) of Contracts; Drennan v. Star Paving Co., 51 Cal. 2d 409, 333 P.2d 757 (1958); Official Commentary n.2 to §2-205 UCC



consideration nor a signed written manifestation, but only a single indication that the offer would be irrevocable for a specific or a reasonable period of time<sup>284</sup>.

Furthermore, the “power of acceptance” may be terminated by the offeree’s making a rejection or a counter-offer of her own<sup>285</sup>, which will be discussed in Section 2.3.5., or by the lapse of time<sup>286</sup>. Like the Brazilian law and the CISG, when the offer itself puts a time limit on that power it terminates at the end of that time, and when no time is stated in the offer this power lasts for a “reasonable time” in the circumstances, unless earlier revoked. Regarding face-to-face or telephone communications, most American courts have understood that an offer made in the course of conversation is deemed to lapse when the conversation is terminated and cannot be accepted thereafter<sup>287</sup>. In contrast to the Brazilian law approach, under American law, the offeror’s death or incapacity may also cause the termination of revocable offers<sup>288</sup>.

#### 2.3.4. Acceptance

“An acceptance is a voluntary act of the offeree whereby he exercises the power conferred upon him by the offer, and thereby creates the set of legal relations called a contract”<sup>289</sup>. In general, according to UCC, an acceptance does not need to coincide precisely with all the terms of the offer, as will be explained in the following section, and it may be made in any manner and by any medium capable of showing the offeree’s intention to be bound, unless the offeror has unequivocally indicated that it will not be acceptable otherwise<sup>290</sup>.

<sup>284</sup> DIMATTEO, Larry A. *Idem* (2009) at 241

<sup>285</sup> §36(1)(a) of Restatement (Second) of Contracts

<sup>286</sup> §§36(1)(b) and 41 of Restatement (Second) of Contracts

<sup>287</sup> *Caldwell v. E.F. Spears & Sons*, 216 S.W. 83 (Ky. 1919); *Akers v. J.B. Sedberry, Inc.*, 286 S.W.2d 617 (Tenn. App. 1955)

<sup>288</sup> §36(1)(d) of Restatement (Second) of Contracts

<sup>289</sup> CORBIN, Arthur L. *Idem* (1917) at 199

<sup>290</sup> §2-206(1)(a) UCC reads: “an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances”. However, under traditional common law, an acceptance is a manifestation of assent to all the terms of the offer in the medium and in the manner of acceptance dictated by the offeror. As a result, an acceptance that does not mirror the offer is considered a rejection or a counter-offer, and an acceptance by an inappropriate medium or manner will only form a contract if the language contained in the offer merely suggests a satisfactory method of acceptance (§§39, 50, 58, 59 and 60 of Restatement (Second) of Contracts).

With respect to the medium of acceptance, the American law adopts an identical position to the Brazilian law and the CISG. Accordingly, an acceptance can either be made by oral or written words or be implied from conduct, and need not be identical with that of the offer<sup>291</sup>. In addition, silence does not, in general, constitute an acceptance; however, case law has recognized few exceptions. One exception is “where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer”<sup>292</sup>. Another exception is “where, because of prior dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept”<sup>293</sup>.

Regarding the manner of acceptance, the offeree may accept by either returning the promise (express) or performing (tacit)<sup>294</sup>. In order to return the promise, the offeree has to unambiguously notify the offeror of acceptance, unless the offeror has waived such a condition<sup>295</sup>. Likewise, the beginning of performance is only considered acceptance if the offeree notifies the offeror within a reasonable time of her intention to engage herself<sup>296</sup>. However, if the offeror’s order is for prompt or current shipment, notification is not required for either conforming or non-conforming goods<sup>297</sup>. Moreover, according to case law, part performance without due notification may create an “Option Contract”, explained in the

<sup>291</sup> §2-204(1) UCC; §§ 4 and 19(1) Restatement (Second) of Contracts

<sup>292</sup> §69(1)(b) of Restatement (Second) of Contracts; American Bronze Corp. v. Streamway Products, 456 N.E.2d 1295, 1300 (Ohio App. 1982)

<sup>293</sup> §69(1)(c) of Restatement (Second) of Contracts; Hobbs v. Massasoit Whip Co., 33 N.E. 495 (1893)

<sup>294</sup> Under traditional common law, a contract can be either bilateral or unilateral. A bilateral contract is one in which there are two promises (the offeror’s and the offeree’s), while a unilateral contract is one in which there is one promise (the offeror’s) and one performance (the offeree’s).

<sup>295</sup> §§55, 56 and 57 of Restatement (Second) of Contracts

<sup>296</sup> §2-206(2) UCC reads: “Where the beginning of a requested performance is a reasonable mode of acceptance an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance”. Note that, under traditional common law, in order to accept a unilateral contract, the offeree needs to complete at least part of that offer’s requests to be performed or tendered, and no notification to the offeror is required, unless the offer states otherwise or if the offeror has no adequate means of learning whether the act is being performed (§§53 and 54 of Restatement (Second) of Contracts).

<sup>297</sup> §2-206(1)(b) UCC. Note that, by shipping non-conforming goods, the offeree commits herself to supply goods that conform to the offer and cannot argue later that no contract was formed because the goods shipped did not conform with the goods requested by the offer. However, if the defective goods are shipped as an accommodation to the buyer, such shipment does not constitute acceptance (Corinthian Pharmaceutical Systems, Inc. v. Lederle Laboratories United States District Court, S.D. Indiana, Indianapolis Division, 724 F.Supp. 605 (1989)).

preceding section, making the offer irrevocable in order to protect the offeree<sup>298</sup>. Despite the fact that neither the Brazilian law nor the CISG explicitly require the offeree to notify the offeror about her (express or tacit) acceptance, this requirement can be implied since, under both regimes, an acceptance only becomes effective after it reaches the offeror.

The notification requirement is made clear by the American law because, in contrast to the Brazilian law and the CISG, under this regime, an acceptance becomes effective “as soon as put out of the offeree’s possession”<sup>299</sup>; in other words, after the notification is dispatched by the offeree (the *Dispatch Theory* or the common law *Mailbox Rule*)<sup>300</sup>. Nevertheless, there are two exceptions: (i) offers made by phone or other medium of substantially instantaneous two-way communication are to be accepted until the close of the conversation<sup>301</sup>; and (ii) with respect to “Option Contracts”, acceptance is only operative after it is received by the offeror<sup>302</sup>.

The *Mailbox Rule*, in particular, has a significant effect on acceptance revocation and one that is distinct from the other two regimes. Since, under American law, an acceptance becomes effective after it is dispatched, it cannot be later revoked by an overtaking letter sent by a faster medium of communication even though the revocation is received by the offeror before the acceptance<sup>303</sup>, while it can under Brazilian law and the CISG<sup>304</sup>.

Furthermore, an acceptance is only effective if it is made while the offeree’s “power of acceptance” is still operative; otherwise it is just considered a counter-offer. The circumstances in which the “power of acceptance” terminates were discussed in the previous section. Exceptionally, if the manifestation of assent was dispatched by the offeree prior to the expiration of the time limit given but was received by the offeror after the deadline and

<sup>298</sup> §45 of Restatement (Second) of Contracts. As a general rule, mere preparation to perform is not considered acceptance, thus, does not have this effect (*Doll & Smith v. A.&S. Sanitary Dairy Co.*, 211 N.W. 230 (Iowa 1926)). Nonetheless, in some cases beginning preparations may constitute justifiable reliance to make the offeror’s promise binding under §87(2) of Restatement (Second) of Contracts (Official Commentary “f” to §45 of Restatement (Second) of Contracts).

<sup>299</sup> §63(a) of Restatement (Second) of Contracts

<sup>300</sup> *Adams v. Lindsell*, 106 Eng.Rep. 250 (King’s Bench 1818); §63(a) of Restatement (Second) of Contracts

<sup>301</sup> §64 of Restatement (Second) of Contracts

<sup>302</sup> §63(b) of Restatement (Second) of Contracts

<sup>303</sup> FARNSWORTH, E. Allan. *Idem* (2008) at 147

<sup>304</sup> The Brazilian law and the CISG understand that an acceptance becomes effective after it reaches the offeror. Therefore, an acceptance can be withdrawn if the withdrawal reaches the offeror prior to the acceptance.

the offeror stays silent, it is seen as an effective acceptance<sup>305</sup>. Both the general rule and the exception are similar to the provisions under the Brazilian law and the CISG dealing with timely acceptances, late acceptances, and late arrivals.

### 2.3.5. Counter-Offer

As mentioned above, the Brazilian law, the CISG, and the American law agree that a late acceptance should be considered a counter-offer. However, they disagree on whether expressions of assent that do not conform integrally to the offer should be considered an acceptance or a counter-offer. The Brazilian law and the CISG understand that a reply to an offer that contains different or additional terms is a counter-offer<sup>306</sup>. Although American common law embraces this approach for contracts in general (the common law *Mirror Image Rule*)<sup>307</sup>, this rule does not apply for contracts for the sale of goods.

A contract for the sale of goods differs from other kinds of contracts because it is often a result of an exchange of several phone calls, messages, purchase orders, written confirmations and standardized forms, rather than a single integrated, carefully drafted document signed by both parties. Since sellers' forms favor sellers and buyers' forms favor buyers, a mismatch between the parties' conditions is likely to happen, especially with respect to terms on the back of the forms and in small print that were not negotiated by the parties. This situation is called the "Battle of the Forms" in the American legal literature<sup>308</sup>.

Being more attentive to these commercial practices, §2-207 UCC abandoned the *Mirror Image Rule* stating that a response that has different or additional terms operates as an acceptance unless the response is expressly made conditional on assent to these terms, the offer expressly limits acceptance to its terms, or the offeror objects to the offeree's new

<sup>305</sup> §§70 and 69 of Restatement (Second) of Contracts. In fact, even in this situation the acceptance is considered a counter-offer that is accepted by the original offeror if she remains silent. Since the practical effects of this wording and the interpretation given above are the same, the latter was used in order to facilitate a legal comparison.

<sup>306</sup> In the case of the Brazilian law, any alteration in the response will be enough to constitute a counter-offer. For the CISG, a response will only be seen as a counter-offer if the additional or different terms materially alter the offer. However, considering the fact that the CISG's list of material terms is very broad, any term may be seen as material.

<sup>307</sup> *Minneapolis & St. Louis Railway Co. v. Columbia Rolling-Mill Co.*, 119 U.S. 149 (1886); *Maddox v. Northern Natural Gas Co.*, 259 F.Supp. 781 (W.D. Okla. 1966)

<sup>308</sup> WHITE, James J. & SUMMERS, Robert S. *Idem* (2000) at 29; MACAULAY, Stewart. "Non-Contractual Relations in Business: A Preliminary Study" in *28 Am. Sociological Review* 55 (1963) at 57-59

terms within a reasonable time<sup>309</sup>. As a result, “neither purchaser nor supplier can afterwards refuse performance by seizing upon boilerplate discrepancies that had no economic significance to either party at the time they made their deal”<sup>310</sup>.

If the new terms are additional to the terms of the offer and are non-material, they become part of the contract<sup>311</sup>. If they materially alter the offer, the response is seen as a proposal that is subject to the original offeror’s express acceptance in order to be binding. The UCC provides examples of both material and non-material clauses. Typically, terms may be found material that would cause surprise or hardship if included in a contract without the other party’s knowledge<sup>312</sup>.

On the other hand, if the manifestation of assent materially differs from the terms of the offer rather than adding to it, the UCC does not provide a solution<sup>313</sup>. There are three competing views to solve this issue<sup>314</sup>. The majority understands that conflicting terms cancel each other out, and are therefore knocked out of the contract and supplemented by UCC gap-fillers provisions<sup>315</sup>. The “leading” minority argues that the offeror’s original terms must be kept<sup>316</sup>. A third approach treats “different” as “additional”, so if the new discrepant term is materially different it is considered a proposal, and if not it becomes part of the contract<sup>317</sup>.

<sup>309</sup> §2-207(1) UCC reads: “A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms”; §2-207(2) UCC reads: “(...) Between merchants [additional] terms become part of the contract unless: (a) the offer expressly limits acceptance to the terms of the offer; (...) (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received”.

<sup>310</sup> CHIRELSTEIN, Marvin A. *Idem* (2006) at 68

<sup>311</sup> §2-207(2) UCC reads: “(...) Between merchants [additional] terms become part of the contract unless: (b) they materially alter it (...)”

<sup>312</sup> Official Comment n. 4 to §2-207 UCC. See also Official Comment n. 5 to §2-207 UCC

<sup>313</sup> WHITE, James J. & SUMMERS, Robert S. *Idem* (2000) at 29-48; MURRAY JR, John E. “The Chaos of the ‘Battle of the Forms’: Solutions” in *39 Vanderbilt Law Review* 1307 (1986) at 1354-1365

<sup>314</sup> UTZ, John L. “More on the Battle of the Forms: The Treatment of ‘Different’ Terms Under the Uniform Commercial Code” in *16 UCC L.J.* 103 (1983) at 110-112

<sup>315</sup> *Daitom, Inc. v. Pennwalt Corp.*, 741 F.2d 1569 (1984); *Northrop Corp. v. Litronic Industries*, 29 F.3d 1173 (7th Cir.1994)

<sup>316</sup> *Valtrol, Inc. v. General Connectors Corp.*, 884 F.2d 149, 155 (4th Cir.1989); *Reaction Molding Technologies, Inc. v. General Electric Co.*, 588 F.Supp. 1280, 1289 (E.D.Pa.1984); LAWRENCE, William H. & HENNING, William H. “Understanding Sales and Leases of Goods”, Matthew Bender (1996) at 31

<sup>317</sup> *Steiner v. Mobil Oil Corp.*, 20 Cal.3d 90, 141 Cal.Rptr. 157, 569 P.2d 751, 759 n.5 (1977)

When the writings of the parties do not establish a contract (i.e., when acceptance was made expressly conditional on assent to the additional or different terms and no express assent was given) but their conduct recognizes its existence, a court may find that a contract in fact exists. In this event, American courts tend to apply the CISG “Knock Out Rule”, finding that the terms of the contract are the ones which the parties’ writings have agreed on, supplemented by UCC gap-fillers<sup>318</sup>. In contrast, in a similar situation, Brazilian courts would apply the “Last Shot Rule”, finding that the contract was formed under the offeree’s terms.

Both courts and scholars have observed that §2-207 UCC “is a challenging exercise in statutory analysis”<sup>319</sup> and that “its application is often awkward and problematic”<sup>320</sup>. Furthermore, this section has been described as “an amphibious tank that was originally designed to fight in the swamps, but was sent to fight in the desert”<sup>321</sup>. Unfortunately, “there is no language that a lawyer can put on a form that will always assure the client of forming a contract on the client’s own terms”<sup>322</sup>.

### 2.3.6. Moment of Contract Formation

Under the Brazilian law, the CISG and the American common law of contracts, a contract is formed when the acceptance becomes effective. However, the UCC provides a more versatile rule for contracts for the sale of goods acknowledging the existence of a binding obligation even when it is not possible to specify the exact moment the acceptance became effective and the deal was closed<sup>323</sup>. According to §2-204(2) UCC, “an agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined”.

<sup>318</sup> §2-207(3) UCC

<sup>319</sup> FARNSWORTH, E. Allan. *Idem* (2008) at 192

<sup>320</sup> KNAPP, Charles L. *Idem* (1996) at 210

<sup>321</sup> WHITE, James J. & SUMMERS, Robert S. *Idem* (2000) at 30

<sup>322</sup> WHITE, James J. & SUMMERS, Robert S. *Idem* (2000) at 47

<sup>323</sup> GABRIEL, Henry. *Idem* (2004) at 87

### 2.3.7. Place of Contract Formation

Like the Brazilian law, which has adopted the *lex loci contractus* rule to determine the law applicable to disputes over international contracts, the place where a contract is formed is also a relevant factor for determining the UCC territorial application, since it may have a strong connection to the transaction.

According to §1-105 UCC<sup>324</sup>, parties are free to choose the UCC as the controlling law for their contract if this Code bears a “reasonable relationship” to the transaction. If there is no agreement between the parties with regard to the applicable law, the UCC may be applied if it bears an “appropriate relationship” to the transaction.

However, in contrast to the Brazilian law, the place of contracting is not the only factor for this determination. Points of contact that have also been considered substantial by courts are the place where either party conducts business; either party’s place of business; where performance is to occur; where the goods that are the subject of the contract are located; and where payment will take place<sup>325</sup>.

### 2.3.8. Formal Requirements

In general, oral contracts are enforceable under American common law. However, all American states except for Louisiana have enacted a statute, derived from the English Statute of Frauds of 1677, which imposes a writing requirement for specific kinds of contracts in order to avoid fraudulent claims<sup>326</sup>. Contrary to the Brazilian law and the CISG, contracts for the sale of goods for the price of US\$500 or more fall, under the American law, into the statute of frauds<sup>327</sup>. As stated by §2-201(2) UCC<sup>328</sup>, in transactions involving

<sup>324</sup> While revised Article 1 has now been adopted by many states, the states that have adopted the revisions have failed to adopt the revised §1-301. For more information, see GRAVES, Jack M. “Party Autonomy in Choice of Commercial Law: The Failure of Revised UCC §1-301 and a Proposal for Broader Reform” in 36 *Seton Hall L. Rev.* 59 (2005) at 102-103

<sup>325</sup> *Seeman v. Philadelphia Warehouse Co.*, 274 U.S. 403, 47 S.Ct. 626, 71 L.Ed. 1123 (1927); NORDSTROM, Robert J. & RAMERMAN, Dale B. “The Uniform Commercial Code and the Choice of Law” in 4 *Duke L.J.* 623 (1969) at 632

<sup>326</sup> FARNSWORTH, Allan E. *Idem* (1996) at 122; KNAPP, Charles L. *Idem* (1996) at 211

<sup>327</sup> §2-201(1) UCC reads: “Except as otherwise provided in this section a contract for the sale of goods for the price of \$500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties (...)”

<sup>328</sup> §2-201(2) UCC reads: “Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents,



merchants a written memorandum is required to evidence the parties' agreement. This writing does not need to be signed by the party against whom the contract is sought to be enforced; it only needs to be delivered to the other party within a reasonable time<sup>329</sup>. It becomes binding if the other party has reason to know about its content, unless written objection is given within ten days after receipt.

Although the presence of a writing is essential to evidence the existence of a contract, an undocumented agreement may be legally binding, exceptionally, if: (i) one of the parties has fully performed; (ii) the seller has partly performed and the goods were specially manufactured for the buyer and are not suitable for sale to others; (iii) the party against which enforcement is sought admits that a contract was in fact made; and (iv) one party has relied on the oral agreement<sup>330</sup>. Nonetheless, these exceptions do not apply to arbitration clauses, which must be written in order to be valid by force of the Federal Arbitration Act<sup>331</sup>. In practice, these four exceptions have an effect similar to the Brazilian law and the CISG approach, since neither of these two regimes impose any formal requirement on contracts for the sale of goods, aside from the written arbitration clause.

A problem that arises from the statute of frauds' writing requirement is related to previous or contemporaneous oral terms agreed on by the parties during the negotiation stage that do not appear in their writing<sup>332</sup>. As already seen, both the Brazilian law and the CISG would allow extrinsic evidence to prove the parties' real intent. In contrast, under the American legal system, the common law parol evidence rule<sup>333</sup> gives preference to written terms over extraneous oral terms<sup>334</sup>.

---

it satisfies the requirements of subsection (1) against such party unless written notice of objection to its content is given within 10 days after it is received".

<sup>329</sup> The expression "reasonable time" has been given expansive readings, as shown by *St. Ansgar Mills, Inc. v. Streit*, Supreme Court of Iowa, 613 N.W.2d 289 (2000)

<sup>330</sup> §2-201(3) UCC; §§139 and 87(2) Restatement (Second) of Contracts; FARNSWORTH, E. Allan. *Idem* (2008) at 262-264, 294-296 and 305; WHITE, James J. & SUMMERS, Robert S. *Idem* (2000) at 77-84

<sup>331</sup> 9 U.S.C. Section 2

<sup>332</sup> This problem also arises when there is no statute of frauds requiring a writing but the parties have reduced at least part of their agreement to a writing or writings.

<sup>333</sup> The term "parol evidence rule" is a misleading expression. Actually, it is a substantive rule of contract law and not a rule of evidence, and it is not limited to oral evidence but may also include written evidence.

<sup>334</sup> WHITE, James J. & SUMMERS, Robert S. *Idem* (2000) at 89

With respect to contracts for the sale of goods, as specified by §2-202 UCC<sup>335</sup>, prior or contemporaneous oral agreements are inadmissible and cannot be placed before a judge when they contradict the written terms. However, a contract may be explained or supplemented: (i) by consistent additional terms when the court finds that the parties did not intend the writing to be a complete and exclusive statement of the terms of the agreement<sup>336</sup>; and (ii) unless carefully negated, by course of performance, course of dealing or usage of trade, even when the court finds the contract to be complete and exclusive<sup>337</sup>. The idea is that these practices “are interpretative elements that help the court to understand the contracting parties’ true intent, rather than being additional terms whose admission as such would offend the parol evidence restriction”<sup>338</sup>. The practical effect of these exceptions is that, to some extent, American law is similar to the Brazilian law and the CISG, inasmuch as all three legal regimes would consider the parties’ intent with regard to the contractual terms and would allow usages and practices to be incorporated into the contract.

Importantly, there are two judge-made exceptions to the parol evidence rule. The most important is the fraud exception, which precludes a party to invoke this rule in order to shield her own fraud<sup>339</sup>. Mistake, both mutual and unilateral, is the second exception<sup>340</sup>.

Since, under both the Brazilian law and the CISG, previous or contemporaneous terms may always be considered in the determination of the parties’ intent, the possibility that parties may be liable for representations made at the negotiation stage is greater than under the UCC. In order to reduce liability with respect to these representations, parties may

<sup>335</sup> §2-202 UCC reads: “Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement (...).”

<sup>336</sup> §2-202(b) UCC reads: “(...) but may be explained or supplemented (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement”. “The more complete a writing appears to be on its face, the less likely it is that any extrinsic term was agreed upon, even if consistent with the writing” (WHITE, James J. & SUMMERS, Robert S. *Idem* (2000) at 98)

<sup>337</sup> §2-202(a) UCC reads: “(...) but may be explained or supplemented (a) by course of performance, course of dealing, or usage of trade”. See also §§1-205 and 2-208 UCC; Official Comment n. 2 to §2-202 UCC; *Columbia Nitrogen Corp. v. Royster Co.*, 451 F.2d 3 (1971); *C-Thru Container Corporation v. Midland Manufacturing Company*, Supreme Court of Iowa, 533 N.W.2d 542 (1995)

<sup>338</sup> CHIRELSTEIN, Marvin A. *Idem* (2006) at 104

<sup>339</sup> *Associate Hardware Supply Co. v. Big Wheel Distributing Co.*, 355 F.2d 114, 3 UCC 1 (3d Cir.1965)

<sup>340</sup> *Braund, Inc. v. White*, 486 P.2d 50, 9 UCC 183 (Alaska 1971)

avail themselves of merger or integration clauses<sup>341</sup>. A merger clause may bar extrinsic evidence on the theory that the contract does not constitute a complete and exclusive expression of the parties' agreement. However, it would not keep all evidence out. Submissions of course of performance, course of dealing or usage of trade would still be admissible, as well as rights and duties that arise by operation of law and the judge-made exceptions mentioned above. Furthermore, merger clauses may be attacked by rules on bad faith, unconscionability, or the fact that the parties did not intend to form an integrated contract<sup>342</sup>.

Taking into account the fact that, under American common law, neither the parol evidence rule nor merger clauses apply to future oral modifications of the contract<sup>343</sup>, the UCC provides that any amendment to the contract must be in writing, but no consideration is required for this purpose. If the parties did not put the modification into a writing, it operates as a waiver<sup>344</sup>.

---

<sup>341</sup> *General Aviation, Inc. v. Cessna Aircraft Co.*, 915 F.2d 1038, 14 UCC2d 73 (6th Cir.1990); *Dixie Aluminum Products Co., Inc. v. Mitsubishi Int'l Corp.*, 785 F.Supp. 157, 17 UCC2d 1073 (N.D.Ga.1992). An example of a merger clause would be: "This contract embodies the entire understanding of the parties, it is complete and exclusive statement of the terms of this agreement, and there are not verbal agreements or representations in connection therewith".

<sup>342</sup> WHITE, James J. & SUMMERS, Robert S. *Idem* (2000) at 104-108; CHIRELSTEIN, Marvin A. *Idem* (2006) at 103

<sup>343</sup> *Atlas Concrete Pipe, Inc. v. Roger J. Au & Son, Inc.*, 467 F.Supp. 830, 26 UCC 395 (E.D.Mich.1979); *Trad Indus., Ltd. v. Brogan*, 246 Mont. 439, 805 P.2d 54, 14 UCC2d 718 (1991); CHIRELSTEIN, Marvin A. *Idem* (2006) at 103; WHITE, James J. & SUMMERS, Robert S. *Idem* (2000) at 108

<sup>344</sup> §2-209 UCC; *BMC Industries, Inc. v. Barth Industries, Inc.*, United States Court of Appeals for the 11th Circuit, 160 F.3d 1322 (1998)

## CONCLUSION

As explained in Section 1, Brazilian judicial courts do not respect parties' freedom to choose *ex ante* the law that will be applicable to their commercial transaction, but parties may bypass this problem by selecting as the forum to solve their future disputes a Brazilian arbitration court or a foreign court in a country that recognizes the parties' right to choose the law applicable to their contracts. In this situation, the law chosen by the parties will be the applicable one, unless it violates the public order. However, if they do not pursue this alternative path, the determination of the governing law will only be made *ex post*, in the event of a legal dispute, by a judge, and according to PIL rules of the forum, which generates considerable uncertainty for Brazilian parties and their foreign counterparts. In that event, apart from the Third Country Exception, discussed previously, international contracts for the sale of goods perfected between Brazilian parties would potentially be subject to one of at least two different legal regimes: the seller's and the buyer's place of business.

Theoretically, if one of the parties is from Brazil, one of these regimes will be Brazil's domestic sales law. As a result, all else being equal, there is a fifty percent chance that Brazilian sales law will regulate all international commercial transactions involving Brazilian parties. On the other hand, the other party being a foreigner, the other fifty percent will depend on whether the country in which she has her place of business is a CISG Contracting State, and, if it is a Contracting State, on whether or not it is an Article 95 Reservatory Contracting State. If she is from a Contracting State, the CISG may apply. If she is from an Article 95 Reservatory Contracting State, the governing law may be the CISG, the Reservatory Contracting State's domestic sales law, or, eventually, a Non-Reservatory Contracting State's domestic sales law. If she is from a Non-Contracting State, its domestic sales law may apply.

Taking into account the fact that Brazil's main trading partners are CISG Contracting States (both Reservatory and Non-Reservatory Contracting States), approximately sixty-five percent of Brazil's imports and fifty-five percent of Brazil's exports would potentially be subject to the Brazilian law or the CISG, according to 2009

figures<sup>345</sup>. With respect to contracts involving parties from the US or China, which are Reservatory Contracting States and Brazil's two most important trading partners and amount to more than twenty-eight percent of Brazil's imports and twenty-three percent of Brazil's exports, either the Reservatory Contracting State's domestic sales law, or, eventually, a Non-Reservatory Contracting State's domestic sales law are potentially applicable, in addition to the Brazilian law and the CISG. Regarding the remaining trade transactions with parties from Non-Contracting States, the Brazilian law and their respective domestic sales law are potentially applicable. Therefore, there are in fact three potential legal regimes applicable to international contracts involving Brazilian parties: the Brazilian sales law, the CISG, and a foreign domestic sales law.

A comparative study of these legal regimes with respect to formation of business contracts for the sale of goods, making use of the American law as the foreign domestic sales law, has been made in Section 2. This study demonstrates that there are both similarities and differences among these regimes, but that on the whole their approaches are very distinct, and this confirms the legal uncertainty.

First of all, in spite of the fact that both the American and the Brazilian legal systems are primarily based on statutes, their respective legislative powers construe laws in very different ways. Laws are also interpreted differently in each country, and the role played by courts is much more significant in the US than in Brazil, despite the "Sumulas" issued by Brazilian higher courts. In this respect, the CISG is a middle ground between the Brazilian and the American legal systems. It is neither a civil law nor a common law rule; it is a mix of rules from these two legal systems and from socialist countries as well. With respect to formation of sales contracts, the 2002 Brazilian Civil Code is almost a replica of the old 1916 Civil Code, whereas the 1958 American Uniform Commercial Code's rules are much more advanced going beyond the offer-acceptance analysis. In contrast, the CISG is neither old nor progressive; it is an intermediate rule adequate to current international trade transactions.

Second, with respect to the proposal/contract essential elements, the American law approach considerably deviates from that of the Brazilian law. While the Brazilian law

---

<sup>345</sup> See footnote n. 5

assigns great importance to the parties' real intent and to the definiteness of the terms of the offer, the American law gives only limited importance to the parties' subjective statements of opinion, requires "Consideration" as an objective manifestation of assent, and puts lax constraints on certainty of terms. Under the CISG, both the subjective and the objective intent of the parties are relevant, but the real intent analysis is the rule, whereas the objective intent is the exception. Furthermore, there is no objective requirement of assent, and the offer has to be sufficiently definite to be binding.

Third, although as a general rule offers may, under all three legal frameworks, be revoked by the offeror until the offeree dispatches her acceptance and offers are irrevocable if the offeree had relied on the offer being kept open and thus suffered damages, they disagree with respect to the firm offer exception. Brazilian law does not expressly regulate firm offers, but it admits that some kinds of unilateral declarations of will are irrevocable and puts no restraints on this interpretation. The CISG expressly states that offers that are indicated to be irrevocable cannot be revoked. The American law regulates firm offers, but it requires either Consideration in the case of an "Option Contract" or a signed written document in the case of "Firm Offers", between merchants.

Fourth, the Brazilian law and the CISG concur that the offeree may withdraw her acceptance by communicating her desire before or at the same time that the acceptance is received by the offeror. In contrast, the American law understands that a dispatched acceptance can never be withdrawn. Therefore, while the Brazilian law and the CISG treat offeror and offeree equally, allowing both parties to withdraw their unilateral declarations of will, the American law treats them differently, allowing only the offeror to change her opinion about entering into the contractual relationship.

Fifth, regarding a response to an offer that purports to be an acceptance but has additional or different terms, both the Brazilian Civil Code and the CISG understand that it is a rejection of the offer and counts as a counter-offer that has to be accepted by the original offeror to form the contract. However, while the Brazilian law adopts a strict version of the "Mirror Image Rule", requiring all terms of the offer to mirror the terms of the acceptance, the CISG is not so rigorous, allowing a contract to be formed when the divergences between offer and acceptance are not material. Since the CISG's list of material terms is very broad,

the Convention approach is not a huge departure from the “Mirror Image Rule”. Contrariwise, the American UCC abandoned this rule admitting that a response with different or additional terms may operate as an acceptance in some circumstances. Although the offeror has to agree with material terms for them to become part of the contract, fewer terms would be considered material under the UCC than the CISG.

Finally, neither the Brazilian law nor the CISG demand any formality for contracts for the sale of goods to be enforced, except if the parties have agreed otherwise. As a result, their existence and their terms can be proved by any means. Contrary to this approach, the American law as a general rule imposes a writing requirement on commercial contracts with a price of \$500 or more. Despite the fact that the UCC requires only a simple written memorandum to be delivered to the other party, which is not complicated for parties to comply with, in most cases, previous or contemporaneous terms would be precluded from being presented before a court if they contradict the written document, according to the parol evidence rule.

As a consequence of the dissimilarities between the Brazilian law, the CISG, and the American law with respect to formation of contracts for the sale of goods evidenced in this thesis, both Brazilian businessmen trading internationally and their foreign counterparts are subject to uncertainty as to the outcome in the event of a lawsuit. If, during contract negotiation and performance, the parties act according to the domestic rules they are used to following, they may, in the event of a contractual breach, have an unpleasant surprise, because the applicable law determined *ex post* by a judge may be a different law, such as the CISG or a foreign law, with rules that differ from the parties' domestic sales laws. For instance, their contract may be unenforceable for not complying with a formal requirement, or the terms in the writing may not be the terms originally proposed by the offeror or the terms thought to be agreed on by the parties.

In order to reduce this legal uncertainty, there are at least three different strategies the Brazilian government could adopt. One strategy would be to reform Article 9 LICC recognizing the Principle of Party Autonomy in order to give parties the right to choose *ex ante* the law that will govern their contractual relationship, even if the issue is to be resolved by a Brazilian judicial court. However, this solution would be limited to contracts that



contain a valid choice-of-law clause. Absent this clause, the legal uncertainty would remain the same, since PIL rules would be needed to determine the applicable law.

Another solution would be to reform the 2002 Civil Code to include rules better adapted to current international trade practices. Nevertheless, this solution would be limited in helping to reduce this legal uncertainty, because the PIL rules discussion would still be in place regardless of the existence or the absence of a valid choice-of-law clause. More importantly, since there are different levels of “modern rules”, such as the UCC forward-looking rule and the less than progressive CISG provisions, the uncertainty with respect to the legal outcome may remain, depending on the sales law used as a role model for the proposed 2002 Civil Code reform. For example, if the new rules are modelled on the CISG (without a formal CISG ratification), a foreign domestic sales law would still potentially be applicable to international sales contracts perfected between Brazilian parties and parties from the US or China, because these countries are Article 95 Reservatory Contracting States, as explained above. Furthermore, this legal reform would change the rules for domestic sales contracts as well, which might or might not be desirable by Brazilian businesspersons.

The best solution would be Brazil’s ratification of the CISG. Taking into account the fact that Article 1(1)(a) CISG prevents the use of PIL rules for the determination of the applicable law to contractual disputes involving parties from Contracting States, if Brazil ratifies this Convention, the CISG would always govern contractual transactions between Brazilian parties and parties from other Contracting States, except if there is a valid choice-of-law clause opting out of its provisions. This assertion would also be true for disputes with American or Chinese parties inasmuch as Article 95 would be inapplicable. In these situations, a foreign domestic sales law would only be applicable if the Forum State is a Non-Contracting State and its PIL rules point to its own law or to a law of another Non-Contracting State, inasmuch as Non-Contracting States are not bound to the CISG.

Moreover, if Brazil ratifies the CISG without making use of the Article 95 reservation, this Convention would also be applicable to commercial contracts between Brazilian parties and parties from Non-Contracting States, unless the parties have specified that a different law would regulate their commercial relationship, provided that PIL rules of the forum point to the Brazilian law or to a law of another Contracting State by force of

Article 1(1)(b) CISG. Therefore, the uncertainty with respect to the law applicable to international sales transactions would be confined to the situations in which PIL rules of the forum indicate a law of a Non-Contracting State as the governing law.

The fact that Brazil's ratification of the CISG would prevent the Brazilian domestic sales law from regulating the parties' affairs does not mean that Brazilian parties are at a disadvantage. As shown in this thesis, the 2002 Civil Code is to some extent compatible with the CISG, despite the differences between the two legal frameworks. It is true that Brazilian businesspersons and their lawyers would have to get acquainted with the CISG rules, which may increase transaction costs after ratification; however, in the long run, these costs may decrease or become inexistent. In fact, Brazilian parties would benefit from the application of the CISG to their international commercial contracts, since it is a more modern and adequate rule than the Brazilian domestic sales law. In any event, if the Convention is not the desirable applicable law, Article 6 CISG would allow parties to opt out of its provisions by selecting another law, which indirectly would make the Principle of Party Autonomy valid in Brazil. Moreover, the CISG would only be applicable to international transactions; thus, domestic contracts for the sale of goods would continue to be regulated by the 2002 Civil Code.

Consequently, in order to reduce the prevailing legal uncertainty regarding international contracts for the sale of goods performed between Brazilian parties and their foreign counterparts, Brazil's ratification of the CISG without any reservation is strongly recommended. Additionally, Article 9 LICC may also be reformed to expressly embrace the Principle of Party Autonomy to choose the law applicable to commercial transactions, confirming the provision of Article 6 CISG.

## REFERENCES

ALI, Restatement (Second) of Contracts (1979)

ALI & NCCUSL, Uniform Commercial Code (1958)

ALVES, Jose Carlos Moreira. “A Panorama of Brazilian Civil Law from its Origins to the Present” in *A Panorama of Brazilian Law*. Jacob Dollinger & Keith S. Rosenn (ed.) Coral Gables / Rio de Janeiro: University of Miami North-South Center / Editora Esplanada (1992)

AGUIAR JR, Ruy Rosado de. “Extinção dos Contratos por Incumprimento do Devedor”. Rio de Janeiro: Aide Editora (1991)

ARAUJO, Nadia de. “Contratos Internacionais: Autonomia da Vontade, Mercosul e Convenções Internacionais”, 3<sup>rd</sup> ed. Rio de Janeiro: Renovar (2004)

\_\_\_\_\_. “Direito Internacional Privado: Teoria e Prática Brasileira”. 2<sup>nd</sup> ed., Rio de Janeiro: Renovar (2004)

BATALHA, Wilson de Souza Campos. “Tratado Elementar de Direito Internacional Privado”. São Paulo: Revista dos Tribunais (1961)

BESSONE, Darcy. “Do Contrato – Teoria Geral”. 4<sup>th</sup> ed., Sao Paulo: Saraiva (1997)

BEVILAQUA, Clovis. “Código Civil Comentado”. vol. IV, 2<sup>nd</sup> ed., Rio de Janeiro: Francisco Alves (1924)

BIERWAGEN, Mônica Yoshizato. “Princípios e Regras de Interpretação dos Contratos no Novo Código Civil”. 3<sup>rd</sup> ed. São Paulo: Saraiva (2007)

BOGDAN, Michael. “Comparative Law”. Springer (1994)

BONELL, Michael Joaquim. “The CISG, European Contract Law and the Development of a World Contract Law”, in *American Journal of Comparative Law*, Vol. 56, Issue 1 (2008)

BRAZIL, Constituição da Republica Federativa do Brasil de 1988 (10/05/1988)

\_\_\_\_\_, Decreto-Lei n. 4.657, 07/04/1942 (Lei de Introdução ao Código Civil)

\_\_\_\_\_, Lei n. 5.869, 01/11/73 (Código de Processo Civil)

\_\_\_\_\_, Lei n. 10.406, 01/10/02 (Código Civil Brasileiro)

\_\_\_\_\_, Minister of Development, Industry and Foreign Trade. “Brazilian Trade Balance Consolidated Data 2009”, available at [http://www.desenvolvimento.gov.br/arquivos/dwnl\\_1275505327.pdf](http://www.desenvolvimento.gov.br/arquivos/dwnl_1275505327.pdf)

\_\_\_\_\_, Projeto de Lei do Senado n. 166 (06/08/2010)

BURNHAM, William. “Introduction to the Law and Legal System of the United States”, 2<sup>nd</sup> ed., St Paul: West Group (1999)

BURTON, Steven J. & EISENBERG, Melvin A. “Contract Law: Selected Source Materials”. West Publishing Co. (2008)

CARVALHO DE MENDONCA, Manoel Ignácio. “Doutrina e Pratica das Obrigações ou Tratado Geral dos Direitos de Credito”. Curitiba: Typ. E Lith. A Vapor Imp. Paranaense (1908)

CARVALHO SANTOS, João Manuel de. “Código Civil Brasileiro Interpretado, Principalmente do Ponto de Vista Pratico”, 11<sup>th</sup> ed., Rio de Janeiro: Freitas Bastos (1986)

CASTRO, Amílcar de. “Direito Internacional Privado”. Rio de Janeiro: Revista Forense (1987)

CHIRELSTEIN, Marvin A. “Concepts and Case Analysis in the Law of Contracts”, 5<sup>th</sup> ed., New York: Foundation Press (2006)

COELHO, Fabio Ulhoa. “Curso de Direito Civil”. Vol. 3, São Paulo: Saraiva (2005)

CORBIN, Arthur L. “Offer and Acceptance, and Some of the Resulting Legal Relations” in *26 Yale Law Journal* 169 (1917)

DATE-BAH, Samuel K. “Comments on Article 29 CISG [Modification of Contract] in *Bianca-Bonell Commentary on the International Sales Law*, Millan: Dott. A Giuffre Editore, S.p.A. (1987)

DE LY, Philip. "Sources of International Sales Law: An Eclectic Model", at UNCITRAL – SIAC Conference on 25 Years United Nations Convention on Contracts for the International Sale of Goods, Singapore (22 September 2005), available at <http://www.cisg.law.pace.edu/cisg/text/e-text-95.html>

DIMATTEO, Larry A. (et. al). “International Sales Law: A Critical Analysis of CISG Jurisprudence”, New York: Cambridge University Press (2005)

\_\_\_\_\_. “Law of International Contracting”. 2<sup>nd</sup> ed, Kluwer Law International (2009)

DINIZ, Maria Helena. “Lei de Introdução ao Código Civil Interpretada”. São Paulo: Saraiva (1994)

\_\_\_\_\_. “Curso de Direito Civil Brasileiro”. vol. 3, São Paulo: Saraiva (1997)

\_\_\_\_\_. “Tratado Teórico e Prático dos Contratos”. vol. 1, 5<sup>th</sup> ed., São Paulo: Saraiva (2003)

DOLLINGER, Jacob. “Direito Internacional Privado”. Rio de Janeiro: Renovar (2007)

DORE, Isaak I. “Choice of Law Under the International Sales Convention: A U.S. Perspective”, in *American Journal of International Law* 537 (1983)

EUROPEAN UNION, Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (1968 Brussels Convention)

\_\_\_\_\_, Convention on the Law Applicable to Contractual Obligations (1980 Rome Convention)

\_\_\_\_\_, Council Regulation n. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.

\_\_\_\_\_, Regulation (EC) No. 593/2008 on the Law Applicable to Contractual Obligations, OJ L 177/6

FARNSWORTH, E. Allan, “Formation of Contract” in *International Sales: The United Nations Convention on Contracts for the International Sale of Goods*, Nina M. Galston and Hans Smit (eds.), New York: Matthew Bender (1984)

\_\_\_\_\_. “An Introduction to the Legal System of the United States”, 3<sup>rd</sup> ed., New York: Oceana Publications, Inc. (1996)

\_\_\_\_\_. “Contracts”. 7<sup>th</sup> ed., New York: Foundation Press (2008)

FEIJOS, Andrea. “Battle of Forms Under the Convention on Contracts for the International Sale of Goods (CISG): A Uniform Solution?” in *Vindobona Journal of International Commercial Law & Arbitration*, vol. 11 (2007)

FERRARI, Franco. “CISG and Private International Law” in *The 1980 Uniform Sales Law – Old Issues Revisited in the Light of Recent Experiences*, Franco Ferrari ed., Verona Conference 2003: Sellier European Law Publishers (2003)

FERREIRA FILHO, Manoel Goncalves. “Fundamental Aspects of the 1988 Constitution” in *A Panorama of Brazilian Law*. Jacob Dollinger & Keith S. Rosenn (ed.) Coral Gables / Rio de Janeiro: University of Miami North-South Center / Editora Esplanada (1992)

GABRIEL, Henry. "Contracts for the Sale of Goods: A Comparison of Domestic and International Law". New York: Oceana Publications, Inc. (2004)

GABOR, Francis A. "Stepchild of the New *Lex Mercatoria*: Private International Law from the United States Perspective", in 8 *Northwestern Journal of International Law & Business* (1998)

GAGLIANO, Pablo Stolze. "Novo Curso de Direito Civil", vol. IV, 2<sup>nd</sup> ed. São Paulo: Saraiva (2006)

GAMA E SOUZA JR, Lauro da. "Autonomia da Vontade nos Contratos Internacionais no Direito Internacional Privado Brasileiro: Uma Leitura Constitucional do Artigo 9<sup>o</sup> da Lei de Introdução ao Código Civil em Favor da Liberdade de Escolha do Direito Aplicável" in *O Direito Internacional Contemporâneo – Estudos em Homenagem ao Professor Jacob Dollinger*, Carmen Tiburcio & Luis Roberto Barroso (org.), Rio de Janeiro: Renovar (2006)

GONCALVES, Carlos Roberto. "Direito Civil Brasileiro - Contratos e Atos Unilaterais", 3<sup>rd</sup> ed., São Paulo: Saraiva (2007)

GRAVES, Jack M. "Party Autonomy in Choice of Commercial Law: The Failure of Revised UCC §1-301 and a Proposal for Broader Reform" in 36 *Seton Hall L. Rev.* 59 (2005)

GREBLER, Eduardo. "The Convention on International Sale of Goods and Brazilian Law: Are Differences Irreconcilable?" in *Journal of Law and Commerce*, Vol. 25 (2005)

GREENBERG, H. "Rights and Remedies Under UCC Article 2", New York: Wiley (1987)

HONNOLD, John O. "Uniform Law For International Sales", 3<sup>rd</sup> ed., The Hague: Kluwer Law International (1999)

HUGHES, Graham. "Common Law Systems" in *Fundamentals of American Law – New York University School of Law*, Allan B. Morrison (ed.), New York: Oxford University Press (1996)

KNAPP, Charles L. "Contract Law" in *Fundamentals of American Law – New York University School of Law*, Allan B. Morrison (ed.), New York: Oxford University Press (1996)

KOEHLER, Martin F. "Survey regarding the relevance of the United Nations Convention for the International Sale of Goods (CISG) in Legal Practice and the Exclusion of its Application" (2006), available at <http://www.cisg.law.pace.edu/cisg/biblio/koehler.html>

LAWRENCE, William H. & HENNING, William H. "Understanding Sales and Leases of Goods". Matthew Bender (1996)

LOOKOFSKY, Joseph. “The 1980 United Nations Convention on Contracts for the International Sale of Goods” in *International Encyclopaedia of Laws – Contracts*, J. Herbots & R. Blanpain ed., Suppl. 29, The Hague: Kluwer Law International (2000)

LOOKOFSKY, Joseph. “Understanding the CISG”, 3<sup>rd</sup> ed., The Hague: Kluwer Law International (2008)

MACAULAY, Stewart. “Non-Contractual Relations in Business: A Preliminary Study” in *28 Am. Sociological Review* 55 (1963)

MATHER, Henry. “Firm Offers Under the UCC and the CISG”, 105 *Dickinson Law Review* (2000)

MERCOSUR, Buenos Aires Protocol on International Jurisdiction in Contractual Matters (1994 Buenos Aires Protocol)

\_\_\_\_\_. Agreement on International Commercial Arbitration

MIRANDA, Pontes de. “Tratado de Direito Privado”, Campinas: Bookseller (2000)

MONTEIRO, Washington de Barros. “Curso de Direito Civil, Direito das Obrigações, 2<sup>a</sup> Parte”, 24<sup>th</sup> ed., Sao Paulo: Saraiva (1990)

MOROSINI, Fabio. “A Arbitragem Comercial como Fator de Renovação do Direito Internacional Privado Brasileiro dos Contratos” in *Revista dos Tribunais n. 851*, São Paulo: RT (2006)

MURRAY JR, John E. “The Chaos of the ‘Battle of the Forms’: Solutions” in *39 Vanderbilt Law Review* 1307 (1986)

\_\_\_\_\_. “Murray on Contracts”, 4<sup>th</sup> ed., Lexis Nexis (2001)

MURRAY JR, John & FLECHTNER, Harry. “Sales, Leases and Electronic Commerce: Problems and Materials on National and International Transactions”. Thomson West (2003)

NADER, Paulo. “Curso de Direito Civil”, vol. 3, Rio de Janeiro: Forense (2008)

NORDSTROM, Robert J. & RAMERMAN, Dale B. “The Uniform Commercial Code and the Choice of Law” in *4 Duke L.J.* 623 (1969)

OAS, Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments (1984 La Paz Convention)



\_\_\_\_\_, Inter-American Convention on the Law Applicable to International Contracts (1994 Mexico Convention)

PELICHET, Michel. “La Vente Internationale de Marchandises et Le Conflit de Lois” in *Recueil des Cours Academie de Droit International*, vol. 201 (1987)

PELUSO, Cezar (et.al.). “Código Civil Comentado, Doutrina e Jurisprudência”, 3<sup>rd</sup> ed., Barueri: Manole (2009)

PERALES VISCASILLAS, Maria del Pilar. “El Contrato de Compraventa Internacional de Mercancias (Convencion de Viena de 1980)” (2001), available at <http://www.cisg.law.pace.edu/cisg/biblio/perales1.html>

PEREIRA, Caio Mario da Silva. “Instituições de Direito Civil - Contratos”, vol. III, Rio de Janeiro: Forense Jurídica (2006)

PLANTARD, Jean-Pierre. “Un Nouveau Droit Uniforme de La Vente Internationale: La Convention des Nations Unies du 11 Avril 1980” in *Journal de Droit International* 2 (1998)

POPP, Carlyle. “Responsabilidade Civil Pré-Negocial: O Rompimento das Tratativas”. Curitiba: Juruá (2002)

RAJSKI, Jerzi. “Comments on Article 96 CISG [Final Provisions: Declaration as to Written Form] in *Bianca-Bonell Commentary on the International Sales Law*, Millan: Dott. A Giuffrè Editore, S.p.A. (1987)

RAPSON, Donald J. “Commercial Law” in *Fundamentals of American Law – New York University School of Law*, Allan B. Morrison (ed.), New York: Oxford University Press (1996)

RICHARDS, Bradley J. “Contracts for the International Sale of Goods: Applicability of the United Nations Convention” in *69 Iowa Law Review* (1983)

RIZZARDO, Arnaldo. “Contratos”. Rio de Janeiro: Forense (2005)

RODAS, João Grandino. “Elementos de Conexão do Direito Internacional Privado Brasileiro Relativamente as Obrigações Contratuais” in *Contratos Internacionais*, João Grandino Rodas (coord.), 2<sup>nd</sup> ed. Editora dos Tribunais (2002)

RODRIGUES, Silvio. “Direito Civil”, vol. 3, São Paulo: Saraiva (2003)

ROSENN, Keith S. “Civil Procedure in Brazil” in *American Journal of Comparative Law*, vol. 34 (1986)

SARCEVIC, Petar. "The CISG and Regional Unification" in *The 1980 Uniform Sales Law – Old Issues Revisited in the Light of Recent Experiences*, Franco Ferrari ed., Verona Conference 2003: Sellier European Law Publishers (2003)

SCHLECHTRIEM, Peter. "Vienna Sales Convention 1980 (recent developments) - Developed Countries' Perspectives", presentation at Conference for International Business Law (Singapore 1992)

\_\_\_\_\_. "Basic Structures and General Concepts of the CISG as Models for a Harmonisation of the Law of Obligations" in *Juridica International*, vol. 10 (2005)

\_\_\_\_\_. "25 Years of the CISG: An International Lingua Franca for Drafting Uniform Laws, Legal Principles, Domestic Legislation and Transnational Contracts" in *Drafting Contracts Under the CISG*, Harry M. Flechtner et al. eds., Oxford University Press (2008)

SCHRODER, Jochen & WENNER, Christian. "Internationales Vertragsrecht: Das Kollisionsrecht Der Transnationalen Wirtschaftsverträge". 2nd ed., Cologne (1998)

SCHWENZER, Ingeborg & HACHEM, Pascal. "The CISG – Successes and Pitfalls" in *The American Journal of Comparative Law*, vol. 57, n.2 (2009)

SICA, Lucia Carvalho. "A Convenção das Nações Unidas sobre Contratos de Compra e Venda Internacional de Mercadorias: Estados Não Signatários e a Situação do Brasil" in *Revista Trimestral de Direito Civil*, ano 8, vol. 31 (2007)

SPAGNOLO, Lisa. "A Glimpse Through the Kaleidoscope: Choices of Law and the CISG (Kaleidoscope Part I)" in *Vindobona Journal of International Commercial Law and Arbitration*, 13 (2009)

STRENGER, Irineu. "Direito Internacional Privado". 4<sup>th</sup> ed., São Paulo: Editora LTR (2000)

STRINGER, Dana. "Choice of Law and Choice of Forum in Brazilian International Commercial Contracts: Party Autonomy, International Jurisdiction, and the Emerging Third Way", in *Columbia Journal of Transnational Law*, vol. 44, no. 3 (2005)

TENORIO, Oscar. "Direito Internacional Privado". São Paulo: Livraria Freitas Bastos (1962)

UN-UNCITRAL. "Convention on Contracts for the International Sale of Goods (1980)", Vienna, 11 April (1980) U.N. Doc. A/CONF.97/18

\_\_\_\_\_. "Commentary on the 1978 Draft Convention on Contracts for the International Sale of Goods", UN Doc. A/Conf. 97/5 (03/14/1979).

UTZ, John L. “More on the Battle of the Forms: The Treatment of ‘Different’ Terms Under the Uniform Commercial Code” in *16 UCC L.J. 103* (1983)

VALLADAO, Haroldo. “Direito Internacional Privado”. 3<sup>rd</sup> ed. Rio de Janeiro: Livraria Freitas Bastos (1971)

VON MEHREN, Arthur T. “Civil Law Analogues to Consideration: An Exercise in Comparative Analysis” in *72 Harvard Law Review 1009* (1959)

VON MEHREN, Arthur Taylor & MURRAY, Peter L. “Law in the United States”. 2<sup>nd</sup> ed., New York: Cambridge University Press (2007)

ZELLER, Bruno. “Determining the Contractual Intent of Parties under the CISG and Common Law – A Comparative Analysis” in *European Journal of Law Reform* (Kluwer), vol. 4, no.4 (2002)

ZIEGEL, Jacob S. “Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods” (1981), available at <http://www.cisg.law.pace.edu/cisg/wais/db/articles/english2.html>

ZWART, Sara G. “The International Law of Sales: A Marriage Between Socialist, Third World, Common, and Civil Law Principles” in *13 North Carolina Journal of International Law and Commercial Regulation* (1988)

ZWEIGERT, Konrad & KOTZ, Heiz. “An Introduction to Comparative Law”. 3rd ed., vol. 1, Oxford University Press (1998)

WINSHIP, Peter. “The Scope of the Vienna Convention on International Sales Contracts”, in *International Sales: The United Nations Convention on Contracts For The International Sales of Goods*, Nina M. Galston and Hans Smit (eds.), Matthew Bender (1984)

WHITE, James J. & SUMMERS, Robert S. “Uniform Commercial Code”. 5<sup>th</sup> ed. St. Paul: West Group (2000)