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MAIN DIFFERENCES BETWEEN THE APPLICATION OF SPANISH COMMERCIAL LAW INSTEAD OF CISG

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INTRODUCTION

Any spanish or foreign company who would like to trade with spanish businesses must ask first, what law would benefit me mostly? Searching the answer of that question we found that, Spain, as part of the European Union and many international Conventions, does not only have one general national commercial law applicable to all type of contracts, but also has international applicable law. The curious fact about this situation is that, though those types of laws regulate the same legal reality and are part of a single legal system, they differ in its contents in some matters. That is the situation that gives relevance to our present study here, since depending on the origin countries of the parts of the contract, one regulation or another will be applicable.

That does not mean that the several international conventions are not part of the spanish legal system, they are part of the legal system, but those two types of commercial law are not completely unified (yet) in the spanish legal system.

Of course ratified international conventions become part of the spanish law, but yet that does not mean that spanish law will be changed, since for trade inside the country the applicable law will still be the spanish one.

Although long ago an unification of sales law was started in some countries –specially focused on the unification of regulation of the European Union´s countries- , there are still some matters that differs from national laws to international one.

In any case, the international body responsible to regulate that world wide currently is the United Nations Convention on Contracts for the International Sale of Goods of 1980, ratified by Spain on 1990.

1. UNIFICATION OF SALES´ LAW

The idea and need of the unification of sales law is just as old as the idea of sovereignty itself. If there is something that unites all societies is trade. An international regulation for trading was always a need, but with the appearance of states, as we know them nowadays, and international cooperation organizations such as United Nations and the European Economic Union, came finally the chance to put the topic upon the table and talk about it in a way that a fair and appropriate regulation for all countries could be set.

Law itself is an instrument created from the necessity to regulate daily situation that happens with more or less frequency in order to guarantee some protection to citizens and business. As a consequence, the lack of a national entity behind a legal act should not be an excuse to avoid its regulation, but it is an even more heavy reason to regulate it properly in order to ensure the security of the needed trade relation between countries.

1.1. INTERNATIONAL LAW: CISG[1]

As far as the United Nations is concerned, this desire could be finally embodied in 1980, in the United Nations Convention on Contracts for the International Sales of Goods (CISG).

It is important to consider here the role that globalisation played on that, a phenomenon difficult to date but still with a huge relevance on the final writing of the CISG.[2]

Nevertheless, it is relevant to mention that this Convention was not the first legal international document wrote about the matter, but it is actually the result of multiple tries of an international sales law, embodied in it, such as the Uniform Law of International Sales (ULIS) and the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF) both from 1964.

Unfortunately did those first legal international law texts not reach the level of influence desire, as only some few countries ratified it, what supposed the lack of one of the main objectives, the global aspect. Thus, a commission was created, the United Nations Commission on International Trade Law (UNCITRAL), which took over the task to lift it up to a more international field, and conclude it with the United Nations Conference on Contracts for the International Sale of Goods held in Vienna from March 10 to April 11, 1980. This Convention has been until now ratified by 89 countries.

According to the Preamble of this Convention, in consideration of the founding international peace spirit of the United Nations Organization and being conscience of the relevance of trade in order to guarantee peace between countries and in a tried to

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[1] https://www.cisg.law.pace.edu/cisg/text/gap-fill.html
Nives, P., *Interpretation an gap-filling under the United Nations Convention on Contracts for the international sale of goods*, University of Zagreb Faculty of Law, Zagreb, Croatia – History of the Uniform Law of International Sales
[2] Steger, Manfred B., *Globalización*, Antoni Bosch editor, 2019, page 15

remove the legal barriers existing on the moment to the correct development of trade, this convention was wrote.

The comparison that we are going to make here is precisely between the content of this text (CISG) and the one of the spanish national sales law, established in the spanish Commercial Code and, subsidiarity, in the Civil Code, through which any person who reads this paper can easily recognize how far did this unification spirit actually removed the legal barriers on international trade in relation to its application on Spain.

1.2. EUROPEAN LAW

That the European Union is a complex institution is a fact that should not surprise anyone. We should keep in mind that it is nothing else but a kind of states´ organisation that in some matters is organize as a huge federal state and in others as another normal international organization. That leads to the following legal competences distribution, since the states are not willing to quit its legislative power, though it is necessary to give up a bit of it in order to be able to make such an institution work. That is the reason why we may find two compulsory legal texts (directives and regulations), and others not so important, such as recommendations or decisions.

In any case, the founding fathers of the European Economic Community were always plenty conscience of the necessity of a trade union between the European states, which lead to the implantation of the Euro and lately to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters.[3]

1.2.1. OPTIONAL LAW: CESL[4]

However is the CISG not the only legal document aiming to unify international sale law, within the European Union there is already since 2011 a project to create a new sales legal code called Common European Sales Law (CESL). But, as Robert Koch says "*there is the Convention on Contracts for the International Sales of Goods (CISG),*

[3] López Castillo, Antonio, *Instituciones y derecho de la Unión Europea*, editor literario; Castellà Andreu, Josep Ma., 2020, pages 31-33 y 38
[4] Magnus, U., Koch, R., *CISG vs Regional Sales Law Unification: With a Focus on the New Common European Sales Law*, 2012, CISG vs CESL

there are the UNIDROIT´s Principles of International Commercial Contracts (PICC), there are the Principles of European Contract Law (PECL), so why do we need another instrument for international sales contracts?"[5]

Well, probably the most appropriate way to answer that question is by focusing on the objectives of both legal documents and on its important lack of application on some matters. We will start talking about the objectives. We are in both cases talking about international legal texts which expect to have utility on different states; as a consequence, they both are somehow in competence with the national laws while trying to get an unification of them, although in the case of the CESL the countries affected by it would be way fewer.

Nevertheless it is important to mention that there is a relevant difference between them, since the CISG is directly applicable once it has been ratified, whereas for the CESL´s application it has to be expressly mentioned that the parties want this text to be applicable to the contract, so it is stated on article 25 of Directive 2011/83/UE of the European Parliament and of the Council of 25 October, about rights of the consumers, where it is expressly established that the European rules will have preference over the CESL.[6]

Another distinction is related to the kind of subjects those regulations would affect to. One of the reason why the CESL is claimed as mandatory is exactly because of the CISG failing on the regulation of international contract from B2C. When reading the CISG, the very first paragraph of article one states that it will be applicable to "*contracts of sale of goods between parties whose places of business*" and then, on paragraph three says "*neither the nationality of the parties nor the civil or commercial character of the parties*"; it is definitely not the best way to clarify to what kind of person the Convention should be applicable to. Can we consider that civil persons have "places of business"? Besides being it clear that the intention of the legislator here is to include all kind of persons, they do fail on covering them properly.

The CISG does in practice only regulate the contracts between businesses, that is, there is a lack of regulation for international contracts when one of the parts, the most fragile

[5] Magnus, U., Koch, R. *CISG vs. Regional Sales Law Unification: With a Focus on the New Common European Sales Law,* 2012, pag 125
[6] Fernández Rozas, J. C..; Sánchez Lorenzo, S. , *Derecho Internacional Privado,* Thomson-Civitas, 2018, page 489

one of the relation, is a consumer. And here is the actual reason why CELS is a necessity; the interconnection created the last years between countries does not only reach companies, but also consumers. What about the case of the many European consumers who buy to some online Asian shops? How could we regulate such a relation when the current legal means do not expressly mention that they are responsible for them as well? Just like in all B2C cases, the consumer is always the most unprotected part of the business and therefore there is a necessity to create a document regulating those relations. Moreover, it is important to highlight that we need to understand the term "consumer" here in an extended way, that is, consumer is not only the particular who is buying one pair of shoes online to China, but it is also the entrepreneur or the small or medium business buying many of them, since it is usually difficult for them to apply properly the CISG because of a lack of means and knowledge about international sales law.

That is just an overview about the current existing international regulations applicable in Spain concerning international contracts; however, the objective of this paper is actually to highlight the differences between the national law and the international law on international contracts in Spain. That is the reason why it is needed to mention the european regulation, as far as in Spain, as part of this organisation, the european law should become national law. The CESL, however, is an exception to that rule. The CESL is not defined or introduced in any of the current groups of european laws (regulation, directive, decision, recommendations), it is a law that exists, but that applies only in the case that the parts want it to rule the contract. That is quite a weird phenomenon in law; recommendations are usual, but a law full of obligations that only applies when the will of the parties is that, is definitely something atypical. Besides, that is also a distinction between the CISG and the CESL, since even though the CISG is actually an international treaty; it contents rules and norms where it is determinated when it takes part in the game. The CESL does not contain such norms.

Summing up, we may say that, though it is truth that the CISG has already been ratified by 23 of the 27 members of the European Union, the CELS is still needed as far as the key of this project relies not only on a general regulation, but it hopes to fulfil the areas the CISG does not cover. However, this instrument would still be the first establishing an optional regime of special substantive rules for cross-border contracts.[7]

1.2.2. COMPULSORY LAW: DIRECTIVES AND REGULATIONS

As we mentioned before, the CESL is just an optional law that may be applicable according to part´s will, but not all European laws are voluntary. CESL it is not the only law regulating sales law inside the European Union. May we here remember that at the very beginning this international union was created in order to promote the economy between countries nearby; actually, it used to be called the European Economic Union. In accordance with the main objective latent from the very beginning of the Union, there are many faculties on matter civil and sales or commercial law that the countries has given to the European Union, in order to be able to create a more trustful and coherent economical system and to promote commercial activities inside the Union.

The situation exposed upon is reflected on the legal field through the already mentioned *Convention on jurisdiction and the enforcement of judgments in civil and commercial matters*, a document ratified even by countries as Sweden or Iceland, countries that, though not being completely part of the European Union, maintain special relations.

Another important legal text to mention would be Directive (EU) 2019/771 of the European Parliament and of the Council on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests, and repealing 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.

2. DIFFERENCES BETWEEN CISG AND SPANISH LAW

Once clarified how the international regulation applicable in Spain relating the configuration of sales contracts is structured, has come the time to talk about the

[7] Magnus, U., Koch, R. *CISG vs. Regional Sales Law Unification: With a Focus on the New Common European Sales Law*, 2012, pag 125 -126

differences that may appear when applying international law in Spain or the national law – focusing on the CISG -, since depending on those differences, the parties could choose one or another because of considering one more favourable to them. Usually that decision will be also influenced by the nationalities of the parties, as usually do nationals feel more comfortable with the law they are used to.

Thus, the most remarkable practical differences that may arise when applying CISG or spanish national regulation appear related to the following matters: rule of advertising integration, non-conformity declaration, imminent unfulfilment, extended liability and the sale of useless things.

In the following paragraphs we will extended explain what all those concepts are and how they impact on the diary practical of the contract of sales´ world.

2.1. THE RULE OF ADVERTISING INTEGRATION[8]

In contrast with other jurisdictions and especially the CISG, in the spanish law exists the rule of advertising integration. This ancient spanish rule possesses, because of its age, a very rich legislation.

In order to properly analyse the content of that rule, we will define what should be understood under the word "Advertisement". The legal definition can be found under several legal texts, national and european: on article 2 of Law 34/1988 about Advertising, according to which an advertisement is any form of communication made by a natural or legal person, public or private, in the exercise of a commercial, industrial, craft or professional activity, with the aim of directly or indirectly promoting the contracting of movable or immovable goods, services, rights and obligations, whose addressees are the persons to whom the advertising message is addressed or reached; and on Directive 84/450, which also contains a definition of advertising which itself differs from the national definition only in the inclusion of the expression "*any form of communication*", thus providing a somewhat broader definition. An advertisement can also be defined as a public statement.[9]

[8] Plaza Penadés, J. , Martínez Velencoso, L. M. , *European Perspectives on the Common European Sales Law*, Springer International Publishing Switzerland, 2015, pages 83 - 85
[9] Martin García, M. Del Lirio, *La publicidad y su incidencia en la contratación*, Corp. 2002, page 19-21

Consequently, the rule of advertisement integration means that a company has the obligation to incorporate to the contract the possible offers that they may have advertised, being it compulsory the application of those offers to the contracts, no matter if the consumer mention it or not. For instance, a supermarket makes an advertise according to which the kilo cheese is on Tuesdays with a fifty per cent sale. Now let´s imagine that a woman go there to buy the cheese, no matter if she expects to get the sale or not, or if she has heard about the offer or not, she should automatically become that sale, as long as all what has been advertised should be integrated immediately in sale´s contract.[10] That is a an essential element of this rule, as there is no need at all to highlight the existence of this public statement, as long as what determinates its integration is not the interest of the consumer to get it, but the simple act of doing it.

This rule of advertising integration can be found in several articles all across the spanish legislation, some of them specifically mentioning it and in others can be considered to be there as well through an extended interpretation or just because so has been set in case law.

2.1.1. GENERAL RULE OF ADVERTISING INTEGRATION

Firstly, the article regulating the general rule of advertising integration for any kind of contract is article 1258 from the Civil Code.

> *Article 1258 CC. Contracts are perfected by mere consent, and since then bind the parties, not just to the performance of matters expressly agreed therein, but also to all consequences which, according to their nature, are in accordance with good faith, custom and the law.*

As we can see, the article itself does not mention the rule we are studying directly, nevertheless, case law interpreted its content so in several judgments, the main ones Judgments of Spanish High Court of June 14, 1976 and January 27, 1977. According to those judicial decisions, we can locate the rule of advertising integration on this article through an extended interpretation of the principles of veracity and good faith, using

[10] "*In Spanish law the public statements by the professional suppliers are considered to be a contractual offer and, therefore, have a binding character.*" F. Infante Ruiz

those principles as instruments of integration and interpretation, since it is to expect that the consumer can rely on the "promise" that the seller makes. It is relevant to mention that those public statements are not necessarily a specific advertisement (as may be concluded in accordance with the rule mentioned upon) but it can be applied to all kind of public statements or promises which may have been done in a way to be considered serious enough to be able to reclaim its effective fulfilment.

Another essential element to highlight from this article, though having been mentioned before, is its general character, which means that its applicability is susceptible to be extended not only for all kind of advertisements but also to all kind of contracts; however, as we are focusing here on the differences between the spanish legislation and the CISG – and that ultimate rule is only applicable to sale contracts according to its article 4 – we will not analyse in detail this feature.

As any other legal text, the CISG also contains general principles responsible to be considered when a matter governed by this Convention may not be expressly settled in it, contained on articles 7 and 12. In that way, may we mention the existence of the very same principle of good faith within the content of the CISG, on articles 7 and 13, according to which, when disputes related to the Convention arises "*all parties (...) are admonished to observe its international character and to promote uniformity in its application and the observance of good faith in international trade*", so as article 7.1. "*In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade*".

Besides, the CISG talks all along its chapter on the formation of a contract about "acceptance of offer". This offer they are referring is undoubtedly of a contract, therefore no advertising offer. Nevertheless, is it not part of the good faith (as the spanish courts already have highlighted) to expect that the offer you will receive, will be in accordance with what promise by any means? If we consider it so, we might conclude that the mix of those two concepts mentioned both more than once on the CISG, that is, the acceptance of the contract of offer and the principle of good faith, can lead us to consider that it could eventually exists an interpretation from the International Court of the Chamber of Commerce on this line. Nevertheless, that is just a fantasy by the moment. [11]

2.1.2. SPECIFIC RULE OF ADVERTISING INTEGRATION

Nevertheless, as mentioned before, there are also other rules regulating this matter, more precisely, contained in other legislative documents such as the General Law for the Defence of Consumers and Users, also known as Consumer Act. The appearance of more specific rules on this matter is, naturally, a consequence of the already mentioned multiple court decisions, which encourages the legislator to mention it expressly within new rules. That was the case of the Spanish Consumer Act, a legal document with a long history and which has suffered many renovations. This document contains many references to the rule of advertisement integration.

One of the articles referring to the rule of advertising integration within the Spanish Consumer Act is article 61, which focus specifically on consumer contracts, named inside this act as "Inclusion of offer, promotion and advertising in the contract".

1. *The offer, promotion and advertising of goods and services shall be in keeping with the nature, features, use or purpose thereof, and with the legal or financial terms of the contract*
2. *The content of the offer, promotion or advertising, the features inherent to each of the goods and services, the legal and financial terms and the guarantees offered shall be enforceable by consumers and users, even when not appearing expressly in the signed contract or in the provided document or receipt, and must be taken into account when determining the principle of contractual compliance.*
3. *Notwithstanding the provision of the preceding paragraph, if the signed contract contains more beneficial clauses, these shall prevail over the content of the offer, promotion or advertising.*

As far as this article 61 is concerned, first should we mention a fundamental feature which derives from its origin, that is, the Consumer Act. Consumer Act regulates

[11] DiMatteo, L.A., *Commercial contract law transatlantic perspectives*, Cambridge University Press, 2013, Contract design and good faith

contracts only when one part of the contractual relation is a consumer[12], therefore, the rule contained here is not a general rule applicable to all kind of relations (notwithstanding the fact that is not that often that in a B2B relation may arise from an advertisement), but an extension and representation of the rule of advertising integration set up by the courts in the exclusive case of business to consumer relations[13]. That is, though, not impediment to exclaim the importance of the expression of that rule on a valid legal test.

Concerning the contain of the article itself, the first paragraph contains the general rule itself which stays that what is offered and advertised should stick to the real thing offer and advertised; it could also be considered as a guarantee of content, of the thing upon which the advertisement relies. For instance, if the thing offered is a bath mat, the thing that the consumer gets when buying it should be exactly the bath mat described in the advertisement, with the same features, sizes and purpose, and not one with other features or a simple bedroom mat. That is something actually contained as well on article 35 of the CISG[14]. Nevertheless, may we remark a tiny difference, since, as said before, the CISG do not contains any rule of advertising integration but it does naturally include such a clause for contracts, that is, a clause that what negotiated to be delivered should correspond to that what will in fact release.

It is in any case interesting how the spanish case law has understood under the principle of good faith that an advertisement should has the same guarantees as a contract, in order to try to bring more juridical security to the matter. In my opinion, it is just a matter of time that the CISG case law evolves to such a situation, as long as it can be truly consider as an offer of a non-yet signed contract, a proposal of contract that should enjoy from the same kind of guarantees that contracts do, in order to avoid the abuse of big business and to follow the content of good faith.

Back to the analysis of article 61 of the Spanish Consumer Act, its second paragraph covers a right for the consumer. Not only should the details of the promotion be included on the contract but also is the consumer allowed to demand the compliance of

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[12] Article 2. Scope of application. "*This rule shall apply to relations between consumers or users and entrepreneurs*."

[13] However, should we consider here that article 3 of this law does actually defines who should be consider as a consumer and establishes that consumers will be physical person along with legal persons with no profit motive.

[14] 35.1. "*The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.*"

that rule even if it has not been particularly expressed on the contract that, reached that point, is already signed. This paragraph contains an indisputable guarantee in favour of the consumer or user which connects the advertisement´s content with the contract´s content.[15]

Last but not least, paragraph three backs up the compatibility between the already explained guarantees covered in the precedent paragraph and others that may be negotiated by the parties, being the more beneficial also the preference one´s – no matter where they come from (advertisement or agreement between the parties) -, specially the one´s concerning the weakest part, the consumer or user.

2.1.3. DISTINCTION BETWEEN OFFER OF CONTRACT AND ADVERTISEMENT OFFER

As far as the advertisement is concerned, it needs to accomplish certain requirements for the rule of advertising integration to be applicable. First, it needs to have some "informational content", in order to be able to generate expectation on the future consumer or user; second, there is no need to be able to consider it as an offer of contract (although it is clear that in most cases they are indeed offering the signature of a contract with specific and already expressed advantages); and third, the expectation create should cover any quality of the product (legal, economical, …). Related to the second requirement, it is important to highlight the differences between a sales contract and an advertisement or promotion.

In what affects the spanish legislation, the difference is not so clearly stated as in the Viena Convention – where the distinction is clearly stated on its articles, as we will explained later -, for this reason we will have to require to a wide variety of sources in order to properly determinate it. According to Albaladejo García, the offer is a proposal of contract which one person does to another[16], a serious proposal in order to make a contract towards a concrete person or a collective[17], a will declaration aimed from one

[15] According to F. Infante "*a rule of general application, applicable to any consumer contract, which substantially means that the advertising assertions integrate the contractual content and bind the entrepreneur or professional*".
[16] Albadejo García, A. M.; Derecho civil II. Derecho de obligaciones, .I, Bosh, Barcelona, 1997, p.384 y ss.
[17] Menéndez Mato, J.C.; *La oferta Contractual*, Aranzadi, Pamplona, 1998, p. 46.

of the parties to the other with the objective of concluding a contract once acceptance is received[18]. Besides, article 1261 of the spanish Civil Code adds that, a contract, in order to be considered as it, must content the consent of the parties – must be accepted -, an object and a cause. Also the doctrine states that, according to the content of the Civil Code in matters of contract, an offer must be firm, unequivocal, precise, complete, voluntary and addressed to the addressee or addressees and come to their knowledge.

On the other hand and related to the CISG, within this convention the difference can be found on articles14 and 15 of the CISG. According to those articles, "*a proposal for concluding a contract addressed to one or more specific persons constitutes an offer*" and "*an offer becomes effective when it reaches the offeree*", which leads to the conclusion that "*a proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers*". Summing up, the difference relies on the fact if the offer has a specific and concrete receptor or not.[19]

Concluding we see that for the CISG there is no further need to check any other source to find the contrast between the two concepts, as long as for the difference to be found in the spanish legislation the use of doctrine is certainly unavoidable. In any case, closing states are the content of both on this matter equal, so that if we compare and contrast the two concepts, we will notice that the only difference relies on the fact that offer of contracts do need a concrete receptor or receptors, whereas an advertisement offer do not require to be directed to a concrete receptor; moreover does the advertisement offer not need to be as specific and well legally written as the contract offer, being possible that it lacks of some essential conditions for the contract offer.

Besides, the finalities of both legal instruments are also not alike. Although someone may think that the finality of both legal concepts are to actually get the signature of a contract, and they might be right somehow, that is not the main intention for both. The intention of a promotional or advertisement offer is not directly the signature of a contract, but to promote and stimulate the perfection of more than one contracts; it is a

[18] Sentence of the Supreme Court, 2 of Februar 1990, RJ 1990/652, third juridical fundament
[19] United Nations Convention on Contracts for the International Sales of Goods, Vienna, 1980. Article 14 and 15.

sale technique. This feature of the promotional offer locates it in the pre-contract phase[20].

Meanwhile, the contractual offer has only one single finality and that is, the perfection of a contract which is about to be closed and perfected, therefore it must be placed in the phase of the beginning of a contract. This may look irrelevant, but should I remember that the guarantees of the procedure changes and get harder at the same speed we reach the moment of actually signing the contract.

Weighing up, an essential element of a contractual offer is its accuracy, which undoubtedly requires of concrete parts stated in the contract and its intention of contract´s signature; and for advertising or promotional offer it is its generality and its intention of increase in sales by the company doing it.

In spite of all that, it is undeniable that publicity has a huge influence on the consumer´s decision if to finally make the contract or not, consequently the importance of the rule of advertising integration as an extended guarantee of the principle of good faith on trade[21].

2.2. NON CONFORMITY DECLARATION

The non-conformity declaration is a buyer´s right or guarantee, which consists on the possibility to refuse the goods received in concept of the goods bought because of a lack of coincidence between the features of the thing actually obtained and the one described on the contract. This right of non-conformity can be found both in the CISG and the spanish legislation[22].

> Although the provisions of the Civil Code on which a "general theory" on this matter has been built have not undergone any modification after more than one hundred and twenty years of validity, it is true that before the entry into force of

[20] As Diez Picazo mentions, it is an *invitatio ad offerendum. Fundamentos del Derecho Civil Patrimonial*, page 303.
[21] López García, M.; *La publicidad y el derecho a la información en el comercio electrónico,* Servicios Académicos Intercontinentales S.L., 2004, Diferencias entre publicidad comercial y ofertas https://www.eumed.net/cursecon/libreria/2004/mlg/223.htm#_ftn9
[22] The very essence of this right can be found on the Civil Code, while the right itself more specifically and specially focus on sale of goods can be found on the Consumers and Users´General Protection Law, 23/2003.

> the LGVBC'03 (now recast in the TRLGDCU'07), and especially in recent decades, there had been an important revision of these ideas, accentuated even more since the accession of Spain in 1990 to the United Nations Convention on the International Sale of Goods, made in Vienna in 1980 (Tur Faundez).[23]

This right derives, at the same time, from the contract features. May we here remember contract´s concept and elements.[24] According to the spanish Civil Code, a contract is an agreement by which two parties compromise an exchange of goods for money,[25] being an absolute necessity the previous accordance of price[26] and goods[27] before the actual execution of the contract. Besides, article 1091 of the spanish Civil Code states that obligations born from a contract have the force of law between the contracting parts. Therefore, the non-conformity declaration is a right, a legal possibility to break a contract when it was not properly fulfil by the seller, may it be because of selling something broken or just not useful for what was conceived - the spanish legislation contains different methods to solve this question depending on the kind of break of contract we are talking about - .

The CISG, in contrast, does not content such a clear definition of what a contract should look like, nevertheless, it does mention more than once the traditional contractual features that the doctrine and jurisdiction of many countries defend. Consequently, we are allowed to assert the equality of the concept of contract both under the CISG and the spanish legislation, which is generally also applied in all Europe and America. However, although the CISG does not mention this rule specifically, it is perfectly described how it works and for which cases it is applicable; even creating a special chapter, Section II about Conformity of the goods and third parts claims.

As far as the location of this guarantee or right within the spanish legislation is concerned, its spirit can be related to the content of the Civil Code on its general regime

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[23] Tur Faúndez, M. N., *Del saneamiento a la responsabilidad por falta de conformidad una propuesta de regulación*, Tirant Lo Blanch, 2017, page 35

[24] According to doctrine and law, which at the same time got the concept from the custom practice.

[25] The Civil Code does actually also allows the possibility of permute but we are only interested in cases of sales of goods by an Exchange between goods and money.

[26] Article 1447 Civil Code "*For the price to be taken for certain, it is sufficient that it be taken for certain other things, or that its indication is left to the discretion of a certain person. If the latter is unable or unwant to do so, the contract shall be rendered ineffective*."

[27] Artículo 1445. "*Por el contrato de compra y venta uno de los contratantes se obliga a entregar una cosa determinada …"*

Article 1097 Civil Code. *"The obligation to give a specific thing includes the obligation to deliver all its accessories, even if they have not been mentioned".*

on remedies for hidden defects in the contract of sale[28]; however, this regime was described as insufficient in consideration of the intervention of the figure of the consumer and the fact that the object of the sale is consumer goods[29]. As a consequence and in attendance of the content of international law on sales contract – that is, the CISG[30] and the Directive 1999/44, of 25 May 1999, on certain aspects of the sale of consumer goods and associated guarantees, which wanted the unification of the different legislation on matter of consumer guarantees because of the proliferation of those in an international way - the Law 23/2003, of July 10, 2003, on Guarantees in the Sale of Consumer Goods was created, in order to introduce a new regime for hidden defects in the goods sold to consumers, through which the weak position of users and consumers could be fortificated[31].

> The influence of Law 23/2003[32] goes beyond the scope of consumer law. In addition to strengthening the guarantees available to consumers as purchasers of consumer goods with respect to Article 11 LGDCU, the Law introduces the principle of conformity with the contract in a specific type of sale and purchase, such as the sale and purchase of consumer goods. The principle of conformity, known in the field of the international sale of goods, concluded between professionals, now eclipses the traditional remedy for hidden defects. As we shall see, the delivery of a thing with hidden vices or defects that redound to the quality of the thing is in any case traceable to its lack of conformity with the contract, without any distinction between the categories of hidden vices, defective performance or non-performance or *aliud pro alio*[33], the distinction between which has given rise to so much doctrinal controversy.[34]

[28] Articles 1484 et seq.
[29] Lucia Costas Rodal, 29/03/2021: https://burjcdigital.urjc.es/bitstream/handle/10115/12121/LUCIA%20COSTAS%20RODAL.pdf?sequence=1&isAllowed=y
[30] Spain ratified the CISG the 24 of September 1990
[31] The approval of the new Law is due to the need to provide a special protection to the consumer who acquires consumer goods against the presence of defects in the thing,
[32] The Law 23/2003 is derogated in 2007 by the Legal Act 1/2007 which contains the current Consumers and Users´General Protection Law
[33] This expression means "full failure inability object, to be unfit for the purpose for which is is intended" and is used for the sake of a postulate of material justice.
[34] Lucia Costas Rodal, 29/03/2021: https://burjcdigital.urjc.es/bitstream/handle/10115/12121/LUCIA%20COSTAS%20RODAL.pdf?sequence=1&isAllowed=y

In this previous paragraph explains Misses Costal Rodal pretty good the influence of the Law 23/2003 and its impact on the regime for consumers´ guarantees, nevertheless this analyses is made based on the predecessor of the actual Consumer Act 1/2007, in which it is already considered the influence of internet and its impact on the market. As a consequence, when making this analysis she is still not aware about how the situation and consumer protection decreases by the impact of the internet and the new General Conditions. Internet does weaken the position of consumers and strengthen the power of companies as long as there is no longer direct contact between seller and consumer and, therefore, no chance to handle. Consumers see themselves force to sign General Conditions in order to be able to go on with their bought even when those are usually written in really complex juridical terms. In order to balance this situation comes Consumer Act 1/2007 which, by the first time, takes into account the repercussion of the General Conditions and non-negotiated clauses and set up requirements for them. Article 80.1 of the Consumer Act contains those requirements:

> *In contracts with consumers and users that use non-individually negotiated clauses, including those promoted by public administrations and the entities and companies that depend on them, they must accomplish with the following requirements:*
>
> *a) Concreteness, clarity and simplicity in the wording, with the possibility of direct comprehension, without referring to texts or documents that are not provided prior or simultaneously to the conclusion of the contract, and to which, in any case, express reference must be made in the contractual document.*
>
> *b) Accessibility and legibility, so that the consumer and user is aware of its existence and content prior to concluding the contract. In no case shall this requirement be deemed to be fulfilled if the size of the lettering in the contract is less than one and a half millimetres or if the insufficient contrast with the background makes it difficult to read.*
>
> *c) Good faith and fair balance between the rights and obligations of the parties, which in any case excludes the use of unfair terms.*

However, these conditions are only applicable to sales made by General Conditions, therefore, by the action of a consumer, but, what happens when we are talking about business to business contracts? Well, here is where the difference between the non-conformity declaration and hidden defects regime come in action.

The non-conformity declaration within spanish law is only considered to be applicable to contracts in which one of the parties is a consumer, as a guarantee which was assumed in spanish law from the international to try to soften the position of businesses in those kind of contracts. In contrast to the spanish legislation , the CISG contains the non-conformity declaration as an instrument which can be used by both consumers and businesses. Moreover, now shall we here repeat that although, theoretically, the CISG is applicable to all kind of contracts, the usual praxis is to be used only for business to business contracts since those are the only ones aware of its existence; even for small businesses is often difficult to appeal to it.

Once that point has been clarified, we will now focus on the distinction of non-conformity declaration regime and hidden defects´ regime within the spanish legislation.

2.2.1. NON- CONFORMITY DECLARATION AND DEFECT´S REGIME

Another essential question on this point is to highlight the differences between the non-conformity declaration and the defects regime, as long as its legal development is different, especially within the spanish legislation. Actually, this paragraph will focus mainly on how spanish legislations uses other instruments apart from the non-conformity declaration to solve the cases of vices in contracts of sales, as long as that is one of main differences between the spanish legislation and the CISG and may be decisive to decide if to apply one regime or another.

However, before getting plenty on this topic, it is also relevant to highlight where the non-conformity declaration and vices regime rules. We have already explained that both the spanish legislation and the CISG contains the possibility of the non-conformity declaration, nevertheless there are some slightly differences between its use on one jurisdiction and the other. In order to properly understand the point that I am going to analyse now, I would like to remind the reader the applicability rules of the CISG; as it was already explained on the paragraph of the CESL, theoretically CISG does apply to both consumers and business contracts, according to its article one, as long as it talks only about parties and emphasises on its paragraph three that "*neither the nationality of the parties nor the civil or commercial character of the parties*"; but we have already explained that its effect and praxis in contracts in which consumer are one of the parties is not that often, thus, it is not wrong to say that the non-conformity declaration covered on the CISG is an instrument for juridical persons, business. Meanwhile, the non-conformity declaration contains on the spanish Consumer Act is actually an instrument expressly for consumers, thus, not an instrument that a business or juridical person, since it is established particularly in the Consumer Act.

In the spanish legal system, in addition to the general remedies granted to the buyer in the event of non-performance by the seller and the declaration of non-conformity explained above, other remedies specific to the sale are recognised for the buyer. In effect, the seller is liable to the buyer for the remedy for eviction and for hidden defects of the thing that is the object of the contract, and the buyer is granted the possibility of exercising the building actions to make these guarantees effective.

Continually, we will talk about the different instrument available on it.

2.2.1.1. APPARENT VICES

Within the spanish legislation, there are two types of vices, whose regimes differ from one another. Apparent defects are those defects in the thing sold that are manifest. Likewise, apparent defects are also considered to be those which, although hidden in nature, the buyer should have been aware of easily by reason of his trade or profession.

In short, in the case of apparent defects of quality or quantity, the general rule is that the buyer must make a corresponding disclaimer at the time of delivery in order to be able to reclaim those, nevertheless, there is an exception for the cases in which the goods are received packed, wrapped or packaged. The buyer shall have the right to claim against the seller, for defect in the quantity or quality of the goods received wrapped or packaged, provided that he exercises his right of action within four days of receipt and does not apply to accidental damage, defect or fraud. In such cases, the buyer may choose to terminate the contract or to perform it in accordance with the agreed terms, but always with compensation for damages caused by defects or defects. That exception could be applicable to the cases of online shopping, as long as you usually become a thing you could not see personally before and also package. Once again, it is a guarantee to protect the consumer from the business power.

However, even in those cases the Civil Code states that the seller may demand, at the time of delivery of the goods, the recognition of the goods by the buyer. In this case the guarantee disappears as soon as the buyer confirms the good state of the good even though the time to check may not have been enough to actually recognise the possible vices.

When the good do actually suffer from a vice and the buyer claims, he will have two options: rescission of the contract or demand performance of the contract as agreed. As soon as he chooses one of them there is no way back to reclaim possible damages in the future. In both cases – rescission or performance of the contract, this option will always be followed by compensation for damages caused to the buyer. That is to say, whichever option is chosen and in any case, whether to rescind or to demand the fulfilment of what has been agreed, the seller will have to pay the buyer compensation to the buyer.[35]

2.2.1.2. HIDDEN VICES[36]

Regarding hidden vices, article 1484 of the Civil Code assigns to the seller the obligation to remedy hidden defects, but the importance question here is: which defects are to be considered as such? Well, it refers to those defects that make the thing sold unfit for the use for which it is intended or that diminish it in such a way that, if the buyer had known about them, he would not have acquired it or would have paid a lower price. The wording of the provision allows two different interpretations of the concept of hidden defect: on the one hand, a notion that takes into account the normal use made of the thing, which does not take into account the specific objective of the buyer when concluding the contract, it is a defect that prevents the thing from serving its natural purpose; on the other hand, a functional concept of the defect can be deduced from that precept, based on the specific purposes pursued by the buyer when acquiring the thing.

[35] Fayos Gardó, A., *Derecho Civil: Manual de derecho de obligaciones y contratos*, Dykinson, 2018, page 101

[36] Tur Faúndez, M. N., *Del saneamiento a la responsabilidad por falta de conformidad una propuesta de regulación*, Tirant Lo Blanch, 2017, pág. 14-15

This latter conception constitutes a broader meaning, since it not only includes the objective and easily recognisable defects of the thing, but also the "defects" that are to be understood according to the expectations of the buyer when acquiring it.

However, in order for the seller to actually be liable for remediation, there are additional requirements:

· The defect in question must be of a hidden nature. With respect to this requirement, Article 1484 CC expressly excludes manifest defects or those that are in plain view, as well as those that without being so can be easily recognised by the buyer in view of his personal circumstances (trade or profession).

· That the defect exists before the sale, pre-existence. Although this is a requirement that the Civil Code does not expressly mention, it is clear that defects that may arise after the sale are at the buyer's risk. The burden of proof that the defect exists prior to the sale rests with the buyer. It is generally understood that the defect existed prior to the sale when it becomes apparent shortly after the conclusion of the contract.

· Some authors add to this list the requirement that the vice be serious[37] . What is certain is that the concept of "seriousness" must be understood in accordance with the legal precept, that is, that the defect in question renders the thing unfit for its intended use or significantly diminishes its use.

Having clarified the concept of hidden defects, it is now time to explain the legal regime applicable to them. According to Article 1486 CC, the buyer can exercise in this case two actions, known under the name of *edilicias*: the *redhibitory* action and the *estimatory* or *quanti minoris* action. The first allows the buyer to withdraw from the contract and be reimbursed for the expenses he has paid; the second is intended to reduce a proportional amount of the price. From the wording of the provision, it can be deduced that the factual situation of both actions is the same, leaving the buyer the possibility of choosing between one or the other action in the event of the existence of any hidden defect. However, it has been stated that the seriousness of the defect may serve to determine the exercise of one or the other.

[37] García Cantero, *Comentario a los artículo 1484 a 1490 CC*, en Comentarios al Código Cicil y Compilaciones Forales, Madrid, 1991, página 338

According to this theory, in the case of serious defects, the buyer may choose between a redhibitory action or an injunctive action, whereas in the case of a minor defect he may only exercise the injunctive action.

Only in the case where the seller has acted in bad faith, i.e., when he knew of the existence of the defects and did not inform the buyer, and the buyer has opted for rescission, may the buyer claim compensation for damages.

Regardless of whether we agree with this theory or not, it does seem logical to set limits to this right to compensation based on the seriousness and damage caused to the consumer, since otherwise we could find ourselves in a situation in which the consumer abuses the seller.

With regard to the time limits for these actions, the buyer has six months to exercise them (art. 1490 CC), which will begin to run from the time of delivery. [38]

2.2.2. SPECIAL RULE OF CONFORMITY WITH PROMOTIONAL STATEMENTS[39]

The legislation about this spanish rule does not stop on the explanation given until now in the paragraph of the Rule of Advertising Integration, but it has still a last guarantee on article 116.1.d. Consumer Act, so as exceptions when this should not be applied.

> Article 116. Consumer Act. Conformity of products with the contract.
>
> *(1) Save for evidence to the contrary, it shall be understood that products conform to the contract provided that they accomplish with all the requirements set forth hereafter, unless any of the requirements is not applicable due to the circumstances of the case:*
>
> *(d) They display the typical quality and features of a product of this type which consumers and users have good reason to expect, taking into account the nature of the product and, if any, the public statements made by the vendor, producer or*

[38] Tur Faúndez, M. N., *Del saneamiento a la responsabilidad por falta de conformidad una propuesta de regulación*, Tirant Lo Blanch, 2017, pág. 14-15

[39] Age Värv and Piia Karu*, The Seller's Liability in the Event of Lack of Conformity of Goods,* Pages 85-93

representative thereof, regarding specific features of the product, especially in the advertising or labelling.

Once again, the Consumer Act covers the doctrine established by the spanish Supreme Court in a similar way as article 61 does, but not as directly. In this case, however, the focus relies not on the importance of the advertisement self, but on the fact that the consumer does have a right to express its disconformity when realizing that the good acquired does not fit with the description made in the public statement did by the producer, which would lead to an unfulfilment of the contract.

As we have already explained before the CISG does not mention in any article nothing about advertising and even less covers a rule of advertising integration, though it could be eventually so understood by the courts in consideration of the principle of good faith; in spite of that, it does cover a right to make a non-conformity declaration actually with huge differences on the conditions for it compared to the ones establishes on spanish law, and, obviously, not making any reference to the possibility that those may be based on a public statement or advertisement.

Summing up, through an extended interpretation of the content of the CISG, taking into account both the existence of the principle of good faith and the possibility of the non-conformity declaration, the rule of advertising integration could appear; even though, the key question here is if to consider a public declaration strong enough to be consider as a proposition of contract that the consumer, in the case of acceptance, may use to demand the possible vices or faults of the thing bought or not. Here come, as well, the matter about who is to be considered consumer. Although from an strict understanding of the CISG, it is actually applicable to cases of physical consumers, the fact is that it is mostly used and applied in cases of sales between businesses or juridical persons, subjects that do always signed complete contracts for sales, not like physical consumers who usually just buy under the general sale conditions establish by the seller logically using the most favourable legislation for itself and without giving the consumer the chance to handle[40].

[40] Sales under General Sale Conditions establish by the seller have also specifically regulation under the spanish law through the Consumer Act which pretends to give as much guarantees as possible to the weak part of the contract, the consumer.

2.2.3. DEADLINES FOR USING THIS NON-CONFORMITY DECLARATION

We have already explained the differences existing between the formal spanish non-conformity declaration and the one contained on the CISG, however, its distinctions are not only formal but also procedural. There is no surprise in the affirmation that the CISG is written in a general and undetermined tone, consequence of its international character, a fact that affects directly to the action´s deadline. In the case of the non-conformity declaration´s deadline, articles 38 and 39 CISG[41] covers the possible deadlines applicable to a sale according to the circumstances in which it may take place and the deadlines for those, so as the Commercial Code does on its articles 336[42] and 342[43], articles those last one extended and modified by the Consumer Act for the case of consumer or entrepreneurs..

The differences between the contents of those articles mentioned are clear. While the CISG does not set a specific deadline or times, apart from the two years deadline of article 39.2., the spanish legislation does establish that the already mentioned non-conformity declaration, so as the other possible actions within a sale´s contracts, do have a limited possible time of action, very limited and scarce, which, so as the CISG covers, will also be different according to the delivery means. It must be highlighted that the CISG does contemplate the possibility of being physically in a shop or storehouse, however its international character supposes that most of the times that the two parts of the sale relation will be far away from each other, so it will all be a sale

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[41] **Article 38** (1) *The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances. (2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination. (3) If the goods are redirected in transit or redispatched by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or redispatch, examination may be deferred until after the goods have arrived at the new destination.*
Article 39 (1) *The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.* (2) *In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time limit is inconsistent with a contractual period of guarantee.*

[42] Artículo 336. *El comprador que al tiempo de recibir las mercaderías las examinare a su contento, no tendrá acción para repetir contra el vendedor alegando vicio o defecto de cantidad o calidad en las mercaderías.*

[43] Artículo 342. *El comprador que no haya hecho reclamación alguna fundada en los vicios internos de la cosa vendida, dentro de los treinta días siguientes a su entrega, perderá toda acción y derecho a repetir por esta causa contra el vendedor.*

contracts in which the good must be sent somewhere else, thus there will be always a delivery time and a determinate spot in which the good is to be picked up.

Nevertheless, as general rule the CISG establishes on article 38.1. that the examination of goods must be done "*within a short period of time as is practicable in the circumstances".* Thus, the Convention provides an unspecified and very flexible time limit, adaptable to the specific case, for notifying the seller of the lack of conformity (if applicable). The maximum time limit for such notice is two years from the time the goods are in the buyer's possession, as mentioned before on article 39.2. CISG, which allows, on an international view, the adaptability of this period to all kind of circumstances that may appear in the goods´ way from the seller to the buyer and back, if needed.

Interesting is also this reference at the end of article 38.1. CISG "*as is practicable in the circumstances*", so not only don´t we have a concrete deadline but it may be change according to the circumstances. Besides, what circumstances? Considering that the paragraph two and three of this very same article contemplates the situation in which carriage and even redirection shall be done, what other circumstances may appear? I guess there was just no intention of stating a binding deadline – apart from the two years - in consideration of the wide range of variety of goods that is frequently sold on the international market and which needs different times in order to realize whether they work or not (f.i. electronic devices which usually are sold with a guarantee time of two years, the limit CISG sets). This situation creates an enormous insecurity for the seller but, as we already mentioned, seller are mostly businesses and they make sure that it is properly established on the contract how long the other part may reclaim or give back the good because of vices, and under which circumstances, sometimes even abusing of the lack of awareness of the other part of the contract, when this not a business is.

Back to the possible circumstances that the CISG covers, those are the need of carriage or transport of the goods from the place where the seller is to the buyer´s location, and within this one, when goods must be redirected or redispatched once they have been already sent. In both cases, the CISG contemplates the same solution, the claim time will not start running until the moment in which the buyer gets physically the goods, that is, the sale object arrives to the buyer´s place.

As far as the spanish legislation, articles 336 and 342 of Commercial Code, is concerned, the deadline is way more exact, although it is different depending on the king of vices we talk about. We have already explained that the spanish legislation recognises two kind of vices: apparent and hidden vices.

Remarkable is, as well, the fact that spanish legislation has different applicable legislation for wholesale and retail purchase. For the first one, the applicable legislation according to the spanish legislation will be the Commercial Code in relation with the Civil Code. But for retail purchase, that is, individual consumers who buy just small things, not to be sold but to use them for themselves, the applicable legislation will still be Commercial Code in relation to the Civil Code, and the Consumer Act, in which the guarantees for consumers are set.

The difference must be kept in mind since, in fact, for wholesale, there is actually no deadline in cases in which the sale happens physically, that is, the exchange of goods and money take place in a specific store, as long as the buyer has no longer the right to reclaim when he or she has already examine the goods and agreed on its good condition. But, of course, this examination cannot go further than an external revision, as long as the hidden vices or internal vices will not be shown or recognizable until the moment in which the good is used. It is, as well, thought-provoking the fact that the doctrine has establishes that this deadline for hidden vices, that according to article 342 Commercial Code is set on thirty natural days, will not always be applicable, as long as in case the buyer, because of its occupation or studies, must have been able to recognise them with a simple external examination, the deadline will be the same one as for apparent vices[44].

Related to retail purchase, the Consumer Act guarantees the possibility of return even without a specific reason, the known as right to withdraw from the contract. This right is regulated under Title number I, Chapter II of Consumer Act and its definition can be found on article 68.1. Consumer Act:

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[44] It is a question of justice according to personal circumstances and a protection for the seller, as long as the articles talk about apparent, but the apparency of a vice depens on the eye with which the good is examinated. Just think about the current situation with technology, it is not as easy for an old person to recognise a broken mobile phone, as for a person born in 2001, since the first one may have never learnt about technology while the other born in 2001 has been its whole life in contact with it. In contrast ,it will be much easier for an old person born in a farm to recognise an ill animal, as for a person who has never been in contact with animals or take care of them.

“*The right to withdraw from a contract is the right of the consumer and user to terminate the contract concluded, thus notifying the other contracting party within the time limit set for the exercise of that right, without needing to justify its decision and without penalty of any kind.”*.

This is just another guarantee set on Consumer Act in order to protect the consumer. Its function and conditions are plenty set on the mentioned chapter. It is interesting how the legislator highlights two times “*without needing to justify its decision and without penalty of any kind”* and then “*Clauses imposing a penalty on the consumer and user for exercising their right of withdrawal shall be automatically null and void*.”, so it does not only mentions the prohibition of penalties related to this guarantee, but it also set a clause in which the nullity of such a clause is stated.

Back to deadlines, the right of withdrawn of the contract´s time must be of a minimum of fourteen days, being it possible to extend it in case the seller does not accomplish with its obligations, which are informing the consumer about the existence of this right in a clear way [45]. This fourteen days deadline can be found under article 71.1 Consumer Act, in the new wording of the same given by Law 3/2014 following the provisions of Directive 2011/83/EU, stating that "*The consumer and user shall have a minimum period of fourteen calendar days to exercise the right of withdrawal*".

This is the general period set out in the law and corresponds to the time limit set as a general rule by Community legislation, both in Directive 2008/48 and Directive 2008/122. The establishment of this period in Community legislation has led to the generalisation of this period in the contractual regulations of European countries. The only exception to this general withdrawal period is to be found in article 9.1 Law on Installment Sales of Movable Goods, which limits the period to seven working days.

[45] Article 71. Time limit for exercising the right of withdrawal.
1. *The consumer and user shall have a minimum period of fourteen calendar days to exercise the right of withdrawal.*
2. *Provided that the employer has fulfilled the duty to provide information and documentation laid down in Article 69. 1, the period referred to in the preceding paragraph shall be counted from the date of receipt of the goods covered by the contract or from the date of conclusion of the contract if the object of the contract was the provision of services.*
3. *If the employer has failed to accomplish with the obligation to provide information and documentation concerning the right of withdrawal, the period for exercising this obligation shall end 12 months after the date of expiry of the initial withdrawal period, from the date of delivery of the contracted goods or the conclusion of the contract, if the object of the contract was the provision of services. If the obligation to provide information and documentation is fulfilled within the said 12-month period, the period laid down by law for the exercise of the right of withdrawal shall begin to run from that moment.*

This European generalisation of establishing a general deadline period for the break of consumer contracts without a reason[46]has facilitated cross-border trade with consumers inside the European Union. [47]

In conclusion, the CISG does never really consider the position in which each part is in a contract according to its personal circumstances (being a business or being a consumer), and for that reason there are many fields in which fails in the protection of them.

2.3. EXTENDED LIABILITY IN SPANISH LAW

This extended liability concept is, just as its own name explains, a legal regime which foresees that when one of the contracting parties (usually the seller) causes damage to the other party (usually the buyer), the Convention provides that only the loss that the non-performing party foresaw or should have foreseen at the time of the conclusion of the contract is compensable, while, when applying the Civil Code, the question is more complex: generally, if there is a deliberate intention to breach, the non-performing party must also make good the damage caused that was not foreseeable.

In relation with the CISG this disposition can be found on article 74, according to which, as advanced before, damages for breach of contract by one party must be a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages cannot exceed the loss which the party in breach foresaw or ought to have foreseen 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. Therefore, CISG establishes a limit on the quantity to be reclaimed.

On the other hand, spanish legislation sets on article 1486 of the Civil Code that, in relation to the options that we have already seen as defect regimes, in particular hidden vices, if the buyer chooses rescission of the contract, that is the redhibitory action, and the seller knew of the defects or hidden defects of the thing sold and did not make them

[46] We must highlight that related to consumer contracts the break of the contract must not be justified and can be done without a reason.

[47] Juaréz Torrejón, A., *La protección contractual del consumidor por las faltas de conformidad de los productos*, Tirant lo Blanch, Valencia, 2015, pages 35-37

known to the buyer, the buyer shall have the same option and in addition shall be compensated for damages. Therefore, this is actually a punishment for the seller that sells or acts with fraud intention, a concept which means the intention to fool, defraud or simulate in order to harm someone or to create a damage.

Besides, in relation to that last point about fraud, article 1270 of the Civil Code provides that when the fraud is serious and has not been used only by one of the contracting parties, the contract will be null and void. This article sets, as well, that when the fraud were incidental, so that there was no plan to defraud, it will only oblige the party who used it to pay damages.[48]

Might we here remember the difference between casual and direct fraud. Direct fraud is, according to article 1269, "*when, by insidious words or machinations on the part of one of the contracting parties, the other is induced to enter into a contract*", therefore, in the formation of the contract there was a lie which induced the other party to conclude a contract which he would not otherwise have made; there is a harmful intention in a way that not only you can recognise the danger or probability to produce that damage but you also want it. Casual fraud is when you can recognise this danger, this probability of the damage happening, but you do not want it to happen or you consider the probability not high enough, it is a kind of imprudence.

In any case, the fact is that the spanish regulation contemplates an extended liability in compared with the one set on the CISG, in compared with the one contained on the spanish legislation consider not only an extra damage to be indemnify.

2.4. ANTICIPATORY BREACH OF CONTRACT

The notion of anticipatory breach of contract, was created by the Common Law for the case in which, having concluded a contract of sale, it is reasonably foreseeable that one of the parties will fail to perform some essential obligations of the contract (the most typical example: that the seller will not deliver the goods). In such a situation, the legal

[48] Tur Faúndez, M.L. *Del saneamiento a la responsabilidad por falta de conformidad*, Tirant lo Blanch, Valencia, 2017, pages 14-15

possibilities to solve it according to the CISG or the spanish legislation will have diverse solutions[49].

Spanish law does not contain the concept of the exception due to insecurity, but there is a similar notion, which is the suspension of one's own performance in the face of feared non-performance, which means that the obligee can suspend its own performance when there is a risk of non-performance by the other party, unless the obligor guarantees the performance (Articles 1467 and 1502 of the Civil Code).

As Ángel Carrasco explains, this risk or fear of non-performance by another party does not give rise to the termination of the contract, but to the suspension of the performance itself, except for the provisions of article 1503 of the Civil Code[50].

The Spanish legal system presents three possibilities of reaction of the obligee before the "non-performance simply feared" - Ángel Carrasco explains -, despite the fact that the general rule is that before the non-performance there are no remedies available to the obligee"[51].

In the event of feared non-performance, the obligee can:

1) Suspend the performance itself (as we have seen, arts. 1467 and 15027 of the Civil Code)

2) Terminate the contract when there is "good reason to fear non-performance"[52] (arts. 1467 and 1502 of the Civil Code)

3) Exercise the general power to request the early maturity of the obligation (article 1129 of the Civil Code)[53].

On contrast, CISG does contain this possible of anticipatory breach of contract regulated under article 71 of the CISG. According to the named article, the CISG foresees the possibility of breaching the contract in an anticipatory way. However, in

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[49] https://www.diariojuridico.com/compraventas-internacionales-de-mercaderias-vindicando-la-convencion-de-viena/

[50] Carrasco Perera, A.., *Derecho de contratos*, 1.a ed., Navarra (Thomson Reuters), 2010, p. 869.

[51] Carrasco Perea, A., *Derecho de contratos*, cit., p. 872

[52] There is "well-founded reason to fear the loss of the immovable thing and the price" (Article 1503 of the Civil Code, provided for in Article 1467 and 1502 of the Civil Code)

[53] Yun Li, *The suspension of performance: comparison between the defence of uncertainty (or the defence of uncertainty), the exceptio non admipleti contractus and anticipatory non-performance,* Revista Jurídica de la Universidad Autónoma de Madrid , pages 225-252

order to appreciate the validity of the use of such an action within the CISG regulation, this suspicious must derive from:

a. A serious deficiency in:
    - His ability (the ability of the seller) to perform (the contract
    - His creditworthiness
b. His conduct in preparing to perform or in performing the contract.

That is, it is not only that the suspicious must in fact exit, but it must to be justified in consideration of a specific behaviour of the party accused not to be trusted, may it be seller or buyer - seller for not sending the goods or buyer for not paying the price in time -. Therefore, both parties are entitled to use this action, the important and key fact is the suspect, as long as this suspect exits and can be properly justified, this action could be used.

Within the text of the CISG exits as well a guarantee in order to abuse the use of that action, specifically on article 71.3 which sets that "*A party suspending performance (…) must immediately give notice of the suspension to the other party and must continue with performance if the other party provides adequate assurance of his performance*", thus, this action will not be able to be use when the party about which the party doubts, prove to have accomplished with its contractual obligation, therefore, it is mandatory to inform about the use of this action, so that the other party can prove its good contractual behaviour.[54]

In conclusion, the difference between the application of this action, that actually does not exist within the spanish legislation is that if the Convention applies, the other party (party in bonis[55]) can anticipate events by terminating the contract of sale if it can already foresee before the time fixed for performance that the first party will default. On the other hand, the question is not so simple under the traditional rules: generally, in order to be entitled to terminate the contract, the party in bonis must wait for the actual non-performance of the other party.

[54] Vidal Olivares, A., *El riesgo de las mercaderías en la compraventa internacional en la Convención de Viena sobre compraventa compraventa internacional de mercaderías (CVCIM*), Vol. 8, Ius et praxis Vol. 8, Talca, Chile, 2002, pages 549 - 551
[55] The party which acts with good faith and uses the action.

CONCLUSION

After having studied in deep the possible practical differences when applying the CISG or the spanish regulation for international contracts of sale, I would conclude that the application of one or another is to be considered by the parties in consideration of their individual interest.

We can say that, of course, for a buyer, the spanish legislation covers way more guarantees for him as a consequence of the popular believe that the buyer is usually less aware of the legal matters than the seller, but of course, that is not something to take for granted, as long as this situation will depend on the personal features of the buyer. However, it is true that frequently, businesses that sell in the international market are big companies that have studied before the legislation that may benefit them most in case of problems, and will to impose their will. At the same time, it is also truth that in most of the cases for international sales, both parties will be businesses, but still it is not to compared a Start Up or entrepreneur trying to create a business on their city with an international company with seats all around the world and responsible to sell to all those small businesses, as we know that happen.

In conclusion, a party entering into an international sale and purchase agreement can gain a significant advantage if it succeeds in negotiating with the other party the regulation they want to govern its contractual relationship. To make the Convention govern is usually as easy as simply refraining from providing in the contract for any clause on the applicable law. Obviously, it will not be possible to determine at the outset which regulation suits a contracting party best. However, when there are risks that the buyer or seller considers relevant from the outset, deliberately opting for the Convention, or instead refusing to apply it, may constitute a weighty element among the precautions to be taken in the face of these risks.

What is undeniable is that the businessman who includes this analysis in his negotiations will make more informed decisions and is at an advantage over the businessman who does not, thus the important of this study and its future relevance on international negotiations.

BIBLIOGRAPHY

· Websites

https://www.diariojuridico.com/compraventas-internacionales-de-mercaderias-vindicando-la-convencion-de-viena/ Checked on 03.02.21

https://www.cisg.law.pace.edu/cisg/text/gap-fill.html Checked on 22.02.21

https://www.eumed.net/cursecon/libreria/2004/mlg/223.htm#_ftnref9 Checked on 19.03.21

https://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1049&context=pilr Checked on 22.03.21

Lucia Costas Rodal, checked on 29/03/2021: https://burjcdigital.urjc.es/bitstream/handle/10115/12121/LUCIA%20COSTAS%20RODAL.pdf?sequence=1&isAllowed=y

· Books

Age Värv and Piia Karu, *The Seller's Liability in the Event of Lack of Conformity of Goods*

Albadejo García, A. M.; *Derecho civil II. Derecho de obligaciones*, I, Bosh, Barcelona, 1997

Alcover Garau, G., La transmisión del riesgo en la compraventa mercantil: derecho español e internacional, 1991

Carrasco Perera, A., *Derecho de contratos*, 1.a ed., Navarra (Thomson Reuters), 2010

De Gruyter; Magnus, U., *CISG vs. Regional Sales Law Unification : With a Focus on the New Common European Sales Law*, Editorial Sellier - European Law Publishers GmbH, 2012

DiMatteo, L.A., *Commercial contract law transatlantic perspectives*, Cambridge University Press, 2013, Contract design and good faith

Fayos Gardó, A., *Derecho Civil: Manual de derecho de obligaciones y contratos*, Dykinson, 2018

Fernández Rozas, J. C..; Sánchez Lorenzo, S. , *Derecho Internacional Privado*, Thomson-Civitas, 2018

García Cantero, *Comentario a los artículo 1484 a 1490 CC*, en Comentarios al Código Civil y Compilaciones Forales, Madrid

Ingeborg, S.; Atamer, Y. M.; 35 years CISG and beyond, 2016

Juaréz Torrejón, A., *La protección contractual del consumidor por las faltas de conformidad de los productos*, Tirant lo Blanch, Valencia, 2015

López Castillo, Antonio, *Instituciones y derecho de la Unión Europea*, editor literario; Castellà Andreu, Josep Ma., 2020

López García, M.; *La publicidad y el derecho a la información en el comercio electrónico*, Servicios Académicos Intercontinentales S.L., 2004, Diferencias entre publicidad comercial y ofertas

Martin Garcia, M. Del Lirio, *La publicidad y su incidencia en la contratación*, Corp. 2002

Magnus, U., *CISG vs. Regional Sales Law Unification: With a Focus on the New Common European Sales Law*, 2012

Menéndez Mato, J.C.; *La oferta Contractual*, Aranzadi, Pamplona, 1998, p. 46.

Nives, P., *Interpretation an gap-filling under the United Nations Convention on Contracts for the international sale of goods*, University of Zagreb Faculty of Law, Zagreb, Croatia – History of the Uniform Law of International Sales

Plaza Penadés, J. , Martínez Velencoso, L. M. , *European Perspectives on the Common European Sales Law*, Springer International Publishing Switzerland, 2015

Saidov, D., *The law of damages in international sale: the CISG and other international instruments*, 2008

Schwenzer, I. ; Atamer, Y. M. ; Butler, P. ; *Current issues in the CISG and arbitration*, Eleven International Publishing, 2014

Steger, Manfred B., *Globalización*, Antoni Bosch editor, 2019

Tur Faúndez, M. N., *Del saneamiento a la responsabilidad por falta de conformidad una propuesta de regulación*, Tirant Lo Blanch, 2017

Vidal Olivares, A., *El riesgo de las mercaderías en la compraventa internacional en la Convención de Viena sobre compraventa compraventa internacional de mercaderías (CVCIM*), Vol. 8, Ius et praxis Vol. 8, Talca, Chile, 2002

Yun Li, *The suspension of performance: comparison between the defence of uncertainty (or the defence of uncertainty), the exceptio non admipleti contractus and anticipatory non-performance*, Revista Jurídica de la Universidad Autónoma de Madrid

· **Jurisprudence**

Sentence of the Supreme Court, 2 of Februar 1990, RJ 1990/652, third juridical fundament

· **Regulation**

Common European Sales Law

Convention on Contracts for the International Sales of Goods

Convention on jurisdiction and the enforcement of judgments in civil and commercial matters.

Directive 1999/44, of 25 May 1999, on certain aspects of the sale of consumer goods and associated guarantees

Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising

Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC

Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts

Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests

Directive 2011/83/UE of the European Parliament and of the Council of 25 October, about rights of the consumers

Directive 2019/771 of the European Parliament and of the Council on certain aspects concerning contracts for the sale of goods

General Law for the Defence of Consumers and Users and other complementary laws., also named as Consumer Act

Law 23/2003, of 10 July 2003, on Guarantees in the Sale of Consumer Goods

Law 34/1988 about Advertising

Law 3/2014, of 27 March, which amends the revised text of the General Law for the Defence of Consumers and Users and other complementary laws,

Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation

Spanish Civil Code

Spanish Commecial Code

· **Abbrevations**

B2B: Business to business

B2C: Business to consumers

PECL: Principles of European Contract Law

PICC: Principles of International Commercial Contracts

CESL: Common European Sales Law

CISG: Convention for the International Sale of Goods