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"THE CISG AND ENERGY CONTRACTS"

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I. INTRODUCTION

The subject matter of this master thesis is the CISG, meaning the UN Convention on Contracts for the International Sales of Goods and the energy contracts, or more precisely how this convention applies to energy contracts. The CISG is a widely applied all over the world multilateral treaty and it constitutes an example of a successful unification of the private law in the international trade sector as well as a venture which has achieved the reduction of costs from the transactions conducted between the parties since this convention governs the sale contracts, depending of course also on the fulfillment of the requirements, so there is no need for the application of a domestic law which entails costs for the party which is established in another state. The CISG governs the formation of the contract and the rights and obligations of the parties, but not the validity of the contract. Among the issues it deals with is the remedies provided to the injured party in case of a contractual breach on the part of the party in breach. The legal protection system established by the CISG focuses on the concept of the “breach of contract” and the liability introduced is the strict liability which does not depend on the parties’ fault. Indicatively, the injured party is entitled to demand the performance of the obligations of the party in breach, to claim damages or to withdraw, while if the injured party is the buyer, except for the aforesaid, they are also provided with the right to require the handing down of substitute goods, the right to require the repair of the goods and the right to ask to pay less than the agreed price and in proportion with the value of the delivered goods.

Another important issue of the present thesis is the energy sector and especially the energy contracts. A lot of data has changed in the energy sector over the years and a characteristic one worth of mentioning is the dominant role the state oil companies play today contrary to the former significant role the major oil companies, used to play, while another characteristic one is that new technologies are now available concerning activities like the exploration and exploitation. The countries characterized by wealth in their natural resources can opt for entering into agreements which will allow them to exploit their reserves and enjoy a development. The resources utilization can take place either through the foundation of state companies by the government, companies willing to undertake the conduct of exploration and production activities, or through the conclusion of contracts with private companies. As far as the upstream energy sector is concerned, that is the sector of exploration and production, there are four main types of energy contracts, the concessions, the production-sharing

agreements, the joint ventures and the service contracts. The host state contracts, as mentioned above, are concluded between the state or a national oil company and the private investor which is an international oil or gas company, while in parallel with such contracts, there are contracts like the confidentiality agreements, concluded between the private parties which are charged with oil and gas exploration and production activities. The internationalization of the host state contracts is in progress because they use to a large extent provisions and clauses that are alike to the ones used in the private sector model contracts so that they can attract foreign investors by assuring them that their investment will be efficient and that it will take place in a safe and stable environment.

But in addition to the upstream energy sector, there are also the midstream and downstream sector and the respective energy contracts. Midstream activities include the processing, storage, transportation and marketing of oil, natural gas, and natural gas liquids. In other words, the midstream sector consists the link between the upstream and downstream sector, that is the production of oil and gas products and their marketing as well as their consumption, so the midstream companies, owners and operators of pipelines and storage facilities sign contracts with both the producers and the companies engaged in the downstream sector. Last but not least, the downstream sector includes the refining, the product marketing and the distribution and contracts are signed for the sale of the energy products, like oil and gas with natural or legal persons engaged either in the wholesale or in the retail sector or with the end consumers. Except for the analysis of the energy contracts driven by the aforesaid sectors, an analysis is conducted as regards the commodities, a category of which is also the energy products. The analysis focuses on the meaning of the commodities, the way they function and their markets and it examines the basic legal instruments which can apply to commodity sale contracts, i.e. the CISG, the English law and the Incoterms.

The purpose of the present thesis is not only to highlight the importance of the CISG in the International Trade and generally in the transactions field, but also to analyze the how and if the various energy contracts signed can have the CISG as a compass, after of course a review process of the energy contracts and the different categories of them, and all of these topics will be developed under the light of the privotal role Energy possesses today at international level. The following analysis begins from the CISG and its most important provisions, it proceeds with the energy field and particularly the energy contracts and the different types of them and finally it focuses on the law applicable to the energy contracts.

II. AN INTRODUCTION TO THE CISG

1.1. HISTORICAL BACKGROUND

The United Nations Convention on Contracts for the International Sale of Goods (CISG) has gained international recognition, as it has many member states, and almost all the important trading nations, but mainly it rules an important part of all sales and trade relations globally. It is the successful result of a project for the creation of a uniform law, aiming at offering a uniform legal framework for contracts in the international trade, safety in the transactions and lower costs, as the national sales laws, which are not characterized by uniformity, lead to higher transaction costs. The CISG came into force in 1988, and by now it has been adopted by 95 States so far[1] representing over the two-thirds of the global economy[2]. This treaty plays a significant role in the international trade field, since it provides a legal framework not characterized by a division in pieces, but instead having the advantage of uniformity, which means that the parties participating in cross-border transactions related to sales of goods, are able to count on a reliable legal framework that leads to safe sales contracts, that is contracts with no legal uncertainties and consequently with no demand for costly procedures[3].

The importance of the CISG creates a need to make a short look back to its roots. Early in the 19th century, a lot of efforts were made with the purpose of sales unification, which finally came in 1926 with the creation of UNIDROIT, the International Institute for the Unification of Private Law. In 1930, UNIDROIT decided, after a proposal from German jurist Ernst Rabel who saw the ultimate need for a harmonization of the different legislations in international trade law as a necessary step for the fighting of legal uncertainties, the set up of a Commission with the purpose of the creation of a draft of a uniform law relating to international sales. The draft was sent to the UN, but the efforts were interrupted because of World War II. In 1964, two conventions relevant to the international sales framework were adopted, 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 (ULF), which consist the base for the CISG and an interpretative tool as well. In 1966, the General Assembly of the

[1]United Nations Commission on International Trade Law, Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG), https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status
[2]UN Commission on International Trade Law, The CISG, https://uncitral.un.org/en/cisg40
[3] Ibid

United Nations, knowing that these two conventions would not have a wide acceptance, established a commission on International Trade Law, more familiar as UNCITRAL, which in 1978 made the New York Draft, which consisted of provisions for the conclusion of the international sales contract as well as the rights and obligations of the parties. In 1980, a diplomatic conference held in Vienna, led to the signing of the CISG, which came into force in 1988, because it was then that it was ratified by ten countries, that is the minimum necessary for it to develop international validity.

1.2. CONCEPTUAL CLARIFICATION

Before proceeding to the analysis of the issues mentioned in the introduction above, a clarification of some basic concepts is more than necessary. First of all, it should be noted that the CISG applies in sale contracts of moveable property, which is destined for professional and not consumer use and also it governs only the conclusion of sales contracts and the rights and obligations of the parties, as defines article 4. In addition to that, according to article 7 that concerns the interpretation of the convention, attention must be paid to its international character and the need for uniformity and observance of good faith. On the basis of the same article, issues that are not settled explicitly in the Convention, can be interpreted according to general principles or the international private law. One such issue is the definition of the sales which is not mentioned in the CISG. However, its meaning can be drawn from the provisions of the convention, and especially articles 30 and 53. So, a definition of the sale in the context of the CISG, could be that it is about a reciprocal, undertaking legal act by virtue of which the seller undertakes the obligation to deliver the goods, hand over any relevant documents and transfer the property in the goods, and the buyer must pay the price of the goods and take delivery of them. This definition is very much similar with the definition of the majority of national legislations about the sales contracts (for example, the Greek law, in article 513 of the Civil code, or the American law, in the Uniform Commercial Code in paragraphs 2-106 and 2-301). This fact contributes to the uniformity of interpretation and application of the CISG in the international trade and juridical practice. According to article 513 of the Greek civil law, a sales contract is a contract under which the seller must transfer to the buyer the property or a right over the good and also if it is moveable to deliver it to the buyer, and the buyer must pay the price. A short comparison of the two definitions, leads to the conclusion that the definition of the

CISG adds two more obligations, the obligation of the seller to hand over any relevant documents and the obligation of the buyer to take delivery of the goods. Another point in need of clarification is that in principle, the CISG applies in international trade sales, i.e. sales that have a commercial nature for at least one of the involved parties, like the sales with the purpose of profit from the aspect of the buyer, who intends to resell the goods and in addition to that, they have the element of cross-border transactions[4]. The parties, of course, can also agree that the sales agreement in which they have entered and which is governed by the civil law, or which does not present any cross-border elements, shall fall within the scope of the CISG, but in such a case, the CISG cannot prevail over the mandatory rules of the domestic law that is considered to be the forum according to the Convention of Rome[5].

The concept of the "contract" is also nonexistent in the CISG, it is obvious though, through its wide use in countless legislatures, that its essential characteristics are the offer and the acceptance[6], while in addition to that, the Convention does not provide a definition for the "goods", but it can be concluded, along with taking into consideration Article 2, that the goods which fall within the scope of application of the CISG are the tangible ones, that are moveable upon delivery[7], and not the immoveable or intangible ones. However, except for Article 2, which excludes from the application of the CISG goods that have not the above mentioned characteristics, like electricity or goods for personal or household use, Articles 42 and 60 contribute in the formation of such definition for goods. Article 42 declares that the seller must deliver goods which are free from any right or claim of a third party based on intellectual property, while article 60 defines that the buyer is obliged to do all the necessary acts to enable the delivery and to take over the goods.

1.3. THE LEGAL NATURE OF THE CISG

Except for the characteristic of multilaterality, the CISG is a treaty of international uniform law, which adopts rules of private international law, as well as a law-making and self-executing treaty. First of all, the Vienna Convention on the Law of Treaties sets forth in Article 2 the definition of treaty as "an international agreement concluded between states in

[4] Δ. Φλάμπουρας σε Χ. Παμπούκη, Δίκαιο Διεθνών Συναλλαγών, p. 283
[5] Ibid, p. 284-285
[6] Jacob Ziegel, The Scope of the Convention: Reaching out to Article one and beyond, Journal of Law and Commerce, Vol. 25:59, p.60
[7] Honnold J.,Uniform Law for International Sales under the 1980 United Nations Convention, 3rd ed. (1999) p. 51,52

written form and governed by international law". Since the CISG falls under the sphere of application of the VCLT, the international character of this treaty means that the Contracting States are obliged to abide by the CISG and consequently their domestic law should be in accordance with it. Furthermore, as a law-making treaty, the CISG establishes obligations for all the ratifying parties which are obliged to form their internal law in a way that will accord with the content of the treaty and in this way, the purpose of law-making treaties is the unification of private law. Last but not least, the CISG is a self-executing treaty, i.e. a treaty whose implementation in national legal systems is direct and it is ensured through rules that prevail over the provisions of national laws. The self-execution of this treaty is laid down in Articles 1, 7 and 99(2). More specifically, examining Article 1, it is clear that the CISG applies to contracts dealing with international sales of goods between parties with a place of business in Contracting States, but of course only to the extent of the formation of the contracts and the rights and obligations of the parties, according to Article 4 of the Convention. The provision of Article 1 leads to the conclusion that the CISG applies directly to cases like the aforementioned, independent of the legal systems of the ratifying states. Article 7 leads also to the same direction, since, according to it, "regard is to be had to its international character", which means that the CISG as an international treaty comes above the domestic laws of the ratifying parties. Finally, by virtue of Article 99, "this Convention enters into force, on the first day of the month following the expiration of twelve months after the date of deposit of the tenth instrument of ratification, acceptance, approval or accession", so it is legally binding upon either of these four options.

1.4. THE RATIFICATION OF THE CISG FROM GREECE

Greece proceeded to the ratification of this treaty in 1997, with the enactment of law 2532/1997. This step was not hard to be taken, since the Greek legislation was not completely unfamiliar with the content of this CISG, taking into consideration the domestic law about sales[8]. This fact led to the participation of Greece in the uniform international sales law and consequently constituted another effort towards the eradication of transactions uncertainty and to the development of international trade under the light of a substantial cooperation among the Contracting States, according to the preamble of law 2532/1997. But the adoption of this law was not the only measure towards a reform of the sales law. Account should also

[8] ΕφΛαμ 63/2006, ΕπισκΕΔ 2006, p.1108 επ.

be taken of the law 3043/2002, which consists the transposition of the EC Directive and which contributed to smoothing the differences between the Greek sales law and the CISG.

1.5. WHY THE UK HAS NOT RATIFIED THE CISG

It is known that the UK has not taken the appropriate measures to ratify this treaty. On the one side, this fact can be considered as inexplicable, taking into account first of all the active participation of the UK in drafting and negotiating about the CISG and secondly the ratification of the Convention from countries in which the UK is an importer[9], but on the other side, it may be unsuitable for English common law[10] and not a "legislative priority"[11].

More particularly, despite the fact that the CISG is an impressively wide-spread treaty which governs the international trade law and especially the international sales of goods from the aspect of the formation of the contracts and the rights and obligations of the contracting parties, the UK has not approved it. According to arguments in favor of the ratification, the UK should proceed to it, because such a step would confer on the parties of a sales contract the benefit of a uniform sales law to govern their contract, as well as the benefit of equal treatment and equal remedies[12]. Nevertheless, there are also counter-arguments which contend that the CISG presents substantial differences with English law, as e.g. in the case of Article 49 of the former, according to which "the buyer may declare the contract avoided" under the mentioned terms, like a fundamental breach of the contract, while on the contrary, the English Sale of Goods Act permits the termination of a contract under any non-compliance[13]. Another issue arising is the interpretation provision of Article 7 of the CISG, and particularly the term "good faith", since, except for the fact that it is a vague concept, it is also not recognizable under the English common law[14]. Moreover, as far as the classification of the CISG as a non-priority from the UK Parliament is concerned, it should be highlighted that first of all it has been observed that the non-ratification has not affected, at least until now, the national economy and secondly, some powerful organizations, like BP, the Law Society of England and Wales and the Commercial Bar Association, do not support the

[9] Kuderin I.K., The suitability of the CISG for adoption into English Law, https://articlekz.com/en/article/14848
[10] Ibid
[11] Sally Moss, Why the UK has not ratified the CISG, the Journal of Law and Commerce, Vol.25, Issue 2, 2006, p.483
[12] Kuderin I.K., (n.9)
[13] Ibid
[14] The UK and the CISG, https://thestudentlawyer.com/2014/03/06/the-uk-and-the-cisg/

ratification of the CISG[15]. It should also be underlined that during a couple of meetings for members of the business community and for arbitrators and academics, organized for the provision of a consultation about the matter, some main arguments either in favor or against, were that "implementation would involve a greater number of disputes", "there was a danger that London would lose its edge in international arbitration and litigation", "failure to adopt the Convention may adversely affect the City of London as a forum for litigation and arbitration", "a political benefit is rebutting the negative perception of the U.K. as being a reluctant participant in international trade law initiatives", "even if we do not adopt the Convention, U.K. companies will not be able to ignore it completely. If the contract is with a company in a country which has adopted the Convention, they may well press for the Convention to apply"[16]. In any case, and given the fact that "on average there are 2.45 adoptions a year, making it the CISG the second most adopted treaty in the field of international commercial law after The New York Arbitration Convention of 1958"[17], maybe, the ratification of the CISG from the UK, would offer financial benefits[18] and an even more effective increase in trading relationships with other states[19].

[15] Sally Moss, (n.11), p. 483
[16] Ibid, p. 484-485
[17] Silvia E. Nikolova "UK's Ratification of the CISG", 2012
[18] Sally Moss, (n.11), p. 485
[19] The UK and the CISG, (n.14)

III. THE CISG AND ENERGY CONTRACTS

2.1. THE INTERPRETATION OF THE CISG

According to Article 7(1), "in the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade." That means that this article establishes as interpretation criteria the internationality, uniformity and good faith and that the treaty should be applied independently from any national legislation and be interpreted in a uniform way in all legal systems[20]. Even when disputes arise, consistency and good faith in its interpretation and application are necessary. The requirements for the application of this first paragraph of Article 7 are first of all the assurance of the application of the CISG to the case in question and subsequently its regulation from a specific provision of the treaty, a provision in need of interpretation, in order to be concluded that this case is indeed governed by the particular provision of the CISG[21].

By virtue of Article 7(2), in case that there are issues not regulated clearly by the Convention, then they should be settled in accordance with the general principles of the international law in which the CISG is based. If such principles do not exist, the issue should be settled in accordance with the rules of private international law and what they define as applicable law in that case. The case of legal gaps does not refer to matters excluded from the scope of the CISG by virtue of articles 4 and 5, i.e. the validity of the contract. The legal gaps are distinguished between external and internal ones. More specifically, on the one side, the external gaps concern the matters which fall outside the scope of the CISG, e.g. the transfer of ownership of the goods, so in such cases, matters like that are governed by the domestic law which is determined on the basis of the Private International Law, while on the other side, the internal gaps are referred to matters which are governed by the CISG, but they do not fall inside a particular provision of the treaty, like the electronic conclusion of the sale contract or the principle of "exceptio non adimpleti contractus", so in such cases, according to Article 7(2), the general principles are the answer[22]. Indicative general principles of the CISG which are not laid down in the treaty but they are derived from its provisions, are the principle of "pacta sunt servanda", arising from Articles 30, 53, 71-73, 79, the principle of

[20] Δ. Φλάμπουρας σε Χ. Παμπούκη, (n.4), p. 333
[21] Ibid, p. 335
[22] Ibid, p. 336

"the supersession of the parties' autonomy" or of " the supplementary in nature provisions of the CISG", which means that the parties can exclude completely or partially the CISG from governing their contract and arises from Article 6 of the treaty, the fair trading principle arising from Article 40, the principle of "venire contra factum proprium" arising from Article 80 and the principle that the contractual obligations must be performed upon the set out from the CISG time, according to Article 59[23]. Last but not least, if the general principles of the CISG are not applicable to the case in concern, then the recourse to the domestic law in accordance with the rules of the Private International Law should be considered as the ultimate solution[24].

2.2. CONTRACT CONCLUSION UNDER THE CISG

The formation of sales contracts occupies the second part of the CISG, i.e. Articles 14-24. Related to the second part are the provisions of Article 92, according to which a Contracting State is enabled to exclude this second part from applying to its contract, but in such a case, since at least one Contracting State is not considered as one, insomuch as the second part of the treaty is concerned, Article 1(1)(a) cannot apply, but instead Article 1(1)(b) applies and subsequently the formation of the contract is governed by the domestic law which suggest the rules of the Private International Law.

The second part of the Convention is "a typical example of compromise between Civil Law and Common Law systems", in favor of the unification[25]. A sale contract governed by the CISG is formed by the exchange of an offer and an acceptance. More specifically, a proposal is "upgraded" to offer when, according to Article 14, it is directed towards persons in particular, it is final in an adequate manner and indicates the intention of the party that proceeds to the offer to comply with it if the offeree accepts it. The definitive nature of the proposal that renders it an offer, according to the same article, depends on the indication of the goods, as well as their quantity and their price. As far as the price is concerned, it must be noted that contrary to Article 14, Article 55 of the convention defines that if the parties have not agreed on the price upon the conclusion of the contract, then it is assumed that the agreed price is the usual one for transactions of this kind. While it seems that these two articles are

[23] Ibid, p. 338, 339, 340, 342
[24] Ibid, p. 337
[25] Pilar Perales Viscasillas, Contract Conclusion under CISG, Journal of Law and Commerce, Vol. 16:2:315, p. 315

opposite at first glance, this is only an impression arising from a quick look at them[26]. A more in-depth study would reveal that, since Article 6 permits to the parties to proceed to the conclusion of a sale contract by derogating at the same time from some of the provisions of the CISG, it is possible the tacit determination of the price of the goods for sale and subject to that, the difference between Article 14 and Article 55 is not substantial[27].

As stated above, especially the second part of the CISG constitutes a compromise between legal systems with different rules, like the open-price contracts of Articles 14 and 55 mentioned above, or the revocability and irrevocability of the offer of Article 16[28]. This "legal compromise" was achieved in the name of a uniform legislation for commercial transactions within the context of internationality and good faith[29]. The CISG adopts the Receipt Theory as a general rule as regards to the starting point of the effectiveness of the proposal. This theory "requires the reception of the will declaration in order for a contract to be formed"[30]. A reading of Article 24 of the Convention leads to the conclusion that the offeree must receive the proposal in order for the latter to develop results. The receipt reaches the offeree when it is addressed orally to him/her, or delivered to his/her place of business or emailing address or if none of them is available, to his/her habitual residence. An interpretation of this Article shows that the adequate element here is the receipt and not the knowledge of the proposal's content[31].

According to Article 18, "a statement made by or other conduct of the offeree indicating assent to an offer is an acceptance", while according to Article 23, "a contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of this Convention". The starting point for the effectiveness of the acceptance is when the offeror becomes aware of the assent. Contrary, to that, the acceptance cannot be considered as effective if the offeror has not received the indication of the assent within the time frame he/she has set or in case he/she has not, "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". Article 18(2) is connected to Article 21, by virtue of which, an acceptance in delay produces results if the offeror notifies the offeree either in an oral manner or in a writing notice, or if it can be proved that the delay is due to

[26] Γ. Νικολαΐδης, Η Διεθνής Πώληση Κινητών κατά τη Σύμβαση της Βιέννης, 2000, p. 90-91
[27] Δ. Φλάμπουρας σε Χ. Παμπούκη, (n.4), p. 367
[28] Pilar Perales Viscasillas, (n.25), p. 316
[29] Ibid, p. 317
[30] Ibid, p. 320
[31] Δ. Φλάμπουρας σε Χ. Παμπούκη, (n.4), p. 369

the means of transmission of the offer, but in this latter case, the offer is not effective if the offeror does not consider it as valid and notifies the offeree in that regard. According to an opinion, Article 21 introduces an exception from the Receipt Theory, since it sets as a prerequisite for the effectiveness of the delayed offer the oral information of the offeree about the matter or the dispatch of a notice and subsequently these two alternatives seem to relate to the Information Theory – which is adopted by the CISG for the purposes of contract formation orally[32] - and the Dispatch Theory – which requires the dispatch of the acceptance to the offeror for the formation of the contract and which is adopted by the CISG for the purpose of the protection of the offeree from the offeror's revocation[33]- respectively[34]. Except for the aforesaid, the acceptance of the offer can be derived from actions of the offeree like the payment of the price. However, if such actions are performed by the offeree, without the awareness of the offeror, then they are effective – and subsequently the acceptance of the offer is effective – if according to Article 18(2) the act is performed either within the time indicated by the offeror or within a reasonable time on the basis of the circumstances of the transaction. The above mentioned, set out in Article 18(3), constitute an exception from the Receipt Theory. Another exception is laid down by Article 19 which introduces the concept of the counter-offer and provides that it constitutes a counter-offer and not an acceptance to the offer a reply which consists of additions, limitations or other modifications. However, an important requirement of the counter-offer is the substantial alteration of the terms of the offer. As a consequence, if the modifications are related to the non-exhaustive list of the third paragraph then the reply to the offer is a counter-offer. On the contrary, if the terms of the offer are not significantly modified by the reply and if the offeror raises no objections to the deviation, then the reply is considered as an acceptance and its terms become the terms of the contract.

2.3. STRUCTURE AND SCOPE OF APPLICATION

The CISG consists of four main parts. The first part includes provisions about the scope of application of the treaty as well as general ones, the second part contains rules concerning the formation of international sales contracts, the third part deals with the

[32] Pilar Perales Viscasillas, (n.25), p. 321
[33] Ibid, p. 319
[34] Ibid, p. 336

obligations of the parties and the remedies at their disposal in case of a breach and finally the fourth part includes clauses about reservations, declarations and the termination of the CISG.

As regards to the scope of application, by virtue of Article 1, "this Convention applies to contracts of sale of goods between parties whose places of business are in different States: (a) when the States are Contracting States; or (b) when the rules of private international law lead to the application of the law of a Contracting State", while according to article 2, the CISG "does not apply to sales of goods for personal/family/household use, -unless the seller at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use - , to sales by auction, to sales of stocks and shares, to sales of ships, to sales of electricity". The combination of the above articles, along with Article 3 that is related to the exclusion of this treaty from supply contracts, and particularly contracts which have as an object the sale of goods that sustain "a substantial part of the materials necessary for such manufacture or production" and from contracts " in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labor or other services", leads to the conclusion that the sphere of application of the CISG concerns not only what falls within this convention, but also what falls outside it[35].

More analytically, on the basis of the first subsection of the treaty's first clause, it is noted that the CISG will apply if the business places are at least in two different Contracting States and not in the same one. This is about the international character of the CISG which is a prerequisite for the governance of the sales contracts. However, it should be underlined that notwithstanding this requirement, the conclusion and execution of the CISG can take place in the same state[36]. Contrary to that, if the parties have their place of business in the same Contracting State, then the CISG cannot govern the sale contract, even if the object of the contract requires the import of export of the agreed goods[37]. At this point, it is worth mentioning a decision of the Paris Court of Appeal which, during a dispute between two firms, held that the contract is governed by the CISG despite the fact that the contract was concluded between the buyer with its place of business in France and the seller with a branch

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[35] United Nations Convention on Contracts for the International Sales of Goods, United Nations, New York, 2010,p.34, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09951_e_ebook.pdf

[36] A. Δήμας, Πεδίο Εφαρμογής της Συμβάσεως των Ηνωμένων Εθνών για τις διεθνείς πωλήσεις κινητών πραγμάτων ΔΕΕ 1998, p. 453

[37] Ibid, p. 454

in France, because as a matter of fact, this branch did not constitute a legal person different from that of the registered office of the seller in Germany[38].

The "place of business" that is referred in article 1 as well as in article 10, is determined depending on the relationship it has to the contract. That is, according to article 10, if the parties have more places in which they are active, then a place of business is considered the one which has the closest connection to the contract. This theory is the appropriate one to decide if the place of business is in a Contracting State. At this point, it should be noted that it is not necessary that the party's business place is the company's headquarters for example, but it could be one of the company's branches instead. Notwithstanding the previous mention in a judgment which ruled that a company's branch was not considered as being a different legal person in comparison with its headquarters, it is a fact that the critical factor, except for the connection, is the engagement in commercial activities in a permanent manner in a state as well as the legal independence of the operator at that state[39]. It is crucial though a reference in the principle of "favor conventionis", according to which if there is a doubt about the choice of law and about the independence or not of the branch, then this doubt should be solved in favor of the application of the CISG[40]. For example, if two companies enter into a contract with the purpose of an international sale of goods and the one company has its business place in a Contracting State, but the other one has its headquarters in a non-Contracting State, while its branch is situated in a Contracting State, then the branch should be considered as the business place of the second company, so that the contract could be governed by the CISG. The vice versa could also apply, i.e. if the branch of the one interested party is located in a non-Contracting State or in the same Contracting State as the business place of the other interested party, then, even if the branch is linked with constant commercial activity, the headquarters should be considered as the signing party, in favor of the application of the CISG. Factors like parties' agreement and intentions, their conduct, but also the agreed terms of the contract, like the offer and acceptance of the contract, play an important role in the determination of the business place and the performance of the contract.

As far as the international character of the CISG is concerned, it is obvious that this is related to the need for an establishment of the parties in different states. In addition to that,

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[38] Ibid, p. 454
[39] Arbitral Decision no 7531/1994 ICC Court of Arbitration, Paris, UNILEX 2004
[40] Lookofsky J. & Bernstein H. : Understanding the CISG in Europe, Kluwer Law International 1997 p.11

the internationality of this treaty has two aspects, which means that the CISG as an international treaty applies to international sales contracts either in the case that the CISG is connected to both the states as contracting ones, or in the case that the rules of the Private International Law lead to the application of the CISG, because a Contracting State is considered as the forum. But this internationality should be acknowledged sparingly in favor of the transactions security. Besides, the second section of the first article of the CISG is oriented towards this purpose. More specifically, according to this clause, the interested parties are required to define in their contract their establishment or otherwise the establishment should be obvious either through previous transactions of these parties, or through information the parties have exchanged before or upon the conclusion of the contract. If none of the said is the case, then the internationality criterion and consequently the establishment in different states cannot be taken into consideration, because such a fact could harm the party which considered that the sales contract would be governed by the domestic law.

Last but not least, with respect to the second subsection of the treaty's first clause, it should be mentioned that while there were doubts about it because of the legal uncertainty it could cause, these doubts were eradicated after all in favor of the broadening of the scope of the CISG, but of course there is always the possibility on behalf of the interested parties of the exclusion of this subsection from their contract[41]. The cases in which this subsection is considered enforceable are based on the Rome Convention. For example, under the Greek law no. 1792/1988, which constitutes the ratification of the aforesaid convention as regards to the Greek legislation, when the parties have not proceeded with the choice of applicable law, then the used criterion is the closest connection of the contract with either domestic law[42]. More specifically, according to the fourth clause of the Greek law no. 1792/1988, the sales contract is connected to the state which consists the place of business of the party that is required to perform the "characteristic consideration", which, in terms of contracts involving reciprocal obligations, is the consideration of the seller[43].

The above mentioned fall within the subjective scope of the CISG. The scope of the CISG though, refers also to the object, the place and the time. More particularly, the objective scope includes the sales of moveable goods, according to the first section of Article 1.

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[41] Δ. Φλάμπουρας σε Χ. Παμπούκη, (n.4), p. 320
[42] Ibid, p. 317-318
[43] Ibid, p. 318

Although the concept of "sale" and "goods" is not explained in the CISG, it is analyzed to some extent in the paragraph of "conceptual clarification" cited above. However, the moveable goods are subject to exceptions, meaning that according to Article 2 of the CISG, if the scope of the sales contract concerns the electricity or goods like those destined for consumer use, then the CISG cannot apply. What is worth mentioning at this point, is the fact that the electricity does not belong to the scope of the CISG, because the sales contracts of electricity are special contracts with specific contractual conditions, so as a matter of fact, the CISG is not applicable to such contacts, but, on the other side this exception does not extend to other sources of energy, like the oil or the natural gas[44]. A reason for the aforesaid is that for this exception to be enforceable, an express referral to the CISG is required and not a mutatis mutandis application.

The local scope of this treaty is alike with the subjective scope, since it also refers to establishment matters. In addition to that, it is noted that by virtue of Article 95, "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". This clause can be studied in combination with the sixth clause according to which, the parties to the sales contract are given the ability to agree upon the exclusion of the CISG from their contract, either in the form of the complete exclusion through an express referral in the contract, or through a parties' choice of a non-Contracting State law as the applicable law, or in the form of a partial exclusion through a the clause of "opting out", i.e. the exclusion of specific parts of the treaty[45].

The ratione temporis scope of the CISG is related with the Articles 99 and 100, since the answer to the question of the application of this treaty, depending on the time point, lies between the defined from Article 99 entry into force and the individual entry into force in each Contracting State. More analytically, according to the first Article of the above mentioned, "this Convention enters into force, subject to the provisions of paragraph (6) of this article, on the first day of the month following the expiration of twelve months after the date of deposit of the tenth instrument of ratification, acceptance, approval or accession, including an instrument which contains a declaration made under article 92". However, this clause cannot be interpreted without Article 100 which defines that the CISG is applicable to

[44] P. Schlechtriem, in P. Schlechtriem/I. Schwenzer, Commentary on the UN Convention on the International Sale of Goods, 2005, 2nd ed., p.52
[45] Δ. Φλάμπουρας σε Χ. Παμπούκη, (n.4), p. 320

a sales contract, along with the other prerequisites, only if the Contracting States of the subparagraph (1)(a) or the Contracting State of the subparagraph (1)(b) have already ratified the treaty before the conclusion of the agreement or at least upon it. The conclusion of the contract though is one parameter for the determination of the time point from which a state is considered as a contracting one. This parameter is taken into consideration if the reason of the examination of the particular case in question is related to the performance of the contact which falls within Articles 24-88 of the CISG. Contrary to that, if the question under consideration is the conclusion of the sales contract which falls within Articles 14-24 of the CISG, then the crucial matter is the time when a proposal for the conclusion of this particular contract took place. There is case law regarding the ratione temporis scope of the CISG in support of the above mentioned. Indicatively, according to no 7153/1992 judgment, the ICC Paris Court of Arbitration ruled that the CISG applies to a sales contract between two parties with places of business in Austria and Croatia, because the contract was concluded in May 1989 and by that time both states had become contracting ones[46]. Furthermore, according to a judgment of the American Court of California, which examined a case of a sale contract among parties with places of business in Great Britain, Spain, Argentina and U.S.A. – this case is an example that the CISG applies also to sales contracts with more than two parties-, the CISG could not apply to this particular contract. That is because upon the conclusion of the contract in June 2000, the United Kingdom was not a signatory on the CISG and consequently, Article 1(1)(b) of the CISG could not apply, even if according to Rome Convention the forum would be the law of the state of the seller, since according to Article 1(2) of the CISG, the parties knew that upon the conclusion of the contract the United Kingdom was not a Contracting State, so as a matter of fact, the performed after the conclusion of the contract merger of the company in the United Kingdom with a company in Canada which is a signatory part of the CISG could not lead to the application of the CISG to this particular sale contract[47].

2.3.1. EXPRESS EXCEPTIONS FROM THE SCOPE OF THE CISG

At this point, and after the above analysis of the scope of the CISG, it is crucial an equal analysis of the scope of non-application of the CISG set out by Article 2. As far as the

[46] ICC Court of Arbitration – Paris, 00.00.1992, Judgment No 7153/1992, UNILEX 2004

[47] U.S. District Court, Southern District of Florida, 22.11.2002 Judgment No 01-7541, UNILEX 2004

field of energy is concerned, the delivery of electricity does not fall within the CISG according to 2(e), because the contracts having as scope the supply of electricity include particular terms which cannot be satisfied by the provisions of the CISG, while this does not apply to the delivery of gas and oil, since the proposals for a proportional application of this exception to these energy sources was not approved during the preparatory work of the Convention[48]. It should be observed though that there are more topics under question with regard to the application or non-application of the CISG to energy contracts except for the issue of electricity, like the sale of goods for personal use or the framework agreements.

2.3.1.1. THE MEANING OF GOODS

First of all, the CISG applies in contracts related to the sale of goods, which means that despite the non-express exclusion, the leasing contracts do not fall within the scope of the CISG[49]. The CISG does not set out a definition about the goods, however, as goods should be considered the movable ones at the time of the delivery, regardless of their existence during the formation of the contract or the need of manufacturing[50]. The characteristic of movability is necessary and that is implied in Articles 31, 32 and 33 concerning the obligations of the seller about the delivery of the goods[51]. Taking the above into consideration, the rights are not considered as goods in the context of the CISG, and consequently neither the intellectual property rights, included the know-how[52].

2.3.1.2. THE DESTINATION OF GOODS

If the goods bought are destined for personal and not commercial use, or in other words in case that the natural person - buyer is the end consumer, then the sales contract is not governed by the CISG, by virtue of Article 2. But there are some steps being the criteria which will determine the application or the non-application of the CISG, i.e. the intended use at the time of the formation of the contract, and if this is not clear, the usual destination of

[48] Schlechtriem & Schwenzer, Commentary on the UN Convention on the International Sale of Goods (CISG), Fourth Edition, Oxford University Press, p. 59
[49] C. Brunner, B. Gottlieb, Commentary on the UN Sales Law (CISG), Wolters Kluwer, p. 31
[50] Ibid, p. 28-29
[51] Clayton P. Gillette, Steven D. Walt, The UN Convention on Contracts for the International Sale of Goods: Theory and Practice, Second Edition, Cambridge University Press, p. 44
[52] C. Brunner, B. Gottlieb, (n.49), p. 29

this particular good, the role of the buyer as a private person or not[53]. If the buyer has objections in the application of the CISG, they carry the burden of proof for the end-consumer-destination of the goods and on the contrary, if the seller is in favour of the application of the CISG, they bear the burden of proof that such contract is governed by the said Convention because the seller "at any time before or at the conclusion of the contract neither knew nor ought to have known that the goods were bought for any such use"[54]. The seller is in a position of knowing of the consumption purpose of the goods due to either their information on the part of the buyer or due to the character of the goods[55]. There are cases though that do not lead expressly to the application or the non-application of the CISG, and that is because the buyer may give the impression that it participates in the transaction as a commercial capacity or this good is used in most circumstances for commercial purpose, while in fact the good is destined for personal use, but in such cases the courts' judgments are in favour of the application of the CISG, since the seller has the right to assume that the subject sale serves a business purpose[56]. In any case, the CISG applies if the buyer does not inform the seller about the personal or household use -either because they do not know the law and this particular provision or because they do have an interest in the application of the CISG and not the domestic sales laws-, or if it is not obvious that the good is destined for such a use[57]. Taking the above into consideration, it should be noticed that the CISG does not apply in sale contracts with end consumers, but it does apply in sale contracts with commercial consumers and this is an important note for the below analysis of the energy contracts and the applicable law. The application of the CISG in sales contracts with commercial consumers is obvious from the fact that Article 2 excludes the application of the said Convention in consumer cases related to personal, family or household use, which means that in case that the buyer in a sale contract is a business which acts as a consumer for commercial or professional purposes, then the specific contract will be governed by the CISG. Even if the goods sold are destined for personal use but under a professional context, then the sale contract will be governed by the CISG[58]. Besides, the business purpose does not

[53] C. Brunner, B. Gottlieb, (n.49), p. 33
[54] Ibid, p. 33
[55] Clayton P. Gillette, Steven D. Walt, (n.51), p. 45
[56] Ibid, p. 45
[57] Ibid, p. 45-46
[58] Γ. Νικολαΐδης, Το Πεδίο Εφαρμογής της Σύμβασης της Βιέννης για τις Διεθνείς Πωλήσεις Κινητών Πραγμάτων (Ν.2532/97), Εκδόσεις Αντ. Ν. Σάκκουλα, 2001, p. 68

necessarily mean that the good under question is destined for industrial use, as it can also be destined for professional use[59].

2.3.1.3. THE FRAMEWORK AGREEMENTS

Another case is the one described in Article 3. More specifically, according to the first paragraph of the third article of the CISG, if the buyer is obliged to supply the majority of the materials needed for the production of the goods which are to be sold subsequently, then the contract under question is not considered as a sale contract and therefore it is not governed by the CISG. Under the same ratio, according to the second paragraph, the CISG does not apply to contracts where the majority of obligations of the seller "consists of the supply of labour or other services". This article deals with the hybrid contracts, i.e. contracts related to both goods and services. The CISG applies to such contracts if the elements of a sale prevail over the elements that would render it a service contract. If there are more contracts which are autonomous the one from the other, then only the sale contract will be governed by the CISG, but if there is a single mixed contract, a fact determined either by the will of the parties or the economic unity of the contracts, then if the element of the sale prevails, the whole contract will be governed by the CISG[60]. The preponderant or not part of the offered materials or services will be judged by its value in proportion with the whole project[61]. Furthermore, there are hybrid contracts classified as framework agreements, like the distribution agreements, i.e. agreements where the distributor deals with the supplier or the manufacturer from whom he buys goods in order to resale them to customers and they set out the obligation of the parties, the terms and conditions of the supply and the territories covered by the agreement, the dealer agreements, i.e. agreements between the distributor and the retailer or the reseller, which act as the link between the supplier and the dealer, or the joint ventures. Such agreements, signed between the parties, lay down the terms for sales of goods but without, in most cases, setting out the price or the quantity of the goods, but by setting out instead, the terms about the land or the way the goods are to be marketed or purchased, or about the rights granted for the distribution of the goods[62]. The framework agreements are not considered as sales contract and subsequently they are not governed by the CISG, because first of all, according to Article

[59] Schlechtriem & Schwenzer, (n.48), p. 48
[60] Γ. Νικολαΐδης, (n.58), p. 166-167
[61] Ibid, p. 169
[62] Clayton P. Gillette, Steven D. Walt, (n.51), p. 62

14, a proposal is considered as an offer when it sets out the price and the quantity of the goods and secondly, according to Article 23 of the said Convention, the entry into force of the acceptance of the offer marks the conclusion of the contract[63]. But the framework agreements are not governed by the CISG only in case that the regulatory element, like the transfer of the know-how or the organization of the distribution prevails over the elements in favour of classifying a contract as a sale one[64]. There are distribution agreements governed by the CISG, if the sale part is the preponderant part, but there are also distribution agreements which are considered as mixed sales contracts or service ones if for example the main subject is the advertisement and the marketing of the exported products on the part of the distributor or the prevention of the distributor from entering into contracts without the consent of the exporter[65]. Anyway, even if the CISG applies, it does not set out rules about the post-contractual obligations, like the non-competition or confidentiality obligation, so these will be regulated by the applicable national law[66]. On the assumption that the distribution agreement is not a sales agreement, it will be governed in most EU member states like Greece by the EU Directive on commercial agents, since in those states the differences between the distribution agreements and the agency agreements, i.e. agreements concluded from the commercial agent who acts for and on behalf of the master and not on its own account like the distributor, have been smoothed out[67]. It is a fact that most countries have not proceed with the regulation of the distribution agreements, so these are governed mostly by the national contract laws and the competition law[68].

2.3.1.4. THE LONG -TERM CONTRACTS

The aforesaid agency and distributorship agreements are basically long-term contracts[69]. Such contracts may be subject to changes due to their extensive term, so a deterrent to changes are the clauses developed from the international contract practice and used in these contracts[70]. The long-term contracts can be sale contracts in case that their scope refers to the transfer of ownership, or service contracts, or framework agreements if

[63] Clayton P. Gillette, Steven D. Walt, (n.51), p. 62
[64] Γ. Νικολαΐδης, (n.58), p. 164
[65] Prof. Dr. L. Dimatteo, Prof. Dr. A. Janssen, Prof. Dr. U. Magnus, Prof. Dr. R. Schulze, International Sales Law Contract, Principles & Practice, C.H. Beck Hart Nomos, 2016, p. 985
[66] Ibid, p. 985
[67] Ibid, p. 903, 926-927
[68] Ibid, p. 927
[69] Ibid, p. 932
[70] Ibid, p. 950

they regulate the conditions under which the delivery or the payment will take place, the quality of the goods, the criteria for the price fixing, the liability of the parties, etc[71]. In any case, the long-term contracts should include adjustment mechanisms, either in the form of price escalation clauses which permit the adjustment of the initial price agreed by the parties without the need for a renegotiation on their part, especially when it is about the quantity or the price of the goods, or in the form of renegotiation clauses, which permit the renegotiation of the contract when it is about the time frame of the performance[72]. In other words, since the commodities suffer continuous fluctuations, the price escalation prevents the parties from having to pay according to the fixed price of the contract and regardless of the fluctuation and permits them instead to pay depending on the market value of the commodity[73]. Of course, there can be a combination of these two kind of mechanisms, when, for example, the escalation clauses include a cap and there is an excess of this cap, so the parties can renegotiate the terms of the contract by virtue of the renegotiation clauses[74].

It should be noted though that the same way that the parties are entitled, by virtue of Article 6 of the CISG, to opt out of the CISG either entirely or partly, it is accepted that they can opt into the CISG in cases that their contract is not regularly governed by this Convention. Since this is not expressly set out by the CISG as a possibility, there is a difficulty because if the CISG does not govern a contract as the law of a contracting state but by the choice of the parties, then it has not exactly the power of a law but it acts as a term[75]. So, according to conflict rules, such a choice is not effective, however there are courts which have upheld that choice of law because it would be really costly for the parties to render the CISG their domestic law in order to govern their contract and besides in most cases this is not an issue dealt with by the courts, as most contracts governed by the CISG have arbitration clauses and arbitration is more lenient with parties' choice of law[76].

[71] Ibid, p. 951
[72] Ibid, p. 965
[73] Ibid, p. 969
[74] Ibid, p. 965
[75] Clayton P. Gillette, Steven D. Walt, (n.51), p. 74
[76] Clayton P. Gillette, Steven D. Walt, (n.51), p. 74

2.4. THE ENERGY CONTRACTS

2.4.1. A SHORT INTRODUCTION

The energy sector and especially the energy law is a relatively new field of law which is continually evolving, as the energy industry, this complex industry of international nature relates to various energy sources, transactions like bidding arrangements, purchases and sales of energy resources, exploration, and actors and also the traditional energy sources like oil are gradually replaced by new ones, the renewable sources of energy that are more environmentally friendly, in light of the legislations adopted and the measures taken in a global level as hinders towards the burdens put upon the planet[77]. It is a sector which has a significant position in security, geopolitical and economic issues and consequently the investments concerning this coveted field cannot be stable since they are subject to changes of legal framework[78].

A lot of data has changed in the energy sector over the years and a characteristic one worth of mentioning is the dominant role the state oil companies play today contrary to the former significant role the major oil companies, like the Anglo-Persian Oil Company or Texaco used to play, while another characteristic one is that new technologies are now available concerning activities like the exploration and exploitation and as a matter of fact, this has a significant influence in the global oil and gas market[79]. Participants in this important industry signing contracts for projects of exploration, production and marketing of natural resources are both international and state-owned companies, with the former to be distinguished in “major” and “independent” ones, depending on the participation in all the main activities of “producing, transporting, refining and selling oil and gas products at retail” or part of them respectively and the latter to ensure the participation of states in the energy activities[80].

It should be noted that according to research, a US$48 trillion of investment is needed to cover the global energy requirements until 2035, which means that despite the fact that this investment is going to be conducted in developing states which are rich in natural resources,

[77] Bishop D., Quintanilla Roché E., McBrearty S., The Breadth and Complexity of the International Energy Industry in Doak Bishop and Gordon Kaiser (eds.), The Guide to Energy Arbitrations (2nd Edition, Law Business Research Ltd, 2017), p. 1
[78] Ibid, p. 6
[79] Ibid, p. 1-2
[80] Ibid, p. 6

and despite the fact that most energy resources are state-owned – since most countries adopt the dominial system meaning they own the minerals below the surface -, the international private companies are going to play a significant role too[81]. An indicative example is the case of Mexico, which, while it had the monopoly in matters of energy through its national energy company, now it accepts private investors[82]. The international contracts do not cover only the oil, but also the natural gas, and in fact a kind of natural gas, the associated gas can be tracked in oil reservoirs and in addition to that, when natural gas is discovered today through oil wells it is exploited adequately grace to the new technologies and infrastructures, like pipelines, LNG facilities and power plants[83].

A basic principle in the energy law and the international law in general is the principle of "Permanent Sovereignty over Natural Resources". This principle is based on the need for development of the states which are not so powerful but are rich in natural resources and in fact the UN General Assembly Resolution 523 of 1952 declared that the developing countries should be entitled to exploit and control their natural resources in the sake of their growth and subsequent to that the "Declaration on Permanent Sovereignty over Natural Resources" was adopted by the United Nations General Assembly Resolution 1803 of 1962. The UNGA Resolution 1803 was followed by the UN Conference on Trade and Development of which the General Principle of the Final Act enshrined the disposal of the natural resources of the developing states through their transactions based on the interest for their growth, as well as the Resolution 2158 of 1966 which focused on the foreign investments and their contribution in the growth of the developing countries[84]. A resolution of equal importance is the one about the New Economic Order which included the right of nationalization of the resources and the right for compensation for the costs incurred from the exploration activities[85]. The natural resources Declaration of 1962 has led many states to be guided by the principle of permanent sovereignty over natural resources, which constitutes an expression of the self-determination of the states and is now considered as a customary principle of international law in the energy field[86] and in addition to that, it has become part of the treaty law, since it is taken into consideration in treaties like the Energy Charter Treaty as well as in arbitral and judicial

[81] Ibid, p. 2
[82] Ibid, p. 6-7
[83] Ibid, p. 4
[84] Marc Bungenberg and Stephan Hobe (eds.), Permanent Sovereignty over Natural Resources, (Springer, 2015) p.7
[85] Ibid, p.7
[86] Ibid, p.10

decisions of international courts, like the Texaco Award of 1977 or the Armed Activities Case[87].

2.4.2. UNBUNDLING AND THIRD PARTY ACCESS

Given the below analysis of the energy sectors, it is important a short analysis of the unbundling and the third party access. The energy sector network that constitutes the link between the electricity generators or the gas producers to the consumers should allow the access to third parties acting as sellers or buyers of energy. The third party access enables third parties to have access to and utilize energy facilities that they do not own or operate and more specifically to transportation infrastructures and to transmission and distribution networks, which is of utmost importance for fruitful competition in both wholesale and retail energy markets. It is a fact that the transmission assets are a monopoly, since they are not economically duplicable, which means that they require large investments and a lot of permits, and the owners may not allow access to the infrastructure to generators or producers, or even may be prone to discriminations with the purpose of their exclusion, or may exercise their market power in the downstream sector[88]. So, in favour of a healthy competition, it is considered as crucial the provision of a non-discriminatory access to transmission networks through open access tariffs supervised by energy regulators[89] which assure that the tariffs charged to producers by the transmission system operators as well as the distribution system operators are not a deterrent factor for the access of the former[90]. The said third party access is achieved through the unbundling, that is the procedure of separation of the generation/production/supply assets from the transmission and distribution networks from the perspective of operation, control and structure[91].

The European Union has taken notable steps towards the liberalization of the energy markets, which is based legally on Articles 194 and 114 of the Treaty on the Functioning of the European Union and consists of five –until now- Energy Packages for a single integrated internal European market. So, while in the past the same companies were on charge of the

[87] Ibid, pp.25, 27
[88] I.H.Anchustegui, Transmission Networks in Electricity Competition: Third-Party Access and Unbundling – A Transatlantic Perspective, p. 1, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3159458
[89] Ibid, p. 1
[90]What does Liberalization and Unbundling of Energy Markets mean? https://www.next-kraftwerke.com/knowledge/liberalization-energy-markets
[91] I.H.Anchustegui, (n.88), p. 2

generation/production, transmission, distribution and retail activities, now through the unbundling process these activities are separated and as a result, they are fully competitive offering more options and better prices to consumers.

There are different forms of unbundling, but the most characteristic one representing the higher degree of unbundling, is the ownership unbundling, pursuant to which, the company who owns and operates the network is not allowed to participate in any other part of the supply chain, not even as a shareholder in a company engaged in such activities, and vice versa, the participants in the generation/production/supply are not allowed to have an interest in the network company[92]. According to the Third Energy Package of the European Union, the aforesaid kind of unbundling is set out for the electricity and gas transmission, while the electricity and gas distribution requires the legal unbundling, where the network activities should be undertaken by a separate legal person, nevertheless this entity may participate in the other segments of the supply chain too, by being, for example, a subsidiary company[93].

2.4.3. THE UPSTREAM SECTOR

As mentioned above, the countries characterized by a wealth in their natural resources can opt for entering into agreements which will allow them to exploit their reserves and enjoy a development. The resources utilization can take place either through the foundation of state companies by the government, companies willing to undertake the conduct of exploration and production activities, as in the case of Saudi Arabia, or through the conclusion of contracts with private companies willing to invest in the development of the natural resources, as in the United States, or finally through a combination of the aforesaid as in Azerbaijan[94].

"The contract is the most important instrument by which benefits and responsibilities from projects are distributed"[95]. The parties need to negotiate in a way that will ensure a balance between the profits and the losses of each of the parties and that depends to an important extent on the selected type of contract and on the contractual clauses. There are four main types of upstream energy contracts, the concessions, the production-sharing

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[92]Florence School of Regulation, Unbundling in the European electricity and gas sectors, https://fsr.eui.eu/unbundling-in-the-european-electricity-and-gas-sectors/

[93] Ibid

[94] Jenik Radon, The ABCs of Petroleum Contracts, in Svetlana Tsalik and Anya Schiffrin (eds.), Covering Oil: A Reporter's Guide to Energy and Development (Open Society Institute, 2005), pp. 61-62

[95] Michael Likosky, Contracting and regulatory issues in the oil and gas and metallic minerals industries, Transnational Corporations Vol. 18, No. 1, 2009, p.6

agreements, the joint ventures and the service contracts. The norm, but without that being absolutely necessary, is that the international companies of the private sector sign licences with the states of Europe, state contracts with the states of South America and production sharing agreements with the governments in Asia and Africa.

Regardless of the four types of contracts met in the upstream sector analyzed below, it should be noted that the logic behind this sector which concerns the exploration and production of oil and gas is that the operator obtains a lease from the owner of onshore or offshore acreage thought to contain oil or gas, then they conduct research for the determination of the wells and then contractors and service companies conduct the drilling and they provide expertise to the operator.

2.4.3.1. THE CONCESSION CONTRACTS

The oldest type of energy contract is the concession, an agreement between a private company and a state which permits to the former to proceed to the exploration of the natural resources lain below the soil of the latter, their production and their marketing with the payment of an amount which nevertheless in the form of the old-type concession was low in comparison with the value of the extracted natural resources, as it was on the volume produced[96]. The modern-type concession is differentiated in that the royalties paid from the private investors are now oriented towards a more –value of the natural resources- approach, and in addition to that, since one of the goals is the development of the state that hosts the investors, partnership plays the main role, which means that the company cannot have at its disposal the whole state for exploration and production, not for a long-term period and certainly not if it remains unexplored, so in such case the state is entitled to handle the matter and take over the control of the unexplored area if it decides so[97]. The difference between the two types of concession could be enlightened with a study of the contract concluded in 1935 between the state of Kuwait and the company Kuwait Oil Company Limited in the UK which had agreed upon the calculation of the payable royalties based on the produced volume as well as the study of the contract concluded in 1964 between the state of Indonesia and the company P.T. Stanvac Indonesia based on the cooperation of these two entities for the economic growth of the state. The procedure of a concession contract lies in the selection of a

[96] Ibid, p.2
[97] Ibid, pp.9-10

private company through a competition consisting of bids. The company selected as the successful bidder pays the bid which the government keeps as fees no matter what the result of the exploration or the production is, but in addition to that, the successful bidder pays to the host state an amount corresponding to the royalties the latter collects depending on the volume of the produced resources and their price, while the former bears the exploration and production risk and the latter suffers simply a loss of chance or time in case of a failure[98]. However, on the other side, since the area available to the activities is under question from the aspect of profitability and productivity, the companies do not usually offer large bids out of fear of no return[99].

2.4.3.2. THE PRODUCTION SHARING AGREEMENTS

Another type of energy contracts is the production sharing agreement which started from Indonesia. This type of contract gives the contracting company the opportunity to proceed to exploring as regards to natural resources activities and if such activities are not profitable after all, the company suffers a loss, but if they are eventually profitable, the company is entitled to have a reimbursement of the costs incurred and after that, to share the profits occurred with the host state, but, contrary to the concession contracts, in this case the company is not the owner of the natural resources[100]. Another difference with the concession agreements is that the PSAs do not define a specific time frame for the possession of rights over the resource, so it is the appropriate form of contract for a company who estimates that it will not be able to depreciate the costs it proceeded to for the conduct of activities in the strictly defined time period of the concession agreement[101]. The host state is not encumbered with costs other than those paid for the carrying out of negotiations like the provision of advice from the experts and the only loss the government could suffer would be the loss of the chance to fulfil the project, e.g. in case the company did not find adequate resources after the conduct of the exploration, or the loss of time, e.g. in case that the government noted a breach in the terms of contract and proceeded to a replacement of the company while by contrast, the state is entitled to share the profits arising from the project[102]. It should be noted that in essence, a PSA consists of a consortium in which the host state can also be a

[98] Jenik Radon, (n.94), p. 65
[99] Ibid, p.65
[100] Michael Likosky, (n.95), p.10
[101] Ibid, p.11
[102] Jenik Radon, (n.94), p. 70

shareholder, otherwise the company can ask for a bigger amount of profit during the negotiations for the share[103]. But even if the host state becomes a shareholder in the consortium, the company can cover the participation of the former and demand the payed amount during the share profit which is carried out after the cost depreciation on the part of the latter[104]. It should also be noted that a PSA is called to deal with a lot of issues in the event that the energy operations are not regulated by the legal system of the host state[105]. However, since this type of contract is a flexible one, strict negotiations and adequate expert knowledge is of utmost importance and in parallel with the aforesaid, the host state on the one hand should proceed with the drafting of the agreement having that kind of knowledge and on the other hand it should maintain a balance between the will for more profits and the need for compliance with the environmental legislation[106]. Incidentally, it should be mentioned that the ideal solution not only for this type of contract but in general, would be the acquisition of the party identity by a national company and not by the host state itself, since in such a case the liability from a breach would burden the company and furthermore, it would be more easy for the state to separate its commercial activities from its duty to abide by the enacted regulations[107].

2.4.3.3. THE JOINT VENTURES

In addition to the aforesaid types, there are also the joint ventures, a partnership-based contract in that the exploring, producing and marketing activities are usually conducted by a project company which is under the control of both the host state and the private company and through this partnership the common decision-making as well as the transfer of the technology tools and the know-how is more concrete[108]. The parties have the opportunity to share their technology knowledge and their expertise but also to share the profits, which means that the host state has something more to earn than royalties and taxes, as well as the responsibilities, which means that the government shall also be liable for e.g. environmentally unfriendly actions[109].

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[103] Ibid, p. 68
[104] Ibid, pp. 68-69
[105] Ibid, p. 69
[106] Ibid, pp.70-71
[107] Ibid, p. 75
[108] Michael Likosky, (n.95), p.13
[109] Jenik Radon, (n.94), pp.66-67

2.4.3.4. THE SERVICE CONTRACTS

Last but not least, the service contracts, which are categorized in risk service contracts, pure service contracts and technical assistance contracts, are concluded between the host state and a company but the former keeps the control of its natural resources and the profit occurred from this venture while the latter is assigned to a specific task against a compensation and as a matter of fact, the host state is required to have at its disposal the know-how as well as the capital needed for the conduct of the energy activities, except for the case that there is a need for a capital in view of the exploration, nevertheless the results of the exploration are not certain and consequently the offer of the capital bears a significant risk[110]. The risk service contracts are alike with the PSAs since their object is the conduct of the energy activities by the private company that bears the risk arising from entering into exploring procedures, and subsequently if the activities are not profitable the company suffers the loss, but if they are profitable the company is entitled to cash remuneration, while contrary to that, the pure service contracts have the host state to bear the risk[111]. Finally, the technical assistance contracts do not leave the control of the natural resources to the company not in the least but the latter offers to the whole venture the know-how and the capital resources[112].

An indicative example of risk service contracts is that of Brazil whose oil policy was dependent on the state company Petro-Bras until 1975, where there was a turn towards international private companies due to a number of key facts leading to this direction, like the increase in oil prices, the energy crisis and consequently the energy needs which could not be covered only by Petro Bras anymore[113]. This type of energy contracts concluded with the Brazilian government defines a three-year time frame as the exploration period after which either the result is no oil discovery and subsequently the company will have to withdraw with no refund, or the exploration activities bring into light oil discoveries, so in this last case, the company proceeds with an evaluation of the findings and after that it undertakes the development part based on a plan[114]. Notwithstanding the undertaking of the exploration and development on part of the company, the conduct of the production activities is carried out by Petro Bras who is the exclusive owner of the natural resources and who is also responsible for

[110] Michael Likosky, (n.95), p.14
[111] Ibid, p.14
[112] Ibid, p.15
[113] Joao Santos Coelho Neto, Risk-Bearing Service Contracts in Brazil, Journal of Energy and Natural Resources Law, 1985, p. 114
[114] Ibid, p. 115

the remuneration of the company for the costs incurred[115]. From the aforesaid, it is obvious that Brazil has chosen to cooperate with outside factors to utilize its resources in the best way possible grace to their capital and technology, but substantially the state remains at the control of the natural resources and has the supervisory role of the conducted operations.

Mexico is another case in which the energy industry was monopolized by the state. More accurately, the past years the upstream industry was under the responsibility of Pemex which was entitled to proceed to exploration activities within a specific area and to organize competitions with bids for the assignment of drilling contracts, but despite those, the state was the only owner of the subsoil[116]. In parallel with the above mentioned, the related to petroleum activities, including both upstream and downstream sector, were considered as strategic ones, meaning that they are owned by the state and this is constitutionally enshrined[117]. The Constitution of Mexico declared that the strategic activities should be undertaken by decentralized public entities, like Pemex, which, along with its subsidiaries are responsible for the upstream activities either by administration or by contract, with the latter meaning that Pemex is able to sign service contracts with private companies but the ownership and control of the natural resources remain to the state[118]. The oil field service, exploration and drilling contracts were considered as public contracts and governed by the Procurement Code and as such they were subject to procedures of public bidding, except for the cases where Pemex was able to follow the procedure of selective tendering by issuing an invitation of participation to at least three contractors or suppliers or the procedure of direct contracting by awarding the project to the contractor or supplier of its selection[119]. However, in 2013, significant reforms in Mexican legislation were noted as far as the energy industry is concerned and as a result, a reverse of "decades of resource nationalism" was achieved and subsequently the private sector undertook a more crucial role and Mexico started to establish its position as a "conventional oil producer and a clean energy power"[120].

[115] Ibid, p. 115
[116] Rogelio Lopez-Velarde, Mexico's Petroleum Drilling Contracts, 13 J. Energy & Nat. Resources L. 199 (1995), pp.199-200
[117] Ibid, p.200
[118] Ibid, pp.200-201
[119] Ibid, pp.203-205
[120]Meghan L. O' Sullivan, Mexico's energy reforms: A blow to realizing the most competitive and dynamic region in the world, 2022 https://www.brookings.edu/blog/up-front/2022/02/28/mexicos-energy-reforms-a-blow-to-realizing-the-most-competitive-and-dynamic-region-in-the-world/

2.4.4. THE MIDSTREAM SECTOR

This sector constitutes the link between the upstream sector and the downstream sector, i.e. between the production activities and the sale of the products to refiners, industrial customers or the end consumers. The midstream sector includes the field gathering, the process of the manufactured products, their transport through transmission plants and their storage in storage units[121]. First of all, the products of oil and gas are extracted from wells, but then, they are gathered to a central location and they are sent to processing facilities through pipelines for the measurement of their production, the separation of impurities and their temporary storage[122]. Their processing is followed by their transport through pipeline transmission and distribution infrastructure, since either the refineries deliver the processed products to the downstream distributors or the wholesalers distributors deliver the goods to the downstream sector[123], i.e. to the distribution networks owned by the retailers who further sell the products to retail stores for their delivery to the end consumers. Of course, there are also less complex supply chains where the distribution networks supply directly the customers with the products[124]. The distribution network includes a variety of facilities, like storage units and means of transport aiming at reaching finally the consumer[125].

2.4.5. THE DOWNSTREAM SECTOR

The downstream sector concerns the marketing of oil and gas products, such as gasoline, diesel, heating oil and asphalt for roads, to commercial, industrial or retail end users[126]. Product marketing is the business of finding and supplying customers who possess either internal demand for refined fuels, like industrial manufacturers, utilities, municipalities, and airlines or distribution networks for reaching retail customers, like independent service stations suppliers or home fuel oil supply companies[127].

[121] EKT Interactive, What is Midstream Oil and Gas? https://ektinteractive.com/what-is-midstream/
[122] Ibid
[123] Lonetree, Upstream, Midstream, and Downstream…What's the difference? https://lonetreeusa.com/upstream-midstream-downstream-whats-difference/
[124] Investopedia, Distribution Network: Definition, How It Works, and Examples https://www.investopedia.com/terms/d/distribution-network.asp
[125] CFI, Distribution Network https://corporatefinanceinstitute.com/resources/valuation/distribution-network/
[126] EKT Interactive, What is Downstream Oil and Gas? https://ektinteractive.com/what-is-downstream/
[127] Ibid

In any case, the three aforesaid sectors can be intersected, since both the upstream sector can include the storage of the extracted products as one of its procedures, like the midstream sector, and in the downstream sector transports can be conducted as also in the midstream sector[128].

2.4.6. THE NATURAL GAS CONTRACTS

Specifically, as regards to the natural gas contracts, they have been affected by the evolution to which is subject the natural gas industry. A significant change has to do with the large development of the natural gas products that are not under exchange in the stock market and another one has to do with the adoption of the Natural Gas Policy Act of 1978[129]. The reform of the natural gas industry has led to a new category of gas contracts, the financial gas contracts, that is those contracts whose main purpose is to handle the risk deriving from the fluctuation of the gas prices, contrary to the physical gas contracts, i.e. the traditional gas contracts whose main purpose is the sale and the purchase of natural gas[130]. The financial gas contracts consist of future contracts, swaps and options and they are governed by the commodities law and especially the Commodity Exchange Act. The future contract is "a transaction involving a "[contract] of sale of a commodity for future delivery", as defined in the CEA, which means that it determines the price of the delivery of the commodity in advance, no matter what the price of natural gas will be by the agreed delivery time, and as a matter of fact, the parties accept the possibility of a loss and in essence their expectations do not lie in the performance of the contract, but rather in the formation of the gas prices, while by contrast, in the forward contract the parties expect the performance of their agreement as well as the exchange of the commodity for cash[131].

More particularly, since the natural gas contracts are long-term contracts of at least 15 years and the conditions can easily change throughout their term, they are structured in a way that enables them to respond to changes, given, besides, the fact that they are contracts demanding large investments and expensive technological equipment, rendering important for the gas producers to have entered into a gas contract before proceeding to investments on

[128]Lonetree, (n.123)
[129] Mark Haedicke, Contracts for The New Natural Gas Business, Energy Law Journal, vol 13, p.313
[130] Ibid, p.314
[131] Ibid, p.317

the gas field[132]. So, the basic contract types of natural gas are the depletion contracts and the supply contracts[133]. According to the former one, all the gas produced from the reserves has to be sold under one contract, while according to the latter, the seller is engaged to sell a certain amount of gas at an agreed delivery point, regardless of the source of the gas[134]. If it is about non-associated gas, i.e. gas produced from a gas reservoir, independently from crude oil, then the choice about the quantity delivered belongs to the buyer, while the opposite applies if it is about associated gas, i.e. gas produced along with crude oil[135]. It is also important to note that among the principal contractual terms used in gas sales contracts is the take or pay obligation, pursuant to which, the buyer is engaged to buy the agreed quantity of natural gas for the agreed time period, otherwise, he is obliged to pay for the quantity he did not manage to buy, since the seller needs a guarantee, as mentioned above, before proceeding to the investment[136].

But despite these categories, the long-term gas contracts can be distinguished into upstream and downstream long-term contracts with the former to concern agreements between the government and a company for the exploration of specific areas and the latter to concern agreements between such a company and export markets or domestic markets which can be either large industrial consumers or household sector and small industrial consumers[137], and of course the former and the latter to be connected with the procedures of the field gathering, the processing and the transmission.

2.4.7. THE ENERGY CONTRACTS CLAUSES

In addition with the aforementioned, it should be highlighted that the content of a contract is formed by its clauses except for its type. Hence, the parties can agree upon clauses which determine the way the different stages of the activities like the exploration and the production are going to take place, the remuneration set for the exploration costs, the percentages by which the parties are going to share their tasks during the conduct of a joint venture, or even the recruitment from the company of local workers. The contract may also

[132] Ashok Kumar Bansal, Understanding Natural Gas Sales & Purchase Contracts and Principal Contractual Terms https://www.linkedin.com/pulse/understanding-natural-gas-sales-purchase-contracts-principal-bansal
[133] Ibid
[134] Ibid
[135] Ibid
[136] Ibid
[137] Piet Jan Slot, The Impact of Liberalisation on Long-Term Energy Contracts, 1 J. Network Ind. 287 (2000) pp.289-290

set out a clause as regards to the handing over of the control from the company to the host state when e.g. the former leaves the country and the latter has thereon the facilities at its disposal, or a clause about the settlement of the arising disputes. In general, these contracts include issues for which the negotiations are necessary like the government take consisting of royalties, taxes and profits, while on the contrary, issues like the environment are not governed by the contract but by regulations and the domestic law.

It is a fact that the management of natural resources is related to the investment sector and regulated by the investment law in that the state with the permanent sovereignty over the natural resources is entitled to have under its control the activities conducted by the foreign investors, since the host state is able to conclude contracts with investors and to assign to them the exploitation of specific fields[138]. Taking the aforesaid into consideration, it should be stressed that such contracts are characterized by internationalization and consequently the host state cannot set out terms without the assent of the investor or modify the rights of the other party in a way that causes harm to that party[139]. In general, "the aim of the internationalization of contracts is to stabilize the relationship between a State and a private party"[140]. The stabilization clauses are useful to assure that the host state cannot use its legislative or administrative power in order to bring either a modification of the contract terms for the sake of its own interests or an annulment of the contract[141]. In other words, a stabilization clause is used to prevent regulations of the host state from coming into force after the conclusion of the agreement and from affecting adversely the investors, but also this type of clause is used to allow the contract modification with the prerequisite of the mutual consent of the parties, as well as to "freeze" the applicable law by the time of the conclusion of the contract[142]. An example of a stabilization clause, which, as a matter of fact, prevents the host state from using its power as a means to supersede over the other contracting party, is the stabilization clause included in the concession agreement concluded between Iran and the Anglo-Iranian Oil Company, according to which the state has not the power to modify the terms of the contract at the expense of the investor, while another type of a stabilization clause is the one included in the concession agreement concluded between the Republic of Liberia and the Liberia Iron and Steel Corporation, according to which this particular contract

[138] Marc Bungenberg and Stephan Hobe (eds.), (n.84), p.126

[139] Esa Paasivirta, Internationalization and Stabilization of Contracts versus State Sovereignty, British Yearbook of International Law, Volume 60, Issue 1, 1990, p.317

[140] Ibid, p.323

[141] Piero Bernardini, Stabilization and adaptation in oil and gas investments, Journal of World Energy Law & Business, Volume 1, Issue 1, 2008, p.100

[142] Ibid, p.100

would be regulated by the domestic law of Liberia, with the exception of regulations adopted either before or after the conclusion of the contract which were in contrast with the terms of the contract[143]. The stabilization clauses are divided into the freezing clauses which assure the application of the legislation applicable upon the time of the conclusion of the contract all over its term, the economic equilibrium clauses which assure the good faith in the contract acting as indemnity clauses, i.e. permitting the application of the new legislation in the contract but also ensuring compensation for the company in case of its adversary effect and finally the intangibility clauses. The intangibility clauses by virtue of which the mutual consent of the parties is demanded for an alteration of the contracts terms, as in the case of a contract concluded between the Abu Dhabi and three Japanese companies[144]. On the contrary, the adaptation clauses has the purpose to prevent a substantial contract modification arising from events not able to be under the control of the parties and consequently by adding that clause to their contract, the parties accept the obligation to alter the contract terms in case that the upcoming and unforeseeable by them circumstances demand renegotiation in good faith[145].

The renegotiation mentioned above is a common phenomenon in long-term contracts as are the contracts having as object investments in the energy sector, since the operations undertaken by the investors in the energy field like the oil exploration and production cannot be characterized anything else if not as long-term[146]. Hence, the long duration of such contracts demands most times the renegotiation of the contract and adaption of the parties to the circumstances subject to changes[147]. An example describing this condition is the Aminoil Case according to which the concession contract concluded between Kuwait and Aminoil needed an adaption in respect of its terms because the parties had agreed so in case that the host state was benefited to a great extent from other concession contracts, but despite that fact, no agreement upon any modification of the contract terms was achieved and therefore, the contract was terminated and the competent for the arising dispute arbitral tribunal had to determine the compensation of the Aminoil for the termination[148]. As far as the renegotiation is concerned, it should be mentioned that the renegotiation clauses are distinguished into the

[143] Esa Paasivirta, (n.139), pp.323-324
[144] Ibid, p.323
[145] Piero Bernardini, (n.141), pp.99, 102
[146] Ibid, p.98
[147] Stefan Michael Kröll, 'The Renegotiation and Adaptation of Investment Contracts', in Norbert Horn and Stefan Michael Kroll (eds), Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects (Kluwer Law International 2004), p.1
[148] Ibid, p.3

limited renegotiation clauses which require that the parties are aware upon the conclusion of the contract about the possible changes of circumstances and consequently about the necessary changes on the contract terms, like in the Aminoil case and the hardship clauses which demand that the party fulfills its contractual obligations except for the case that the party is not able to act so because of an event over its control[149]. Last but not least, the gap filling clauses which are often met in the long-term contracts, permit to the parties to agree upon some terms after the conclusion of the contract at a time when, dependent on the information at their disposal, the agreement on those terms will be more useful[150].

2.5. THE COMMODITIES

The commodity trade is related to the sale of commodities, that is materials, either solid or liquid, that are usually destined for the manufacturing of a final product. Commodities are also the energy products, like oil and natural gas, known as hard commodities. The basic difference from the products is that a commodity is the same regardless the producer and it is offered at the same price if it is from the same good, while the products are differentiated on that basis. Commodities have been grown or extracted from their natural state and brought up to a grade for sale in the market place and they are usually found at the initial stages of the chain production, unlike products[151]. For instance, the oil is used for the production of petrol, or for the heating of buildings, the production of electricity and the construction of roads. The initial product of oil can be processed in refineries and then distributed in the market. The refineries are mostly involved in the process of oil for its use in the transportation, but they can also process the oil for the production of liquids used subsequently by the petrochemical industry for the production of plastic, solvents, etc[152] which are then distributed through pipelines, marine transportation, or other means from the storage locations to the wholesale or directly to the retail market. Hence, a producer of oil, or an importer of oil who has been supplied the said commodity from a producer can enter into a commodity sale contract with a refinery either in the spot market or the derivatives market. However, refined products such as gasoline can also be traded as commodities, so then

[149] Ibid, pp.6-7
[150] Ibid, p.8
[151] Investopedia, Commodity vs. Product: What's the Difference?, https://www.investopedia.com/ask/answers/021615/whats-difference-between-commodity-and-product.asp
[152] U.S. Energy Information Administration, Oil and petroleum products explained, Refining crude oil, https://www.eia.gov/energyexplained/oil-and-petroleum-products/refining-crude-oil.php

commodity sale contract can be concluded between, e.g., a distributor and a wholesaler or a retailer. Accordingly, natural gas is used for the heating of buildings, for transportation, or to make fertilizers, fuel, paint and for the operations of the metallurgic industries. The norm is that this type of trading is conducted mainly through documents until the final delivery and it is also a string trading, i.e. a lot of exchanges in which different contracts are involved, a sale contract may be followed by another sale contract by the tender of documents from the buyer of the former contract to the buyer of the latter, without the need for the delivery of the goods to the former buyer before their delivery to the next[153]. For instance, a sale contract the subject matter of which is the oil trading is concluded between a buyer and a seller, but this particular seller had been supplied the oil cargo by virtue of another sale contract concluded between the latter as the buyer and another party acting as the seller, and accordingly, the buyer of the firstly mentioned contract above will sell the cargo to another buyer via another sale contract. Or likewise, the oil may be transferred from the production to the storage and then to the distribution and sold through ports of loading and ports of destination. This procedure of continuous transport may end up to loss or damage of the goods, due to, for example, robbery, fire, or even fluctuations in the prices because of the demand and supply which render the commodity market rather unstable.

As a matter of fact, the string trading facilitates the traders involved, from the producer to the ones in charge for the process of the commodity and from the processors to the distributors and from them to the wholesalers or the retailers, as it protects them from the price fluctuations. In the string trading, a party is able to conclude a sale contract where it will agree to sell goods to the other party, but it is possible that the seller has not yet at its disposal the agreed for sale goods and accordingly the buyer of this contract can agree to sell the said goods before their delivery. Under the same logic, the seller to the first contract mentioned above can have agreed to buy goods by virtue of another sale contract. Besides, the nature of the string trading suggests that the shipper and the end buyer are the sole ones that deal physically with the goods, since the intermediate participants are involved in the trading of the documents linked with the cargo for sale, except for the case that the delivery is carried out to the end buyer along with the necessary documents without the intervention of

[153] Siddharth Kanojia, Does English Law Provide The Best Framework For The Sale Of Commodities? A Comparison Between English Law, Incoterms And The CISG, SOUTH ASIAN LAW REVIEW JOURNAL, Volume 3.1, 2017, p. 143

intermediates[154]. As a matter of fact, the contracts concluded between parties in their capacity as intermediates may not end up to the delivery of the goods, because they can close them out, so any dispute arising out of such contracts will be of financial nature[155]. In the event that a trader has entered into a sale contract in his capacity as seller and on the one hand the delivery time has been agreed to be, e.g., four months later, but on the other hand the quantity of this type of commodity at his disposal upon the delivery date is less than the agreed quantity, then he is considered to be "short", thus he should conclude a future sale contract to complete the needed quantity with an agreement about its virtual delivery the same time[156]. Accordingly, if the seller of the above example exceeds his selling obligations by having at his disposal a greater quantity, then he is considered to be "long" and he is going to enter into a sale future contract so as to sell the excess quantity. The traders involved in string trading should take good care of the balancing of their selling and purchasing commitments upon the performance of their contractual obligations, so the matter of time in the commodities sector is considered to be of utmost importance[157].

In the commodities string trading, the seller is required to proceed with the ascertainment of the goods which are going to constitute the agreed cargo for sale, i.e. to deliver the notice of appropriation and subsequently to tender the relevant documents, like the bill of lading, the invoice and the insurance policy[158]. The notice of appropriation, the time frame for the delivery of which will be set out in the contract should include, among others, the date of the bill of lading, the weight and quantity of the cargo being appropriated as well as the name of the vessel which will conduct the shipment[159]. It is the obligation of every seller engaged in the string to ensure that the notice of appropriation has been delivered on time[160]. The date of the bill of lading is not binding, but it is used for keeping the buyer informed, however the calculation of the time of arrival will be based upon the date of the bill of lading, so, upon the tender of the documents, among which will be also the bill of lading, the date of the bill will become clear and respectively the compliance or not of the notice of appropriation with the time limits[161]. If the notice of appropriation complies with the form

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[154] M. Bridge, Uniformity and Diversity in the Law of International Sale, Pace International Law Review, 15, no.1, 2003, p. 59
[155] Ibid, p. 59
[156] M. Bridge, International Private Commodity Sales, Canadian Business Law Journal, 19, 1991, p. 487
[157] Ibid, p. 488
[158] Ibid, p. 489
[159] Ibid, p. 489
[160] Ibid, p. 489
[161] GAFTA, Guidelines for Appropriations, https://silo.tips/download/guidelines-for-appropriations

and the time limits of the notice as set out in the sale contract, then the buyer has not the right to reject the notice[162]. In a relevant with the notice of appropriation case, the "Vladimir Ilich", the court upheld that the buyers were not entitled to reject the notice solely because of the seller mentioned another name for the loading vessel, on the grounds that if the notice delivered by the seller or the carrier is considered invalid by the buyer, then the latter gives the former the right to correct the notice, as in the said case[163]. If the case is the string trading, the buyer of the one sale contract will have to deliver the notice in his capacity as a seller to another sale contract to the buyer of this contract[164]. The intermediate parties are considered to be engaged by the same time limits of the initial notice of appropriation depending upon the date of the bill of lading[165]. If the intermediate seller receives the notice upon the expiration of the notice or the day after that, then he is not deemed as liable for the delay in the notice delivery as long as he delivered the notice to his buyer without delay and that, most of times, means on the day he received the notice if he received before 1600 hours on a business day and the day after its receipt if he received after 1600 hours, or on the next business day, or on a non-business day[166]. This is why the markets dealing with the string trading use clauses by virtue of which the buyers declare the names of their sellers, so, as a matter of fact, if the notice has not been handed over before the arrival of the cargo, then the seller having received the notice before the arrival will be the responsible one for the extra costs incurred[167]. The intermediate seller delivers the same notice as the first seller or carrier, so it is of utmost importance his protection, via the concluded contract, from errors of the notice that are not up to him[168]. Finally, it is important to note that the notice of appropriation is not a means for the transfer of the property, which is usually achieved by payment of the agreed price or by the tender of the necessary documents[169].

The notice of appropriation basically ties together the sale contracts and via this notice the seller defines the specific cargo and, as a result, the documents delivered at a later stage along with the bill of lading are tailored to this particular cargo, while the buyer to this contract should follow the same procedure in his capacity as seller to another sale contract of

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[162] M. Bridge, The CISG and Commodity Sales: A relationship to be revisited? Singapore Journal of Legal Studies, 2021, p. 276
[163] Waren Import Gesellschaft Krohn and Co v Alfred C Toepfer (The Vladimir Ilich) [1975] 1 Lloyd's Rep 322 (QB)
[164] M. Bridge, (n.149), p. 276
[165] GAFTA, (n.148)
[166] Ibid
[167] Ibid
[168] Ibid
[169] Ibid

the string[170]. Due to the role that the notice of appropriation serves, there is a strict approach about the time frame within which it should be carried out[171]. A relevant case is the "Post Chaser", where there was a CIF string trading of crude palm oil in that the sellers to the contract in question had concluded a contract for the sale of the said product and the buyers to the contract in question had entered into another contract with another buyer which in turn had done the same and so on[172]. The issue arising out of this case was that while the sellers to the contract in question received a bill of lading from their own sellers dated 6.12.1974 and a declaration of ship on 16.12.1974, they made a declaration of ship to the buyers to the contract in question on 10.01.1975, despite that, by virtue of a contractual term, the sellers should make the said declaration towards the buyers "as soon as possible after the vessel's sailing"[173]. Hence, the court upheld that this delay constituted a breach of condition because although the time frame was not specifically defined, it was obvious from the wording that the declaration was considered to be of utmost importance and besides, the declaration of ship is treated as a contractual obligation of the seller within the context of the performance of the contract on his part, since it would permit to the buyer to appropriate goods from the vessel in order to perform in turn his own contractual obligations in his capacity as seller towards the buyer to another sale contract of the same string[174]. It should be pointed out that when the contract is governed by the CIF Incoterm, the seller is the one in charge of nominating the ship, while in FOB contracts the reverse applies, so in the "Bunge Corp. v. Tradax Export S.A.", the FOB buyer was the responsible one to deliver on time the notice of readiness for the loading of the vessel. It was upheld that the courts have the power to judge if the contractual term under question is considered as a condition, a warranty or an innominate term and that the time clauses are usually classified as conditions in the mercantile contracts, so in this case, the delivery of the notice of readiness within 15 days was considered to be a condition, since the performance of the sellers about the nomination of the loading port was dependent on this[175].

There are places where commodities can be traded, i.e. exchanged by buyers and sellers, the markets, or exchanges specialized in commodities. The commodities are traded in markets which are classified either as spot markets also called physical markets, or as

[170] M. Bridge, (n.141), p. 63
[171] Ibid, p. 64
[172] Societe Italo-Belge v. Palm and Vegetable Oils Sdn. Bhd. (The Post Chaser), [1981] 2 Lloyd's Rep. 695
[173] Ibid
[174] Ibid
[175] Bunge Corp. v. Tradax Export S.A., [1981] 2 Lloyd's Rep. 1

derivatives markets[176]. In a spot market the traders offer the commodities in return for cash, that is the buyer offers cash and the seller offers a direct delivery of the commodity, while in a derivatives market, the commodities are traded through forward, futures or options, which means for example, that a trader agrees to buy a future contract and therefore the price of the commodity locks upon the conclusion of the contract, based on its price at that moment, but the delivery will take place in the future, when the contract expires[177]. This is a way of dealing with the consequences of the inflation and the demand and supply, because of which the prices of commodities are characterized by volatility. In the future contracts, there are some standards set, concerning the quality and the quantity, called the basis grade, which should be met by the commodity negotiated in the said contract[178]. At this point it should be stressed that it is not necessary for the traders who have at their disposal the future contract to take delivery of the agreed commodity upon the expiration of the contract, since their goal may be not to obtain the commodity, but to exploit the locked value, so they can "close out their positions before the delivery"[179] and sell the commodity to have profit. The commodities via future contracts are traded by producers and buyers who intend to use these contracts as a hedge to price volatility in order not to undergo significant loss in the future, so they actually provide or receive the real commodity upon the expiration of the contract[180]. So, for example, a producer of oil who is afraid of a dramatic reduction in its price in the future can enter into a future contract with a buyer who has also interest from this transaction because he may be afraid of a dramatic increasing of a price in the future. Except for the aforesaid case, the commodities through future contracts can also be traded by speculators, i.e. the traders who do not intend to possess the commodities, but to exploit the price volatility and to make profit out of it and in that sense, future contracts can be used by brokerages and portfolio managers to hedge the risk[181]. Commodities though can also be traded via stocks in that an investor is able to hold shares in a company active, e.g. in the oil sector and then sell them[182]. On the other side, there are the forward contracts which operate in a likewise manner as the future contracts, but their substantial difference from the former

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[176] Investopedia, Commodities, https://www.investopedia.com/commodities-4427780
[177] Investopedia, Futures Contract Definition: Types, Mechanics, and Uses in Trading, https://www.investopedia.com/terms/f/futurescontract.asp
[178] Investopedia, Basis Grade, https://www.investopedia.com/terms/b/basisgrade.asp
[179] Investopedia, (n.163)
[180] Investopedia, What Is a Commodity and Understanding Its Role in the Stock Market, https://www.investopedia.com/terms/c/commodity.asp
[181] Ibid
[182] Investopedia, (n.138)

ones is that they are negotiated via OTC and not via exchanges, so they are not subject to the restrictions of the future markets.

2.6. THE APPLICABLE LAW IN ENERGY CONTRACTS

In general, the law which applies in the energy contracts is determined by the contract itself and more specifically by a contract clause placed by the parties which in fact are the ones to decide, grace to their autonomy, which is the proper legal system between international law, national law, general principles, lex petrolea or a combination of them to govern their contract[183] or if none of this is the case the domestic law of the host state will be the “law contractus” in oil and gas exploration and exploitation agreements, especially in cases of ‘energetic nationalism’ like the case of the Venezuela or Libya contract, a phenomenon which justified the existence in some contracts of clauses which allowed to the parties to choose the domestic law as the law governing their contract, instead of international law[184]. It must be stressed that exactly because of the connection of the contract with the state concerned, some international instruments like the UNGA Resolution on the permanent sovereignty of a state over its natural resources, declare that in case of absence of a choice-of-law clause from the contract, the applicable law should be the domestic law[185].

As for the lex petrolea, it first appeared as a term in 1982 in Kuwait v. Aminoil case in which the arbitral tribunal supported that the international petroleum industry had developed a custom applicable in the oil industry, the lex petrolea, as a part of the wider lex mercatoria[186] on the basis of the determination of the compensation payable to the private party because of a state decision to proceed to expropriation[187]. Today lex petrolea is not only a product of the courts and the arbitral tribunals but it is also met in the petroleum legislation adopted by the governments, in contracts drafted by the host states and in the industry’s business practices through its model contracts[188].

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[183] Carmen Otero García-Castrillón, Reflections on the law applicable to international oil contracts, Journal of World Energy Law & Business, Volume 6, Issue 2, 2013, p.136

[184] Ibid, p.138

[185] Ibid, pp.138-139

[186] Tim Martin, "Lex petrolea" in International Law, in Ronnie King (ed.), Dispute Resolution in the Energy Sector : a Practitioner's Handbook (Globe Law and Business, 2012) p.1

[187] Terence Daintith, The Against ‘lex petrolea’, Journal of World Energy Law & Business, Volume 10, Issue 1, 2017, p.4

[188] Tim Martin, (n.173), p.1

The host state contracts, as mentioned above, i.e. the concession agreements, the psa agreements, the joint ventures and the service contracts, are concluded between the state or a national oil company and the private investor which is an international oil or gas company, while in parallel with such contracts, there are contracts like the confidentiality agreements, concluded between the private parties which are charged with oil and gas exploration and production activities[189]. The latter category of contracts is based on a willingness of cooperation on behalf of the parties which have the intention to share the risks in the exploration and production sector, since according to the aforesaid in a previous chapter, these fields bear a risk due to uncertainty in the quantity of the findings, while by contrast, in the downstream sector, the relations of the private parties are characterized by competition[190]. These contracts present similarities in the issues with which they deal, so the international petroleum industry proceeded to a standardization of them, i.e. the creation of a standard contract form with standard contractual provisions and as a matter of fact, the industry encouraged the formation of such model contracts by organizations like the AIEN and former AIPN[191]. Actually, the AIEN provides model contracts including but not limited to gas sale agreements, gas transportation agreements, confidentiality agreements and offshore drilling contracts. On the contrary, the host state contracts are not characterized by standardization because such contracts are usually oriented towards the jurisdiction of the host state and they are not widely accepted and no organization has yet created a model contract since such contracts are "country specific" and besides, the model contracts formed in the private sector are considered to have covered most needs[192]. But speaking of host state contracts, despite the fact that the previously mentioned model contracts are the ones widely accepted, the host states can also use model contracts which are published on government or ministries websites, like the one of the Ministry of Energy, in order to attract foreign investors through their transparency grace to their numerous non-negotiable clauses which at the same time contribute to the equality in the investors' treatment[193], because e.g. it reduces the possibility of their breach on the part of the state through an expropriation without compensation. It should be stressed that although the model contracts of host states are not that widely accepted as the model contracts used in the private sector, their internationalization is in

[189] Kim Talus, Scott Looper and Steven Otillar, Lex Petrolea and the internationalization of petroleum agreements: focus on Host Government Contracts Journal of World Energy Law & Business, Volume 5, Issue 3, 2012, p.182

[190] Ibid, p.183

[191] Ibid, p.184

[192] Ibid, p.185

[193] Ibid, p.190

progress, because first of all there are the model contracts of the private parties that can be used as a template and secondly there are institutions, like the World Bank, willing to help the rich-in-resources-but-still-developing countries in the formation of the proper legislation[194]. As a consequence, the host state model contracts use to a large extent provisions and clauses that are alike to the ones used in the private sector model contracts so that they can attract foreign investors by assuring them that their investment will be efficient and that it will take place in a safe and stable environment[195].

In the commodities sector, with many different contracts and transactions, it is even more crucial the need for a uniform legal system for the avoidance of uncertainties arising from the involvement of various jurisdictions[196]. So, in the international commodity sales, the most popular legal frameworks are the CISG, the English law and the Incoterms. For the best understanding of the three said legal frameworks with respect to which of them is considered the most appropriate for the commodities sales, an analysis of them as regards the remedies provided in case of breach of the contract, the passing of risk, the documentary breaches and the specific performance is considered important[197].

2.6.1. THE CISG AND THE ENGLISH LAW

It is true that many standard form contracts concerning the commodities sales like the oil exclude the application of the CISG using the opting-out possibility of Article 6, on the grounds that some provision of this convention may not be the appropriate ones for the commodity sales[198]. These model contracts, at least those concerning the oil sector, are often formed by companies who own a significant position in the oil sector, or in other words by the “oil majors”, and they are used by the smaller companies too, and in this way, such models are considered as a form of legislation regulating the trade sector[199]. It must be noted that the law governing these model contracts is the English law, but this is not the case only for companies in the UK as the BP but also for companies outside the UK as the Chevron, so

[194] Ibid, p.191
[195] Ibid, p.192
[196] Siddharth Kanojia, (n.140), p. 141
[197] Ibid, p. 149
[198] Michael Bridge, (n.149), p. 272
[199] Ibid, p. 273

as a matter of fact, it is not probable that there is a misunderstanding about the possibility of the CISG to function as the applicable law, since the UK has not ratified this convention[200].

It is known and it has been mentioned above that the UK does not constitute a signatory part of the CISG. So, in terms of sales of goods, the applicable domestic law is the Sale of Goods Act 1979 if the scope the contract is the B2B sale transactions, contrary to the B2C sale transactions which are governed by the Consumer Rights Act 2015. The B2B sales concern the transactions carried out between businesses, like the wholesale/distribution sales and basically they have to do with either producers or resellers who sell their products to businesses. On the contrary, the B2C sales deal with transactions between businesses and end consumers. For example, in the energy sector, the B2C refers to companies which provide with different forms of energy the end consumers, like the households. The B2B energy industry, driven by the energy trends, like the decarbonization and the digitalization, provides to companies operating in the retail sector a variety of services, like services aiming at energy efficiency, less CO2 emissions, as well as the designing, construction and operation of generation and storage infrastructures. Of course, the English law governing the commodity sales is not only the SGA, but it is about a combination of legislation, case law and standard contract forms. Besides, the SGA does not set out explicitly the right of the parties to terminate the contract due to breaches arising out of the matter of time or the matter of documents, so matters like these depend upon the courts[201].

A significant difference between the CISG and the Sale of Goods Act 1979 (SGA) is the risk transfer. Before proceeding with the said analysis, it is important to note that the CISG is compared with this specific English sales law and not with the Consumer Rights Act, because the scope of the CISG does not cover the sales of goods to the end consumers. These two legal instruments deal with the transfer of the risk from the seller to the buyer in a different way, since the CISG, by virtue of Articles 67-70 is considered more favorable for the buyer, because the buyer assumes the risk upon the delivery of the goods from the seller to the first carrier, while the Sale of Goods Act is considered more favorable for the seller, because the buyer assumes the risk upon the conclusion of the sale contract with the seller. Of course, in any case, i.e. regardless of the law that the parties have agreed their contract to be governed by, Incoterms can also apply either explicitly or implicitly regulating the risk transfer differently. Pursuant to the Sale of Goods Act and specifically pursuant to Article 20,

[200] Ibid, p. 274
[201] M. Bridge, (n.149), p. 289

the risk is transferred upon the transfer of the property of the goods to the buyer, regardless of the conduct of the delivery. Of course, there are exceptions to this norm, e.g. a different agreement between the parties, or a delay in the procedure of the delivery, attributable to the seller, which leads to the liability of the seller for the realized risk, despite the conclusion of the contract and the transfer of the property of the goods to the buyer. Another basic difference between the two legal instruments is the sales in transit. While the SGA does not include any provision for the settlement of this matter, the CISG sets it out by virtue of Article 68, according to which, in such cases, the rule is that the risk is transferred to the buyer upon the conclusion of the contract with the exception either of a different indication by the conditions which suggests the risk transfer to be realized upon the delivery of the goods to the first carrier, or of the awareness on the part of the seller of the loss or damage of the goods upon the conclusion of the sale contract. The aforesaid exceptions refer to the case where the goods in transit got lost or damaged, but it is not clear if this situation occurred before or after the conclusion of the sale contract. So, in such cases, it is accepted that the risk transfer to the buyer is considered to have been realized retroactively from the moment of the delivery of the goods to the first carrier, even though this point is prior to the conclusion of the sale contract, under the prerequisite, of course, that the seller was not aware of the loss or damage upon the conclusion of the contract. It can be noticed that the said conditions that the CISG lays down about the sales in transit are similar to the ones set out by the SGA concerning the regular sales and not the ones in transit, but not alike, since the SGA, as a matter of principle, establishes as significant the moment of the conclusion of the contract, without allowing a deviation in favour of a retroactive allocation of the risk to the buyer according to indications driven by the circumstances. In addition to the aforesaid, the CISG also sets out by virtue of Article 69 another possibility for the risk transfer. In particular, in the event that, for some reason, the terms and conditions described by Articles 67 and 68 are not met, the risk transfer is considered as realized when the buyer takes delivery of the goods, or when the goods are placed at his disposal and he is aware of it. Last but not least, an arising issue and how it is dealt with by the two legal instruments is the legal treatment of goods that are not identified. The CISG, according to Article 67, establishes the general rule that for non-ascertained goods, the buyer cannot assume the risk. However, while the said rule is used to guide such cases, there is no precedence so far and in any case, for the avoidance of any ambiguities, the parties are entitled to regulate such matters, through

explicit clauses and agreements, on the basis of the party autonomy principle established by Articles 6 and 19 of the Convention[202]. On the other side, the SGA, sets out through Article 16 that in so much as the goods do not meet the requirement of ascertain, the property cannot be transferred in the buyer. It is obvious that, unlike the CISG which sets as a defining point for the treatment of the unidentified goods the risk transfer, the SGA puts an emphasis on the transfer of the property, since anyway, according to the English law, the general rule, as mentioned above, is the realization of the risk transfer upon the transfer of the property. Under this ratio, Article 20A of the SGA specifies that if a specific quantity of unidentified goods that constitute a part of an identified bulk have been paid by the buyer, then the buyer is rendered an owner in a non-divided share in the bulk.

As far as the treatment of the specific performance by the above legal instruments is concerned, first of all, the CISG, through Articles 46 and 62, entitles either the buyer or the seller respectively, to demand from the party in breach to procced to the performance of the contract. It seems, based on the placement of this article as the first remedy that this Convention sets the specific performance as its primary remedy. More specifically, on the other hand, pursuant to the first of the aforesaid articles, the buyer, in case of a breach of the sale contract on the part of the seller, has the right to ask from the latter either to fulfill its obligations and deliver the goods to the buyer, or in the event that the delivered goods lack conformity, either to provide him with substitutes or to repair them. Under the same ratio, Article 62 specifies that the seller, in case of a breach of the sale contract on the part of the buyer, has the right to demand from the latter to fulfill his obligations arising from the concluded contract, like the payment of the price and the acceptance of the agreed goods. Of, course, the CISG provides to the parties other remedies too, like the compensation claims and the right to withdraw from the contract. At this point, it is important to note that under civil law jurisdictions, the remedy of the specific performance is considered as the primary remedy, while the remedy of damages comes second· on the contrary, under the common law jurisdictions, the reverse applies, as set out in Article 52 of the SGA[203]. In this logic, a court operating under the common law system, can award the remedy of the specific performance, should it hold that the damages would not be a sufficient remedy to make good the loss that

[202] Panagiotis Gkikas, Critical Analysis of the Differences Between the Approach to the Passing of Risk in the Sale of Goods Act 1979 and the CISG, https://www.linkedin.com/pulse/critical-analysis-differences-between-approach-passing-gkikas

[203] Demo Essays, International Sale of Goods Convention Role: A Comparison With English Law, https://demoessays.com/international-sale-of-goods-convention-role-a-comparison-with-english-law/

the injured party underwent[204], or when pursuant to the court's judgment, when the goods are unique, or especially ordered or designed[205]. A characteristic example is the Sky Petroleum case[206], according to which, the buyer, an operator of petrol stations, had entered into an agreement, governed by the SGA, with the seller in order to be supplied with petrol only from the latter and not other supplier for the next ten years. However, due to a period of fuel restrictions, the buyer lodged a claim against the seller and the court awarded the plaintiff with the remedy of the specific performance on the ground that the award of damages would not be adequate, since the defendant was the only supplier and in addition to that, the petroleum market is an unstable market with fluctuating prices. Contrary to the aforementioned, a court of a civil law system, must award the remedy of the specific performance and can only deviate from this norm under certain conditions[207]. The CISG is somewhere in the middle between the two legal systems and by virtue of Article 28, it sets out that the court is not obliged to award the remedy of the specific performance if, by the legal system to which the court belongs, the enforcement of the specific performance would not be the norm in the case of a sale contract in breach not governed by the CISG. Under this context, if the court holds in favour of the specific performance because it has been formed in that way by the legal system which regulates the proceeding of the court, then this court must pass such an order if the sale contract is governed by the CISG and the injured buyer or the injured seller fulfills the prerequisites set out in Articles 46 and 62[208]. In other words, the CISG does not give to the court the power to deny the award of the specific performance to the injured party under the said articles[209].

Except for the risk transfer and the specific performance, the CISG and the SGA present other differences. A further point of difference between the two instruments is the treatment of the remedy of the avoidance of the contract. More specifically, according to Article 49 of the CISG, the buyer is entitled to declare the contract avoided in case that the seller has committed a fundamental breach of it, while according to Article 25, as fundamental is considered the breach if it leads the injured party to a detrimental situation which prevents it from enjoying the rights conferred upon by the contract, under the

[204] Ibid
[205] Contracts for Sale of Goods in English Law: Comparison to UN, Law Teacher, https://www.lawteacher.net/free-law-essays/contract-law/sale-of-goods-in-english-law-un-2625.php
[206] Sky Petroleum v VIP Petroleum – 1974, Law Teacher, https://www.lawteacher.net/cases/sky-petroleum-v-vip-petroleum.php
[207] Demo Essays, (n.192)
[208] Ibid
[209] Ibid

requirement that neither the party in breach nor a reasonable person in the same situation could have foreseen this detriment. This prerequisite set out by the CISG in order for the contract to be avoided is not favorable for the party in breach. Accordingly, Article 64 specifies that the seller may terminate the contract if the non-fulfillment of the obligations on the part of the buyer constitute a fundamental breach of the contract. In addition to that, by virtue of Article 26, the termination of the contract has an effect only if accompanied by notice to the other party. The aforesaid suggest that the CISG enables the termination of the contract as the last resort, by rendering it feasible only in the event of a fundamental breach of the contract. As a matter of fact, the CISG does not specify the meanings of fundamental breach or detriment by giving examples. The principles of "good faith" and "favor contractus" are considered useful guides towards the effort of defining the said meanings. Except for the first aforesaid principle which is established in the Convention through Article 7, the second principle can also be assessed as established implicitly in the Convention, taking into consideration that the CISG stands in favor of remedies like the damages or the specific performance rather than the termination of the contract when the breach is not considered as fundamental[210]. Another way of determining the fundamental or not of the breach is through the investigation of the circumstances of each case. For instance, the timely delivery can be considered as being of the essence depending on the case. In particular, in the event that the sale contract is related to commodity sales which are usually sales consisting of string contracts, since, on the one hand, except for the sale contracts there are other contracts involved, like carriage contracts and insurance contracts, on the other hand, there are further sale contracts where the buyer of the first sale contract becomes the seller, then the timely delivery is indeed of the essence. A characteristic example is the case Diversitel Communications Inc. v. Glacier Bay Inc. where the buyer, before the conclusion of the contract with the seller, had already entered into an agreement with another party for the installation of the delivered goods, so, the supply of the goods on time was of the essence, in order to be able to fulfill his obligations arising from the pre-existing agreement[211]. Furthermore, it is set out through Articles 47 and 49 that if the breach of the contract on the part of the seller is not fundamental, then the buyer is given the discretionary power to set to the former an additional period in order to fulfill its obligations and if not, then the buyer has the right to terminate the contract. The fulfillment of obligations on the part of the seller does

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[210] Bzhar Abdullah Ahmed, Hassan Mustafa Hussein, Avoidance of Contract as a Remedy under CISG and SGA: Comparative Analysis, Journal of Law, Policy and Globalization, Vol.61, 2017, p.130

[211] Unilex, Diversitel Communications Inc. v. Glacier Bay Inc., https://www.unilex.info/cisg/case/1189

not solely refer to the delivery of the goods, so, even if the delivery has taken place, the buyer can still set an additional deadline to the seller for the fulfillment of the other obligations. Accordingly, Article 64 specifies for the seller that he is entitled to terminate the contract if the buyer does not fulfill his obligations within the new deadline that the seller set for him for this purpose. As a matter of fact, the CISG has introduced the Nachfrist mechanism by virtue of Articles 47 and 63 about the right of the injured party to set to the party in breach an additional deadline for the conduct of its obligations[212]. It could be said that the said mechanism contributes to the maintenance and performance of the contract, as it seems that it is like a "companion" to the specific performance. Contrary to domestic civil law systems, the CISG does not adopt the mandatory application of this mechanism in any case of a late performance[213]. On the contrary, the English law does not provide for any such mechanism. In the case, Valero Marketing & Supply Company v. Green Oy & Greeni Trading Oy[214], the seller and the buyer entered into a contract which had as object the sale of naptha. The arising issue was that while the parties had defined as the arrival time of the cargo at the port of destination the 20th of September 2001 because the buyer had scheduled the distribution in the market of the final product consisted of naptha and other components before the 30th of September, it became obvious that the seller would not fulfill its obligations on time. For this reason, the buyer set a deadline of four days, by virtue of Article 47 of the CISG and since the seller failed to deliver the cargo within the new deadline, the buyer terminated the contract. First and foremost, it should be noticed that the buyer used the right granted by the said article because the conducted breach was not considered as fundamental, since the buyer, despite the initial delay of the seller, could still catch the day determined for the release of the final product and in addition to that, the buyer was able to set a deadline of four days, that is two days more from the initial delay. However, finally, the fact that the buyer was not entitled to ask for a reduce in the price taking into consideration that Article 47 prohibits this possibility, along with the fact that Article 49 permits the buyer to terminate the contract if the seller does not deliver the goods within the new deadline but not out of the fault of the buyer, like its unjustifiable refusal, did not vindicate the buyer.

On the other side, but before proceeding with the termination of the contract under the SGA, it is important to have a little focus on the meaning of conditions, warranties and

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[212] Chengwei Liu, Additional Period (Nachfrist) For Late Performance, Arbitration Law, Juris Legal Information, 2007, p. 54-55

[213] Ibid, p. 59

[214] Unilex, Valero Marketing & Supply Company v. Green Oy & Greeni Trading Oy, https://www.unilex.info/cisg/case/1106

innominate, or otherwise, intermediate terms which are met in contract law. First of all, the condition is considered as the most essential part of a contract, the performance of which is inextricably linked with the performance of the contract, so the breach of a condition can lead to the avoidance of the contract[215]. For instance, a condition in a sale contract could be an agreement between the parties that time is of the essence for the particular contract and therefore the delivery should be carried out at a certain time. Secondly, the warranty is not so vital as the condition, in that it is more of an explicit or implicit promise from the one party to the other and also it cannot end up to the termination of the contract, but probably to claims of damages[216]. For example, the parties can agree to incorporate in their contract a warranty, according to which, the seller guarantees to the buyer that the quality of the delivered goods is the expected. Last but not least, the intermediate terms are somewhere in the middle between conditions and warranties, so their nature depends on the damage underwent by the injured party in that they will be considered as conditions if the said party is prevented from enjoying its rights arising from the concluded contract, or they will be considered as warranties if the breach has a not so significant effect upon the contract[217]. For the definition of the innominate term, the court will take into account various factors, including but not limited to the extent of the damage caused to the injured party, the time wasted and if this time was of the essence and if compensation would make sense[218].

After the above analysis, it is advisable to continue with the provisions of the SGA about the right of avoidance of a contract. As regards the buyer, according to Article 15a, if there is a breach of the contract with respect to Articles 13-15, that is, including but not limited to the failure of the goods to match the description and fit the appropriate quality, then the buyer is acknowledged the right to declare the contract avoided. The breach mentioned in the aforesaid article is not classified as major or fundamental, which leads to the conclusion that the buyer can terminate the contract even if the breach is not fundamental as set out by the CISG. Thus, the buyer is entitled to avoid the contract even if the necessary documents are not due on time[219]. However, under the same article, it is stressed that if the breach is slight, then it should be considered as a warranty and not a condition, and as a result the termination is not an option. Despite this provision, according to the principle of the

[215] Upcounsel, Conditions, Warranties, And Innominate Terms, https://www.upcounsel.com/conditions-warranties-and-innominate-terms
[216] Ibid
[217] Ibid
[218] Upcounsel, Innominate Terms: Everything You Need to Know, https://www.upcounsel.com/innominate-term
[219] Bzhar Abdullah Ahmed, Hassan Mustafa Hussein, (n.199), p.133

freedom of contract, it is up to the agreement of the parties the classification of a term as a condition or not and in parallel with that, there are some conditions considered as such by the international trade practice, like the time or the port of loading in FOB contracts[220]. So, in the last two exceptions, even if the breach is minor, the right of termination will be recognized[221]. In Bunge Corp v. Tradax Export SA, the agreement was that the claimant should have given a 15 days notice of the readiness of the vessel for loading, which was not complied with, so the defendant avoided the contract, because the said term was classified as a condition[222]. Last but not least, the breach of an intermediate term and the termination or not of a contract will depend on the consequences to the injured party, i.e. on the complete deprival or not of the rights arising from the contract. For example, in the case Hong Kong Fir concerning a charterparty, the judgment was that the seaworthiness of the vessel was an intermediate term and therefore the charterer had no right of termination[223]. Another case where time was considered to be of the essence, is the Bowes v Shand, where the other than the agreed time of shipment was held by the court as a reason for termination under the ground that it falls within the description of the goods which is set out by Article 13 of the SGA and the failure of which is considered as a breach of a condition and therefore as a reason for termination[224]. It becomes obvious from the above mentioned that the English law lays down more strict provisions about the termination of a contract in that it is allowable to happen as a remedy even for a minor breach and in that sense, it is not the last resort as in the case of the CISG where the specific performance prevails over the avoidance.

As regards the seller, contrary to the CISG, the SGA does not set out any provisions permitting the avoidance of the contract on the part of the seller in case of a breach of the contract by the buyer. So, it seems that while the CISG has introduced mechanisms for the protection of both parties, the SGA has not done the same as far as the right of termination is concerned. Despite this fact though, the exercise of the right of termination on behalf of the seller is not impossible, since the party may have agreed that a term of their contract is equal to a condition and as a result, the termination is feasible. For instance, while by virtue of Article 10 of the SGA the norm is that the time during which the payment of the contract

[220] Ibid, p.134
[221] Ibid, p.134
[222] Bunge Corp. v. Tradax Export S.A., (n.162)
[223] Hong Kong Fir Shipping Co. Ltd v Kawasaki Kisen Kaisha Ltd [1961] EWCA, https://www.bailii.org/ew/cases/EWCA/Civ/1961/7.html
[224] Lawteacher, Parties Respective Rights Duties, https://www.lawteacher.net/free-law-essays/jurisprudence/parties-respective-rights-and-duties.php

price will take place does not constitute a condition and therefore the remedy is not the avoidance, this could be reversed, should the parties have agreed that the time of payment is of the essence[225]. In addition to that, according to Article 39 of the SGA, the seller can either exercise the right of retention of title to the goods if the goods have been delivered to the buyer but the buyer has not paid for them the agreed price, or the right to interrupt the procedure of transit if the buyer has been insolvent, or the right to resale the goods. Except for the aforesaid, the same provision provides also for the case that the property has not been transferred to the buyer, by laying down that in such a case the seller is entitled to retain the delivery. It should be stressed though that in accordance with Article 48(1) of the SGA, a sale contract cannot be avoided only via the retention of the title or the interruption of the transit, which means that the right to resell the goods is assessed as crucial for the contract to be considered as avoided. However, by virtue of 48(3) and 48(4), the seller is entitled to resell if he has explicitly reserved the relevant right in the event that the buyer does not perform the contract on his part and in such a case, the seller should inform the buyer with a notice about his intention to resell and proceed with the resale should the buyer pay the price within a reasonable time. In any case, the English law cannot be characterized as adverse for the seller and favorable for the buyer, since it is known that in the string trading both parties can be buyers and sellers.

The CISG sets out in Article 25 that if a party proceeds to a contractual breach, it is considered to be substantial for the injured party in case that it has as a result that this party suffers a loss so serious which does not permit to it to obtain the agreed with the exception of the non-foreseeability on the part of the party in breach and of any reasonable person under the same conditions. By contrast, the predecessor of the CISG, the ULIS set out in Article 28 that the party that fails to deliver the agreed goods on the agreed time is considered to have committed a fundamental breach of the contract in the event that the price of the non-delivered goods "is quoted on a market where the buyer can obtain them". The fact that this provision did not transport into the CISG created a climate of uncertainty in the commodities trade where the timely performance is of utmost importance[226].

It must also be stressed that while the commodity trade considers the documentary performance as an essential element of the whole procedure and in accordance with this fact the English law sets out the non-documentary performance as a fundamental breach of the

[225] Toepfer v Lenersan-Poortman N.V.[1981] 1 Lloyd's Rep. 143
[226] Michael Bridge, (n.149), p. 285

contract, under the CISG it does not seem that such a breach is considered as fundamental[227]. And that is because Article 48 of the CISG which mentions the possibility of cure but does not seem to concern only the goods but also the documents, enables the seller to fix any lack of conformity even after the date of the delivery, and that could cause serious problems of uncertainty, since e.g. the bill of landing must be clean and not to be subject to amendments[228]. The English law puts in a primordial position the documentary performance in a way that the lack of conformity is treated as a breach of condition and subsequently as a reason for the termination of the contract on part of the buyer. This is evident through the case law with a relevant case being the "SIAT di Del Ferro v Tradax Overseas SA, where the court upheld that the buyers were entitled to reject the documents as non-compliant because they did not contain the carriage contracts of the agreed goods from the port of loading to the port of destination[229]. The bill of lading should ensure the buyer that the goods will reach the contractual port of destination, otherwise the bill of lading is defective, even if the actual carriage contract includes the port of destination and the buyer has every right to reject the documents without that being considered on his part as a breach of contract[230]. The documents delivered to the buyer should be "reasonably and readily fit to pass current in commerce", so an amendment of the bill of lading is not allowable, except for the case that the correction refers to a slight clerical error[231].

Except for the said differences between the CISG and the English law and the different way they treat the commodity sales, like the difference between the priority in the performance of the contract combined by the principle of good faith as set out by the CISG and the termination of the contract for the breach of a condition or for the breach of time or documentary obligations as set out by the English law, a significant difference is the way that these two instruments treat the evaluation of the damages underwent by the injured party. In particular, the English law provides for the assessment of the damage on the basis of the prevailing market price upon the delivery date, without setting as an obligation on the part of the injured party the conclusion of another sale contract so as to resell the commodities or to buy another cargo depending on whether the injured party is the seller or the buyer[232]. The English law does not take into account factors like the reasonable or not of the termination of

[227] Ibid, p. 286
[228] Ibid, pp.286-287
[229] SIAT di Del Ferro v Tradax Overseas SA [1980] 1 Lloyd's Rep 53 (EWCA)
[230] Ibid
[231] Ibid
[232] M. Bridge, Uniformity and Diversity (n. 141), p. 68

the contract on the part of the injured party or the conclusion or not of a substitute contract and the time of its conclusion, because, in fact, the English law considers that the injured party entered into a substitute contract on the due date of performance[233]. On the contrary, the CISG, by virtue of Article 75, relates the damage evaluation with the resale transaction in that the injured party is entitled to claim damages amounted to the difference between the contract price and the price of the substitute contract.

The important in such cases of string trading, except for the need to mirror each other but for the price or the quantity when the cargo is split into more units destined for more buyers, is the need for the same law to apply[234]. Hence, it is not feasible a contract being a part of a string sale to be governed by the CISG and another contract being a part of the same string to be governed by the English law[235]. So, taking especially into consideration the fact that organizations like GAFTA and oil majors like BP have launched standard forms of commodities sale contracts, it is considered as more complicated a possible elimination of the English law and the prevailing of the CISG over it, since most of times, the traders use these contract forms[236]. It is a fact that the English law has been established in the commodities sale sector as the most appropriate, since it is considered as tailored to the commodities trading, while the CISG is considered as most appropriate for cases where, e.g., the seller is in a remote place, so a possible rejection of the goods by the buyer would be detrimental and therefore the seller needs a safety barrier, like the restrictions set out by Article 25 of the CISG concerning the avoidance of the contract due to a fundamental breach[237].

In conclusion with reference to the different legal instruments by which the commodities sale contracts can be governed, it is important to note that on the one side, the CISG sets as a priority the remedy of the specific performance, while for the termination of the contract demands the prerequisite of the fundamental breach. Despite of that though, the CISG has not clarified some points, such as the meaning of fundamental breach, because, besides it is an international convention which may apply in combination with a domestic law, it does not govern all the aspects of a contract like its validity and on top of that, it provides the ability for a cure of the defective documents even at a later than the delivery time. On the other hand, the English law seems to be more influential, since it started to apply

[233] Ibid, p. 68
[234] M. Bridge, (n.149), p. 278
[235] Ibid, p. 278
[236] Ibid, p. 278
[237] Ibid, p. 288

in commodities before the CISG and in addition to that, it is preferred by the large organizations involved in the commodities trading, like the GAFTA and leading oil trading companies, like the Shell and the BP, it provides less uncertainty due to its more clear provisions, like Section 14(2) about satisfactory quality, and besides, any ambiguity is usually solved by the various case laws and also it has a more strict approach concerning the treatment of the documents which are considered crucial in the commodities trading. However, the English law encourages the termination of the contract and not the specific performance.

2.6.2. THE INCOTERMS

In the international trade law, Incoterms, i.e. the International Commercial Terms enacted by the International Chamber of Commerce, serve the unification of the international transactions related to the international sales of goods, eradicating the misinterpretations of an agreement from country to country or the need for the drawing up of a more specific agreement for each transaction and facilitating the whole procedure by regulating the place of dispatch and the place of the delivery, the payment of the expenses arising at each stage of the transaction, as well as by clarifying if the seller or the buyer bears the risk at each stage of the transaction from the shipment of the goods to their delivery. Two distinctive cases of Incoterms that belong to the category of the ship carriage of goods is the FOB that falls within the F team, the characteristic of which is that the seller pays only the freight for the transport of the goods to the point of delivery to the international carrier within the exporting country and the CIF that falls within the C team, the characteristic of which is that the seller pays the freight for the international transport, without bearing the risk of the goods being lost or damaged in transit. The incorporation of the FOB clause in a sale contract meant, by virtue of Incoterms 2000, that the delivery obligation of the seller was considered as fulfilled when the agreed goods for sale “pass the ship rail to the designated port of loading”, so from that point onwards it was the buyer who born the risk as well as the obligation of paying any expenses[238]. However, Incoterms 2010 changed the scene and set out as landmark for the transfer of risk from the seller to the buyer the goods to be on board the vessel, since the need for the goods to pass the ship’s rail as a landmark for the liability delimitation of the seller had given rise to problems concerning the interpretation of the contract in question, like the

[238] Δ. Φλάμπουρας σε Χ. Παμπούκη, (n.4), p. 570

possibility of loss or damage of the goods during their loading on board the vessel, or in the case of the oil contracts by virtue of which the agreed for sale oil cargo should be carried directly to the storage units of the vessel through pipes from onshore, the replacement of the above requirement concerning the ship's rail by "the point at which the loading terminal's loading line connects with the vessel's permanent hose connection[239]. Incoterms 2020, which apply either in contracts expressly referred to or in contracts concluded from 1.1.2020 onwards, lay down the same provision regarding both the FOB term as well as the CIF term analyzed below.

On the other hand, unlike the FOB term where the buyer pays for the transport, i.e. the freight and insures the cost as soon as the goods are loaded onto the vessel - nominated by the buyer at the time and place also defined by the buyer - and during the voyage, despite the fact that the seller is the one charged with the costs as regards the delivery and loading of the goods onto the vessel, the most used and significant clause is the CIF one, according to which the seller is charged with the responsibility of the shipment until the arrival of the cargo to the port of destination, a responsibility which includes freight charges, insurance costs and any additional fees, although the transfer of the risk as well as the possession of the shipment passes to the buyer after the loading of the goods onto the vessel and the latter is obliged to pay the agreed price once the goods are delivered to the port destination. The seller basically is the one obliged to enter into the carriage and insurance contracts and to hand over the relevant documents to the buyer who is obliged to pay a total price for the cost of the goods, the insurance and the freight (CIF) upon the delivery of the documents[240]. That is why the sales under the CIF term are often considered as documents sales[241]. Exactly because of the aforesaid fact, that is the payment of the incurred costs, like the freight, on the part of the seller on the one hand and the transfer of the risk to the buyer upon the loading of the cargo on board the vessel on the other hand, the buyer is entitled to make a compensation claim against the carrier or the insurer in his capacity as the injured third party in favour of which the seller had enter into the relevant contracts, should the goods be lost or damaged[242]. However, it should be highlighted that while the aforementioned constitute the prevailing case law, the right viewpoint requires the recognition to the seller of the right to claim compensation against the insurer in his capacity as the owner of the goods before the transfer

[239] Ibid, p. 571
[240] ΕφΑθ 555/2005, ΕΕμπΔ τεύχος 3, 2005 p. 738
[241] Ibid, p. 739
[242] ΕφΑθ 3957/2006, ΕλλΔνη 2008, p. 901

of their ownership to the buyer via the delivery of the bill of lading, should of course the risk comes before the said transition and under the prerequisite that the seller will not present a claim against the buyer as regards the payment of the agreed price[243].

As far as the relation of the CISG and Incoterms is concerned, it should be stressed first of all that, this Convention does not consists of mandatory provisions but it constitutes soft law in that by virtue of Article 6, the parties are able to agree otherwise and to exclude one or more provisions from their contract. According to the first paragraph of Article 9, the parties are engaged to abide by usages or practices established between them, while pursuant to the second paragraph, the parties are engaged to abide by a usage of which they knew or ought to have known and which is observed to apply regularly in international trade transactions like the one under question. With regard to Incoterms, should they be mentioned expressly in the contract, they prevail over the CISG taking into consideration the Article 6 of the latter, but of course the CISG applies in matters not covered by these terms[244]. However, the arising issue is the application of Incoterms and if they can be classified as the usage set out in the second paragraph of Article 9 in the event that either they are expressly mentioned in the contract, but not in a way that clearly settles the matters regulated by them or they are expressly mentioned, but not as the ones drafted by the ICC. In such case, while many points of view have been expressed, the prevailing one is that according to which if the parties had agreed to incorporate Incoterms in their contract but without the explicit reference of their origin, i.e. the ICC, or even if one party claims their implicit application, then the CISG is superseded by Incoterms by virtue of the first paragraph of Article 9, in case, of course, that the parties have sufficient pieces of evidence that the Incoterms of the ICC are usages or practices established between them[245]. Accordingly, if a party is not able to prove that Incoterms which are not expressly mentioned in the sale contract, are mandatorily applicable though pursuant to the first paragraph of Article 9, then the next step will be the investigation of the fulfillment or not of the requirements set out in the second paragraph of the same article[246].

One of the alleged grounds about the non-ratification of the CISG by the UK is the Incoterms and in particular the non-conformity of these terms with the provisions of the

[243] ΕφΑθ 555/2005, (n.229), p. 739
[244] L. Singh/B. Leisinger, A Law for International Sale of Goods: A Reply to Michael Bridge, Pace International Law Review, vol. 20, no. 1, Spring 2008, p. 161-190
[245] J. P. William, Analysis of Incoterms as Usage under Article 9 of the CISG. University of Pennsylvania Journal of International Law, vol. 35, no. 2, Winter 2013, pp. 422-426
[246] Ibid, pp. 422-426

Convention[247], which should not be considered as a significant obstacle taking into account Article 6 of the Convention. As a matter of fact, Incoterms and the CISG can definitely co-exist, since they do not always regulate the same matters, e.g. Incoterms can settle the conclusion of an insurance contract or of a carriage contract, while the CISG can settle the remedies the parties are entitled to claim. For instance, in a FOB contract, if the buyer does not fulfill his obligation about the nomination of the vessel, the seller is entitled to the remedies set out by the CISG – should this Convention apply -, through Articles 61 and on, i.e. the performance, the setting of an additional deadline, or the claim of damages, while if the said breach is considered as fundamental, the avoidance of the contract. In fact, under the English law, the lack of nomination of the vessel on the part of the buyer in the case of a FOB contract is treated as a breach of condition and the result is the withdrawal. However, there are issues where these two instruments collide, like the obligations of the seller or the time of the delivery of the goods as well as the risk transfer. More specifically, according to Article 34 of the CISG, one of the obligations of the seller is to hand over any documents which necessarily accompany the goods for sale at the agreed time and place and under the required form. Since such documents are considered to be of utmost importance because, e.g. the buyer in the contract under question may be the seller of the same goods in another contract, a defect in the delivery of these documents or the non-delivery of these documents constitute a breach of the contract on the part of the seller which gives the buyer the right either to claim damages activating Articles 34, 45, 74-77 or to withdraw from the contract should the breach is classified as a fundamental one pursuant to Articles 49 and 25. If the parties have incorporated an Incoterm in their contract, then this term is going to outline in detail the necessary documents, so, as a matter of fact, the breach of the Incoterm will be classified as fundamental. Especially if the parties have concluded a documentary sale contracts, like the CIF sale contract, then it will be crucial that the delivery of the documents takes place pursuant to the detailed way as described in the contract and that it contains no defects, because in such cases the documents participate in lots of stages before their handing over to the final buyer, so any breach of the procedure will be considered as a fundamental one[248].

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[247] N. Hofmann, Interpretation Rules and Good Faith as Obstacles to the UK's Ratification of the CISG and to the Harmonization of Contract Law in Europe, Pace International Law Review, vol. 22, no. 1, Winter 2010, p. 153

[248] I. Schwenzer, The Danger of Domestic Preconceived Views with Respect to the Uniform Interpretation of the CISG: The Question of Avoidance in the Case of Non-Conforming Goods and Documents, Victoria University of Wellington Law Review, vol. 36, no. 4, December 2005, pp. 804-805

In addition to that, as far as the risk transfer from the seller to the buyer is concerned, while it is set out in Articles 67-70 of the CISG, it can be regulated in a more detailed way by Incoterms which do not oppose to the Convention but rather they co-exist and either they settle issues like the risk transfer more specifically than the Convention, or they let the Convention settle matters like the consequences from the breach of the obligations of the parties. An example in support of the argument that Incoterms co-exist with the CISG and they do not suggest parties' full derogation from it, is Article 66 of the CISG which permits the buyer's relief from the payment of the price despite the fact that the risk has been transferred to the buyer, if the goods have been lost or damaged and the seller is liable for this loss or damage[249]. If it was accepted that the articles of the CISG concerning the risk transfer do not apply at all because Incoterms prevail over them, then the said provision would not apply and the buyer would have to pay the agreed price. Under the same ratio, the breach of an Incoterm which regulates the procedure of the risk transfer as well as the obligation of the seller to notify the buyer about the delivery of the goods would be considered as a fundamental one and would result to the application of the provisions of the CISG about the restitution of damages, like Article 74[250].

As far as the relation of the CISG and the two aforesaid Incoterms is concerned, it should be stressed first of all that, with respect to the FOB clause, in so much as it opposes to the provisions of the CISG concerning the place of the delivery and the place of the risk transfer, set out in Articles 31a and 67 par.1 respectively, it prevails over it[251]. More specifically, pursuant to the first of the two said articles, if the seller is not otherwise engaged to deliver the agreed goods in a particular place, for example by virtue of the FOB clause incorporated in the sale contract, then his obligation is considered as complete upon the delivery of the goods to the first carrier, should the contract include a carriage of goods, while according to the second of the two said articles, the same applies to the transfer of the risk from the seller to the buyer in that it takes place at an earlier point than that laid down by the FOB clause. On the contrary, as regards the permission for the export of the goods, while upon the conclusion of the contract it falls within the obligations of the seller[252], in the event that restrictions forbidding such permission arise at a later date than that of the conclusion and on the prerequisite that the parties have not included a special provision about that matter

[249] CIETAC China International Economic and Trade Arbitration Commission, 1995, http://www.unilex.info/cisg/case/210
[250] J. Ramberg, ICC Guide to Incoterms 2010 Understanding and practical use, 2011
[251] Δ. Φλάμπουρας σε Χ. Παμπούκη, (n.4), p. 571
[252] ΠΠρΑθ 11628/1981, ΕΕμπΔ 1982, p. 37

in their contract, then the applicable law will be the one suggested by the international private law of the forum, e.g. the CISG and its provisions about either the breach of the contractual delivery obligation on the part of the seller or the lack of conformity of the goods[253]. Moreover, as far as the obligation of the seller to deliver the goods without a legal defect under the FOB or CIF terms is concerned, it is about an obligation laid down by the applicable sales law, like the CISG in Article 41. More particularly, as a matter of fact, in a sale under the FOB term, since the buyer has to pay except for the agreed price for the delivered goods added costs linked with the after the loading of the goods stage, but also probably the costs of the seller for the before the loading of the goods loading, costs incorporated in the agreed price, he is entitled to have the goods delivered clear of any defects that could cause either their removal from the ownership of the buyer, or the impossibility of acquisition on the part of the buyer[254]. The same apply in the case of the CIF term, since the buyer has to pay for the agreed price which incorporates the insurance premium as well as the freight and also he is charged with the costs incurred after the arrival of the goods at the port of destination. Besides, it is a fact that the party to the CIF and FOB contracts which constitutes the buyer is usually a merchant and as such he should be able to make profit and not to be engaged in contentious cases which are contrary to the nature and purpose of the trade[255].

There are, of course, exceptions to the above mentioned that need to be analyzed. First and foremost, in a sale conducted under the term CIF, the parties are entitled to add the clause “net weight” or in case that the subject matter of the contract is the sale of oil, they can add the “out-turn clause”. These clauses basically indicate that the pricing of the cargo agreed to be delivered will depend upon its net weight as delivered to the port of destination[256]. Under the English law, such clauses are finally effective only in the event that the goods undergo loss in their weight due to predictable factors, like in the case of oil cargo a quantity of which can evaporate in the course of the route due to high temperatures[257]. Such cases are classified as transportation loss and the seller is the one who bears the risk of loss in that the buyer will eventually pay a price equivalent to the delivered quantity[258]. On the contrary, should the loss in a cargo quantity be caused due to an unforeseeable event, e.g. in the

[253] Δ. Φλάμπουρας σε Χ. Παμπούκη, (n.4), p. 572
[254] Β. Κιάντος, Η υποχρέωση του πωλητή να παραδώσει το πράγμα ελεύθερο παντός νομικού ελαττώματος στις πωλήσεις CIF και FOB, ΕΕμπΔ, τεύχος 1 , 1999, p. 407
[255] Ibid, p. 407
[256] Δ. Φλάμπουρας, Η κατανομή και η μετάθεση του κινδύνου στην πώληση κινητών, 2007, p. 549
[257] Ibid, p. 549
[258] Ibid, p. 549

aforementioned case of the oil cargo, due to a crack in the oil tank resulting in a loss classified as marine loss, the buyer is the one who bears the risk of loss and consequently is obliged to pay the agreed price[259]. In the oil trade, the out-turn clauses is a common phenomenon, taking into consideration that transportation losses are observed frequently, and as a result these clauses contribute to the determination of the price of the cargo assessing the conditions upon the arrival of the vessel at the port of destination[260]. At this point it should be stressed that since the said clauses refer to sale contracts under the CIF term, the buyer is obliged to pay the agreed price "on tender of documents"· so, while ostensibly it seems that the CIF term and the above mentioned clauses are opposed to each other and cannot apply at the same time, these clauses basically suggest a future adjustment of the price[261]. Last but not least, the parties to the CIF contract are entitled to agree that the seller will bear the risk not only for the occurrence of the transportation loss but also for the marine loss, by using clauses like the DES or DDP[262].

In addition to the above mentioned exception, there is also the exception as regards the sale of goods in transit under the CIF term. The issue arising in such cases is that the transfer of risk from the seller to the buyer is not determined based on the arrival of the goods on board the vessel considering that the goods are already at that stage before the conclusion of the sale contract. The solution depends on the applicable law. Thus, should the CISG applies, the risk passes to the buyer upon the conclusion of the contract, pursuant to Article 68. However, this solution is not always sufficient, since there can be cases where it is not clear for the loss or damage occurred before or after the conclusion of the contract. This is why according to the same article, the risk is transferred to the buyer even before the conclusion of the sale contract and upon the conclusion of the carriage contract, "if the circumstances so indicate". The said prerequisite can indicate that the retroactive transfer can be agreed by the parties by virtue of Articles 6, 8 and 9 of the CISG, or by other conditions, e.g. the conclusion of an insurance contract the beneficiary of which is the buyer[263]. However, the retroactive transfer requires the complete ignorance of the seller about the loss or damage of the goods upon the conclusion of the contract, according to Article 68 of the CISG.

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[259] Ibid, p. 549-550
[260] Ibid, p. 551
[261] Ibid, p. 551
[262] Ibid, p. 553
[263] Δ. Φλάμπουρας σε Χ. Παμπούκη, (n.4), p. 532

2.6.3. THE CISG AND ENERGY CONTRACTS

To turn back to the CISG, as far as its application to energy contracts is concerned, first of all, it should be mentioned, that this convention has achieved the unification of the private international law in the trade sector, thus reducing the transaction costs incurred by the domestic laws applied to international transactions conducted by the parties. Even though the CISG does not lay down provisions about its application to energy contracts, but it only sets out its non-application in the contracts related to electricity sale, it should be accepted that this convention applies too in such contracts[264], since in the opposite case, it would be explicitly mentioned as in the electricity. For example, two parties sign a contract according to which the one party which is a factory is going to buy from the other party, the supplier, electricity and since such a contract is excluded from the scope of the CISG, the parties shall either agree upon the law regulating their contract or determine the applicable law through the choice-of-law rules[265]. In order to be more understandable why the CISG excludes from its scope the electricity but not the other energy sources, it should be stressed that the ULIS and ULF, the predecessors of the CISG also excluded their application to the electricity field, but the arguments were not so clear, except for the fact that the electricity is a special form of energy which presents difficulties with respect to the delivery and storage so it needs special treatment and special legislation, however there were states, like Hungary and the United States who had proposed the exclusion of the gas and other sources of energy as well with the argument that they too needed special treatment[266]. During the drafting of the CISG, the working groups decided the exclusion of the electricity from the scope of the convention on the ground that except for the aforesaid difficulties it presents, it is not even considered as goods in many legal systems, so despite the objection on behalf of some states, like Finland and Norway which supported that the integration of electricity in the scope of the convention would not entail its treatment as goods, the Committee proceeded with its exclusion with the argument that its integration as well as the need for different treatment would lead to uncertainties and legal gaps[267]. Contrary to that exclusion, the Committee did not accept the proposal made by the USSR for the exclusion of the gas sale from the scope of the convention on the ground that it would be more complex as a procedure and by contrast it would be more simple if the parties decided each time the exclusion of the CISG from

[264] Peter Winship, Energy Contracts and the United Nations Sales Convention Texas International Law Journal, Volume 25, 1990, p.371
[265] Ibid, pp.371-372
[266] Ibid, p.373
[267] Ibid, p.375

governing their contract[268]. In addition to that, the diplomatic conference on the CISG in 1980, rejected the proposal of Iraqi which suggested the exclusion of the oil from the scope of the convention on the ground that oil contracts are formed by organizations specialized in that[269]. In conclusion, it should be said that the CISG applies to energy contracts covering matters of formation of the contract and of rights and obligations of the parties, but it does not deal with matters of validity of the contract.

However, it cannot be accepted that the CISG applies to all energy contracts without distinction, but contrary to that, there has to be an analysis of the application of the CISG depending on the type of the energy contract. More specifically, as far as the upstream sector contracts are concerned, there is the licensing concession system where the authorization provided by the state or the national oil company to the private oil company for the conduct of the exploration and production activities is given under the form of specific terms set out in the national legislation concerning the operation of exploration by virtue of exploration license as well as the operation of production by virtue of concessions or lease contracts, operations which take place in a defined area for a specific period of time and on an exclusive basis. Except for the aforesaid system, there is also the exploration and production contractual system in the event that the subject country has not formed a specific legislation about this kind of activity, so the provisions not set out in the legislation, are covered by an E&P contract. In any case, the above mentioned in combination with the said in the chapter for the upstream sector lead to the conclusion that these contracts cannot be governed by the CISG the scope of which covers the sale of goods, since the scope of the contracts of the upstream sector covers a variety of issues like the lease with the purpose of the exploration and production, technical issues like the use of equipment and expertise, intellectual property issues like the transfer of the know-how and financial issues like the payment of royalties and taxes. Continuing with the midstream sector, a sector concerning the processing of the produced goods, their transmission, their storage and possibly their distribution in wholesale distribution networks, it should be noted that to the extent that the scope of these contracts is the process, the transmission and the storage, it is obvious that they are not governed by the CISG. If the scope of the contract is the delivery of the goods to the wholesale distributor or their delivery from the wholesale distributor to the downstream distributor, then it is about a distribution agreement and the application of the CISG will be determined depending on the

[268] Ibid, p.376
[269] Ibid, p.376

content of this agreement, i.e. if it is about setting out the terms of the sale of the goods but without setting out the price and the quantity or the way of marketing of the goods, or in other words if the regulatory or distribution element prevails over the sales element, then the CISG does not apply. Finally, the downstream sector refers to the delivery of the goods from the downstream distributor to the retailer, then from the retailer to the retail store and last but not least to the end consumer. As far as the first stage is concerned, it is about a dealer agreement for which the same as in the distribution agreement apply. With respect to the second stage, the CISG is applicable because the main element of an agreement between a retailer and a retail store is the sale of goods. But with regard to the final stage, the CISG cannot apply pursuant to its second article which excludes expressly the consumers from its scope with the exception of course that the consumer is a company, since the commercial/industrial/professional use is not excluded from the scope of application of the CISG. In any case though, it should be stressed that as mentioned above, there are many model contracts concerning the commodities sales which opt out of the CISG because some of its provisions are not friendly with the nature of the commodities. For instance, in the LNG sales and purchase agreement drafted by the BP, the application of the CISG is expressly excluded[270]. However, a characteristic example suggesting that the CISG applies to energy sale contracts if the contract in question falls within the scope of this particular convention and if this convention is not explicitly excluded is the case BP Oil International and BP Exploration & Oil INc v. Empresa Estatal Petroleos de Ecuador, according to which the parties had entered into a contract for the sale of gasoline and the court upheld that, since the CISG was not expressly excluded from the contract, it would govern this particular contract[271].

Last but not least, it is important to mention the relation between the CISG and the arbitration which at first sight is inexistent because they represent two different legal concepts. First of all, these two concepts present indeed basic differences, since the CISG is an international treaty relating to the sales of goods at a global level, while the arbitration is a way for disputes to be settled and certainly it does not relate only to sales of goods. Besides, the CISG regulates only the substantive rights and obligations of the parties, while on the

[270] BP, LNG master sales and purchase agreement, p.39 https://www.bp.com/content/dam/bp/business-sites/en/global/bp-trading-and-shipping/documents/pdf-fob-lng-msa-bp-standard%20(1)%202.pdf

[271] Unilex, BP Oil International and BP Exploration & Oil INc v. Empresa Estatal Petroleos de Ecuador, https://www.unilex.info/cisg/case/924

contrary the arbitration deals with procedural issues[272]. Contrary to the aforesaid, the two concepts present similarities too, since they have as an intention to support the international trade, they are founded on the concepts of “good faith” and “party autonomy” and they are interpreted likewise because their interpretation is based on the conviction of the reasonable third person[273]. As a matter of fact, the common features contribute to the fact that the connection between these two concepts is real, since the arbitrators either decide the application of the CISG due to its identity as the law of the contracting state which constitutes the place of arbitration or in other words the “lex loci arbitri”, or due to the application of the CISG in any way because of the place of business of the parties in contracting states or finally the CISG owes its application by the arbitral tribunals to the fact that it constitutes the conflict of law rules of whom the lex loci arbitri consists[274]. More analytically, the CISG may be chosen by the arbitrators in the case that the parties have agreed either upon the regulation of their contract by the CISG or by the law of a contracting state[275]. At this point it must be noted that the latter case is subject to examination of the requirements which render a state a contracting one, while the former case is not because the choice of the states is explicit[276]. Except for the aforesaid about the choice of law on behalf of the parties as far as the application of the CISG by the arbitral tribunals is concerned, there is also the case that the parties have not agreed upon the applicable law and consequently the arbitrators are the responsible ones for the choice, according to the conflict of law rule or the substantive law[277].

[272] Nils Schmidt-Ahrendts, CISG and Arbitration, 2011 Annals FAC. L. BELGRADE INT'l ED. (2011). pp.212-213
[273] Ibid, p.220
[274] Ibid, p.214
[275] Ibid, p.214
[276] Ibid, p.215
[277] Ibid, pp.215-216

IV. CONCLUSION

In conclusion, the United Nations Convention on the International Sales of Goods is a very significant convention which has played a key role in the unification of the private law with respect to the international sales of goods and provides the parties with a context of legal certainty. Its basic provisions are related to the formation of the contract, the rights and obligations of the parties as well as the remedies provided in the event that one of the parties proceeds to a breach of the contract.

In parallel to the CISG analysis, another issue examined under this thesis is the energy sector and particularly the energy contracts, those concluded between states rich in natural resources and foreign investors, i.e. international oil and gas companies as well as the midstream, the downstream sector energy contracts and the commodity sale contracts. The energy contracts of the upstream sector are divided into four main types, the concessions, i.e. an agreement between a private company and a state on the basis of which the former undertakes exploration, production and marketing activities with the payment of royalties, the production sharing agreements which enables the contracting company to conduct exploring activities and in the event that they are not profitable, the company suffers a loss, but if they are eventually profitable, the company is entitled to have a reimbursement of the costs incurred and to share the profits with the host state, the joint ventures, a partnership-based contract where the energy activities are usually conducted by a project company which is under the control of both the host state and the private company and through this partnership the common decision-making as well as the transfer of the technology tools and the know-how is more concrete, and finally the service contracts categorized in risk service contracts, pure service contracts and technical assistance contracts and concluded between the host state and a company with the former keeping the control of its natural resources and the profit and the latter assigned to a specific task against a compensation. There are also the natural gas contracts which are divided into the physical ones, i.e. the traditional ones related to the sale and the purchase of natural gas and the financial ones, which is a derivative of the reform of the natural gas industry and their purpose is to handle the risk arising from the fluctuation of the gas prices. The natural gas contracts though are also divided into supply contracts and depletion contracts depending on the quantity agreed to be sold and to seller's option or buyer's option depending on the nature of the gas as associated or non-associated.

A crucial issue related to the matters mentioned above is the applicable or non-applicable of the CISG to all these contracts. Except for the case of the sale of electricity which is expressly excluded from the scope of the CISG, the case of oil and natural gas is not so clear. So, a useful tool for the determination of the application or not of this Convention is the sector where each contract belongs. Thus, the upstream sector contracts are not governed by the CISG, because their scope does not concern the sale of goods but it deals with issues like the lease, the use of equipment and of expertise, the transfer of the know-how and the payment of royalties and taxes. Likewise, the midstream sector contracts are not governed by the CISG to the extent that they involve the processing, the transmission and the storage, but if the contract deals with the delivery of the goods to the wholesale distributor, then it is classified as a distribution agreement and the issue of the application or not of the CISG depends on a number of factors. The same apply in the downstream sector in case that the contract concerns the delivery of the goods from the wholesale distributor to the downstream distributor, while in the event that the contract deals with the delivery of the goods from the latter to the retailer, it is classified as a dealers agreement the ratio of which is alike to the distribution agreement. Contrary to that, if the scope of the downstream contract refers to the transaction taking place between the retailer and the retail store, then the CISG applies, while this is not the case for the transaction between the latter and the end customer due to the express exclusion set out in the CISG, with the exception of the company acting as the consumer. Nevertheless, it should be stressed that many standard form contracts concerning the sales of commodities, like the oil and natural gas, exclude the application of the CISG on the grounds that some of the provisions of this convention as analyzed above may not be the appropriate ones and fall instead within the scope of the English law, because it is considered as tailor made for the commodity sales. However, it can be supported that the CISG represents a significant effort towards the unification of the international trade law, ratified by many states globally as well as a valuable legal instrument for the governance of energy contracts, thus it could be considered an equal player in the commodities arena, even though the string trading should be governed by the same law each time and traders usually depend on standard contract forms issued by organizations and companies voting for the English law.

BIBLIOGRAPHY

Foreign Bibliography

A.K.Bansal. (n.d.). Understanding Natural Gas Sales & Purchase Contracts and Principal Contractual Terms https://www.linkedin.com/pulse/understanding-natural-gas-sales-purchase-contracts-principal-bansal. *Linkedin*.

Administration, U. E. (n.d.). *Oil and petroleum products explained Refining crude oil*. Retrieved from https://www.eia.gov/energyexplained/oil-and-petroleum-products/refining-crude-oil.php

Anchustegui, D. I. (n.d.). Transmission Networks in Electricity Competition: Third-Party Access and Unbundling – A Transatlantic Perspective https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3159458. *Social Science Research Network*.

Bernardini, P. (2008). Stabilization and Adaptation in Oil and Gas Investments. *Journal of World Energy Law & Business, 1*(1).

Bishop, Quintanilla Roche, McBrearty, D. (2017). The Breadth and Complexity of the International Energy Industry. In D. Bishop, Kaiser, *The Guide to Energy Arbitrations* (2nd ed.). Law Business Research Ltd.

BP. (n.d.). LNG master sales and purchase agreement https://www.bp.com/en/global/bp-trading-and-shipping/documents-and-downloads/technical-downloads/lng-master-sales-and-purchase-agreement.html.

Bridge, M. (1991). International Private Commodity Sales. *Canadian Business Law Journal*(19).

Bridge, M. (2003). Pace International Law Review. *Uniformity and Diversity in the Law of International Sale*, pp. 55-89.

Bridge, M. G. (2021). The CISG and Commodity Sales: A Relationship to be revisited? *Singapore Journal of Legal Studies*, 271-290.

Brunner, C., & Gottlieb, B. (n.d.). *Commentary on the UN Sales Law (CISG).* Wolters Kluwer.

Bunge Corp. v. Tradax Export S.A. (1981). *Lloyd's Law Reports, 2*.

Bungenberg, Hobe, M. (2015). *Permanent Sovereignty over Natural Resources.* Springer.

Bzhar Abdullah Ahmed, H. M. (2017). Avoidance of Contract as a Remedy under CISG and SGA: Comparative Analysis. *Journal of Law, Policy and Globalization*(61).

CISG, U. (n.d.). *BP Oil International and BP Exploration&Oil INc v. Empresa Estatal Petroleos de Ecuador*. Retrieved from https://www.unilex.info/cisg/case/924

CISG, U. (n.d.). *CIETAC China International Economic and Trade Arbitration Commission, Arbitral Award*. Retrieved from https://www.unilex.info/cisg/case/210

CISG, U. (n.d.). *Diversitel Communications Inc. v. Glacier Bay Inc.* Retrieved from https://www.unilex.info/cisg/case/1189

CISG, U. (n.d.). *Valero Marketing & Supply Company v. Green Oy & Greeni Trading Oy*. Retrieved from https://www.unilex.info/cisg/case/1106

Daintith, T. (2017). The Against 'lex petrolea'. *Journal of World Energy Law & Business, 10*(1), 1-13.

Decisions, E. a. (1961). *BAILII*. Retrieved from https://www.bailii.org/ew/cases/EWCA/Civ/1961/7.html

Dimatteo, P. D., Janssen, P. D., Magnus, P. D., & Schulze, P. D. (2016). *international Sales Law Contract, Principles & Practice.* C.H.BECK HART NOMOS.

Dimatteo, P. D., Janssen, P. D., Magnus, P. D., & Schulze, P. D. (2016). *International Sales Law Contract, Principles & Practice* . C.H.BECK HART NOMOS.

Essays, D. (n.d.). *International Sale of Goods Convention Role: A Comparison With English Law* . Retrieved from https://demoessays.com/international-sale-of-goods-convention-role-a-comparison-with-english-law/

Gabrielson, G. (2015). Upstream, Midstream, and Downstream… What's the difference? https://lonetreeusa.com/upstream-midstream-downstream-whats-difference/. *Lonetree*.

GAFTA. (n.d.). *Guidelines for Appropriations*. Retrieved from https://silo.tips/download/guidelines-for-appropriations

Garcia-Castrillon, C. (2013). Reflections on the law applicable to international oil contracts. *Journal of World Energy Law & Business, 6*(2), 129-162.

Gillette, C., & Walt, S. (n.d.). *The UN Convention on Contracts for the International Slae of Goods: Theory and Practice.* CAMBRIDGE UNIVERSITY PRESS.

Gkikas, P. (n.d.). *Critical Analysis of the Differences Between the Approach to the Passing of Risk in the Sale of Goods Act 1979 and the CISG*. Retrieved from https://www.linkedin.com/pulse/critical-analysis-differences-between-approach-passing-gkikas

Haedicke, M. E. (1992). Contracts for the New Natural Gas Business. *Energy Law Journal, 13*(2), 313-339.

Hayes, A. (2021). Distribution Network: Definition, How It Works, and Examples https://www.investopedia.com/terms/d/distribution-network.asp. *Investopedia*.

Hofmann, N. (2010). Interpretation Rules and Good Faith as Obstacles to the UK's Ratification of the CISG and to the Harmonization of Contract Law in Europe. *Pace International Law Review*(22).

Honnold, J. (1999). *Uniform Law for International Sales under the 1980 United Nations Convention* (3rd ed.).

Institute, C. F. (2022). Distribution Network: The flow of goods from a producer or supplier to an end consumer https://corporatefinanceinstitute.com/resources/valuation/distribution-network/. *Corporate Finance Institute*.

Interactive, E. (n.d.). What is Downstream Oil and Gas? https://ektinteractive.com/what-is-downstream/. *EKT Interactive*.

Investopedia. (n.d.). *Basis Grade*. Retrieved from https://www.investopedia.com/terms/b/basisgrade.asp

Investopedia. (n.d.). *Commodities*. Retrieved from https://www.investopedia.com/commodities-4427780

Investopedia. (n.d.). *Futures Contract Definition: Types, Mechanics, and Uses in Trading*. Retrieved from https://www.investopedia.com/terms/f/futurescontract.asp

Investopedia. (n.d.). *What is a Commodity and Understanding its Role in the Stock Market*. Retrieved from https://www.investopedia.com/terms/c/commodity.asp

Investopedia, N. L. (n.d.). *Commodity vs. Product: What's the Difference?* Retrieved from https://www.investopedia.com/ask/answers/021615/whats-difference-between-commodity-and-product.asp

Kanojia, S. (2017). DOES ENGLISH LAW PROVIDE THE BEST FRAMEWORK FOR THE SALE OF COMMODITIES? – A COMPARISON BETWEEN ENGLISH LAW, INCOTERMS AND THE CISG. *South Asian Law Review Journal, 3.1*.

Kroll, S. (2004). The Renegotiation and Adaptation of Investment Contracts. In N. Horn, Kroll, *Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects.* Kluwer Law International.

Kuderin, I. (2015). The suitability of the CISG for adoption into English Law - https://articlekz.com/en/article/14848. *KazNU Bulletin*.

L. Singh, B. L. (2010). A Law for International Sale of Goods: A Reply to Michael Bridge. *Pace International Law Review*(22).

LAW, U. N. (2010). *United Nations Convention on Contracts for the International Sale of Goods.* New York: United Nations.

Likosky, M. (2009, April). Contracting and regulatory issues in the oil and gas and metallic minerals industries. *Transnational Corporations, 18*(1).

Liu, C. (2007). Additional Period (Nachfrist) For Late Performance. *Juris Legal Information, Arbitration Law*.

Lookofsky, Bernstein, J. (1997). Understanding the CISG in Europe. *Kluwer Law International*.

Lopez-Velarde, R. (1995). Mexico's Petroleum Drilling Contracts. *Journal of Energy and Natural Resources Law*.

Martin, T. (2012). "Lex petrolea" in International Law. In R. King, *Dispute Resolution in the Energy Sector : a Practitioner's Handbook.* Globe Law and Business.

Moss, S. (2006). WHY THE UNITED KINGDOM HAS NOT RATIFIED THE CISG. *JOURNAL OF LAW AND COMMERCE, 25*(2), 483-485.

Nikolova, S. E. (2012). UK's Ratification of the CISG – An Old Debate or a New Hope for the Economy of the UK on Its Way Out of the Recession: The Potential Impact of the CISG on the UK's SME. *Pace International Law Review Online Companion*.

O' Sullivan, M. L. (2022). Mexico's energy reforms: A blow to realizing the most competitive and dynamic region in the world - https://www.brookings.edu/blog/up-front/2022/02/28/mexicos-energy-reforms-a-blow-to-realizing-the-most-competitive-and-dynamic-region-in-the-world/. *Brookings*.

Paasivirta, E. (1990). Internationalization and Stabilization of Contracts versus State Sovereignty. *British Yearbook of International Law, 60*(1).

Perales Viscasillas, P. (1997). Contract Conclusion under CISG. *Journal of Law and Commerce, 16*(2), 315-344.

Radon, J. (2005). The ABCs of Petroleum Contracts: License-Concession Agreements, Joint Ventures, and Production-sharing Agreements. In S. Tsalik, Schiffrin, *Covering Oil: A Reporter's Guide to Energy and Development.* Open Society Institute.

Ramberg, J. (2011). ICC Guide to Incoterms 2010 Understanding and practical use. *International Chamber of Commerce* .

Regulation, F. S. (n.d.). Unbundling in the European electricity and gas sectors https://fsr.eui.eu/unbundling-in-the-european-electricity-and-gas-sectors/. *European University Institute* .

Santos Coelho Neto, J. (1985). Risk-Bearing Service Contracts in Brazil. *Journal of Energy and Natural Resources Law*.

Schlechtriem, Schwenzer, P. (2005). *Commentary on the UN Convention on the International Sale of Goods* (2nd ed.).

Schmidt-Ahrendts, N. (2011). CISG and Arbitration. *Annals of the Faculty of Law in Belgrade - Belgrade Law Review*.

Schwenzer, I. (2005). The Danger of Domestic Preconceived Views with Respect to the Uniform Interpretation of the CISG: The Question of Avoidance in the Case of Non-Conforming Goods and Documents. *Victoria University of Wellington Law Review*(36).

Schwenzer, S. &. (Fourth Edition). *Commentary on the UN Convention on the International Slae of Goods (CISG).* OXFORD UNIVERSITY PRESS.

SIAT di Del Ferro v Tradax Overseas SA. (1980). *Lloyd's Law Reports, 1*.

Slot, P. (2000). The Impact of Liberalisation on Long-Term Energy Contracts. *Journal of Network Industries*, 287-303.

Societe Italo-Belge v. Palm and Vegetable Oils Sdn. Bhd. (The Post Chaser). (1981). *Lloyd's Law Reports, 2*.

Talus, Looper, Otillar, K. (2012). Lex Petrolea and the internationalization of petroleum agreements: focus on Host Government Contracts. *Journal of World Energy Law & Business, 5*(3), 181-193.

Teacher, L. (n.d.). *Contracts for Sale of Goods in English Law: Comparison to UN*. Retrieved from https://www.lawteacher.net/free-law-essays/contract-law/sale-of-goods-in-english-law-un-2625.php

Teacher, L. (n.d.). *Parties Respective Rights Duties*. Retrieved from https://www.lawteacher.net/free-law-essays/jurisprudence/parties-respective-rights-and-duties.php

Teacher, L. (n.d.). *Sky Petroleum v VIP Petroleum - 1974*. Retrieved from https://www.lawteacher.net/cases/sky-petroleum-v-vip-petroleum.php

The UK and the CISG - https://thestudentlawyer.com/2014/03/06/the-uk-and-the-cisg/. (2014). Retrieved from The Student Lawyer.

Toepfer v Lenersan-Poortman N.V. (1981). *Lloyd's Law Reports, 1*.

UN Commission on International Trade Law. (n.d.). The UN Convention on Contracts for the International Sale of Goods (CISG) - https://uncitral.un.org/en/cisg40.

United Nations, U. N. (n.d.). *Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG)*. Retrieved from https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status

Upcounsel. (n.d.). *Conditions, Warranties, And Innominate Terms*. Retrieved from https://www.upcounsel.com/conditions-warranties-and-innominate-terms

Upcounsel. (n.d.). *Innominate Terms: Everything You Need to Know*. Retrieved from https://www.upcounsel.com/innominate-term

W.P.Johnson. (2013). Analysis of Incoterms as Usage under Article 9 of the CISG. *University of Pennsylvania Journal of International Law*(35).

Waren Import Gesellschaft Krohn and Co v Alfred C Toepfer (The Vladimir Ilich). (1975). *Lloyd's Law Reports, 1*.

What does Liberalization and Unbundling of Energy Markets mean? https://www.next-kraftwerke.com/knowledge/liberalization-energy-markets. (n.d.). *Next Kraftwerke*.

What is Midstream Oil and Gas? https://ektinteractive.com/what-is-midstream/. (n.d.). *EKT Interactive*.

Winship, P. (1990). Energy Contracts and the United Nations Sales Convention. *Texas International Law Journal, 25*, 365-379.

Ziegel, J. (2005, June). The Scope of the Convention: Reaching Out to Article One And Beyond. *Journal of Law And Commerce*, 59-73.

Greek Bibliography

Δήμας, Α. Γ. (1998, Μάιος). Πεδίο Εφαρμογής της Συμβάσεως των Ηνωμένων Εθνών για τις Διεθνείς Πωλήσεις Κινητών Πραγμάτων. *ΔΕΕ*, pp. 452-455.

ΕφΑθ 3957/2006. (2008). *ΕλλΔνη*.

ΕφΑθ 555/2005. (2005). *ΕΕμπΔ*(3).

ΕφΛαμ 63/2006. (2006). *ΕπισκΕΔ*.

Κιάντος, Β. (1999). Η υποχρέωση του πωλητή να παραδώσει το πράγμα ελεύθερο παντός νομικού ελαττώματος στις πωλήσεις CIF και FOB. *ΕΕμπΔ*(1).

Νικολαΐδης, Γ. (2000). *Η Διεθνής Πώληση Κινητών Κατά τη Σύμβαση της Βιέννης.* Αθήνα: Αντ. Ν. Σάκκουλας.

Νικολαΐδης, Γ. (2001). *Το πεδίο Εφαρμογής της Σύμβασης της Βιέννης για τις Διεθνείς Πωλήσεις Κινητών Πραγμάτων (Ν.2532/1997).* ΑΝΤ.Ν.ΣΑΚΚΟΥΛΑΣ.

Παμπούκης, Χ. (Ed.). (2009). *Δίκαιο Διεθνών Συναλλαγών.* Αθήνα: Νομική Βιβλιοθήκη.

ΠΠρΑθ 11628/1981. (1982). *ΕΕμπΔ*.

Φλάμπουρας, Δ. (2007). *Η Κατανομή και η Μετάθεση Κινδύνου στην Πώληση Κινητών.* ΑΝΤ. Ν. ΣΑΚΚΟΥΛΑΣ.