

# THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS: THE CANADIAN EXPERIENCE

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*The author discusses the Canadian jurisprudence involving the application, or potential application, of the CISG. He concludes that the Canadian courts are beginning to implement the CISG, but that there is still a tendency to apply domestic law alongside, or even in preference to, the international sales law, even when this is not warranted.*

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## **I INTRODUCTION**

The United Nations Convention on Contracts for the International Sale of Goods (1980) (CISG or Convention)<sup>1</sup> created a uniform international sales law by regulating the rights and obligations of buyers and sellers in international transactions for the sale of goods. This landmark Convention was acceded to in Canada on 23 April 1991 pursuant to the International Sale of Goods Contracts Convention Act<sup>2</sup> and came into force on 1 May 1992. Between the years of 1988 and 1992 the Convention was further integrated into Canadian law by the enactment of provincial and territorial International Sale of Goods Act legislation in every province and territory in Canada.

Despite initial optimistic forecasts, the CISG has remained relatively obscure from its implementation in the early 1990s until very recently. Canadian courts have been reluctant to apply it, appearing to be more comfortable applying domestic law in its place or, at the very least, alongside it. The evidence shows that the CISG is now used by more than two-thirds of the world.<sup>3</sup>

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1 (11 April 1980) 1489 UNTS 3.

2 International Sale of Goods Contracts Convention Act RS C 1991 c C-13.

3 According to the United Nations Commission on International Trade Law (UNCITRAL), as of December 2004, there are 64 countries that are signatories to the CISG <<http://www.uncitral.org>> (last accessed 9 November 2005).

This global trend toward the increased use of the CISG means that it is necessary for Canadian lawyers, judges and arbitrators to gain familiarity with the law in order to better address clients' needs.<sup>4</sup> Lawyers can no longer rely on knowledge of their own legal systems alone when representing their clients in the international sphere. This movement toward the increased prevalence of the CISG in international trade has meant that Canadian courts have had to struggle to improve their understanding of the CISG so that they can apply it more rigorously and consistently. This paper will illustrate the evolution of the application of the Convention in the context of Canadian jurisprudence and will show that the evolution, while gradual, has nevertheless been steady and positive.

## **II THE CANADIAN CASES**

### **A Nova Tool and Mould Inc v London Industries Inc**

The first time the CISG was considered in a Canadian case was in 1998 in *Nova Tool and Mould Inc v London Industries Inc*.<sup>5</sup> Nova Tool manufactured steel moulds used in the production of plastic auto parts and carried on business in Canada. London Industries was a manufacturer of plastic auto parts based in the United States with Honda being one of its main customers. London Industries sent Nova Tool, and Nova Tool's competitors, a request for a quote for nine moulds that were to be used for parts required by Honda. As a result, London Industries accepted the bid from Nova Tool. The contract included a clause providing that time was of the essence and that a failure to deliver by the due date could result in London Industries purchasing the moulds elsewhere and charging Nova Tool with any resulting loss.

The contract commenced and most of the jobs were completed on time. However, jobs number 619 and 620 were slow to be completed. London Industries was particularly concerned about the status of job number 620. They felt that they had no other option but to find another mould shop who could deliver the mould on time so that London Industries could meet its obligations to Honda. As well, London Industries was not satisfied with the quality of some of the other moulds provided by Nova Tool. Ultimately, London Industries found another mould shop to finish the moulds. Subsequent to London Industries contracting with another company to finish the moulds, Nova Tool sued for payment of the balance of the contract price for the remaining jobs. London Industries counterclaimed for the price that they paid to the third party to complete job number 620, repair costs for previously received faulty moulds, the texturing costs for three of the moulds completed by Nova Tool and internal costs for late deliveries. London Industries was substantially successful in its counterclaim.

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4 J Anthony Van Duzer "The Adolescence of the United Nations Convention on Contracts for the International Sale of Goods in Canada" (Canadian Bar Association's International Law Section Annual Conference, Ottawa, May 2001).

5 *Nova Tool and Mould Inc v London Industries Inc (Nova Tool)* [1998] CarswellOnt 4950 (Ontario Court of Justice).

In his decision, Zalev J found that London Industries had relied on the warranty provisions in their contract and on the implied warranties under the CISG. The only reference to the CISG in the judgment of Zalev J was that "London relies particularly on Article 1(1)(a) and (1)(b), 35(1), 36(1) & (2), 45(1)(a) & (1)(b) and 74, all of which follow as Schedule 'B'."<sup>6</sup> Zalev J did not define or comment further on the CISG provisions pleaded by London Industries, nor was there any discussion as to why these articles were being invoked, though it was most likely due to a lack of understanding of the law being pleaded. Furthermore, Zalev J considered and applied domestic sales law despite the fact that the CISG clearly governed the dispute because the dispute involved Canada and the United States who are both parties to the Convention. This was the first time a court in Canada had considered the CISG and commentators have remarked that Zalev J missed an excellent opportunity to establish an important and meaningful Canadian precedent in applying the Convention for the first time. Instead, we are left with a precedent that provides no guidance about how the CISG should be applied in future Canadian cases dealing with international sales contracts governed by the Convention. It appears in this case that London Industries invoked the Convention in support of its claim that Nova Tool had breached its implied warranty obligation. However, there is nothing in the court's decision that gives any indication that the provisions of the Convention were actually argued at trial.

### **B La San Giuseppe v Forti Moulding Ltd**

A year after *Nova Tool* was released, there was a second Canadian case which addressed the CISG, *La San Giuseppe v Forti Moulding Ltd*.<sup>7</sup> La San Giuseppe was a manufacturer of picture frame mouldings with its place of business in Italy and supplied mouldings to the defendant located in Canada. Forti Moulding was a Canadian distributor of mouldings and picture frames, and between 1989 and 1996 the parties conducted regular and ongoing business with one another, but never had a written agreement. Despite the lack of a written contract, there was an understanding between the parties that orders shipped might vary above or below the ordered amount by 10 per cent. Payments were made by Forti Moulding to La San Giuseppe regularly and currently until 1995. In 1996 Forti Moulding was behind in payments and soon became unable to pay La San Giuseppe the outstanding amounts that it was owed. Soon afterward, La San Giuseppe brought an action claiming damages for breach of contract against Forti Moulding. Forti Moulding counterclaimed for damages and setoff, claiming that some of the mouldings were defective and that many shipments had varied by more than the 10 per cent originally agreed.

One of the main issues at trial was whether or not the CISG applied to the contract. It was not disputed that both countries were signatories to the CISG. However, Forti Moulding argued that the parties concluded the "master contract" in either Italy or Canada before the CISG came into force

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<sup>6</sup> *Nova Tool*, above n 5 para 61.

<sup>7</sup> *La San Giuseppe v Forti Moulding Ltd (La San Giuseppe)* [1999] CarswellOnt 2837 (Ontario Superior Court of Justice).

and therefore it did not govern their agreements. Swinton J found that the parties had what the court considered to be an "agreement to agree" whereby each time an order was made by Forti Moulding and then accepted by La San Giuseppe a contract was created for the shipment of goods. Therefore, since all of the complaints in this case arose with respect to shipments in and after 1993 (by which time both Italy and Canada were signatories to the CISG), the CISG did apply to the case at hand. In this instance Swinton J correctly dealt with the issue of the Convention's applicability by reference to the appropriate principles such as article 2(a) of the CISG which applies to contracts for the sale of commercial goods.<sup>8</sup>

The defendant also argued that some of the mouldings it had received were damaged. Swinton J found that there was nothing substantially wrong with the mouldings despite the arguments of Forti Moulding on that point. Furthermore, the Court applied article 39(1) CISG which requires that notice of a lack of conformity of goods must be given to the seller within a reasonable time after the buyer discovers or ought to have discovered the damaged goods and not later than 2 years after actual delivery.<sup>9</sup> The court concluded that the defendants failed to make timely complaints prior to the statement of defence and therefore did not satisfy the requirements of article 39(1) of the Convention.

Forti Moulding further relied on article 40 which provides that the seller cannot rely on the limitation period in article 39 if the seller knew or ought to have been aware of the lack of conformity and did not disclose it to the buyer pursuant to article 40.<sup>10</sup> Swinton J concluded that there was no evidence that the plaintiff knew or ought to have known of any damage to the goods. The plaintiff claimed that there were no complaints about quality or overshipment until the

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8 CISG, art 2(a) provides as follows:

This Convention does not apply to sales:

- (a) of goods bought for personal, family or 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;
- (b) by auction;
- (c) on execution or otherwise by authority of law;
- (d) of stocks, shares, investment securities, negotiable instruments or money;
- (e) of ships, vessels, hovercraft or aircraft;
- (f) of electricity.

9 CISG, art 39(1) provides as follows:

(1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.

10 CISG, art 40 provides as follows:

The seller is not entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer.

statement of defence and counterclaim was issued in April 1998, and therefore the claims were time barred. Even if there had been overshipments, Swinton J found that the defendant accepted those goods in accordance with article 52(2) of the CISG and section 29(2) of the Ontario Sale of Goods Act 1990 and there could be no valid complaint years later.<sup>11</sup> On this basis, the Court dismissed the claims of the defendant.

This judgment is notable because it deals with many provisions in the Convention in a manner which had not been done before in *Nova Tool*. However, that said, there are portions of the judgment where Swinton J's application of the law to the facts is faulty. An example is when she discusses the concept of the merchantable quality of the goods by relying on sections 14-16 of the Ontario Sale of Goods Act 1990. This is puzzling considering that domestic sales law is not applicable once a matter has been held to fall within the four corners of the CISG unless it can be shown that there is a gap in the Convention that cannot be resolved through its interpretive or analogous provisions.<sup>12</sup> In this instance Swinton J should have held that the Ontario legislation had no bearing and that only the CISG should be applied in this case.<sup>13</sup> Furthermore, in holding that La San Giuseppe was entitled to pre-judgment interest pursuant to section 128 of the Ontario Courts of Justice Act 1990, she overlooked the applicability of article 78 of the CISG<sup>14</sup> which governs the seller's entitlement to interest and therefore should have been applied in place of section 128.<sup>15</sup> Given the controversy surrounding article 78 of the CISG and what rates of interest to apply, it would have been interesting for Swinton J to engage in a discussion of the issues surrounding the debate.<sup>16</sup> However, the discussion of the CISG in this case is fairly succinct, Swinton J does far more to incorporate the principles and the provisions of the CISG into her judgment than Zalev J in *Nova Tool*. This case, warts and all, nevertheless represents a positive step forward for the CISG in Canada.

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11 CISG, art 52(2) provides as follows:

- (1) If the seller delivers the goods before the date fixed, the buyer may take delivery or refuse to take delivery.
- (2) If the seller delivers a quantity of goods greater than that provided for in the contract, the buyer may take delivery or refuse to take delivery of the excess quantity. If the buyer takes delivery of all or part of the excess quantity, he must pay for it at the contract rate.

12 Jacob Ziegel "Canada's First Decision on the International Sales Convention" (1999) 32 CBLJ 313, 321.

13 Jacob Ziegel, above n 12, 322.

14 CISG, art 78 provides as follows:

If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74.

15 Jacob Ziegel, above, n 12.

16 Jacob Ziegel, above, n 12.

### **C *Brown & Root Services Corp v Aerotech Herman Nelson Inc***

In 2002, the Court in *Brown & Root Services Corp v Aerotech Herman Nelson Inc*<sup>17</sup> considered the application of the CISG to a contract for the sale of goods. In this case, Aerotech, a Canadian company, contracted with Brown & Root, an American company, to provide logistical support for the United States military in the Hungary and Bosnia region during "Operation Joint Endeavour" by providing heaters for military tents. Brown & Root alleged that most of the heaters that arrived were faulty and were not in working order. Consequently, Brown & Root brought an action against Aerotech alleging that they had fraudulently misrepresented to them that the heaters would be new, and furthermore, materially misrepresented the nature of the heating equipment and their ability to supply technicians to ensure proper installation. Aerotech counterclaimed for losses it allegedly incurred for the sale of the goods.

The court held that Aerotech was in breach of its agreement with Brown & Root to provide new heaters as specified in the terms and conditions agreed to by the parties. Brown & Root was awarded CAN \$1.6 million in compensatory damages and CAN \$50,000 in punitive damages. Aerotech argued pursuant to articles 38 and 49 of the CISG that Brown & Root had taken too long to assert a claim of fundamental breach or to repudiate the contract. However, McKelvey J found that Brown & Root repudiated the contract within a reasonable time. Presumably, the Court was of the view that the time from delivery of the goods (22 December 1995) to the time when Brown & Root's legal department formally notified Aerotech of non-performance (6 March 1996) was "within a reasonable amount of time" in accordance with article 49(2)(b) of the CISG. Once again, as in the previous Canadian cases dealing with the CISG, the Court was remarkably silent on the applicability of the CISG provisions and did not provide any meaningful commentary on how it was applying the provisions of the CISG and why. However, total blame cannot be laid at the feet of the Court as it was not clear to what extent counsel provided detailed submissions on the application of the CISG in its pleadings.

### **D *Mansonville Plastics (BC) Limited v Kurtz GmbH***

In the following two cases involving application of the CISG it is evident that Canadian courts are making greater efforts to apply the provisions of the Convention in a more accurate and meaningful manner. For instance, in *Mansonville Plastics (BC) Limited v Kurtz GmbH*, the provisions of the CISG were considered with more detail and sophistication than the three earlier cases.<sup>18</sup> This case involved a dispute between Mansonville, a Canadian company, who manufactured styrofoam blocks and Kurtz, a German company, who manufactured equipment for the production of styrofoam. Mansonville contracted to buy equipment from Kurtz which was

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17 *Brown & Root Services Corp v Aerotech Herman Nelson Inc (Brown & Root)* [2002] MBQB 229 (Court of Queen's Bench Manitoba).

18 *Mansonville Plastics (BC) Limited v Kurtz GmbH (Mansonville)* [2003] BCJ 1958.

manufactured by Kurtz's Austrian subsidiary. The equipment was late and did not produce proper styrofoam blocks until almost a year after delivery. As a result, Mansonville brought a claim against Kurtz alleging a breach of contract and breach of statutory warranties of fitness.

With regard to the late delivery of the equipment, Kurtz argued that they had validly suspended performance of the contract because Mansonville had not provided them with the stipulated letter of credit and that they were therefore not liable for the late delivery. In support of their position, they argued that article 71 of the CISG was applicable. Article 71 of the Convention provides that a party to a contract may suspend the performance of its obligations if it becomes apparent that the other party will not perform a substantial part of its obligations. However, Tysoe J also compared sections 17 and 18 of the British Columbia Sale of Goods Act 1996 to article 71 CISG as being "to like effect". To consider the British Columbia statute at this point was unnecessary as it was clear that the CISG governed the dispute. Article 71(3) provides that a party suspending performance must immediately give notice of the suspension to the other party. Tysoe J found that Kurtz was indeed entitled to suspend performance of its obligations under the contract pursuant to article 71 and did in fact do so, but only for a two week period. Thus, Kurtz was still in breach of the contract for the remaining six week delay in the delivery of the equipment to Mansonville.

Also in dispute was the suitability of the equipment when it arrived and whether or not any statutory warranties of fitness existed. Tysoe J considered both the CISG and the British Columbia Sale of Goods Act 1996 and found that Kurtz did not breach the statutory warranties of fitness under either the Convention or the British Columbia statute. Article 35 of the Convention reads:

- (1) the seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract and,
- (2) except where the parties have agreed otherwise, the goods do not conform with the contract unless they:
  - a) are fit for the purpose for which goods of the same description would ordinarily be used, or
  - b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract.

The Court found that because the machinery eventually worked without any major repairs, it was fit for its intended purpose at the time of its delivery and, therefore, Kurtz did not breach its statutory warranty of fitness. This case clearly represents a step in the right direction because the court applied provisions of the Convention where appropriate and provided more in-depth analysis and reasoning. However, the troublesome fact remains that Tysoe J (as in all of the previous cases) unnecessarily and improperly applied the British Columbia Sale of Goods Act 1996 and Canadian common law to assist in interpreting and applying the CISG provisions.

### **E Diversitel Communications Inc v Glacier Bay Inc**

The 2003 case of *Diversitel Communications Inc v Glacier Bay Inc*<sup>19</sup> represents the most positive application of the CISG by Canadian courts thus far. In August of 2002, Diversitel, a Canadian company, entered into a contract with Glacier Bay, an American company, for the supply of vacuum panel installation. Diversitel required the product to be delivered by 30 July 2003 in order to meet the terms of a pre-existing contract with the Canadian Department of National Defence. Diversitel paid Glacier Bay US \$40,000 when it issued its purchase order on 26 August 2002. Glacier Bay failed to deliver the goods on time leading Diversitel to terminate the contract and commence an action claiming US \$40,000 in damages. Glacier Bay argued that Diversitel terminated the contract without appropriate justification and counterclaimed for breach of contract and damages for lost profits in the amount of US \$144,900.00.

This case is especially noteworthy because it is the first Canadian case to consider other international decisions interpreting the provisions of the CISG. Diversitel argued that, pursuant to article 25 of the CISG, a failure to deliver what was contracted for may constitute a fundamental breach of contract.<sup>20</sup> Furthermore, Diversitel argued that article 33 of the CISG provides that a seller must deliver by the date specified in the contract.<sup>21</sup>

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19 *Diversitel Communications Inc v Glacier Bay Inc (Diversitel)* [2003] OJ4025 (Ontario Superior Court of Justice).

20 CISG, art 25 provides as follows:

A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

21 CISG, art 33 provides as follows:

The seller must deliver the goods:

- (a) if a date is fixed by or determinable from the contract, on that date;
- (b) if a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the buyer is to choose a date; or
- (c) in any other case, within a reasonable time after the conclusion of the contract.



Diversitel argued that its position was further strengthened by article 49<sup>22</sup> which provides that a buyer may declare the contract avoided in a case of fundamental breach, thereby giving way to a claim for restitution pursuant to article 81(2) of the Convention.<sup>23</sup> Diversitel argued that the CISG may, therefore, establish a lower threshold for the proof of fundamental breach than that required by the common law. However, the Court disagreed with this position. Roccamo J commented that counsel for Diversitel submitted a number of cases which reflected how European Courts had construed late delivery under article 33 CISG as tantamount to fundamental breach of contract.

Roccamo J then summarised one such case involving a contract between an Egyptian businessman and a German company. In an unpublished decision, the plaintiff, an Egyptian businessman, entered into a contract with the defendant, a German company, for the sale of nine used printing machines that were to be shipped to Egypt.<sup>24</sup> The defendant was obliged to send the machines in two shipments with the first shipment containing six machines and the second shipment containing the remaining three machines. The first shipment only included three machines. After demanding the shipment of the missing machines several times, the plaintiff declared the contract at an end and demanded the return of his money. The Court in that case held that the plaintiff properly

22 CISG, art 49 provides as follows:

(1) The buyer may declare the contract avoided:

- (a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or
- (b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed.

(2) However, in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so:

- (a) in respect of late delivery, within a reasonable time after he has become aware that delivery has been made;
- (b) in respect of any breach other than late delivery, within a reasonable time:
  - (i) after he knew or ought to have known of the breach;
  - (ii) after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of article 47, or after the seller has declared that he will not perform his obligations within such an additional period; or
  - (iii) after the expiration of any additional period of time indicated by the seller in accordance with paragraph (2) of article 48, or after the buyer has declared that he will not accept performances.

23 CISG, art 81(2) provides as follows:

(2) A party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract. If both parties are bound to make restitution, they must do so concurrently.

24 *Oberlandesgericht Celle*, 20 U 76/94 (27 May 1995) <<http://www.unilex.info>> (last accessed 10 November 2005).

ended the contract pursuant to the "fundamental breach" provision of article 49 of the CISG. The Court in *Diversitel* concluded that this decision, while instructive, did not lower the threshold for proving fundamental breach as established by the common law. However, while the Court went on to conclude that a fundamental breach had taken place, it did so on the basis of the common law and not on the basis of article 49 of the CISG, as it should have done.

#### **F Shane v JCB Belgium NV**

*Shane v JCB Belgium NV* made reference to the application of the CISG, but was in substance a tort case not a contract case.<sup>25</sup> The plaintiff in this case operated a farm near Ottawa, Canada and purchased a tractor directly from JCB in Belgium. The tractor caught fire and burned while being used by Shane once he had brought it back to Canada. Shane claimed damages for negligent manufacture and design of the tractor and made the claim in Ontario where the damages were suffered. JCB disputed the jurisdiction and claimed that Belgium was the most convenient and appropriate forum for any such claim.

In this case the parties did not dispute that the CISG was the law to be applied to the contract itself, but the Ontario court held that there was a real and substantial connection between Ontario and the claim for damages advanced by the plaintiffs in their tort action against JCB Belgium. Given that this was a tort claim, no substantive discussion of the CISG took place.

### **III THE ADVANTAGES OF THE CISG**

While the Canadian jurisprudence illustrates a positive step in the right direction for the wider acceptance of the CISG, it is not apparent from the cases what some of the key advantages of using the CISG are. A short discussion of some of the benefits is provided below.

#### **A Uniformity**

One of the cornerstones of the CISG – and any other treaty of a commercial nature – is that it injects a sense of uniformity and predictability in international trade and business relations. Instead of parties having protracted negotiations about the governing law of the contract, a neutral set of rules (that is, the Convention) is available and likely to be equally familiar to both contracting parties. In fact, some commentators have argued that the CISG, unlike domestic sales laws of countries, was drafted with practical business considerations in mind in keeping with the commercial intention of those that conduct cross-border transactions.<sup>26</sup> As one leading Canadian commentator has put it:<sup>27</sup>

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25 *Shane v JCB Belgium NV(Shane)* [2003] OJ 4497 (Superior Court of Justice, Ontario).

26 J Anthony Van Duzer, above n 4.

27 Jacob S Ziegel, "The Future of the International Sales Convention from a Common Law Perspective" (2000) 6 NZBLQ 336.

the CISG provisions are logically arranged and, on the whole, the drafting style is lucid and the wording is simple and uncluttered by complicating subordinated clauses. One does not have to be a sales expert to grasp the general sense of the Convention even on a first reading.

Therefore, commercial lawyers and their clients should give serious consideration to the application of the CISG to their contracts before it is excluded without a full understanding of the costs and benefits.

### ***B Substantive Advantages***

While the substantive advantages of using the CISG over domestic Ontario Sales law are numerous, for reasons of space, this paper will use one particular example to highlight one such advantage. Article 42 of the CISG is an example of how the Convention has been wisely drafted with the exigencies of international commerce in mind.<sup>28</sup> Article 42 of the CISG provides:

- 1) The seller must deliver goods which are free from any right or claim of a third party based on industrial property or other intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware, provided that the right or claim is based on industrial property or other intellectual property:
  - (a) under the law of the State where the goods will be resold or otherwise used, if it was contemplated by the parties at the time of the conclusion of the contract that the goods would be resold or otherwise used in that State; or
  - (b) in any other case, under the law of the State where the buyer has his place of business.
- (2) The obligation of the seller under the preceding paragraph does not extend to cases where:
  - (a) at the time of the conclusion of the contract the buyer knew or could not have been unaware of the right or claim; or
  - (b) the right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer.

It provides protection to a buyer against a third party "right or claim" based on intellectual property. The rationale for this is that the seller will almost always be in a better position to both assess and defend such intellectual property claims, whether they are meritorious or frivolous. In balancing the obligations of the seller, article 42 of the CISG also allocates risk to the buyer in cases where the seller would not be in a position to appreciate a risk of claims in the buyer's jurisdiction.

When comparing the protections afforded to buyers under article 42 of the CISG to the Ontario Sale of Goods Act it becomes immediately apparent that the protections provided under Ontario law are weaker and less clear. There is no specific provision that addresses the seller's responsibility for

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28 For a detailed discussion see J Anthony Van Duzer, above n 4.

third party intellectual property claims. Moreover, the certainty provided by article 42 of the CISG is also preferable to Ontario law. Under article 42 it is clear that the right or claim must exist under "the law of the state where the goods will be resold or used" as contemplated by the parties...or in the absence of contemplation, the buyer's state. In contrast, it is not clear or obvious how one would determine the relevant intellectual property laws for application of Ontario law without resort to conflict of law rules. Clearly, the certainty of the CISG provision is to be preferred and is more in keeping with the allocation of risks contemplated by businesses engaged in cross-border sales. This is especially true because of the obligations placed on the buyer in cases where it knows or ought to know about third party intellectual property claims. Again, the Ontario law does not limit the seller's obligations in as clear and practical a manner as article 42.

#### ***IV CONCLUSION***

As illustrated by the analysis of the Canadian cases above, the Canadian courts still show a reluctance to disregard domestic law when applying the CISG. The CISG is to be applied by looking to its provisions, its guiding principles and CISG decisions from other jurisdictions, not by trying to fit the provisions within the framework of domestic law.<sup>29</sup> Nevertheless, a comparison of the earlier cases with the most recent ones illustrates a marked willingness to apply the Convention's provisions and international case law interpreting it. While the Canadian courts have been slow to recognise and employ the provisions of the CISG, with time and education it is likely that they will become much more savvy in applying the Convention's provisions appropriately. Commercial lawyers practising in this area must lead the way by educating themselves (and their colleagues) about the provisions of the Convention and the benefits they bestow upon their clients. The escalation of the use of the CISG elsewhere in the world will likely ensure that this happens, if not now, then soon. Though there have been very few cases to date in Canada which have dealt with the provisions of the CISG in great detail, incremental improvements are slowly but surely evident between the first decision handed down in 1998 and the subsequent cases. Judges, lawyers and arbitrators are now showing a familiarity with the law and a willingness to apply CISG provisions and case law. While the evolution has been gradual, let us not forget that it has only been a mere seven years since the first CISG decision in Canada. I am fairly confident that we can look toward the future of the CISG in Canada with optimism and see the glass as being half full rather than half empty.

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29 Bruno Zeller "The United Nations Convention on Contracts for the International Sale of Goods – a Leap Forward toward Unified International Sales Laws" (2000) 12 Pace Int'l L Rev 79.