

# Regional and Global Unification of Sales Law\*

Ingeborg Schwenzer\*\*

## A. Introduction

When discussing regional and global unification of sales law it seems appropriate to briefly mention the globalisation of trade. The overall development of international trade over the last half century is startling. Although in Fall 2008 and persisting into 2009 there was a sharp decline worldwide – in 2009 alone the drop amounted to 12% –, preliminary figures indicate a strong rebound, with value of trade in 2010 said to expand by 9,5% compared to 2009.<sup>1</sup> WTO figures for 2008 indicate that worldwide merchandise export trade amounted to 15,717 billion USD and worldwide merchandise import trade to 16,127 billion USD.<sup>2</sup> These figures are approximately 100 times more than 45 years ago and more than 10 times the level at the time of the signing of the United Nations Convention on Contracts for the International Sale of Goods (“CISG”) in 1980.<sup>3</sup> The average annual growth from 2000 to 2008 was more than 5% for both exports and imports worldwide.<sup>4</sup> No longer is the highest growth found in North America, Europe and Japan, but instead it is the transition economies from different points of the globe – particularly China, Brazil, Russia and some African countries.<sup>5</sup> Disregarding the figures for 2009, in Africa the annual growth of exports amounted to 18% in 2007 and 28% in 2008, that of imports to 23% in 2007 and to 27% in 2008.<sup>6</sup>

Different laws have always been an obstacle to trade, be it on a domestic or on the international level. Thus, with the increasing globalisation of trade the necessity of harmonizing and unifying the relevant sets of rules governing international trade becomes more and more urgent.

From a global perspective two different trends can be discerned. On the one hand, there is the United Nations Convention on Contracts for the International Sale of Goods (CISG). On the other hand, there are regional harmonization and unification efforts such as the ones undertaken by OHADA in Africa, the Draft Common Frame of Reference and the Draft Common European Sales Law in Europe and similar endeavours undertaken in South East Asia.

\* The author is deeply indebted to lic. iur. Alain F. Hosang for editing the footnotes. All web pages have been last accessed on 8 December 2011.

\*\* Dr. iur (Freiburg, Germany), LL.M. (Berkeley, USA), Professor for Private Law, University of Basel, Switzerland.

1 See World Trade Organization (WTO), Press Release 26 March 2010, available at <[www.wto.org/english/news\\_e/pres10\\_e/pr598\\_e.htm](http://www.wto.org/english/news_e/pres10_e/pr598_e.htm)>.

2 See World Trade Organization (WTO), World Trade Developments, available at <[www.wto.org/english/res\\_e/statis\\_e/its2009\\_e/its09\\_world\\_trade\\_dev\\_e.pdf](http://www.wto.org/english/res_e/statis_e/its2009_e/its09_world_trade_dev_e.pdf)>, p. 9 *et seq.*

3 *Id.*

4 *Id.*, p. 7.

5 *Id.*, p. 8.

6 See *supra* note 1.

In my presentation I will briefly introduce you to the CISG, I will then point out the main differences between the CISG and the OHADA sales law, and finally discuss the question whether beyond the regional unification there is a need for African states to join the CISG community.

## B. The CISG

Elaborated at the famous Vienna Conference in 1980, the CISG has now been in force since 1 January 1988.<sup>7</sup> The official languages are Arabic, Chinese, French, English, Russian and Spanish.<sup>8</sup>

Today the CISG has 77 member states.<sup>9</sup> Nine out of the ten leading trade nations are today member states with the United Kingdom being the sole exception.<sup>10</sup> Already today the CISG potentially covers more than 80% of the world trade.<sup>11</sup> It is expected that important further countries will join in the near future; especially this is true for Brazil, one of the most important transition economies.<sup>12</sup>

Unfortunately, in Africa the CISG has not yet gained wide acceptance. All over Africa, including Egypt, there are only eleven CISG member states.<sup>13</sup> Most notably, only three out of the sixteen and soon seventeen OHADA member states<sup>14</sup> have joined the CISG. Ghana signed the Convention but never ratified it; South Africa is now considering adopting the Convention.<sup>15</sup>

7 For a comprehensive collection of official documents relating to the Vienna Conference, see J. Honnold (Ed.), *Documentary History of the Uniform Law for International Sales. The Studies, Deliberations, and Decisions that led to the 1980 United Nations Convention with Introductions and Explanations*, Deventer 1989 (cited as: *Documentary History*).

8 The CISG in the official languages is available at <[www.globalsaleslaw.org/index.cfm?pageID=643](http://www.globalsaleslaw.org/index.cfm?pageID=643)>.

9 An updated status is available at <[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)>.

10 See World Trade Organization (WTO), Statistics of 2007, available at <[www.wto.org/english/res\\_e/status\\_e/its2007\\_e/its07\\_world\\_trade\\_dev\\_e.htm](http://www.wto.org/english/res_e/status_e/its2007_e/its07_world_trade_dev_e.htm)>, Table I.8.

11 See I. Schwenzer & P. Hachem, 'The CISG – Successes and Pitfalls', 57 *Am. J. Comp. L.* 2009, p. 457, available at <[www.cisg.law.pace.edu/cisg/biblio/schwenzer-hachem.html](http://www.cisg.law.pace.edu/cisg/biblio/schwenzer-hachem.html)>.

12 See generally L.G. Castellani, 'Promoting the Adoption of the United Nations Convention on Contracts for the International Sale of Goods (CISG)', 13 *Vindobona Journal of International Commercial Law and Arbitration* 2009, p. 241.

13 The African CISG member states are Benin, Burundi, Egypt, Gabon, Ghana, Guinea, Lesotho, Liberia, Mauritania, Uganda and Zambia, available at <[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)>.

14 The OHADA member states are Benin, Bissao Guinea, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo, Equatorial Guinea, Gabon, Guinea, Ivory Coast, Mali, Niger, Senegal and Togo, see the website of OHADA, available at <[www.ohada.com](http://www.ohada.com)>. The Democratic Republic of Congo is in the process of becoming a member state of OHADA. However, only Benin, Gabon and Guinea are contracting states of the CISG.

15 See the webpage relating to status of the CISG in Africa, hosted by the University of South Africa, available at <[www.unisa.ac.za/Default.asp?Cmd=ViewContent&ContentID=658](http://www.unisa.ac.za/Default.asp?Cmd=ViewContent&ContentID=658)>.

Beyond the global unification of sales law it is a well known fact that the CISG has exerted influence on an international as well as domestic level.<sup>16</sup> Thus, when the first set of the UNIDROIT Principles of International Commercial Contracts (PICC) was launched in 1994 they closely followed the CISG not only in its systematic approach but also with respect to the remedy mechanism.<sup>17</sup> The same holds true for the Principles of European Contract Law (PECL) issued in 1999.<sup>18</sup> Furthermore, the EC Directive on certain aspects of the sale of consumer goods should be mentioned here.<sup>19</sup> OHADA based its *Acte uniforme sur le droit commercial général* (AUDCG) primarily on the CISG.<sup>20</sup> Finally, the Draft Common Frame of Reference 2009 and the Draft Common European Sales Law 2011 are not much more than a continuation of all these different unification efforts based on the CISG.<sup>21</sup>

Over the last two decades the CISG has also proven to be a decisive role model for domestic legislators and not just on an international level. Finland, Norway and Sweden took the coming into force of the CISG in their countries on 1 January 1989 as an opportunity to enact new domestic sale of goods acts, thereby heavily relying on the CISG.<sup>22</sup> With the end of the cold war and the collapse of the former Soviet Union the young Eastern European states looked to the CISG when facing the task of formulating their new civil codes.<sup>23</sup> This holds true

- 16 See P. Schlechtriem, '25 Years of the CISG: An International lingua franca for Drafting Uniform Laws, Legal Principles, Domestic Legislation and Transnational Contracts', in Flechtner, Brand & Walter (Eds.), *Drafting Contracts Under the CISG*, Oxford 2008, p. 167 and 174 *et seq.* (hereinafter cited as: *25 Years*); P. Schlechtriem, 'Basic Structures and General Concepts of the CISG as Models for a Harmonisation of the Law of Obligations', 10 *Juridica International* 2005, p. 27 *et seq.* (hereinafter cited as: *Basic Structures*).
- 17 See UNIDROIT International Institute for the Unification of Private Law, UNIDROIT Principles of International Commercial Contracts (PICC) (2004), Rome, April 2004, available at <[www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf](http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf)>; M. J. Bonell, 'The CISG, European Contract Law and the Development of a World Contract Law', 56 *Am. J. Comp. L.* 2008, p. 1, 16.
- 18 See Principles of European Contract Law (PECL), 1999, available at <[http://frontpage.cbs.dk/law/commission\\_on\\_european\\_contract\\_law/PECL%20engelsk/engelsk\\_partI\\_og\\_II.htm](http://frontpage.cbs.dk/law/commission_on_european_contract_law/PECL%20engelsk/engelsk_partI_og_II.htm)>; O. Lando, 'CISG and Its Followers; A Proposal to Adopt Some International Principles of Contract Law', 53 *Am. J. Comp. L.* 2005, p. 378 and 381.
- 19 Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees, L 171/12.
- 20 See U.G. Schroeter, 'Das einheitliche Kaufrecht der afrikanischen OHADA-Staaten im Vergleich zum UN-Kaufrecht', *Recht in Afrika* 2001, p. 163 and 166 *et seq.*
- 21 See C. von Bar *et al.*, *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR)*, Munich 2009. See furthermore Schlechtriem, *Basic Structures*, *supra* note 16, p. 167 and 175 *et seq.*; C. von Bar, 'Working Together Toward a Common Frame of Reference', 10 *Juridica International* 2005, p. 17 and 22.
- 22 Of course, the method of implementation of the CISG differed. While Finland and Sweden introduced the CISG along side their domestic sales laws, Norway enacted one single sales law for international and domestic sales contracts. See for criticism V. Hagstrøm, 'CISG – Implementation in Norway, an Approach not Advisable', *Internationales Handelsrecht* 2006, p. 246 *et seq.* In 2007, a new Danish Sale of Goods Act was drafted. An English translation is available at <[www.sprog.asb.dk/SN/Danish%20Sale%20of%20Goods%20Act.pdf](http://www.sprog.asb.dk/SN/Danish%20Sale%20of%20Goods%20Act.pdf)>.
- 23 See Schlechtriem, *25 Years*, *supra* note 16, p. 167 and 177 *et seq.*

on the one hand with regard to the Commonwealth of Independent States (CIS)<sup>24</sup> and the Baltic states amongst which Estonia is the most prominent exponent. Nowadays, China is of utmost importance for international trade and especially for African countries. The contract law of the People's Republic of China dated 15 March 1999, again, closely follows the CISG.<sup>25</sup> Finally, the modernisation of the German Law of Obligations which began in the 1980s was from the very beginning strongly influenced by the CISG.<sup>26</sup>

Three main features can be identified that have influenced all of these instruments. First, the drafters of the CISG endeavoured to depart from domestic legal terms and concepts, instead seeking an independent legal language.<sup>27</sup> Indeed, to a large extent they succeeded. Likewise, traditional domestic systematic approaches have been discarded. Instead the Convention features a transparent structure unfettered by any historical whimsicalities.<sup>28</sup> Thus, for example, the sections on the obligations of the seller are followed by the section on remedies for breach of contract by the seller.<sup>29</sup> What has proven most influential on a substantive level is, however, the remedy mechanism. The Convention, unlike the Roman heritage in Civil Law countries, does not follow the cause oriented approach but the breach of contract approach of Common Law descent.<sup>30</sup> Special features of these systems have been overcome making the CISG truly suitable for the international context.

### C. The OHADA Sales Law<sup>31</sup> in Comparison with the CISG

Although – as has already been mentioned – the sales law provisions of the OHADA Uniform Act Relating to General Commercial Law have been modelled on the basis of the CISG there are notable differences that may become important in practice.

24 See R. Knieper, 'Celebrating Success by Accession to CISG', 25 *J. L. & Com.* 2005, p. 477. The Commonwealth of Independent States is a supranational organization between states of the former Soviet Union, available at <[www.cisstat.com/eng/frame\\_cis.htm](http://www.cisstat.com/eng/frame_cis.htm)> for further details.

25 See only A.E. Butler, 'Contracts for the International Sale of Goods in China', 21 *International Litigation Quarterly* 2006, p. 3.

26 See P. Schlechtriem, 'Internationales Einheitliches Kaufrecht und neues Schuldrecht', in Dauner-Lieb & Konzen & Schmidt (Eds.), *Das neue Schuldrecht in der Praxis*, Cologne 2002, p. 71.

27 The interpretation according to its 'international character' is a crucial element of the Convention, see Art. 7(1) CISG. See also Regional Court 's-Hertogenbosch, 16 October 2002, CISG-online 816, available at <[www.cisg-online.ch](http://www.cisg-online.ch)>; J.O. Honnold & H.M. Flechtner, *Uniform Law for International Sales under the 1980 United Nations Convention*, 4th edn, Alphen aan den Rijn 2009, Art. 7 para. 86; I. Schwenzer & P. Hachem, in Schlechtriem & Schwenzer (Eds.), *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 3rd edn, Oxford 2010, Art. 7 para. 8 *et seq.* (hereinafter cited as: *Commentary*). For further references, see F. Ferrari, in Schlechtriem & Schwenzer (Eds.), *Kommentar zum Einheitlichen UN-Kaufrecht – CISG –*, 5th edn, Munich, 2008, Art. 7 para. 9.

28 See P. Schlechtriem, *Internationales UN-Kaufrecht*, 4th edn, Tübingen 2007, para. 5.

29 See Art. 30 *et seq.* CISG.

30 See Schlechtriem & Schwenzer, *Commentary*, *supra* note 27, Introduction, sub. II.

31 This paper is based on the version as of 17 April 1997, the amendments decided in December 2010 were not available at the time of writing.

The rules concerning contract formation are by and large comparable. However, there is one notable exception. Whereas under the CISG it is in principle possible to conclude a contract without specifying a price – although this has been and still is a highly debated issue –,<sup>32</sup> the AUDCG has clarified that a valid contract cannot be concluded without a specification of the price.<sup>33</sup> As in the meantime even the French *Cour de Cassation* has abandoned the strict application of the doctrine of *pretium certum*, this severe obstacle to a smooth international trade seems all the more deplorable.<sup>34</sup>

Major differences exist in the field of remedies. Although the AUDCG as the CISG in principle does not distinguish between the different types of breaches of contract especially when it comes to the remedy of avoidance the AUDCG and the CISG part company.

Like under the CISG under the AUDCG avoidance of the contract generally requires that the breach must be fundamental. In the words of Art. 248 AUDCG it must be essential. The definitions when a breach is deemed to be fundamental resemble each other. However, Art. 248 AUDCG contains an important exception. If the breach was due to an act of a third party or to circumstances beyond the debtor's control, the breach is not considered to be fundamental. This is indeed most remarkable. In other legal systems *force majeure* – the concept that is underlying the exception dealt with in Art. 248 AUDCG – excludes liability for damages only. This does not only hold true for the CISG (Art. 79 CISG) but can be commonly found in Civil as well as in Common Law legal systems around the world.<sup>35</sup> It is hardly conceivable why a party – who does not bear the risk of loss – should be bound to a contract that has been fundamentally breached by the other party.

The other major difference in relation to avoidance relates to the manner of the avoidance mechanism. Whereas the CISG – as all other modern legal systems – provides for avoidance by mere declaration of the aggrieved party, the relevant AUDCG provisions provide for termination of the contract by court decision (Art. 245-247, 254(1), 259 AUDCG).<sup>36</sup> This is in line with the position taken by the French Code Civil (Art. 1184).<sup>37</sup> Although this might function in a purely domestic setting, in the international context where parties often stipulate for arbitration it is extremely burdensome if the aggrieved party has to turn to the

32 See U.G. Schroeter, in Schwenzer (Ed.), *Commentary, supra* note 27, Art. 14 para. 17 *et seq.*

33 See Art. 235 AUDCG.

34 See French Supreme Court, Cass Civ 1er, 19 November 1994, *J.C.P.* 1995, II, 22371 with a note by J. Ghestin. See also U. G. Schroeter, in Schwenzer (Ed.), *Commentary, supra* note 27, Art. 14 para. 15.

35 See generally C. Brunner, *Force Majeure and Hardship under General Contract Principles*, Alphen aan den Rijn 2009; I. Schwenzer, in Schwenzer (Ed.), *Commentary, supra* note 27, Art. 79 para. 1 *et seq.*

36 In case of a fundamental breach, the seller and the buyer can avoid the contract by declaration, see Art. 49(1)(a) and Art. 64(1)(a) CISG respectively. For the requirements of a declaration, see M. Müller-Chen, in Schwenzer (Ed.), *Commentary, supra* note 27, Art. 49 para. 23 *et seq.*

37 Art. 1184 French Civil Code expressly states that "Avoidance must be applied for in court [...]". An official translation is available at <[http://195.83.177.9/upl/pdf/code\\_22.pdf](http://195.83.177.9/upl/pdf/code_22.pdf)>.

competent domestic court in order not to lose the possibility of avoidance of the contract.

Furthermore, there are significant differences in relation to seller's liability for non-conformity of the goods. At the outset again the CISG and the AUDCG seem to have the same starting point. Like Art. 35 CISG, Art. 224 AUDCG provides that the seller must deliver goods that according to quantity, quality, description and packaging conform to the contract. However, Art. 231 AUDCG additionally incorporates the well known French *vices cachés* approach.<sup>38</sup> It seems at least questionable how these two fundamentally different approaches can be reconciled in practice. Most notably, the duty of the buyer to examine the goods and to give notice of any non-conformity (Art. 227-229 AUDCG) does not apply to *vices cachés*.<sup>39</sup>

As just mentioned, both the CISG (Art. 38, 39 CISG) and AUDCG (Art. 227-229) require the buyer to examine the goods and to give notice to the seller of any non-conformity. If the buyer does not comply with this duty it loses all remedies in relation to the non-conformity.<sup>40</sup> At the Vienna Conference, the provisions establishing the examination and notice requirement were met with great criticism especially from so-called developing countries.<sup>41</sup> It was feared that they might act as a booby trap for the unwary not so sophisticated buyer and thus disadvantage parties from these countries.<sup>42</sup> Therefore, unlike in any domestic legal system accustomed to the notice requirement, if the buyer has a reasonable excuse for not having given notice it does not lose all remedies for non-conformity, but only the right to avoid the contract and damages for loss of profit under the CISG.<sup>43</sup> Most importantly, it may still reduce the purchase price, if necessary to zero.<sup>44</sup> Looking at the examination and notice provisions of AUDCG one is taken by surprise. In the first place, there is no such provision as Art. 44 CISG, that means, even if the buyer has a reasonable excuse for not giving notice it loses all remedies and has to pay the full purchase price without being able to make use of the goods. Second, whereas the CISG allows the buyer to give notice during a period of maximum two years from the date on which the goods were actually handed over to the buyer (Art. 39(2) CISG), the respective cut-off period in Art. 229 AUDCG is only one year. Thus, the buyer is much worse off under the

38 Under French law, the *vices cachés* doctrine is laid down in Art. 1641 and Art. 1642 French Civil Code. According to this doctrine, the seller is only liable for 'hidden defects' and not for obvious defects which the buyer could have detected himself. Art. 230 AUDCG follows this approach stating that the seller "shall deliver the goods with assurance that no third party has a right or claim to them, *unless the buyer accepts to collect the goods under such conditions.*" (emphasis added).

39 Art. 230 AUDCG seems to understand the doctrine of *vices cachés* as a guarantee, following Art. 1641 French Civil Code. Under the AUDCG, the obligation of the buyer to examine the goods and to give notice to the seller of any non-conformity is laid down in a separate chapter from Art. 230 AUDCG.

40 See Art. 229 AUDCG and Art. 39(1) CISG.

41 For further details see I. Schwenzler, in Schwenzler (Ed.), *Commentary, supra* note 27, Art. 39 para. 2.

42 See Honnold (Ed.), *Documentary History, supra* note 7, p. 320 *et seq.* and 345 *et seq.*

43 See Art. 44 CISG.

44 See *id.*

AUDCG than under the CISG. The only way to circumvent this result might be by relying on the already mentioned doctrine of *vices cachés*.

The remedies of the seller in case of breach by the buyer again largely resemble the CISG model.<sup>45</sup> Avoidance can be asked for – again by request to the court – if the breach amounts to a fundamental one (Art. 259 lit. 1 AUDCG). However, as under the CISG, the breach of buyer's obligations will rarely in itself surpass the threshold of fundamentality.<sup>46</sup> Therefore, the possibility of the aggrieved to set an additional period of time – the so-called *Nachfrist*-principle – becomes of crucial importance.<sup>47</sup> But unlike the CISG the AUDCG recognizes the possibility of the seller to set such a *Nachfrist* as a prerequisite for the avoidance of the contract only in respect to buyer's obligation in taking delivery but not in respect to buyer's payment obligation (Art. 259 lit. 2 AUDCG). In practice, this might lead to considerable uncertainty for unpaid sellers who are bound to the contract.

Finally, important differences between the CISG and AUDCG exist where it comes to damages. Art. 74 CISG embodies two important principles; the principle of full compensation and the so-called contemplation rule, i.e. that damages may not exceed the loss which the party in breach could foresee at the time of the conclusion of the contract.<sup>48</sup> Whereas the principle of full compensation can also be found in Art. 264 AUDCG the contemplation rule is missing. This might well lead to exorbitant damages. Furthermore, the CISG provides for two easy methods to calculate damages; the first is calculation of damages according to a cover transaction (Art. 75 CISG), the second is calculation according to the market price (Art. 76 CISG). The latter is especially important for parties dealing in the commodity trade.<sup>49</sup> AUDCG in contrast only allows calculation of damages according to a concrete cover transaction (Art. 265 AUDCG), thus putting a heavy burden of proof on the aggrieved party. Last but not least the duty to mitigate damages is only found in case of a fundamental breach of contract (Art. 266 AUDCG). However, whether a breach is fundamental or not is decisive only for the remedy of avoidance but not for damages (Art. 264 AUDCG). All in all, damages under the AUDCG may go further than under the CISG.

45 See only Art. 61 CISG and Art. 256 AUDCG.

46 Since avoidance of the contract is understood as *ultima ratio*, a fundamental breach is only assumed in serious cases, see U.G. Schroeter, in Schwenzer (Ed.), *Commentary, supra* note 27, Art. 25 para. 37 *et seq.*

47 According to the *Nachfrist*-principle as provided by Art. 49(1)(b) and Art. 64(1)(b) CISG, avoidance of the contract is also possible after the lapse of an additional period for performance. For further details, see M. Müller-Chen, in Schwenzer (Ed.), *Commentary, supra* note 27, Art. 49 para. 15 *et seq.*

48 See I. Schwenzer, in Schwenzer (Ed.), *Commentary, supra* note 27, Art. 74 para. 3 *et seq.* with further references.

49 See K. Winsor, 'The Applicability of the CISG to Govern Sales of Commodity Type Goods', 14 *Vindobona Journal of International Commercial Law and Arbitration* 2010, p. 83; B. Zeller, Commodity Sales and the CISG, in Andersen & Schroeter (Eds.), *Sharing International Commercial Law across National Legal Boundaries*, London 2008, p. 627 *et seq.*

#### D. The Need for the CISG in OHADA Member States

Certainly, it has to be applauded that the law of sales as it is contained in the AUDCG substantially modernized the law of sales as it can be found in the Civil Codes and that is still very much influenced by the old Roman law heritage and thus orientated at the sale of cattle and slaves. The CISG has rightly been chosen as a blueprint for this endeavour. However, as could be seen major differences exist between the CISG and the AUDCG in core areas of sales law that are of significant practical importance. The question therefore arises, should regional unification of sales law be pursued or is there a need for OHADA member States to adopt the CISG, and if so, how could the AUDCG and the CISG coexist.

It has to be awaited whether the sales law of the AUDCG proves to yield satisfactory results for solving conflicts within the OHADA member states. Up to now there is hardly any case law applying the sales law provisions of the AUDCG. Thus the outcome of a case still seems to be highly unpredictable. Although one might rely on case law interpreting the CISG in those areas where the AUDCG and the CISG are indeed identical this approach is not possible in those areas where differences exist.

On an international scale, i.e. concerning sales contracts between members of OHADA states and third states the CISG is certainly preferable.

The first argument relates to the system and the concepts of the CISG. These are so clear and easily understandable that they can be explained to any trader that is not sophisticated and that does not have in-house counsel.<sup>50</sup> This makes the CISG most suitable for parties coming from developing countries.<sup>51</sup>

The second argument is the easy accessibility of the CISG. Not only is the text of the CISG available in the six authentic languages of the United Nations, the CISG has been translated into many other languages, especially – most important to the African continent – also in Portuguese although it has not yet entered in force in Portugal and Brazil is only on the verge of adopting it.<sup>52</sup> Most important is the fact that abundant case law – nowadays already more than 2500 published cases and arbitral awards – and scholarly writing from all over the world interpreting the CISG are available on databases in the internet that are accessible free of charge.<sup>53</sup> Most of the material is originally written in today's *lingua franca* of international trade or is at least translated into English. This certainly is again a

50 Cf. Schlechtriem, *25 Years, supra* note 16, p. 167 and 187.

51 See only *CISG-Brazil Interview with UNCITRAL Legal Officer L. Castellani*, April 2010, available at <<http://cisgw3.law.pace.edu/cisg/biblio/castellani2.html>>.

52 A translation of the CISG into various languages is available at <[www.globalsaleslaw.org](http://www.globalsaleslaw.org)>. See also Castellani, *supra* note 12, p. 241 and 246.

53 See only <[www.cisg-online.ch](http://www.cisg-online.ch)>, providing a comprehensive database of more than 2'500 cases applying the CISG around the world. See furthermore <[www.cisg.law.pace.edu](http://www.cisg.law.pace.edu)> for an online collection of more than 1,400 pieces of scholarly writing and more than 9,000 bibliographic references.

striking argument for parties from countries in Africa. It makes the outcome of a case much more predictable than relying on a law that yet has to be interpreted. At the same time this easy accessibility facilitates teaching the CISG in law schools and thus contributes to train a young generation to be knowledgeable and competent in international trade without having access to large and expensive law libraries as they can be found in Western countries. It furthermore opens the door for students to participate in the now most prestigious law students competition, the Willem C. Vis International Commercial Arbitration Moot, annually held in Vienna and Hong Kong.<sup>54</sup>

The CISG furthermore could significantly strengthen African parties' bargaining position in international trade. Whereas it seems to be extremely difficult – to say the least – that an African party succeeds in insisting on a choice of law designating the law of its own country as the proper law of the contract, the chances are much better if the African party can rely on the CISG. For example, a Chinese party whose domestic contract law is based upon the CISG may be much more ready to agree to the CISG that is also regularly applied by the CIETAC, the Chinese International and Economic Trade and Arbitration Commission than to any other legal system.<sup>55</sup>

But even if it were possible that an African party succeeds in agreeing on its proper law the outcome of a case seems not always predictable. If the case is not tried before a court of the country how this law is applied can hardly be foreseen. This especially holds true in international arbitration where domestic law has to be proven by experts. Furthermore, if the language of the arbitration is – as is most often the case – English, all legal materials that are in another language must be translated which may turn out to be extremely expensive. All these uncertainties and costs can easily be avoided by choosing the CISG.

How can the CISG on the international and the AUDCG on the regional level be reconciled? First, the CISG is fully compatible with regional unification endeavours. Thus, Art. 90 CISG provides that the CISG does not prevail over any international agreement which has already been or may be entered into.<sup>56</sup> Additionally,

54 The Willem C. Vis International Commercial Arbitration Moot takes place on a yearly basis in Vienna and had 254 participating universities from 63 countries in 2010/2011. Its sister event, the Willem C. Vis East International Commercial Arbitration Moot in Hong Kong had 80 teams from 20 countries in 2010/2011. For further details see <[www.cisg.law.pace.edu/vis.html](http://www.cisg.law.pace.edu/vis.html)>. For the undisputed educational value of the Moot, see J.M. Graves & S.A. Vaughan, 'The Willem C. Vis International Commercial Arbitration Moot: Making the Most of an Extraordinary Educational Opportunity', 10 *Vindobona Journal of International Commercial Law and Arbitration* 2006, p. 173 *et seq.*

55 The CISG has been used as a guideline for the PRC Contract Law 1999, see M.R. Shulman & L. Singh, 'China's Implementation of the UN Sales Convention Through Arbitral Tribunals', 48 *Colum. J. Transnat'l L.* 2010, p. 242 and 268 *et seq.*, available at <[www.cisg.law.pace.edu/cisg/biblio/shulman-singh.pdf](http://www.cisg.law.pace.edu/cisg/biblio/shulman-singh.pdf)>. The [cisg-online.ch](http://www.cisg-online.ch) database, available at <[www.cisg-online.ch](http://www.cisg-online.ch)>, contains 270 cases decided by the CIETAC regarding the CISG.

56 For further references, see P. Schlechtriem, I. Schwenzer & P. Hachem, in Schwenzer (Ed.), *Commentary*, *supra* note 27, Art. 90 para. 1 *et seq.*

according to Art. 94 CISG Contracting States which have the same or closely related legal rules on matters governed by the CISG may declare that the CISG is not to apply to sales contracts where the parties have their places of business in those States.<sup>57</sup> This would enable the OHADA member States to retain the AUDCG while at the same time adopting the CISG for transactions with parties from third states. In the long run, however, one might discuss whether it seems advisable to keep two separate sets of rules on sales contracts at all. Having but one sales law for domestic, regional and international transactions greatly facilitates trade especially for traders who do not have nor can afford to pay for legal advice. That this single sales law must be the CISG in my view is not questionable, having regard to the CISG's worldwide success.

57 For further details, see P. Schlechtriem, I. Schwenzer & P. Hachem, in Schwenzer (Ed.), *Commentary*, *supra* note 27, Art. 94 para. 1 *et seq.*