

CISG'S IMPACT IN LATIN AMERICA*

Gustavo Cerqueira**

ABSTRACT: The CISG celebrates its 40th anniversary and does not leave any Latin American legal system indifferent to its existence and to the solutions it brings. In the past years, a growing impact of the CISG's application on national legal systems can be observed. This growth brings undesirable court's practices and reveals a well-known global paradox: the reluctance of practicing lawyers to apply the CISG.

KEYWORDS: CISG – International Sale of Goods – Latin America Legal Systems – Contract Law – Comparative Law – Circulation of Legal Models.

I. Introduction

I am delighted to celebrate the CISG's 40th anniversary with you and with eminent colleagues and specialists of this Convention¹. It is a pleasure to share with you today some core elements that will allow us to measure the CISG's impact on national legal systems in Latin America.

Of the 19 States Parties to the CISG in the Americas, 15 are Latin American States. They are Argentina, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, El Salvador, Ecuador, Guatemala, Honduras, Mexico, Paraguay, Peru and Uruguay. Although Venezuela is a signatory State to the Convention, it has yet to ratify it.

These 15 States plus Venezuela are now celebrating the age of maturity of the most advanced instrument for the international harmonization of private law.

But this 40th anniversary can be misleading. The entry into force of the Convention in these countries happened in different dates. This means that the CISG has only entered into force 22 years ago in Argentina, 21 years ago in Mexico, 20 years ago in Uruguay, 18 years

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** Full Professor at the University of Nîmes, France. E-mail: gustavo.cerqueira@unimes.fr

¹ Webinar Panelists: Lisa Spagnolo (Monash University), Stefan Kröll (Bucerius Law School), Gustavo Cerqueira (University of Nîmes), Peter Arnt Nielsen (Copenhagen Business School), Clayton P. Gillette (NYU School of Law). Moderators: Franco Ferrari (NYU School of Law), Luca Castellani (UNCITRAL Secretariat).

ago in Colombia, 13 years ago in Paraguay, 6 years ago in Brazil, 2 years ago in Costa Rica, and so on.

Different ages, different maturities! Maturities all the more different as the Convention has found, in each of these countries, a particular foundation to take root. In this sense, its blossoming and fruit-bearing should also be appreciated case by case.

Furthermore, major studies reveal common difficulties faced by these countries. These include the proper understanding of the CISG's sphere of application and the application of its provisions, regardless of how many years the State party's relationship with the Convention is.

Despite these classic difficulties, the CISG does not leave any Latin American legal system indifferent to its existence and to the solutions it brings.

In the past years, we can see a growing impact of the CISG's application on national legal systems. At the same time, this growth provokes some vicissitudes and reveals an interesting Paradox.

In this perspective, I will try my best to outline these levels of influence of the CISG in Latin American national legal systems and the main vicissitudes and paradox that arise from it.

II. A closer look at the influences

The first type of influence concerns the modernization of the countries' internal legal order. Such modernization can take place both through legislators and through judges.

At the legislative level, the CISG has not really had a direct influence in the majority of the Latin American legislations yet.

An exception comes from Argentina. We can find good examples of the CISG's influence in some provisions of the new Argentinean civil and commercial Code of 2014. For example:

- articles 971, 980 and 983 adopt the *reception theory* during the formation of the contract and accept that *assent* may be indicated by performing an act. This is the solution offered by CISG's article 18;
- article 1125 retains the qualification of sale in the presence of contracts for the supply of goods to be manufactured or produced in the same terms of the CISG's article 3;
- article 1143 follows the CISG's article 55 system of price determination by presumption where the price has not been set, either expressly or implicitly, and a means for its determination has not been stipulated;
- and finally, article 1156 incorporates the unitary concept of conformity of goods provided by the CISG's article 35 – a concept which the Argentinean legislator has transposed through the notion of “adequacy”.

Even if the pertinence of certain transpositions is questioned², such an influence seems to be globally welcomed by Argentinean scholars.

In any case, the new Argentinean codification is advocated by some Mexican scholars as a model for future reforms of domestic contract law in Latin America because of its international sources of inspiration, including the Vienna Convention³. This scholars' recommendation is particularly significant given that Mexican law has not been influenced by the CISG even though the Convention has been in force in Mexico since 1989.

Moreover, the legislative modernization of contract law based on the CISG is also recommended by Chilean⁴ and Guatemalan scholars⁵.

Let's not forget that the civil codifications of Paraguay in 1985 and Brazil in 2002, whose drafts date back to the 60s and 70s, failed to take advantage of the modernization of sales law. This modernized sales law was drafted by the two Hague Conventions of 1964 relating to a Uniform Law on the International Sale of Goods – the predecessors of the CISG⁶.

Now, regarding case law, influences are difficult to appreciate due to the low number of decision records in most Latin American countries. In Costa Rica, for instance, no decisions seem to have been recorded so far⁷. But out of the existing case law, most of the recorded decisions are criticized for having misapplied the Convention. Examples are the *sua sponte* use of the CISG by judges – without the lawyers having invoked the CISG rules – to interpret or even fill gaps in national law in purely domestic cases, as Colombian⁸ and Paraguayan⁹ courts have done.

The second type of influence concerning the Convention is its strong impact on the Latin American scholars. The way in which contract law is understood has completely changed in the last 20 years. The CISG model has been given a fundamental role in the interpretation of nineteenth century Civil Codes. This phenomenon has been strongly emphasized by scholars. According to them, no one studying contract law in Chile or in Colombia, for example, can ignore the content of the principles on which the CISG is

² M. B. NOODT TAQUELA, "CISG's impact on Argentine sales domestic law", in *The Vienna Convention in America. 40th anniversary of the United Nations Convention on Contracts for International Sale of Goods*, *op. cit.*, p. 71 *et seq.*

³ E. MUÑOZ, I. MORFÍN KROEPFLY, "The 2015 Civil and Commercial Code of Argentina: a model for Latin American Contract Law reform inspired by the CISG and the PICC?", in *The Vienna Convention in America*, *op. cit.*, p. 363 *et seq.*

⁴ I. MAZA GUZMURI, A. VIDAL OLIVARES, "La Convention de Vienne sur les contrats de vente internationale de marchandises et son impact au Chili", in *The Vienna Convention in America*, *op. cit.*, p. 132 *et seq.*

⁵ P. MENDOZA MONTANO, E. MARTÍNEZ GUZMÁN, "The Vienna Convention in Guatemala", in *The Vienna Convention in America*, *op. cit.*, p. 219 *et seq.*

⁶ C. WITZ, "Regards d'un juriste européen sur le nouveau code civil brésilien", in *Code civil brésilien*, édition bilingue, traduit sous la direction de Arnaldo Wald, Instituto brasileiro de direito comparado et Société de législation comparée, Paris: Société de législation comparée, 2009, p. 29-45.

⁷ M. PARÍS CRUZ, "The relevance of a uniform interpretation of the CISG from a Costa Rican perspective", in *The Vienna Convention in America*, *op. cit.*, p. 165 *et seq.*

⁸ D. ROJAS TAMAYO, "Les 18 ans de l'entrée en vigueur en Colombie de la Convention de Vienne de 1980: à l'âge de la majorité, une maturité en devenir", in *The Vienna Convention in America*, *op. cit.*, p. 139 *et seq.*

⁹ J. A. MORENO RODRÍGUEZ, "The CISG in Paraguay", in *The Vienna Convention in America*, *op. cit.*, p. 251 *et seq.*

based¹⁰. We can conclude that the CISG is gradually finding its place into Latin American legal thinking.

In several cases, this influence on the scholars goes back well before countries acceded to the Convention, as in the case of Brazil, Paraguay and Uruguay.

Let's take Brazil as an example. Since 2002, Brazilian judges, professors and lawyers meet annually in Brasília at the Civil Law Journey – held by the Brazilian Federal Council of Justice – to adopt non-case specific doctrinal interpretative statements of the 2002 Civil Code provisions¹¹. Some of these statements are largely inspired by the CISG¹². For example, while Brazilian law was not aware of the duty to mitigate losses, and Brazil was not yet a party to the CISG, the 1st Civil Law Journey in 2002 adopted statement n°. 169 interpreting article 422 of the Civil Code relating to good faith. This statement, inspired by CISG's article 77, posits that “the principle of good faith imposes on the creditor the obligation to mitigate his own losses”. Many other examples could be mentioned. I will limit myself to one: the notions of “fundamental breach” (CISG's article 25) and the notion of “anticipatory breach” (CISG's article 72). These notions are used to interpret the provisions of the civil Code relating to the effect of non-performance. Even if they are not binding, these interpretative statements are nowadays applied by the courts in disputes concerning purely domestic contracts.

Furthermore, let us not forget the publication in 2017 of the Latin American Principles of Contract Law. Its content is largely inspired by the Convention¹³.

Finally, Law Schools are opening up to the study of the CISG, in particular through the development of “specialized literature” and “the organization and participation of Latin American students and professors in various competitions in the field of international trade”.

This growing influence of the CISG is also the source of some vicissitudes.

III. A closer look at the undesirable court's practices

Let's look at some undesirable judicial practices through two examples.

The first one concerns the failure to comply with the CISG's rules regarding its sphere of application. This is the case when the CISG's provisions are applied as *international trade usages* by the Brazilian¹⁴ and Venezuelan¹⁵ courts. Sometimes, the judges apply the

¹⁰ I. MAZA GUZMURI, A. VIDAL OLIVARES, *quoted above*, Footnote 4 ; D. ROJAS TAMAYO, *quoted above*, Footnote 8.

¹¹ See I. DE AGUILAR VIEIRA, G. CERQUEIRA, “Les énoncés interprétatifs : un moyen de restructuration du droit commercial brésilien”, in *Mélanges en l'honneur des Professeurs Michel et Patrice Storck*, Dalloz/Lextenso, 2021, p. 211-225.

¹² L. GAMA JR, “L'impact de la CVIM sur le droit brésilien des contrats”, in *The Vienna Convention in America*, *op. cit.*, p. 93 *et seq.*

¹³ See I. DE LA MAZA, C. PIZARRO, A. VIDAL (coord. y eds.), *Los Principios Latinoamericanos de Derecho de los Contratos*, Madrid, Agencia Estatal Boletín Oficial del Estado, 2017, p. 17 *et seq.*

¹⁴ F. PIGNATTA, “L'application de la Convention de Vienne au Brésil et les défis de son interprétation” in *The Vienna Convention in America*, *op. cit.*, p. 81 *et seq.*

¹⁵ C. MADRID MARTINEZ, “Domestic Contract Law and Private International Law of Venezuela and the Vienna Convention on the International Sale of Goods”, p. 301 *et seq.*

CISG to solve issues relating to contracts not governed by the Convention, either because they are purely domestic or because they are contracts that do not involve the sale of goods. This is particularly the case in Honduras¹⁶ and in Colombia¹⁷.

The second example concerns the interpretation of the CISG. Despite the requirement for an autonomous interpretation, “importing trend” and “homeward trend” – expressions enshrined by Franco Ferrari¹⁸ – still prevail in Latin American courts. Taking Brazil again as an example, courts still resort to national approaches when applying the CISG. Recently, the Rio Grande do Sul Court of Appeals resorted to the German *Nachfrist’s regime* to implement CISG’s article 47 related to the *additional period of time for performance*. However, unlike German law, where granting an additional time for performance is a necessary condition before the contract can be terminated, in CISG’s article 47 granting such a period is not mandatory¹⁹.

This pitfall should not offend the emerging efforts of some courts to neutralize the national approach to interpreting the rules of the Convention, as is the case of the Chilean²⁰ and Uruguayan²¹ courts.

To this end, the judges have recourse in particular to the Unidroit Principles, either on the grounds that they are the general principles on which the Convention is based or on the grounds of domestic law. Regarding the latter, for instance, since 2015 Paraguayan private international law allows the choice of a non-State law by the parties, of which the Unidroit Principles are the best-known example. The same can be said regarding Brazilian arbitration law, that allows the application of a non-State law since 1996.

In order to fight against the “importing” and the “homeward” tendencies, pedagogical efforts are being made by Scholars. For instance, the 3rd Brazilian Commercial Law Journey – also held by the Brazilian Federal Council of Justice – adopted in 2019 an interpretative statement reaffirming the importance of using international case law and scholarly writing to interpret the CISG according to the guidelines of its article 7.

In any event, while these wrongful applications and reprimandable trends can be overcome over time, they show, in the end, that Latin America does not mistrust uniform law, but rather is open to it, as demonstrated in the works of Professor Alejandro Garro.

However, the impact of the Convention on domestic law and the transformations that it engenders contrasts with the reluctance of practicing lawyers to apply the CISG. A well-known global paradox.

¹⁶ R. A. WILLIAMS CRUZ, “Impact of the Convention on the internal law of obligations in Honduras”, in *The Vienna Convention in America*, *op. cit.*, p. 239 *et seq.*

¹⁷ D. ROJAS TAMAYO, *quoted above*, Footnote 8.

¹⁸ F. FERRARI, “Interpretation autonome, tendance insulariste et tendance importatrice dans la jurisprudence de la CVIM”, in *The Vienna Convention in America*, *op. cit.*, p. 225 *et seq.*

¹⁹ TJ-RS, *Apelação civil*, 12ª Câmara civil, 14/02/2017, nº 70072362940, *Anexo Comercial vs. Noridane Foods S.A.*

²⁰ I. MAZA GUZMURI, A. VIDAL OLIVARES, *quoted above*, Footnote 4.

²¹ C. FRESNEDO DE AGUIRRE, “The Application of the Vienna Convention in Uruguay”, in *The Vienna Convention in America*, *op. cit.*, p. 271 *et seq.*

IV. Paradox: the practitioners' reluctance to apply the CISG

Lastly, and I am coming to the end of my presentation, let's talk about this specific paradox.

Several studies reveal a resistance by practitioners to use the CISG. In this context, CISG's article 6 is largely employed since it admits an *opting out* of the Convention rules.

Sometimes it gives rise to complex disputes, especially when the judge or the arbitrator is faced with a tacit exclusion of the Convention. In this regard, the Chilean Supreme Court goes against the flow and admits the tacit exclusion in a very flexible way. For this Court, it is enough that the parties pled based on national law provisions to consider the Convention has been tacitly excluded²².

It is difficult to criticize the practitioner's predisposition to set the CISG aside, since the convention gives the parties the option of being the first judge of their contractual regime.

At the same time, the CISG's exclusion is most often based on lack of knowledge and lack of experience in international commercial dispute resolution rather than a conscientious choice. Changes are nevertheless expected since a lot of Latin American practicing lawyers are also professors in the field of international commercial law.

However, this actual marginalization makes it difficult for a uniform interpretation to emerge. This means that the less the CISG is applied, the more remote are the opportunities to test the requirement and the system of autonomous interpretation that the Convention provides.

In any case, let us end this presentation on a positive note.

These 40 years that we are celebrating today will be soon a distant memory, because the life of the Convention shall be long. Therefore, today's mistakes and reluctances will be overcome, so that the Convention will be able to offer all the good fruits it is meant to provide.

Thank you very much for your attention.

References

- Cerqueira, G. ; Nord, N. "Retour sur le silence des parties à propos de l'application de la Convention de Vienne sur la vente internationale des marchandises", *AJ Contrat* n° 12, 2020.
- De Aguilar Vieira, I.; Cerqueira, G. "Les énoncés interprétatifs: un moyen de restructuration du droit commercial brésilien", in *Mélanges en l'honneur des Professeurs Michel et Patrice Storck*, Dalloz/Lextenso (2021).
- De La Maza, I.; Pizarro, C.; Vidal, A. (coord. y eds.). "Los Principios Latinoamericanos de Derecho de los Contratos". Madrid: Agencia Estatal Boletín Oficial del Estado (2017).

²² Supreme Court, 22 September 2008, n° 1.782-2007. About this issue from a French perspective, see. G. CERQUEIRA, N. NORD, "Retour sur le silence des parties à propos de l'application de la Convention de Vienne sur la vente internationale des marchandises", *AJ Contrat* n° 12, 2020, p. 517-521.

- Ferrari, F. “Interprétation autonome, tendance insulariste et tendance importatrice dans la jurisprudence de la CVIM”, in *The Vienna Convention in America*.
- Fresnedo de Aguirre, C. “The Application of the Vienna Convention in Uruguay”, in *The Vienna Convention in America*.
- Gama Jr, L. “L’impact de la CVIM sur le droit brésilien des contrats”, in *The Vienna Convention in America*.
- Mendoza Montano, P.; Martínez Guzmán, E. “The Vienna Convention in Guatemala”, in *The Vienna Convention in America*.
- Madrid Martinez, C. “Domestic Contract Law and Private International Law of Venezuela and the Vienna Convention on the International Sale of Goods”.
- Maza Guzmuri, I.; Vidal Olivares, A. “La Convention de Vienne sur les contrats de vente internationale de marchandises et son impact au Chili”, in *The Vienna Convention in America*.
- Moreno Rodríguez, J. A. “The CISG in Paraguay”, in *The Vienna Convention in America*.
- Muñoz, E.; Morfín Kroepfly, I. “The 2015 Civil and Commercial Code of Argentina: a model for Latin American Contract Law reform inspired by the CISG and the PICC?”, in *The Vienna Convention in America*.
- Noodt Taquela, M. B., “CISG’s impact on Argentine sales domestic law”, in *The Vienna Convention in America. 40th anniversary of the United Nations Convention on Contracts for International Sale of Goods*.
- París Cruz, M. “The relevance of a uniform interpretation of the CISG from a Costa Rican perspective”, in *The Vienna Convention in America*.
- Pignatta, F. “L’application de la Convention de Vienne au Brésil et les défis de son interprétation” in *The Vienna Convention in America*.
- Rojas Tamayo, D. “Les 18 ans de l’entrée en vigueur en Colombie de la Convention de Vienne de 1980: à l’âge de la majorité, une maturité en devenir”, in *The Vienna Convention in America. 40th anniversary of the United Nations Convention on Contracts for International Sale of Goods*.
- Williams Cruz, R. A. “Impact of the Convention on the internal law of obligations in Honduras”, in *The Vienna Convention in America. 40th anniversary of the United Nations Convention on Contracts for International Sale of Goods*.
- Witz, C. “Regards d’un juriste européen sur le nouveau code civil brésilien”, in *Code civil brésilien, édition bilingue, traduit sous la direction de Arnaldo Wald. Instituto brasileiro de direito comparado et Société de législation comparée. Paris: Société de législation comparée (2009)*.