THE NEW CIVIL AND COMMERCIAL CODE OF ARGENTINA (2015) AND THE VIENNA CONVENTION ON CONTRACTS FOR THE SALE OF GOODS. *Offer and counter-offer with differing terms, deadline to revoke an offer in contracts "inter absentes"; drawing line between contracts of sale and work contracts; seller's libility for non-conforming goods: Some good and not-so-good provisions of the new Civil and Commercial Code that were modeled after the "CISG".*

Alejandro M. Garro y Alberto L. Zuppi1

Despite the controversial provisions the Executive Power has added to the original draft of the Civil and Commercial Code, this new instrument will come into effect on August 1, 2015. The purpose of this brief article is to consider some questions arising from the reading of the Draft when comparing it to the regime of The Vienna Convention on the Contracts for the International Sale of Goods 1980 ("CISG"), which has been in force in our country for more than thirty years.

The rules applicable to contracts of sale under the Civil Code of Argentina of 1869-72 ("Civ.C"), as well as under the new Civil and Commercial Code due to come into force in August, 2015 ("CivComC"), are scattered under the rubric of obligations in general (Title I of Book III on "*Derechos Personales*", Arts. 724-956 CCivCom), those referring to contracts in general (Titulo II, Arts. 957-1122 CCivCom) and, within Title IV on "Contracts in Particular", regulating thirty three different types of contracts, rules that are specifically applicable to contracts of sale (Chapter I of Title II, Arts. 1123-1186 CCivCom), though governing sales of goods as well as contracts governing the sale of real property.

Some of the rules of the new CCivCom on contracts have been modeled after, directly or indirectly, the United Nations Convention on Contracts for the Sale of Goods

1 Alejandro M. Garro, Professor of Comparative Law, Columbia University, garro@law.columbia.edu; Alberto L. Zuppi, alzuppi@gmail.com, former Robert & Pamela Martin Professor of Law, Louisiana State University.

("CISG"), in force in Argentina since 1988 (Law No. 22.765, incorporated as Law No. 1356 pursuant to the Argentine Legal Digest adopted by Law No. 26.939).

Comparisons drawn between the CivComC and the CISG focus on the provisions applicable to contracts in general and those dealing with the sale of "movable property" (*cosas muebles*) in particular, a concept roughly equivalent to the Anglo-American concept of "goods". The topics herein discussed are many, although the focus is on some of the provisions of the CivComC that are allegedly modeled after the CISG, some of which were taken verbatim from the Vienna Convention of Contracts for the Sale of Goods, while other provisions depart –intentionally or not— from the CISG.

Let us start by addressing those provisions of the CCivCom which have purportedly followed the CISG, starting with the very notion of contract of sale and the obligations it entails. The notion of "sale" implicates the seller's obligation to transfer ownership over the object sold and buyer's obligation to pay a sum of money. Article 1420 of the original Civil Code of Argentina ("CivC") regards a contract of sale as a consensual contract perfected with the delivery of the goods. Under the new Article 1137 CCivCom, following the style of Article 30 CISG, the delivery of the goods sold remains an obligation of the seller, coupled with the obligation to cooperate with the transfer of ownership as well as transfer the documents "*required by the use or particular circumstances of the sale*".

Other aspects of the obligation to deliver the goods, governed by Article 1149 CCivCom, the new code lost the opportunity to improve on the ambiguity left by the CISG. Thus, in the case of goods to be sold in transit, the delivery of the goods may be agreed by the parties, "*materialized in the assignment by endorsing the transport documents as of the time of the assignment or endorsement*". The drafting of the article is poor, for it is obvious that every sale implies consentment by the parties. It is also unfortunate the vague reference to "*transport documents*", for there are many of those, though not all of them evidence ownership in the goods or the buyer's entitlement to own them or demand delivery of the goods. The question may be raised, for example, whether the endorsement of a commercial invoice suffices to transfer title to goods in

transit, for such a document may well qualify as a “transport document”. It would have been preferable for Article 1149 CCivCom to improve on the ambiguity left in Article 57 CISG, making specific reference to the type of documents representative of title to the goods, such as a bill of lading, clearly entitling its holder, once the sale has been completed, to demand delivery of the goods, depriving the seller of the power to control or dispose the goods once the sale has been concluded.

Other provisions adopted by the CCivCom, applicable to contracts in general, depart from the model offered by the CISG. On matters of formation of contracts, for example, the CCivCom includes a series of provisions (Articles 971-983) in Chapter 3, governing “Formation of consent”, Section 1 (“Consent, offer and acceptance”), dealing with issues covered in Articles 14-24 CISG. Thus, the new CCivCom follows the notion of “offer” and a “proposal other than one addressed to one or more specific persons” adopted by the CISG (compare Art. 14 CISG with Arts. 972-973 CCivCom). In other respects, the CCivCom takes a different position, such as in the regulation on formation of consent between parties at a distance (“*inter absentes*”). Thus, departing from Article 1154 of the CCiv, Article 980(b) CCivCom provides that the conract is perfected when the offer “*is received by the offeror during the period in which the offer remains effective*”, period which extends, unless the offer otherwise provides, “*until the offeror could reasonably expect to receive a response to the offer*” (Art. 974, third paragraph, CCivCom). This entails a departure from the shorter period granted to the offeror under the CISG to revoke the offer. Whereas Article 15(1) CISG provides that the offer remains effective until the time it is received by the offeree, according to Article 16(1) CISG the offeror loses the right to revoke the offer as of the time the offeree sends its acceptance, rule that is not adopted by the CCivCom.

Another departure from the CISG and the position adopted by most modern legislation regards the mechanism for the formation of contracts in case the terms of the acceptance are different from those of the offer. The new Article 978 CCivCom keeps the traditional approach of former Article1152 CCiv, which also happens to be the rule in the common law of contracts, pursuant to which any modification introduced to the

terms of the offer turns the purported acceptance into a counteroffer, adding what appears obvious, that is, that "*the modifications* [to the terms of the offer] *may be admitted by the offeror if the latter immediately communicates the acceptance of such modifcations to the offeree*." This is an unfortunate departure from the CISG, which establishes just the opposite presumption, that is, the modifications to the terms of the offer are deemed part of the contract, thus favoring the conclusion of the contract pursuant to the terms of the party who had the last chance to introduce changes (the so-called "*last-shot*" rule). According to Article 19(2) CISG, the "*additional or different terms*" added to the offer, as long as they are not "substantial", are presumed to be part of the acceptance "*unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect...*"). It would have been more fair and efficient to adopt the solution propounded by Article 19 CISG, but according to the terms of Article 2.1.11(2) of the UNIDROIT Principles on International Commercial Contracts ("UPICC" or "UNIDROIT Principles"), which carries the additional advantage of leaving to the discretion of the decision-maker the decision whether the additional or different terms are genuinely "*substantial*".

Turning now to those instances in which the CCivCom follows the CISG, we find that the drawing line between a contract of sale and a service contract, a distinction not always easy to make. Closely following Article 3 CISG, the new Article 1125 CCivCom draws such distinction on the basis of the economic value of the goods, as opposed to the value of the services to be rendered by the seller. Thus, Article 3(1) provides that a contract in which the seller's obligation is to "*supply goods to be manufactured or produced*" are deemed sales "*unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.*"

The CCivCom also follows the CISG on the criteria to determine the price in those instances in which the parties failed to do so. According to Article 1354 CCiv, the price implicitly fixed was the price current at the time and place of where the goods were to be delivered. Article 55 CISG establishes, more specifically, that unless the parties agree otherwise, the price will be the one "*generally charged at the time of the*

conclusion of the contract for such goods sold under comparable circumstances in the trade concerned". The new Article 1143 CCivCom reproduces, almost verbatim, this formulation.

Regarding the seller's obligation to transfer the goods sold free of vices and defects, the provisions of the new CCivCom on the contract of sale intends to follow the approach introduced by the CISG, which refers to the "conformity" of the goods sold with what the contract and the law require. Yet, the new CCivCom, probably seeking some originality, does not adopt the concept of "conformity" but rather of "adequacy" of the goods. That the goods must be "adequate" to what the contract requires ("*adecuación de las cosas muebles a lo convenido*"), meaning "appropriate", does not quite carry the day. The fact that the goods are "adequate" does not exclude that they may not conform to what the contract calls for, and it is "conformity" with the contract what really matters in order to determine whether a breach has occurred. Thus, if the goods are delivered before the date of delivery, which is the issue addressed in Article 1150 CCivCom ("*Entrega anticipada de cosas no adecuadas al contrato*"), the CCivCom practically replicates Article 37 CISG, except that it refers to the lack of "adequacy" of the goods, as opposed to the lack of conformity.

Another unfortunate departure from the CISG is found in the new Article 1156 CCivCom, which replicates the notion of "adequacy" of the goods sold in order to express that such goods must conform to what the contract requires. But this is not the only unfortunate replica of the CISG.

In order to specify when the goods sold are to be deemed "adequate", as well as the circumstances in which the seller should be held liable for breach of contract, Article 1156 CCivCom seems to follow Article 35 CISG almost "*ad paedem letere*", with the exception of Article 35(2)(c), regarding goods which the seller "*held out to the buyer as a sample or model*", addressed in a separate provision (Article 1153 CCivCom).

According to paragraph (a) of Article 1156 CCivCom, unless the parties agree otherwise, the goods sold are deemed "adequate" (or "conforming") to the contract as long as they are "*fit for the purpose which goods of the same description would ordinarily be used*"; or as long as they are "*fit for any particular purpose expressly or*

impliedly made known to the seller at the time of the contract…", as expressed in paragraph (b) of Article 1156 CCivCom; or as long as, according to paragraph (d) of Article 1156 CCivCom, the goods are "*contained or packaged in the usual manner* " (Article 1156 (c) CCivCom). However, intending to replicate the third paragraph of Article 35 CISG, the last paragraph of Article 1156 states that "*the seller is not liable under subparagraphs (a) to (c) of this article for the lack of adequacy of the goods if, at the time of the conclusion of the contract, the buyer knew or could not have been unaware of such lack of adequacy*".

In other instances, the CCivCom decides –and in this case correctly— to formulate a rule different tan the CISG in view of the different circumstances in which domestic and international sale transactions take place. Accordingly, Article 1147 CCivCom provides that, in the absence of the parties' agreement, the goods are to be delivered within 24 hours of the conclusion of the contract. In contrast, Article 33(c) CISG, provides a default rule for cross-border transactions according to which the goods must be delivered, unless the parties agreed otherwise, within a reasonable time after the conclusion of the contract. The inevitable and vague reference to a "reasonable" time seems appropriate in the context of cross-border transactions in which the parties' commercial establishments are likely to be located in different countries and the delivery is also likely to implicate their transportation from one country to another.

Similarly, the default rule adopted by the CCivCom for the buyer to communicate to the seller the lack of "adequacy" (i.e., conformity) of the goods is different than the one adopted by the CISG. Thus, when the goods are delivered in a way that the buyer is unable to detect its defects, that is whenever the goods are delivered "packaged or covered" ("*en fardos o bajo cubierta*"), Article 1155 CCivCom provides a ten-day period for the buyer to complain about the quality of the goods sold. In contract, Article 38(1) CISG resorts to a more flexible rule, prescribing that the the goods must be examined carried out "*within as short a period as is practicable in the circumstances*". The first paragraph of Article 39(2) CISG adds that notice of the lack of conformity, including the specific reference to what is wrong with the goods, must be given "*after a reasonable time*" after the buyer discovered our ought to have discovered the defects, and in no

case beyond two years after such discovery. In contrast, according to Article 2564(a) CCivCom, the right of action to complain for defects of the goods sold prescribe within a year.

In a few and limited instances, the new CCivCom decided to assimilate the criteria fitting for international sales to those applicable to domestic sales. Thus, Article 1161 CCivCom refers to contractual clauses that are widely known as part of international usage ("*cláusulas de difusión general en los usos internacionales*"), which are presumed to be used with the same meaning in domestic sales, unless the circumstances suggest otherwise. Among other clauses, this reference points to the extended use of the INCOTERMS, as such commercial terms, widely used in international trade, distribute the risks and obligations of parties to a sales transaction (including the passing of risk, who bears the costs of insurance, custom duties, license fees, etc.). Perhaps the indiscriminate reference to "*international usage*" in Article 1161 is too broad, and it would have been preferable to make more specific reference to the specific INCOTERMS (e.g., FOB, CF, CIF), including the year in which the International Chamber of Commerce ("ICC") adopted such terms,because for at least every ten years or so the CCI updates the definition of the INCOTERMS in order to adapt them to new technologies and usages common to international trade.

El Book IV, Chapter IV of the CCivCom gathers a series of rules of private international law, by and large a welcoming addition to obsolete rules formerly scattered throughout the original CivC. Some of the rules, however, fall short of providing the clarity that would have been desirable. Thus, Article 2651(d) CCivCom, referring to the principle of party autonomy governing the determination of the law applicable to international contracts, refers to "*widely accepted commercial usages and practices widely accepted, customs and general principles of international commercial law that apply whenever the parties incorporate them to their contract."* This rule, *a contrario sensu*, suggests that such usages, customs and principles do not apply unless the parties expressly incorporate them into their contract, which does not seem fair or conducive to the development of modern international commercial practices. These usages, practices and customs ought to be applied, independently of whether the

parties expressly incorporated into their contract, as prescribed in Article 9(2) CISG, as long as such customs and usages are known to the parties or as long as they "*ought to have known [them] and which in international trade* [are] *widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.*" It would have been helpful to consider such commercial usages and customs implicitly governing international contracts, as long as they refer to "*contracts of the type involved in the trade concerned*."

This brief commentary does not refer to other issues governed by the new CivComC which, although referring to the formation, interpretation, and enforcement of international contracts, are not addressed by the CISG. This is the case, for example, of whether the buyer under an international contract of sales may be discharged by paying in national currency the purchase price that was agreed to be paid in foreign currency. In this case, the new CCivCom includes conflicting provisions to be sorted out by means of a clarifying statute or by the judges or arbitrators called to decide specific cases.