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«Cisg» and directives on sale: remedies for non-conformity and interaction with national law

TESI PRESENTATA DA: Cecilia Pasquale
TUTOR: Prof. Edoardo Ferrante

COORDINATORE DEL DOTTORATO: Prof.ssa Elena D'Alessandro

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Introduction

This study aims at investigating the mechanisms of interaction between two international sources on sales contracts (United Nation Convention on Contracts for the International Sale of Goods and European directives on certain aspects concerning contracts for the sale of goods - Dir. 1999/44, repealed by Dir. 2019/771 with effect from 1 January 2022 -) and domestic law, with specific reference to remedies for non-conformity of the goods. The investigation will be carried out in the light of the interpretative criteria specific to those instruments and considering the balancing of interests proposed by the architechture of remedies contained therein.

The contract of sale, besides being the most common scheme in business practice and the paradigm of exchanges, is at the crossroads of a plurality of statutes and sources (domestic, European and international). Among these, the research will focus in particular on the United Nation Convention on Contracts for the International Sale of Goods (CISG), Dir. 1999/44 and Dir. 2019/771.

The United Nation Convention on Contracts for the Internationale Sale of Goods (CISG) is a private international uniform law which reached worldwide acceptance. Though promulgated forty years ago in a different socio-economic and political environment, it remains a landmark in the international unification process. Adopted by ninety-four countries[1], the CISG has achieved the status of a world sales law but has also led a number of states to renovate their domestic sales laws and has influenced the EU Consumer Sales Directive in Europe.

EU legislation dealing with central aspects of consumer sales contracts has been in place since 1999, when the Consumer Sales Directive (Dir. 1999/44) was adopted. In 2019, the European Parliament and the Council adopted the Dir. 2019/771 concerning

[1] The status of signatories to the Convention is listed at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10&clang=_en.

contracts for the sale of goods, which will repeal Dir. 1999/44, with effect from 1 January 2022.

Both the United Nation Convention on Contracts for the International Sale of Goods (CISG) and European directives on the contract of sale, despite having different scopes of application, are instruments designed to create a uniform set of rules governing the sale of goods, although moved by different interests.

The field that, more than the others, lends itself to be investigated is that of the remedies available to the buyer in case of lack of conformity of the good purchased. The choice is motivated, first of all, from the increasing centrality that the issue has assumed, since the moment of the transfer of the property seems to have lost its centrality, and, rather, the profile of the verification of the correspondence of the economic operation to the interest of the buyer has become increasingly important. Secondly, since the area of the remedies in sales law is governed by the abovementioned stratification of national, European and international tools, there are different disciplines that differ for the parties and for the object involved in the exchange. These sources do not always coexist peacefully, but can overlap, concur or collide. All these three legal tools, indeed, provide an "architecture" of remedies for the buyer in case of lack of conformity and pose different problems of interaction with national rules, by reason of their nature. In fact, although the rules contained in these instruments are intended to replace the domestic rules and to supplant them (each with reference to its scope of application), national law continues to significantly interfere with sales transactions. The choice in favour of non-conformity issues is based on the grounds that, on the one hand, most sales controversies grow out of disputes over whether the goods conform to the contract, also in commercial contracts[2]. On the other hand, in order to compare the Convention with European Directives, the choice of remedies for non-conformity is compulsory, since European Directives only deal with these types of remedies.

The research will be conducted through a preliminary analysis of the rules of interpretation provided in the CISG and in the European directives on sale.

Textual uniformity, despite being a necessary step toward achieving substantive legal harmonisation, is insufficient and does not ensure a subsequent uniform application in

[2] J. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* , Kluwer Law International ed. (1999) p. 252.

practice. The mere existence of a common law, in fact, is not sufficient to guarantee uniformity: whether or not a uniform law is successful depends on its interpretation and, in particular, on whether national courts interpret its provisions uniformly, and whether those courts adopt a uniform approach to the filling of gaps in the law.

Issues of interpretation are more likely to arise when the subject has been drafted at an international level. In fact, while in the interpretation of domestic legislation, it is possible to rely on rules of interpretation and well-known principles within a particular legal system, when dealing with a Convention agreed upon at an international level and integrated into different national legal systems, interpretation becomes more uncertain since there is not an international legal infrastructure[3].

The examination of the interpretation of the Convention and of the directives on the sale will be carried out analysing, in the first place, the nature of the instruments in question and, in the second place, the applicable interpretative principles.

In the second chapter, we will focus on the remedies available to the buyer for the case of non-conformity of the purchased goods, provided by the laws in question. In particular, once the scheme of remedies proposed by the Vienna Convention has been illustrated, the possibility of setting it up in terms of hierarchy (as in the case of EU directives) will be explored. The possibility for the buyer who has received non-conforming goods of resorting to remedies provided by the law of the forum, instead of to those set in the CISG, will also be investigated. We will then move towards the illustration of the hierarchy of remedies set in Dir. 1999/44 and 2019/771, also investigating in this case the space left to the consumer in the use of the domestic system of remedies. In the case of European directives, in fact, questions of consumer protection arise.

Finally, after having illustrated the interpretative solutions accepted in the matter of interaction between supranational and internal remedies, we will proceed to compare CISG and directives on sale, trying to propose a criterion that defines the mechanism of interaction, in particular between the remedies of Dir. 2019/771 and those remedies, provided by the legislations of the Member States, which are designed to claim deficiencies in the quality of the goods.

[3] L. A. DiMatteo, L. Dhooge, S. Greene, V. Maurer, and M. Pagnattaro, *International Sales Law: A Critical Analysis of CISG Jurisprudence* (Cambridge University Press, 2005) p. 10.

CHAPTER I – Interpretation of «CISG» and European directives on certain aspects of contract for the sale of goods and interaction with national laws

1. Introduction

This chapter aims to analyse the gaps left by two categories of international sources on sales contracts (the United Nation Convention on Contracts for the International Sale of Goods and European directives on certain aspects concerning contracts for the sale of goods -Dir. 1999/44, repealed by Dir. 2019/771 with effect from 1 January 2022 -) and domestic law. This preliminary analysis is functional to illustrate, in the following chapter, how the system of buyers' remedies for non-conformity, provided by these supranational sources of law, interacts with remedies offered by national legal orders.

The United Nation Convention on Contracts for the International Sale of Goods[4] (also known by the acronym "CISG") was approved at the 1980 Vienna Diplomatic Conference and entered into force on 1st January 1988, after the ratification by eleven States[5]. The Convention has currently been ratified by ninety-four countries[6]. The CISG applies to contracts of the sale of goods between parties whose places of business are in different States, when the States are Contracting States (Art. 1 (1) (a)). It also applies if the parties whose place of business is in different countries (which are not Contracting States) and the conflict of law rules lead to the application of the law of a Contracting State (Art. 1 (1) (b)).

[4] *United Nations Convention on Contracts for the International Sale of Goods* (1980).

[5] Argentina, China, Egypt, France, Hungary, Italy, Lesotho, Syria, the United States, Yugoslavia, and Zambia.

[6] The list of ratifying countries is available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10&clang=_en.

The Directive 1999/44[7] was adopted in May 1999 and was to be transposed into national law before 1st January 2002. The Directive is applicable to sales contracts concluded between a consumer and a professional seller, whether the transaction is a domestic or cross-border one within the European Union. A similar scope of application is provided for by the 2019/771 Directive [8], adopted in May 2019 and which is going to repeal Dir. 1999/44 with effect from 1 January 2022.

Both the United Nation Convention on Contracts for the International Sale of Goods (CISG) and European directives on the contract of sale, despite their different scope of application, are instruments designed to create a shared set of rules governing the sale of goods, in order to achieve their respective objectives.

The Vienna Convention aims at creating a uniform law for the B2B international sale of goods, based on the assumption that the need to deal with multiple national contract laws with differing characteristics is likely to oblige companies to, *inter alia*, negotiate and agree on the applicable law, find out and obtain legal advice on foreign contract law, obtain translation of the rules, adapt contractual terms and commercial policies, comply with different consumer protection rules abroad and solve cross-border contractual disputes. Since this scenario creates the perception of legal complexity and also entails many significant additional transaction costs for businesses, agreeing on a common set of neutral rules should generate many and substantial benefits for the development of international trade[9].

Dir. 1999/44 points out that the creation of a uniform minimum set of fair rules governing the sale of consumer goods ensures a high level of consumer protection[10], strengthening consumer confidence[11]; Dir. 2019/771 states that the maximum harmonisation of certain aspects of sales law would allow the realization of the right

[7] *Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees* (1999).

[8] *Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC* (2019).

[9] As stated in the 3rd paragraph of the Preamble, "*the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade*".

[10] Recital 1 of Directive 1999/44

[11] Recital 5 of Directive 1999/44.

balance between achieving a high level of consumer protection and promoting the competitiveness of enterprises[12].

Although the rules contained in these legal tools are intended to replace the domestic rules and to overcome them (each with its own degree of "invasiveness" and with reference to its scope of application), national law continues to play an important role in respect of sales transactions. This is true, firstly, because the CISG and the European directives do not really discipline all sales transactions, their substantive sphere of application being limited to specific parties[13] and specific sales[14]. The CISG is applicable to B2B sales of movable goods between parties whose places of business are in different States, to the exclusion of the sales listed in Art. 2, while European directives applies to sales contracts of tangible movable item concluded between sellers and consumers, to the exclusion of some goods. Secondly, they do not expressly settle all the issues that may arise in connection with the transactions to which they apply. The Vienna Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract, with the exclusion of validity issues and the effect which the contract may have on the property in the goods sold; both directives on sale lay down rules limited to the matters of conformity of goods with the contract, remedies in the event of a lack of such conformity, the modalities for the exercise of those remedies, and on commercial guarantees.

Moreover, even issues settled in these legal tools are not always exhaustively regulated. This is the case, for example, of the formation of the contract under the CISG: the Convention only governs the requirements for the conclusion of a sales contract, which is achieved by means of offer and acceptance, but leaves uncovered precontractual duties of the parties. Similarly, the European Directives on sales, in so far as they promote the *harmonisation* of the systems on which they affect, leave to the Member States the freedom to complete the discipline (e.g. providing for a limitation on the period during which consumers can exercise their rights).

These three degrees of "incompleteness" (one determined by the scope of application; one linked to matters not expressly regulated within the scope of application; one due to the non-exhaustive nature of certain rules provided for) constitute many gaps

[12] Recital 2 of Directive 2019/771, third sentence.
[13] See Art. 1 CISG; Art. 1 (1) Dir. 1999/44; Art. 3 (1) Dir. 2019/771.
[14] Art. 2 and 3 CISG; Art. 1 (2) lett. b) and Art. 1 (4) Dir. 1999/44; Art. 3 (2) (3) (4) Dir. 2019/771.

that could be filled by national law. Since the investigation concerns the buyer's remedies in the event of non-conformity of goods, which is a matter that falls within the scope of application of all three instruments under observation, the issues which are particularly relevant are those which may arise with reference to the second and third cases of incompleteness.

This study will be carried out not only by exploring the rules that expressly deals with the impact of a domestic law remedy on the system provided by the CISG and the directives (which will be examined in the following chapters), but also by analysing the provisions governing in general the application of these tools and the interaction between them and domestic law. In light of the above, this chapter investigates the nature and the interpretation principles of the CISG and European directives, from which it is possible to deduce their degree of self-sufficiency and resistance to national law.

2. Status of «CISG» and European directives

The margins left to national law depend, in addition to the degree of completeness of the rules contained in the legal tools, also on the nature of the Convention and directives and, therefore, on the degree of interaction with the national system of the specific legislative instrument.

The CISG is a multilateral uniform treaty, containing statutory rules on the international sale of goods. A uniform substantive law is a legal tool which lays down specific, single and shared rules for all Contracting States, and in this it differs from rules of international private law, which find a connecting criterion to identify which legislation should apply. According to the majority opinion in case law, the nature of uniform substantive legal tool of the Convention entails that the CISG should prevail over other private international law rules, such as the 1955 The Hague Convention on the law applicable to international sale of goods, since the CISG contains uniform substantive law rules that are more specific than the relevant rules of private international law[15].

[15] With specific reference to Italian case law, see Tribunale di Pavia, *Fall.Tessile 21 S.r.l. v. Ixela S.A.* (1999); Tribunale di Vigevano, *Rheinland Versicherungen v. S.r.l. Atlarex and Allianz Subalpina S.p.A.* (2000) with commentary by F. Ferrari, 'Applying the CISG in a Truly Uniform Manner : Tribunale di Vigevano (Italy), 12 July 2000' (2001) 6 *Uniform Law Review* 203–15; Tribunale di Rimini, *Al Palazzo S.r.l. v Bernardaud di Limoges S.A.* (2002) also commented by F. Ferrari, 'International Sales Law and the Inevitability of Forum Shopping: A Comment on Tribunale di Rimini' (2004) 23 *Journal of Law and Commerce*.

This body of law also has self-executing nature[16], as legislative history shows. In contrast to ULIS[17] and ULF[18], which were conceived as uniform law annexed to a convention and provided that contracting states incorporate it into its own legislation[19], the CISG was drafted as an integrated convention, with the aim of making the substantive provisions of the uniform law applicable even without resort to domestic legislation[20]. This choice was intended to speed up the implementation and acceptance of the instrument[21]. Furthermore, it has been argued that also the fact that CISG's focus is devoted to the substantive law regulating the sale of goods between private parties (and does not address the ratified states) reveals its nature of a self-executing tool[22].

This characteristic of the Convention entails that, once it has been ratified by the countries, it does not require a transposition by a national legislative body and applies as if it is the domestic law of each Contracting State; on the other hand, people living in a Contracting State are entitled to enforce their rights or demand the fulfilment of another person's duty by referring directly to the legal rules of the treaty itself[23]. Thus, the Convention enters into force and directly applies to contracts of sale of goods between parties whose places of business are in different Contracting States or whose places of business are in different States, which are not both Contracting States, if the rules of private international law lead to the application of the law of a Contracting State[24]. In any case, even if the requirements for the application of the Convention are met, the parties may exclude the operativity of the CISG by mutual agreement, according to Art. 6. By

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16 There is consensus on this point. See C. P. Gillette and S. D. Walt, *The UN Convention on Contracts for the International Sale of Goods: Theory and Practice* , 2 ed. (Cambridge University Press, 2016) p. 1; P. Volken, 'The Vienna Convention: Scope, Interpretation, and Gap-filling' International sale of goods; Dubrovnik lectures, (New York, NY: Oceana, 1986) pp. 19–20; M. Van Alstine, 'Dynamic Treaty Interpretation' (1998) 146 *University of Pennsylvania Law Review* 687 at 700.

17 *Convention relating to a Uniform Law on the International Sale of Goods (The Hague)* (1964).

18 *Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (The Hague)* (1964).

19 With the consequence that the ratification was necessarily accompanied by legislation enacting the uniform law. See A. Janssen and O. Meyer, *CISG Methodology* (Sellier. european law publishers, 2009) p. 13.

20 See UNCITRAL Working Group, *Report of the Working Group on the International Sale of Goods on the work of its sixth session* (1975) p. 50; K. Sono, 'The Vienna Sales Convention: History and Perspective' International Sale of Goods: Dubrovnik Lectures, (Oceana Pubns, 1986) p. 4.

21 See J. Bailey, 'Facing the Truth: Seeing the Convention on Contracts for the International Sale of Goods as an Obstacle to a Uniform Law of International Sales' (1999) 32 *Cornell International Law Journal* 273–318 at 281; J. R. Hartwig, 'Schmitz-Werke & Co. v. Rockland Industries Inc. and the United Nations Convention on Contracts for the International Sale of Goods (CISG): Diffidence and developing International Legal Norms' (2003) 22 *Journal of Law and Commerce* at 81.

22 Bailey, 'Facing the Truth', 282.

23 F. Ferrari, *The Sphere of Application of the Vienna Sales Convention* (Springer Netherlands, 1995) p. 4.

24 According to Art 1 (1) (a) and (b) CISG.

stating that the CISG can be excluded, the drafters clearly affirmed the dispositive nature of the Convention, which applies automatically only when parties concerned have not otherwise agreed[25]. The dispositive nature of the Convention is understood here in the sense that dispositions are non-mandatory, and parties may exclude the application of the Convention, derogate from it or vary the effect of any of its provisions, opting-out from the Convention[26] (indeed, the exclusion of its application is frequent between parties of an international sale[27]). Also Art. 9 highlights the recessive character of the Convention, giving weight to usages to which parties have agreed, regardless of whether they specifically designated an applicable law[28]. This entails that the designated domestic law applies and, in the case in which the parties agree that the Convention does not apply, the applicable domestic law will be determined by the rules of private international law[29].

By comparison, Dir. 1999/44 and Dir. 2019/771 have profoundly different characteristics from an international treaty. In the field of consumer contract law, directive is the preferred instrument of the European Union for the implementation of its policies: these, in fact, allow for obtaining an approximation of the internal rules in an area, such as that of consumer protection, in which there is a shared competence between the Union and the Member States (Art. 4 par. [2][f] TFEU). The choice is also consistent with the

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[25] For references to the CISG's default character, compare C. P. Gillette and R. E. Scott, 'The Political Economy of International Sales Law' (2005) 25 *International Review of Law and Economics* at 476 and ; S. Walt, 'The CISG's Expansion Bias: A Comment on Franco Ferrari' (2005) 25 *International Review of Law and Economics* at 344 and ; J. Lookofsky, 'In Dubio Pro Conventione? Some Thoughts About Opt-Outs, Computer Programs and Preëmption Under the 1980 Vienna Sales Convention (CISG)' (2003) 13 *Duke Journal of Comparative & International Law* at 264; ; Gillette and Walt, *The UN Convention on Contracts for the International Sale of Goods*, p. 9 As for dispositive nature, see ; F. Ferrari, 'Specific Topics of the CISG in the Light of Judicial Application and Scholarly Writing' (1995) *Journal of Law and Commerce*; F. Ferrari, 'Remarks on the UNCITRAL Digest's Comments on Article 6 CISG' (2005) 25 *Journal of Law and Commerce* at 17; Corte di Cassazione, *Premier Steel Service v Oscam s.p.a* (2000).

[26] Only Article 12 is expressly declared to be of a mandatory character; however, there are other provisions which seem to be incapable of being excluded or modified by the parties, for example Art. 4 and Art. 7 CISG; C. M. Bianca and M. J. Bonell, *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (1987), at 60 and 92.

[27] See M. Koehler, Survey Regarding the Relevance of the United Nations Convention for the International Sale of Goods (CISG) in Legal Practice and the Exclusion of Its Application, 2006, according to which 70.8% of USA practitioners and 72.7% of German practitioners excluded it. For an analisys of the reasons for exclusion, compare Spagnolo, 'Green Eggs and Ham: The CISG, Path Dependence, and the Behavioural Economics of Lawyers' Choices of Law in International Sales Contracts', 6 *Journal of Private International Law* (2010). See also E. Ferrante, *La vendita nell'unità del sistema ordinamentale. I 'modelli' italo-europei e internazionali* (2018), at 64, on the role of the CISG between *lex* and contract.

[28] According to Art. 9, "[t]he parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.
The parties are considered, unless otherwise agreed, to have implicitly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned".

[29] Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, p. 78.

principle of subsidiarity found in Art. 5 (3) TEU, which permits EU action "*only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level*" and with the proportionality principle, which requires that the "*content and form of Union action*" does not exceed what is necessary to achieve a particular objective (Art. 5 (4) TEU). The principle of subsidiarity, in particular, imposes not only to consider proposing regulatory action by the Union in a certain field, but also to use less invasive regulatory instruments in respect with States' area of responsibility[30].

Directives establish a legal framework in which Member States are free to choose how to achieve the target set by the act, as long as they ensure its effective transposition[31]. From this consideration follows that he implementation phase left to Member States is not a mechanical process, but it usually leaves room for interpretation and is most likely guided by the distinctive values of each jurisdiction, which are shaped by Member States' socio-economic, philosophical and historical backgrounds[32]. Not only the content, but also the form and method of implementation may differ significantly[33]. The application mechanism of the directives makes clear that they are instruments of harmonization rather than unification, since they are aimed at approximating Member State legislation, leaving them some room for manoeuvre in the implementation[34], at the same time avoiding disruptive interference with provisions and principles of domestic law. This technique inevitably implies varying degrees of fragmentation to persist amongst the Member States.

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[30] E. Cannizzaro, *Il diritto dell'integrazione europea. L'ordinamento dell'Unione* (Giappichelli, 2015) p. 263. This latter aspect of principle of subsidiarity is, in practice, absorbed by the principle of proportionality; see ; M. E. Bartoloni, *Ambito d'applicazione del diritto dell'Unione europea e ordinamenti nazionali* (Edizioni Scientifiche Italiane, 2018) p. 63.

[31] J. Devenney and M. Kenny (eds.), *European Consumer Protection: Theory and Practice* (Cambridge University Press, 2012) p. 8.

[32] L. Miller, *The Emergence of EU Contract Law: Exploring Europeanization* (Oxford University Press, 2011) p. 75.

[33] See C. Twigg-Flesner, "'Good-Bye Harmonisation by Directives, Hello Cross-Border Only Regulation?" - A Way Forward for EU Consumer Contract Law' (2011) at 6–7, which observes that Member States do not have an obligation to create a specific national measure (a 'consumer code' or a section in existing codifications) where locate all the consumer provisions. Furthermore, the possibility of transposing directives by using legal language coherent with national law may cause a 'blend' into national law to such an extent that it becomes difficult to identify the European discipline.

[34] Whereas uniformity is aimed at making disciplines identical, harmonisation is a softer process. In EU law, regulations are aimed at reaching uniformity. The word harmonisation, rather, has become characteristic of European law as a result of the directive. C. Castronovo, 'Armonizzazione senza codificazione. La penetrazione asfittica del diritto europeo' (2013) *Europa e diritto privato* 905–26; See also F. Parisi, 'The Harmonization of Legal Warranties in European Sales Law: An Economic Analysis' (2004) 52 *American Journal of Comparative Law* at 406; Bridge, 'Uniform and harmonised sales law: choice of law issues' International Sale of Goods in the Conflict of Laws, (Oxford University Press, 2005) p. 909.

To this remark it should be added that the fragmented character of directives inevitably gives rise to interactions with national contract law. This issue will be further investigated in par. 7.

It should also be pointed out that, in contrast to what has been said about the UN Convention, consumer directives provide mandatory rules[35]. Once the directive has been implemented, it will be in force as a binding law which the contracting parties cannot exclude, since otherwise the legal protection provided to the consumer would be frustrated. This reasoning is grounded on the implicit assumption that benefits attributed to the consumers are to the detriment of sellers, so that the allocation of rights and obligations constitutes a balance of the conflicting interests of the parties[36]. In this regard, Art. 7(1) of Dir 99/44 states that any agreement aimed at waiving or restricting such rights before a lack of conformity is brought to the seller's attention, shall not be binding (the only exception being second-hand goods). Not only it is impossible to derogate from those rights, but is also not possible to escape from the application of the Directive, since parties are not allowed to choose the law of a non-Member State where the contract has a close connection with the territory of a Member State (art 7 (2))[37]; similarly, Art. 21 of Dir. 2019/771 provides that, unless otherwise specified, "*any contractual agreement which, to the detriment of the consumer, excludes the application of national measures transposing this Directive, derogates from them, or varies their effect, before the lack of conformity of the goods is brought to the seller's attention by the consumer, shall not be binding on the consumer*". Therefore, while the Member States are given a certain margin of manoeuvre in the implementation (regardless of the full or minimum character of the harmonization), little autonomy is reserved to the parties, due to the protective intent of the EU legislation.

A second set of factors which impacts on how those legal acts relate differently with national law is their interpretation and, with reference to directives, the post-implementation stage. Those aspects will be examined in the following paragraphs.

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35 S. A. Kruisinga, 'What do Consumer and Commercial Sales Law Have in Common? A Comparison of the EC Directive on Consumer Sales Law and the UN Convention on Contracts for the International Sale of Goods' (2001) 9 *European Review of Private Law* at 179.

36 See, critically, G. Wagner, 'Mandatory Contract Law: Functions and Principles in Light of the Proposal for a Directive on Consumer Rights' (2010) 3 *Erasmus Law Review* at 62.

37 A. Luminoso, *La compravendita* , 8th ed. (Giappichelli, 2015) p. 405; ; M. Scotton, 'Directive 99/44/EC on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees' (2001) 9 *European Review of Private Law* at 304.

3. Interpretation of the «CISG»

The discourse on the interrelation of the CISG with national law can only start with Art. 7 CISG, in which the methods on interpretation of the Convention are laid down. Art. 7 CISG prescribes to interpret the Convention having regard to three principles: the "*international character*" of the CISG, "*the need to promote uniformity in its application*," and "*the observance of good faith in international trade*"[38]. The provision is aimed at securing an interpretation free from biases of domestic laws by focusing on the international character of the CISG; it also aims to promote uniformity in its application, and the promotion of good faith in international trade (Art. 7 (1)); the disposition, furthermore, serves as a basis for gap filling (Art. 7 (2)).

3.1 The *international character*

For the purposes of this work, special attention will be paid in regard to the international character of the Convention and the so-called "autonomous interpretation"[39], while being aware that this prescription is not disconnected from the "uniform application" recommendation. Achieving uniformity in the discipline applicable to international sales contracts, indeed, is one of the main reasons for autonomous interpretation of the Convention[40]. The choice to focus on autonomous interpretation is

[38] Art. 7 of the CISG provides the following:"(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.(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law". The formula 'regard is to be had' has to be understood as a command direct to courts applying the Convention and not as a mere recommendation to use the principles laid down in Art. 7. See I. Schwenzer (ed.), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods* , Fourth Edition ed. (Oxford University Press, 2010) p. 121.

[39] The international character of the Convention as prescription of autonomous interpretation is supported by courts (see Tribunale di Forlì, *Mitias v Solidea S.r.l.* [2008]; Tribunale di Modena, *XX Cucine S.p.A. v Rosda Nigeria Limited* [2005]; Tribunale di Padova, *Ostroznik Savo v La Faraona soc. coop. a.r.l.* [2005]) and commentators (for all, ; F. Ferrari, 'Homeward Trend and Lex Forism Despite Uniform Sales Law' [2009] 1 *Vindobona Journal of International Commercial Law & Arbitration* at 16 and ; Bianca and Bonell, *Commentary on the International Sales Law*, p. 73.

[40] The attribution of a shared meaning should help in the application of the Convention and avoid regional interpretations. It has been pointed out that in the CISG, the elements of "internationality" and "uniformity" are interrelated thematically and structurally; they are interrelated functionally because an autonomous approach to interpretation is necessary for the functioning of both, and they are interdependent because the existence of one is a necessary prerequisite for the existence of the other. The international, rather than national, interpretation is necessary for uniformity in the application of the CISG to be achieved, and uniformity of application is vital if the CISG is to maintain its international character. See Gillette and Walt, *The UN Convention on Contracts for the International Sale of Goods*, p. 12; ; Bianca and Bonell, *Commentary on the International Sales Law*, p. 71; See also V. S. Cook, 'The Need for Uniform Interpretation of the 1980 United Nations Convention on Contracts for the International Sale of Goods' (1988) *University of Pittsburgh Law Review*; DiMatteo, Dhooge, Greene, Maurer, and Pagnattaro, *International Sales Law*, p. 10; J.

motivated by the fact that this, among the criteria of Art. 7 (1), it is the one that most of all has to do with the relationship between the Convention and the law of the Contracting States. The non-compliance with the principle of autonomous interpretation, in fact, may determine a high degree of penetration of national law in the Convention.

The principle has to do with the meaning to be attributed to the terms of the Convention: to have regard to the international character of the Convention has to be intended in the sense that its terms and notions have to be interpreted autonomously, in the context of the structure and the underlying policies of the Convention. Consequently, in order to solve interpretative problems arising under the CISG, one should not refer to the meaning which might usually be attached to a term within a particular legal order, even if the terms used by the CISG are exactly the same expressions that have a specific meaning within a particular domestic legal system. Art. 7 command, thus, is a warning to interpreters not to treat the Convention as a basis on which to graft national legal traditions. The need for an internationally oriented interpretation is easy to guess: in international uniform law, any choice of one expression rather than another is the result of a compromise between different legal traditions[41] and, generally, the terms used do not correspond to concepts in the meaning they assume in a specific domestic law[42]. Furthermore, the prescription is motivated by the need to make up for the absence of the legal infrastructures and legal culture that characterises a domestic legal setting. Therefore, even though the CISG is incorporated into national law, it should not be considered as a part of the national legal systems but should be regarded as part of international law and should be entitled to an international, rather than national, interpretation.

Felemegas (ed.), *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law* , 1 edition ed. (Cambridge University Press, 2007) p. 45.

[41] I. Schwenzer (ed.), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods* (Fourth Edition, 2010), at 123; the necessity of an interpretation which keeps in mind the international carachter of the Convention is due to the fact that not only the content of the Convention, but also its formal presentation is the result of deliberations between lawyers from all parts of the world with different legal backgrounds and, '*[w]hen drafting the single provisions these experts had to find sufficiently neutral language on which they could reach a common understanding. Even in the exceptional cases where terms or concepts were employed which are peculiar to a given national law, it was never intended to use them in their traditional meaning*'; compare C. M. Bianca and M. J. Bonell, *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (1987).

[42] In rare cases, it may however be possible that a term was chosen in view of its meaning under domestic law, e.g. the notion of 'stock, shares, investment securities' and 'ships'. Compare Schwenzer, *Schlechtriem & Schwenzer*, p. 123. See also F. Ferrari, 'Autonomous Interpretation versus Homeward Trend versus Outward Trend in CISG case law' (2017) 22 *Uniform Law Review* at 246.

As mentioned above, the primary addressees of the prescription are courts and arbitral tribunals, i.e. those who apply the Convention. Since the CISG, once ratified, becomes domestic law, interpreted by domestic courts within their national legal system, the risk of a non-autonomous interpretation (or homeward trend, which is the natural tendency to read the international text "through the lenses of domestic law"[43]) is actual[44]. This tendency can be the result of a tendency, conscious or not, of courts to read the uniform law through the background of their *lex fori* and to interpret the uniform law according the national principles, with which they are familiar. It has been observed that the homeward trend may consist in different attitudes of the courts. It may take the form of the non-application of the CISG where it should be applied (as applicable by default and not excluded by the parties[45]); secondly, and more frequently, the homeward trend may consist in interpreting the terms used in the Convention in light of domestic law or narrowing the scope of the CISG by resorting to domestic concepts[46]. In any case, this trend is undesirable, because it promotes parochialism, in contrast to what is claimed by the CISG[47]. The risk of a domestic interpretation of the Convention is exacerbated by the fact that the CISG does not include a unitary mechanism for resolving disputes that might arise with respect to its own meaning. The Convention, indeed, is not provided with a supreme judge having exclusive jurisdiction and the interpretation of conventional provisions is left to the judges of the contracting states.

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[43] J. Honnold, 'The Sales Convention in Action - Uniform International Words: Uniform Application' (1988) 8 *Journal of Law and Commerce* at 208. For further definitions, see Ferrari, 'Autonomous Interpretation versus Homeward Trend versus Outward Trend in CISG case law', 249.

[44] The homeward trend has to be distinguished from recourse to domestic law for interpretive purposes, where that recourse to domestic law is imposed by the CISG itself. It is the case of the expression 'private international law': since the CISG constitutes a substantive law convention that does not set forth any private international law rule, the expression 'private international law' found in Arts. 1(1)(b) and 7(2) CISG has to be understood as a reference to the private international law of the forum. Ferrari, 'Autonomous Interpretation versus Homeward Trend versus Outward Trend in CISG case law', 250.

[45] See par. 2 of this work.

[46] L. A. DiMatteo, *International Sales Law: A Global Challenge* (Cambridge University Press, 2014) p. 204;; H. M. Flechtner, 'The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and Other Challenges to the Uniformity Principle in Article 7(1) Symposium - Ten Years of the United Nations Sales Convention' (1997) 17 *Journal of Law and Commerce* at 199. Among the different areas of divergent interpretation, the examination of the goods and the notice requirements (Art. 38 and 39) is particularly relevant, due to the fact that, in domestic sales laws, there is a great variety of views concerning the question of whether a buyer has to inspect the goods and give notice to the seller of a nonconformity. .

[47] In the CISG preamble and in Art. 7(1). See Ferrari, 'Autonomous Interpretation versus Homeward Trend versus Outward Trend in CISG case law', 247.

Within this framework, the development of case law based on the provisions of the CISG and the serious consideration of this case law by later courts plays a decisive role in the process of interpretation of the CISG. From the necessary regard given to the international character of the Convention, it has been deduced that courts have to take foreign CISG jurisprudence into account when interpreting the Convention. A court which address a question of interpretation of the CISG's provisions, which may have already been faced by a court in another Contracting State, should take into consideration the interpretative answer given by the foreign courts. In this context, even if Art. 7 does not mention the authority of decided cases, however, the incitement to treat the CISG as an international text and to promote uniformity in its interpretation is intended in the sense that courts should decide with deference to judicial opinions from other countries[48]. Foreign CISG decisions should, at least, be regarded by courts as of persuasive value[49]. According to the majority view, this body of case law has not to be intended in the common law sense, but in a new system like the CISG's, in which courts have an obligation to expand their reasoning process to convey persuasion to courts of other legal systems[50].

3.2 Gap-filling and matters governed but not expressly settled

The relationship between dispositions of the Convention and domestic law (and how much the second enters in the first) is also connected to how the CISG regulates the mechanism of gap-filling[51].

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[48] Compare Felemegas, *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law*, p. 16; ; DiMatteo, *International Sales Law*, p. 406.

[49] Bianca and Bonell, *supra* note 17, at 90; Schwenzer and Hachem, *supra* note 39, at 468. Italian courts have often referred to foreign cases not as binding precedent, but as persuasive authority, reporting that foreign case law, although not binding, is however to be taken into consideration as required by CISG Article 7 (1). Compare Ferrante, *supra* note 16, at 76 ; See, e.g., the following italian case law: Tribunale di Cuneo, *Sport d'Hiver Di Genevieve Culet v. Ets. Louys et Fils*, 31 January 1996 Tribunale di Pavia, *Fall.Tessile 21 S.r.l. v. Ixela S.A.*, 29 December 1999 Tribunale di Vigevano, *Rheinland Versicherungen v. S.r.l. Atlarex and Allianz Subalpina S.p.A.*, 12 July 2000. See also DiMatteo, *supra* note 19, at 406.

[50] The not binding force of foreign precedents is based on the observations that not all national judges possess the knowledge to study the case law from all CISG countries. Furthermore, it has been argued that this would require a supranational judicial system ensuring the uniform application of the CISG. However, the Italian CISG cases suggest that a supranational stare decisis is possible in the application of the CISG. The rejection of the idea of a binding precedent seems only formal, while, in practice, they have accurately followed the principles established by foreign courts. In this view, see DiMatteo, *International Sales Law*, p. 406.

[51] Gap-filling and interpretation are in a substantive relationship with each other: interpretation must be the means whereby gaps are filled, because when a gap is detected the problem arising thereby should be solved through interpretation of the CISG. Felemegas, *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law*, p. 23.

Art. 4 distinguishes the matters governed by the CISG from those that it does not govern. As a result, the disposition marks a line that impacts on the interaction between the Convention and domestic law.

CISG, indeed, does not cover all subject matters in the area of sales law, but it governs "*only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract*" (Art. 4 sentence 1). It has to be pointed out that, according to the majority opinion among scholars, the list of the matters covered (and settled) is not exhaustive but has an introductory function[52]. In this regard, it should be noted that the matter listed in sentence 1 of Art. 4 are not the only ones settled by the CISG, given that the Convention also governs issues that does not concern the matters listed in the first part of Art. 4, such as the interpretation of statements, conduct, and contract (Art. 8), the relevance of practises and usages (Art. 9), the form (Art. 11), modification and termination of contract by agreement (Art. 29). In this view, it has been correctly noted that it may be proper to interpret the reference to the matters governed by the CISG "as implying that these matters are «without any doubt» governed by the Convention"[53].

The Convention also specifically excludes issues concerning the validity of the contract (Art. 4 (a)) and the effect of the contract on the property in the goods (Art. 4 (b)), "*except as otherwise expressly provided in this Convention*". The domestic law applicable has to be determined by the conflict of laws rules of that country, the courts of which have jurisdiction to settle the controversy. The legislative choice not to regulate this aspects arises from a twofold reason: on a technical level, this is due to an objective difficulty of standardizing very different rules and dogmatic categories; at the political level, the choice is motivated by a substantial reluctance to invade aspects of contract law which some Contracting States still jealously consider appropriate to reserve to national law[54], and also because these aspects are governed by mandatory rules, while the discipline of the CISG has a dispositive nature.

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[52] Schwenzer, *Schlechtriem & Schwenzer*, p. 75; ; F. Ferrari, 'The Interaction between the United Nations Conventions on Contracts for the International Sale of Goods and Domestic Remedies (Rescission for Mistake and Remedies in Tort Law)' (2007) 71 *Rabels Zeitschrift für ausländisches und internationales Privatrecht / The Rabel Journal of Comparative and International Private Law* at 59.

[53] Ferrari, 'The Interaction between the United Nations Conventions on Contracts for the International Sale of Goods and Domestic Remedies (Rescission for Mistake and Remedies in Tort Law)', 60.

[54] S. M. Carbone, 'L'ambito di applicazione ed i criteri interpretativi della convenzione di Vienna sulla vendita internazionale' La vendita internazionale, (Giuffrè, 1981) p. 81.

The structure of this body of law inevitably leaves gaps behind, that the CISG faces through the mechanism of gap-filling via Art 7 (2). Indeed, between matters excluded and matters expressly settled, there is the "grey area" of the matters *governed by this Convention*, not excluded nor expressly settled. These issues need to be "*settled in conformity with the general principles on which it* [the CISG] *is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law*"[55]. Art. 7 (2) reaffirms the criteria established in Art. 7 (1): autonomous interpretation is a principle that applies to the Convention in general, not only in the case of ambiguities in the text, therefore also in the case of gaps courts should, as much as possible, abstain from resorting to domestic laws and try to find an answer within the Convention.

The interpretation rule set in Art. 7 (2) requires firstly to determine which are the matters governed by the CISG but not expressly settled in it; secondly, once the matters are found, the disposition provides that the gap left by the Convention has to be filled with the "general principles"[56] on which the Convention is based. Finally, if such principles are not discovered, the judge has to engage the conflict of laws analysis and determine which law applies. Thus, where a gap is found in the Convention, primary reference must be made to the Convention's "general principles" and the reference to domestic law is only subsidiary. Since Art. 7 (2) relates to "matters governed" by the Convention, this mechanism does not apply to issues excluded from the scope of application of the Convention. These matters, indeed, do not constitute a gap, but rather a logical consequence of the decision not to regulate those issues and, subsequently, are voluntarily left to the competence of the national laws.

The gap-filling procedure is aimed at diminishing the risk of diversity in the Convention's gap-filling from one legal system to another, given that the recourse to domestic laws is to be had only when it is not possible to fill a gap by applying the general

[55] Art. 7 (2). The gaps to which the rule refers are not the explicit exclusions. See Felemegas (ed.), *supra* note 21, at 24; However, although is not possible to fill the exclusions by means of 'general principles', the significance to be attributed to them should be derived from a uniform and internationally oriented interpretation (see par....).

[56] The content of this notion and the ways to find these principles in the Convention is not the object of this work, but it has been extensively investigated. Compare Felemegas, *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law*, p. 27; ; O. Lando, 'CISG and Its Followers: A Proposal to Adopt Some International Principles of Contract Law' (2005) 53 *The American Journal of Comparative Law*.

principles on which the Convention is based[57]. The gaps which are filled by means of uniform rules are referred to as internal gaps, since they can be settled by extensive interpretation and underlying general principles of the CISG; instead, external gaps are those for which such an internal settlement is not possible and have to be filled through the recourse to domestic rules determined by the conflict rules of the forum[58].

It should be noted, moreover, that the question of whether a topic has or has not been included explicitly or implicitly within the scope of CISG may be difficult to answer in practice: there can be substantial debate about whether an issue falls within that range, depending on how narrowly or broadly one defines the issue. However, if uniformity in the CISG's application is the ultimate objective, it follows that, also in the case of external gaps, interprets should try to find an interpretative solution within the Convention.

Within this framework, it has been observed that, on the one hand, the recourse, in Art. 7 (2), to the law applicable in accordance with the rules of private international law, highlights that the idea of the Convention being a self-contained body of rules independent of and distinct from the different domestic laws is not an absolute one. On the other hand, the fact that gaps are to be settled in conformity with the general principles on which the Convention is based or, *in the absence of such principles,* in conformity with the law applicable by virtue of the rules of private international law, shows that recourse to domestic law represents a last resort option to be used only if it is not possible to find a solution by analogical application of specific provisions or by the application of general principles underlying the Convention[59]. The recourse to domestic law, therefore, should not be used as an "easy path around the sometimes difficult task to determine general principles of the CISG"[60].

3.3 The validity exception

In the light of the foregoing paragraphs, it is now possible to investigate the meaning of the exclusion of validity from the matters dealt with in the Convention. Sentence 2 (a)

[57] Felemegas, *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law*, p. 22.
[58] See, on the distinction between internal and external gaps Schwenzer, *Schlechtriem & Schwenzer*, p. 134.
[59] Bianca and Bonell, *Commentary on the International Sales Law*, p. 73.
[60] Schwenzer, *Schlechtriem & Schwenzer*, p. 142.

of Art. 4 is a relevant provision when assessing the extent of the interaction between the CISG and domestic law[61].

The investigation on the meaning to be attributed to the exception of validity constitutes an application of what has been said in the previous paragraphs regarding interpretation and is functional to what will be said on the possibility for the buyer to resort to domestic remedies for the non-conformity of the goods.

Article 4's second sentence expressly excludes from the CISG's scope the validity of the contract and any of its provisions, and the effect of the contract on title (property) in the goods sold, "*except as otherwise expressly provided in this Convention*". The provision in question, on the one hand, makes the CISG politically acceptable by acknowledging that diversity sets limits to the goal of unification. On the other hand, due to the fact that Art. 4 (a) is an elastic exception, it should be able to facilitate changes in international commercial practice which foster the goals of uniformity[62]. The disposition, distinguishing the matters governed by the CISG from those not governed, draws a line between the Convention and domestic law in general: the fact that an issue is not addressed by the Convention means that national Courts have to engage the traditional conflict of law analysis to determine which law has to be applied to the issue.

With specific reference to the exclusion of validity issue from the scope of application of the Convention, it should be noted that the CISG does not define the term "validity". It is, however, clear that the interpretation of the excluded matters and the amplitude of their significance may have a significant impact on the space for national dispositions[63]. The notion, according to the meaning normally attributed in private law, concerns the issues that render a contract void, voidable or unenforceable, with significant differences between the different national laws.

However, the CISG's precept of interpreting its provisions in view of promoting autonomous interpretation suggests that the question of what constitutes a matter of validity is governed by the CISG itself. If the notion of validity is to be reconstructed on the basis of the Convention, then it shall be subject to the interpretative techniques

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[61] '*The exclusion of validity issues from the scope of the CISG embodies the tension between the domestic and the international legal orders*'. Hartnell, 'Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods', 18 *Yale Journal of International Law* (1993) , at 8.

[62] Hartnell, 'Rousing the Sleeping Dog', 20.

[63] For a view on the approaches to this task, see Hartnell, 'Rousing the Sleeping Dog', 8 ss.

referred to in Art. 7 and shall be understood in an autonomous and internationally oriented sense[64]. This means that an issue is not one of validity simply because national law labels it as one; rather, the issue should be excluded from the CISG's scope only if the CISG considers it an issue of validity. According to this assumption, the list of all the validity issues in the contracting States' jurisdictions cannot be a satisfactory definition of validity under the CISG. Such an approach, rather, increases the excluded "validity area", actually limiting its scope of application[65].

An internationally oriented interpretation, which would lead to a more widespread and uniform application of the Convention, has to take into account the *ratio* of the validity dispositions in different jurisdictions and include in Art. 4 only the ones who cannot be harmonized because they express a choice of public policy, that needs to be left to individual States[66].

The scope of this exclusion is, moreover, reduced by those who observe that, irrespective of the interpretation of the term, the mention of validity is not decisive for the inclusion or exclusion of certain issues from the Convention. On the one hand, the sentence's introductory phrase ("*In particular*") leads to the conclusion that the matters referred to in paragraphs a) and b) of Art. 4's second sentence are not the only ones potentially excluded[67]; on the other hand, as already highlighted, the text explicitly assumes that the CISG may govern questions excluded elsewhere, as can be deduced from the

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64 Schwenzer, *Schlechtriem & Schwenzer*, p. 88; Ferrante, *La vendita nell'unità del sistema ordinamentale. I 'modelli' italo-europei e internazionali*, p. 179; H. Flechtner, 'Selected Issues Relating to the CISG's Scope of Application' (2009) at 94.

65 Arguing that domestic law is responsible for determination of validity would entail that a party in one country could apply its national law on the ground that a certain issue is a validity one under its own law, with subsequent great lack of uniformity. See P. C. V. Leyens, 'CISG and Mistake: Uniform Law vs. Domestic Law – The Interpretative Challenge of Mistake and the Validity Loophole' (2005); Furthermore, it has been noted that systems providing for many conditions of validity of the contract would impose a restriction of the Convention, while legal systems 'poor' of conditions of validity would give more space to the CISG. Ferrante, *La vendita nell'unità del sistema ordinamentale. I 'modelli' italo-europei e internazionali*, p. 179.

66 There is no disagreement on the fact that Art. 4(a) CISG preserves the effect of domestic rules avoiding illegal or immoral contracts, which are the classic issues which the drafters intended to leave untouched by the uniform law. Hartnell, 'Rousing the Sleeping Dog', 19. See also ; Ferrari, 'The Interaction between the United Nations Conventions on Contracts for the International Sale of Goods and Domestic Remedies (Rescission for Mistake and Remedies in Tort Law)', 52 and ; Ferrante, *La vendita nell'unità del sistema ordinamentale. I 'modelli' italo-europei e internazionali*, p. 125.

67 See U. Schroeter, 'The Validity of International Sales Contracts: Irrelevance of the "Validity Exception" in Article 4 Vienna Sales Convention and a Novel Approach to Determining the Convention's Scope' Boundaries and Intersections. 5th Annual MAA Schlechtriem CISG Conference, (Eleven International Publishing, 2013), pp. 95–117 p. 101, which argues that the wording of the disposition makes clear that issues not covered by the term 'validity' may nevertheless be outside the Convention's scope, with the consequence that domestic law may apply even with reference to issues not qualified as 'validity' matters.

expression "*except as otherwise expressly provided in this Convention*"[68]. This entails that everything settled in the CISG, even if it is a validity issue under a national law, cannot be labelled as a matter of validity for the international sale of goods under the CISG. For example, many national laws provide that contracts that do not satisfy requirements of form, such as writing or signature requirements, are invalid and therefore unenforceable. However, Art. 11 allows a contract to be enforceable if it is not in written form or evidenced by a writing (unless the reservation in Art. 96 and recognized by Art. 12 applies). In the light of the fact that the CISG expressly provides for the validity of contracts not concluded or evidenced by a writing, it is reasonable to conclude that form is not a matter excluded under the Convention[69]. Moreover, the fact that Art. 68 sentence 3 provides for the risk of loss in cases where, at the time of the conclusion of the contract, the goods had already been lost or damaged leads to the conclusion that a contract relating to non-existent goods is valid notwithstanding the solution adopted by the otherwise applicable domestic law, even if this would be a validity issue under some national laws.

To sum up, the interpretative attitude set in the Convention allows for finding an autonomous significance of the term validity that prevents national preconceptions[70].

4. Interpretation of European directives

4.1 Minimum and maximum harmonisation in European directives

What has been previously said in par. 2 about the implementation of directives needs to be specified in view of the different levels of harmonisation set by the single legal tool, with specific reference to Dir. 1999/44 and Dir. 2019/771. Moreover, it has to be taken into account that the harmonisation process takes place, at least in part, through rulings of European Court of Justice (although Directive 1999/44 did not give rise to a significant number of decisions).

[68] According to the majority view, the phrase does not refer only to issues explicitly addressed in the Convention's provisions, but also to those settled in the Convention through the general principles, accoring to Art. 7 (2). Schroeter, 'The Validity of International Sales Contracts', p. 102; See also Schwenzer, *Schlechtriem & Schwenzer*, p. 88 stating that the term 'expressely' should not be overstated.

[69] Ferrante, *La vendita nell'unità del sistema ordinamentale. I 'modelli' italo-europei e internazionali*, p. 120; ; Gillette and Walt, *The UN Convention on Contracts for the International Sale of Goods*, p. 79.

[70] Schwenzer and Hachem, 'The CISG—Successes and Pitfalls'.

Harmonisation by means of directives may take the form of minimum and maximum harmonisation[71]. The attempt to describe the differences between these two levels of harmonization is based on the abstract comparison of these tools, in the knowledge that the implementation may in practice be much more complex.

Both approaches are adopted on the basis of Art. 114 TFEU, which allows the European Parliament and the Council to adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market. The adoption of consumer protection directives on the basis of Art. 114 TFEU is grounded on the assumption that consumers do not shop across borders because of the differences in national consumer laws, by reason of the fact that they are not sufficiently confident that they will be adequately protected when buying goods or services abroad. Harmonised laws, therefore, are aimed at producing more confident consumers and, consequently, more cross-border transactions for the benefit of the internal market[72].

Dir. 1999/44 and Dir. 2019/771 are examples of each approach and are representative of the evolution of the model of EU "interference" in national contract law. European policies developed from a less intrusive top-down intervention, which was valid at a time when consumer rights were very different between the Member States, to a stricter interference in national rules, on the grounds of the assumption that more rigid standards from which national legislators cannot deviate may solve the problem of the differing domestic rules that consumers and businesses have to face[73]. It has been argued

[71] We refer to this also by the name of full harmonisation.

[72] Art. 114 TFEU has become the cornerstone, albeit a contested one, of the contract law programme. Compare Miller, *The Emergence of EU Contract Law*, p. 46. With regard to the functioning of the internal market, the European Union has exclusive competence with reference to competition rules (Art. 3 par. [1][b] TFEU) and shared competence in all other areas (Article 4 par. [2][a] TFEU). Also consumer protection is a shared competence (Art. 4 par. [2][f] TFEU). In case of shared competence, "the Union and the Member States may legislate and adopt legally binding acts in that area" (Art. 2[2] TFEU); until the European Union has made use of its competence, Member States remain free to legislate, when the Union does exercise its competence, Member States are no longer free to regulate these matters themselves. Therefore, when harmonisation takes place, unless the harmonisation measure taken by the European Union provides otherwise, the Member States are no longer free to maintain or introduce national legislation in the harmonised area (; European Court of Justice, *María Victoria González Sánchez v Medicina Asturiana SA*). In the area of consumer protection, Article 169 (2) TFEU indicates that measures may be taken (a) "pursuant to Article 114 in the context of the completion of the internal market" as well as (b) to support, supplement and monitor the policy pursued by the Member States. Where harmonisation is intended to contribute to the completion of the internal market, the European Union is free to choose between minimum and full harmonisation. Compare M. Loos, 'Full Harmonisation as a Regulatory Concept and its Consequences for the National Legal Orders: The Example of the Consumer Rights Directive' (2010) at 3–5.

[73] The shift to the maximum harmonisation approach was enshrined in the Green Paper on the Review of the Consumer Acquis (92 COM (2006) 744 final), which was published in 2007 after the launch of the Review of the Consumer Acquis

that this shift towards maximum harmonization has a constitutional dimension, because it regards the distribution of competence on the level of protection of the consumers in favour of the EU and must be consistent with the principles of subsidiarity and proportionality[74]. Issues such as how to balance consumer protection against the interests of business in freedom of contract and security of transactions are removed from the national domain in favour of a more hierarchical and less cooperative pattern of contract[75]. Therefore, although both minimum and maximum harmonisation aim at enhancing consumers' confidence[76] to shop cross border and stimulate businesses to sell in different countries for the benefit of competition[77], they demonstrate a different degree of interference between European and national law and may lead, as a last resort, to a different balance of interests.

Minimum harmonisation implies that Member States might, in the transposition of the dispositions, afford consumers a higher level of protection than is required by the directive[78]: Dir. 1999/44/CE imposed a set of minimum requirements to be enforced by

in 2004 from the Commission. The Review covers eight directives and provides a comparative analysis on how the Directives are applied in the Member States. This aims to achieve "a real consumer internal market striking the right balance between a high level of consumer protection and the competitiveness of enterprises, while ensuring the strict respect of the principle of subsidiarity". See C. Goanta, *Convergence in European Consumer Sales Law: A Comparative and Numerical Approach* (2016), at 19; this 'top-down' legislative strategy is sustained by a 'hierarchical mode of governance that presupposes that the doctrine of the supremacy of EU law will be sufficient as a governance mechanism'Miller, *supra* note 14.

74 Miller, *The Emergence of EU Contract Law*, p. 13.

75 The adoption of measures by EU has to respect the following regulatory triangle: optimise the functioning of the internal market; allow the consumer to participate in the internal market without limitation linked to state borders; respect Member State autonomy in areas traditionally left to their competence. (G. Howells and N. Reich, 'The current limits of European harmonisation in consumer contract law' [2011] 12 *ERA Forum* at 41). ; The maximum/minimum harmonization option has consequences on this balance and determines, to some extent, the type of "society in which we want to live"; see G. G. Howells and R. Schulze, *Modernising and Harmonising Consumer Contract Law* (sellier. european law publ., 2009) p. 49.

76 Recital 5 of Directive 1999/44 and recital 4 and 8 of Directive 2019/771.

77 Recital 3 of Directive 1999/44 and especially recital 8 of Directive 2019/771, which states that contract law rules of Member States "*are among the key factors shaping business decisions as to whether to offer goods cross-border*".

78 Directives adopted between 1985 and 2002 were based on a minimum harmonisation standard: *Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises* (1985); ; *Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours* (1990); ; *Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts* (1993); ; *Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis* (1994); ; *Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts - Statement by the Council and the Parliament re Article 6 (1) - Statement by the Commission re Article 3 (1), first indent* (1997) and, obviously, Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees. Directive 85/577/EEC and Directive 97/7/EC have been repealed by ; *Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council* (2011), which is a full harmonisation directive.

the Member States, which could provide stricter requirements than those specified in the Directive (Art. 8 (2)) to ensure a higher level of consumer protection[79].

The choice in favour of a minimum harmonisation clause has been motivated by political reasons (enacting a maximum harmonisation legislation that needs to be agreed through a system of co-decision[80] and in accordance with a qualified majority vote would have been challenging) and legal diversity of the systems involved[81]. A minimum harmonised contract law, which allows member states to modify *in melius* the provisions included in the Directive, thus increasing consumer protection beyond the minimum level, has a little impact both on national private law and responsibility of States, which preserve their legislative freedom. From this point of view, minimum harmonisation acts as "relief valve" that releases some of the pressure generated by the expansion of European contract law and its interference with national contractual structures. In addition, the minimum harmonization provision reflects the multi-level mechanisms of the EU, in which both national and European levels cooperate in the development of consumer contract law[82], and enhances the cultural diversity of the Member States[83].

However, the fact that minimum harmonisation allows Member States to enact or retain more stringent measures than the ones set within the Directive itself, although advantageous in terms of tendency to encourage political agreement and beneficial to the consumer, nonetheless reduces the effectiveness of harmonization measures, since it does not eliminate divergent practices between Member States[84]. The main criticism brought against minimum harmonisation is that it fosters a "puzzling" approach: giving rise to different implementations of the same text, national consumer laws risks becoming a mix

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[79] Art. 8(2) of Directive 1999/44 provides that Member States may adopt or maintain in force more stringent provisions, compatible with the Treaty in the field covered by this Directive, to ensure a higher level of consumer protection.

[80] Art. 289 and 294 TFEU.

[81] Opinion on the 'Proposal for a European Parliament and Council Directive on the Sale of Consumer Goods and Guarantees', 97/C 66/04 pointed out that, '*while systems of private law are in many ways similar, they are each built on very differing concepts. Complete harmonization of legal and commercial guarantee systems therefore would not appear advisable, or indeed necessary to provide consumers with a minimum degree of rights*' (par. 2.2) and rejects '*any dismantling or loosening of national arrangements*' (par. 3.2).

[82] Miller, *The Emergence of EU Contract Law*, p. 80.

[83] Cultural differences which are relevant in consumer law comprehend expectations and vulnerability of consumers, which may have different attitudes and expectations, for example with regard to advertising, due to linguistic, cultural and social differences; see P. Rott, 'Minimum harmonization for the completion of the internal market? The example of consumer sales law' (2003) 40 *Common Market Law Review* at 1131.

[84] See par. 3.2 of COM(2006) 744 final, *Green Paper on the Review of the Consumer Acquis* (2007). See also ; Miller, *The Emergence of EU Contract Law*, p. 66.

of pointillist[85] EU measures and existing national law (some of which are specific for consumer protection, the remainder applicable to all transactions alike). This approach, thus, merely corrects the degree of diversity between the national laws of the Member States, with the risk of making the overall picture more, rather than less, complex[86]. As noted in the Staff Working Document[87] relating to the impact assessment conducted in respect of the proposal of Dir. COM(2017)637[88], the fragmentation generated by the implementation of the Dir. 1999/44 had effects especially on international trade. The Commission supported its arguments arguing that differences in mandatory consumer contract law rules create costs for businesses[89] and hinder consumers' confidence in buying goods cross-border: cross border trade is limited because consumers are not sure that the level of protection they are used to in their home country will apply when they shop cross-border; on the other hand, businesses may be deterred from marketing their products or services across the EU by the fact that they have to comply with different rules in each Member State[90]. To sum up, minimum harmonization is perceived to lie at the origin of part of the fragmentation in the regulation of the EU market.

Most recent directives seek to achieve maximum harmonisation (or full harmonisation)[91], on the basis of the observation that they set an optimal balance between the interests of consumers and entrepreneurs that should not be upset by national measures[92]. Maximum harmonisation means that Member States must apply the rules as reported in the Directive and may not go further ("*floor and ceiling harmonisation*"). This

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85 W.-H. Roth, 'Transposing Pointillist EC Guidelines into Systematic National Code' (2002) 10 *European Review of Private Law* 761.

86 Devenney and Kenny, *European Consumer Protection*, p. 9.

87 SWD (2017) 354 final, *Staff Working Document on the impacts of fully harmonised rules on contracts for the sales of goods* p. 5.

88 COM(2017) 637 final, *Amended proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on certain aspects concerning contracts for the online and other distance sales of goods* (2017).

89 While it's true that the Rome I Regulation allows contracting parties to choose which law applies to their contract, nonetheless the trader must respect the mandatory consumer contract law rules of the consumer's country to the extent that those rules provide a higher level of consumer protection. Consequently, "*businesses which intend to sell to consumers in another Member State and need to adapt their terms and conditions or want to assess in advance the legal and financial risk in the event of disputes are faced with additional contract law-related costs*" SWD (2017) 354 final, Staff Working Document on the Impacts of Fully Harmonised Rules on Contracts for the Sales of Goods.

90 Highlights the shortcomings of the practice of creating EU Consumer Law through directives which harmonise selected aspects of national law Twigg-Flesner, "Good-Bye Harmonisation by Directives, Hello Cross-Border Only Regulation?'.

91 *Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.*

92 See the Green Paper on the Review of the Consumer Acquis, COM(2006) 744 final, 2007.

approach involves that Member States cannot go beyond the scope of European rules in their transposition, with stricter or divergent disposition, also if they are more beneficial for the consumer, unless expressly provided by secondary legislation[93]. The purpose is to achieve a more compact and unitary system of consumer protection[94], in the view that even providing additional protection would hinder harmonisation and promote a distortion of competition. In Dir. 2019/771, this approach is explicated in Art. 4 (Level of harmonisation), according to which "*Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more, or less, stringent provisions to ensure a different level of consumer protection, unless otherwise provided for in this Directive*". The reasons that are the basis of the increasing use of this approach are, in essence, the same reasons why minimum harmonisation is considered inadequate. The main argument in favour of full harmonization is that it serves the purposes of the internal market better than minimum harmonization, since it does not allow for different sets of rules in the Member States, ensuring a sufficient level of "consumer confidence"[95].

However, it has been observed that maximum harmonisation could provide less benefits for consumers than for enterprises[96]. Higher benefits would have been obtained by enterprises, which would market products more easily in different Member States, with the level of protection set by mandatory rules of consumer protection being the same in each country. Business will be able to operate with the same set of standard terms in each of the Member States and may save transaction costs on negotiations in individual cases, for example with regard to remedies if goods turn out to be defective. There is, therefore, an economic benefit to maximum harmonisation of consumer law.

If maximum harmonisation increases the confidence of cross border consumers, however it may worsen the conditions at which domestic consumers shop in their own country, compared to how they used to under the previous minimum harmonisation directive. As pointed out on the occasion of the adoption of the Consumer Rights Directive, the direct consequence of a full harmonisation clause is that further-reaching

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[93] It has been pointed out that full harmonisation inhibits the exercise of the competence of the Member States in the harmonised area, achieving similar effects as exclusive competence of the Union; Bartoloni, *Ambito d'applicazione del diritto dell'Unione europea e ordinamenti nazionali*, p. 95.

[94] Goanta, *Convergence in European Consumer Sales Law*, p. 18.

[95] According to the Commission, the maximum-harmonisation creates a "*single set of rules ensuring that, whether domestically or cross-border, online or offline, consumers enjoy the same high level of consumer protection across the European Union and traders can sell to consumers in all Member States based on the same contractual terms*" SWD (2017) 354 final, *supra* note 70, at 11.

[96] V. Mak, 'Review of the Consumer Acquis - Towards Maximum Harmonisation?' (2008) *SSRN Electronic Journal* at 15.

national consumer protection measures have to be abrogated, with the consequence that the European minimum level of protection would also become the European maximum. In conclusion, this means that the level of consumer protection would decrease in all legal systems[97]. From this latter point of view, full harmonization may also be an actual burden at the domestic level: Member States are required to dismantle provisions of national law that fall in the material scope of the Directive and which offer a level of protection that goes beyond that established by the Directive. This can be a massive and expensive task, particularly where the Directive's material scope is very broad[98].

It has been also observed that maximum harmonisation, rejecting the differences between jurisdictions, risks restricting the competition[99] since it is claimed that a certain amount of regulatory diversity can lead to enhanced competition on the internal market as far as the price is concerned. Moreover, maximum harmonisation risks not working as an effective strategy for resolving fragmentation, because diversity and fragmentation are congenital elements of the process of Europeanization itself[100]. This raises the aforementioned constitutional dimension of maximum harmonization concerning the appropriate balance between centralization (and uniformity) and decentralization (and local diversity) in the EU legal order.

Finally, it should be remembered that a full harmonisation directive may pose problems of implementation in cases of ambiguous material scope: in order for all Member States to transpose in the same way, the Directive should be precise in the use of the terms that define its scope of application. While minimum harmonization allows the national legislator to extend the meaning of a notion to resolve interpretative uncertainty, maximum harmonization inhibits this practice and thereby puts pressure on national legislators at the implementation stage[101].

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[97] See I. Claeys and E. Terryn, *Digital Content & Distance Sales: New Developments at EU Level* (Intersentia, 2017) p. 10, with reference to the proposal for a Consumer Rights Directive.

[98] Miller, *The Emergence of EU Contract Law*, p. 82. ; Loos, 'Full Harmonisation as a Regulatory Concept and its Consequences for the National Legal Orders', 9, highlights that costs for Member States arise from the fact that they need to adapt existing legislation, especially if they choose to maintain the connection between consumer contract law and general contract law. Furthermore, it would require a re-training for lawyers, in order to become familiar with the new legislation. Moreover, in order to come to a uniform interpretation of the harmonised European concepts and rules, Member States courts will need to frequently refer questions on the interpretation of these concept and rules to the European courts.

[99] S. Pagliantini, 'Contratti di vendita di beni: armonizzazione massima, parziale e temperata della Dir. UE 2019/771' (2020) 1 *Giurisprudenza Italiana* at 217.

[100] Miller, *The Emergence of EU Contract Law*, p. 104.

[101] Miller, *The Emergence of EU Contract Law*, p. 82.

To sum up, the two models of harmonisation proposed by the European Union in the field of consumer law have both advantages and disadvantages. We can only take note of the fact that maximum harmonisation is the instrument chosen by the European Union for regulating consumer sales. It is worthwhile underlining that the balance of interests proposed by the maximum harmonised directive seems to be more favourable for businesses, given that the provision of identical rules, at least for harmonised areas, facilitate sales in those countries which would have had different disciplines. Indeed, the non-modifiability of the rules is not easy to combine with the higher consumer protection, especially when the directive requires Member States to dismantle domestic provisions that exceed the maximum level allowed. From this point of view, full harmonisation has no immediate favourable effects for the consumer, who has to renounce more favourable rules provided for by the domestic legislation.

4.2 Targeted harmonisation

The question whether a directive provides for minimum or full harmonisation must be distinguished from the question as to what extent the directive must be considered an exhaustive regulation of the subject matter covered by it. It has been previously noted that European directives do not govern all sales transactions, as it is the scope of application limited to specific parties[102] and specific sales[103]. Also, they do not expressly settle all the issues that may arise in connection with the transactions to which they apply. Dir. 1999/44/EC provides a discipline on *certain aspects* of contracts of sale of goods between consumers and businesses, i.e. the criteria of conformity of goods with the contract[104], the contractual remedies[105], limitation periods and time limits for notifying complaints in the context of such contracts[106], and an eventual core consisting of conventional guarantees[107]. Aspects *others* that those settled in the Directive (*inter alia*, the obligations of the buyer, the obligations of the seller other than that of delivering goods conform with the contract, damages) are left to national regulation. Similarly, Dir.

[102] Art. 1 (1) Dir. 1999/44 and Art. 3 (1) Dir. 2019/771.
[103] Art. 1 (2) lett. b) and Art. 1 (4) Dir. 1999/44; Art. 3 (2) (3) (4) Dir. 2019/771.
[104] Art. 2 Dir. 1999/44.
[105] Art. 3 Dir. 1999/44.
[106] Art. 5 Dir. 1999/44.
[107] Art. 6 Dir. 1999/44.

2019/771 only regulates conformity of the goods[108]; remedies in the event of a lack of conformity and modalities for the exercise of those remedies[109] and commercial guarantees[110]. This tendency to limit intervention to some aspects of sales law, identified as obstacles to cross-border trade, is distinctive of the European Union' s approach and is consistent with the principle of subsidiarity found in Article 5 (3) TEU and with the proportionality principle. In this approach, the blanks left by EU law are filled by domestic law.

When the sectoral framework meets maximum harmonisation, we talk about "targeted full harmonisation" of consumer protection rules[111]. Targeted full harmonisation may be defined as a subcategory of full harmonisation and reflects, at the moment, the favoured policy option of the Commission[112]. This kind of harmonization, albeit full, is limited to the issues expressly prescribed as falling within the scope of the directives and does not affect other contractual topics, with the consequence that the latter are left to the law of the Member States. With regard to sales law, maximum harmonisation of rules creates a uniform European regime for conformity of goods with the contract, remedies in the event of a lack of conformity and modalities for the exercise of those remedies. However, Member States would still be free to regulate matters falling outside the scope of the directive. A further implication of this approach is that the limited scope of maximum harmonisation implies that Member States can keep in place rules which, though dealing with similar issues, have a different legal basis than the rules prescribed by the European legislator, with the risk that application of domestic law may "circumvent" the scheme laid down in European rules.

This partial harmonisation casts some doubts also with reference to the objective of sales directives to enhance trade: since a full harmonisation directive is necessarily limited to particular areas, as the directive can only discipline what is within its scope, much will still be left to the Member States. Consequentially, differences in consumer contract law in the Member States will persist and problems remain that are similar to the minimum

[108] Art. 5-9 Dir. 2019/771.
[109] Art. 13-16 Dir. 2019/771.
[110] Art. 17 Dir. 2019/771.
[111] The term is used by the document *EU Consumer Policy Strategy (2007-2013) – Empowering consumers, enhancing their welfare, effectively protecting them* p. 7.
[112] Authors also call this kind of harmonization "partial maximum harmonisation". Compare S. Pagliantini, 'Contratti di vendita di beni: armonizzazione massima, parziale e temperata della Dir. UE 2019/771'.

harmonisation implementation. Where the scope of harmonising legislation allows for concurrent legislation at national level to operate alongside European rules, it is not unlikely for particular issues to be governed by different sets of rules.

At this stage of the discussion it should also be noted that the analysis of the texts of sales directives shows that the degree of interaction with national law is not simply described by the regulated/non-regulated alternative. Also in sales directive, what we have identified as third degree of incompleteness is present, i.e. the fact that even issues settled are not always exhaustively regulated: the same aspects which are specifically addressed by the Directive are not fully regulated and do not exhaust all the issues of the regulatory regime for consumer sales. In Dir. 1999/44, remedies for lack of conformity, for example, do not exhaust the possibilities available to the consumer in the case of defect of the goods purchased, since "*other rights*"[113] which the consumer may invoke under the national rules governing contractual or non-contractual liability are left to national law. Also the text of the Dir. 2019/771 allows national laws, in some cases, to deviate from the rules thereof and, in other cases, to "complete" the Directive on issues not covered or only partly covered by it (this interaction will be further investigated in Ch. 2 par. 7.2).

This means that the harmonisation proposed by the Directive in object is not only "targeted" (generating gaps for the issues not regulated), but also "non exhaustive" in the sense that, even in regulated areas of sales law, there is room for domestic law. In view of the foregoing, it has been observed that this targeted approach gives rise to a "*double disharmony*"[114]. On the one hand, domestic law integrates European law in the areas non-regulated by the latter: this is an integration different from the one realised with minimum harmonisation (where domestic law may provide a stricter discipline on the same matters governed by the European law), since in this case national law discipline issues are excluded by the Directive. In Dir. 2019/771, this phenomenon can be observed, *inter alia*, with regard to the possibility of Member States to regulate aspects of general contract law, such as rules on the formation, validity, nullity or effects of contracts, including the consequences of the termination of a contract, in so far as they are not regulated in this Directive or the right to damages[115], to allow consumers to choose a specific remedy, if

[113] Art. 8 (1) Dir. 1999/44.
[114] S. Pagliantini, 'Contratti di vendita di beni: armonizzazione massima, parziale e temperata della Dir. UE 2019/771', 219. The author makes this remark with reference to Dir. 2019/771, but the reasoning is extendable to Dir. 1999/44.
[115] Art. 3 (6).

the lack of conformity of the goods becomes apparent within a period after delivery, not exceeding 30 days[116], to determine the modalities for return and reimbursement[117].

On the other hand, Member States have space to provide a protection stronger than the one set by the European Directive. If this is the natural condition for a minimum harmonisation directive such as Dir. 1999/44, it is rather peculiar for a maximum harmonisation directive such as Dir. 2019/771, yet it is undeniable that Member States may "overcome" the maximum harmonisation limit in cases in which it is "*provided for in this Directive*", according to the last part of Art. 4 . In some cases, thus, Dir. 2019/771 acts like a minimum harmonisation directive, with the consequence that national law may substitute the content of the Directive. It happens with reference to the possibility of excluding from the scope of the Directive contracts for the sale of second-hand goods sold at public auction and living animals[118], to maintain or introduce longer time limits than those referred to in the Directive[119], to maintain or introduce provisions stipulating that the consumer has to inform the seller of a lack of conformity within a period of at least 2 months from the date on which the consumer detected such lack of conformity[120] and regulate whether and to what extent a contribution of the consumer to the lack of conformity affects the consumer's right to remedies[121]. Also, freedom of Member States to provide for a right for the consumer to reject goods with a defect[122] represent a deviation from the maximum harmonisation scheme, because, as a rule, Member States should not be free to provide further remedies in a maximum harmonisation model.

This shows that the interaction between national and European law, in this matter fully harmonised, may still be high and comprehend both integration of lacunae and possible substitution of dispositions. It depends on the fact that this area of law is not exhaustively harmonised, therefore national protection standards remain unaltered and both national regimes concur[123]. The extent of the area in which national and European legislation concur depends on the rate of exhaustiveness not only of the harmonised

116 Art. 3 (7).
117 Art. 16 (3).
118 Art. 3 (5).
119 Art. 10 (3).
120 Art. 12.
121 Art. 13 (7).
122 Recital 19 of the Directive.
123 S. Pagliantini, 'Contratti di vendita di beni: armonizzazione massima, parziale e temperata della Dir. UE 2019/771', 219.

discipline, but also of the single dispositions. As we will see, this relationship between directive and national law regards in particular the discipline of remedies.

4.3 Interpretation of directives and principle of effectiveness

The interaction between EU law and national law may also be determined by the interpretation and the margin left in this activity to national institutions.

While the CISG comes with its own interpretation rules, which are contained in Art. 7, neither primary nor secondary EU law provides for interpretation rules similar to those laid down in the Convention. Directives on the contract of sale, in particular, focusing only on certain aspects of the contract, leaves completely undefined not only the general discipline of sale, but also the "methodology", i.e. the rules on the use and the interpretation of the tool. Nevertheless, the European Court of Justice, to which the interpretation of the Treaties and other Union acts is reserved (Art. 267 TFEU), has drawn up interpretative principles similar to those set in the CISG, stating that European private law, or national law based thereon, requires that the law is interpreted taking into consideration its European character and the need for a uniform and independent application within the EU, regardless of the meaning in which a term is used in the law of a specific Member State[124]. Therefore, any interpretation of European directives in the area of contract law should not be influenced by the national legal background in which they are applied. Instead, the interpretation should be based on the *acquis* of contract law within the EU, i.e. the existing EU private law in other directives and regulations. Furthermore, the interpretation may also be based on what can be described as the "common core" of the national contract laws of the member states[125]. The autonomous interpretation of the directives and, in general, of European Union law is guaranteed by

[124] The European Union interpretative policy has been manifested in different field of law. European Court of Justice, *Irmtraud Junk v Wolfgang Kühnel* (2005), deciding on the concept of 'redundancy' provided for in Dir. 98/59/EC, stated that '[t]he need for a uniform application of community law and the principle of equality require that the terms of a provision of community law which makes no express reference to the law of the member states for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the community ; that interpretation must take into account the context of the provision and the purpose of the relevant regulations' (par. 29). In *Nordania Finans A/S, BG Factoring A/S v Skatteministeriet* (2008) the Court, with reference to the notion of uniform basis of assessment in Sixth VAT Directive, argued the same (par. 17). With regard to a regulation, see European Court of Justice, *Ekro BV Vee- en Vleeshandel v Produktschap voor Vee en Vlees* (1984).

[125] 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' (2010) 22 *Pace International Law Review* at 31.

the Court of Justice[126] through the preliminary ruling promoted by the courts of Member States, which are obliged to interpret their laws in a way that conforms to the directives[127].

The command to interpret the directives autonomously is necessarily in conflict with the fact that the implementation is made by the national legislator, and that the text, implemented by means of a national law, is interpreted by national courts applying the national methods of interpretation; therefore, even if national courts are assisted in their task by the ECJ through the preliminary reference procedure, application of the law is a matter resolved purely at a national level[128]. Thus, although, for harmonization purposes, EU legislation is to be given an autonomous interpretation, it is often difficult for a national court to depart from previous interpretative national practices, particularly where the wording of the European measure is identical to the domestic measure[129]. It is also important to notice that an effective and uniform application is made complex also by the fact that European directives greatly interfere in national law. This process also involves full harmonisation directives, given that the text has to be lowered into national contexts and is inevitably influenced by the legal systems that import it.

The interaction between European sales directives and national law must also be observed through the lens of the principle of effectiveness, specifically in its "hermeneutical meaning", and the criterion of high protection of the consumer. The

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126 Under Art. 19 par. 3 lett. b] TEU and Art. 267 TFEU (ex Art. 234 TEC]. The contribution of the Court of Justice of the European Union is significant and depends on a number of factors including: (1] the content of its decisions; (2] the effect of the decision in the country of the court from which the reference for a preliminary ruling is made, and in particular the 'resistance' exercised by national courts to overcome their previous case-law and (3] the impact of the decision of the Court of Justice in other countries. P. Gallo, G. Magri, and M. Salvadori, *L'armonizzazione del diritto europeo: il ruolo delle corti* p. 23.

127 The obligation to interpret national law in conformity with directives is a consequence of the obligation to general loyalty under Art. 4 (3) TEU. According to this principle, in order to ensure that the goal of the directive is achieved it is not only important to implement the directive correctly but also ensure that national law is applied according to the same. It also follows from the obligation to a precise transposition of directives under Art 288 (3) TFEU, which involves the obligation of national courts to interpret transposed laws in light of the wording and the purpose of the directive in order to achieve the result referred to in article. See European Court of Justice, *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen*, Case 14/83, 10 April 1984.

128 Miller, *The Emergence of EU Contract Law*, p. 69; This process involves also full harmonisation directives, given that the text of the directive has to be lowered into national contexts and is inevitably influenced by the legal systems that import them. In the light of the role played by national courts, which are entitled to decide on the relations among private individuals, great relevance is assumed by the dialogue between Courts, which is a tool to promote innovation and non-legislative harmonisation. This dialogue comprehends vertical relations between national courts and ECJ through preliminary ruling and horizontal relations between national courts on how to apply the principle expressed by the European Court. The ECJ provides national courts, upon their request, with guidance in the uniform interpretation of European legislation. In this manner, it resolves or at least reduces the differences of interpretation that may arise as a result of the implementation of European standards in the national legislative fabric; compare Gallo, Magri, and Salvadori, *L'armonizzazione del diritto europeo*.

129 Miller, *The Emergence of EU Contract Law*, p. 66.

principle of effectiveness is a concept derived from EU case law, the content of which has been variously declined and much investigated by scholars[130]. Within the framework of European law, the principle of effectiveness is written into Article 47 (1) of the Charter of Fundamental Rights of the European Union, which reads: "*Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article*". In addition, Art. 19 (1) TEU puts the responsibility for "*providing remedies sufficient to ensure effective legal protection in the fields covered by Union law*" on Member States through the status of their courts of law as "Union courts".

The underlying idea is that effectiveness indicates the practice that ensures that dispositions are applied in such a way that their abstract content finds a complete correspondence in its concrete application[131]. This entails, on the one hand, that State intervention, although in principle admissible, is precluded when it is contrary to Union law or undermines its effectiveness: the interpretation of European law is "outcome oriented", in the sense that a substantive rule must be interpreted in such a way that its "useful effect" is maximised and the State must refrain from adopting not only acts that are in conflict (materially incompatible) with secondary legislation, but also that interfere with its objectives. On the other hand, effectiveness implies the right to an effective protection in the process, that is, to ensure the substantive interest underlying the subjective position relied upon.

More specifically, it has been pointed out that the principle of effectiveness has been intended in three different ways in the case law of the ECJ: effectiveness as an "elimination rule"; effectiveness as a "hermeneutical" principle; and effectiveness with a "remedial" function[132]. In the first meaning, the effectiveness principle, in parallel with the equivalence principle, is aimed at eliminating restrictions to protection (not at creating remedies for protection). This entails that, once the ECJ has established that a national rule makes the implementation of EU rights excessively difficult, the national court must

[130] For an overview of the thesis of the scholars, see G. Vettori, 'Il diritto ad un rimedio effettivo nel diritto privato europeo' (2017) 3 *Rivista Di Diritto Civile*; ; see also, in case law, European Court of Justice, *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* (1986); European Court of Justice, *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v Georges Heylens and others* (1987).

[131] S. Mazzamuto, 'La prospettiva dei rimedi in un sistema di civil law: il caso italiano' (2019) 35 *Contratto e impresa*.

[132] N. Reich, *General Principles of EU Civil Law* (Intersentia, 2013) p. 91; ; Vettori, 'Il diritto ad un rimedio effettivo nel diritto privato europeo'.

either disapply the incriminated national provision or interpret it in conformity with EU law[133]. In other cases, the ECJ makes use of effectiveness as a principle of interpretation of Union law, in order to strengthen the *effet utile* of the directives[134]. Finally, the remedial function of the effectiveness principle requires Member State courts to create or improve remedies that are "sufficient" for the effective protection of Union rights, according to the provision of Art. 19 (1) TEU, which highlights a clear link between "effective protection" and "sufficient remedies".

Focusing specifically on consumer contracts, the principle of effectiveness has been used to interpret national law consistently with EU law and in a consumer-friendly manner. This process regards, in particular, procedural law, an area that falls outside the competence of the European legislator, but which is likely to affect the effectiveness of EU substantive dispositions[135].

Here, therefore, the discussion on the principle of effectiveness is preparatory to investigating if the general principle of effective protection may embody the application of the most favourable provision to the consumer. Greater protection of consumer rights is the general rationale of consumer regulation: at the basis of consumer law there is the ratio of protection of the weaker party, as derived from the reference to the high level of consumer protection contained in Art. 169 TFEU and in Art. 38 of the Charter of Fundamental Rights of the European Union.

With reference to Sale Directive, this principle is stated in Art. 8 (2) of Dir. 1999/44, which allow Member States to adopt or maintain in force more stringent provisions than those set in the Directive, if it ensures a *higher level of consumer protection*. This particular declination of the principle of effectiveness plays a relevant role in minimum

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133 See, for example, European Court of Justice, *Mohamed Aziz v Caixa D'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*, Case C-415/11, 14 March 2013 on the compatibility of national law with the Unfair Contract Terms Directive 93/13/EC.

134 See European Court of Justice, *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA (C-295/04), Antonio Cannito v Fondiaria Sai SpA (C-296/04) and Nicolò Tricarico (C-297/04) and Pasqualina Murgolo (C-298/04) v Assitalia SpA* (2006) where the Court held that, once an infringement of Art. 81 EC (now Art. 101 TFEU) has been committed, any individual should be able to rely on the invalidity of an agreement or practice prohibited under that article before a national court.

135 For an analysis of the principle of effectiveness on the interpretation of relevant provisions contained in Directive 1999/44, see Patti, 'The Effectiveness of Consumer Protection in Sales Contracts – Some Observations from Recent European Case Law', 4 *Journal of European Consumer and Market Law* (2015) , available at https://kluwerlawonline-com.bibliopass.unito.it/JournalArticle/Journal+of+European+Consumer+and+Market+Law/4.5/EuCML2015033 (last visited 1 November 2020] , at 179.

harmonisation directives, given that Member States have space to implement the directive, even providing stricter provisions.

It seems to be more difficult to support the application of the principle of higher protection for the consumer protection in the case of remedies crystallised by maximum harmonisation clauses, since the access to protection not provided by the directive would constitute an unlawful derogation *in melius*[136]. The need for harmonisation, in this latter case, would prevail over the high level of consumer protection, not only in the sense that Member States can't introduce more favourable dispositions, but also in the sense that they can't apply national provisions more favourable to the consumer. In this regard, it may be argued that a higher level of consumer protection could come into play, also in maximum targeted harmonisation directives such as Dir. 2019/771. This may occur by reason of the fact that the discipline is limited to specific matters and leaves behind numerous gaps: as previously stated, a directive, although of maximum harmonisation, does not affect national law concerning profiles which have not been regulated at European level and aspects where domestic law may provide a stricter protection[137]. However, the question arises as to whether the use of internal rules in matters not expressly or not exhaustively regulated may be admissible or if it may circumvent the balance developed precisely in the Directive. This issue will be investigated in Chapter II, with reference to access to domestic remedies for non-conformity.

5. Conclusion

In light of the above, divergences emerge between the "system" of the Convention on International Sale of Goods and the one of Dir. 1999/44 and 2019/771, with respect to the possible concurrency of supranational law and national legal systems.

The CISG is conceived as a self-sustaining legal tool, in which the interactions with private international law, and thus with domestic laws, are reduced for the sake of development of international trade. Although domestic law continues to play an important role in respect of international sales transactions, given that numerous issues

[136] G. D'Amico and S. Pagliantini, *L'armonizzazione degli ordinamenti dell'Unione europea tra principi e regole. Studi* (Giappichelli, 2018) p. 124.
[137] D'Amico and Pagliantini, *L'armonizzazione degli ordinamenti dell'Unione europea tra principi e regole*. *Studi*, p. 130.

are left unsettled[138], the mechanisms described (autonomous interpretation, management of *lacunae* through general principles, limitation of matters excluded) are aimed at minimising the recourse to private international law and, eventually, to the different national laws of the parties. The CISG, although it is not a code in a civilian sense, it is code-like in its interpretive methodology[139], in the sense that went beyond the intent to provide a discipline for the matters governed (formation of the contract and rights and obligations of the parties) and established a general framework of the contract of sale. In essence, although the Convention cannot be defined as "complete", the mechanisms identified in Art. 7 allows it to aspire to be somehow self-sufficient. The creation of this almost self-sufficient system leads to the consequence that, when CISG applies, the contract of sale could be governed by this only and remain national-law-resistant.

The Convention is certainly an outdated text for which there is no prospect of renewal or amendment; however, the use of general clauses, on the one hand, and the presence of a rich and widespread case law make up for the static nature of the source and even make it contemporary. The lack of a supreme court of the CISG, although may be regarded as a severe deficit for uniform application of the Convention, it promotes a "ground-up" approach, in which uniformity is achieved with the efforts of national courts and their international dialogue[140]. Also the lack of an framework comparable to the European one, not only provided with a supreme court but also with a complete set of political and judicial institutions, does not appear to have prejudicial consequences and, indeed, ensures that the Convention resists impulses dictated by political choices or cultural values, whether or not they are international or are universal, regional or local.

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[138] See Ferrari, *supra* note 50, at 54–55, which points out that the scope of application of the CISG is limited, in particular because it does not settle all the issues that may arise in connection with the transactions to which it applies; Giannuzzi, 'The Convention on Contracts for the International Sale of Goods: Temporarily out of 'Service'?', 28 *Law and Policy in International Business* (1997) 991 , at 992, which points out how the Convention fails to account for service industries and service-related contracts.

[139] Larry A. DiMatteo, L. Dhooge, S. Greene, V. Maurer, and M. Pagnattaro, *International Sales Law: A Critical Analysis of CISG Jurisprudence* (Cambridge University Press, 2005) p. 21.

[140] See Ferrante, 'Thirty Years of CISG: International Sales, Italian Style', 5 *Italian Law Journal* (2019) , at 92, which observes that "[s]*uch liquid and spread nomophylaky represents somehow a unique feature, but it seems effective, to the extent that it makes the law sufficiently knowable. It looks as if the absence of a supreme judge encourages the recourse to 'active' comparison –in the meaning of a comparative method applied to cases and the interpretative self-sufficiency, far from erasing the past, becomes a synthesis and accomplishment of national experiences*".

The Vienna Convention, in its consolidated version, neither welcomes them nor rejects them; it simply takes no position in their matter[141].

The nature of EU sales law and its implementation, on the contrary, gives rise to a multi-layered architecture, characterized by the necessary interplay between different levels of governance.

As mentioned, this is due in large part to the explicit incomplete nature of the tool, since EU directives, regardless of whether they are minimum or maximum harmonisation directives, addresses only "*certain aspects*" of the sale of consumer goods and in particular focuses on remedies, which is assumed as being the substantial barriers that deter consumers from buying cross-border, with the aim of intervening to rebalance a set of interests that is presumed unbalanced. Irrespective of the degree of the harmonisation, consumer legislation inevitably (and voluntarily) remains fragmentary, and leaves completely undefined not only the general discipline of sale, but also the "methodology". To these elements must be added the criticality brought by the implementation of the text in the legal systems of the Member States, exacerbated when directives contain general clauses, vague expressions and generic terms, which legitimate the attribution of different meanings to the same rules in different legal systems.

Furthermore, the role of the apical judge, which should facilitate the uniform interpretation of European legislative texts through the preliminary ruling, risks being reduced by the poor appeal of the decisions: in this regard, it has been pointed out that, while in some cases the Court is limited to statements of principle which do not fit into the context, in other cases, it leaves the decision to national courts, essentially abdicating its nomophylactic function[142]. This circumstance emphasizes the fact that harmonization in European contract law is mainly left to legislative texts, on the assumption that top-down imposition of European harmonizing rules providing common mandatory rules can harmonize national contractual practices[143].

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[141] U. Schroeter, 'Does the 1980 Vienna Sales Convention Reflect Universal Values? The Use of the CISG as a Model for Law Reform and Regional Specificities' (2018) 41 *Loyola of Los Angeles international and comparative law journal*.

[142] Ferrante, *La vendita nell'unità del sistema ordinamentale. I 'modelli' italo-europei e internazionali*, pp. 89–91. The author gives as an example of the first tendency, among others, the decisions; European Court of Justice, *Jean-Claude Van Hove v CNP Assurances SA* (2015) and; European Court of Justice, *Bogdan Matei and Ioana Ofelia Matei v SC Volksbank România SA* (2015), both generically stating that that requirement of transparency is to be interpreted broadly. .

[143] Miller, *The Emergence of EU Contract Law*, p. 13.

Therefore, even if, regarding both legal tools, the distinction between regulated matters, excluded matters and other matters arise, the rules for determining the discipline applicable to these three categories of "issues" are not necessarily the same for CISG and for directives.

CHAPTER II – Remedies for non-conformity and national law in CISG and European directives on certain aspects of contract for the sale of goods

1. Introduction

The CISG's remedial scheme inspired international sets of contract law principles, such as the UNIDROIT Principles and the Principles of European Contract Law, as well as many national laws. The European Union used it to a considerable extent for its Dir. 44/1999. In terms of remedies, the CISG provides two innovations which have been transposed in the Dir. 99/44: the duty to deliver goods which conform to the contract[144] and the provision of conservative remedies such as repair and substitution.

Both the European model of consumer sales and the international model of business to business sales provide for a system in which conservative remedy prevails over termination, since, in the European model, the consumer cannot terminate the contract if repair or replacement is possible, whereas, in the international model, the professional buyer can do so only if the breach is "fundamental" and a corrective action is not possible at a reasonable cost and within a reasonable time. The possibility, on the one hand, of derogating from this hierarchy and, on the other hand, of resorting to internal remedies has been widely discussed by commentators. The answer to these questions cannot disregard considerations on the exhaustiveness of these legal tools and on interpretation policy on whether or not it is appropriate to have recourse to national law for matters not provided by supranational sources.

[144] Provided in Art. 35 (1) CISG and Art. 2 dir. 99/44.

In this framework, the present Chapter aims firstly to provide a picture of the remedies available to the buyer under the Vienna Convention and European Directives 1999/44/EC and (EU) 2019/771. The analysis will focus particularly on the remedies for non-conformity included in the hierarchy, in the knowledge that, while the European Directives examined regulate only those aspects[145] the Vienna Convention provide remedies for the event that the seller fails to perform any of his obligations[146].

For all three legal instruments examined, it is stressed that the remedial architecture is inspired by the preservation of the contract and, therefore, to the performance rather than the termination. This choice, which constitutes a balance between the desires of the seller and the buyer, is common to both the CISG and the Sales Directives, although the subjective scope is significantly different, and bears witness to the fact that the remedy system seems more favourable to the seller. This, if still needed, shows once again that the Consumer Sales Directives (like consumer legislation in general) is motivated by the protection of competition, rather than the weaker party of the contract.

Thus, the degree of interaction between the remedies described and the law of the Contracting States/Member States, as permitted by the disciplines under consideration, shall be examined. The work focuses, in particular, on the possibility for the buyer to invoke internal rules, other than those provided to react to the non-conformity of the purchased goods, such as such as those applicable in the event of an error or as a result of the seller's non-contractual liability.

With specific reference to the European sales directives, attention will be paid to the possibility of derogation of the hierarchy laid down by both directives, in the light of the transition from minimum to maximum harmonisation, illustrating what happened in force of Dir. 1999/44 and what could happen in the implementation of Dir. 2019/771.

For the latter, efforts will be made to identify and describe the remaining space for national remedies, within a targeted full harmonisation.

2. Remedies for non-conformity in the CISG as a hierarchy

Section III of Chapter II of the Vienna Convention contains the provisions on remedies available to the buyer in case of failure of the seller to perform his obligations.

[145] Art. 3 Dir. 1999/44 and Art. 13 Dir. 2019/771.
[146] Art. 45 CISG.

According to Art. 45, in case of breach of contract by the seller[147], the buyer can exercise the rights provided in the Art. 46 to 52, as well as sue for damages (Art. 74 to 77), which may be claimed in addition to the other remedies[148]. If the conditions discussed further are met, the buyer, consequently, can resort to the following remedies: performance; reduction of the price; avoidance of the contract; damages.

Starting from the examination of the first of the cited remedies, it should be stated from now on that the right to require performance depends on the obligation that has been left unfulfilled. In this regard, a distinction should be made between the case in which the non-performance takes the form of delivery of a non-conforming good from that in which the seller fails to perform another one of its obligations, such as the one to deliver goods within the prescribed period[149] and to provide the documents relating to the goods[150]. In these latter events, the request of specific performance will consist in the requirement of the delivery of the goods or of the documents.

In case of delivery of non-conforming goods, the right to require performance is regulated by Art. 46 (2) and (3): the buyer may, in the first place, ask for repair, unless this is unreasonable having regard to all the circumstances [151]. The request for repair the goods has to be made in conjunction with notice given to the seller within a reasonable time after he has discovered the defect or ought to have discovered it, specifying the nature of the lack of conformity[152].

Secondly, the buyer may require the substitution of the goods, if the lack of conformity constitutes a fundamental breach of contract (Art. 46 (2)). Here too, the request must be made either in conjunction with notice under Art. 39. The request of performance is possible unless the buyer has resorted to a remedy which is inconsistent

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147 It is a shared opinion that the notion of breach of contract under the CISG comprises any non-fulfilment of contractual obligations, as stated in Artt. 30 ff, without distinction between main and auxiliary obligations, including violation of additional duties stipulated in the contract. F. Enderlein and D. Maskow, *International Sales Law: United Nations Convention on Contracts for the International Sale of Goods* (Oceana Pubns, 1992) p. 174 ff; M. Will, 'Article 46' Bianca-Bonell Commentary on the International Sales Law: The 1980 Vienna Sales Convention, (1987) p. 330.

148 As explicitly contemplated in Art. 45(2). See P. Schlechtriem, *Uniform Sales Law: The UN-Convention on Contracts for the International Sale of Goods* , Manz ed. (1986) p. 74; ; Bianca and Bonell, *Commentary on the International Sales Law*, p. 330; ; Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, pp. 301–2.

149 Art. 30, 31 and 33 CISG.

150 Art. 30 and 34 CISG.

151 A claim for repair is intended to be unreasonable, i.e., if there is no reasonable ratio between the costs involved and the price of the goods or if the seller is a dealer who does not have the means for repair (Enderlein and Maskow, *International Sales Law*, p. 180) or if the repair could be made more readily by the buyer; Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, p. 309.

152 Art. 39 (1) CISG.

with this requirement. Such inconsistent remedies include avoidance of the contract[153], reduction of the price[154] and a claim for damages[155]. Except these latter cases, the buyer's right to specific performance is unrestricted under Art. 46[156]. Thirdly, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had, at the time of the delivery, bears to the value that conforming goods would have had at that time (Art. 50)[157]. Price reduction maintains the contract, which must be fully performed on the lower level. The buyer must pay the reduced price and, if the price is already paid, the buyer may request repayment of the amount of reduction. Finally, if the failure by the seller to perform any of his obligations under the contract or the Convention amounts to a fundamental breach of contract or, in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer, or declares that he will not deliver within the period so fixed, the buyer may declare the contract voided (Art. 49 (1)). Avoidance has the effect of releasing the parties from their obligations, except for residual obligations, mainly of restitution or already incurred damages, which remain in force. In this framework, parties may always claim for damages, which may also be combined with any other remedy insofar as the other remedy leaves uncompensated losses unsettled[158]. The loss has to be caused by the breach, but it is compensable only as far as the party in breach foresaw or ought to have foreseen it "*at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract*".

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153 Since there can be no compatibility between a remedy which safeguards the contractual agreement and one which releases both parties from their obligations. See also Schwenzer, *Schlechtriem & Schwenzer*, p. 707.

154 Given that the buyer, through the repair or the replacement of the goods, has obtained what was due to him and there are no remaining defaults that could justify the price reduction.

155 This has to be intended in the sense that the buyer cannot ask for specific performance together with damages due to failure to perform, since his interest in performance has been satisfied and this would involve an overcompensation of the buyer. However, he is not deprived of his right to claim damages by exercising his right to claim performance according to Art. 45 (2), in regard to those losses that are not compensated by the chosen remedy (e.g. damages suffered while awaiting performance or due to ancillary and consequential losses). See Will, 'Article 46', p. 336; ; C. Liu and M. S. Newman, *Remedies in international sales: perspectives from CISG, UNIDROIT principles and PECL* (Juris Net, 2007); Schwenzer, *Schlechtriem & Schwenzer*, p. 699.

156 S. Walt, 'For Specific Performance under the United Nations Sales Convention' (1991) 26 *Texas International Law Journal* 211 at 213.

157 Reduction of the price is incompatible with specific performance (including substitution or repair) and avoidance. U. Magnus, 'Remedies: Damages, Price Reduction, Avoidance, Mitigation, and Preservation' in L. A. DiMatteo (ed.), International Sales Law: A Global Challenge, (Cambridge: Cambridge University Press, 2014) p. 275 ff.

158 Damages require a breach of contract, irrespective of which duty has been breached, as it has been observed in note 145. See also Magnus, 'Remedies: Damages, Price Reduction, Avoidance, Mitigation, and Preservation'.

Therefore, in summary, the buyer who has received a non-conforming good can: request the repair or replacement of the good (the latter only in case of fundamental breach) and claim compensation for any losses unsettled, such as those arising from delayed performance. In addition, he can keep the defective goods and ask for the price reduction or opt for the termination of the contract (also possible only in case of fundamental breach), followed by the return of the defective goods and the restitution of the price paid by the seller. Also in case of reduction of the price or termination, the buyer may demand damages[159].

For the purpose of this work, it is interesting to investigate the dialectic between specific and conservative remedies, on the one hand, and negative and merely compensating remedies, on the other hand. In view of the foregoing, the remedial structure can primarily be examined from the perspective of the fundamental or non-fundamental nature of the breach by the seller: in the latter case, the buyer can resort only to remedies, such as repair, compensation and price reduction, which may be defined as "soft", in the sense that they presuppose that the buyer keeps the goods he purchased[160]; only if the aggrieved party has suffered a detriment that substantially deprived him of what he was entitled to expect under the contract, he may also use "hard", strict remedies (termination and substitute delivery)[161].

Thus, in case of fundamental breach, the buyer has access, in addition to "soft remedies", and also to a substitution of the goods and termination of the contract.

According to Art. 25 CISG, a breach 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[162]. With reference to breach of the

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159 In case of avoidance, he may demand damages for all losses (e.g. costs for removal of the good or damages due to delay); damages may also be combined with a claim for price reduction, but the amount claimed by way of price reduction reduces the overall damages payable. See Schwenzer, *Schlechtriem & Schwenzer*, pp. 699–700.

160 See, for the 'hard/soft distinction', A. Spaic, 'Interpreting Fundamental Breach' in L. A. DiMatteo (ed.), International Sales Law: A Global Challenge, (Cambridge: Cambridge University Press, 2014), pp. 237–54 p. 243.

161 Avoidance and substitution are both 'hard remedies' (and requires a fundamental breach) given that both presuppose that the buyer return the goods. Moreover, the economic consequences of a delivery of substitute goods may be the same for the seller as in the case of an avoided contract. Enderlein and Maskow, *International Sales Law*, p. 179. Actually, the economic consequences could even surpass those of an avoidance of contract, given the additional expenses incurred and the risks involved in transporting substitute goods born by the seller. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, p. 296.

162 The fundamental breach issue has been very much investigated. Compare Magnus, 'Remedies: Damages, Price Reduction, Avoidance, Mitigation, and Preservation', p. 273; M. Will, 'Article 25' Bianca-Bonell Commentary on the

seller, others that deliver non-conforming goods, it is sufficient to recall here that where the party does not perform its duties (non-delivery of the goods[163]) or where this party finally refuses to perform its duties[164], this will generally rise to the level of a fundamental breach. Delayed delivery, in most cases, is not considered a fundamental breach, since the buyer receives what it expected under the contract. Delay may be relevant only where the parties have so agreed[165], or where it is clear from the circumstances that time is of the essence.

With regard to delivery of non-conforming goods, this becomes relevant where the defects deprive the buyer of what it reasonably expected under the contract. Based on that, there is substantial agreement on the fact that a breach is not fundamental if the goods are repairable or can be replaced without a delay, that in itself would constitute a fundamental breach, and if the cure does not cause the buyer unreasonable inconvenience[166]. In those cases, courts are rather reluctant to allow avoidance[167]. Likewise, it was claimed that non-conformity concerning quality remains a mere non-fundamental breach as long as the buyer - without unreasonable inconvenience - can use the goods or resell them, even at a discount[168]. The underlying policy is to avoid the unnecessary termination of contracts or the delivery of substitute goods, since they may generate costs for the seller which, in case of substitution, has to (1) take back the

International Sales Law: The 1980 Vienna Sales Convention, (1987); ; Larry A. DiMatteo, Dhooge, Greene, Maurer, and Pagnattaro, *International Sales Law*, p. 125; ; R. Koch, 'Art. 25 CISG–UP' An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law, (2007) p. 124.

163 See Pretura circondariale di Parma, *Foliopack v Daniplast* (1989), which stated that the delay by the seller in delivering the goods, together with the fact that two months after the conclusion of the contract the seller had delivered only one third of the goods sold, amounted to a fundamental breach of the contract according to article 49(1)(a) CISG.

164 In OLG Celle (1995), the seller admitted that he had sold the goods to another party, with the consequence that he became incapable of fulfilling his contractual obligation. Moreover, this entitles the buyer to avoid the contract, even without setting an additional period of time. In OLG München (2004) the seller explicit refused to deliver on the assumption that the contract was cancelled.

165 In Corte d'Appello di Milano, *Italdecor SAS v. Yiu Industries* (1998) the Court stated that the failure to comply with the fixed time for delivery constitutes a fundamental breach of contract; . See also OLG Düsseldorf (1997).

166 Schwenzer, *Schlechtriem & Schwenzer*, p. 427.

167 OLG Köln (2002); HG Zürich (1995), which excluded the fundamentality of the breach on the ground that the good could have been easily corrected according to the expertise presented by the buyer.

168 In China International Economic and Trade Arbitration Commission, *CLOUT no. 988* (2000), the Commission held that the seller's breach was not fundamental, since the buyer was able to sell three-quarters of the goods, therefore, the seller did not substantially deprive the buyer of what it was entitled to expect under the contract. ; This principle has been extended to cases in which the goods delivered were not defective, but could not be used by the buyer because the seller failed to comply additional obligations, such as the obligation to install the goods, if the buyer has been able to put the goods into operation and use them (OLG Hamburg [2008]). See on this point ; Schwenzer, *Schlechtriem & Schwenzer*, p. 428.-

delivered goods; (2) deliver substitute goods, which involve expenses (such as transportation and storage) and the risk of damages or loss[169].

Furthermore, remedies may also be observed from the point of view of the relationship between conservative and non-conservative remedies. Under the CISG, the buyer is not obliged to preliminarily require the seller to remedy a breach; he may instead move directly to avoidance and damages, if the conditions required by law are met. The choice between remedies, thus, has been given to the buyer, which is only subject to the seller's right to cure according to Art. 48 (1). However, the conditions under which the buyer may claim termination of the contract make it a remedy of last resort that will be granted only after the exhaustion of other options[170].

Performance, on the contrary, may be described as the "primary" CISG remedy, which allows the buyer to require that the seller deliver the goods (if he has not yet done so) or deliver substitute goods (if the goods delivered do not conform) or cure defective delivery[171]. The primacy of the specific performance emerges, firstly, from the broad scope of this remedy under the CISG[172]. The aggrieved party, indeed, has the right of election between claiming damages or performance, the only limitation to this latter remedy being having resorted to an inconsistent remedy. Furthermore, he can require the breaching party to perform the full range of his contractual obligations: the buyer may be entitled to this remedy when the seller fails to procure or produce the goods or to deliver them, hand over any documents relating to them at the right place or the date fixed in the contract (Arts. 31, 33 and 34), when the seller refuses to deliver goods, hand over any documents relating to them (Art. 30), or where part of the purchased goods are missing or does not conform to the contract (Art. 51) and do all other acts necessary to fulfil the contract as originally agreed. Also, the placement of Art. 46 as the first of the buyer's

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169 Compare R. Koch, 'The Concept of Fundamental Breach of Contract under the United Nations Convention on Contracts for the International Sale of Goods (CISG)' (1998) *Review of the Convention on Contracts for the International Sale of Goods (CISG)* at 333 and ; M. Will, 'Article 49' Bianca-Bonell Commentary on the International Sales Law: The 1980 Vienna Sales Convention, (1987) p. 363; Schwenzer, *Schlechtriem & Schwenzer*, p. 427.

170 Huber, 'CISG - The Structure of Remedies', *Rabels Zeitschrift Fuer Auslaendisches Und Internationales Privatrecht* (2007) , at 18; Spaic, *supra* note 128, at 243; Magnus, 'Remedies: Damages, Price Reduction, Avoidance, Mitigation, and Preservation', in L. A. DiMatteo (ed.), *International Sales Law: A Global Challenge* (2014) 257 , at 269. In case law, see Tribunale di Busto Arsizio, *Expoplast C.A. v Reg Mac s.r.l.*, 13 December 2001, which stated that termination '*è destinata ad intervenire solo allorché non vi siano ulteriori e possibili margini per una soluzione di tipo differente*'.

171 Schwenzer, *Schlechtriem & Schwenzer*, p. 706; ; J. M. Lookofsky, 'The 1980 United Nations Convention on Contracts for the International Sale of Goods' p. 28.

172 Liu and Newman, *Remedies in international sales*, p. 32.

remedies provisions suggests that the Convention favours remedies that preserve the contractual bond in contrast to remedies that involve termination of the contract[173]. Moreover, for a claim of specific performance under CISG to be successful it is not necessary that the goods have been identified in the contract, or that the aggrieved party demonstrates the impossibility of finding the goods on the market[174].

Secondly, the primacy of specific performance can be gathered by the recessive nature of termination. Indeed, in the case of a lack of conformity, other than late delivery[175], the buyer that wishes to terminate the contract must act (1) within a reasonable time after he knew or should have known of the breach[176], (2) after the seller has failed to remedy the breach within the period set by the buyer under Art. 47[177] or after the seller has declared that he will not perform within such a period[178], (3) after the expiration of any additional time period indicated by the seller under Art. 48[179], or after the buyer has indicated that he will not accept performance under Art. 48[180]. Art. 48 (1) CISG lays down the principle that a seller is entitled to perform the contract even after the date for delivery has passed, thus providing a right to cure of the seller that deprives the buyer, at least temporarily, of his right to avoid the contract during the period of time offered by the seller[181].

Moreover, a general principle upon which the Convention is based is that termination constitutes an *extrema ratio*[182], since it is provided only for a breach that essentially deprives

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173 '*Avoidance of the contract should be available only as a last resort (ultima ratio), and only if the continuation of the contract would no longer be tolerable because of a severe breach of contract by the seller*' UNCITRAL, 'Digest of Case Law on the United Nations Convention on the International Sale of Goods', (2016) , available at http://digitallibrary.un.org/record/535347 (last visited 14 November 2020] , at 221.

174 Walt, 'For Specific Performance under the United Nations Sales Convention', 215 ff.

175 According to Art. 49(2)(a), in case of late delivery, the buyer may declare the contract avoided if he does it within a reasonable time after he has become aware that delivery has been made.

176 Art. 49(2)(b)(i).

177 According to Art. 47, the buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations and, in this period of time, the buyer may not resort to any remedy for breach of contract, unless he has received notice from the seller that he will not perform within the period so fixed. Thus, even if the non-fulfilment was a priori a fundamental breach of contract, the buyer is not in a position to declare the contract avoided, but he has to wait until the period of time has expired.

178 Art. 49(2)(b)(ii).

179 Art. 48 provides the right to cure of the seller, which may remedy his breach provided that this does not result in an "unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer" (Art. 48 (1) CISG).

180 Art. 49(2)(b)(iii).

181 Schwenzer, *Schlechtriem & Schwenzer*, p. 733 ff.

182 The term 'extrema ratio' is used by Tribunale di Forlì, *Mitias v Solidea S.r.l.*; ; LG München (2002); ; Oberster Gerichtshof (2000). ; OLG Köln states that 'the remedy of avoidance shall only be available to the seller as the last resort to react to a breach of contract by the other party, which is so fundamental that it essentially deprives it of its positive interest'; ; see also Schwenzer, *Schlechtriem & Schwenzer*, p. 747.

the party of the interest he has in the contract, according to the abovementioned meaning. In particular, it may be recalled the tendency to preclude fundamental breach and avoidance in case of delivery of goods that do not conform to the contract, when the goods are repairable. Thus, the fundamental breach exists only where lack of conformity cannot be remedied by the seller[183] (at all or within a reasonable time) or can only be remedied with serious inconvenience for the buyer. Thus, if performance is still possible, the buyer would still have an interest in keeping the contract alive.

In the light of above, the one outlined by the CISG is a remedial mechanism that places the right to resolution in a subordinate position with respect to the right of the seller to correct the defective performance[184]. The favour towards specific performance seems to satisfy, in particular, the interest of the seller, for which termination usually involves high costs and a serious detriment: in attempting to perform, he may have incurred expenses which would be wasted in case of termination, especially when there is no market for the goods elsewhere[185]. On the contrary, it is not unlikely that the aggrieved party prefers termination, especially in the cases where the defaulting party is insolvent and cannot perform its obligations or pay damages.

The limitation of the avoidance remedy to the above occasions, however, is consistent with the CISG's underlying strategy of contract continuance (derived from the principle *pacta sunt servanda*), which attempts to avoid contract termination, in view of the fact that unwinding the contract, especially in international B2B relationships, involves the loss of a background of relationships and common usages between the parties, and the subsequent search for a new supplier.

Finally, a clarification might be added. It should be recalled that the CISG's remedies are dispositive and may be excluded or derogated by parties' agreement under Art. 6 CISG. This entails that parties may limit available remedies, excluding the right of the buyer to receive substitutive delivery or repair of the goods or, on the contrary, restricting the non-breaching party's remedy to repair or replacement of the goods or recovery of the contract price or stated portion of it[186]. Furthermore, the buyer's right to require

[183] A breach of contract would not be fundamental, since the seller makes a serious offer to cure the defect or offer a substitute delivery; OLG Koblenz (1997).

[184] A. Plaia, 'I rimedi nella vendita transfrontaliera' (2012) 2012 *Europa e diritto privato*.

[185] J. Yovel, 'The Buyer's Right to Avoid the Contract: Comparison between Provisions of the Cisg and the Counterpart Provisions of the Pecl' (2006).

[186] Gillette and Walt, *The UN Convention on Contracts for the International Sale of Goods*, p. 395.

performance may be extended providing that, in case of delivery of non-conforming goods, he has the right to receive substitute goods, regardless of the fundamental breach[187]. Moreover, the parties may also agree in the contract that the breach of an obligation constitutes a fundamental breach, making clear that their contract should stand or fall with the performance of a certain obligation indicted as fundamental, even if it would not be in accordance with Art. 25 CISG. In this case, any breach of such obligation constitutes a fundamental breach, therefore allowing the buyer to avoid the contract.

3. Interaction between CISG and domestic remedies

3.1 Performance and Art. 28 CISG

The investigation on the interaction between conventional and domestic remedies requires a brief examination of Art. 28 CISG, which provides a possible limit to the prevalence of specific performance and, moreover, is the only disposition of the Convention that expressly deals with the impact of domestic law remedies on the CISG.

As explained above, in case of non-conformity the buyer may ask for specific performance. i.e. repair or substitution of the goods delivered. In order that the buyer can demand specific performance, it is not sufficient that the abovementioned internal conditions are met, but the existence of an external condition is also necessary, provided by Art. 28 CISG, according to which the judge is not obliged to order the specific performance "*unless the court would do so under its own law in respect of similar contracts of sale*".

The admissibility of the specific remedy is thus also conditional on the existence of circumstances outside the Convention, i.e. the availability of the specific performance in national law, and this is historically explained by the persistent mistrust of the common law systems with respect to this kind of remedy[188].

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[187] Schwenzer, *Schlechtriem & Schwenzer*, p. 723.

[188] In general, in civil law (but the principle has exceptions - e.g. Italy-) specific performance is the primary remedy, while in common law the primary remedy is damages and specific performance is ordered only when damages would be inadequate (e.g. when the goods are unique and, therefore, damages for non-delivery would not give the buyer the equivalent of that which the seller had promised). By allowing courts to refrain from ordering specific performance where they would not do so under their own law, the Convention tried to reach a compromise between those jurisdictions. Ferrari, 'The Interaction between the United Nations Conventions on Contracts for the International Sale of Goods and Domestic Remedies (Rescission for Mistake and Remedies in Tort Law)', 56. ; Liu and Newman, *Remedies in international sales*, p. 29; A. Garro, 'Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods' (1989) 23 *International Lawyer* 443 at 458–59.

The disposition involves, on the one hand, that if specific performance would be ordered under domestic law, a court must make the remedy available under the CISG.

If, on the contrary, the court would not allow specific performance under its own law[189], it has discretion and may choose whether or not to enter a judgment for specific performance under the Vienna Convention[190].

The provision, therefore, does not involve that the court is prohibited from entering a judgment for specific performance when it would not do so under their own law, with the consequence that the common law courts would not be prevented from going even further in international contract cases than they have gone in domestic contract cases[191].

Leaving that area of discretion to the court, the rule expresses the complexity of the relationship between the CISG and domestic law remedies, which cannot be limited to the choice between application and non-application of the CISG[192].

This procedural exception presupposes that a right to require performance exists under the CISG, and the court should firstly determine whether the buyer may demand performance under the Convention. If such right exists, the court must check if it would reject the action on the basis of its law in case of similar agreements (in the sense that it does not contemplate the possibility to another party to perform its obligations under the contract through court action). Thus, specific performance may be excluded on the basis of Art. 28 if domestic law denies performance because of specific concerns against this remedy, in contrast to damages, or due to reasons based in enforcement law, but cannot be excluded because of substantive reasons[193]. For example, if the CISG denies the right

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189 The reference to the 'own law' of the courts is ambiguous, but it should be intended as a reference to the substantive law of the forum, not to the private international law rules of the forum. Interpreting 'its own law' as referring to a forum's entire law, including conflict-of-law rules, would defeat the purpose of the amendment. Ferrari, 'The Interaction between the United Nations Conventions on Contracts for the International Sale of Goods and Domestic Remedies (Rescission for Mistake and Remedies in Tort Law)', 57; ; Walt, 'For Specific Performance under the United Nations Sales Convention', 218; ; Schlechtriem, *Uniform Sales Law: The UN-Convention on Contracts for the International Sale of Goods*, p. 63.

190 In this regard, it has been observed that Art. 28 is not a provision aimed at protecting the contracting parties, but rather to protect the courts' discretionary powers over the granting of remedies. This is the reason because parties cannot opt out of this disposition. B. Zeller, 'CISG and the unification of international trade law' (2006).

191 O. Lando, 'Article 28' Bianca-Bonell Commentary on the International Sales Law: The 1980 Vienna Sales Convention, (1987) p. 236.

192 Ferrari, 'The Interaction between the United Nations Conventions on Contracts for the International Sale of Goods and Domestic Remedies (Rescission for Mistake and Remedies in Tort Law)', 55 argues that, in the context of Art. 28, the interaction between systems may enhance forum shopping, due to the fact that 'an obligation to grant specific performance depends, as mentioned, on the substantive law of the forum'.

193 Schwenzer, *Schlechtriem & Schwenzer*, p. 465.

to substitution, this is the case also if the court would apply substitution under domestic law.

If, thus, the court is not bound to render the judgment for specific performance according to Art. 28, the enforcement by legal action is stopped and, if the buyer wants to avoid the contract, the precondition of Art. 49 must be satisfied and there is no automatic replacement of the right to require performance with avoidance or damages[194].

The opinions of the scholars on the scope of this norm and on its effective potential to undermine the primary remedy of the specific performance are divergent. However, for some commentators Art. 28 threatens all remedial uniformity and creates extreme uncertainty regarding the right to performance[195]; its relevance may be resized, since parties of a contract governed by the CISG may expressly provide that specific performance will or will not be available in case of breach of contract, in order to avoid possible uncertainty caused by Art. 28. Such exclusion should be admissible in light of the principle of freedom of contract pursuant to Art. 6 of the CISG[196].

Moreover, the disposition gave rise to poor case law[197], a fact that led some commentators to argue that the cases in which it makes sense for a party to seek a performance-oriented remedy are also the occasions in which domestic sales laws, even in common law jurisdictions, which restrict the possibility to resort to specific performance, will also grant it[198].

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194 Schwenzer, *Schlechtriem & Schwenzer*, p. 469.

195 A. Kastely, 'The Right to Require Performance in International Sales: Towards an International Interpretation of the Vienna Convention' (1988) 63 *Washington Law Review* at 627. The author highlights that early drafts of the disposition provided that a court would not be bound to order specific performance unless it 'could' do so under its own law. This formulation restricted the scope of the article to those cases in which a legal system did not authorize injunctive orders, 'but if some such procedure did exist, then the Convention's general remedial provisions would govern'.

196 Lando, 'Article 28'; ; J. Koskinen, 'CISG, Specific Performance and Finnish Law' (1999) *Faculty of Law of the University of Turku - Private law publication series*; Kastely, 'The Right to Require Performance in International Sales', 643; but see Schwenzer, *Schlechtriem & Schwenzer*, p. 470, stating that Art. 28 is not excludable by mutual consent, since it is directed to national courts and does not affect the rights of the parties. If the parties want to secure the actionability of specific performance, they should select a jurisdiction friendly to performance.

197 UNCITRAL, 'Digest of case law on the United Nations Convention on the International Sale of Goods', 122.

198 H. M. Flechtner, 'Buyers' Remedies in General and Buyers' Performance-Oriented Remedies (25th Anniversary of the United Nations Convention on Contracts for the International Sale of Goods)' (2009).

3.2 CISG and domestic remedies in the light of the interpretative principles of the Convention

Thus, although Art. 28 is the only provision within the Convention that expressly deals with the impact of national law on the CISG architecture of remedies, its practical relevance in solving the issue whether the buyer may resort to domestic remedies for non-conformity is limited. Moreover, other less explicit provisions of the Convention may be significant in order to evaluate whether and to what extent an interaction between the CISG and domestic remedies can occur. As stated above, the CISG is exclusively concerned with the contractual relationship between the seller and the buyer and, in particular, with remedies to non-conformity and non-delivery. However, under most legal systems, the mere presence of contractual remedies does not preclude the buyer from using other tools if the respective conditions are fulfilled.

This simple observation leads to wonder whether the party, in case of non-performance by the seller, may resort to remedies provided by national law for the same defect (for what here is of interest: the non-conformity of the goods); use contractual remedies available at national level but not settled by the CISG (in particular mistakes, fraud and duress); resort to non-contractual remedies (torts), given that a specific case of non-contractual liability (the liability for death or personal injury caused by the goods to any person, according to Art. 5) is expressly excluded from the scope of the Convention.

In these cases, one wonders whether remedies for breach of an international sale contract falling under CISG may "pre-empt" or "concur" with liability based on domestic tort law rules. We can come to the conclusion that a remedy is excluded from the scope of application of the Convention, which means that, for that defect, the buyer will be able to resort to national discipline, with consequent concurrence or "*cumul*" of domestic and conventional remedies. On the contrary, including a given situation within the scope of the Convention, even if it is not expressly regulated by it, it entails that it will be resolved only on the basis of the Convention, and the buyer will not be able to resort to internal remedies.

With regard to the remedies provided by the domestic rules in the event of delivery of non-conforming goods, it can be stated that they do not concur with the conventional provisions, on the basis of the observation that both remedies, internal and international, meet the same requirement, i.e. to offer to the buyer the legal tools to satisfy himself, in

case the seller fails to perform the obligations assumed by the sale. In this case, the scope of the Convention and that of national law fully overlap, so that the former prevails over the latter.

In respect to the possibility of resorting to other national defences, here it is different to contractual remedies for non-conformity, and not expressly settled in the Vienna Convention, hence the discourse is more articulated. The possibility that the buyer may choose remedies other than those provided by the Convention must be investigated, not only through Art. 28 CISG, but also by applying the interpretative rules illustrated in Chapter I.

Assuming the exclusivity of uniform law as a general principle[199], if the architecture of CISG remedies is intended as being "complete" with respect to the contractual aspects of the relationship, it should prevail over internal rules; on the contrary, allowing a party to resort to domestic law in order to use a remedy which he already has at his disposal under the CISG's rules potentially undermines foreseeability and legal certainty in international trade. From this point of view, the recourse to non-unified law risks upsetting the carefully considered assessment of rights and obligations of international buyers and sellers that has been laid down in the CISG[200]. If one accepts the argument that the remedies in the Convention are exhaustive and prevalent upon domestic actions, it should be concluded that the space for domestic actions is occupied and cannot be "filled" by non-uniform law. From this standpoint, given that the CISG provides a remedial scheme for cases where the seller delivers goods that do not conform to the terms of the contract, it would be an unjustified circumvention of the CISG if the buyer could avoid the contract on the basis of a domestic remedy[201]. The possibility of integrating conventional discipline with remedies pursuant to domestic law should consider whether this will lead to outcomes that may result in being contrary to those reached under the CISG: the chance to use the remedies indifferently may mean that a party may circumvent provisions by basing his claim on domestic law, for which such

[199] Schwenzer, *Schlechtriem & Schwenzer*, p. 701.

[200] See U. Schroeter, 'Defining the Borders of Uniform International Contract Law: The CISG and Remedies for Innocent, Negligent or Fraudulent Misrepresentation' (2013) 58 *Villanova law review* 553; ; Schwenzer, *Schlechtriem & Schwenzer*, pp. 701–2.

[201] Leyens, 'CISG and Mistake'.

foreclosures do not operate (so called "election of remedies"[202]). More specifically, resorting to remedies provided in national law, the buyer may circumvent the non-compliance of the obligation to give notice of non-conformity to the seller within a reasonable time, after he has discovered or ought to have discovered it (Art. 39 (1)), or overcome Art. 39 (2) CISG, which cuts off all of the buyer's remedies when two years after delivery no notice has been given. Furthermore, the party could avoid the contract in the cases in which the other party has not committed a fundamental breach of contract, circumventing Art. 25 CISG.

The interpreter who aims at investigating the interaction between internal and conventional defences must, therefore, take into account the so-called "methodology" of the CISG. The choice whether to fill gaps in remedies by means of domestic law is not merely "technical", but necessarily involves an interpretative decision: if the objective is to achieve the greatest level of uniformity in the application of the Convention as it is laid down in Art.7 (1), the space left to contracting states to apply their domestic laws, whether contractual or based on tort, should be classified as a form of homeward trend[203] and, therefore, reduced to a minimum. For the purpose of this work, two fields in which domestic law remedies could interfere with the CISG provisions on buyers' remedies for non-conforming goods have been identified: (1) recourse to mistakes, fraud and duress (which are not expressly settled in the CISG and are often treated as validity issues under domestic laws); (2) tort recovery for economic loss caused by defective goods, as well as for property damages. As we tried to explain in the first part of this work, this analysis must be conducted bearing in mind that the fact that the CISG does not address all issues that may arise in connection with an international sales contract should not lead automatically to the conclusion that such matters are not covered by the Convention.

The relationship between the Convention and domestic rules that vitiate the parties' requisite intent, such as duress, fraud and mistake, must be investigated starting from the statement that none of these issues is explicitly settled by the CISG.

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[202] Schlechtriem, 'The Borderland of Tort and Contract—Opening a New Frontier', 21 *Cornell International Law Journal* (1988) at 468.

[203] DiMatteo, *International Sales Law*, p. 112.

Mistake

With particular reference to mistake, it should be preliminarily noted that, although there are great differences amongst domestic legal systems (and also terminology changes), it is generally recognised that mistake may consist in a defect of intention (error in motive) or a in a defective expression of a correctly formed intention (error in expression). The consequences of mistake, however, diverge from country to country[204]. It should also be pointed out that the problems of interaction only arise where there is a conflict between domestic law and the CISG (for example, when domestic law provides for nullity in a case which the CISG would lead to its remedial scheme). In cases like this, allowing the recourse to domestic claim for mistake could lead the buyer to resort to the domestic remedy if he has lost his remedies under the CISG, e.g. due to a failure to give timely notice.

Some commentators exclude this issue from the CISG's scope of application on the grounds that mistake (like fraud and duress) is not expressly included in the matters governed by the CISG, according to the first part of Art. 4[205]. This interpretation is strengthened by the fact that the predominant opinion assumes that "formation" is intended in the first sentence of Art. 4 as referring to the so-called "external consensus" (i.e. the mechanics of how the contract is concluded), with the consequence that "internal consensus" issues (such as incapacity, fraud, mistake) are regarded as matters not governed by the CISG[206]. This approach is criticized by those who note that the matters listed in Art. 4 are not the only ones the CISG is concerned with, and the reference to the matters governed by the CISG should be interpreted in the sense that the matters listed are "without any doubt" governed by the Convention[207].

Another point of view to investigate is the interaction between mistake and CISG remedies, which comes from Art. 4 lit. (a), which excludes from the scope of application of the CISG the validity of the contract, except as otherwise expressly provided in the Convention. From the interpretation of the concept of validity, we may derive the

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[204] The right to step back from the contract can bring to retroactive invalidation (e.g. in Italy) or to termination of the contract with effet pro futuro. I. Schwenzer (ed.), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods* (Fourth Edition, 2010), at 90.

[205] J. Klein and C. Bachechi, 'Precontractual Liability and the Duty of Good Faith Negotiation in International Transactions' (1994) 17 *Houston Journal of International Law* 1.

[206] Schwenzer, *Schlechtriem & Schwenzer*, p. 75.

[207] Ferrari, 'The Interaction between the United Nations Conventions on Contracts for the International Sale of Goods and Domestic Remedies (Rescission for Mistake and Remedies in Tort Law)', 60. See, on this point, Chapter I, par. 4.

inclusion or exclusion of remedies, such as mistake from the scope of application of the Convention, with the consequence that, if mistake falls within the notion of invalidity, domestic law is applicable.

As stated in the previous Chapter, what is considered a validity issue under the Convention is something on which there is a lack of consensus, because of the vagueness of the term and the possible relevance that the domestic meaning of this term may assume in the interpretation of the Convention[208]. On the basis that validity issues often concern, in national private law, the reasons that render a contract void, voidable or unenforceable, some commentators automatically equate mistake (as fraud and duress) with some kind of invalidity[209], with the consequence that this is excluded by the Convention[210].

Other scholars reach the same conclusions on the basis of the following argument: since validity is excluded from the CISG, then the notion of validity must be interpreted on the basis of the applicable national law. Consequently, whether a party can avoid the contract on the ground of his mistake is not determined by the Convention but rather by the applicable domestic law[211]. However, emphasising what was said in Ch. I, it is considered that the concept of invalidity should be interpreted autonomously, irrespective of the question of the validity of the individual legal systems and transcending any

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208 G. Cuniberti, *Is the CISG Benefiting Anybody?*, SSRN Scholarly Paper, ID 1045121 (2007), available at https://papers.ssrn.com/abstract=1045121 [last visited 13 November 2017]. The author considers that this exclusion impairs the utility of the whole Convention.

209 J. E. Murray, 'The Definitive "Battle of the Forms": Chaos Revisited' (2000) 20 *Journal of Law and Commerce* at 2 note 11 stating that 'CISG does not deal with "validity" issues such as mistake, fraud, duress or unconscionability'; with the same words; G. Nakata, 'Filanto S.p.A. v. Chilewich Int'l Corp.: Sounds of Silence Bellow Forth under the CISG's International Battle of the Forms' (1994) 7 *Global Business & Development Law Journal* at 148; R. Speidel, 'The Revision of UCC Article 2, Sales in Light of the United Nations Convention on Contracts for the International Sale of Goods' (1996) 16 *Northwestern Journal of International Law & Business* 165 at 173 stating that 'the CISG is not concerned with the "validity" of the contract or of any of its provisions or of any usage. This excludes defences that the contract is against public policy or should be avoided because of mistake, fraud, duress, or unconscionability'; ; seems to adhere to this approach Plaia, 'I rimedi nella vendita transfrontaliera' when he says that the substantive reluctance to deal with certain aspects of contract law is also motivated by the fact that matters such as consent defects are governed by mandatory rules in national law, while the CISG rules have a dispositive nature; ; see also Lookofsky, 'In Dubio Pro Conventione?', 280. ; For further references Ferrari, 'The Interaction between the United Nations Conventions on Contracts for the International Sale of Goods and Domestic Remedies (Rescission for Mistake and Remedies in Tort Law)', 61–62 note 58.

210 Dodge, 'Teaching the CISG in Contracts', 50 *J. Leg. Ed.* (2000) , available at https://papers.ssrn.com/abstract=2711971 (last visited 15 November 2020] , at 78, stating that the CISG '*is expressly not concerned with questions of validity, which means that domestic law continues to govern such issues as incapacity, fraud, duress, mistake, and unconscionability*'.

211 See Eörsi, 'Article 14', in *Bianca-Bonell Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (1987) , at 140, according to which '*mistake belongs to the sphere of validity of the contract and, since the issue of validity is excluded from the Convention (Article 4[a]) the rules of the applicable domestic law of the contract bearing on mistake have to be applied*'.

domestic labelling of the Contracting State[212]. This attitude to the Convention allows one to find an autonomous significance of the term "validity" that prevents national preconceptions[213].

With this interpretative objective in mind one must read Art. 4 where it states that the CISG is not concerned with validity "*except as otherwise expressly provided in this Convention*". This expression implies that even when dealing with "validity", the CISG cannot automatically be disregarded in favour of domestic law remedies[214], but that it is necessary to evaluate whether the Convention provides an "express" solution to the specific problem. Notwithstanding the CISG does not expressly refer to domestic remedies such as rescission for mistake, fraud and duress, according to the interpretation given to the expression "*except as otherwise expressly provided in this Convention*", it should be intended in the sense that the Convention expressly provide for validity even if it contains other options to resolve the problem[215]. In light of these remarks, some commentators argue that, where the CISG provides solutions that are "functionally equivalent" to the otherwise applicable domestic remedies, the CISG pre-empts recourse to those domestic remedies. In practice, courts should apply a "functional equivalence test"[216]: once the court has decided that an issue is one of "validity" according to the autonomous interpretation of the CISG and excluded from its scope of application on the grounds of Art. 4, the court has to find the applicable domestic law and determine whether domestic remedies are available to the parties in that case. After that, the court should determine whether the CISG provides functionally equivalent solutions to those available to the parties under the applicable domestic law and, if so, conclude for the pre-emption of the domestic remedies. If the CISG does not provide functionally equivalent solutions to the

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212 Ferrari, 'The Interaction between the United Nations Conventions on Contracts for the International Sale of Goods and Domestic Remedies (Rescission for Mistake and Remedies in Tort Law)', 63.

213 Schwenzer and Hachem, 'The CISG—Successes and Pitfalls'.

214 For this conclusion see Ferrari, 'The Interaction between the United Nations Conventions on Contracts for the International Sale of Goods and Domestic Remedies (Rescission for Mistake and Remedies in Tort Law)', 71; Schwenzer, *Schlechtriem & Schwenzer*, p. 33.

215 Ferrari, 'The Interaction between the United Nations Conventions on Contracts for the International Sale of Goods and Domestic Remedies (Rescission for Mistake and Remedies in Tort Law)', 65; Enderlein and Maskow, *International Sales Law*, p. 40; but see ; Leyens, 'CISG and Mistake' which is critical to this approach, arguing that, 'if all issues addressed by the CISG were non-validity issues the "expressly provided"-exception of CISG article 4 would be redundant'.

216 Enderlein and Maskow, *International Sales Law*, p. 41; Ferrari, 'The Interaction between the United Nations Conventions on Contracts for the International Sale of Goods and Domestic Remedies (Rescission for Mistake and Remedies in Tort Law)', 66–67.

domestic ones, remedies and defences that the parties can rely on will be determined by domestic law[217]. With the same intent, another scholar has developed a similar approach, consisting of two phases[218]. According to this method, a domestic law rule is displaced by the CISG if: (1) it is generated by a factual situation that the CISG also applies to (the factual criterion), and (2) it relates to a matter that is also regulated by the CISG (the legal criterion). If both criteria are cumulatively fulfilled, the domestic law overlaps with the CISG's sphere of application in a way that will result in its pre-emption.

Whatever methodological approach is chosen to resolve the issue, and although the individual domestic law may recognize a number of mistakes as relevant, it can be stated that that rescission for mistake through national law is only possible where the CISG has not established functional rules for the mistake, giving rise to rescission under domestic law[219].

The rules set out by these theories, furthermore, must be adapted and applied to different types of mistake. Only for certain types of error can it be argued that the Convention prevents the application of national law. It is generally assumed that in so far as a mistake relates to the characteristics of the goods or the extent to which the buyer is capable of performing his obligations under the contract, these matters fall within the scope of the CISG provisions, which implies that resorting to the applicable national law on these matters is not necessary.

With reference to errors concerning characteristics or qualities of the goods, it is assumed that the functional equivalence test does not allow the buyer to have recourse to the domestic remedies[220]. In many cases where the goods have been defective when the

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217 Ferrari, 'The Interaction between the United Nations Conventions on Contracts for the International Sale of Goods and Domestic Remedies (Rescission for Mistake and Remedies in Tort Law)'. District Court Aachen (1993) stated that rules of frustration or economic hardship under domestic law or domestic law challenges having to do with mistake as to the quality of the goods are irrelevant because the CISG fills the field in these areas.

218 Schroeter, *supra* note 149, at 555 ff. This author starts from the observation that Art. 4 CISG does not reveal with certainty which questions are governed, nor which questions are not governed by the CISG. In particular, the list of issues contained in the second sentence of Art. 4 is neither inclusive nor exclusive in nature: '*it is not inclusive because it does not provide that any question concerning the validity of sales contracts or a contract of sale's effects on the property in the goods is per se outside the CISG's scope—on the contrary, it specifically assumes that the CISG might govern such questions elsewhere in its provisions* («[E]xcept as otherwise expressly provided in this Convention . . .»)'.

219 Schwenzer, *Schlechtriem & Schwenzer*, p. 90; but see Hartnell, 'Rousing the Sleeping Dog', 77, which observes that, whichever interpretative solution may be developed, as undesirable as it may be that the Convention failed to achieve uniformity, Art. 4 (a) would justify a court's decision to rescind a contract pursuant to domestic law of mistake and restore the parties to the status quo ante.

220 Schwenzer and Hachem, *supra* note 39, at 471; UNCITRAL, *supra* note 139, at 140.This thesis is also refered by Commercial Court Hasselt, *Brugen Deuren BVBA v Top Deuren VOF*, 19 April 2006, stating that '*the Convention would be disturbed if the buyer could claim the nullity of the contract based on error or mistake about the substantial quality of the goods*'.

contract was concluded, there will also have been an error of the buyer in that respect. Allowing the buyer to resort to the right to rescind the contract provided under the applicable domestic law would circumvent the limits imposed by the CISG on the right to avoid the contract for defects of the goods, such as the notice regime under Art. 39 CISG, the exception in Art. 35 (3) CISG, the fundamental breach requirement in Art. 49 (1) lit. (a) CISG)[221].

As for mistakes concerning the characteristics of the other party, such as the seller's ability to perform, domestic remedies should be treated in the same way as errors concerning the characteristics of the goods: Art. 71 CISG offers a set of remedies in the case in which becomes apparent one party's potential inability to perform after the conclusion of the contract, and this should exclude remedies of the applicable national law[222].

In the case of a mistake as to the existence of the goods at the time the contract is concluded[223], difficulties caused by the dual nature of mistake arise. It has been convincingly noted that, on the one hand, mistake seems like a validity issue because it concerns the decision to enter a contract; on the other hand, it seems like a risk allocation issue, because parties might have allocated the lack of knowledge concerning potential in their agreement[224]. However, scholars agree on the fact that that CISG treats the issue as relating to the location of risk and as an excuse for non-execution[225]. This argument is supported by the fact that the Convention seems to cover the same operative facts, as can be deduced from Art. 68 (3) and from Art. 79 (1) CISG. Art. 68 (3) presupposes the validity of a contract, notwithstanding the non-existence of the goods at the time of its conclusion; Art. 79 (1) provides a rule applicable to the case where the goods no longer

[221] P. Huber, 'Some introductory remarks on the CISG' (2006) 6 *Internationales Handelsrecht* at 231–32.

[222] Schwenzer, *Schlechtriem & Schwenzer*, p. 711; ; Huber, 'Some introductory remarks on the CISG', 232.

[223] For some countries, a mistake as to the existence of the goods at the time the contract is concluded leads to avoidance because of initial impossibility, while in other countries the issue is treated not as one of validity, but rather of non-performance.

[224] T. Weitzmann, 'Validity and Excuse in the U.N. Sales Convention' (1997) 16 *Journal of Law and Commerce* notes that 'mistake is similar to validity because it deals with a state of affairs at the time of contract formation (i.e., things were not as parties believed them to be); but it is also like excuse because, in the performance stage of the contractual obligations, one party could not perform (i.e., performance was impossible or extremely difficult)'.

[225] Leyens, 'CISG and Mistake'.

exist at the time the contract is concluded. Finally, this should lead to the pre-emption of domestic law in regard to this type of mistake[226].

For other types of mistake, however, the CISG does not provide equivalent solutions. Regarding mistake in expression, where will and declaration diverge, scholars agree on the application of domestic law[227], since the CISG deals exclusively with the achievement of an "objective agreement", every defect of intention remaining without regulation.

Also, as for mistake concerning the identity of the other party (an issue which appears to be "more discussed than seen"[228]), recourse to the CISG should not be possible, since the Convention does not determine who is "party" to a contract[229]. A similar conclusion should be reached on rescission for mistake regarding the identity of the goods, since the CISG does not provide rules that have the same function as national rules.

Cases where the buyer concluded the contract under the influence of fraud or deceit are not thought to be governed by CISG, even though in these cases there is also often a close connection with conformity issues[230]. This is derived from the application of the functional equivalence test, since the CISG does not at all provide rules that, from a functional point of view, are equivalent to those that provided by domestic law for fraud and duress. Furthermore, this approach is also consistent with an interpretation of validity in the sense that it includes only public policies issues.

Therefore, national rules on fraud apply where a mistake has been deliberately caused by the seller, so that in such cases the contract may be void or avoided.

Tort law

The issue of the concurrence of remedies may also arise in respect of domestic remedies based on tort law, and the specific discipline of contractual liability provided by

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226 Ferrari, 'The Interaction between the United Nations Conventions on Contracts for the International Sale of Goods and Domestic Remedies (Rescission for Mistake and Remedies in Tort Law)', 70.

227 Leyens, 'CISG and Mistake'. The solution is also reflected in a judgment of a German court, which stated that, in cases of error in expression, domestic law applies. LG Hamburg (1997); see also ; E. A. Farnsworth, 'Article 8' Bianca-Bonell Commentary on the International Sales Law: The 1980 Vienna Sales Convention, (1987) p. 102, which classify error in expression as a validity issue, this regulated by domestic law.

228 Leyens, 'CISG and Mistake'.

229 Ferrari, 'The Interaction between the United Nations Conventions on Contracts for the International Sale of Goods and Domestic Remedies (Rescission for Mistake and Remedies in Tort Law)', 70–71; ; Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, p. 263.

230 Hartnell, 'Rousing the Sleeping Dog', 71–72. See also Schlechtriem, 'The Borderland of Tort and Contract—Opening a New Frontier', 474 according to which fraud should be excluded from the area covered by the Convention since 'the duty not to defraud or intentionally harm other people exists independently of an agreement of the parties, and the respective interests are not only created by contract'; ; Schwenzer, *Schlechtriem & Schwenzer*, p. 90.

the Convention, when conduct qualified as a breach of contract under the CISG constitutes, at the same time, a tort under domestic law. Given that the Convention regulates the sales *contract*, from this it should follow that what is not contract is outside the scope of the CISG and is governed by domestic law. However, it is precisely in the dichotomy between contract and tort that the main criticisms are found.

Every legal system has to deal with the issue of the possibility for the buyer who is damaged by the goods sold to resort to tort remedies. The answer to this question will depend on how the contract rules and the tort rules interact with each other within that legal system[231]. If the contract is governed by the CISG, the matter is even more complex, given that the international regime of the Convention faces in most cases a domestic tort system. Those systems, in fact, are not coordinated in the same way as they are in the national legal system. In the context of international sales, this situation may give rise to two possible approaches: a court or tribunal of a CISG Contracting State which might allow that claims grounded in tort co-exist and compete with CISG contract-based claims, or hold that the CISG pre-empts the application of such domestic remedial rules[232].

To this it has to be added that, even if it is agreed upon the fact that the buyer may resort to domestic claims under the CISG, the possibility of resorting to concurrent tort claims will eventually depend on whether the applicable law adopts the *cumul* rule or the *non-cumul* rule. In the latter case, it is likely that only claims based on the CISG will be allowed. If the applicable law adopts the *cumul* rule, concurrent claims will be allowed.

Moreover, to determine whether the CISG pre-empts domestic tort law or concurs with it, is of primary importance, given the characteristics of the CISG and its difference with some national legal systems: firstly, damages recoverable under the CISG are limited to the foreseeable ones[233], while domestic tort law may allow the recovery of unforeseeable damages[234]; furthermore, domestic tort law may recover damages regardless of whether notice of non-conformity has been given, while in the CISG claim for damages

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231 Huber, 'Some introductory remarks on the CISG', 233.

232 J. Lookofsky, 'CISG Case Commentary on Preëmption in Geneva Pharmaceuticals and Stawski' (2005) *Review of the Convention on Contracts for the International Sale of Goods (cisg) 2003-2004* at 2.

233 Art. 74 CISG.

234 This is true, for example, in Italy: although Art. 1225 of the Italian Civil Code ex pressly limits contractual damages to those that are foreseeable (where the breach of con tract is not an intentional one), this provision, and thus the foreseeability limitation, does not apply to tort law. Ferrari, 'The Interaction between the United Nations Conventions on Contracts for the International Sale of Goods and Domestic Remedies (Rescission for Mistake and Remedies in Tort Law)', 72.

is subject to compliance with the notice requirement recited in Art. 39. In addition, while Art. 6 allow parties to derogate from the Convention's damages provisions, domestic tort law generally cannot be excluded straightforwardly.

In order to resolve the issue, it seems appropriate to move from the rule of Art. 5 CISG, which excludes the application of the Convention "*to the liability of the seller for death or personal injury caused by the goods to any person*"[235]. The purpose of this provision, it has been noted, is not to exempt the seller from liability under both uniform law and national law, in relation to the types of damage referred to above; it rather implies the submission of the right to compensation for such types of damage (only) to the domestic discipline applicable under the private international law of the forum[236]. Since it is a matter expressly excluded, no problem of *cumul* may arise and domestic liability regime applies[237]. On the contrary, the leading opinion points out that claims from products liability for damages other than personal injury, such as property damages, must be considered as part of the Convention and in general as being regulated by it, given that they are not excluded from the scope of application of the Convention[238].

The possibility of enforcing the domestic claim for contractual damages must be considered pre-empted by the Convention, since the contractual liability appears, with regard to property damage, not excluded by the Convention, and the facts that invoke the

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235 Schlechtriem, 'The Borderland of Tort and Contract—Opening a New Frontier', 471. ; It has been noted that the exclusion covers injury to the buyer or other persons participating at least indirectly in the contract and also injury to non-participating third parties. Cfr. Schwenzer, *Schlechtriem & Schwenzer*, p. 50.

236 This interpretation is supported by Ferrari, 'The Interaction between the United Nations Conventions on Contracts for the International Sale of Goods and Domestic Remedies (Rescission for Mistake and Remedies in Tort Law)', 72–73; ; Huber, 'Some introductory remarks on the CISG', 233; ; M. Tescaro, 'Responsabilità extracontrattuale domestica e Convenzione di Vienna del 1980 sulla vendita internazionale di beni mobili' (2007) 4 *Responsabilità civile*; ; Schlechtriem, *Uniform Sales Law: The UN-Convention on Contracts for the International Sale of Goods*, p. 34.

237 Consequently, all requirements provided by the Convention for the enforcement of claims (such as the requirement of notice of lack of conformity under Art. 39) would be excluded. See Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, p. 101.

238 This thesis is confirmed by CISG Advisory Council, *Liability of the Seller for Damages Arising out of Personal Injuries and Property Damage Caused by Goods and Services under the CISG* (2013). ; See also, among scholars, Schwenzer, *Schlechtriem & Schwenzer*, p. 76; ; Schlechtriem, *Uniform Sales Law: The UN-Convention on Contracts for the International Sale of Goods*, p. 34; ; Enderlein and Maskow, *International Sales Law*, p. 46; ; W. Khoo, 'Article 5' Bianca-Bonell Commentary on the International Sales Law: The 1980 Vienna Sales Convention, (1987) p. 50; Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, p. 34.

domestic rules of "product liability" are the same facts that invoke the Convention[239]. Thus, these are recoverable under Art. 74 CISG[240].

In the event that national law is based on partially differing facts, some problems may arise. For example, while in the CISG the negligence of the seller is not relevant to the buyer's right to recover from the seller, for damage caused by nonconforming goods[241], a domestic law could require the proof of lack of due care by the seller. Likewise, if the damages were not foreseen or foreseeable at the time of the conclusion of the contract, it will not be recoverable under the Convention, while it could be under domestic tort law.

For some authors, also in this case the Convention would not be excluded, given that "*proof of the seller's lack of due care does not change the essential character of the claim, and access to domestic law based on such proof would make it possible to circumvent the uniform international rules established by the Convention*"[242].

Notwithstanding, the leading opinion is that property damages caused by non-conformity of goods are recoverable under Art. 74, however there is disagreement whether tort (product) liability is displaced in these cases by CISG, when domestic law provides a non-contractual liability for damages caused to property by the goods sold.

Therefore taking into account only the non-contractual liability, a thesis may be recalled according to which, as regards property damages other than those related to death or personal injury, the compensation of contractual damages provided under the Vienna Convention should preclude not only the recourse to contractual damages under domestic law, but also to any other legal tool available in domestic law, in order to enforce extra contractual damages[243]. The arguments put forward by those who support this thesis are mainly based on the view that non-contractual domestic liability corresponds to the contractual liability referred to in the Vienna Convention, with the consequence that the

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[239] This is true, for example, when the seller supplied the goods; the goods were defective; the goods caused damage to the user and domestic rules provide for this a tortious product liability, regardless of a lack of due care of the seller. In this case the facts that invoke the domestic rules of 'product liability' are the same facts that invoke the Convention. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, p. 34.

[240] Schlechtriem, 'The Borderland of Tort and Contract—Opening a New Frontier', 471.

[241] Therefore, the liability under Article 74 is a strict liability, independent of any fraud or fault of the party in breach. V. Knapp, 'Article 74' Bianca-Bonell Commentary on the International Sales Law: The 1980 Vienna Sales Convention, (1987) p. 540.

[242] Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, p. 35.

[243] For this view, see Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, p. 73.

possibility of relying on the former should be precluded, in view of ensuring the most uniform possible application of international contractual law.

According to the CISG Advisory Council, if the damage is caused to the goods themselves (or to property attached to the goods, or with which the goods are combined or commingled, or which are processed by the goods in the normal course of business or in the course of normal use) the liability of the seller is governed by the CISG to the exclusion of any claims based on domestic law, whether contractual or not[244]. This opinion is based on the assumption that the interest protected by rules on property damages is not an extra-contractual interest, therefore it should be covered by the Convention and should not be altered or changed by a tort protection granted by domestic legislatures or courts.

According to another, prevailing, thesis, the question should be resolved by adopting the above mentioned functional equivalence approach, according to which the recourse to a particular domestic action is precluded only where the Convention regulates a remedy which, although not expressly classified in the same way as the national remedy, appears by its nature to be preclusive, or even only functionally equivalent, to the domestic action[245]. Supporters of the latter view take as their starting point the fact that contractual liability (both under the Vienna Convention and under domestic law) protects, at least in principle, interests other than those protected by extra-contractual liability in domestic law[246]. Given that CISG pre-empts domestic law only when it provides for a solution that is functionally equivalent to the solution provided by domestic law, CISG cannot pre-empt all domestic tort law, since tort law is based on different policy considerations and has a purpose which is different to that of contract law. Consequently, when interests protected by the CISG and domestic law overlap, the CISG applies exclusively, while where there is no overlap, domestic tort law is not excluded. This would mean, in practice,

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244 CISG Advisory Council, *Liability of the Seller for Damages Arising out of Personal Injuries and Property Damage Caused by Goods and Services under the CISG*.

245 Ferrari, 'The Interaction between the United Nations Conventions on Contracts for the International Sale of Goods and Domestic Remedies (Rescission for Mistake and Remedies in Tort Law)', 75.

246 '*Whereas contract law, and thus the CISG, protect «what [a party] is entitled to expect under the contract» -i.e., interests shaped by the parties' agreement- tort law protects a much wider and more fundamental range of interests that exist independently from any contractual relationship between the parties*'; Ferrari, 'The Interaction between the United Nations Conventions on Contracts for the International Sale of Goods and Domestic Remedies (Rescission for Mistake and Remedies in Tort Law)', 71 *Rabels Zeitschrift Für Ausländisches Und Internationales Privatrecht / The Rabel Journal of Comparative and International Private Law* (2007) , at 75.

that when the CISG applies, the buyer will not be able to claim unforeseeable damages on the basis of the applicable domestic tort law, given that Art. 74 applies; where domestic tort law applies, a tort action for property caused by defective and non-conforming goods should not be prevented by an omission to give notice within reasonable time under Art. 39 CISG[247].

A similar approach is proposed by another commentator, which states that dogmatic classifications should not be relevant in defining the CISG's substantive scope[248]. Reference to national categories would constitute an interpretation of the CISG's material scope in light of domestic law, which is incompatible with the autonomous interpretation promoted in Art. 7 (1) CISG.

Another author adopted a different position, stating that if the law of a given jurisdiction permits a certain rule-competition between contract and tort, the fact that the State is a CISG contracting State does not automatically pre-empt the domestic regime of remedies, also in the case in which a given set of operative facts seems "covered" by CISG rules[249]. This position is deemed by the author to be compatible with case law, which has ruled on the issue of pre-emption[250]. In the view of the aforementioned author, allowing some domestic rules to compete with CISG rules represents little threat to the goal of uniform interpretation: if two courts of different Contracting States, when decide similar types of facts, would both interpret the Convention remedies as non-exclusive, that would be a uniform interpretation of the CISG remedial scheme which allows the concurrence of domestic remedies and which is not rendered "less uniform" by the possibility that the private international laws in these States differ, thus leading to the supplementary

247 Schlechtriem, 'The Borderland of Tort and Contract—Opening a New Frontier', 473.

248 Schroeter, 'Defining the Borders of Uniform International Contract Law', 560.

249 Lookofsky, 'CISG Case Commentary on Preëmption in Geneva Pharmaceuticals and Stawski'. The author support his thesis observing that Art. 7 CISG does not dictate the conclusion that domestic remedies invariably are pre-empted when the "operative facts" of the case seem "covered" by a given CISG rule.

250 The reference is to two cases decided by U.S. courts: New York Federal District Court, *Geneva Pharmaceuticals Tech. Corp. v Barr Labs. Inc.* (2002) and; U.S. Federal District Court, *Stawski Distributing v Zywiec Breweries* (2003). In this latter case, the Court held that the domestic provisions which limit the right of brewers to "terminate" contracts with their American buyers is not preempted by the avoidance provisions of the CISG. This is due to the fact that the CISG is to be given the same weight as any other Federal statute in a case implicating issues regulated by State law in accordance with the twenty-first Amendment to the U.S. Constitution; . Lookofsky, 'CISG Case Commentary on Preëmption in Geneva Pharmaceuticals and Stawski' adds that another reason for not pre-emption is that the domestic disposition provides a 'validity-related regime (designed to protect wholesalers with arguably inferior bargaining power) containing rules which lie outside the CISG scope'.

application of different domestic law rules[251]. It has been also pointed out that the concourse of domestic extra-contractual liability and international remedies is compatible with the dispositive nature of the Vienna Convention: if the compensation for property damage (other than those referred to in art. 5 CISG) should be deemed to be insured by the Convention alone, the parties could opt out from CISG liability pursuant to Art. 6 CISG, with the consequence that the damaged party would remain without protection[252].

In essence, according to the functional approach, the CISG replaces any domestic rules if the facts that invoke such rules are the same facts that invoke the Convention: wherever concurring domestic remedies are only concerned with the non-conformity of the goods, such as mistake as to the features of the goods, such remedies must be pre-empted by the CISG[253]. However, a different thesis highlights the fact that, especially on tort, different protected interests arise, with the consequence that CISG does not apply to these issues. In this regard, it is not only due to the fact that the CISG does not address all issues that may arise in connection with an international sales contract that the intended uniformity and legal certainty in international trade is at risk in practice.

6. Hierarchy of remedies under Dir. 1999/44

The Consumer Sales and Guarantees Directive[254] (Dir. 1999/44/EC) provides a discipline on *certain aspects* of contracts of sale of goods between consumers and businesses, in order to ensure "*a uniform minimum set of fair rules governing the sale of consumer goods*"[255]. The model chosen consists of an essential minimum core, focusing on the criteria

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251 The reference is to two cases decided by U.S. courts: New York Federal District Court, *Geneva Pharmaceuticals Tech. Corp. v Barr Labs. Inc.*, 21 August 2002 andU.S. Federal District Court, *Stawski Distributing v Zywiec Breweries*, 6 October 2003. In this latter case, the Court held that the domestic provisions which limit the right of brewers to "terminate" contracts with their American buyers is not preempted by the avoidance provisions of the CISG. This is due to the fact that the CISG is to be given the same weight as any other Federal statute in a case implicating issues regulated by State law in accordance with the twenty-first Amendment to the U.S. Constitution. Lookofsky, *supra* note 207 adds that another reason for not pre-emption is that the domestic disposition provides a 'validity-related regime (designed to protect wholesalers with arguably inferior bargaining power) containing rules which lie outside the CISG scope'.

252 Tescaro, 'Responsabilità extracontrattuale domestica e Convenzione di Vienna del 1980 sulla vendita internazionale di beni mobili'.

253 I. Schwenzer, 'Buyer's Remedies in the Case of Non-conforming Goods: Some Problems in a Core Area of the CISG' (2007) 101 *Proceedings of the ASIL Annual Meeting* at 421.

254 *Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees*.

255 Recital 2 of the Preamble to the Directive. The free movement of goods, which is one of the pillars of the internal market, implies that consumers resident in one Member State should be free to purchase goods in the territory of another Member State on the basis of a uniform minimum set of fair rules governing the sale of consumer good.

of conformity of goods with the contract[256] and contractual remedies[257], and a larger and purely eventual core consisting of conventional guarantees[258]. The minimum core is preserved by the imperative nature of the provisions.

In particular, the Directive aims at achieving approximation in the field of content of obligation of the seller, (remedies in the case of) non-conformity with the contract for sale of consumer goods, limitation periods and time limits for notifying complaints in the context of such contracts, and seller guarantees. Aspects *other* than those settled in the Directive (*inter alia*, the obligations of the buyer, the obligations of the seller other than that of delivering goods conform with the contract) are left to national regulation. Furthermore, the same aspects which are specifically addressed by the Directive are not fully regulated and do not exhaust all the issues of the regulatory regime for consumer sales. Remedies for lack of conformity, for example, do not exhaust the possibilities available to the consumer in case of defect of the goods purchased, since they are left to national law's "*other rights*"[259] which the consumer may invoke under the national rules governing contractual or non-contractual liability.

Focusing on remedies for non-conformity, Art. 3 (3), stating that "*In the first place*, the consumer may require the seller to repair the goods or he may require the seller to replace them, in either case free of charge, unless this is impossible or disproportionate", introduces a *hierarchy*[260] between the different remedies of consumers in case of non-conformity of the delivered goods, with the consequence that the consumer is obliged to primarily invoke the remedies of repair or replacement, that keep the contract in force, before he may have access to a reduction of the price or the termination of the contract.

This is the so called two-stage hierarchy of remedies available to the buyer in case of non-performance by the seller, based on two pairs of alternative remedies: at the first stage, the consumer is entitled to require the seller to repair or replace the goods. The

256 Art. 2 Dir. 1999/44.
257 Art. 3 Dir. 1999/44.
258 Art. 6 Dir. 1999/44.
259 Art. 8 (1) Dir. 1999/44.
260 The principle of primary and secondary remedies and a hierarchy between them is widely accepted: C. Hawes and C. Twigg-Flesner, 'Sales and Guarantees' Handbook of Research on International Consumer Law, (2010) pp. 202–3; ; R. Schulze and F. Zoll, *European Contract Law* , Revised edizione ed. (Nomos / Hart, 2018) p. 255; ; F. Zollers, S. Hurd, and P. Shears, 'Consumer Protection in the European Union: An Analysis of the Directive on the Sale of Consumer Goods and Associated Guarantees' (1999) 20 *University of Pennsylvania Journal of International Law* 97 at 110; C. M. Bianca, 'Art. 130' (2006) *La vendita dei beni di consumo (artt. 128-135 del d.lgs 6 settembre 2005, n. 206). Commentario a cura di C.M. Bianca in Nuove leggi civ. comm.*

second stage is engaged if neither of these remedies is available, or if the seller fails to complete the requested remedy within a reasonable period of time or without significant inconvenience to the consumer.

The choice of the European legislator, therefore, follows the one already provided for by the Vienna Convention, with a clear deviation[261]: in contrast to the rules governing international sales, the Directive deprives the purchaser of the right to choose the remedy and introduces a hierarchical graduation which favours the restoration of conformity and, only if it is impossible, disproportionate, or the seller fails to fulfil his obligations within a reasonable period of time or without significant inconvenience, then it allows the consumer to have recourse to termination or to claim for a price reduction. The consumer is not free to decide which remedy to resort to and must first give the seller another chance to perform by asking the goods to be remedied free of charge, by either repair or replacement, unless this is impossible or disproportionate (Art. 3 (3)). The decision, thus, is guided by the legislator, in virtue of the principle of *favor* for the preservation of the contract.

This legislative choice, criticized by some commentators[262], is aimed at balancing the rights provided by the Directive in favour of the consumer, which, in case of non-conformity, usually wishes to terminate the contract and to turn as soon as possible to a new seller, with the interest of the seller, who must not be confronted with a claim for termination or price reduction before he had had a second chance to properly perform the contract[263].

At this point, it is appropriate to briefly recall the remedies of the buyer. Neither repair nor replacement are described extensively in the Directive. Repair is defined as

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261 For this expression, see Luminoso, *La compravendita*, p. 382.

262 Part of the scholars commented critically the limitation of the right of choice of the consumer, pointing out the internal contradiction of the Directive, which, on the one hand, aims to safeguard the consumer and, on the other hand, seems to primarily protect the market and the interest of the seller. Compare Luminoso, *La compravendita*, p. 343; ; G. Amadio, 'Difetto di conformità e tutele sinallagmatiche' (2001) 47 *Rivista di diritto civile*, according to which the hierarchization of the remedies constitutes the point of emergence of the antinomies between interests of the market to the maintenance of the contract and individual need of reappropriation of the freedom of choice. This situation threatens to exacerbate disputes between professionals and consumers. See also S. Grundmann, 'Consumer Law, Commercial Law, Private Law: How Can the Sales Directive and the Sales Convention Be So Similar' (2003) 14 *European Business Law Review* at 243; A. Maniaci, *Rimedi e limiti di tutela dell'acquirente* (ETS, 2018) pp. 140–42. On the contrary, Bianca, 'Art. 130' argues that the hierarchy is based on the principle of good faith, and this principle requires the consumer to give preference to remedies less burdensome for the seller.

263 The favor of the Directive for the interests of the seller seems to be demonstrated also by the fact that, according to Recital 12, "*the seller may always offer the consumer, by way of settlement, any available remedy*". The hierarchy, therefore, is strict for the consumer, not only in the sense that it benefits from it, but also in the sense that it cannot depart from it.

"bringing consumer goods into conformity with the contract of sale" (Art. 1 (2) (f)) [264]. No definition of "replacement" is provided in the Directive, but according to the meaning commonly attributed to this term, it is believed that this means substituting the non-conforming item with an identical, but conforming item. The choice of the consumer between repair and replacement is subject to two limits: a consumer cannot require the seller to repair or replace the non-conforming goods if the chosen remedy is impossible[265] or disproportionate compared to the other[266]. In applying the disproportionality test, three factors have to be considered: the value the goods would have had if they had been in conformity with the contract; the significance of the lack of conformity and whether the alternative remedy could be completed without significant inconvenience to the consumer[267]. Furthermore, which repair or replacement that is going to be less costly for the seller to provide needs to be considered. In this connection, it should be pointed out that, while the impossibility identifies a "natural" limit, i.e. linked to the actual availability in nature of that remedy, the disproportion introduces, within a legal discipline, a qualitative element, which reproduces a negotiated comparison of interests[268].

Consequently, when a consumer chooses repair or replacement, it is first necessary to consider whether it is possible to provide that remedy; secondly, it has to be verified whether it is proportionate in comparison to the other remedy, on the assumption that the other remedy would also be possible. As mentioned above, it is only permitted to

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264 It has been observed that, if goods have several latent causes of lack of conformity, which manifest at different time, repair should entail that the seller has to resolve the particular lack of conformity the consumer has complained about, and when a second non-conformity manifests, then this should not mean that the consumer can immediately proceed to the second stage remedy. G. Howells, C. Twigg-Flesner, T. Wilhelmsson, C. Twigg-Flesner, and T. Wilhelmsson, *Rethinking EU Consumer Law* (Routledge, 2017) p. 187.

265 Repair may be impossible when the lack of conformity is so severe that repair could not bring the goods into conformity, or if spare parts required are not available. In cases in which it would be uneconomical to try and repair the goods (e.g. because of the costs of labour), it has been noted that this should not be regarded as a question of impossibility; rather, such economic considerations might be relevant in considering whether repair would be disproportionate when compared to replacement. Substitution may be considered impossible where the goods are unique; on the contrary, substitution should not be regarded as impossible if the item is no longer in the seller's stock, since a replacement could be obtained by the seller from another supplier. Howells, Twigg-Flesner, Wilhelmsson, Twigg-Flesner, and Wilhelmsson, *Rethinking EU Consumer Law*, p. 188; see also Luminoso, *La compravendita*, p. 386.

266 A remedy shall be deemed disproportionate if it imposes unreasonable costs in comparison with "the alternative remedy". The wording of Article 3(3) second sentence thus shows that this test will only be applied between the two primary remedies in relation to one another.

267 Article 3(3) second sentence.

268 See Nivarra, 'Rimedi: un nuovo ordine del discorso civilistico?' (2015) *Europa e Diritto Privato*, which argues that 'disproportion' is the point at which the interest of the parties in the preservation of the contract, become concrete. According to this view, the moment of identification of the disproportion it is a real renegotiation.

compare repair with replacement and vice versa, but not to compare repair with other remedies, e.g. price reduction[269].

According to Art. 3 (4), both those remedies have to be provided "free of charge". As stated in case law, this term excludes the imposition both of compensation for using the defective goods until non-conformity has been discovered and of the costs of the instalment of the substitutive good. In the decision *Quelle AG v. Bundesverband der Verbraucherzentralen und Verbraucherverbände*, the European Court of Justice stated that not charging the consumer for available remedies is essential for the protection afforded to consumers by the Directive, since in the absence of such protection consumers might be deterred from exercising their rights. Consequently, Art. 3 of the Directive cannot be interpreted as allowing national legislation to impose compensation on the buyer for using faulty goods until the seller would replace that good[270]. In *Gebr. Weber GmbH v. Jürgen Wittmer* and *Ingrid Putz v. Medianess Electronics GmbH*, the Court of Justice, in order to tackle the issue of whether it is the obligation of the seller to pay any costs affiliated not only with the removal of goods not in conformity with the contract, but also with the subsequent instalment of replacement goods, decided that these costs shall be borne by the seller[271]. Also in *Quelle* the Court had noticed that costs arising out of the removal of defective goods and the installation of new ones are to be borne by the seller, as long as the buyer had installed the machine in good faith.

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[269] In European Court of Justice, *Gebr. Weber GmbH v Jürgen Wittmer and Ingrid Putz v Medianess Electronics GmbH* (2011) the CJEU held that, although the first subparagraph of Article 3(3) is "formulated in a manner which is sufficiently broad to cover cases of absolute lack of proportionality, the second subparagraph of Article 3(3) defines the term 'disproportionate' exclusively in relation to the other remedy, thus limiting it to cases of relative lack of proportionality. Furthermore, it is clear from the wording and purpose of Article 3(3) of the Directive that it refers to two remedies provided for in the first place, namely the repair or replacement of the goods not in conformity". Moreover, recital 11 of the Directive states that a remedy is "disproportionate if it imposed, in comparison with the other remedy, unreasonable costs". See, for a comment, J. Luzak, 'A Storm in a Teacup? On Consumers Remedies for Nonconforming Goods after "Weber and Putz"' (2015) 23 *European Review of Private Law*.

[270] In Quelle, the buyer ordered a 'stove set' from Quelle, and only noticed the appliance's lack of conformity two years later. Quelle subsequently replaced the goods (as repair was not possible), but also charged the buyer a sum representing the enrichment the buyer had gained from using the initial product. The Court concluded that Art. 3 of the Directive cannot be interpreted as allowing national legislation to impose compensation on the buyer for using faulty goods until the seller would replace those goods, since it was the intention of the European legislator to make repair or replacement available to the consumer without any significant inconvenience. It is for this reason the Court came to the conclusion that the availability of such remedies "free of charge" is an essential element of the Directive's protection regime.

[271] The European Court of Justice, *Weber and Putz* In these cases, the analysis was centered on comparing a legal transaction characterised by the non-conformity of the delivered good, with a situation where the consumer actually receives what he has contracted for. If the seller delivered a good free of defects, the consumer would only have to bear the cost of installation once. However, if the good is not in conformity with the contract, other costs arise, namely for the removal of the defective good, and for a second installation. The Court thus argued that if it were for the buyer to support any incidental costs, it would be contrary to Article 3(2) and (3).

If neither repair nor replacement are able to remedy the lack of conformity, or neither is available, the consumer can instead request price reduction or rescission. The consumer can freely choose whether to have the price reduced or the contract rescinded, since Art. 3 (5) states that "[…] *the consumer is entitled to neither repair nor replacement, or if the seller has not completed the remedy within a reasonable time, or if the seller has not completed the remedy without significant inconvenience to the consumer*[272]". This clearly shows that the remedies of repair and replacement are not only a right for the consumer, but also a right for the seller, who has a second chance to perform the contract.

The remedy of final resort is rescission, since (1) a consumer may seek rescission only if repair and replacement are not available or once they have been attempted and failed and (2) it is not obtainable where the lack of conformity is minor[273] (Art. 3 (6)). The Directive does not contain specific provisions on the consequence of termination, neither on the modalities to exercise thereof.

In conclusion, the buyer of non-conforming goods has the following possibilities: (1) if repair or replacement are both possible and not disproportionate, he may freely choose between them, while he cannot resort to secondary remedies; (2) if one of the primary remedies is impossible or disproportionate, he has no choice but to invoke the other primary remedy; (3) if both repair and replacement are impossible or disproportionate, the buyer may immediately resort to termination (if the lack of conformity is not minor) or price reduction, at his own choice.

6.1 Derogation to the hierarchy of remedies and national remedies for non-conformity

The architecture of the remedies designed by the Directive cannot be fully understood if one does not consider the fact that Dir. 1999/44 is a minimum harmonisation tool and allows Member States to adopt, in the sector regulated by the

[272] The "significant inconvenience to the consumer" criterion is relevant both to Art. 3(3) in assessing whether repair or replacement is "disproportionate" and here in considering the availability of rescission and price reduction. While, for the purposes of Art. 3(3), this criterion has to be applied in abstract terms, since it is done before repair or replacement are attempted, in Art. 3(5) it applies with the knowledge of whether an attempt to repair or replace was performed without significant inconvenience.

[273] The Directive does not indicate the meaning of minor defect. It has been argued that the term 'minor' has a differnet meaning than that of non-fundamental breach under the CISG and the standard of proof should be lower than for providing fundamental breach. H. Sivesand, *The Buyer's Remedies for Non-conforming Goods: Should There Be Free Choice or Are Restrictions Necessary?* (Sellier European Law Pub, 2005) p. 147.

Directive, more protective rules, if they ensure "*a higher level of consumer protection*" (Art. 8 (2)).

Although the observation may be obvious, it must be noted beforehand that the range of remedies available must be sought in the multi-level system composed of rules at both the national and European level. National laws usually provide, in case of non-performance, that consumers may claim performance as well as damages and termination. The availability of each of these actions is tied to more specific requirements that differ from one Member State to another. The result of this is that rules on consumer remedies within the EU are fragmented in two different ways[274]. On the one hand, differences among Member States remain either because the remedy is not covered by EU-law at all (e.g. the claim for damages for non-performance and elements of the claim for termination and delivery), or because the remedy is covered, but only by means of minimum harmonisation. The second type of fragmentation is caused by EU-law itself, mainly because national implementations of EU-directives has to be treated differently from national rules, since the former require an interpretation in line with the aims of the EU-instrument and the case law of the Court of Justice of the European Union. To these observations it may be added that, in the context of a minimum harmonisation directive, the implementation of the European text by Member States may not only be more favourable to the consumer, but also significantly different.

One first issue that was raised was whether, in the area of remedies already regulated by the Directive, i.e. in the context of remedies for non-conformity of the goods, Member States could, at the implementation stage, derogate from the strict two-stage model, in a twofold way: on the one hand, allowing the consumer "cherry-picking" the remedy he preferred, possibly even opting for termination at first hand (instead of invoking repair or replacement); on the other hand, enabling him to invoke an internal remedy for non-conformity if it ensures a higher level of consumer protection. The possibility of derogating from the hierarchy, in the sense of admitting that the consumer can choose between the remedies provided by the Directive, was excluded by some authors on the basis that some of the provisions of Dir. 1999/44 are meant to be unchangeable by the Member States. Looking at the *travaux preparatoires*, the negotiations between Commission,

[274] See, on this point, J. M. Smits, *The New EU Proposal for Harmonised Rules for the Online Sales of Tangible Goods (COM (2015) 635): Conformity, Lack of Conformity and Remedies* (2016) p. 5.

Parliament and the Council on sets of remedies seem to suggest that the hierarchy of remedies is the "last word"[275]. Nevertheless, most authors argued that the Member States are free to maintain or introduce a remedies system more favourable to the consumer. Because of the minimum harmonisation character of the Directive, it has been possible for Member States to retain other remedies such as the possibility for the consumer to terminate the contract immediately instead of having to give the seller the possibility to repair or replace the goods first.

In any case, the debate on the possibility to freely choose the remedy has been superseded by the fact that Member States, on the grounds of leeway afforded by the minimum harmonisation standard, have gone on different points and to a different extent beyond the standard set in the Directive, in particular regarding the hierarchy of remedies, the legal guarantee period and the period for reversal of the burden of proof. Of course, the chosen hierarchy of remedies must be more favourable towards consumers, compared to the regime in the Consumer Sales Directive (e.g. providing a regime which gives the consumer free choice between all four remedies). However, this has inevitably led to a large variety of national rules on consumer protection.

Member States	Duration of legal guarantee (years)	Notification obligation on consumer	Reversal burden of proof	Hierarchy of remedies
Austria	2	No	6 months	Yes
Belgium	2	Yes	6 months	Yes
Bulgaria	2	Yes	6 months	Yes
Croatia	2	Yes	6 months	Free choice
Cyprus	2	Yes	6 months	Yes

[275] Rott, 'Minimum harmonization for the completion of the internal market?', 1125. According to the Author, the Directive 99/44 provides for a definite hierarchy which Member States cannot alter. This is due to the fact that the hierarchy represents a specific balance between the obligations of the sellers and consumers. See also D. Staudenmayer, 'The Directive on the Sale of Consumer Goods and Associated Guarantees — A Milestone in the European Consumer and Private Law' (2000) 8 *European Review of Private Law* at 554, which states that 'the rather precise wording does not leave a lot of room of manoeuvre for implementation by Member States'.

Czech Republic	2	Yes	6 months	Yes
Denmark	2	Yes	6 months	Yes
Estonia	2	Yes	6 months	Yes
Finland	No fixed time limit	Yes	6 months	Yes
France	2	No	2 years	Yes
Germany	2	No	6 months	Yes
Greece	2	No	6 months	Free choice
Hungary	2	Yes	6 months	Yes
Ireland	6	No	6 months	Yes + short term right to reject
Italy	2	Yes	6 months	Yes
Latvia	2	Yes	6 months	Yes
Lithuania	2	Yes	6 months	Free choice
Luxembourg	2	Yes	6 months	Yes
Malta	2	Yes	6 months	Yes
Poland	2	No	1 year	Yes
Portugal	2	Yes	2 years	Free choice
Romania	2	Yes	6 months	Yes
Slovakia	2	Yes	6 months	Yes
Slovenia	2	Yes	6 months	Free choice
Spain	2	Yes	6 months	Yes
Sweden	3	Yes	6 months	Yes
The Netherlands	No fixed time limit	Yes	6 months	Yes

United Kingdom	6 (5 in Scotland)	No	6 months	Yes + right to reject

Table 1 – Legal status quo in relation to four key provisions of Dir. 1999/44[276]

With regard to the possibility of allowing the consumer to resort to remedies provided by national law, for the case of non-conformity of the goods, it is necessary to ask whether the *higher level of consumer protection* may be a criterion for resolving potential conflicts of rules when the question of the concurrent application - and, consequently, the potential conflict - between the rules of domestic law and the EU discipline arises.

This issue must be addressed bearing in mind that, in a minimum harmonisation directive, the principle of higher consumers protection justifies even significant deviations from the text of the Directive, as long as the different domestic rule protects the part identified as weak. If, therefore, the aim is to protect the consumer, any divergence *in melius* from the standard can only be viewed favourably. On the contrary, allowing the consumer to resort to domestic remedies, in particular when they are provided for non-conformity, which is exactly the matter regulated by the Directive, may circumvent provisions which had been negotiated during the legislative procedure, undermining the agreement reached through the EU's legislative process[277], not to mention the fact that every objective of standardization and simplification of EU sales law fails. In the context of a minimum harmonisation directive, these considerations have resulted in the freedom in the implementation by Member States, to which the obligation to balance the needs abovementioned has been substantially assigned.

Transposition in Italy and concurrence of remedies

The general discourse referred to in the previous subparagraph does not take into account the implementation of the Directive in Member States; in fact, problems of concurrence of remedies (the same remedies based on lack of conformity) may arise from transpositions into national law that go beyond what is expressed in Art. 8 (1).

[276] *Consumer Market Study to Support the Fitness Check of EU Consumer and Marketing Law: Final Report* (2017).

[277] Rott, 'Minimum harmonization for the completion of the internal market?', 1107. Furthermore, it should be rcalled that Art. 8 (1) leaves to national law the possibility to exercise "other rights", from which it could be inferred that rights which are not different from those regulated by the Directive (i.e. domestic remedies for lack of conformity) are precluded to the consumer.

In Italy, the consumer directives were originally transposed into the Italian Civil Code as a subtype of the sale of movable property (art. 1519-bis ff.) and only then passed into DLgs. 206/ 2005 (Articles 128-135). The Italian legislator transposed the remedies as a hierarchy (Art. 130) as set out in the Directive, disposing in Art. 135 that to the extent not provided for in this title, the provisions of the Civil Code in the matter of sales contract apply[278]. This latter disposition poses the problem of reconstructing the systematic relations existing between the provisions of the Civil Code in matter of contract in general (art. 1321-1469 c.c.), the rules on the contract of sale (art. 1470- 1509 c.c.), the norms on the consumer contracts and, finally, those on the contract of sale of consumer goods.

The provisions of art. 135 comma 1 cod. cons. does not correspond, in reality, to the letter of Art. 8 (1) of Dir. 99/44, where the consumer's entitlement to act as a contractual and non-contractual liability remains unaffected by the exercise of "*other rights*". The domestic disposition, referring to the rights conferred by other rules of the legal system, seems to give the consumer a higher protective standard, comprehensive of any right that is provided by the Italian legislation and not limited to remedies other than those set out in Dir. 99/44. When interpreting the coordination of these provisions, two fundamental approaches have been opposed.

According to a first thesis, domestic rules governing the sale of movable goods and sales law in general shall apply in a residual manner, in so far as the rules governing the consumer sales do not regulate in a different and exhaustive manner a given aspect. Therefore, a direct application of the domestic rules is only valid within the limits of what is not provided for by the Directive[279]: it is the case of damages for consequential loss, which may be combined with one of the remedies listed in the hierarchy when the remedies do not fully repair the injury suffered.

However, according to the majority of the scholars, a concurrence of domestic and EU remedies for non-conformity may exist, with the consequence that the Italian

[278] Art. 135 provides that "1. Le disposizioni del presente capo non escludono né limitano i diritti che sono attribuiti al consumatore da altre norme dell'ordinamento giuridico. 2. Per quanto non previsto dal presente titolo, si applicano le disposizioni del codice civile in tema di contratto di vendita".

[279] De Nova, 'La direttiva n. 1999/44/Ce e la sua attuazione' L'acquisto di beni di consumo: D. Lgs. 2 febbraio 2002, n. 24 / G. Alpa ... [et al.], (Milano: IPSOA, 2002) p. 17; ; De Cristofaro, 'Il "Codice del consumo": un'occasione perduta?' (2005) *Studium iuris* at 1146. This argument is based on the consideration that the sale of consumer movable goods must be considered as a sub-type of sale of movable goods, which in turn is a sub-type of sale.

consumer may resort to any kind of remedy[280]. He may (1) derogate[281] from the hierarchy of remedies set in Art. 3 of the Directive and demand the price reduction or the termination of the contract according to domestic sales rules[282]; (2) claim for the termination of the contract or a reduction of the price pursuant to the rules applicable to contracts in general[283]; (3) claim for damages in lieu of performance[284]; (4) act for the avoidance of the contract for lack of consent.

Valuing the principle of higher consumer protection, other commentators argued that Art. 135 refers to all the rules of the legal system that are more favourable than those provided by the consumer discipline, not in the sense that only these are available, but in the sense that the buyer can choose whether to invoke, as a consumer, the rules on the sale of consumer goods or, as a "common" buyer, other rules of the legal system of the State[285].

In conclusion, the implementation of the Directive of 1999 by the Italian State leads one to believe that the consumer may choose the regulatory discipline to be referred to, in the sense that the general sale discipline is applicable, not in a purely supplementary

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[280] This argument starts from the assumption that the sale of movable goods is a trans-typical discipline, in the sense that it contains a set of rules applicable in any case where the consumer obtains a good through a contract. Therefore, the status of consumer is just a prerequisite to access to special instruments and does not prevent the consumer from opting to the remedies he has available as a buyer. S. Pagliantini, 'Contratti di vendita di beni: armonizzazione massima, parziale e temperata della Dir. UE 2019/771'; Bianca, 'Art. 130'; T. Dalla Massara, 'La "maggior tutela" dei diritti del consumatore: un problema di coordinamento tra codice civile e codice del consumo' La direttiva consumer rights. Impianto sistematico della direttiva di armonizzazione massima, (Roma TrE-press, 2017) p. 58; Luminoso, *La compravendita*, p. 407.

[281] It has been correctly observed that the choice to seek a different remedy is not technically a derogation, since there would be no disapplication of the hierarchy. On the contrary, the consumer moves outside the scope of Consumer Code, opting in favour of a remedy whic is based on different assumptions Dalla Massara, 'La 'maggior tutela' dei diritti del consumatore: un problema di coordinamento tra codice civile e codice del consumo', p. 52.

[282] Art. 1492 c.c.

[283] Pursuant to art. 1453 c.c., which is available to the consumer in the case of aliud pro alio. A. Luminoso, 'Chiose in chiaroscuro in margine al d. legisl. n. 24 del 2002' Garanzie nella vendita dei beni di consumo, (Cedam, 2003) p. 114; ; Sirena, 'La tutela in tema di contratto di vendita e il richiamo ad altre disposizioni di legge stabilito all'art. 135 del D.Lgs. 6 settembre 2005, n. 206' (2006) *La vendita dei beni di consumo (artt. 128-135 del d.lgs 6 settembre 2005, n. 206). Commentario a cura di C.M. Bianca in Nuove leggi civ. comm.*; S. Pagliantini, 'Contratti di vendita di beni: armonizzazione massima, parziale e temperata della Dir. UE 2019/771'.

[284] Luminoso, *La compravendita*, p. 411; ; contra M. Paladini, 'I rimedi al difetto di conformità nella vendita di beni di consumo' La tutela dei consumatori in internet e nel commercio elettronico, (2012) p. 361.

[285] Maniaci, *Rimedi e limiti di tutela dell'acquirente*, p. 173. Another thesis, based on the same premise, concludes that the consumer have access to national rule, in addition to the remedies provided for in the Directive, if they provide him with a higher level of protection, while the others would remain inapplicable. The protection under nation law would therefore remain in force if it better fits the interests of the consumer. This interpretation is based on Art. 8 (2) of Dir. 99/44. However, it has been noted that comparison - in terms of greater or lesser advantage - between different legal instruments would be impracticable in practice, having to take into account many issues, including procedural aspects, as well as the subjective preference of the consumer for a remedy instead of another.

way, but as alternative, provided that the rules on the sale of consumer goods constitute an additional framework, applicable in addition, for consumer protection purposes.

6.2 UE remedies and other domestic law *rights*

A significant issue arises with reference to the interaction between domestic remedies and European defences, other than those provided by the Directive for nonconformity: since the Directive is a minimum harmonisation tool and, furthermore, it is explicitly incomplete (given that it addresses only "*certain aspects*" of the sale of consumer goods), it has to be asked through which instruments it is possible to reconstruct the completeness of the discipline available to the consumer. This issue must be addressed, bearing in mind that allowing the consumer to resort to domestic remedies could result in a circumvention of provisions which had been carefully negotiated during the legislative procedure, undermining the agreement reached through the EU's legislative process.

With special regard to a possible concurrence of EU remedies and domestic law, Dir. 1999/44 explicitly refers to national rules in Art. 8 (1), where it states that rights resulting from the Directive shall be exercised without prejudice to *other rights* which the consumer may invoke under the national rules governing contractual or non-contractual liability.

The text of the disposition suggests that the consumer may refer to national remedies, relating to contractual or non-contractual liability, which are different from those provided in the Directive, with the consequence that he should refer to national provisions if he wants to invoke avoidance of the contract based on mistake, fraud and duress and claim damages. Therefore, the consumer may choose to base his claim on mistake, in accordance with applicable domestic law. This choice, thus, will presumably lead to the unwinding of the agreement, which will take effect in accordance with the rules laid down by the laws of the Member State.

In this regard, question arise as to whether the Directive should apply in matters expressly referred to the competence of the Member States, where national rules provide for remedies that substantially overlap, in the defect to which they intend to remedy, to those of the Directive. If we propose again the reasoning made for the Vienna Convention, it has been noted that the rule set in Art. 8 (1) should not entail that Member States have total discretion on allowing the consumer access to national rule on contractual and non-contractual liability, but, on the one hand, the principle of

effectiveness should be taken into consideration (so as not to render impossible or excessively difficult the exercise of the rights conferred by the Directives); on the other hand, the rules aimed at protecting the trader from further reaching claims, which are not undermined under a different label, should be ensured[286]. This conclusion is reached through a parallelism with what has been said, with reference to mistake and Art. 4 CISG, i.e. that exclusion of a validity issue from the scope of application on the Convention should not lead to applying national rules, if based on operative facts covered by the legal tool. The consequence would be that rights provided in national law should be eligible only if they do not deal with circumstances where the Directive regards the consumer as not deserving protection[287]. Who supports this theory argues the applicability, both with regard to damages and to defects of consent, of the conclusions reached by the European Court of Justice with reference to Art. 13 of Dir. 85/374 (Product Liability Directive). The disposition provides that the directive does not affect any rights which an injured person may have according to the rules of the law of contractual or non-contractual liability, as set in 1999 Directive, and the European Court of Justice[288] interpreted this provision in a restrictive way, arguing that it only related to rights based on *other grounds* than those defined in Dir. 85/374, with the consequence that the same approach should be adopted in Dir. 1999/44. According to this view, the consumer should not be able to invoke, for example, mistake on the quality of the goods.

Such an extension of the scope of application of the Directive, although it may be justified by the need to ensure uniformity in the disciplines of the Member States, does not take into account the fact that the Directive and the Vienna Convention are different legal tools with different scopes of application and are aimed at protecting different interests; furthermore, only in the latter case where the interpretative principles are set out in Art. 7 is where it seeks to ensure the maximum possible exclusion of national laws. Dir. 1999/44, on the other hand, consider it appropriate to harmonize national laws governing the sale of consumer goods, as far as the issue of non-conformity of goods is concerned, without however impinging on provisions and principles of national law relating to contractual and non-contractual liability (Recital 6).

[286] Rott, 'Minimum harmonization for the completion of the internal market?', 1128.
[287] Rott, 'Minimum harmonization for the completion of the internal market?', 1128.
[288] European Court of Justice, *María Victoria González Sánchez v Medicina Asturiana SA*.

Finally, this argument, extending the Court's interpretation of Dir. 85/374 to Dir. 1999/44, does not consider that the former is a maximum harmonisation directive, where Member States are no longer free to maintain or introduce national legislation in the harmonised area and where the recourse to national law must be considered more carefully. In Dir. 1999/44, a similar conclusion is not acceptable, also taking into account that the principle of higher consumer protection set in Art. 8 (2) should always allow access to more favourable domestic remedies.

A similar reasoning can be made with regard to damages. The Dir. 1999/44 does not devote any attention to contractual or tortious compensation claims for damages [289]: the EU legislator has renounced intervening and harmonizing national contractual and non-contractual remedies in case of breach of a consumer sale contract, and the relationship between them[290]. Damages, thus, remain outside the harmonizing scope of the Directive.

The omission of any provision about the aforementioned has been severely criticized, given that the possibility to award damages for consequential losses is important for the consumer, since he often will not seek a remedy to deal with the non-conformity of goods itself, but also seek compensation for consequential losses beyond the immediate non-conformity, and therefore also this area deserves to be harmonised[291].

In the first instance, it has to be noted that damages (1) caused by death or by personal injuries, (2) caused to private property to the consumer are settled by Dir. 1985/374[292], which allows the consumer to sue the producer[293] for damage caused by a defect in his product[294]. However, the harmonization resulting from the Product Liability Directive is

[289] This has been explained by the fact that the Directive deals with price reduction, which is regarded by many authors as a substitute for damages. However, 'the proportionate character of price reduction and its applicability in case of breach of contract and in case of force majeure are, already, two elements showing that both remedies are not alike'. S. Jansen, *Consumer Sales Remedies in US and EU Comparative Perspective* (Intersentia, 2018) p. 30.

[290] As stated in Recital 6, the main difficulties encountered by consumers concern the non-conformity of goods with the contract and is therefore appropriate to approximate national legislation in this respect, "*without however impinging on provisions and principles of national law relating to contractual and non-contractual liability*"..

[291] Howells, Twigg-Flesner, Wilhelmsson, Twigg-Flesner, and Wilhelmsson, *Rethinking EU Consumer Law*, p. 196; Contra K. Królikowska, 'Concurrence of Claims in Damages and EU Law' in A. L. M. Keirse, M. B. M. Loos (eds.), Waves in Contract and Liability Law in Three Decades of Ius Commune, (Intersentia, 2017), pp. 11–40 p. 20, stating that the reason for this choice is that 'minimal harmonization of contractual remedies does not require taking steps to harmonize the complex and politically dangerous field of damages'.

[292] *Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products* (1985).

[293] Or the supplier of the product, in cases provided in Art. 3(3) of the Directive.

[294] Howells, Twigg-Flesner, Wilhelmsson, Twigg-Flesner, and Wilhelmsson, *Rethinking EU Consumer Law*, p. 269.

limited to the abovementioned kind of damages, while it does not cover pure economic losses and non-material damages (Art. 9 (3))

In respect with the possibility of claiming damages for consequential purely economic losses, it is agreed that the provision of Art. 8 (1), stating that the rights resulting from the Directive shall be exercised without prejudice to other rights which the consumer may invoke under the national rules governing contractual or non-contractual liability, which allows the consumer to claim for additional damages under non-harmonised national law[295].

A more critical issue is whether the consumer may claim for direct loss, bypassing the hierarchy of remedies set in the Directive. Some authors think that allowing the consumers the immediate remedy of damages for the lack of conformity of the goods would circumvent the hierarchy since it would, in fact, offer consumers the option to claim reduction of the price on the first hierarchy level[296]. Following this reasoning, damages for lack of conformity should be secondary to repair and replacement[297].

In any case, in the absence of further dispositions, it may be argued that the circumstances in which it is possible to award damages, also for the direct loss instead of one of the other remedies, are left to national law[298]. Thus, if the implementation of Dir. 99/44 in the individual Member State allows it to resort to domestic remedies for non-conformity, as happens in Italy, it should follow that the consumer may immediately ask for damages. If, on the contrary, he asks performance according to Dir. 1999/44, it should follow that he cannot invoke damages in substitution of repair or replacement, since it would circumvent the hierarchy. However, the absence of any indication concerning the

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295 Howells, Twigg-Flesner, Wilhelmsson, Twigg-Flesner, and Wilhelmsson, *Rethinking EU Consumer Law*, p. 196; ; Rott, 'Minimum harmonization for the completion of the internal market?', 1129.

296 Rott, 'Minimum harmonization for the completion of the internal market?', 1129; ; C. Jeloschek, 'Transposition of Directive 99/44/EC into Austrian Law' (2001) 9 *European Review of Private Law* 163 at 171, according to which only at first sight damages appear to be a subject of no interest for the European Union; actually, maintaining a domestic discipline which allows the consumer to resort directly to damages would frustrate the aims of the Directive, that is the primacy of bringing into conformity.

297 In this regard, see Court of First Instance of Tongeren of 14 June 2010, reported by Jansen, *Consumer Sales Remedies in US and EU Comparative Perspective*, pp. 19–20. In this case, the consumer had provided a repair on his own initiative and wanted to recover the cost of this repair, as damages, from the seller. The Court highlighted the fact that there was a clear hierarchy of remedies which had to be respected and, therefore, the consumer should have given precedence to specific performance.

298 Howells, Twigg-Flesner, Wilhelmsson, Twigg-Flesner, and Wilhelmsson, *Rethinking EU Consumer Law*, p. 196. See also Luminoso, *La compravendita*, p. 408 ff. and ; S. Pagliantini, 'Contratti di vendita di beni: armonizzazione massima, parziale e temperata della Dir. UE 2019/771', according to which, in Italy, if the buyer opts for domestic remedies according to Art. 135 cod. cons., claim for compensation would be available not only as a supplementary remedy to one of the four harmonised, but also autonomously.

possibility to directly claim for damages under domestic law may also entail the risk that countries which grant damages as a primary remedy under national law, would be more prone to recognising compensation instead of repair or replacement, while courts in countries with different traditions would probably decide differently[299]. In the above cases where national discipline applies, the imputation criteria of liability for damage must be derived from the rules of domestic law[300].

It must be recalled here that, also if arguing that the buyer does not have immediate access to damages, the seller may offer the consumer, by way of settlement, any available remedy (including damages), which the consumer can accept or reject, according to Recital 12.

7. Hierarchy of remedies under Dir. 2019/771

Dir. (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Dir. 2009/22/EC and repealing Dir. 1999/44/EC, were published in the Official Journal of the European Union on 22 May 2019[301]. It applies to all sales of goods (both online and off-line[302]) between a consumer and a seller (Art. 3 (1)), whereby goods are defined as "any tangible movable items" (Art. 2 (5)), including goods with digital elements.

The 2019 Directive follows the system of remedies already laid down in the Dir. 1999/44 with some relevant deviation, which will be further illustrated. The legislative framework that emerges has moreover to be investigated, bearing in mind the nature of maximum, albeit targeted, harmonisation of the tool.

Art. 13 of Dir. 771/2019, apparently, is limited to confirming the hierarchical system of remedies, reiterating the distinction between the two pairs of alternative remedies,

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299 Sivesand, *The Buyer's Remedies for Non-conforming Goods*, p. 82.

300 Luminoso, *La compravendita*, p. 408.

301 Together with the Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services. Both Directives must be transposed into national law by 1 July 2021 and the date of entry into force of the transposition rules shall be 1 January 2022 (Art. 24 of the Directive).

302 Overcoming, thus, the many criticisms raised by the first version of the proposal COM(2015) 635 final, which was limited to online and other distance sales. M. B. M. Loos, 'Not Good but Certainly Content: The Proposals for European Harmonisation of Online and Distance Selling of Goods and the Supply of Digital Content' in E. Terryn, I. Claeys (eds.), Digital Content and Distance Sales: New Developments at EU Level, (Intersentia, 2017) p. 14; ; Mańko, *Contracts for online and other distance sales of goods* (2016); ; Smits, *The New EU Proposal for Harmonised Rules for the Online Sales of Tangible Goods (COM (2015) 635)*, p. 7 ff.

always ordered according to a principle of *favor* for the preservation of the contract (par. 1-4). Therefore, according to this two-step remedy system (Art. 13), the consumer must first claim repair or replacement (Art. 14) and is only in the second stage be allowed to claim a price reduction (Art. 15) or termination (Art. 16).

In accordance with the system of the Dir. 1999/44, the consumer, in the event of a lack of conformity with the contract, must first insist on a remedy pursuant to Art. 14 by demanding, at his choice (Art. 13 par. 2) and free of charge (Art. 14 (1) (a)), that the goods be brought into conformity with the contract by the supplier through repair or replacement, unless the remedy chosen would be impossible or, compared to the other remedy, would impose costs on the seller that would be disproportionate (Art. 13 par. 2), taking into account all circumstances, including the value the goods would have if there were no lack of conformity (Art. 13 (2) (a)); the significance of the lack of conformity (Art. 13 (2) (b)); and whether the alternative remedy could be provided without significant inconvenience to the consumer(Art. 13 (2) (c)). Even in this Directive the disproportion is relative, in the sense that the proportionality test has to be taken between repair and replacement. As discussed below, the same approach has been approved by the CJEU on the basis of the similar rule in Art. 3 (3) of the Dir. 1999/44[303].

Compared with the previous Directive, Dir. 2019/771 creates a new rule, according to which the seller can refuse to bring the goods into conformity, if both repair and replacement are impossible or would impose costs on the seller that would be disproportionate, taking into account all circumstances including those mentioned in points (a) and (b) of paragraph 2[304]. Therefore, the seller has a right to refuse specific performance, thus "forcing" the consumer to choose between price reduction and termination of the contract according to Art. 13 (4) (a) if both repair and replacement would cause disproportionate costs, taking into account the same circumstances which are relevant for the consumer's choice between repair or replacement.

This means that, in Dir. 2019/771, the disproportionate costs criterion equally applies to the situation of choice between repair and replacement and price reduction and termination of the contract. This amends the rule resulting from Weber & Putz, that EU law precludes "*national legislation from granting the seller the right to refuse to replace goods not in*

[303] European Court of Justice, *Weber and Putz*. See par. 6 of this work.
[304] Art. 13 par. 3.

conformity, as the only remedy possible, on the ground that, because of the obligation to remove the goods from where they were installed and to install the replacement goods there, replacement imposes costs on him which are disproportionate with regard to the value that the goods would have if there were no lack of conformity and the significance of the lack of conformity". In a future similar case, after the implementation of the Directive, the decision will be that the consumer does not have a right to the replacement of the goods[305].

According to Art. 14, repairs or replacements shall be carried out free of charge (Art. 14 (1) (a)); within a reasonable period of time from the moment the seller has been informed by the consumer about the lack of conformity (Art. 14 (1) (b)); and without any significant inconvenience to the consumer, taking into account the nature of the goods and the purpose for which the consumer required the goods (Art. 14 (1) (c)).

The disposition specifies (Art. 14 (3)) that, if a repair requires the removal of goods that had been installed in a manner consistent with their nature and purpose before the lack of conformity became apparent, or where such goods are to be replaced, the obligation to repair or replace the goods shall include the removal of the non-conforming goods, and the installation of replacement goods or repaired goods, or bearing the costs of that removal and installation, thus crystallising the principle expressed in Weber & Putz[306].

With reference to the second stage of remedies, the consumer shall be entitled to either a proportionate reduction of the price (Art. 15)[307] or the termination (unless the defect is minor) (Art. 16) of the sales contract in four cases: an absence of an attempt to bring the goods into conformity (either because it was impossible or disproportionate or for any other reason connected to the trader)[308]; lack of conformity despite an attempt to bring the goods, digital content or digital services into conformity[309]; seriousness of the lack of conformity, which justify an immediate price reduction or termination of the sales

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305 J. Morais Carvalho, 'Sale of Goods and Supply of Digital Content and Digital Services – Overview of Directives 2019/770 and 2019/771' (2019) at 18–19.

306 European Court of Justice, *Weber and Putz*. See p. 63 of this work.

307 The disposition clarifies the modality of calculation of price reduction, stating that reduction of price shall be proportionate to the decrease in the value of the goods which were received by the consumer compared to the value the goods would have if they were in conformity. This type of calculation was already assumed under Dir. 1999/44, but is now made explicit.

308 According to Art.13(4)(a), reduction or termination are available if "the seller has not completed repair or replacement or, where applicable, has not completed repair or replacement in accordance with Article 14(2) and (3), or the seller has refused to bring the goods into conformity in accordance with paragraph 3 of this Article".

309 (Art.13(4)(b)).

contract[310]; explicit declaration by the trader that he would not bring the goods into conformity, or if it is clear from the circumstances, within a reasonable time, or without significant inconvenience for the consumer[311]. In this latter particular situation, as well as in the hypothesis of non-minor lack of conformity, the rule allows direct access to the remedy of resolution, in derogation from the rigid hierarchy conceived by Dir. 1999/44.

According to Art. 16 (1), the consumer shall exercise the right to terminate the sales contract by means of a statement to the seller expressing the decision to terminate the sales contract. With this disposition, the possibility of enforcing termination of the contract extra-judicially is expressly introduced[312], overcoming the doubt, present in the force of Dir. 1999/44[313], of whether the activation of the remedies can take place out of court as well as in court and whether the choice, once made, is irrevocable[314].

Termination leads to a reversal of the performance of all obligations: the consumer must first return the goods and the seller must only subsequently reimburse the price (Art. 16 (3)). This entails that the consumer's obligation to return the goods is due before the seller's obligation to return the price, burdening the consumer with the risk of the seller's insolvency or non-performance[315]. Furthermore, Dir. 2019/771 makes explicit that the consumer has the right to withhold payment of the price until the goods are brought into conformity (Art. 13 (6)). This right was not explicitly laid down in Dir. 1999/44, but all Member States recognise it in their national laws.

The other aspect of novelty introduced by Dir. 771/ 2019 is the possibility for the consumer to terminate the contract only in relation of some goods, where the lack of conformity relates only to some of the goods delivered, "*and in relation to any other goods which the consumer acquired together with the nonconforming goods if the consumer cannot reasonably be expected to accept to keep only the conforming goods*". Moreover, a direct access to termination is

310 (Art.13(4)(c)).

311 (Art.13(4)(d)).

312 C. Sartoris, 'La risoluzione nella vendita di beni di consumo nella Dir. 771/2019 UE' *Nuova Giurisprudenza Civile Commentata* at 706.

313 See, on this aspect, Bianca, 'Art. 130'; Amadio, 'Difetto di conformità e tutele sinallagmatiche'.

314 It has been pointed out that the disposition does not provide detailed rules on when a notice (and so the termination) becomes effective; Smits, *The New EU Proposal for Harmonised Rules for the Online Sales of Tangible Goods (COM (2015) 635)*, p. 13; therefore, it will have to be determined on the ground of the applicable national law; Loos, 'Not Good but Certainly Content', p. 26.

315 In this regard, it has been noted that, since termination is the result of the fact that the seller has not performed his obligations after an unsuccessful attempt to remedy the defect, 'it is difficult to see why the consumer should be required to – again – trust the seller to properly perform her obligation where she has already proven not to be trustworthy on several occasions'. Loos, 'Not Good but Certainly Content', pp. 26–27.

provided in Art. 3 (7), according to which Member States are "*free to allow consumers to choose a specific remedy, if the lack of conformity of the goods becomes apparent within a period after delivery, not exceeding 30 days*".

The picture that emerges is, therefore, that of an "elastic"[316] hierarchy of remedies, if we consider that the termination is directly accessible (1) in case of seriousness of the lack of conformity (Art. 13 (4) (c)); (2) if the trader would not bring the goods into conformity (intention deductible also from the circumstances of the case) (Art. 13 (4) (d)); (3) if the lack of conformity of the goods becomes apparent within a period after delivery, not exceeding 30 days.

Since the system above described is included in a full harmonisation directive, the problem of coordination between domestic law and EU discipline would seem to have to be resolved in the sense of the primacy of the latter over the former: maximum harmonisation would not allow any resumption of general discipline. It has to be borne in mind, however, that Directive regulates only certain aspects ("*requirements for conformity, remedies available to consumers for a lack of conformity of the goods with the contract and on the main modalities for their exercise*"[317]), while others remain unsettled.

It is therefore necessary to ask, firstly, whether at least for the regulated part, the system of remedies can be defined as exhaustive and if so, to what extent. Secondly, it should be noted that maximum harmonisation is "dampened" by the space that the Directive leaves to Member States on certain aspects, providing for a large number of exceptions to the principle[318]. Thus, the space left to domestic remedies should be evaluated bearing in mind these three elements: (1) the Directive provides maximum harmonisation, but (2) it is a targeted one and (3) contains express references to national law, which may define certain aspects.

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316 The term has been used by S. Pagliantini, 'Contratti di vendita di beni: armonizzazione massima, parziale e temperata della Dir. UE 2019/771'.

317 Recital 10.

318 In addition to the derogations concerning remedies, which will be examined below, A. Barenghi, 'Osservazioni sulla nuova disciplina delle garanzie nella vendita di beni di consumo' (2020) 2 *Contratto e impresa* at 808 notes that it is also left to national law, inter alia, the regulation of the meaning of 'delivery' (recital 38) and the choice of the place where repair and replacement should take place (recital n. 56). Furthermore, national law may introduce or maintain rules on the contribution of the consumer in the of non-conformity (Art. 13 par. 7), it may provide either that sellers are liable for a lack of conformity that becomes apparent within a specific period of time, possibly coupled with a limitation period, or that consumers' remedies are only subject to a limitation period (recital 42). The Directive leaves to national law also the possibility of providing for a period of liability for the seller longer than two years (art. 10 par. 3), the possibility of extending the period of one year in which the defect is presumed to have existed at the time of delivery.

7.1 Derogation to the hierarchy of remedies and national remedies for non-conformity

Since Directive 2019/771 is a full harmonisation directive, the problem of coordination between domestic law and EU discipline would seem to have to be resolved in the sense of the primacy of the latter over the former: maximum harmonisation would not allow any resumption of general discipline.

This should be true, in particular, for those aspects regulated by the Directive ("*requirements for conformity, remedies available to consumers for a lack of conformity of the goods with the contract and on the main modalities for their exercise*"[319]), with the consequence that it would not be possible for the buyer to resort to domestic rules on non-conformity. Allowing the consumer to invoke a national remedy for the same breach (non-conformity of the goods) for which the Directive provides a discipline would mean Member States "*maintain or introduce…provisions diverging from those laid down in this Directive",* a possibility expressly prevented by Art. 4[320].

The possibility of recognising a competition of remedies, left to the discretion of the consumer, should be limited to the defences of "others" than those provided by the Directive[321]. These latter, instead, remain available to the consumer: since the "diverging" rule is to be understood only as a rule regulating the same remedy in another way, the provision of national contract law conferring on the consumer another right does not constitute, at least in abstract, a divergent rule.

Equally, no chance of derogating to the hierarchy would be admitted[322]. In fact, the main consequence of providing a hierarchy of remedies in a full harmonisation directive is the inhibition of Member States to maintain or introduce rules diverging from those laid down in this Directive, including more, or less, stringent provisions. The implementation of the set of remedies, thus, can only be done by means of norms that

[319] Recital 10.

[320] See D'Amico and Pagliantini, *L'armonizzazione degli ordinamenti dell'Unione europea tra principi e regole. Studi*, p. 120, which define 'diverging' the provision which which regulates the same remedy differently.

[321] S. Pagliantini, 'Contratti di vendita di beni: armonizzazione massima, parziale e temperata della Dir. UE 2019/771', which notes that, if it can be assumed that any harmonisation is neutral with respect to remedies not provided by European legislation, allowing concurrence of domestic remedies in a harmonised area, would constitute an illegal form of derogation in melius.

[322] This point is not doubted. E. Ferrante, 'La nuova Dir. 19/771/UE in materia di vendita al consumo: primi appunti' Annuario del contratto 2018, (Torino: Giappichelli, 2019) p. 44.

faithfully reproduce the hierarchy, without admitting the possibility for a Member State to give freedom of choice to the consumer. Setting out a rigid hierarchy of remedies, the Directive would maintain the current level of consumer protection in 20 Member States[323] and decrease it for the five Member States which currently have no hierarchy of remedies[324] and two Member States where it is recognised a short-term right to reject[325].

This could mean that an overall higher level of protection will lower the level of protection in some Member States[326]. This entails, furthermore, that also implementations that go beyond the wording of the Directive, as happened in Italy under Dir. 99/44 with art. 135 cod. cons. according to the interpretation accepted by the majority of scholars (in the sense of "admissibility" of concurrence of national remedies for non-conformity), shall be deemed to be precluded by reason of maximum harmonisation, regardless of the solution that was given to the problem under the previous regime[327]. With the new directive the question already illustrated re-emerges, i.e. whether or not such a hierarchy is actually advantageous for consumers, since its application might lead to a remedy that does not fit the consumers' needs or wishes, for example when the non-conformity has caused a severe distrust on the part of the consumer[328].

According to the Commission, however, the Directive implies an overall increase in consumer protection across the EU even if, in some Member States, consumers' rights would be reduced. For example, in a few Member States consumers would no longer have a free choice of remedies for defective goods, but they could more easily exercise their

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323 Austria, Begium, Bulgaria, Cyprus, Czech Republic, Germany, Denmark, Estonia, Spain, Finland, France, Hungary, Italy, Latvia, Luxembourg, Malta, The Netherlands, Poland, Romania, Slovakia, Sweden.

324 Greece, Croatia, Lithuania, Portugal, Slovenia.

325 The United Kingdom and Ireland. However, the Directive now provides the possibility for Member States to allow consumers to choose a specific remedy, if the lack of conformity of the goods becomes apparent within a period after delivery not exceeding 30 days (Art. 3 (7)), namely national provisions which provide for a right for the consumer to reject (Recital 19). For these countries, therefore, the Directive does not decrease the level of protection.

326 Loos, 'Not Good but Certainly Content', p. 25; ; Smits, *The New EU Proposal for Harmonised Rules for the Online Sales of Tangible Goods (COM (2015) 635)*, p. 11.

327 Barenghi, 'Osservazioni sulla nuova disciplina delle garanzie nella vendita di beni di consumo', 810; Ferrante, 'La nuova Dir. 19/771/UE in materia di vendita al consumo: primi appunti', p. 44. For a study on the concrete modalities in which the Dir. 2019/771 could be implemented in Italy and the possible consequences of the choices of the Italian legislator on art. 135 cod. cons., see F. Bertelli, 'L'armonizzazione massima della direttiva 2019/771. UE e le sorti del principio di maggior tutela del consumatore.' (2019) *Europa e diritto privato*.

328 From this perspective, it has been pointed out that allowing the consumer to resort to a remedy that might be considered more detrimental (such as termination) could dissuade sellers from not holding up their part of the bargain. J. Vanherpe, 'White Smoke, but Smoke Nonetheless: Some (Burning) Questions Regarding the Directives on Sale of Goods and Supply of Digital Content' (20200601) 28 *European Review of Private Law* at 266.

right to remedies since they would no longer need to prove that the defect existed already at the time of delivery at any point during the legal guarantee period[329].

In any case, this choice is perfectly representative of the balance sought by the Union between consumer protection and competition protection, directly derivable from Art. 1, which emphasizes that the purpose of the Directive is to contribute to the "*proper functioning of the internal market while providing for a high level of consumer protection, by laying down common rules on certain requirements concerning sales contracts concluded between sellers and consumers*".

In this framework, it should be noted that the recourse to the principle of higher consumer protection, which has been used as a justification to resort to more favourable remedies for the consumer, conflicts with maximum harmonisation, since it would constitute an unlawful derogation *in melius*. Dir. 2019/771 seems, therefore, to lead to the definitive overcoming of that principle[330].

The discourse on the role of the (higher) protection of the consumer in the architecture of remedies set by the Directive may be completed noting that the remedies granted to the consumer for lack of conformity cannot be considered unavailable[331]. The new Directive brings out elements which enhance the role of the negotiation of certain aspects of the contract and, more generally, of the autonomy of the parties. Firstly, Art. 7 (5) Dir. 19/771 excludes the liability of the seller if at the time of the conclusion of the sales contract, "*the consumer was specifically informed that a particular characteristic of the goods was deviating from the objective requirements for conformity*" and he "*expressly and separately accepted that deviation when concluding the sales contract*", allowing the parties to deviate from the objective requirements for conformity provided for in the Directive. Furthermore, Art. 21, specifying that the consumer is not bound by contractual agreement which, *to the detriment of the consumer*, excludes the application of the dispositions *before the lack of conformity of the goods is brought to the seller's attention by the consumer*, this also provides the possibility for the seller to offer to the consumer contractual arrangements that go *beyond the protection* provided for in the Directive. The disposition admits not only the possibility that after

[329] SWD (2017) 354 final, *Staff Working Document*, p. 26, which also states that, beyond the important issue of consumers' rights, which would also benefit by the legal certainty brought by the proposal since consumers would enjoy the same level of protection whether they buy online or offline, domestically or cross-border, the proposal would yield a number of economic benefits for consumers in terms of wider choice of products at more competitive prices.

[330] S. Pagliantini, 'Contratti di vendita di beni: armonizzazione massima, parziale e temperata della Dir. UE 2019/771'.

[331] Bertelli, 'L'armonizzazione massima della direttiva 2019/771. UE e le sorti del principio di maggior tutela del consumatore.'.

the communication of the lack of conformity the trader and the consumer agree on exceptions to the less favourable consumer regulations (already set in Dir. 1999/44), but it also admits the possibility that, at the time of conclusion of the contract, the parties agree on conditions which derogate *in melius* the rights conferred on the consumer by the Directive. From this point of view, the inclusion, in the sales contract, of a clause granting the consumer the right to exercise also all the remedies provided in national rules does not conflict with the provisions of the new Directive. Therefore, although the objective of maximum harmonisation marks the abandonment of the principle of greater protection of the consumer, this only apparently results in a reversal of the trend of greater consumer protection; the introduction of a hierarchical system through maximum harmonisation, indeed, does not restrict the possibility of consumer discipline being conventionally derogated in favour of domestic discipline. The principle of maximum harmonisation does not allow the survival of competition between remedies for lack of conformity, but the need for certainty and predictability of cross-border transactions does not imply the absolute unavailability of the rights granted by the consumer Directive. Although the European legislator has provided for a hierarchy of remedies inspired by the maintenance of the contract to satisfy the general interest of the economy, there is nothing to prevent the seller from offering the consumer free access to more than one system of remedies and, once the lack of conformity has occurred, the contracting parties may agree by consensus to derogate from the consumer discipline when this choice, in the single case, satisfies the reasons of both.

From this standpoint, the fact that the consumer cannot choose to which remedy to resort to is also consistent with the fact that the EU discipline is not only focused on consumers interests, but rather to protect the market and to meet the interests and needs of sellers and buyers. If the rights granted to the consumer were in his sole interest, there would be no reason why he should not be able to dispose of them unilaterally; instead, a concurrence of remedies, left to the discretion of the consumer, conflicts with the interests underlying the objective of maximum harmonisation and suggests that the availability of the remedies granted to the consumer is necessarily subject to the consent of both parties.

7.2 Directive and national discipline of remedies

With reference to remedies not covered by the Directive, it seems necessary to distinguish between issues expressly ascribed to national disciplines from those on which the Directive is silent. In these latter cases, in fact, doubts may arise as to whether they can be included in the scope of the Directive, although implicitly.

Firstly, the text of the Directive allows national laws to (1) vary the rules of the Directive: this chance is provided, for example, in Art. 10 (3), where it is written that Member States may maintain or introduce longer time limits for the liability of the seller than those referred to in paragraphs 1 and 2. In this case, domestic law may provide a different time for seller liability as long as it is longer than two years; in cases like this, Dir. 2019/771 acts as a minimum harmonisation directive, since it allows Member States to introduce more stringent provisions.

Secondly, the Directive also allows Member States to deviate from the rules of the Directive, as in the case of lack of conformity of the goods becoming apparent within a period after delivery, not exceeding 30 days (Art. 3 (7)). The article states that it is the right of the Member States to "*allow consumers to choose a specific remedy, if the lack of conformity of the goods becomes apparent within a period after delivery, not exceeding 30 days*" (Art. 3 par. 7); the Directive does not seek to affect "*national rules not specific to consumer contracts providing for specific remedies for certain types of defects that were not apparent at the time of conclusion of the sales contract*".

The first part of the disposition, in particular, allows the consumer a choice between remedies, which may fall on remedies not included in the Directive, but provided by the national legal system (a right to reject[332]) or on remedies covered in the Directive, that may be chosen outside the hierarchy (directly accessing to termination, for example). The aspect that deserves to be stressed is that the Directive explicitly leaves open the possibility of concurrence of European and domestic remedies exactly on the matter, subject to harmonization (guarantees in the sale of consumer goods). It seems, then, that the possibility of concurrence of remedies for non-conformity is limited to the hypothesis of the defects emerged within 30 days from the delivery, for which it is allowed to national

[332] This provision refers to the common law rules on the right to reject the goods (Consumer Rights Act 2015, sections 19(3), 20, and 22). In English law, the consumer may reject non-conforming goods without further requirements and terminate the contract at an early stage. This remedy needed to be expressly provided in the directive with the derogation of Art. 3 because of the maximum harmonisation principle.

legislators the prevision of concurrent remedies with those harmonized to the maximum level[333]. As for Italy, only in the aforementioned period of time the consumer might resort to all the remedies provided under domestic sales law and domestic contract law in general, as has happened for a long time through the interpretation of art. 135 cod. cons.[334]. On the contrary, a general concurrence of remedies, after the 30-days deadline, should be precluded by reason of maximum harmonisation.

Thirdly, Member States may "complete" the Directive on issues not covered or only partly covered by the Directive, with domestic rules on general contract law, such as rules on the formation, validity, nullity or effects of contracts, including the consequences of the termination of a contract, or the right to damages (Art. 3 (6)).

Mistake

The provision of Art. 3 (6) Dir. 2019/771 is the clear manifestation of the European Directives' tendency to interfere as little as possible with existing national general contract law, leaving completely undefined the general discipline of sale[335].

The disposition, together with Recital 18, excludes any prejudice to the right of national legislators to "*to regulate aspects of general contract law, such as rules on the formation, validity, nullity or effects of contracts, including the consequences of the termination of a contract, in so far as they are not regulated in this Directive, or the right to damages*". Recital 18 specifies that the matters not regulated by the Directive comprehends, in addition to general contract law aspects such as those above mentioned, also the legality of the goods and damages. This disposition faces the fact that the Directive has a narrow scope, mainly limited to lack of conformity and remedies for such lack of conformity, while other rules regarding the contractual relationship in a contract for the sale of goods are mostly not harmonised by EU law. This means that these topics may vary to a great extent, depending on the general national law on contracts[336].

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333 Barenghi, 'Osservazioni sulla nuova disciplina delle garanzie nella vendita di beni di consumo'. ; S. Pagliantini, 'Contratti di vendita di beni: armonizzazione massima, parziale e temperata della Dir. UE 2019/771'.

334 Bertelli, 'L'armonizzazione massima della direttiva 2019/771. UE e le sorti del principio di maggior tutela del consumatore.', 969.

335 D. Staudenmayer, 'The Directives on Digital Contracts: First Steps Towards the Private Law of the Digital Economy' (2020) 28 *European Review of Private Law* at 235.

336 K. Lilleholt, 'A Half-built House? The New Consumer Sales Directive Assessed as Contract Law' (2019) 28 *Juridica International* at 6.

The validity of the contract, thus, is not harmonised by the Directive, but will remain in the realm of autonomous national contract law. Hence, also the rules on the vices of consent seem to be excluded: mistake, duress and fraud should be settled according to domestic law of Member States[337]. The remedies provided for by general contract law should therefore remain available to the consumer[338].

However, these issues could lead to difficulties, known under CISG, leading to ask whether the mistakes concerning the features of the sold goods is excluded or covered by the scope of the application of the Directive, and if they are captured by the requirement of the full harmonization. In such a case, the only available remedies would be the remedies provided for by the Directive[339].

In this regard, it has been correctly observed that it is uncertain if the doctrine of mistake should be regarded as regulated by the Directive or not, since the facts that justify a claim for lack of conformity would probably justify a remedy on the basis of mistake[340]. Under the CISG, this argument is used to exclude the possibility of invoking avoidance according to national law: where the facts could justify a claim on the basis of non-conformity, a claim under national law on the basis of mistake is excluded, as otherwise the uniform application of the rules for non-conformity could be undermined (because it allows for circumventing some limits, such as the rules for prescription)[341]. A parallel reasoning could also be developed under the Directive, as it provides that the consumer may only invoke a remedy for non-conformity for a defect that has manifested itself within two years after delivery. In particular in a directive which imposes maximum harmonisation, it is the area of defects of consent which may be regarded as a "way out"

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337 In its analysis, which had as subject the proposal for the online and other distance sales of goods (COM [2015] 635), Beale argued that certain kind of issues seem unlikely to arise: it is hard to imagine a seller exercising duress over consumers online. Neither there would be scope for mistakes as the nature of what is being bought to arise when the buyer is a consumer, 'because the consumer has to be given so much information by the trader'. Compare H. Beale, *Scope of application and general approach of the new rules for contracts in the digital environment* (2016) p. 26. However, since the approved Directive also applies to online sales, these problems could undoubtedly emerge.

338 On vices of consent, Ferrante, 'La Nuova Dir. 19/771/UE in Materia Di Vendita al Consumo: Primi Appunti', in *Annuario Del Contratto 2018* (2019) , at 52 argues that the consumer cannot be denied access to the protection granted by general contract law, since he, although he enjoys a specific discipline, remains a '*civis*'.

339 F. Zoll, 'The Remedies in the Proposals of the only Sales Directive and the Directive on the Supply of Digital Content' (2016) 5 *Journal of European Consumer and Market Law* at 252.

340 Loos, 'Not Good but Certainly Content', p. 19.

341 On this basis, Loos, 'Not Good but Certainly Content', p. 19, commenting on the Proposal, suggested the EU legislator to explicitly address this issue, stating that it is a matter of national rule. Since it has not happened, it is likely that soon the EUCJ will be asket to pronounce on this issue. The question is also raised by S. Pagliantini, 'Contratti di vendita di beni: armonizzazione massima, parziale e temperata della Dir. UE 2019/771'.

suitable for ensuring that the consumer retains a remedy where the term of two years has expired unsuccessfully.

According to a different view, the possibility of recourse to avoidance for reason of mistake should be evaluated in light of the fact that remedies for lack of consent usually have a protective purpose that differs from the one that characterises remedies for non-conformity, also in the cases in which legal consequence are identical[342]. Thus, while it is possible that a remedy under national law circumvents the architecture of remedies set in the Directive, this in fact happens only in the cases in which the respective remedy has identical or similar preconditions.

Damages

Regarding the right to damages, the articles of the Directive concerning the right to claim compensation indicate that the Member States have great freedom in regulating it (Art. 3 (6)). Recital 18, providing that damages are left to national law, it specifies that it concerns also the consequences of the termination of the contract and aspects regarding to repair and replacement that are not regulated in the Directive.

Nevertheless, Recital 61 of Dir. 2019/771 emphasises that "*the principle of the seller's liability for damages is an essential element of sales contracts"* and therefore the consumer should be *"entitled to claim compensation for any detriment caused by an infringement by the seller of this Directive, including for damages suffered as a consequence of a lack of conformity"* and specifies that "*compensation should put the consumer as much as possible into the position in which the consumer would have been had the goods been in conformity".*

Although this statement seems to set key features of a harmonised law on damages, in the end there is no doubt that the Directive does not regulate this issue, specifying that *"as the existence of such a right to damages is already ensured in all Member States, this Directive should be without prejudice to national rules on the compensation of consumers for harm resulting from infringement of those rules"*[343]. The issue of compensation remains, therefore, not fully

[342] See R. Schulze, D. Staudenmayer, and J. Watson, *EU Digital Law: Article-by-Article Commentary* (Beck C. H., 2020) p. 240 in regard to Dir. 2019/770.

[343] The motivation is not very convincing: the existence of a right to damages in national law does not eliminate the need for harmonisation, since domestic rules vary considerably between Member States. Schulze, Staudenmayer, and Watson, *EU Digital Law*, p. 270.

harmonised and the right to damages will continue to be transferred to the domestic system[344].

As noted with reference to the 1999 Directive, damages caused by death or by personal injuries or caused to private property to the consumer are recoverable under Dir. 1985/374, which allows the consumer to sue the producer for damages caused by a defect in his product, with the already observed limits set by the scope of application.

Since the Member States have the power to regulate liability for damages, it may be asked whether a consumer's claim for damages under national law is compatible with the fully harmonised hierarchy of remedies. The right to damages may be problematic if legal consequences are identical to the ones provided for by the Directive. For example, if the right to damages of a Member State allows the consumer to demand reimbursement without any prior request, there is the risk that the hierarchy of remedies is circumvented.

The compensation of damages for non-conforming performance, for example, would put the buyer in the position he would have if performance had taken place (compensation of positive interest). Providing this possibility at a national level might overlap (and circumvent) the Directive's first stage of remedy, which aims at the performance of the contract. In the same way, the compensation of the negative interest (putting the consumer in the position he would have if he had not concluded the contract) may produce an overlap with the remedies of the Directive, namely with the right of termination.

A solution which has been proposed for Dir. 2019/770 in order to not undermine the harmonising effect of the discipline, and which at the same time respects the autonomy of Member States, is to consider Member States not entitled to a link, by means of compensation, to a lack of conformity, as the same consequences set in the Directive but under different conditions, for example allowing the termination of the contract immediately. However, Member States should be regarded as entitled to link to a lack of conformity consequences other than those provided for by the Directive, by way of compensation of damages. For example, national law could compensate on the grounds of a lack of conformity, the damage resulting from the fact that under the Directive he

[344] Similar considerations were made by Schulze, Staudenmayer, and Watson, *EU Digital Law*, p. 270 in regard to Directive 2019/770, which leaves the issue to Member States.

may not terminate the contract but has to wait for the goods to be brought into conformity[345].

Moreover, in the view of a fully harmonised set of hierarchies, the sanction of substitutive compensation would no longer be compatible with EU law, since it undoubtedly circumvents the command to firstly ask for repair or replacement[346].

[345] Schulze, Staudenmayer, and Watson, *EU Digital Law*.

[346] S. Pagliantini, 'Contratti di vendita di beni: armonizzazione massima, parziale e temperata della Dir. UE 2019/771'.

CHAPTER III – Comparison of approaches: similarities and divergencies

1. Similarities and divergences in the hierarchies of remedies

In the light of what was observed in the previous chapter, both the CISG and the Directives on certain aspects of the contract of sale, despite the different subjective scopes of application, share the same objective, i.e. the conservation of the contract of sale. In European consumer sales directives, the remedy of the resolution is clearly subordinate to the conservative remedy of repair and replacement. With reference to the Vienna Convention, although it is not possible to speak of a technical hierarchy, since the buyer is not is not obliged to ask firstly for the performance, but may choose to terminate the contract immediately, however we have observed that the wide field of application of the specific performance on one side and the recessive character of the resolution on the other, can concur to qualify the architecture of the remedies of the CISG like a hierarchy *de facto*[347]. The buyer may immediately resort to termination according to Art. 49, but the seller has the right to replace or repair the goods (right to cure *ex* Art. 48) and the hierarchy represents a balance between those two faculties: that of the seller to maintain the contract and that of the buyer to request the termination.

The structure of the remedies could already be indicative of the fact that the two texts are less different than they seem. To this consideration can be added another observation, which may constitute an index of convergence of the two texts, namely that, in the CISG, the right of the professional buyer to request a resolution is subordinate to the fact that the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract. The text of Dir. 1999/44

[347] Adopts this approach S. Troiano, 'The CISG's Impact on EU Legislation' (2008) 8 *Internationales Handelsrecht* at 129;; contra Sivesand, *The Buyer's Remedies for Non-conforming Goods*, p. 127.

excludes such a level of seriousness of the breach, allowing the termination of the contract, even if the breach is not essential, as long as the lack of conformity is not minor. However, as highlighted in the previous chapter, according to the prevailing opinion and majority of case laws, the non-conformity of the goods sold cannot be regard as fundamental where it can still be remedied by the seller by repairing or replacing the goods, unless this would cause any significant harm to the buyer. Therefore, under the CISG the professional buyer cannot request a resolution if the default is not fundamental and the default is not such, as long as corrective action is possible, and is not excessively burdensome. This is not very far from what is provided in the sale to the European consumer, where the termination cannot be asked if the specific remedy is possible and less expensive. Moreover, the provision of Art. 13 (4) (c) of Dir. 2019/771, providing that the consumer may unwind the contract if "*the lack of conformity is of such a serious nature as to justify an immediate* […] *termination of the sales contract*" seems to further approximate the conditions under which direct access to resolution is possible. This assumption will have to be verified once the Directive is implemented and the case law is formed but, if the interpretative approach is similar to that developed under the Convention, there would be very minor differences between the legal tools in access to resolution.

To what has been observed in regard to termination, it may be countered that the CISG requires the fundamental breach which also precludes the specific remedy of substitution, thus limiting the access to this type of specific performance; on the contrary Dir. 1999/44 only requires the replacement remedy be not "disproportionate" in comparison to the repair. However, also in this respect it may be argued that the application of the rule set in the Directive will not lead to significantly different results: the less serious the lack of conformity is, the more likely it is that replacing the goods would cost disproportionately more to the seller than simply repairing it. On the contrary, if the lack of conformity is a fundamental breach of contract, it is reasonable to conclude that replacement would be more convenient than repair[348].

On the other hand, it has also been argued that there is not a real "hierarchy" in consumer sales law, but rather a rigid alternative, in the sense that the fulfilment of the conditions of one would exclude the fulfilment of the conditions of the other. If the consumer, for example, demonstrates the excessively burdensome nature of repair, he

[348] Troiano, 'The CISG's Impact on EU Legislation', 230.

could always ask for resolution: this substantially reduces the buyer's claim to the least expensive of the two alternatives[349].

These considerations seem to suggest two models, which are only seemingly distant, in point of remedies: both the European model of consumer sales and the Vienna Convention provide for a system in which the conservative remedy is prevalent over the termination, because, in the European model, the consumer cannot terminate the contract if repair or replacement is possible, while, in the international model, the professional buyer can do so only if the default is fundamentally essential, i.e. if a corrective action is not possible at a reasonable cost and within a reasonable time.

2. The buyer's remedies as a balancing of interests

The objectives of the Dir. 1999/44 are to ensure a high level of consumer protection (Recital 1) creating a common set of minimum rules that strengthen consumer confidence (Recital 5), as well as to harmonising and simplifying the national disciplines of the various EU Member States, with regard to the aspects of sales covered by the Directive. The *ratio* of protection of the weaker party is also manifested in the reference, made in Recital 1 of the Directive, to Art. 153 of the EC Treaty (Art. 169 TFEU), which expressly deals with the objective, to ensure a high level of consumer protection.

In the context of this consideration, however, it should be noted that the provision of the hierarchy of remedies set in Dir. 1999/44 moves in a different direction, tipping the scale in favour of the seller. Usually, it is the seller who aims at keeping the contract alive and receiving payment for the goods sold, while the consumer, which, in the case of non-conformity, usually wishes to terminate the contract, and to turn as soon as possible to a new seller. The *favor* of the Directive for the interests of the seller seems to be demonstrated also by the fact that, according to Recital 12, "*the seller may always offer the consumer, by way of settlement, any available remedy*". The hierarchy, therefore, is strict for the consumer, not only in the sense that it benefits from it, but also in the sense that he cannot depart from it, in abstract terms at least.

[349] Plaia, 'I rimedi nella vendita transfrontaliera'.

This may seem an internal contradiction of the Directive, which, on the one hand, aims to safeguard the consumer and, on the other hand, seems to primarily protect the market and the interest of the seller.

However, it has to be taken into account that the Dir. 1999/44 is a measure of minimum harmonization, which allows Member States to adopt or maintain more stringent measures. Consumer protection can be raised by the Member States, as long as it is more consumer friendly. In essence, the principle of higher consumer protection allows Member States to derogate from the hierarchy, (which evidently constitutes the most seller-friendly profile of the entire discipline set in the Directive), and to allow the competition of domestic remedies that are more favourable to the buyer. In this context, therefore, there can be no doubt that consumer protection is the main objective of the dispositions of the Directive.

In this framework, the achievement of the objective of uniformity of discipline remains in the background, being undermined by the different implementations of the Directive made by the Member States and by the possibility that internal remedies concur with those established at European level.

The CISG, for its part, is aimed at achieving the development of international trade, through the adoption of uniform rules that contribute to the removal of legal barriers on international trade, as stated in the Preamble. Here no weak party needs to be protected (since both contractors are professionals), and the sole objective of the Convention is to achieve a market-oriented legislative uniformity. To reach this goal, the Convention is designed as a strictly neutral set of rules which does not grant preferred treatment to one side or another[350]. This is consistent with the provision in Art. 7 (1) which, prescribing to interpret the Convention, having regard to the "*international character*" of the CISG, "*the need to promote uniformity in its application*," and "*the observance of good faith in international trade*, aims to minimise the recourse to homeward interpretation. The objective of achieving uniformity is also consistent with Art. 7(2), which expressly holds domestic law applicable only in cases in which gap-filling by use of general principles fails. As for the matters covered, the CISG, although it is not a code in a civilian sense, it is code-like in its interpretive methodology[351], with the consequence that, when CISG applies, the sales

[350] Schwenzer, *Schlechtriem & Schwenzer*, p. 16.

[351] Larry A. DiMatteo, Dhooge, Greene, Maurer, and Pagnattaro, *International Sales Law*, p. 21.

contract remains national-law-resistant. In essence, the Convention aspires to be self-sufficient.

This approach, incidentally, is significantly different for the one adopted by the EU, which takes action in specific areas of legislation, mostly regulating only certain aspects of the field with very detailed, technical rules[352]. These two methods lead to very different consequences as for the choice of discipline applicable to non-harmonised areas.

In the absence of the objective of protecting the weaker party of the relationship, the fact that the hierarchy of remedies may, in accordance with the considerations already proposed for Dir. 99/44, be favourable to the seller, does not create any particular problems of compatibility with the stated intent of the Convention. In this context, the interest of the seller that the efforts he made to execute proper performance should not be upset by a minor defect that could be remedied at his expense, are legitimate. Moreover, from an economic perspective, termination may be a very expensive remedy. Contract termination leads to a restitution of the goods, which may carry considerable costs and risks which could be avoided if the contract was not terminated and if the buyer's interest in having conforming goods was remedied by repair or damages.

With reference to Dir. 2019/771, the consumer protection objective already set out in Dir. 1999/44 must be reconciled with the maximum harmonisation canon that characterizes the recent regulatory instrument. What, with the 1999 Directive, being a common playground from which to start and depart, as long as Member States acts for the sake of greater consumer protection, it becomes a starting point, this time fixed and unchangeable by the Member States, which may not introduce or maintain diverging provisions, even if more favourable to the consumer. As was already argued, higher benefits are achieved by enterprises, which can market products more easily in different Member States, with the level of protection set by mandatory rules of consumer protection being the same in each country. The result is a benefit for the consumer, at least in terms of confidence in the market (since the rules applicable in all Member States would be coherent), but from this set of rules it is not allowed to deviate, not finding

[352] In this regard, it has been argued that the main concern in the EU is to have a common set of rules, while insufficient care is dedicated to develop rules that may effectivly encourage consumers and traders to take greater advantage of the Single Market. It has been suggested, then, an alternative approach principles-based, which may be more successful and could in turn create a legal framework that would be a positive feature of the EU's consumer protection brand. Howells, Twigg-Flesner, Wilhelmsson, Twigg-Flesner, and Wilhelmsson, *Rethinking EU Consumer Law*, p. 170.

space in this new framework, the principle of higher protection, which the consumer cannot decide to use, at least in harmonised areas. This balance proposed by the directive has been correctly defined as consumer protection, as long as business is not hindered in the pursit of its economic interests[353]. On the other hand, pursuing objectives of knowledge and uniformity of the rules of the game, the 2019 Directive is openly market oriented, and the goal of unification is more congenial to her than it was for the Dir. 1999/44, even if only in the disciplined matters. Therefore, the balance set in the hierarchy of remedies, between the high level of consumer protection and the competitiveness of businesses, is definitively established in the Directive[354], and cannot be changed by recourse to external rules, without prejudice to the derogations expressly provided for in the Directive[355].

3. Harmonised remedies for non-conformity and domestic remedies

What has been illustrated in the course of this work and summarised, in its main lines, in the preceding paragraphs, may help to review the relationship between the provisions on remedies for non-conformity of goods contained in the legislative instruments in question, and remedies provided for by the domestic laws which they are aimed at, which are intended to demonstrate defects in the quality of the goods sold, although under a different label.

The choice for the application of the Vienna Convention to international contracts (in the sense that this is not excluded pursuant to Art. 6 CISG) involves choosing to maintain intact the regime of remedies established in it, for the case of non-conformity of the goods sold. Once the Convention is applicable, the system of remedies must remain intact and replaces the non-uniform law. This has led the majority of the scholars to argue that, where domestic law provides for remedies relating to the quality of the goods, (such as in the case of an error in quality), the latter must be considered superseded by the provisions of the Convention, although based on partially different assumptions. This conclusion is based on the statement that a hierarchy of remedies provided for by the

353 Loos, 'Full Harmonisation as a Regulatory Concept and its Consequences for the National Legal Orders', 19.
354 At Recital 2, stating that the Directive "*aims to strike the right balance between achieving a high level of consumer protection and promoting the competitiveness of enterprises, while ensuring respect for the principle of subsidiarity*".
355 See, on the balance between higher consumer protection and a market-oriented approach D'Amico and Pagliantini, *L'armonizzazione degli ordinamenti dell'Unione europea tra principi e regole. Studi*, pp. 137–38.

Convention is exhaustive, therefore, since the CISG provides for a series of remedies, in the event that the seller has delivered non-compliant goods, the space for any domestic remedies substantially aimed at enforcing the same defect, is occupied and cannot be filled by national rules.

If, on the contrary, national disposition protects interests other than those protected by the Vienna Convention, as happens in the case of extra-contractual liability for property damages, it is doubtful if CISG can pre-empt domestic tort law. Consequently, according to the majority view, when interests protected by the CISG and domestic law overlap, the CISG applies exclusively and trumps domestic law. Where there is no overlap, domestic tort law is not excluded.

A different discourse must be made with reference to sales law directives. European private law in general aims to harmonise the law of the Member States, with regard to specific objectives, without altering their legal traditions. The remedies in European law reveals a marked tendency to circumvent the domestic situation, changing its effects without necessarily entailing an alteration of its structure[356]. To this observation it must be added that both the 1999 Directive and the 2019 Directive allow the Member States to maintain their discipline on rights other than those settled in the Directive[357].

This statement, however, could lead to partially different consequences in respect to the directives, in the light of the different levels of harmonisation which they impose.

The fact that a directive provides a minimum harmonised discipline only for certain aspects of sales law suggests that the consumer may refer to national remedies, relating to contractual or non-contractual liability, which are different from those provided in the Directive, with the consequence that he should refer to national provisions if he wants to invoke avoidance of the contract based on mistake, fraud and duress and claim damages.

This should be true, even in the case in which national rules provide for remedies that substantially overlap, in the defect to which they intend to remedy, and to those of the Directive. This conclusion is supported, not only by the fact that Art. 8 (1) expressly does

[356] Mazzamuto, 'La prospettiva dei rimedi in un sistema di civil law'.

[357] It should be recalled that Dir. 1999/44 states at Art. 8 (1) that "The rights resulting from this Directive shall be exercised without prejudice to other rights which the consumer may invoke under the national rules governing contractual or non-contractual liability", while Dir. 2019/771 expressly provides that it does not affect national law to the extent that the matters concerned are not regulated by this Directive, in particular with regard to the legality of the goods, damages and general contract law aspects such as the formation, validity, nullity or effects of contracts (Art. 3 (6).

not affect rights other than those of the present directive, but also and above all because the Directive in question expressly allows the application of provisions which ensures a higher level of consumer protection. With this in mind, it would always be possible for the consumer to have recourse, for example, to the domestic action of avoidance for mistake for the quality of the goods if it provides him with higher protection, or if it better meets his interests. This conclusion is also consistent with what has been said in relation to the objectives of the Directive: if the discipline is inspired by the protection of the consumer in the market, then there are no substantive reasons to deny him access to more favourable national remedies, even if they are based on assumptions similar to those that justify the access to the remedies in the Directive.

As for Dir. 2019/771, it is possible to make a different reasoning, based on its nature of maximum harmonisation Directive, that identifies, once and for all, the remedial architecture available to the buyer. Although the Directive expressly provides that it does not affect national law, with regard to matters such as the legality of the goods, damages and general contract law aspects, such as the formation, validity, nullity or effects of contracts, (in coherence with the tendency of EU private law to regulate only certain aspects of the field), the possibility of having recourse to an internal remedy which censures a qualitative defect of the goods, even if classified in the legal system in a different way, (as in the case of error on the quality), which would entail the risk of jeopardising the objective of maximum harmonisation, thus allowing the consumer to bypass the set of interests established by law. This reasoning also seems to be consistent with what the European Court of Justice stated in the case C-183/00[358] where, deciding on the possibility of retaining a general system of product liability different from that provided for in the Directive 85/374, stated that "*the rights conferred under the legislation of a Member State on the victims of damage caused by a defective product under a general system of liability having the same basis as that put in place by the Directive may be limited or restricted as a result of the Directive's transposition into the domestic law of that State*". The possibility of maintaining in force national provisions, even if they afford greater protection than those of the Directive, is therefore excluded if the national discipline has the *same basis* as that put in place by the Directive.

[358] European Court of Justice, *María Victoria González Sánchez v Medicina Asturiana SA*.

If the 2019 Directive is described as a market-oriented directive, therefore aimed at protecting competition rather than the consumer, then it can be understood that the access of the buyer to remedies not provided for by law (but substantially aimed at claiming non-conformity of the goods) would generate uncertainty and unpredictability of the applicable discipline. The seller, in essence, would be exposed to unforeseeable actions, which are likely to have different conditions and modalities of exercise from those laid down in the Directive.

The exclusion of the possibility of claiming for internal remedies which overlap with those governed by the Directive should not conflict with the principle of subsidiarity, since it does not affect the area of competence of the Member States more than the Directive itself does.

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