MG Bridge, The International Sale of Goods (3rd ed.) 2013 Oxford.

10

THE CISG: GENERAL ISSUES

A. Introduction

The CISG as uniform law The Convention on the International Sale of Goods (CISG),[1] signed in Vienna in 1980 and coming into force in 1988 after securing the necessary number of ratifications, has now been adopted in nearly eighty countries located in all of the inhabited continents. This figure includes all of the countries of the European Union, with the exception of the United Kingdom, Ireland, Malta and Portugal. The NAFTA (North American Free Trade Area) countries have implemented it, along with some South American countries. Most of Eastern Europe has implemented it too, along with China, Singapore, and Australasia. As uniform law, the CISG, when implemented in the Contracting State and to the extent that it is applicable, displaces both that State's domestic law and private international law rules concerning the sale of goods. Uniform substantive law like **10.01**

[1] There is a voluminous literature on the Convention, including many books. See in particular CM Bianca and MJ Bonell, *Commentary on the International Sales Law* (1987); H Flechtner (ed), *Honnold: Uniform Law for International Sales under the 1980 United Nations Convention* (4th edn, 2009); S Kröll, L Mistelis and P PeralesViscasillas, *UN Convention on Contracts for the International Sale of Goods* (2011); I Schwenzer (ed), *Schlechtriem and Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd edn, 2010); F Enderlein and D Maskow, *International Sales Law* (1992); N Galston and H Smit, *International Sales: The United Nations Convention on Contracts for the International Sale of Goods* (1984). A comparison of the CISG with UCC Art 2 is afforded by A Kritzer, *Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods* (1989). Useful shorter guides, some comparative, include J Lookofsky, *Understanding the CISG* (4th (Worldwide) edn, 2012); J Lookofsky, *Understanding the CISG in the USA* (4th edn, 2012); P Schlechtriem and P Butler, *UN Law on International Sales* (2009); F Ferrari, *International Sale of Goods* (1999); P Huber and A Mullis, *The CISG* (2007). See also P Schlechtriem, *Uniform Sales Law* (1986); B Audit, *La Vente Internationale de Marchandises* (1990). For a general review of the CISG in article form, see B Nicholas, 'The Vienna Convention on International Sales Law' (1989) 105 LQR 201; F Ferrari, 'Specific Topics of the CISG in the Light of Judicial Application and Scholarly Writing' (1995) 15 Journal of Law and Commerce 1.

the CISG is to be distinguished from uniform private international law conventions[2] or regulations.[3] The former lays down a substantive law to be applied regardless of where a dispute is litigated. Reservations apart, the same law will be enacted in identical terms by each Contracting State. In the case of uniform private international law rules, on the other hand, the substantive law applied to the dispute will not remain the same. It is only the private international law rules themselves that will be uniform, regardless of which Contracting State handles the litigation. Sale of goods has been the subject of two Hague Conventions on private international law, the later of the two dating from 1986.[4] Because of the success of the CISG, the second of these Conventions is not yet in force and in all probability never will be.

10.02 **Example** The difference between the approach of uniform law and uniform private international law rules can be seen in the following example involving States, neither of which has yet adopted the CISG:

> S, having its place of business in India, agrees to sell a quantity of electrical condensers to B, having its place of business in Malaysia. The contract contains no choice of law clause.

If we make the assumption that the Hague Convention of 1986 is in force, then the court seized of the dispute (if it is in a Convention State) will, in the absence of a law selected by the contracting parties expressly or by clear implication,[5] apply Indian law as the law of the State where the seller had its place of business[6] at the date of the conclusion of the contract.[7] Had S's place of business been in Malaysia, then Malaysian law would have been applicable. The applicable law selected in this way will be the same regardless of the Contracting State in which the dispute is litigated. If, however, we turn to the CISG, the outcome is different.

---

[2] Uniform substantive law differs from model laws of the kind usually sponsored by international organizations such as UNCITRAL and Unidroit. Model laws are proffered for enactment to States without their becoming contractually bound to do so. The extent of a State's adoption of the model law will be more or less extensive, so that the outcome of the process is harmonization of law rather than unification as such. The difference between uniformity of law and harmonization, however, is one of emphasis and degree rather than of kind. European Union Directives may be seen as a form of compulsory model law, in that the Member States of the European Union are treaty bound to enact compliant legislation in their territory. They produce harmonized law. The Directive on Unfair Contract Terms creates a minimum level of consumer protection without prejudice to those areas of national law that go further in the cause of consumer protection. The European consumer therefore receives the assurance of a minimum level of consumer protection right across the States of the European Union with added protection on certain matters in some States. Different States will implement a directive in different ways and not necessarily in the same words, which contrasts with international conventions, whether they are choice of law or uniform substantive law conventions, where the implementing State has no discretion to change the wording. On unification and harmonization, see generally: R Goode, 'Harmonization, Unification and Internationalization' in R Goode and R Cranston, *Commercial and Consumer Law* (1993); L Del Duca, 'Developing Transnational Harmonization Procedures for the Twenty-first Century' ibid; A Farnsworth, 'Unification and Harmonization of Private Law' (1996) 27 Canadian Business Law Journal 48; M Torsello, *Common Features of Uniform Law Conventions* (2004).

[3] eg, Regulation No 593/2008 of the European Parliament and of the Council on the law applicable to contracts (Rome I).

[4] Convention on the Law applicable to Contracts for the International Sale of Goods (The Hague: 1986). Its predecessor, not yet superseded, was the Convention on the Law Applicable to International Sales of Goods (The Hague: 1955), which entered into force 1 September 1964.

[5] Art 2.

[6] There is no general definition of 'place of business', but in a case where a party has more than one place of business, Art 10(1) selects the one that has the closest relationship to the contract and its performance.

[7] Art 8(1). A similar rule is to be found in Art 3(1) of the 1955 Convention. Both conventions contain exceptions, of different scope, providing for the application of the law of the country of the buyer's habitual residence (Art 3(2) of the 1955 Convention; Art 8(2) of the 1986 Convention).

To render the CISG applicable in the courts of a Contracting State, buyer and seller will in the usual case have their places of business in different Contracting States.[8] In the above example, S's place of business may be changed to China and B's to Mexico to bring the contract within the CISG. Regardless of which of these countries is the place of business of the buyer and which of the seller, the same law, namely the CISG, will be applied to the dispute. The domestic sales laws of China and of Mexico do not come into play where the CISG on its terms applies.[9] As with a uniform private international law convention, it does not matter in which Contracting State's courts the dispute is litigated.[10]

Merits and drawbacks of uniform law Uniform substantive law is seen by some as superior to uniform private international law,[11] as constituting the next step on the road to a world legal order of private law that will eliminate barriers to trade posed by national legal difference. It comes, nevertheless, at a price. Contracting parties often choose certain countries' laws to govern their contracts because those laws are grounded in and are sympathetic to a broad experience of commercial matters, and have accumulated a body of principles worked out to a degree of predictability affording a measure of certainty to those who subject their dealings to them. Uniform law, on the other hand, is new and on that account in its early stages unpredictable. For some, one of the attractions of uniform law is that it dispenses with archaic features of their domestic law, ill-suited to cross-border trading activity.[12] Archaic law may be dispensed with along the way to uniformity, but the abbreviated nature of the diplomatic process leading to instruments like the CISG often compels the acceptance of what some would consider to be second-best[13] in pursuit of the higher goal that something of value come out of the process. Furthermore, the reduction of transaction costs as parties no longer negotiate over the applicable law is more apparent than real if they negotiate instead over whether to exclude the CISG from their contractual dealings and if their legal advisers have to take on the added cost of understanding a new legal regime. The development of uniform law comes at a cost to litigants; the law created in the early days by the resolution of their disputes subsidizes those who come after them. The CISG is less burdensome to master, however, than the several laws that have to be borne in mind by merchants trading on a diverse geographical plane. Unless it comes with judicial machinery, such as the European Court of Justice aiding the process of uniform interpretation in regional organizations like the European Union, however, uniform law like the CISG is

10.03

[8] There is an alternative head, namely, where the courts of a Contracting State would apply the law of a Contracting State to the contract. See further discussion para 10.12 et seq.

[9] The boundaries of the law of sale are nowhere universally defined. To the extent of any exclusion of sales matters from the CISG, the applicable law under the forum's private international law rules would come into play.

[10] Non-Contracting States are not of course bound to apply the CISG, but they may apply it as part of a foreign applicable law and may indeed do so further to an international convention or regulation laying down uniform private international law rules: see para 10.05.

[11] R David, *The International Encyclopedia of Comparative Law*, Vol 2, ch 5, p 45 (the concern with conflict of laws and jurisdiction a 'nineteenth-century point of view'), p 54 (uniform law 'clearly superior').

[12] eg, the distinction drawn in some legal systems between inferior goods (*peius*) and goods different in kind (*aliud*), leading to a distinction between the delivery of defective goods and non-delivery, with remedial and limitations consequences.

[13] See, eg, Hobhouse, 'International Conventions and Commercial Law: the Pursuit of Uniformity' (1990) 106 Law Quarterly Review 530; *Filanto SpA v Chilewich Int'l Corp*, US District Court (NY), 14 April 1992 (US), available at <http://cisgw3.law.pace.edu/cases/920414u1.html> (' the State Department undertook to fixsomething that was not broken by helping to create the Sale of Goods Convention which varies from the Uniform Commercial Code in many significant ways').

threatened from its inception by the centrifugal forces that lead to national courts absorbing international instruments into the fabric of their national legal culture. This is particularly dangerous where a body of uniform special law, like sale, has no body of uniform general contract law on which to drop anchor. The widespread adoption of the CISG is only the beginning. The real challenge is to maintain its uniformity in the decades that follow through changing political, social, and economic conditions. Through those decades, there will be pressure to afford the CISG a so-called dynamic interpretation to adapt it to changing conditions,[14] with a substantial likelihood that some national tribunals will be more dynamic than others in the way they approach the text of the CISG.[15]

10.04 **Position of the UK** The attitude of the UK Government over the years has generally been lukewarm about implementing the CISG.[16] When Lord Steyn, in his maiden speech in the House of Lords, presented a powerful claim for the implementation of the CISG, the response of the Government spokesman promised no more than the keeping of a watching brief over the CISG's development.[17] In its 1997 Consultation Document on the subject,[18] however, the Department of Trade and Industry (DTI) gave a definite steer to the implementation of the CISG.[19] It took note of the fact that this country's major trading partners had brought (or soon would bring, in the case of Japan) the Convention into force.[20] As the DTI put it in the Consultation Document: 'This evidence suggests the UK is becoming increasingly isolated within the international trading community in not having ratified the Convention.'[21] One respondent, the Law Commission, repeated to the DTI its support for the implementation of the CISG.[22] Had it not been for the illness of its sponsor, a bill would have been presented in the House of Lords to adopt the CISG. The DTI has now been succeeded by the Department of Business Investments and Skills (BIS). Adoption of the Vienna Convention is not currently high on BIS's agenda and there is little likelihood that ministers can be convinced to place the CISG on the legislative agenda of Parliament. There is little enthusiastic support for the CISG in professional and business circles[23] and indeed a degree of outright opposition to it, partly on the ground that it is a perceived threat

[14] See further para.10.40.

[15] See para 10.39 et seq and the role played by Art 7.

[16] See B Nicholas, 'The United Kingdom and the Vienna Sales Convention: Another Case of Splendid Isolation?' (1993) Centro di studi e ricerche di diritto comparato e straniero (Occasional Paper No 9); MG Bridge, 'The CISG from a Common Law Perspective', in J Kleineman (ed), *CISG Part II Conference* (Iustus Förlag 2009),11–30.

[17] *Hansard*, HL, Vol 563, col 1457 et seq, 3 May 1995.

[18] There had earlier been an informal consultation in 1980 and a formal consultation in 1989. There followed a further consultation in 2007.

[19] In its Consultative Document, the DTI asked for responses to the questions whether, if the UK does adopt the CISG, it should enter reservations to Part II (contractual formation), as the Scandinavian countries had done, or should even exclude the whole of Part III (the substantive law of sale), as no country had or has yet done. The DTI also sought responses to the question whether the UK should enter an Art 95 reservation, excluding the application of the CISG pursuant to Art 1(1)(b) in those cases where the parties have their place of business in different States, neither of which need be a Contracting State, and the private international law rules of the forum lead to the application of the law of a Contracting State. The majority of respondents favoured adoption, but the number of responses was small and there were significant dissentients (for example, BP, the Law Society of England and Wales, and the Commercial Bar Association).

[20] Japan is now a Contracting State.

[21] With the impending adoption of the CISG by Brazil, this isolation is becoming ever more marked.

[22] *Thirty-Second Annual Report* (Law Com No 250) (1997), para 2.17.

[23] In the last round of consultations in 2007, there appear to have emerged stronger sentiments against than in favour of adoption, though these meetings did not attract a high level of participation.

to London as a home for international litigation and arbitration. The grounds of opposition also include fears that the adoption of the CISG will lead to a loss of commercial certainty and that its lack of comprehensiveness, notably, its exclusion of validity and property,[24] as well as the permitted declarations[25] that detract from complete uniformity, impede its effectiveness. BIS is not inclined to carry forward adoption of the CISG in the absence of a substantial endorsement of such action by business and the legal profession in the United Kingdom.[26]

UK merchants and the CISG Regardless of the implementation of the CISG in the United Kingdom, UK merchants may be bound by contracts that are subject to its terms. They may have entered into arbitration agreements that provide for the application of the CISG.[27] They may find themselves before the courts of a Contracting State bound to apply the CISG under Article 1(1)(b) when their private international law rules point to the law of a Contracting State. Even before the courts of their own country, UK merchants may find the CISG applied to one of their contracts if it contains a choice of law clause in favour of the law of a Contracting State or if that law proves to be the applicable law for other reasons. The CISG might be applied here as part of the applicable law. Yet a possible argument is that an English court applying the CISG in such a way pursuant to its own private international law rules is accepting a renvoi from the applicable law, which existing case law,[28] statute and convention[29] prohibit. In the case of Contracting States, the same problem would arise if the CISG were applicable further to their private international law rules[30] but not if the CISG were applicable by them without reference to those rules.[31] For Contracting States, the issue of a conflict between their different treaty obligations would arise.[32] The better view, nevertheless, is that the prohibition of renvoi is not breached since the CISG is enacted in the country of the applicable law in substitution for its domestic and private international law rules on the subject of international sale, and for present purposes is not part of some other country's legal order.[33] An English court may discover that, for example, New York rules applicable to an international sale contract may vary

10.05

[24] Discussed at para 10.28 et seq.

[25] Discussed at para 10.54 et seq.

[26] See the statement given by Sally Moss on the position of the UK Government at (2006) 25 Journal of Law and Commerce 483 (available also at <http://cisgw3.law.pace.edu>). Responding to the consultation launched in 2007 by the Department of Business Enterprise and Regulatory Reform (BERR), the temporary resting place of the DTI on its way to becoming BIS, the Financial Markets Law Committee examined the CISG with a view to determine its likely impact on financial markets: Issue 130–Implementation of the Vienna Sales Convention (July 2008). The FMLC, acknowledging the success and laudable aims of the CISG, concluded that the CISG would apply to 'derivative contracts where there is provision for physical delivery, and that without any authority to indicate otherwise, it could also extend to cover other financial instruments falling within the category of *choses in action*'(para 1.7). Parts of the Convention could be detrimental to the workings of the financial markets and standard opt-outs should be included in certain financial markets master agreements (para 1.9).

[27] Or the arbitrator may apply the CISG under a general formula such as 'general principles' or '*lex mercatoria*': Arbitration Act 1996, s 46(1)(b) ('other considerations').

[28] *Re United Railways of Havana and Regla Warehouses Ltd* [1960] Ch 52, CA.

[29] Rome Convention, Art 15; Hague Convention on the Law Applicable to Contracts for the International Sale of Goods 1986 (not yet in force), Art 15.

[30] Art 1(1)(b), discussed at para 10.12.

[31] Art 1(1)(a) discussed at para 10.11.

[32] See para 10.14 et seq.

[33] J Fawcett, J Harris, and M Bridge, *International Sale of Goods in the Conflict of Laws* (2005), pp 921–22.

according to the places of business of buyer and seller and whether their place of business is or is not in a CISG Contracting State. Some UK companies and organizations, as well as foreign companies and organizations, contracting on English law terms, have anticipated the CISG by moving to exclude its application in their standard trading forms, which the CISG itself expressly permits.[34] This is true of the major commodity associations[35] and the leading oil companies.[36]

B. Background to the CISG

10.06 **Early developments** In physical trading, sale is the most important exchange transaction,[37] and exchange is the generator of commercial development and wealth. The transaction of sale was therefore at the forefront of the uniformity process[38] starting with the pioneering efforts of Unidroit prompted by the German jurist, Rabel, in 1929. These efforts were delayed by the onset of the World War II but led in time to two Hague Conventions in 1964, one containing a Uniform Law for the International Sale of Goods (ULIS) and the other a Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF). These Conventions came into force in 1972, having secured the necessary five ratifications, but only nine countries in total ever did ratify them, most of them European.[39] Apart from technical shortcomings attributed to ULIS,[40] the failure of this uniformity initiative[41] can be put down to the late involvement of the United States and the non-involvement of developing and socialist countries in the process. The sense of ownership that comes with participation in a project, even by those who may initially have been sceptical about it, is rather more important than a technical and dispassionate appraisal of its merits and drawbacks. Equally, even the best legal instrument may lack appeal for those excluded, for whatever reason, from the process leading to its creation.

10.07 **The Hague Conventions and the United Kingdom** The two Hague Conventions of 1964[42] were brought into force in the United Kingdom by the Uniform Laws on

[34] Art 6.

[35] eg GAFTA, FOSFA, and the RSA (Refined Sugar Association).

[36] eg Shell and Total. According to the Financial Markets Law Committee, Issue 130–Implementation of the Vienna Sales Convention (July 2008) par 4.8: 'It is general market practice to disapply the Convention to all privately negotiated (OTC, over-the-counter) cross-border transactions in physically settled commodity derivatives (provided they are defined as a "sale of goods" under the Convention) that are expressly governed by a law other than English law. For example, the AIPN Model Form Master LNG Sale and Purchase Agreement (for natural liquefied gas), the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas, the Globalcoal Standard Coal Trading Agreement (SCoTA), the ISDA US Oil and Refined Petroleum Products Annex, the LEAP Master Agreement for Purchase and Selling Refined Petroleum Products and Crude Oil, include an express waiverof the kind contemplated by Article 6 [of the CISG].'

[37] Sale is important too in financial markets, where other transactions such as interest rate and currency swaps also bulk large.

[38] See K Sono, 'The Vienna Sales Convention: History and Perspective' in P Volken and P Sarcevic (eds), *International Sales of Goods[:] Dubrovnik Lectures* (1986).

[39] The European countries were the UK, Belgium, West Germany, Italy, Luxembourg, the Netherlands, and San Marino. The others were Israel and Gambia.

[40] Which did not prevent it, along with ULF, from serving as the basis for the work that led to the CISG.

[41] The Hague Convention to which it was annexed.

[42] The diplomatic conference was sponsored by the Dutch Government; it was not the work of the Hague Conference on Private International Law.

International Sales Act 1967. They were applicable to sale contracts on terms quite different to those applying the CISG.[43] Unlike the CISG, whose application is primarily dependent upon the parties being resident in different Contracting States, the two earlier Conventions were based upon either cross-border formation or cross-border performance of a contract of sale.[44] Furthermore, the United Kingdom, as it was entitled to do under the terms of the Convention,[45] made a declaration to the effect that the parties to a contract would be bound by ULIS only if they chose it themselves as the applicable law of the contract.[46] For all practical purposes, this rendered the two Conventions a dead letter as far as the United Kingdom was concerned. Nevertheless, they remain law in the United Kingdom, at least until they are denounced in the event of the United Kingdom's accession to the CISG.[47]

UNCITRAL After the United Nations Commission on International Trade Law (UNCITRAL) was launched in 1966, charged with the task of fostering world peace through trade, sale became one of its first projects in 1968.[48] National diversity was seen as a barrier to international trade and indirectly therefore a threat to world peace. However tenuous this connection might appear to a sceptic, the mission of UNCITRAL is explicitly and at some length stated in the Preamble to the CISG.[49] The work of UNCITRAL on sale took the 1964 Hague Conventions as the starting point,[50] though numerous and substantial changes were made prior to the 1978 draft Convention and the final version of the CISG, which was the product of a diplomatic conference held in Vienna in 1980.[51] There remain a considerable number of similarities between these earlier Conventions and the CISG and, to the extent that they are similar or even identical, some assistance in understanding the CISG may be afforded by a reference to literature and judicial decisions on the Hague Conventions. **10.08**

Participants in the uniformity process In arriving at a consensus on an international instrument, among the numerous differences that delegates have to reconcile are those between common law and civilian legal traditions.[52] An examination of the debates **10.09**

[43] See para 10.13.

[44] Art 1 of ULF made it applicable to those contracts that, if concluded, would be governed by the ULIS.

[45] Art V.

[46] Uniform Laws on International Sales Act 1967, s 1(3).

[47] Five of the Contracting States have now denounced the Hague Conventions of 1964, namely, Germany, Belgium, Italy, the Netherlands, and Luxembourg. The 1964 Conventions are therefore unlikely to have an effective future (but see an Israeli decision, *Pamisa Ceramica v Ysrael Mendelson* [2009] Israel LR 27, noted by Saidov at [2010] LMCLQ 201), especially since the UK is an opt-in State. Although five instruments of accession were required for the 1964 Convention (Art X(1)), the reduction of the number of Contracting States to below five in number does not result in the termination of the treaty (Art 55 of the Vienna Convention on the Law of Treaties 1969).

[48] See J Honnold, 'The United Nations Commission on International Trade Law: Mission and Methods' (1979) 27 American Journal of Comparative Law 201. Even after the entry into force of the CISG, UNCITRAL continues to promote the adoption of the Convention.

[49] The Preamble to the CISG includes the following words: '*Considering* that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States...'.

[50] See generally P Schlechtriem, 'From the Hague to Vienna—Progress in Unification in the Law of International Sales Contracts?' in N Horn and C Schmitthoff (eds), *The Transnational Law of International Commercial Transactions*, Vol 2 (1986).

[51] A number of new provisions were added in 1980, including Art 5.

[52] See A Garro, 'Reconciliation of Legal Traditions in the UN Convention for the International Sale of Goods' (1988) 23 International Lawyer 443.

leading up to the CISG reveals the progress made beyond the Hague Conventions stemming from the important role played by the United States, which is hardly part of an integrated common law block, and by developing nations. Indeed, any lawyer familiar with the style and content of UCC Article 2 (Sales) would find a great deal that was familiar.[53] The concerns of developing nations, like those of the socialist nations, emerge at a number of points in the legislative debates.[54] But no fundamental challenges were mounted to the basic principles of sale as a contract of exchange. The CISG, moreover, is a law for merchants and not for consumers.[55] Not surprisingly given their planned economies, the concerns of socialist countries were largely played out through matters of contractual formalities and certainty.[56] The concerns of developing countries are to be seen in relatively specific matters, such as the time that should be given to a buyer to issue a notice to the seller that the goods are defective.[57] A common legal background shared by representatives from different types of countries engaged in the diplomatic process often bulks larger than diverse sectional interests.

C. Sphere of Application

10.10 Different places of business According to Article 1, the CISG applies in two alternative cases,[58] the first of which is that the parties must have their places of business[59] in different Contracting States.[60] This first head of application in Article 1(1)(a) is qualified in that the fact of the parties' different places of business is to be 'disregarded' if it does not 'appear' in the contract itself, or in 'any dealings' between the parties, or in information disclosed by the parties[61] before or at the time the contract is concluded.[62] The phrasing of this exception is makeshift but its drift is reasonably clear. A contract of sale will not be governed by the

[53] eg, provisions on cure, damages assessment by reference to cover and resale transactions, adequate assurance of performance, offer and acceptance, risk, exemption. This may not always be apparent to American observers: see *Filanto SpA v Chilewich Int'l Corp*, US District Court (NY), 14 April 1992 (US), available at <http://cisgw3.law.pace.edu/cases/920414u1.html>.

[54] See G Brussel, 'The 1980 United Nations Convention on Contracts for the International Sale of Goods: A Legislative Study of the North-South Debates' (1993) 6 New York International Law Review 53.

[55] Note however the facility with which it could be adapted for the draft Common European Sales Law (see Appendix 1) and the EU Directive (EC/99/44) on certain aspects of the sale of consumer goods and associated guarantees.

[56] In particular, Arts 14 and 29.

[57] Art 39.

[58] The question whether contracting parties may opt directly into the CISG is discussed in para 10.53.

[59] Where a party does not have a place of business, reference is made instead to his habitual residence: Art 10(b). For a discussion of 'place of business', not defined in the CISG, see J Fawcett, J Harris, and M Bridge, *International Sale of Goods in the Conflict of Laws* (2005), pp 923–29.

[60] Art 1(1)(a). The parties have to be resident in different Contracting States and not within provinces, etc within the same State (eg, Quebec and Ontario) that are subject to different legal systems in that State. Furthermore, it is not a question of the contracting parties having different nationalities: Art 1(3). Where a party has more than one place of business, the relevant one for jurisdictional purposes is the one that has the closest connection to the contract and its performance, having regard to circumstances known to or contemplated by the parties before or at the date of the conclusion of the contract: Art 10(a). If the forum State is a third State, it may find itself applying the CISG to a contract concluded before it adopted the CISG, always provided the contracting parties were resident in Contracting States at the time they concluded the contract.

[61] More exactly, one of them.

[62] Art 1(2).

CISG as a result merely of the parties' place of business in different Contracting States[63] if they are ignorant of this fact.[64] The text, nevertheless, goes somewhat beyond this. It may be that one party is well aware of the other's place of business in a different country, yet this fact is not explicitly mentioned in the contract or in any correspondence exchanged between them, and is not disclosed by one of them to the other on some recent or even remote occasion in the past. On the face of it, the CISG would not apply in this, admittedly, rare case unless a broad view were to be taken of the mischief of Article 1. A more serious concern arises if one party is aware of the fact of different places of business but the other is not. Article 1 does not demand knowledge of the fact by both parties, whereas in the interests of justice it should. It may be that Article 1 will receive an interpretation that demands dual knowledge.

Article 1(1)(a) and private international law considerations A Contracting State that applies the CISG according to Article 1(1)(a) is applying it as part of its own national law[65] and is therefore not applying it as a fact in the way that foreign law is applied.[66] Under its own domestic law, the courts of the Contracting State may be bound to take judicial notice of the CISG.[67] It may nevertheless be that, if the parties conduct their litigation without citing the CISG, this will be treated as post-contractual conduct that amounts to a contractual variation by excluding the application of the CISG, further to the parties' right to do so in Article 6 of the CISG.[68] A further issue of private international law emerges in respect of the nature of Article 1(1)(a) itself. The view has been expressed that it might be rationalized as an expression of a rule of private international law.[69] The expression of the rule is imperfect in that the provision directs the forum State to apply either the law of the seller's residence or the law of the buyer's residence, without stipulating which of these two laws is **10.11**

[63] It is not a question of their ignorance of the fact that the two countries are Contracting States.

[64] This same notion helps to explain the exclusion of auction sales from the CISG under Art 2(b).

[65] In the case of Australia, the Convention was adopted in all the Australian States as well as in the Australian Capital Territory. Taking Victoria as an example, s 5 of the Sale of Goods (Vienna Convention) Act 1987 provides that the Convention has 'the force of law in Victoria', and s 6 provides that it shall 'prevail over any other law in force in Victoria to the extent of any inconsistency'. A similar provision to s 6 is to be found in s 66A of the Trade Practices Act 1974 (Cth) (as amended).

[66] An Italian court has ruled that the CISG should first be examined to see whether on its own terms it is applicable before the forum's private international law rules are engaged: Tribunale di Vigevano of 12 July 2000 (Italy), translated at <http://cisgw3.law.pace.edu/cases/000712i3.html>. The court relied upon a decision of the Tribunale di Pavia of 29 December 1999 (Italy), translated at <http://cisgw3.law.pace.edu//cases/991229i3.html> ('In any event, for recourse to international private law, one must prefer the relevant norms of uniform law created by international conventions which, by reason of their speciality, prevail over conflict rules').

[67] This is sometimes expressed as *jura novit curia*.

[68] Art 6 is discussed at para 10.39.

[69] See the explanatory Report of Professor Von Mehren on the Hague Sales Convention 1986: Proceedings of the Extraordinary Session October 1985, para 192. On Art 1(1)(a) as private international law, see also C Saf, A Study of the Interplay between the Conventions Governing the International Sale of Goods' (available at <http://cisgw3.law.pace.edu/cisg/text/saf90.html>). The argument articulated though not advocated by Professor Von Mehren is later criticized in his report as 'both unnecessary and undesirable', especially when its value as a private international law rule is 'limited and problematical': Proceedings of the Extraordinary Session October 1985, 57–59. The argument is assumed to be wrong in the Tribunal Civile di Vigevano of 12 July 2000 (Italy),translated at <http://cisgw3.law.pace.edu/cases/000712i3.html>; Landgericht Landshut of 5 April 1995 (Germany), translated at <http://cisgw3.law.pace.edu/cases/ 950405g1>; *Usinor Industeel v*

to be applied. It should not normally matter which of them is applied since they will each have adopted the CISG on equal or near-equal terms.[70] Such an approach, seeking to absorb uniform law in the choice of law process, fails to appreciate the essential difference between uniform law and private international law and adds nothing useful to the interpretation of the CISG. Where the CISG does embrace private international law, it does so in a measured and essentially marginal way.

10.12 **Article 1(1)(b) and private international law** The alternative and subsidiary head in Article 1 for the application of the CISG is that the contracting parties are resident in different States (which need not be Contracting States) and the rules of private international law[71] lead to the application of the law of a Contracting State.[72] Unlike the case of Article 1(1)(a), the orthodox approach is to treat Article 1(1)(b) as a conventional rule of private international law. This marks a major departure from the approach taken in the Uniform Law on the International Sale of Goods 1964, which rejected the use of private international law in marking out its scope.[73] Article 1 does not say whose rules of private international law trigger the application of the CISG, but they can only be those of the forum State. Furthermore, the forum State must be a Contracting State if it is to be bound to apply the CISG as thus directed. Consequently, if a Belgian court were seised of a dispute between an English buyer and a German seller, and under the rules of the Rome I Regulation[74] concluded that, in the absence of a law chosen by the parties, German law should apply as the law of the seller's residence,[75] the Belgian court would be bound under Article 1 to apply the CISG.[76] If the seller were English and the buyer German, so that the Rome I Regulation led the Belgian court to English law as the applicable law, then it should not apply the CISG, but rather English domestic law, since the United Kingdom is not a Contracting State.[77] Contracting States are permitted to make a declaration that they will not be bound to apply the CISG pursuant to rules of private international law in this way.[78] The significance of this will be discussed below.[79] Instead of regarding Article 1(1)(b) as a conventional private international law rule, an alternative approach builds upon the forum state's own treaty obligation in Article 1(1)(b) to apply the CISG. Although that obligation would be triggered by the forum's choice of law rules, the CISG would then be brought in as part of the

Leeco Steel Products, Federal DC (Illinois), 28 March 2002 (US), available at <http://cisgw3.law.pace.edu/cases/020328u1.html>.

[70] But the two States might have made different declarations (see below) and there might emerge overtime significant differences in the meaning of the CISG in the laws of different Contracting States, despite the existence of rules (in Art 7) designed to avert this process. This would reanimate the choice of law process.

[71] For a discussion of private international law rules in the CISG, see P Winship, 'Private International Law and the U.N. Sales Convention' (1988) 21 Cornell International Law Journal 487; MG Bridge, 'Choice of Law and the CISG: Opting In and Opting Out', in R Brand, H Flechtner and M Walter (eds), *Drafting Contracts Under the CISG* (2008), pp 65–101.

[72] Art 1(1)(b). There is no requirement that either contracting party be resident in that State.

[73] According to Art 2 of ULIS: 'Rules of private international law shall be excluded for the purposes of the application of the present Law, subject to any provision to the contrary in the said Law.'

[74] Which prescribes uniform private international law rules for EU Member States.

[75] Art 4(1)(a).

[76] Belgium and Germany are both Contracting States.

[77] An English court might be led by its rules of private international law to apply the CISG, but it would not be by virtue of Art 1(1)(b). The court, applying the rules in the Rome I Regulation, might conclude that the relevant law is, for example, German law as the law of the seller's place of business and might then conclude that the relevant German law dealing with international sales is the CISG as transposed into German law.

[78] Art 95.

[79] See paras 10.55–57.

forum State's internal law.[80] It would thus displace the forum's choice of law rules and the substantive law to which those rules would otherwise have led, which may anyway be the forum State's domestic law. According to Article 1(1)(b), 'the Convention applies' where the test it lays down is met; it does not say that the Convention applies as part of the law of the Contracting State identified by the forum's choice of law process. In thus acknowledging that the CISG is not foreign law to be proved as a fact in the forum, but may instead be the subject of judicial notice, this approach has the merit of promoting the application of the CISG even if counsel are reluctant to plead it. Any danger that the treatment of the CISG as domestic law will herald a movement towards appropriating it and adapting it to national conditions and sentiments should be averted by Article 7(1), which requires it to be interpreted in an internationalist spirit. If the forum State is not a Contracting State, the choice between this and the first approach to Article 1(1)(b) will not often be significant in practice. Nevertheless, when it comes to how the forum State treats the declarations of other States, the choice between the two approaches may be critical.[81]

ULIS The area of application of the ULIS was drawn very differently. It applied in three separate cases where the parties had their place of business (or habitual residence) in different States. Neither of these different States had to be a Contracting State.[82] Indeed, under this universalist approach, the only State that had to be a Contracting State was the forum State. It need hardly be said that contracting parties could, for example by means of a submission to jurisdiction, find themselves bound by a law, the ULIS, of whose existence and relevance they might have been wholly unaware.[83] The basis on which the CISG applies, that either the parties have their place of business in different Contracting States or that the applicable law is the law of a Contracting State, involves a repudiation of this universalist approach. The three cases where the ULIS applied were, first, the contract concerned goods being or to be carried from one State to another; secondly, the acts constituting contractual offer and acceptance were 'effected'[84] in different States; and thirdly, delivery of the goods was to be made in a State other than the one where the offer and acceptance were effected.[85] An ex works contract involving **10.13**

[80] See J Fawcett, J Harris, and M Bridge, *International Sale of Goods in the Conflict of Laws* (2005), pp 921–23; I Schwenzer (ed), *Schlechtriem and Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd edn, 2010), p 42 ('Within the domestic law of a CISG Contracting State, Article 1(1)(b)... has the function of allocating sales issues to the CISG like (other) norms allocating sales issues to a special commercial code or consumer regulations etc').

[81] See para 10.59.

[82] But Contracting States were permitted, by Art III of the Hague Convention, to enter a reservation to the effect that these States had to be Contracting States and to amend the text of the ULIS to that effect. This amendment was made by the UK: Uniform Laws on International Sales Act 1967, Sch 1.

[83] Under Art III of the Hague Convention to which the uniform law was annexed, Contracting States were permitted to enter a declaration to the effect that the CISG would only be applied 'if each of the parties to the contract of sale has his place of business or, if he has no place of business, his habitual residence in the territory of a different Contracting State'. A number of countries, including Germany and the Netherlands, entered an Art III declaration.

[84] This required rules for determining whether in the case of contracts concluded by correspondence offer and acceptance were effected in different States. This was done in negative terms by providing that the documents embodying the offer and acceptance were effected in the same State only if they were sent and received in that same State: Art 1(4). So, if at least one of the four elements of sending and receiving the offer and sending and receiving the acceptance occurred in a State other than the one in which the other three elements occurred, the offer and acceptance were effected in different States.

[85] In none of these three examples did the two States have to be Contracting States. For the difficulties that arose when the words 'delivery... in the territory of a State' became in the Unfair Contract Terms Act 1977, s 26(4)(c) 'delivered to the territory of a State', for the purpose of the disapplication of the Act, see

parties resident in different States could therefore be governed by the ULIS only if offer and acceptance were split across two or more States, or if they were effected in a State other than the one where the goods were to be delivered. The location of offer and acceptance is irrelevant for the purpose of applying the CISG, as also is the carriage of the goods between States. The ex works contract would without more be governed by the CISG. In addition, the ULIS firmly rejected the rule that it should be applied where the forum State's rules of private international law led to the law of a Contracting State.[86] The CISG, as stated above,[87] will apply in such a case, subject to a Contracting State's declaration under Article 95.

10.14 **The CISG and the international conventions** Article 90 of the CISG states that it 'does not prevail' over international agreements[88] that have 'already been or may be entered into' and that contain provisions 'concerning the matters governed by' the CISG.[89] This 'give-way' clause brings into play the Hague Conventions of 1955 and 1986, and the Rome Convention 1980, as well as the successor to the Rome Convention, the Rome I Regulation, which is not an international agreement.[90] The Hague Convention 1955[91] contains no corresponding 'give-way' clause, so the 1955 Convention will prevail over the CISG to the extent of matters that are common to the two Conventions. Although the two Conventions might arrive at the same result by different means, the give-way clause requires the CISG to be set aside once the 1955 Convention applies on its terms. The difficult question presented by the two Conventions is when they govern the same 'matters'. If the orthodox view of Article 1(1)(a) of the CISG is adopted, so that it is not regarded as a private international law rule at all, then it would seem that a 1955 Contracting State should, if it is also a CISG Contracting State, apply the latter if buyer and seller are resident in different Contracting States. This supposes that the CISG applies if its application is not excluded on its own terms. Yet a case that falls within Article 1(1)(a) of the CISG might also fall under the 1955 Convention according to the latter's terms. If this is the case, then there arises a direct conflict between the 1955 Convention and the CISG. If separately applied, they will usually arrive at the same conclusion,[92] but in some cases they might not.[93] The test of which convention applies in the case of conflict is best left to the principle of *lex posterior derogat*

Mance LJ in *Amiri Flight Authority v BAE Systems plc* [2003] EWCA Civ 1447 at [36]–[40], [2003] 2 Lloyd's Rep 767, discussed at paras 2.34–36. Although the change of wording seems to confuse delivery and carriage, it was herein regarded as a conscious change on the part of the legislator.

[86] Art 2: 'Rules of private international law shall be excluded for the purposes of the application of the present Law, subject to any provision to the contrary in the said Law.'

[87] Para 10.12.

[88] The supersession of the Rome Convention on the Law Applicable to Contractual Obligations 1980 by the Rome I Regulation was with prospective effect (Art 28: in force for contracts concluded after 17 December 2009), so the Rome Convention may be in play for some years to come.

[89] Art 90 goes on to limit its own application to those cases where the contracting parties (both it would seem) have their places of business in States parties to such agreements.

[90] For a more extended treatment of the relationship between the CISG and these Conventions, see J Fawcett, J Harris, and M Bridge, *International Sale of Goods in the Conflict of Laws* (2005), pp 961–72.

[91] There are seven Contracting States, Belgium having denounced the Convention: Denmark, Italy, Norway, Sweden, Finland, France, and Switzerland.

[92] Because the 1955 Convention, in the absence of choice, applies the law of the seller's, in some cases the buyer's, habitual residence (Art 3). In a case where buyer and seller reside in difference Contracting States of the CISG, a forum engaged with the 1955 choice of law process should therefore arrive at the CISG via the internal law of the seller's or buyer's residence as the case may be.

[93] By referring the terms of inspection and the measures that have to be taken with regard to rejected goods to the domestic law of the State in which inspection takes place, Art 4 of the 1955 Convention departs from the uniform rules contained in Arts 39–40 and 44, and 86–88, of the CISG.

legi priori, with the result that the CISG, as the later convention, prevails over the earlier 1955 Convention.[94] In so far as the CISG would apply under Article 1(1)(b) by virtue of the forum's private international law rules, then it deals with the same matters as the 1955 Convention. The give-way clause, Article 90 of the CISG, governs on its own terms and the court should apply the 1955 Convention.[95] The 1986 Hague Convention is not yet in force but the relationship between this Convention and the CISG is clearer. According to Article 23 of the 1986 Convention: 'This Convention does not prejudice the application – *a)* of the *United Nations Convention on contracts for the international sale of goods*...'. The 1986 Convention thus gives way in the area covered by Article 1(1)(a) of the CISG, where the CISG, as stated in relation to the 1955 Convention, does not give way in any case. As for Article 1(1)(b) of the CISG, the give-way provision in Article 90 of the CISG is not brought into play because there is no question of one convention 'prevailing' over another when one of them, the CISG, occupies a field vacated by the other.

Rome Convention Article 21 of the Rome Convention states that it 'shall not prejudice the application of international conventions to which a Contracting State is, or becomes, a party'. The CISG on the face of it defers to the Rome Convention as the Rome Convention also defers to the CISG, thus creating a vacuum rather than a conflict between the two instruments.[96] This deference on the part of both instruments extends to future treaty obligations of the Contracting State.[97] Two principal questions arise. First, how likely is it that a vacuum will arise? Secondly, if there is a vacuum, how is it to be resolved? On the prospects of a vacuum, the first point is that the application of the CISG under Article 1(1)(b), by virtue of the private international law rules of the forum,[98] will be done in pursuance of the Rome Convention when the forum State is a party to the Rome Convention. There is no conflict of approach or outcome between the two instruments in this regard. Since, therefore, it is not a question of the CISG 'prevailing' over the Rome Convention, the give-way provision of Article 90 of the CISG does not come into play, and the general language of Article 21 of the Rome Convention imposes no obstacle to the application of the CISG. There is no vacuum. Where the CISG applies pursuant to the dual residence rule as expressed in Article 1(1)(a),[99] however, the forum is treaty bound to go directly to **10.15**

[94] See Vienna Convention on the Law of Treaties 1969, Art 30(3), (4).

[95] As was decided by the Cour d'appel de Grenoble of 26 April 1995 (France), translated at <http://cisgw3.law.pace.edu/cases/950426f2.html>.The same court, in its decision of 23 October 1996 (France), translated at <http://cisgw3.law.pace.edu/cases/961023f1.html>, in a case where the CISG should have applied under Art 1(1)(a), found its way to the CISG via the Hague Convention because the contract contained a French choice of law clause. By a combined operation of Art 1(1)(b) and Art 3(2) of the Hague Convention, the CISG as part of French domestic law was applied. The court in this case need not have invoked the Hague Convention at all. See the decision of the same court again, of 13 September 1995 (France), translated at <http://cisgw3.law.pace.edu/cases/950913f1.html>, where the CISG was applicable under Art 1(1)(a), but the Hague Convention was brought into play, under CISG Art 7(2), to deal with an issue covered by the CISG but not resolved therein. Note Honnold's view that there was never any intention in the drafting process that the CISG would give way to the 1955 Hague Convention: H Flechtner (ed), *Honnold: Uniform Law for International Sales under the 1980 United Nations Convention* (4th edn, 2009), p 697.

[96] Note that the CISG applies only to some contracts of sale, whereas the Rome Convention applies to all contracts of sale, and also to contractual matters, such as validity, that are not dealt with by the CISG.

[97] This formula in Art 90 of the CISG allows the CISG itself to be amended by methods laid down in the Vienna Convention on the Law of Treaties 1969, instead of by more cumbersome means of denunciation and readoption: H Flechtner (ed), *Honnold: Uniform Law for International Sales under the 1980 United Nations Convention* (4th edn, 2009), pp 693–94.

[98] Under Art 1(1)(b).

[99] Under Art 1(1)(a).

the CISG and not to discover it through its own private international rules. Again, given the general language of Article 21 of the Rome Convention (which has the effect of avoiding a clash with the CISG, thereby depriving Article 90 of the CISG of the conflict conditions that have to exist before it comes into play) the forum State, if a party to the CISG, should apply the CISG. A further reason for this result is that the two instruments do not govern the same 'matter': the Rome Convention is concerned with uniform private international rules and the CISG with uniform substantive law. Article 90 of the CISG does not come into play and, in more general terms, Article 21 of the Rome Convention would avoid prejudicing the application of the CISG. Finally and in any case, as the following example shows, the outcomes of the two different instruments will commonly be the same. Suppose that a contract is concluded between a Belgian seller and a Dutch buyer and litigation occurs in Germany. All three countries have adopted the CISG. Pursuant to the CISG, the German court would apply it directly. Pursuant to the Rome Convention, there would be a presumption that the law of the seller's residence, Belgium, would apply[100] since the seller is the characteristic performer. Since under Belgian law the CISG, in a case of this kind, would have displaced Belgian domestic and private international law rules, the German court would apply the CISG as part of Belgian law. In a rare case, some other law might be more closely connected to the contract than the law of the seller's residence,[101] for example, the law of the place of delivery, which might be the law of a country that has not adopted the CISG. Only then would there be a difference of outcomes between the CISG and the Rome Convention. If the contracting parties selected, as the applicable law, the law of a State that was not a Contracting State for the purposes of the CISG, there would be no conflict between the CISG and the Rome Convention. The Rome Convention gives effect to express choice in Article 3 and the CISG, in Article 6, allows contracting parties to opt out of the CISG.

10.16 **The Rome I Regulation** Article 25 of the Rome I Regulation,[102] which in practical terms supersedes the Rome Convention,[103] provides in Article 25(1):

> This Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to contractual obligations.

This provision amounts to a withdrawal from the field occupied by Article 1(1)(b) of the CISG, so that there is no conflict with the CISG of the type needed to bring Article 90 of the CISG into play. A more difficult question is presented by Article 1(1)(a), which is not a rule of private international law. As with the Rome Convention, the likelihood of conflict is diminished by the similarity of outcomes when the two instruments are applied to the same set of facts. There remains, however, the possibility that an application of the most closely connected law under the Rome I Regulation might lead to the law of a State, such as the United Kingdom, which is not a CISG Contracting State, when the forum State, a party to

[100] Art 4(2).

[101] And thus applicable under Art 4(5).

[102] Regulation (EC) No 593/2008 of the European Parliament and of the Council. Article 25(2) has no part to play in dealing with the relationship between the CISG and the Regulation: 'However, this Regulation shall, as between Member States, take precedence over conventions concluded exclusively between two or more of them in so far as such conventions concern matters governed by this Regulation.'

[103] Denmark is a Rome Convention State and is not bound by the Rome I Regulation. See Art 24 of the Rome I Regulation.

the CISG, would be bound to apply the CISG under Article 1(1)(a). A German seller might, for example, deliver and install parts for a power station operated in England by the French buyer, where the contract is 'manifestly' more closely connected to the United Kingdom than to the law of the German seller's residence.[104] This is possible, if somewhat unlikely. In this case, the Rome I Regulation and the CISG would clearly be at variance. There would be a clash between two legal orders and no way of resolving that clash. A forum State that applied the Rome I Regulation in this way, as part of its internal law, would be in breach of its obligations as a CISG Contracting State. A possible way of avoiding such an undesirable outcome would be to interpret Article 25(1) as deferring to the totality of a convention that contains at least some private international rules, as is the case with the CISG.

D. Field of Operation

Sale of goods contracts Although stating that it applies to contracts of sale of goods,[105] the CISG defines neither 'sale' nor 'goods' nor 'contract of sale of goods'. Although the CISG is marked by the absence of any doctrine of consideration,[106] and although gift in civilian systems is treated as a contract, a gift of goods will not be a sale in view of the obligations of a buyer recited in the CISG, including the duty to pay the price.[107] Despite the general absence of definitions in the CISG, there is a provision, Article 2, that expressly and compendiously excludes certain types of sale as well as sales of certain types of property. Consumer sales[108] and auction[109] and compulsory[110] sales are thereby excluded.[111] Consumer sales are defined not according to the nature of the goods but by reference to the buyer's purpose, which has to be a personal, family, or household use if the contract is to be excluded from the CISG.[112] It means, for example, that the sale of consumer goods from a wholesaler to a retailer will be a commercial contract of sale and governed by the CISG, whereas the sale of consumer goods to individuals will not be. It means also that the sale of a car to a company for business use may come within the CISG, whereas the sale of the same car to an individual for personal and private use will not.[113] The buyer's use will not, however, serve to exclude the operation of the CISG if this fact was reasonably unknown to the seller before or at the date of the contract.[114] As a result of the different definitions of **10.17**

[104] Art 4(1), (3).

[105] Art 1(1).

[106] Para 11.02. The court in *Geneva Pharmaceuticals Technology Corp v Barr Laboratories Inc*, Federal DC (New York), 10 May 2002 (US), available at <http://cisgw3.law.pace.edu/cases/020510u1.html>, nevertheless turned to domestic law in order to conclude that the contract was not invalid for lack of consideration. This misunderstands the scope of the validity exception in Art 4.

[107] See Art 53.

[108] Art 2(a).

[109] Art 2(b), where the seller's agent (the auctioneer) may not be aware of the residence of the bidder. cf Art 1(2) excluding the CISG where the dual residence of the parties is not stated in the contract or otherwise known.

[110] Art 2(c): 'on execution or otherwise by authority of law'. The location of the buyer may not be known or may be known only in the final stages of the transaction.

[111] Art 2(b), (c).

[112] Art 2(a). The ULIS contained no equivalent provision.

[113] It is the intended and not the actual use that is relevant for present purposes: Oberster Gerichtshof, 11 February 1997 (Austria), translated at <http://cisgw3.law.pace.edu/cases/970211a3.html>.

[114] Art 2(a) puts an onus on the buyer to indicate a consumer purpose: see, eg, Oberlandesgericht Stuttgart, 31 March 2008, translated at <http://cisgw3.law.pace.edu/cases/080331g1.html>. Furthermore, since Art 2(a) has an exclusionary character, the purchase of goods for mixed consumer and business purposes will not

consumer transactions under the CISG and in binding national consumer laws, it is possible that a contract will be governed both by the CISG and by national law.[115] There is also a provision giving guidance on the application of the CISG to transactions that involve the supply of 'labour or other services' along with goods, and to transactions where the buyer supplies materials for the manufacture of the goods.[116]

10.18 **Buyer supplies materials** According to Article 3(1), contracts for the supply of goods to be manufactured or produced 'are to be considered sales' unless the party ordering the goods undertakes to supply 'a substantial part' of the necessary materials. So far as this paragraph goes, it resolves doubt that the supply of mass-produced articles for a price is a sale[117] (whereas the supply of customized or bespoke articles may not be).[118] It does nevertheless introduce some uncertainty about the fate of contracts where some of the materials are provided by the buyer. The qualifying word is 'substantial',[119] which is inherently vague, and not 'preponderant';[120] no mention is made of property issues, such as whether the buyer intended to reserve property in the materials supplied or whether, by a process of accession,[121] the buyer's materials attached to the seller's or vice versa. A court applying the CISG would be well advised to concentrate on the meaning of 'substantial' and not be deflected by property matters. There is some support in English law for treating the supply of goods for a price as a contract of sale even if the buyer supplies some of the materials, without any qualification based upon the comparative value or amount of the two sets of materials.[122] Since cases where the buyer supplies a substantial part of the materials are stated as an exception to the main rule in Article 3(1), and since there is no evident policy behind their exclusion,[123] it is submitted that this exception should be given as narrow a reading as

exclude the CISG: Rettini København, 19 October 2007 (Denmark), translated at <http://cisgw3.law.pace.edu/cases/071019d1.html>; Korkein Oikeus, 14 October 2005 (Finland), abstracted at <http://cisgw3.law.pace.edu/cases/051014f4.html>.

115 Bundesgerichtshof, 31 October 2001(Germany), translated at <http://cisgw3.law.pace.edu/cases/011031g1.html>.

116 Art 3.

117 The cases that recognize that the sale of goods to be manufactured are within the CISG are legion: see UNCITRAL *Digest of Case Law on the United Nations Convention on the International Sale of Goods* (2012), Art 3 note 2.

118 But the better view is that such contracts fall within the CISG. See, eg Oberlandesgericht Karlsruhe, 12 June 2008 (Germany), translated at <http://cisgw3.law.pace.edu/cases/080612g1.html>; Hof van Beroep, 14 November 2008 (Belgium), translated at <http://cisgw3.law.pace.edu/cases/081114b1.html>; Cour d'appel de Colmar, 26 February 2008 (France), translated at <http://cisgw3.law.pace.edu/cases/080226f1.html>; Cour d'appel de Paris, 14 June 2001 (France), translated at <http://cisgw3.law.pace.edu/cases/010614f1.html>; Oberster Gerichtshof, 14 January 2002 (Austria), translated at <http://cisgw3.law.pace.edu/cases/020114a3.html> (upholding the judgments of the trial court and the court below).

119 cf ULIS Art 6, where the exclusion was based upon 'an essential and substantial part of the materials necessary'. Note that the French version of the CISG refers to a '*part essentielle*'. The word 'substantial' was given a quantitative meaning in Court of Arbitration, 5 December 1995 (Hungary), translated at <http://cisgw3.law.pace.edu/cases/951205h1.html>.

120 Since 'preponderant' is used in Art 3(2), this point has added force.

121 Another possibility would be specification, by which under English law (probably) the property in new goods created by transformed materials would vest in the operator, namely the seller, so as more easily to characterize the contract for the supply of the new goods as a sale of goods contract.

122 *Dixon v London Small Arms Co Ltd* (1876) 1 App Cas 632, HL (Lord Penzance).

123 Art 35(2)(b), concerning the fitness of goods for their purpose, would not sanction a claim against the seller where it is not reasonable for the buyer to rely upon the fitness of goods for a particular purpose, as might be the case where the buyer supplies some of the materials.

reasonably possible. Some courts have applied a quantitative value test in determining the buyer's contribution,[124] which is the most reliable basis on which to make the distinction called for by Article 3(1). In one case, however, the court considered it was not a question of value or function but turned instead upon whether the buyer's materials played an essential part in the production of the goods.[125] The ambiguity of the word 'essential' should be noted: essential in the sense of necessary is one thing, essential in the sense of pertaining to the very nature of the goods is another.[126] The former meaning would take out of the CISG contracts that ought to be governed by it. Finally, there is the question whether Article 3(1) is engaged when the buyer is not supplying materials, in the narrow sense, but is supplying specifications or plans. The better view is that specifications or plans should not be regarded as 'materials' for the purpose of Art 3(1).[127] The CISG certainly contemplates in Article 65 that the buyer has to specify 'form, measurement or other features of the goods'[128] and it would be odd to have to quantify or otherwise assess these to determine whether the CISG applies or not.[129]

Other labour and material contracts According to Article 3(2), the CISG does not apply to contracts where the 'preponderant' part of the supplier's obligation consists of labour or other services.[130] There is a long-standing body of opaque English law on the distinction between labour (or work) and materials contracts and sale of goods contracts,[131] of little importance in modern times in view of the abolition of the writing requirement for sale **10.19**

[124] Arbitration Court of the Chamber of Commerce and Industry of Budapest, 5 December 1995 (Hungary), translated at <http://cisgw3.law.pace.edu/cases/951205h1.html> (with some hesitancy). This is the view of the CISG Advisory Council which, moreover, does not favour a stated percentage of value: CISG Advisory Council, Opinion No 4 (Contracts for the Sale of Goods to Be Manufactured or Produced and Mixed Contracts (Article 3 CISG)). The Council then goes on to say that: 'An "essential" criterion should only be considered where the "economic value" is impossible or inappropriate to apply, i.e., when the comparison of the materials provided for by both parties amounts to nearly the same value': para 2.7.

[125] Oberlandesgericht München, 3 December 1999 (Germany), translated at <http://cisgw3.law.pace.edu/cases/991203g1.html> (relying on the French translation).

[126] The former meaning may have been understood in Cour d'appel de Chambéry, 25 May 1993 (France) (CLOUT No 157).

[127] See Handelsgericht des Kantons Zürich, 10 February 1999 (Switzerland), translated at <http://cisgw3.law.pace.edu/cases/990210s1.html>; Oberlandesgericht Frankfurt, 17 September 1991 (Germany), translated at <http://cisgw3.law.pace.edu/cases/ 910917g1.html>; ICC Arbitration Case No. 9781 of 2000, available at <http://cisgw3.law.pace.edu/cases/009781i1.html>. Detailed specifications from the buyer, as well as directions concerning the source of the seller's supply of materials, did not prevent the treatment of the contract as one of sale in Bundesgerichtshof, 9 July 2008 (Germany), translated at <http://cisgw3.law.pace.edu/cases/080709g1.html>. cf Cour d'appel de Chambéry, 25 May 1993 (France) (CLOUT No 157), where the buyer supplied designs for the manufacture of connectors and the court, without giving reasons, concluded that the contract was excluded by Art 3(1).

[128] See also Art 42.

[129] The CISG Advisory Council in Opinion No 4 (Contracts for the Sale of Goods to Be Manufactured or Produced and Mixed Contracts (Article 3 CISG))considers that Art 3(2) should not apply to 'drawings, technical specifications, technology or formulas, unless they enhance the value of the materials supplied by the parties'. On this last point, the Council had in mind the case where the drawings etc 'contribute originality, speciality or exclusivity to the goods. This will usually imply that where the buyer or the seller contributes material that embodies industrial or intellectual property rights (eg, a patent or other industrial property rights), these rights should be included in the idea of enhancing the value of the goods in the sense of Article 3(1) CISG': CISG Advisory Council in Opinion No 4 (Contracts for the Sale of Goods to Be Manufactured or Produced and Mixed Contracts (Article 3 CISG), para 2.15.

[130] For a discussion of the issues of quantification that emerge when a decision has to be made whether there is one contract or more than one contract, see: I Schwenzer (ed), *Schlechtriem and Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd edn, 2010) (Schwenzer/Hachem).

[131] See MG Bridge, *The Sale of Goods* (2nd edn, 2009), paras 2.56–62.

of goods contracts[132] and the extension of strict warranty liability to goods supplied under labour and materials contracts, first in the case law[133] and later by statute.[134] It seems that the test in Article 3(2) is normally taken to be one of comparative value,[135] as between the value of the labour (or services)[136] and the value of the goods. This comparison is invited by the word 'preponderant', which lends itself to a simple majority test of value,[137] sometimes with a requirement that the service element 'clearly' exceeds the value of the goods if the contract is to be excluded from the CISG.[138] A broader discretionary approach is sometimes adopted, as where a court judges between the goods and the service to find which is more 'important' and hence 'characteristic' of the contract,[139] or where a court, unable to conduct a valuation exercise, looks at the purpose of the contract.[140] In English law, the comparative value test is one that has been both accepted[141] and rejected.[142] The importance of characterizing a contract under the CISG is more important than it is in English domestic law. If a contract does not come within the CISG, there is no body of uniform law into which it will fall, still less uniform law that contains provisions that complement those of the CISG. Furthermore, an issue of no small difficulty concerns the strictness of the seller's duties with regard to the labour or services component of a contract of sale or of an ancillary contract. If a court were to characterize as two contracts the supply of goods and the supply of installation services, the latter contract would fall to be dealt with under national law and would not in the event of a defective installation attract the rule of strict liability in the CISG.[143] This approach may be a useful expedient for a court disinclined to impose strict liability on

132 Law Reform (Enforcement of Contracts) Act 1954, s 1.

133 *Young & Marten Ltd v McManus Childs Ltd* [1969] 1 AC 454, HL.

134 Supply of Goods and Services Act 1982.

135 See Oberlandesgericht München, 3 December 1999 (Germany), translated at <http://cisgw3.law.pace.edu/cases/991203g1.html>; Cour d'appel de Grenoble, 26 April 1995 (France), translated at <http://cisgw3.law.pace.edu/cases/950426f1.html>; Federation Arbitration Proceeding 356/1999, 30 May 2000 (Russia), translated at <http://cisgw3.law.pace.edu/cases/000530r1.html>; Handelsgericht des Kantons Zürich, 8 April 1999 (Switzerland), translated at <http://cisgw3.law.pace.edu/cases/990408s1.html>. For an approach based on an impressionistic view of the importance of the goods as compared to the services, see Landgericht München, 16 November 2000 (Germany), translated at <http://cisgw3.law.pace.edu/cases//001116g1.html>; Handelsgericht Zürich, 9 July 2002 (Switzerland), translated at <http://cisgw3.law.pace.edu/cases/020709s1.html>; Richteramt Lanfern des Kantons Bern, 7 May 1993 (Switzerland), translated at <http://cisgw3.law.pace.edu/cases/930507s1.html>.

136 The case law sometimes differentiates contracts of sale of goods from contracts for services, instead of contracts for labour and materials, when the latter expression is the more appropriate one.

137 See, eg Oberlandesgericht Wien, 1 June 2004 (Austria), abstracted at <http://cisgw3.law.pace.edu/cases/040601a3.html>; Tribunale di Forli, 16 February 2009 (Italy), translated at <http://cisgw3.law.pace.edu/cases/090216i3.html>.

138 See, eg Oberster Gerichtshof, 8 November 2005 (Austria) (where the intention of the parties was also considered relevant, a dubious view if there is no demonstrated intention to vary the CISG under Art 6), translated at <http://cisgw3.law.pace.edu/cases/051108a3.html>; Handelsgericht Zug, 25 February 1999 (Switzerland), translated at <http://cisgw3.law.pace.edu/cases/990225s1.html>.

139 Oberlandesgericht Karlsruhe, 12 June 2008 (Germany), translated at <http://cisgw3.law.pace.edu/cases/080612g1.html>. Given the dogmatic character of the characteristic performance rule in private international law, this may not be the most appropriate mechanism for handling this issue. A similar approach, without explicitly referring to characteristic performance, is evident in Bundesgerichtshof, 9 July 2008 (Germany), translated at <http://cisgw3.law.pace.edu/cases/080709g1.html>.

140 Landgericht Mainz, 26 November 1998 (Germany), translated at <http://cisgw3.law.pace.edu/cases/981126g1.html>.

141 This appears to be accepted in the difficult case of *Robinson v Graves* [1935] 1 KB 579, CA.

142 *Lee v Griffin* (1861) 1 B & S 272.

143 See Obergericht Zug, 19 December 2006 (Switzerland), translated at <http://cisgw3.law.pace.edu/cases/061219s1.html>.

the seller under a unitary contract.[144] As for the relationship between paragraphs (1) and (2) of Article 3, there appears on the face of it to be some conflict between the two provisions, in that the former deems or considers a contract to be one of sale[145] unless the buyer supplies a substantial part of the materials, without deferring to the rule in the latter that a contract with a preponderant labour element is excluded from the CISG. Plainly, the latter provision should prevail if there is a conflict: the former rule can play a practical role when read as subject to the latter whereas the latter would play no role at all if read as subject to the former. It is perfectly possible that a contract, where the buyer supplies some materials, is not excluded by Article 3(1) but the contract is taken out by Article 3(2), because of the preponderant service element. Article 3(2), however, does not allow the buyer's 'materials' to be cumulated with the seller's 'labour or other services' when the preponderancy calculation is made. Furthermore, if the CISG does not apply to a contract at all, which is the case with para (2), then that contract should not be saved for the application of the CISG by the rule in para (1). Nevertheless, there would probably not be a conflict at all if Article 3(2) did not exclude contracts where labour is blended with materials in the manufacture of goods, but rather excluded certain cases of labour that accompanies the supply of goods, an example being the installation and maintenance obligations of certain suppliers overshadowing their supply obligations. There is, nevertheless, a tendency for contracts where the labour or services component is ancillary to the goods to pass the test in Article 3(2) for inclusion in the CISG,[146] so this distinction falls away.

Goods As stated above, the CISG does not define goods. But it excludes the sales of certain forms of property that would not be goods in English law, namely, stocks, shares, investment securities, negotiable instruments, and money.[147] The exclusion of money means that the CISG does not apply to lending transactions. Nor should it apply to foreign exchange transactions or currency swaps, though it will apply to the sail of coins as souvenir or collectors' items.[148] It is commonly thought that, while financial documents are excluded, the CISG applies to documents of title to goods.[149] The CISG certainly does concern the seller's documentary responsibilities,[150] but the issue here is not the *sale* of **10.20**

[144] An expedient that not all courts will wish to follow: see, eg Handeslgericht Zürich, 17 February 2000 (Switzerland), translated at <http://cisgw3.law.pace.edu/cases/000217s1.html>; Tribunale d'Appello Lugano, 29 January 2003 (Switzerland), translated at <http://cisgw3.law.pace.edu/cases/031029s1.html>.

[145] Art 3(1): 'are to be considered sales'.

[146] As in the case of installation itself: see, eg Obergericht Zug, 19 December 2006 (Switzerland), translated at <http://cisgw3.law.pace.edu/cases/061219s1.html>; Tribunale d'Appello Lugano, 29 January 2003 (Switzerland), translated at <http://cisgw3.law.pace.edu/cases/031029s1.html>; Tribunale di Padova, 1 October 2006 (Italy), translated at <http://cisgw3.law.pace.edu/cases/060110i3.html>; Landgericht München, 16 November 2000 (Germany), translated at <http://cisgw3.law.pace.edu/cases/001116g1.html>. The same applies to assembly: Oberlandesgericht München, 3 December 1999 (Germany), translated at <http://cisgw3.law.pace.edu/cases/991203g1.html>. Also to staff training and maintenance: Zivilgericht Basel-Stadt, 8 November 2006 (Switzerland), translated at <http://cisgw3.law.pace.edu/cases/061108s1.html>. Although courts may be somewhat reluctant to take hybrid contracts of the above sort out of the CISG, they sometimes will do if the preponderancy test requires it: eg Handelsgericht Zürich, 9 July 2002 (Switzerland), translated at <http://cisgw3.law.pace.edu/cases/020709s1.html>.

[147] Art 2(d).

[148] International Economic and Trade Arbitration Commission 2000 (China), translated at <http://cisgw3.law.pace.edu/cases/000000c1.html>.

[149] I Schwenzer (ed), *Schlechtriem and Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd edn, 2010), p 57 (Schwenzer/Hachem).

[150] eg, Arts 32, 34. And therefore does not exclude documentary sales: Secretariat Commentary on the 1978 draft, Art 2 para 8.

documents of title. A seller transferring a bill of lading to the buyer is not selling a document of title but, among other things, is giving the buyer the means of access to the goods. Even if a transaction could be described in some way as a sale of a bill of lading, the reality is that it would be a sale of the underlying goods represented by the bill of lading. The CISG excludes the sale of electricity,[151] though not gas and petroleum.[152] Electricity may or may not be goods for the purpose of sale in English law.[153] The CISG also excludes the sale of ships and aircraft,[154] which certainly are goods under English sales law. This exclusion[155] does not seem to extend to floating structures, such as pontoons or the topsides of oil drilling platforms.[156] Apart from these express exclusions in Article 2, the definition of 'goods' should embrace all tangible, corporeal things. Nevertheless, because there is no catch-all definition of goods, it is uncertain whether the CISG applies to items such as body parts,[157] and the position in respect of software is not straightforward.[158] There is much to be said for giving 'goods' a broad meaning; the tendency to press the CISG too far is checked by the various exclusions to be found in Article 2. Given the different legal traditions of the various Contracting States, one may therefore expect 'goods' to be broadly interpreted, in some cases at least, so as to include intangible property that is not explicitly excluded by Article 2.[159] Consequently, although the position is by no means settled,[160] it would be understandable if the CISG case law developed in favour of the view that the supply of

[151] Art 2(f). The reason is the 'unique' problems presented by electricity and the fact that electricity is excluded from the sales laws of many jurisdictions: Secretariat Commentary on the 1978 draft, Art 2 para 10.

[152] See Oberster Gerichtshof, 2 February 1995 (Austria) (CLOUT No 176) (gas); P Winship, 'Energy Contracts and the United Nations Sale Convention' (1990) 25 Texas International Law Journal 365.

[153] The point was left open in *County of Durham Electrical Power Distribution Co v IRC* [1909] 2 KB 604.

[154] Art 2(e). The reason given for ships is that they are treated as immovable in some jurisdictions and as attracting special registration requirements in some jurisdictions: Secretariat Commentary on the 1978 draft, Art 2 para 9.In a surprising number of cases, the court has had to rule that the CISG does not apply to the sale of yachts. The CISG was however applied to a sale of a number of boats where the seller did not object to the buyer's claim that it applied: Hof Leeuwarden, 31 August 2005 (Netherlands), translated at <http://cisgw3.law.pace.edu/cases/050831n1.html>. Aircraft engines are not excluded: Legfelsóbb Bíróság, 25 September 1992 (Hungary), translated at <http://cisgw3.law.pace.edu/cases/920925h1.html>. An American court declined to apply the CISG, however, in a mixed case where the subject matter was an aeroplane and two engines: *Re Ayers Aviation Holdings Inc*, Bankruptcy Court (Georgia), 25 July 2002 (US), available at <http://cisgw3.law.pace.edu/cases/020725u1.html>.

[155] On the exclusion of ships, see I Schwenzer (ed), *Schlechtriem and Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd edn, 2010), pp 58–59 (Schwenzer/Hachem).

[156] But these bear some comparison with immovable property. The exclusion has also been applied, incorrectly, in cases dealing with a ship and a decommissioned submarine, both sold for scrap: Tribunal of International Commercial Arbitration, Case No 236/1997 (Russia), translated at <http://cisgw3.law.pace.edu/cases/980406r1.html>; Maritime Arbitration Commission, Case No. 1/1998 of 18 December 1998 (Russia), translated at <http://cisgw3.law.pace.edu/cases/981218r1.html>.

[157] Which could raise issues of validity under the applicable law.

[158] See MG Bridge, *The Sale of Goods* (2nd edn, 2009), paras 2.23–25.

[159] A contract for the preparation of a market study was excluded by a German court from the CISG under Art 3 and not Art 2: Oberlandesgericht Köln, 26 August 1994 (Germany), translated at <http://cisgw3.law.pace.edu/cases/940826g1.html>. For the opinion that a sale of goodwill is excluded from the CISG, see Tribunal Cantonal du Valais, Cour civile 1, 2 December 2002 (Switzerland), translated at <http://cisgw3.law.pace.edu/cases/021202s1.html>. The sale of a debt is excluded: Tribunale di Vigevano, 12 July 2000 (Italy), translated at <http://cisgw3.law.pace.edu/cases/000712i3.html>.

[160] See F Ferrari, 'The CISG's Sphere of Application: Articles 1–3 and 10' in F Ferrari, H Flechtner, and R Brand, *The Draft UNCITRAL Digest and Beyond* 2004), pp 77–78, for discussion and citation of the cases. This is a fuller discussion that the one in the UNCITRAL *Digest of Case Law on the United Nations Convention on the International Sale of Goods* 2012.

software is a sale of goods for the purpose of the Convention.[161] The position of software is complicated by the fact that its supply raises issues concerning the meaning of both 'sale' and 'goods', as well as the line drawn between sale of goods contracts and labour and materials contracts in Article 3.[162] For the purpose of defining 'goods', any attempt to separate the tangible from the intangible by including the supply of software contained in a disk, but excluding software downloaded directly into a computer system without a disk, appears to be driven more by form than by substance and to be undesirable on that account. One response to the argument that software is not 'sold', because its use is licensed, is that the case law has not taken the distinction. To supply goods in one form or another is to sell them, so that the transaction should only be excluded from the CISG if it contains a significant number of features that make it unsuitable for inclusion.[163] Another response might be to say that the form of the transaction should be ignored in order to capture its economic reality, which is a matter of sale. It is doubtful, however, that such functional reasoning has a place in a convention whose Contracting States with very few exceptions have not adopted functional methods of legal reasoning in their national legal systems.[164] The supply of bespoke software might, however, even with a broad definition of 'goods', be excluded in consequence of Article 3(2), if the preponderant part of the seller's obligations consists of labour or other services.[165] A further issue concerning the nature of 'goods' arises out of the relationship between goods and land. A court applying the CISG should, it is submitted, give a wide berth to domestic case law dealing with the difference between contracts for the sale of minerals and for the grant of a licence to extract materials, and between contracts for the sale of crops and natural produce and contracts for the grant of access to land to sever crops and produce.[166] The CISG applies to goods that are 'produced',[167] which suitably describes the extraction of minerals and the growth of crops.[168]

Barter Since the CISG does not define 'sale', it is unclear whether it applies to barter or exchange contracts,[169] or to countertrade agreements that deal specifically with goods as opposed to the broad terms of a trading relationship. There seems no reason, however, to **10.21**

[161] See J Lookofsky, 'In Dubio Pro Conventione? Some Thoughts about Opt-Outs, Computer Programs and Preemption under the 1980 Vienna Sales Convention (CISG)' (2003) 13 Duke Journal of Comparative and International Law 263.

[162] Some courts may not be troubled by these various issues in concluding that a contract for the supply of software is governed by the CISG: see, eg Kantonsgericht Zürich, 17 February 2000 (Switzerland), translated at <http://cisgw3.law.pace.edu/cases/000217s1.html>; Oberlandesgericht Koblenz, 17 September 1993 (Germany), translated at <http://cisgw3.law.pace.edu/cases/930917g1.html>.

[163] See the discussion of framework contracts, including franchise contracts, in para 10.22.

[164] See the discussion of lease and hire purchase in para 10.23.

[165] For the view that the CISG applies to the supply of standard software, whereas the supply of individual software is a contract for services, see Oberlandesgericht Köln, 26 August 1994 (Germany), translated at <http://cisgw3.law.pace.edu/cases/940826g1.html>. cf Oberlandesgericht Koblenz, 17 September 1993 (Germany), translated at <http://cisgw3.law.pace.edu/cases/930917g1.html>, advocating a broad interpretation of the CISG and drawing no distinction between standard and individual software.

[166] See MG Bridge, *The Sale of Goods* (2nd edn, 2009), paras 2.04–11.

[167] Art 3(1).

[168] H Flechtner (ed), *Honnold: Uniform Law for International Sales under the 1980 United Nations Convention* (4th edn, 2009), pp 56–57.

[169] Supporting its application, though without reasons, is Tribunal of International Commercial Arbitration, 10 October 2003 (Ukraine), translated at <http://cisgw3.law.pace.edu/cases/031010u5.html>. See, however, excluding the CISG: Tribunal of International Commercial Arbitration, 9 March 2004 (Russia), translated at <http://cisgw3.law.pace.edu/cases/040309r1.html>; Federal Arbitration Court (Moscow), 26 May 2003 (Russia), translated at <http://cisgw3.law.pace.edu/cases/030526r1.html>.

exclude the CISG if the two supplies of goods can sensibly be rationalized as back to back sales with a set-off of the two prices due to each supplier.[170] The requirement in Article 53 that the buyer pay the price would in such a case be met. If the barter transaction does not ascribe a price to either quantity of goods supplied under the contract, this might be seen as raising the issue whether an open price contract is a properly concluded contract under the CISG.[171] Nevertheless, the uncertainty that might arise in a conventional open price contract is not present in a barter transaction where each quantity of goods in effect defines itself as the price for the other goods.

10.22 **Framework contracts** The CISG individual sales effected under a distributorship or under a franchise contract or a contract for the sale of 'output' or 'requirements',[172] but a more difficult question is whether it applies also to the framework agreement itself.[173] It seems pedantic to effect a sharp separation between individual sales and the framework contract, the former being 'contracts of sale of goods'[174] and the latter contracts *for* the sale of goods. The extent to which framework contracts are excluded may depend upon the particular type of contract. On the one hand, a distributorship agreement contains a number of obligations, such as the distributor's duty to build up sales, which are not characteristic of sale contracts. This points towards the contract as not being a contract of sale.[175] In other cases, the non-sale elements in the contract may be subordinate to the sales elements, so that the CISG applies.[176] A franchise contract that also provides for the supply of goods at intervals is unlikely to be a contract of sale of goods itself, given the issues of trade marks, know-how and related matters that arise under such contracts.[177] In such cases, courts have

[170] For English law, see MG Bridge, *the Sale of Goods* (2nd edn, 2009), paras 2.63–64.

[171] See para 11.12.

[172] See Oberlandesgericht Koblenz, 17 September 1993 (Germany), translated at <http://cisgw3.law.pace.edu/cases/930917g1.html>; Handelsgericht des Kantons Zürich, 8 April 1999 (Switzerland), translated at <http://cisgw3.law.pace.edu/cases/990408s1.html>.

[173] One distinguished author concludes that framework agreements for future orders and deliveries and franchise agreements are excluded, though they may supply detailed terms to the individual contracts concluded thereunder so as to supplement the provisions of the CISG in their application to the latter contracts: H Flechtner (ed), *Honnold: Uniform Law for International Sales under the 1980 United Nations Convention* (4th edn, 2009), p 58.

[174] Art 1(1).

[175] See, eg Oberlandesgericht Hamburg, 5 October 1998 (Germany),translated at <http://cisgw3.law.pace.edu/cases/981005g1.html> (where the choice of German law in the exclusive distributorship contract led impliedly to German law, and hence the CISG, for the individual sales); Oberlandesgericht Hamm, 5 November 1997 (Germany),(translated at <http://cisgw3.law.pace.edu/cases/971105g1.html>; Obergericht Luzern, 8 January 1997 (Switzerland), translated at <http://cisgw3.law.pace.edu/cases/ 970108s1.html>; Oberlandesgericht Düsseldorf, 11 July 1996 (Germany), translated at <http:// cisgw3.law.pace.edu/cases/960711g1.html>; Fovárosi Bíróság Budapest, 19 March 1996 (Hungary) (CLOUT No 126); PRC Supreme Court, 21 September 2005 (China), translated at <http://cisgw3.law.pace.edu/cases/050921c1.html>. The question was left open in *Helen Kaminski Pty Ltd v Marketing Australian Products Inc*, Federal DC (New York), 12 July 1997 (US), available at <http://cisgw3.law.pace.edu/cases/970721u1.html>, because a ruling on the matter would not have advanced the litigation.

[176] The CISG was applied to a distribution agreement by Corte di Cassazione, 14 December 1999 (Italy), translated at <http://cisgw3.law.pace.edu/cases/991214i3.html> and appears also to have been applied to a distribution agreement in Schiedsgericht der Handelskammer Hamburg, 21 March 1996 (Germany), translated at <http://cisgw3.law.pace.edu/cases/960321g1.html>; ICC Court of Arbitration, No 12173 of 2004, translated at <http://cisgw3.law.pace.edu/cases/0412173i1.html>; ICC Arbitration No 11849 of 2003, available at <http://cisgw3.law.pace.edu/cases/031849i1.html>; ICC Court of Arbitration, No 9448 of July 1999 (CLOUT No 630).

[177] Obergericht Luzern, 8 January 1997 (Switzerland), translated at <http://cisgw3.law.pace.edu/cases/970108s1.html>. Intellectual property issues are capable of arising under a conventional sale of goods contract, hence the need for Art 42.

not been drawn towards a radically different approach, which would divide the contract between the CISG and the otherwise applicable law, with the latter taking on aspects of the contract that are of a non-sale character. This would amount to a type of dépeçage,[178] and has much to commend it. On the other hand, an output or a requirements contract, by which the seller contracts to supply its entire output and a buyer contracts to purchase all of its requirements, as the case may be, may be likened to instalment sales in which the size of the instalments and the overall quantity supplied will not be known until the contract has been fully executed.[179] As regards these latter framework contracts, there seems no good reason to exclude them from the CISG[180] and every reason to avoid if possible an uncomfortable clash between the CISG in its application to individual sales and any law applicable to the framework contract itself.[181] The framework contract, taken as a whole with individual sales thereunder, contains characteristic obligations of the seller and the buyer as set out in Articles 30 and 53 of the CISG.

Finance leases and hire purchase Other difficult questions of characterization concern finance leases and hire purchase agreements. Unless an economic view is taken of the former as in substance amounting to sales contracts, finance leases should be excluded.[182] Hire purchase agreements present a greater challenge. They may not in English law be contracts of sale within the technical expression given to sale under the Sale of Goods Act 1979, since the hirer never gives an undertaking to buy the goods, but there is an arguable case that they could be treated as sale contracts under the CISG, which lacks a technical definition of a sale as requiring an agreement to buy. Once the option to purchase is exercised, the relations of owner and hirer are superseded by those of seller and buyer. This is, admittedly, rather late in the day, when issues concerning delivery, risk, quality, and payment will have taken their course, so that the application of the CISG to the sale aspect of what is a hybrid transaction would be an empty affair. The exercise of the hirer's option, or the prospect that it might be exercised, should not be enough to bring the overall transaction, whether prospectively or retrospectively, within the CISG. A broader question, in those cases where the expectation is that the 'buyer' will retain the goods for their economic life, is whether transactions of this type should be assimilated with sale in the way that they are in modern personal property security legislation. As powerful as the impulse might be to modernize national secured transactions systems along these lines, the considerations at stake here are different from those that are the concern of the CISG. If a functional interpretation of the scope of the CISG were to be adopted, there is also the danger that some courts, influenced by their own national traditions, might get too far ahead of others for the good

10.23

[178] See para 1.29.

[179] See Tribunale de Padova, 11 January 2005 (Italy), translated at <http://cisgw3.law.pace.edu/cases/050111i3.html>. But an American court declined to apply the CISG to a distribution contract because of uncertainty about the quantity of goods: *Viva Vino Import Corp v Farnese Vini SrL*, Federal DC (Penn), 29 August 2000, available at <http://cisgw3.law.pace.edu/cases/000829u1.html>. A reason that might be cited to conclude that an agreement is too uncertain to be enforced is a poor reason for concluding that a contract falls outside the CISG.

[180] In common law systems, agreements of this kind may not comply with the doctrine of consideration. The nature of a sale contract, and the express terms of Art 29, preclude the importation into the CISG of that doctrine. Therefore, consideration should not be seen as raising issues of validity under Art 4.

[181] But note that the German court was able to apply the CISG to individual sales despite the nullity of a distribution agreement: Bundesgerichtshof, 23 July 1997 (Germany), translated at <http:cisgw3.law.pace.edu/cases/970723g2.html>.

[182] See F Ferrari, H Flechtner, and R Brand, *The Draft UNCITRAL Digest and Beyond* (2004), p 64.

of a uniform interpretation of the CISG. A contract of sale ought therefore to be defined as such by reference to its legal and not its economic characteristics. It is nevertheless open to a national court, applying the CISG, to conclude that a transaction labelled as a lease should be recharacterized as one of sale and therefore made subject to the CISG.[183] To exclude non-sale contracts, or some of them,[184] from the CISG under Article 3(2), on the ground that the preponderant part of the 'seller's' obligations is to make the goods available to the other party[185] does not quite address the matter. The same might be said of an ordinary sale of goods.

10.24 **Tort** The coexistence of tort and contract in national regimes of civil liability is often a matter of acute difficulty, raising such issues as different limitation periods, the scope of exclusion clauses, and remoteness of damage. Some legal systems have strict rules of categorization, so that a claimant may not choose between tort and contract; others do not allow the cumulation of aspects of the two heads of civil liability to the greater advantage of the claimant; and some, as is the case with English law,[186] give the claimant the choice of regimes. Similar issues of coexistence arise as between the CISG and the tortious or delictual rules of any applicable law. Unlike national systems, the CISG, as a free-standing body of uniform law, has no express protocol laying down an order of precedence or even a relationship between its provisions and those of national law, with the exception of personal injuries cases where, in Article 5,[187] it vacates the field. Assuming the existence of inconsistent outcomes between national law and the CISG, the question is which liability regime should prevail. The problem does not lie where the CISG on its own terms is applicable and is more generous than national tort law. Rather, the problem is that of the claimant who avoids certain restrictions and barriers in the CISG in order to take advantage of a more favourable national tort law.[188] It may be, for example, that the buyer's damages claim for harm done to his property is barred under the CISG for lack of notice,[189] but may be maintained under the applicable tort law. In such a case, there is no reason that justifies why the buyer may not turn to a general tortious duty under the applicable tort law if this proves to be more favourable.[190] Consequently, claims for damages based on negligent and

[183] Foreign Trade Court of Arbitration, 15 July 2008 (Serbia), translated at <http://cisgw3.law.pace.edu/cases/080715sb.html> ('lessee' had to pay 50 per cent in advance and the property passed on payment of instalments in full).

[184] Similar problems arise in relation to sale and leaseback contracts (sale and resale too), where the purpose of the contract is not to give the buyer the beneficial enjoyment of the goods, at least where the seller is not in default in making lease payments.

[185] I Schwenzer (ed), *Schlechtriem and Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd edn, 2010), p 72 (Schwenzer/Hachem).

[186] *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 15, HL. But the law may deny the claimant any advantage by so choosing if it unifies the rules of limitation, as is the case with personal injuries claims (Limitation Act 1980, s 11), or if it in fact applies contractual and tortious rules of remoteness to the same effect on a given set of facts (*Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* [1978] QB 791, CA).

[187] See paras 10.26–27.

[188] The strictness of liability for defective goods under the CISG has a tendency to limit any flight in the direction of national law.

[189] Art 39: see para 11.38.

[190] See *Shane v JCB Belgium NV*, Ontario Superior Court, 14 November 2003 (Canada), available at <http://cisgw3.law.pace.edu/cases/031114c4.html>; *Miami Valley Paper LLC v Lebbing Engineering and Consulting GmbH*, Federal DC (Ohio), 10 October 2006 (US), available at <http://cisgw3.law.pace.edu/

fraudulent misrepresentation would be governed by the applicable national law,[191] likewise claims based on *culpa in contrahendo*.[192] The CISG itself does not expressly preclude a tort action;[193] indeed, its scope is limited to '... the rights and obligations of the seller and the buyer arising from ... a contract [of sale]'.[194] Moreover, there is no body of uniform private law that deprives the buyer of the right to elect. A strong argument may nevertheless be made that a distinction should be drawn between damage to the claimant's property caused by defective goods, and a claim based on the diminished value or loss of the goods themselves.[195] This creates a somewhat untidy dépeçage and it may not be necessary in view of a tendency for national tort laws to confine themselves to the former case.[196] If giving the claimant freedom to elect between tort and contract (under the CISG) means that, depending on the applicable tort law, some buyers will be better positioned than others, that does not detract from uniform sales law but derives from discordant national law. It may, however, be that the law applicable to the tort action has its own internal rules preventing the buyer from resorting to tort when the rights of the parties are defined by contract, and that these rules extend also to contract actions governed, not only by its domestic contract law, but also by the CISG. Moreover, although Article 4 states that the CISG governs the rights and obligations of the seller and buyer arising from the contract of sale, the tort relationship of the parties is not founded upon the sale contract but upon the relationship of proximity occasioned by the parties' entry into a contract of sale.[197] Moving even further in the direction of national tort law, it has been argued that domestic tort law should 'principally'

---

cases/061010u1>. According to the latter case: '[A] given State's ratification of the *sales* convention does *not* imply its intention to merge contract with tort.'

[191] *Sky Cast Inc v Global Direct Distribution LLC*, Federal DC (Kentucky), 18 March 2008 (US), available at <http://cisgw3.law.pace.edu/cases/080318u1.html>; *Miami Valley Paper LLC v Lebbing Engineering and Consulting GmbH*, Federal DC (Ohio), 10 October 2006 (US), available at <http://cisgw3.law.pace.edu/cases/061010u1>; *TeeVee Tunes Inc v Gerhard Schubert GmbH*, Federal DC (NY), 23 August 2006 (US), available at <http://cisgw3.law.pace.edu/cases/060823u1>.

[192] See, eg Obergericht des Kantons Thurgau, 12 December 2006 (Switzerland), translated at <http://cisgw3.law.pace.edu/cases/061212s1>; Kantonsgericht St Gallen, 13 May 2008 (Switzerland), translated at <http://cisgw3.law.pace.edu/cases/080513s1.html>.

[193] In *Electrocraft Arkansas Inc v Electric Motors Ltd*, Federal DC (Arkansas), 23 December 2009 (US), however, available at <http://cisgw3.law.pace.edu/cases/091223u1.html>, the court recharacterized certain domestic strict liability and negligence claims as contractual, the result being that they were preempted by the CISG. This result is coloured by US constitutional law, whereby the CISG, as federal law, prevails over state law under the supremacy clause of the constitution. See also *Geneva Pharmaceuticals Technology Corp v Barr Laboratories Inc*, Federal DC (New York), 10 May 2002 (US), available at <http://cisgw3.law.pace.edu/cases/020510u1.html>.

[194] Art 4(a). See Supreme Court, 17 March 2009 (Israel), available at <http://cisgw3.law.pace.edu/cases/090317i5.html>.

[195] P Schlechtriem, 'The Borderland of Tort and Contract—Opening a New Frontier?' (1988) 21 Cornell International Law Journal 467, 474; Hof van Beroep, 14 April 2004 (Belgium), translated at <http://cisgw3.law.pace.edu/cases/040414b1.html>. This approach is driven by protected interests analysis, a characteristic of the German law of delict. For a reference to protected interests in this context, see Supreme Court, 17 March 2009 (Israel), available at <http://cisgw3.law.pace.edu/cases/090317i5.html> at para [58]. Cases that would not even permit a limited tort claim of the present sort are Oberlandesgericht Thüringen, 26 May 1998 (Germany), translated at <http://cisgw3.law.pace.edu/cases/980526g1.html> (seller's fish damaged other fish stocks of the buyer); Polimeles Protodikio Athinon, Decision 4505/2009 (Greece), translated at <http://cisgw3.law.pace.edu/cases/094505gr.html>, para 2.2.15.

[196] The case for allowing national tort law to continue unimpeded is strongest when it retreats from damages for economic loss and from the avoidance, termination or rescission of contracts brought about by tortious misconduct.

[197] For the opposite view, see H Flechtner (ed), *Honnold: Uniform Law for International Sales under the 1980 United Nations Convention* (4th edn, 2009), pp 96–97.

apply where there is concurrency between that law and the CISG.[198] There is no reason to expect such deference on the part of the CISG, and no reason in this regard to distinguish between economic loss and property damage claims, with the former being seen as the particular province of the CISG. The CISG excludes personal injury claims; it could also have excluded property damage claims, but it did not.

10.25 **Derivative claims** An issue not directly addressed by the CISG is whether, in the case of non-conforming goods, its liability provisions may be invoked by someone other than the immediate buyer. This person may be a buyer further down the chain, who may also have contracted on terms governed by the CISG, or may instead have contracted on national contract terms. In the language of product liability, this introduces the issue of vertical privity. The only parties addressed in the CISG are seller and buyer,[199] the last being subject to various obligations, principally, the duty to pay the price and the duty to take delivery.[200] The non-inclusion of other parties rules out any question of a later buyer deriving rights from a CISG contract under the CISG itself,[201] though it would not as such prevent a national law from attaching a later buyer to an earlier buyer's claim under a CISG contract.[202] It is not merely the formal language of the CISG that precludes the later buyer's claim. The logic of the seller's strict liability under the CISG is that the buyer has a claim against a proximate party, its immediate seller, who then has an indemnity claim against its seller and so on. Particularly where a prior seller is in another country, the buyer will benefit from having fault-free access to its immediate seller, even if any deficiency in the goods is the fault of a prior seller. A related question here is whether the CISG governs the assignment of a buyer's claim, whether the assignee is within or outside the distribution chain. The obligations of seller and buyer laid down in the CISG, as well as the application of the CISG to goods, which should not be interpreted as including the agreed transfer of an intangible claim,[203] dictates a negative answer.[204] A further question concerns whether a liability claim under the CISG may be pursued by someone who is not in the distribution chain at all.

---

[198] See I Schwenzer (ed), *Schlechtriem and Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd edn, 2010), p 100; P Schlechtriem, 'The Borderland of Tort and Contract—Opening a New Frontier?'(1988) 21 Cornell International Law Journal 467, 471–75.

[199] See in particular Art 4(a). There are many decided cases ruling that the CISG does not apply to agency issues.

[200] Art 53.

[201] See Cour de cassation, 5 January 1999 (France), translated at <http://cisgw3.law.pace.edu/cases/990105f1.html>. The CISG does not apply to third parties: *American Mint LLC v GOSoftware Inc*, Federal DC (Pennsylvania), 16 August 2005 (US), available at <http://cisgw3.law.pace.edu/cases/050816u1.html>; *Caterpillar Inc v Usinor Industeel*, Federal DC (Illinois), 3 March 2005 (US), available at <http://cisgw3.law.pace.edu/cases/050330u1>; Bundesgerichtshof, 12 February 1998 (Germany), translated at <http://cisgw3.law.pace.edu/cases/980212g1.html>.

[202] As the legislation might wish to do if the CISG buyer is insolvent, leaving the sub-buyer without a solvent defendant unless it can proceed against the CISG seller. If the sub-buyer's claim were to be limited to any amount that the buyer itself might recover, this does not enlarge the risk assumed by the CISG seller on entry into the contract and so does not unduly trespass on the domain of the CISG.

[203] See para 10.20.

[204] See Oberlandesgericht Hamburg, 25 January 2008 (Germany), translated at <http://cisgw3.law.pace.edu/cases/080125g1.html] >;Handelsgericht Aargau, 26 November 2008 (Switzerland), translated at <http://cisgw3.law.pace.edu/cases/081126s1.html>; Supreme Court, 17 September 2008 (Slovakia), translated at <http://cisgw3.law.pace.edu/cases/080917k1.html>; Supreme Court, 19 December 2003 (Poland), translated at <http://cisgw3.law.pace.edu/cases/031219p1.html]>. Nor does the CISG apply to assumption of debt: Landgericht Heidelberg, 2 November 2005 (Germany), translated at <http://cisgw3.law.pace.edu/cases/051102g1.html>; Oberster Gerichtshof, 24 April 1997 (Austria), translated at <http://cisgw3.law.pace.edu/cases/970424a3.html>.

The exclusion of death and personal injuries claims from the CISG would limit this case of so-called horizontal privity to claims for financial and property damage. Again, the formal language of seller and buyer in the CISG would preclude such a claim. If national law were to permit it, this would be an acceptable outcome only if the seller's overall liability exposure were no greater than it would be under the CISG. If national product liability law gave the third party access to the CISG buyer's claim in cases where the buyer would not have been able to recover on behalf of, or by way of indemnifying, the third party, this would amount to national interference in a contract governed by the CISG. National product liability law favouring the third party against the seller in a direct action of a tortious character would be a different matter, even if the economic outcome would have been the same as that achieved by attaching the third party to the CISG contract.

Death and personal injury Reinforcing the exclusion of consumer sales is Article 5, which states that the CISG does not apply to 'death or personal injury caused by the goods to any person'.[205] Because of the exclusion of consumer sales, it is unlikely that Article 5 should need to be invoked to debar a buyer's claim for personal injuries or death, since it is the case of sales of this sort that such claims are most likely to arise. Article 5 leaves untouched damage to the buyer's other property caused by the contract goods, so that there is nothing to prevent the CISG from applying on its own terms. The purpose of the CISG is to deal with the rights and obligations of the parties to a contract of sale 'arising from such sale'.[206] Article 5 may thus be seen as helping in an incomplete way to mark out the boundary between the CISG and national product liability law.[207] Indeed, the brief drafting history of Article 5 shows a concern to accommodate the CISG to national product liability rules.[208] It is in the light of this preoccupation that Article 5 should be interpreted when dealing with the following troublesome case. **10.26**

Whose death or personal injury? Suppose that X, a manufacturer, supplies a car to Y, a dealer, pursuant to a contract of sale governed by the CISG, and that Y in turn sells on the car to Z, a consumer in Y's own jurisdiction. The car is defective and Z suffers extensive personal injuries. In ensuing litigation against Y, Z recovers damages, which may be awarded under domestic tort or sales law. In the event of Y claiming over against X, is this allowed under the CISG, or does Article 5 preclude it? On one view, Article 5 is to be interpreted literally: it excludes personal injuries and death to 'any person', so as between seller and buyer 'any person' includes the sub-buyer.[209] Such a result leads to an untidy *dépeçage*, if Y has purchased from X a number of cars with similar defects, so that, in the case of unsold **10.27**

[205] This provision was incorporated as late as the diplomatic conference in 1980. It has no counterpart in the ULIS.

[206] Art 4.

[207] See generally I Schwenzer (ed), *Schlechtriem and Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd edn, 2010), pp 98–101 (Schwenzer/Hachem); P Schlechtriem, 'The Borderland of Tort and Contract—Opening a New Frontier' (1988) 21 Cornell International Law Journal 467; J Lookofsky, 'Loose Ends and Contorts in International Sales: Problems in the Harmonisation of Private Law Rules' (1991) 39 American Journal of Comparative Law 403.

[208] See J Honnold, *Documentary History of the Uniform Law for International Sales* (1989), pp 466–67.

[209] In the second edition (2005) of I Schwenzer (ed), *Schlechtriem and Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)*, p 78, this result was described as 'appropriate', on the ground that 'product liability in most legal systems has developed into a liability system of its own with special recourse actions for passing on liability' (but this stance is no longer maintained: (3rd edn, 2010) p 99 (Schwenzer/Hachem); CM Bianca and MJ Bonell, *Commentary on the International Sales Law* (1987), p 49 (Art 5 commentary by Khoo).

cars, a claim for the return of the price paid and for damages for loss of profit is subject to the CISG but a claim for consequential damages arising out of Y's liability to Z for the latter's personal injuries[210] is not.[211] This awkward and unnecessary result, it is submitted, should be avoided. First, the words 'any person', in an instrument that is not drawn with the rigour of a UK Parliamentary draftsman and should therefore not be interpreted in a way that is customary in the case of Acts of Parliament, may sensibly be confined so that, for the avoidance of doubt, persons such as the employees, friends, and family of the immediate buyer, Y, have no direct claim against the seller, X. Secondly, Article 5 is concerned with 'the liability of the seller for death or personal injury'. If Y is made liable to Z outside the CISG, or if Y and Z agree a compromise of Z's claim, Y will pay damages or compensation, which means that Y suffers an economic loss, reflected in Y's balance sheet, arising as a consequence of X's supply of non-conforming goods.[212] If Y seeks to recover this loss from X under Article 74 as consequential damages, it is not a case of X being made liable for death or personal injury but of X being liable for Y's consequential losses of a financial character.[213] There seems no sensible reason for excluding from Article 74 this one example of foreseeable consequential loss.

E. Exclusions

10.28 General As stated above, Article 4 provides that the CISG applies only to the substantive law of sale so far as it deals with the 'the rights and obligations of the seller and buyer arising from' a contract of sale.[214] There is widespread agreement among the commentators and courts that the CISG therefore does not apply to limitations[215] and agency.[216] The cases clearly show that issues of burden of proof are dealt with by the CISG.[217] The burden of proof is distinct from the admissibility of evidence and rules concerning the probative

[210] But a successful claim by Z for property damage could be passed on under the CISG by Y to X.

[211] The governing law for this claim may be the law that, but for the CISG, would be the applicable law of the contract or the law governing the tort, pursuant to the forum's private international law rules. See para 1.24 et seq.

[212] In support of applying the CISG, see Oberlandesgericht Düsseldorf, 2 July 1993 (Germany), translated at <http://cisgw3.law.pace.edu/cases/930702g1.html>.

[213] See also MG Bridge, 'The Bifocal World of International Sales: Vienna and Non-Vienna' in R Cranston (ed), *Making Commercial Law* (1997), pp 294–96.

[214] For these and other exclusions, see UNCITRAL *Digest of Case Law on the United Nations Convention on the International Sale of Goods* 2012, Art 4 para 14. The cases in numerous instances note that the CISG does not deal with capacity (see, eg International Economic and Trade Arbitration Commission, 22 May 1997 (China), translated at <http://cisgw3.law.pace.edu/cases/970522c1.html>; Oberlandesgericht Düsseldorf, 8 January 1993 (Germany), translated at <http://cisgw3.law.pace.edu/cases/930108g1.html>). Nor was the CISG applicable when a seller mistakenly reimbursed the buyer a price that had not been paid and then sought restitution: Oberlandesgericht München, 28 January 1998 (Germany), translated at <http://cisgw3.law.pace.edu/cases/980128g1.html>. It also did not apply to the recovery of payments made to a seller under a bank guarantee of performance: Oberlandesgericht München, 8 February 1995 (Germany), translated at <http://cisgw3.law.pace.edu/cases/950208g1.html>. The CISG did however apply so as to preclude the making of a quantum meruit claim under domestic law in *Forestal Guarani SA v Davos International Inc*, Federal DC (NJ), 7 October 2008 (US), available at <http://cisgw3.law.pace.edu/cases/081007u1.html>.

[215] There are very many cases, too numerous to list, holding that the CISG does not apply to limitation periods, on which see the United Nations Convention on the Limitation Period in the International Sale of Goods 1974 and the amending Protocol of 1980.

[216] Again, the point is an obvious one and the cases are too many to list.

[217] In a large number of cases, the CISG has been held to apply to issues concerning the location of the burden of proof. For a good discussion, see Appelationshof Bern, 11 February 2004 (Switzerland), translated at <http://cisgw3.law.pace.edu/cases/040211s1.html>, which notes that the burden of proof is explicitly dealt

quality of particular types of evidence. As far as the first of these two matters goes, Article 11 provides that a contract may be proved by any means, including witnesses. Matters relating to the law of evidence should otherwise be dealt with by the *lex fori*. In addition, set-off, so far as it concerns cross-claims arising under the same contract of sale, but not otherwise, is implicitly covered by the CISG.[218] The coverage of the CISG would therefore be less extensive than the English rules of equitable set-off, which allow even unliquidated claims and cross-claims to be set off where two contracts are closely related.[219] Article 4 goes on to state that, '[i]n particular', the CISG 'is not concerned with' matters of validity of the contract, of any of its or of any usage, and of the effect the contract may have on the property in the goods sold. Overall, Article 4 raises a number of further points. First of all, although certain matters are expressly excluded, their definition as matters of validity or property is to be determined by interpreting the CISG itself. The CISG autonomously defines what is meant by validity, and not the law of France, England, or that of any other country whose law is the applicable law of the contract. Secondly, the CISG should also determine the province of the law of sale, whose scope may vary from one legal system to another. For example, an English lawyer might not treat the recovery of interest as a matter of sale but rather as one of civil procedure or general contract law.[220] The CISG, however, allocates it to the law of sale.[221] Although the CISG cites the 'particular' cases of property and validity as excluded matters, there can hardly be any matters pertaining to sale, as defined by the CISG, that are impliedly excluded. More realistically, matters customarily treated as pertaining to sale in the laws of some countries may be excluded pursuant to Article 4 on the ground that they do not sufficiently concern the rights and obligations of the parties arising out of the contract of sale.[222] The difficulty will be to determine whether the matter in question is excluded from

---

with only in Art 79 but is otherwise a matter of general principle following the rules that (a) he who affirms must prove, but that (b) the burden in relation to certain facts falls on the person in whose sphere those facts originate. To similar effect, see Bundesgericht, 13 November 2003 (Switzerland), translated at <http://cisgw3.law.pace.edu/cases/031113s1.html>, where it is criticized by Mohs for its incorporation in uniform sale law of the German doctrine of *Erfüllungslehre*) (see § 363 BGB). In favour of inferring the burden of proof from the CISG, see Audiencia Provincial de Valencia, 7 June 2003 (Spain), translated at <http://cisgw3.law.pace.edu/cases/030607s4.html>; Bundesgerichtshof, 9 January 2002 (Germany), translated at <http://cisgw3.law.pace.edu/cases/020109g1.html>; Bundesgericht, 15 September 2000 (Switzerland), translated at <http://cisgw3.law.pace.edu/cases/000915s2.html>; Handelsgericht Zürich, 3 November 1998 (Switzerland), translated at <http://cisgw3.law.pace.edu/cases/981130s1.html>. The CISG will not apply to matters of proof concerning collateral agreements, as where an agreement following the agreed termination of a contract of sale was allegedly reached as to the mode of transportation of goods back to the seller: Bezirksgericht der Saane, 2 February 1997 (Switzerland), translated at <http://cisgw3.law.pace.edu/cases/970220s1.html>.

218 See the very many cases listed in UNCITRAL *Digest of Case Law on the United Nations Convention on the International Sale of Goods* 2012, Art 4, notes 56–57. Cases to the effect that set-off falls outside the CISG do not always distinguish as clearly as they should between cross-claims arising out of the same contract and cross-claims arising out of other contracts.

219 *Dole Dried Fruit and Nut Co v Trustin Kerwood Ltd* [1990] 2 Lloyd's Rep 309; *Bim Kemi v Blackburn Chemicals Ltd* [2001] EWCA Civ 457, [2001] 2 Lloyd's Rep 92; *Geldof Metaalconstructie NV v Simon Carves Ltd* [2010] EWCA Civ 667, [2010] 4 All ER 847.

220 If as a result of the buyer's non-payment the seller has to borrow money and pay interest on it. Although there is a provision preserving any right to interest where by law it is recoverable (s 54 of the Sale of Goods Act), this is designed to establish that the Sale of Goods Act does not impinge upon external law in this respect rather than to incorporate the subject of interest in the Act.

221 Art 78 (the unpaid party 'is entitled to interest'). Issues of calculation are dealt with at para 12.63.

222 Disturbance of the buyer's quiet possession by the seller seems not to be dealt with in the CISG, whereas it is dealt with in the English (s 12(2)(b) of the Sale of Goods Act) and French (C civ Art 1626) law of sale.

the CISG or whether it is a gap in the coverage of sale by the CISG and to be filled pursuant to Article 7(2).[223] For example, the CISG says nothing about foreign currency awards. On one view, the currency of an award falls outside the CISG and is dealt with by the applicable law in accordance with the forum's rules of private international law.[224] A better view is that if a contract calls for payment in a particular currency, then it should be paid in that currency in accordance with the seller's right to require performance (where relevant),[225] and if it is a matter of the date of conversion into the local currency, this should be done at a time that best expresses the compensation principle in the CISG.[226] A further possibility—or perhaps a variation on the filling of gaps—is that the CISG may implicitly preclude a rule of contract law that exists in some but not all jurisdictions. If so, the matter would not as such be excluded from the coverage of the CISG and the rule itself would not be inferred as a general principle under the CISG. One possible example of this is the revision of contracts by the court in the light of hardship to one of the parties. If revision were seen to be a subject falling outside the coverage of the CISG, the availability of it as a relieving mechanism would fall to the applicable national law. But if instead revision were seen as a subheading of supervening circumstances, and thus embraced by the coverage of the CISG, a tribunal should note the absence of any explicit mention of revision in Article 79 before turning its attention to two questions: first, whether there is an intention to rule out revision in CISG cases; and secondly, if not, whether revision is available further to Article 7(2) in accordance either with general principles in the CISG or with the applicable law.[227] Finally, and in favour of an expansive interpretation of the language of coverage in the opening part of Article 4, it is noteworthy that the provision states not that the CISG applies to contracts of sale but rather that it applies to 'the rights and obligations of the seller and buyer arising from' a contract of sale.[228] This should discourage attempts to draw a clear line between general contract law and special sales law. Property issues apart, special sales law is but a contextual application of general contract law. Sales issues can be dealt with either by means of general contract provisions or by special sales provisions. If the court turns to national law to deal with an issue, it should therefore, apart from the explicit cases of validity and property, be because the court cannot infer general principles to deal with the issue,[229] and not because the issue is impliedly excluded from the coverage of the CISG.[230] Taking the case law as a whole, some national courts have been too willing to conclude that certain issues are excluded from the CISG, and others have shown a lamentable lack of imagination in

[223] See para 10.43 et seq.

[224] This view has been expressed by the Tribunal Cantonal Valais (Switzerland) in various judgments, including those of 27 October 2006, 27 April 2007 and 28 January 2009, translated at <htttp//cisgw3.law.pace.edu/cases/061027s1.html>, <htttp//cisgw3.law.pace.edu/cases/070427s1.html> and <htttp//cisgw3.law.pace.edu/cases/090128s1.html>. To the same effect, see Juzga do Comercial Buenos Aires, 2 July 2003 (Argentina), translated at <http://cisgw3.law.pace.edu/cases/030702a1.html>. The Handelsgericht Zürich, 3 November 1998 (Switzerland), translated at <http://cisgw3.law.pace.edu/cases/981130s1.html>, ruled that internal Swiss law applied so that a debt in a foreign currency could not be claimed as payable in Swiss francs.

[225] Art 62.

[226] Art 74.

[227] See para 10.43 et seq.

[228] See Bundesgericht, 15 September 2000 (Switzerland), translated at <http://cisgw3.law.pace.edu/cases/000915s2.html>.

[229] See Art 7(2), discussed at para 10.43 et seq.

[230] The case law is often unclear in drawing this distinction.

discerning general principles in the CISG for filing gaps in its express coverage of matters arising between buyer and seller.[231]

Property Without formally defining property, the CISG excludes the effect of the contract on the property in the goods sold.[232] Consequently, the CISG has nothing to say about the requirements that have to be met before the property passes to the buyer or about the time that the property does pass to the buyer.[233] *A fortiori*, it has nothing to say about title conflicts arising out of the disposal of the goods to third parties by dishonest sellers or buyers.[234] The CISG does, however, affirm the seller's contractual duty to transfer to the buyer certain property rights.[235] It also states that the seller must transfer the property in the goods 'as required by the contract and this Convention'.[236] Although the CISG does not determine the effect of a reservation of title clause on the passing of property,[237] the question whether a reservation of title clause is incorporated in the contract is as much a convention issue as the incorporation of standard terms in the contract.[238] An English lawyer would next inquire whether the reference in Article 4 to property means just the general property or ownership, or possessory interests in the sense of a special property as well.[239] If it means the latter, then Article 4 would thus exclude liens and the right of stoppage in transit. Where in English law the seller has a lien for the price, the seller may not be required to deliver the goods when the buyer does not pay, despite the buyer's acquisition of the general property.[240] Where the right of stoppage in transit is exercised, the seller has the right to resume possession of the goods upon the buyer's insolvency provided the goods are still in transit.[241] Does the CISG exclude the unpaid seller's lien and the right of stoppage in transit? Further, does it exclude any entitlement of the seller to recover goods from a non-paying buyer?[242] **10.29**

231 Especially in matters relating to interest and set-off.

232 Art 4(b). According to the Secretariat Commentary on Article 4 of the 1978 Draft, para 4: 'It was not regarded possible to unify the rule on [the passing of property] nor was it regarded necessary to do so since rules are provided by this Convention for several questions linked... to the passing of property: the obligations of the seller to transfer the goods free from any right or claim of a third person; the obligation of the buyer to pay the price; the passing of the risk of loss or damage to the goods; the obligation to preserve the goods.'

233 For the view that the CISG applies to reservation of title clauses so far as they allow contractual avoidance, see I Schwenzer (ed), *Schlechtriem and Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd edn, 2010), p 94 (Schwenzer/Hachem).

234 Oberlandesgericht München, 5 March 2008 (Germany), translated at <http://cisgw3.law.pace.edu/cases/080305g1.html>.

235 Under Art 41, the seller must, unless otherwise agreed, deliver goods free from any right or claim by a third party, and under Art 42, must deliver goods free from certain stated intellectual property rights.

236 Art 30 (but in what sense does the CISG itself require the transfer of the property, given the absence of any other text to this effect?).

237 See eg *Roder Zelt- und Hallenkonstruktien GmbH v Rosedown Park Pty Ltd*, Federal DC (Adelaide), 28 April 1995 (Australia), available at <http://cisgw3.law.pace.edu/cases/951130a2.html>; Oberlandesgericht Stuttgart, 20 December 2004 (Germany), translated at <http://cisgw3.law.pace.edu/cases/041220g1.html.

238 See paras 11.16–17.

239 MG Bridge, *The Sale of Goods* (2nd edn, 2009), paras 2.49–52.

240 Sale of Goods Act, s 41.

241 Sale of Goods Act, s 44.

242 In English law, the unpaid seller may not exercise the power of sale conferred by s 48 of the Sale of Goods Act when the buyer has acquired possession: *Ward (RV) Ltd v Bignall* [1967] 1 QB 534, CA (Diplock LJ). In French law, the seller of movable property has a privilege (or right as against other creditors) to recover it within eight days of delivery: C civ Art 2102 al 4°.

10.30 **Property and contractual avoidance** The CISG is concerned about the contractual rights and obligations of buyer and seller *inter se*, and not about property issues. Still less is it concerned with property issues in the event of the insolvency of one of the contracting parties, where the friction between it and the governing national law would be very great if it were to apply. Nevertheless, so long as the seller is in possession, in a case where delivery and payment are concurrent, it would seem that the seller could take a stand on Article 30, so as to insist that he is bound to deliver only as required by the contract, which is against payment. The difficult case is where the property under the governing law has passed to the buyer and now a secured creditor or the buyer's insolvency representative is demanding the goods. The seller, it is submitted, could not invoke Article 30 in such a case. The matter would fall for determination by the law that, under the forum's private international law rules, governs property matters:[243] that law might or might not in its sales legislation include an unpaid seller's lien. Stoppage in transit, expressly recognized by Article 71(2)[244] but only as between buyer and seller,[245] applies to goods not yet handed over to the buyer, even though the seller's duty to deliver is accomplished when the goods are handed over to the carrier.[246] In this case, and also where the property has passed under the governing law to the buyer, the seller may avoid the contract, assuming the buyer's non-payment amounts to a fundamental breach under Article 25,[247] in which event the buyer comes under a duty to make restitution.[248] There is little doubt that, against a solvent buyer, the seller would be entitled to the very goods and not their financial equivalent.[249] If the buyer is insolvent, or a claim is being made by the buyer's secured creditor, then it is submitted that the seller must defer to the governing property law and submit a personal claim, which may be worth little, for the value of the goods.[250] There is nothing in the CISG to indicate that the seller's right to restitution of the goods is a property right that overrides the provision of national insolvency laws or outranks the rights of creditors who have taken a security interest in the buyer's goods. The CISG's withdrawal from property issues in Article 4(b) should apply both to transfer and retransfer,[251] even though a narrow interpretation would have it that the exclusion in Article 4(b) concerns only the effect of the contract on the property and not the effect of avoidance of the contract on the property.

10.31 **Validity** Matters of contractual validity, relating to the contract as a whole or individual terms or usages, are excluded from the CISG by Article 4(a).[252] As stated above, 'validity'

[243] See J Fawcett, J Harris, and M Bridge, *International Sale of Goods in the Conflict of Laws* (2005), ch 18.

[244] The provision as a whole deals with a contracting party's right to suspend performance when it becomes apparent that the other will not perform a substantial part of its obligations: see para 12.16.

[245] In the unlikely event that the law applicable to the contract of carriage does not compel the carrier to accede to the stop notice, the CISG rules on stoppage would therefore not apply as against the carrier.

[246] Art 31(a).

[247] Or the seller has made time of the essence under Art 63.

[248] Art 81(2). See para 12.35 et seq.

[249] This case, it is submitted, would not be caught by the specific performance exception in Art 28: see ch 12.

[250] cf Art 84(2)(a duty to account for benefits where it is 'impossible' for the buyer, avoiding the contract for the seller's breach, to make restitution).

[251] See CISG Advisory Council Opinion No 9 (Consequences of Avoidance of the Contract), para 3.6.

[252] See H Hartnell, 'Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods' (1993) 18 Yale Journal of International Law 1.

must be given an autonomous meaning under the CISG.[253] The obvious problem here lies in the very exclusion of validity under Article 4, which deprives courts and tribunals of material from which to infer the meaning of validity. It is clear that there are dangers in looking to domestic laws for assistance in this matter since there will be little if any consensus on the meaning of validity. The CISG expressly embraces formal validity in its scheme of coverage[254] and by a mixture of express and implied provision makes it clear that there is no room for the common law doctrine of consideration[255] and the civil law doctrine of cause.[256] Furthermore, in making provision for the payment of interest,[257] it cuts off any reference to prohibitions on interest in religious systems of law. Issues concerning illegality are remitted to national law under the validity exclusion.[258] In defining what is meant by validity, common law systems may present a particular difficulty when they treat certain contracts as unenforceable, which is a notion that is far from being universally recognized. To draw upon the analogy of the writing requirement for contracts for the sale of land in English law, it seems quite clear that the former sanction for non-compliance, which was unenforceability subject to exceptions, meant that the contract was not invalid. For example, subsequent acts of part performance could render the contract active and enforceable against the party committing them. The Law of Property (Miscellaneous Provisions) Act 1989, in stating that a binding contract cannot be concluded unless compliance with the requisite formalities exists, treats formal compliance as a matter of validity. Whilst it is correct to say that illegality comes under the validity exclusion, therefore, the critical question is whether the definition and scope of illegality should be left to the applicable law. Different legal systems may define validity in different ways and to different extents. One possibility is to attempt to fashion transnational notions of public policy and related expressions, which might turn out to be a glacially slow process. Furthermore, in excluding validity, and in treating validity as an autonomous expression under the CISG, it does not necessarily follow that the CISG thereby adopts transnational notions of illegality based upon common international standards. The effect of the validity exception is that the CISG retreats altogether from the field of validity; it does not delegate authority to apply national standards of a certain uniform character. Consequently, for example, national prohibitions on the importation of goods containing certain chemicals or substances should be respected in accordance with Article 4, even if the country in question excludes chemicals and substances that few other countries would.[259]

[253] The Secretariat Commentary on Article 4 of the 1978 Draft provides no assistance here. At one time, a Uniform Law on the Conditions of Validity of Contracts for the International Sale of Goods was contemplated by Unidroit.

[254] Art 11.

[255] See Art 29(1) on modification of the contract. On this point, the decision in *Geneva Pharmaceuticals Technology Corp v Barr Laboratories Inc*, Federal DC (New York), 10 May 2002 (US), available at <http://cisgw3.law.pace.edu/cases/020510u1.html> is clearly wrong.

[256] But cause in French law has been extended to deal with issues of *ordre public* and *bonnes moeurs*, which go to the illegality of contracts. In this respect, cause comes within the validity exclusion.

[257] Arts 78, 84.

[258] The applicable law would therefore deal with issues concerning the compliance of goods with public order standards: Arrondissementsrechtbank 's-Hertogenbosch, 2 October 1998 (Netherlands), translated at <http://cisgw3.law.pace.edu/cases/981002n1.html>.

[259] cf *Sumner Permain & Co Ltd v Webb & Co* [1922] 1 KB 55, CA (salicylic acid, ie aspirin, in tonic water).

10.32 Exclusion clauses and penalty clauses An acute problem presented by the validity exclusion concerns the application of national controls on the exclusion and limitation of contractual liability. Since the CISG in Article 6 allows the parties to modify or exclude the rights and duties of the contracting parties as laid down in the CISG itself, the question is how this provision is to be reconciled with the Article 4 exclusion of validity. A number of decisions have ruled that the control of exclusion and similar clauses is a question of validity for the national law.[260] The quality of discussion is disappointing, but the clear purport of these various decisions is that courts have ruled out the possibility of an unregulated zone for international sales.[261] In so far, as appears to be the case, that national controls are imposed according to broad standards such as unconscionability and the absence of gross negligence, instead of specific prohibitions on excluding duties laid down in the CISG itself, these decisions have avoided a direct conflict with Article 6. Apart from exclusion and limitation clauses, if validity is broad enough to deal with clauses reducing the measure of damages otherwise recoverable for non-performance, and broad enough to deal with one-sided contracts,[262] then it ought to be broad enough to catch penalty clauses too. The CISG does not explicitly deal with penalty clauses, but it does not necessarily follow from this that they are excluded under the validity provision. They might instead be aspects of sale falling outside the general language of Article 4 or they might not pertain to the law of sale at all, both of which are unlikely, given the width of the opening language of Article 4. Or they might be a part of the law of sale representing a gap in the coverage of the CISG and therefore to be dealt with under the mechanism laid down in Article 7(2).[263] The answer is that both Article 4 and Article 7(2) are brought into play by penalty clauses. For present purposes, a penalty clause may amount to more than just an agreed damages clause. So far as the issues raised by the clause are confined to the autonomy of contracting parties in determining the amount of recoverable damages, instead of having a court do it for them, this is a matter for Article 7(2). But if the clause is penal to a degree that it engages unconscionability or related doctrines,[264] then it should be treated as falling within the validity exclusion in just the same way as this is done for exclusion and limitation clauses. The scope of the validity exclusion for legal systems where judicial intervention is pitched at a low entry level is difficult to determine. English law treats as penalty clauses those clauses that are not genuine preestimates of loss.[265] This falls some way short of unconscionability and similar strictures. If, as stated above, there is no room for an international standard of illegality, there would seem to be no prospect of confining the scope of the validity exclusion, in legal systems of this sort, only to the more egregious penalty clauses. As much as one might criticize decisions

260 *Barbara Berry SA de CV v Ken M Spooner Farms Inc*, 9th Cir, 8 November 2007 (US), available at <http://cisgw3.law.pace.edu/cases/071108u1.html>; Cour de cassation, 13 February 2007 (France), translated at <http://cisgw3.law.pace.edu/cases/070213f1.html>; Oberlandesgericht Linz, 23 March 2005 (Austria), translated at <http://cisgw3.law.pace.edu/cases/050323a3.html>; International and Economic Trade Arbitration Commission, 21 January 2005 (China), translated at <http://cisgw3.law.pace.edu/cases/051021c1.html>; Bundesgerichtshof, 31 January 2001 (Germany), translated at <http://cisgw3.law.pace.edu/cases/011031g1.html>; Oberster Gerichtshof, 7 September 2000 (Austria), translated at <http://cisgw3.law.pace.edu/cases/000907a3.html>.

261 cf Unfair Contract Terms Act 1977, ss 26–27, discussed at para 2.34 et seq.

262 Fővárosi Bíróság Budapest, 1 July 1997 (Hungary), translated at <http://cisgw3.law.pace.edu/cases/970701h1.html> (lesion).

263 This approach is discussed at para 10.43 et seq.

264 cf C civ Art 1152 ('manifestly excessive'), with a judicial power to reduce the penalty.

265 *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79, HL.

that in an unanalytical way have simply stated that penalty clauses are a matter for the applicable law,[266] they may be seen in this regard to be following Article 4. The wide scope of penalty rules of this type, however, might be limited by other factors. For example, there is authority in English law for the proposition that a penalty clause may not be enforced to the extent that it does not function as a genuine liquidated damages clause.[267] If it is good law to state that the sanction is unenforceability, then it is difficult to see that the penalties issue goes to validity in English law. Yet other legal systems might characterize penalty clauses in a different way. Ultimately, Article 4 determines what national rules qualify as validity rules; the applicable national law determines the width of those rules.

Contractual vitiating factors So far as claims are made for damages for fraud and misrepresentation, and are to be classified as tortious in character, they fall on that account outside the CISG.[268] Where they give rise to a claim to have the contract rescinded or set aside because of their effect on the consent of the victim, they should be seen as going to validity for the purpose of that specific exclusion.[269] As far as the CISG goes, the result is the same in both cases. There will be some few cases, however, where the presence of fraud affects rights and liabilities under the contract of sale and is determined by the CISG.[270] A difficult issue is presented by misrepresentation in common law systems. To the extent that such systems permit rescission for relatively minor mistakes induced by a misrepresentation, the treatment of misrepresentation as a matter of validity could create discord between common law systems and those systems of law that do not recognize misrepresentation, or at least such a broad notion of misrepresentation, as an independent vitiating factor.[271] The doctrine of misrepresentation, with its easy grant of rescission,[272] has the potential for undermining the fundamental breach rule in Article 25. So long as misrepresentation is characterized as going to validity, then national law on misrepresentation will have a distorting effect on the CISG, to be cured only by national legislation limiting its scope in CISG cases.[273] In **10.33**

[266] Nitra District Court, 29 June 2006 (Slovakia), translated at <http://cisgw3.law.pace.edu/cases/060629k1.html>; International Economic and Trade Arbitration Commission, 20 September 2006 (China), translated at <http://cisgw3.law.pace.edu/cases/060920c1.html>; Foreign Trade Court of Arbitration, 30 October 2006 (Serbia), translated at <http://cisgw3.law.pace.edu/cases/061030sb.html>; Hof van Boerop,18 June 1996 (Belgium), translated at <http://cisgw3.law.pace.edu/cases/960618b1.html>; Oberlandesgericht München, 8 February 1995 (Germany), translated at <http://cisgw3.law.pace.edu/cases/920414g1.html>. Other cases have declined to look for general principles under Art 7(2), including the Tribunal of International Commercial Arbitration of the Russian Federation Chamber of Commerce on numerous occasions, eg13 January 2006, 1 March 2006 and 13 April 2006, translated at <http://cisgw3.law.pace.edu/cases/060113r1.html>, <http://cisgw3.law.pace.edu/cases/060301r1.html>, and <http://cisgw3.law.pace.edu/cases/060413r1.html>.

[267] *Jobson v Johnson* [1989] 1 WLR 1026, CA.

[268] See para 10.24.

[269] *Dingxhi Longhai Dairy Ltd v Becwood Technology Group Inc*, Federal DC (Minnesota), 1 July 2008 (US), available at <http://cisgw3.law.pace.edu/cases/080701u1.html>; Kantonsgericht St Gallen, 13 May 2008 (Switzerland), translated at <http://cisgw3.law.pace.edu/cases/080513s1.html,>; *Beijing Metals & Minerals v American Business Center Inc*, 5th Cir, 15 June 1993 (US), available at <http://cisgw3.law.pace.edu/cases/930615u1.html> (making the same ruling for duress).

[270] Oberlandesgericht Köln, 21 May 1996 (Germany), translated at <http://cisgw3.law.pace.edu/cases/960521g1.html> (Art 35(3)).

[271] This issue is discussed further in ch 11.

[272] Limited somewhat by the power of a court to declare a contract subsisting under the Misrepresentation Act 1967, s 2(2).

[273] The particular case of misrepresentation in English law, if the UK were to adopt the CISG, is dealt with in paras12.23–25.

the same way as there seems to be no scope for distinguishing venial and egregious penalty clauses, so there would seem to be no room for distinguishing misrepresentations according to their veniality or otherwise. As for mistake, there is a strong case for including it in the CISG so long as it goes to the character of the goods[274] (and the same should hold true for misrepresentations inducing mistakes of the same sort). In laying down the standard and type of goods the seller must supply to the buyer, the CISG has occupied this field, thus circumscribing the meaning of validity under Article 4. Other mistakes, dealing with the quantity of goods[275] and the method of computing and paying the price,[276] have been held to fall outside the CISG. In so far as mistakes of this sort might be resolved according to standards of interpretation in Article 8 and to the notion of contractual agreement in Part II of the CISG, resort ought not to be made to national law. The error some courts make is not to appreciate the breadth of the opening language of Article 4, which defines in generous terms the scope of the CISG.

10.34 **Validity and Unidroit Principles** Mention has been made of the difficulty of defining validity for the purpose of a convention that does not deal with validity. Some guidance as to the general scope of validity may be derived from the Unidroit Principles of International Commercial Contracts 2010[277] and the topics included under the heading of 'Validity' in Chapter 3, though it must be stressed that validity has to be given an autonomous meaning under the CISG. Chapter 3 explicitly declares that it does not deal with all aspects of validity that appear in national legal systems and specifically states that capacity is excluded,[278] from which one might fairly infer that incapacity would otherwise have come in for treatment under the heading of 'Validity'.[279] Chapter 3 then goes on to dispense with cause and consideration[280] and to set out rules for initial impossibility, mistake, fraud, duress (threat), and gross disparity (lesion), together with related matters including remedies, before turning to illegality. In addition, although the Unidroit Principles do contain a rule dealing

[274] Rechtbank van Koophandel Hasselt, 19 April 2006 (Belgium), translated at <http://cisgw3.law.pace.edu/cases/060419b1.html>; Oberster Gerichtshof, 19 April 2006 (Austria), translated at <http://cisgw3.law.pace.edu/cases/000413a3.html>; Landgericht Aachen, 13 April 2000 (Germany), translated at <http://cisgw3.law.pace.edu/cases/930514g1.html>. cf Bundesgericht, 22 December 2000 (Switzerland), translated at <http://cisgw3.law.pace.edu/cases/001222s1.html>. A mistake about the agreed method of payment has been held to fall outside the CISG: ICC Court of Arbitration (No 10329 of 2000), available at <http://cisgw3.law.pace.edu/ cases/000329i1.html>. So has a mistake about the agreed method of calculating a price consisting of goods and money.

[275] Oberster Gerichtshof, 20 March 1997 (Austria), translated at <http://cisgw3.law.pace.edu/cases/970320a3.html>.

[276] ICC Court of Arbitration (No 10329 of 2000), available at <http://cisgw3.law.pace.edu/cases/000329i1.html>; Fovárosi Bíróság Budapest, 1 July 1997 (Hungary), translated at <http://cisgw3.law.pace.edu/cases/970701h1.html>; Bundesgerichtshof, 27 November 2007 (Germany), translated at <http://cisgw3.law.pace.edu/cases/071127g1.html>.

[277] The first edition appeared in 1994 and was followed by a second edition in 2004, which was not intended as a revision of the 1994 edition. There were 'very few amendments of substance' in the 2004 edition (see Introduction to the 2004 Edition—only one black letter provision was amended) but the Principles were extended in their coverage in a number of respects. Like the second edition, the current edition of 2010 is not intended to be a revision of previous editions (see the Introduction to the 2010 edition). Only five existing provisions were amended, and these only marginally. Twenty-six new provisions were added dealing with restitution under failed contracts, illegality, conditions, and plural obligors and obligees.

[278] Art 3.1.1 and comment.

[279] In previous editions, an agent's lack of authority and illegality were both excluded. The former is the subject of a separate chapter and section (and of course agency is excluded in any case from the coverage of the CISG), and the latter is now included in the 2010 edition (in Chapter 3 Section 3)).

[280] Art 3.1.3.

with excessive penalty clauses, it is to be found in the section on damages contained in the chapter dealing with non-performance.[281] Exclusion and similar clauses that are 'grossly unfair' are also dealt with outside the Validity chapter.[282] In seeking guidance on the scope of validity in general, it may not be prudent to rely heavily on the location of rules in the Unidroit Principles, which may have been influenced as much by practical convenience in the layout of the rules as by dogmatic purity, but the Principles do provide some general assistance in giving a meaning to 'validity' in Article 4 of the CISG. Even taking the coverage of the Principles of so-called validity issues at face value, it should be understood that, despite the generality of the language of Article 4, the CISG does make some inroads into the validity exclusion by incorporating some aspects of validity in its coverage.

F. Role of Unidroit Principles

Supporting general law In national systems of law, sale is a special contract governed by its own rules. But it does not exist in a vacuum and needs to be supplemented by the rules of general contract law. The broad sweep of Article 4, however, largely dispenses with any such distinction between sales law and contract law. Going beyond the matter of gaps in and the interpretation of the CISG,[283] as well as the role to be accorded to usage,[284] where the possibly supportive role of the Unidroit Principles comes into play, may the Principles play the role of general contract law otherwise allotted to a national law? May they provide a general contract environment for the CISG? Unlike national systems of law, they have the great merit of having been conceived in the same spirit and style, and in many cases by the same personnel, as the CISG. They therefore represent a better fit than national laws. In English law, courts have not always been too concerned to clarify whether they are working within the text of the Sale of Goods Act or within the body of uncodified common law. Even before the Supply of Goods and Services Act 1982, the implied terms of quality and fitness in the Sale of Goods Act had been extended by analogy to non-sale contracts.[285] This type of analogical extension cannot be done with the CISG. There is no authoritative international uniform commercial common law, despite attempts by certain jurists to conjure up a new *lex mercatoria*. The broad wording of Article 4 may nevertheless limit the need to refer to the Unidroit Principles as a source of general contract law, though they may have a greater contribution to make if they could be brought in to deal with validity issues. **10.35**

Legitimacy of Unidroit Principles One possible function of the Unidroit Principles is to repair the deficiency of an underlying common law. But a difficult issue concerns how far these principles might be applied by national courts and arbitrators. A national court may have to concern itself with overriding national rules that cannot be evaded by the choice of law process.[286] There might, for example, be limits on the operation of exclusion clauses.[287] **10.36**

[281] Art 7.4.13(2) ('grossly excessive').
[282] Art 7.1.6.
[283] Discussed at para 10.43 et seq.
[284] Art 9: discussed at para 10.60 et seq.
[285] *Young & Marten Ltd v McManus Childs Ltd* [1969] 1 AC 454, HL.
[286] See the role accorded to mandatory rules and public policy in the Rome I Regulation on the Law Applicable to Contractual Obligations 1980: see para 1.32.
[287] But note the territorial restrictions on the applicability of the Unfair Contract Terms Act 1977, ss 26–27: see paras 2.32–37.

The better view is that the Rome instruments do not sanction the choice of a stateless law.[310]

G. Interpretation and Good Faith

10.39 General Article 7 has some claim to being the most important provision of the CISG. It deals with the interpretation of the CISG and also with the filling of gaps in its coverage.[311] Gaps exist in respect of matters that are impliedly governed by the Convention but are not 'expressly settled' by it. Whilst common lawyers draw a reasonably clear distinction between interpretation and implied terms,[312] some European civil lawyers treat the two matters together under the heading of interpretation. According to Article 7(1):

> In the interpretation of this Convention, regard is to be had to its international character and to the need to provide uniformity in its application and the observance of good faith in international trade.

The first part of the formula, dealing with the international and uniform character of the CISG,[313] is an exhortation to avoid the trap of a homeward tendency in interpretation.[314] It urges courts to avoid domestic preoccupations and, impliedly, to look at what other courts are doing. Not the least of the problems that will have to be faced to ensure the continuing uniformity of the CISG is that concerning the different official, and even unofficial, language versions of the CISG.[315] An enlightened court might in exceptional cases be driven to consider two or more versions side by side.[316] Interpretation is therefore to be approached with an internationalist spirit.[317] In this respect, legal literature has an important role to

---

of Justice, even if not referred to the Court pursuant to Art 1 of the Brussels Protocol (1988). The Brussels Protocol came into force in the United Kingdom on 1 April 2005 when it obtained the necessary number of Contracting Parties.

[310] See M Giuliano and P Lagarde, *Report on the Law Applicable to Contractual Obligations* ([1980] OJ C282/1): 'It must be stressed that the uniform rules apply... only "in situations involving a choice between the law of different countries" (p. 10).' This report on the Rome Convention still has persuasive influence in the interpretation of the Rome I Regulation. On opting into the CISG directly, see para 10.53.

[311] See P Volken, 'The Vienna Convention: Scope, Interpretation and Gap-Filling' in P Volken and P Sarcevic (eds), *International Sale of Goods[:] Dubrovnik Lectures* (1986); G Eörsi, 'General Provisions' in N Galston and H Smit, *International Sales: The United Nations Convention on Contracts for the International Sale of Goods* (1984). On the difficulties involved in maintaining uniformity in practice, see MJ Bonell, 'International Uniform Law in Practice—Or Where the Real Trouble Begins' (1990) 38 American Journal of Comparative Law 865; A Rosett, 'Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods' (1984) 45 Ohio State Law Journal 265.

[312] Recent decisions of the Privy Council and House of Lords go some considerable way towards eroding the distinction: *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101; *Attorney General Belize v Belize Telecommunication Ltd* [2009] UKPC 10, [2009] 1 WLR 1988.

[313] See A Janssen and O Meyer (eds), *CISG Methodology* (2009).

[314] Note, 'The 1980 Convention on Contracts for the International Sale of Goods: Will a Homeward Trend Emerge?' (1986) 21 Texas Journal of International Law 540.

[315] See H 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)' (1998) 17 Journal of Law and Commerce 1187. The Arabic, Russian, and Chinese versions are widely considered to be imperfect.

[316] Consider the differences between the French and English versions of Arts 3(2) and 7(2).

[317] For an interesting approach to the interpretation of the CISG, see A Kastely, 'Unification and Community: A Rhetorical Analysis of the United Nations Sales Convention' (1988) 8 North Western Journal of International Law and Business 574. On interpretation, see also F Ferrari, 'Uniform Interpretation of the 1980 Uniform Sales Law' (1994) 24 Georgia Journal of International and Comparative Law 183.

play. It is not mentioned in Article 7 as a formal source of law but it is certain that it will be influential as authority in interpreting the CISG.[318] It is particularly likely to play a role formulating and expanding the general principles on which the Convention is based,[319] not least because of the weakness shown here by courts and tribunals. The literature on the CISG is voluminous[320]—there are scores of books[321] and thousands of articles on the subject. Since so much material is available, a large part of it having nothing useful to say, a problem to be surmounted is that of making it accessible to courts and tribunals. The most effective way this can be done is with the aid of the leading commentaries on the CISG,[322] which may themselves assist in sifting the periodical literature. One of the primary roles of the literature will be to bring to the attention of national courts decisions from other jurisdictions, which advocates and courts acting unaided may not be able to do.[323] In building up a multi-jurisdictional debate on the CISG, and in encouraging the cross-citation of case law from one jurisdiction to another,[324] the internet will also play a major role.[325]

[318] Some national courts allow legal literature to be cited in national decisions (eg, Germany, Austria), while others (eg, Italy) do not.

[319] See Art 7(2), discussed at para 10.43 et seq.

[320] It has become plain that a disproportionate amount of the literature is written in English, much of it by those whose mother tongue is not English. This is part of the process of international dissemination and the crossing of national boundaries. It demonstrates the importance of informal processes in advancing the cause of uniformity. English is close to becoming the lingua franca of uniform legal activity. Certain major books were written from the outset in English (eg F Enderlein and D Maskow, *International Sales Law* (1992) and CM Bianca and MJ Bonell, *Commentary on the International Sales Law[:] The 1980 Vienna Sales Convention* (1987). Oxford University Press has published an English language version of the major German text by Peter Schlechtriem and other leading German authors: I Schwenzer (ed), *Schlechtriem and Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd edn, 2010). Another major international commentary on the CISG has recently been published in English: S Kröll, L Mistelis and P Perales Viscasillas (eds), *UN Convention on Contracts for the International Sale of Goods (CISG)* (2011).

[321] Some of the books are article-by-article commentaries on the CISG in the Germanic tradition. It may be some time before we see an authoritative general treatise on the law of international sale that does not follow this method.

[322] eg, I Schwenzer (ed), *Schlechtriem and Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd edn, 2010); S Kröll, L Mistelis and P Perales Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG)* (2011).

[323] One American law review (the Journal of Law and Commerce, based in the University of Pittsburgh) has a permanent feature dealing with the CISG. It provides lengthy notes on recent decisions and the text itself, translated into English if necessary. Other American law reviews have produced lengthy symposia dealing with the CISG. A useful survey of decisions is to be found in C Witz, *Les Premières applications jurisprudentielles du droit uniforme de la vente internationale* (1995).

[324] Of which there is relatively little evidence so far, except in the case of a few courts. The position has not greatly changed since the following: MJ Bonell and F Liguori, 'The U.N. Convention on the International Sale of Goods: A Critical Analysis of Current International Case Law—1997 (Part 1) [1997] (2) Uniform Law Review 385 (only two decisions at that time).

[325] The major internet sites are very useful indeed. The best of them for the CISG is a site maintained by Pace University of New York in the name of Professor A Kritzer (<http://cisgw3.law.pace.edu>). It contains an excellent bibliography in English, marshals the burgeoning case law and also contains a large number of articles that can be downloaded in full-text form. Another excellent site, formerly referred to as <http://cisgw3-online.ch>, is now maintained as part of Professor I Schwenzer's Global Sales Project at <http://www.globalsaleslaw.org>. Another excellent site, which covers a very broad range of international commercial law, is maintained by the University of Tromsø (<www.lexmercatoria.org>). The CLOUT (Case Law on Uncitral Texts) service and also the UNCITRAL *Digest of Case Law on the United Nations Convention on the International Sale of Goods* (2012) can be reached via UNCITRAL (<http://www.uncitral.org>). There is also the Unilex site (Unilex on CISG and Unidroit Principles) (<http://www.unilex.info/>) and there are good German language (<http://www.jura.uni-freiburg.de/ipr1/cisg/default.htm>—German and French decisions can be downloaded) and French language sites (<http://www.jura.uni-sb.de/FB/LS/Witz/ cisg.htm>). The Rome Institute for the Unification of Private Law also contains useful material (<http://www.agora.stm.it/unidroit>).

The publication of the UNCITRAL Digest,[326] despite the absence of critical commentary, should over time encourage the habit of citation of cases across jurisdictional lines.[327] A further source that will aid in the uniform interpretation of the convention is the CISG Advisory Council.[328] In the absence of an international commercial court, this unofficial body may by the force and quality of its opinions over time acquire an authoritative standing in the judicial process.

10.40 National attitudes Even before recent changes wrought principles of statutory interpretation by *Pepper v Hart*,[329] English courts had recognized that restrictive canons of statutory interpretation ought not to be brought to bear upon a text that was the product of the international uniformity process.[330] In *Fothergill v Monarch Airlines*,[331] the House of Lords was unanimous in holding that the legislative history of the Warsaw Convention on air carriers' liability[332] should be examined for assistance in interpreting the word 'avarie' (or damage). Assuming the implementation of the CISG in the United Kingdom, the courts of this country should be prepared to scrutinize the debates leading to the conclusion of the CISG,[333] though it is unlikely they will receive much assistance from those debates in respect of the legislator's intent. They should also have to adopt radically changed approaches to the inference of general principles from the text of the CISG. If this involves the adoption of civilian treatments of a code, then this is as it should be. An internationalist approach to interpretation should not lead to the complete abandonment of the rigour of literal interpretation, which must always remain as the starting point if respect is to be paid to the words of a text. Certain national courts appear to have adopted a 'dynamic' interpretation of the CISG[334] that, in an attempt to have it keep pace with changing times, threatens such a sharp departure from the text of the convention as to breach the rule of law.[335] It is by no

---

326 UNCITRAL *Digest of Case Law on the United Nations Convention on the International Sale of Goods* (2012).

327 See <http://www.uncitral.org>; UNCITRAL *Digest of Case Law on the United Nations Convention on the International Sale of Goods* (2012).

328 See <http://www.cisgac.com>.

329 [1993] AC 593, HL. See also *Stag Line Ltd v Foscolo Mango & Co Ltd* [1932] AC 328, 350, HL; *Serena Navigation Ltd v Dera Commercial Establishment Standard Chartered Plc* [2008] EWHC 1036 (Comm) at [9]: '[W]hat the court is seeking to do is to deduce the ordinary meaning of the words used . . . by reference to broad and generally acceptable principles of construction rather than a rigid domestic approach, and without English law preconceptions: . . . and consistently with the evident object and purpose of the Convention or international rule in question, as to which regard may be had to travaux préparatoires . . . which, however, will only be determinative of the question of construction if they amount to a "*bull's-eye*".'

330 On the interpretation of international conventions, see M Sturley, 'International Uniform Laws: The Influence of Domestic Law in Conflicts of Interpretation' (1987) 4 Virginia Journal of International Law 729 (using as a case study the Hague Rules on carriers' liability); R Munday, 'The Uniform Interpretation of International Conventions' (1978) 27 ICLQ 450. See also *Baltic Insurance Corp v Jordan Grand Prix Ltd* [1999] 2 AC 127, 134, HL: '[T]he primary search must be for an objective and independent interpretation capable of accommodating the needs of a diversity of legal systems' (Lord Slynn on the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968).

331 [1980] 2 All ER 696, HL.

332 See the Carriage by Air Act 1961, Sch 1.

333 See J Honnold, *Documentary History of the Uniform Law for International Sales* (1989). For the care that needs to be taken by the court or tribunal engaged in this process, see A Janssen and O Meyer (eds), *CISG Methodology* (2009) (Gruber).

334 For discussions of dynamic interpretation, see A Janssen and O Meyer (eds), *CISG Methodology* (2009) (essays by Magnus, Eiselen and Gruber).

335 Some decisions on fundamental breach (see para 12.04 et seq) come close to a rewriting of Art 25 along the lines that the legislator should have adopted in the first place.

means just on the common law side that concessions will have to be made. The exhortation in Article 7(1) to treat the CISG as an international text will require in practice deference to judicial opinions from other countries, even though no mention is made in Article 7 of the authority of decided cases.[336] It should, however, put a premium on the judgments of courts that give a helpful narrative of the dispute and a reconciliation of the authorities,[337] which is a particular characteristic of common law judgments. It is not at all unlikely that an informal doctrine of precedent, or something by way of the persuasive authority of a 'jurisprudence constante', will emerge.[338] Whilst Article 7(1) does not as such sanction the introduction of a system of binding precedent, it should persuade courts that a departure from a settled approach in other jurisdictions ought not to be lightly undertaken. In taking account of decisions in other jurisdictions, sensitive questions may present themselves concerning the quality of different national courts and arbitral tribunals, with a tendency to accord the greatest weight to jurisdictions where judicial decision-making is of a high standard and where the CISG is regularly the subject of decision. Even though a hierarchy of courts within a national jurisdiction may lead to higher courts in that jurisdiction having either a greater persuasive influence or even the power to bind lower courts, it would be better if a foreign court or tribunal did not take account of such considerations. Internal systems of authority should not impose themselves on transnational uniform law. Given the lack of machinery for legislative amendment, the importance of case law in understanding international sales law will be all the greater. Courts and tribunals may also find themselves at times in the impossible position of having to choose between established bad law and novel good law. This pits the spirit of internationalism and continuity against the suppression of bad law. A belief that critical assessment will over time purify the law should lead even in difficult cases to a choice of good law over bad in these circumstances.

Good faith The second part of Article 7(1), dealing with good faith, is noteworthy for what it does *not* say. It does not impose on the contracting parties a general duty of good faith and fair dealing in the formation and performance of contracts, which was objected to by certain representatives in the legislative process.[339] Rather, it is a compromise reached **10.41**

[336] Although no provision is made for it by the machinery of the CISG, UNCITRAL deals with national correspondents who send in details of significant national decisions. These are published in an abbreviated and cross-referenced form (though latterly case summaries have become increasingly detailed) in collections published under the label of CLOUT. It is a most useful service, but is a long way from the compulsion that the establishment of an international commercial court might bring to bear on the interpretation of the CISG. See also MJ Bonell and F Liguori, 'The U.N. Convention on the International Sale of Goods: A Critical Analysis of Current International Case Law—1997 (Part 1) [1997] (2) Uniform Law Review 385; M Karollus, 'Judicial Interpretation and Application of the CISG in Germany 1988–1994' [1995] Cornell Review of the Convention on Contracts for the International Sale of Goods 51.

[337] In stark contrast are decisions of the French Cour de cassation, which are not designed to convince and explain. One commentator astutely calls for French courts to give more fully reasoned opinions if their views are to carry weight in other jurisdictions: C Witz, 'Droit uniforme de la vente internationale de marchandises' D.1998, Somm. 307.

[338] See generally A Janssen and O Meyer (eds), *CISG Methodology* (2009) (Di Matteo).

[339] 'As its history shows, the origin of [good faith] lies in the reference to good commercial practice and it was originally intended to govern not just the interpretation of the Convention's rules by courts, but the parties' conduct. But such opinions, which are influenced not least of all by the German understanding of the principle of *Treu und Glauben* and its bearing on legal texts as well as individual contracts, cannot be regarded as having prevailed': from the second edition (at p 95) of I Schwenzer (ed), *Schlechtriem and Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)*. The current edition is very clear that the good faith standard in Art 7(1) cannot be applied to individual contracts: 3rd edn, 2010, p 128 (Schwenzer/Hachem).

after objections were made in some quarters to the introduction of a general duty. The application of this provision is something of a mystery. One view is that it is as good as the incorporation of a good faith standard in the contract itself. Parties derive their rights and duties from the contract in accordance with the CISG; the CISG is to be interpreted in accordance with good faith; therefore the parties' rights and duties are subject to good faith.[340] It can fairly be predicted that some national courts will interpret this provision more broadly than others. Some courts might be prepared to spell out a general duty of good faith from the remaining provisions of the CISG pursuant to Article 7(2).[341] There are difficulties of interpretation here. Given that an explicit standard of good faith and fair dealing was rejected by the conference delegates, does this mean that the standard itself was rejected as a general principle or only that express mention of the standard was rejected? The latter approach is likely to gain the ascendancy given the deep commitment of a number of legal systems to a general duty of good faith. A further point is that, if the Unidroit Principles have a legitimate part to play in filling gaps in the coverage of the CISG, they do have a general duty of good faith and fair dealing in Article 1.7.[342] It is arguable that there is no conflict between the CISG, which is silent on the matter of a general duty, and the Unidroit Principles, which do contain such a duty.

10.42 **Excluding good faith** If there is a good faith standard applicable to the interpretation of the contract, may it be excluded? Article 6 of the CISG allows the parties to 'derogate from or vary the effect of any of its provisions'. It is unlikely that the parties could contractually depart from the rules of interpretation laid down for courts in Article 7, which is an expedient that one would not expect to occur to them.[343] Interpretation rules are addressed to tribunals and not to contracting parties. For that reason, and notwithstanding the general wording of Article 6 in allowing parties to derogate from any of the provisions of the CISG, Article 7 should not be open to variation by the parties. Article 6 cannot be read literally. The parties are hardly at liberty, for example, to derogate from the Secretary-General's role as depositary for the purposes of the CISG.[344]

H. Filling Gaps in the Coverage of the CISG

10.43 **General** According to Article 7(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

[340] See the earlier, stronger statement in the first English language edition of the work by Professor Schlechtriem and other German contributors that the reference to good faith cannot be confined to express provisions of the CISG: *Commentary on the UN Convention on the International Sale of Goods* (1st edn, 1998), p 63.

[341] For the view that this is imperative, see *Commentary on the UN Convention on the International Sale of Goods* (1st edn, 1998), p 95.

[342] This is also true of the draft Common European Sales Law, Annex I, Art 2.

[343] The following example might possibly be an attempt, of doubtful efficacy, to draft out of the reference to national law, via the private international rules of the forum, in Art 7(2): 'The agreement shall be governed exclusively by the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) to the exclusion of any rules on the choice of law, which would refer the subject matter to another jurisdiction.'

[344] Under Art 89.

the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.[345]

A gap in the coverage of the CISG may be a subject that is omitted altogether, yet plainly falls within the province of the law of sale as defined by the CISG, or it may be a hole in the partly explicit coverage of the subject by the CISG. Examples of the former are quite hard to find. One possibility, discussed below, is penalty clauses. A prominent example of a gap in the sense of part coverage is the subject of interest. Article 78 provides that a right to interest arises in the event of non-payment of the price or other sum in arrears, but it does not say when such interest begins to run, what the rate is and whether it is simple or compounded. This issue has produced as much litigation as any under the Convention.[346] The Unidroit Principles state that interest runs from the time payment is due. The rate is 'the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place of payment'.[347] One may expect a tribunal applying the CISG to move seamlessly to Article 7.4.9 for inspiration without considering the applicability of the Unidroit Principles at great, or even any, length.

Example Another example of partial coverage is Article 25 on fundamental breach, which, though not as barebones as Article 78, is somewhat lacking in detail. It tells us that a breach is fundamental if it substantially deprives the injured party of what he was entitled to expect under the contract, provided that the breaching party either foresaw or should reasonably have foreseen this substantial deprivation. Article 7.3.1 of the Unidroit Principles introduces further criteria, such as intentional or reckless breach; strict compliance being of the essence of the contract; the threat posed to future performance by the present breach; and any disproportionate loss caused to the breaching party compared to the benefit of the injured party arising out of termination. **10.44**

Discovering general principles How then are general principles in the CISG to be discovered with the aid of Article 7(2)? The first part of that provision highlights a point of interpretation more familiar to a civil lawyer than to a common lawyer. If the code is, as it must be, comprehensive, then the answer to a problem will be found somewhere in the code. Common lawyers approach statutes, even codifying statutes like the Sale of Goods Act 1979, in a different way. As supreme as statute is, as a source of law, it still derogates from the common law which in principle is comprehensive. The Sale of Goods Act, indeed, explicitly directs a reference to the common law unless it is inconsistent with the text of the Act.[348] For that reason, and also because it is a special statute, it is not a true code. To find the general principles in a code requires its various provisions to be subjected to an inductive process that sees them as particular expressions of a more general principle.[349] From the general principle thus discovered, a particular application can be drawn to deal with a novel **10.45**

[345] This provision excited controversy in the legislative process: U Magnus, 'General Principles of UN-Sales Law' (1997) 3 International Trade and Business Law Annual 33. On the gap-filling process, see M Rosenberg, 'The Vienna Convention: Uniformity in Interpretation for Gap-Filling—an Analysis and Application' [1992] Australian Business Law Review 442; J Hellner, 'Gap-Filling by Analogy' in *Studies in International Law: Festskrift til Lars Hjerner* (1990), available at <http://www.cisgw3.law.pace.edu>).

[346] See the discussion in ch 12.

[347] Art 7.4.9.

[348] S 62(2).

[349] For examples of general principles, see U Magnus, 'General Principles of UN-Sales Law' (1997) 3 International Trade and Business Law Annual 33.

issue not explicitly dealt with in the code. The text of Article 7(2) demands a search for the principles upon which the CISG is 'based':[350] an incidental reference to a principle may not be enough. Two approaches in particular seem to be apt. First, particular rules might be seen as incomplete expressions of a more general rule and thus as sanctioning a broad interpretation of that general rule. For example, the restitution provisions,[351] applicable when a contract is avoided, provide for the concurrent return of goods and price. They express no such rule of concurrency for benefits derived from the goods and interest on the price. In the eyes of a common lawyer, this might justify reading the CISG as implicitly excluding concurrency in the latter case. There is little doubt, however, that the bulk of international opinion, recognizing the necessary brevity in the way the CISG is drafted, would prefer to extend the rule of concurrency to benefits and interest. The second approach involves standing back from the CISG, and inferring the existence of principles that are broader than particular rules that may be seen as inspired by them, so as to fill gaps with those general principles. For example, various rules in the CISG might be seen as derived from a principle of estoppel or something similar.[352] A buyer failing to give notice of defects within a reasonable time is thereafter precluded from claiming against the seller for those defects.[353] An offeror who fails to object to certain additional terms in a purported acceptance is bound by the terms of that acceptance,[354] and a contracting party is precluded from relying on the other party's failure to perform when it was the former party's act or omission that caused that failure.[355]

10.46 **Examples of general principles** The application of Article 7(2) to discern general principles demands an assiduous study and mastery of the text of the CISG. As stated earlier,[356] this is not an area of strength demonstrated by courts and tribunals. The academic literature has also not been entirely even when performing this task, as attempts have been made resulting in the rounding up of various principles of widely varying generality and significance. That said, estoppel appears to bulk large,[357] as well as reasonable reliance,[358] self-help,[359] the avoidance of economic waste and pointless expenditure,[360] the parties' autonomy in defining their own contractual entitlements,[361] compensation for loss caused

[350] U Magnus, 'General Principles of UN-Sales Law' (1997) 3 International Trade and Business Law Annual 33, 38, distinguishing the English text from the weaker French version ('*dont elle s'inspire*') and noting that English was the language of the preliminary drafts and deliberations in Vienna.

[351] Arts 81, 84.

[352] *Non venire contra factum proprium.*

[353] Art 39.

[354] Art 19(2).

[355] See also Art 80.

[356] See para 10.39.

[357] See Arts 8(2), 9(1), 16(2), 18(3) and 39(1); Tribunale di Padova, 25 February 2004 (Italy), translated at <http://cisgw3.law.pace.edu/cases/040225i3>; Tribunal of International Commercial Arbitration, 27 July 1999 (Russia), translated at <http://cisgw3.law.pace.edu/cases/990727r1.html>; Oberlandesgericht Karlsruhe, 25 June 1997(Germany), translated at <http://cisgw3.law.pace.edu/cases/970625g1.html>; Internationales Schiedsgericht der Bundeskammer-Wien SH-4318, 15 June 1994 (Austria), translated at <http://cisgw3.law.pace.edu/cases/940615a4.html>.

[358] See the above provisions supporting estoppel.

[359] See Arts 47, 50, 63 and 65.

[360] See Arts 25, 37, 48 and 85–88.This accords also with the *favor contractus* principle.

[361] See Art 6; Polimeles Protodikio Athinon, Decision 4505/2009 (Greece), translated at <http://cisgw3.law.pace.edu/cases/094505gr.html>; Foreign Trade Court of Arbitration, 9 December 2002 (Serbia), translated at <http://cisgw3.law.pace.edu/cases/021209sb.html>.

by the other party,[362] and the binding force of contract.[363]A particular case is presented by good faith, which ought to be readily inferable from the CISG as a whole[364] but for the drafting history showing a clear intention that an express duty of good faith on the parties ought not to be introduced into the text of the convention. If there is a general principle of good faith underpinning the CISG,[365] may it be excluded by the contracting parties? The Unidroit Principles contain a general contractual duty of good faith and fair dealing and plainly disallow any attempt to contract out of it.[366] To deny the parties the right to do this under the CISG would fly in the face of Article 6. A more difficult question would be whether mandatory rules of good faith in national law might be treated as going to the validity of a clause of this kind, so as, in accordance with Article 4, to override the parties' exclusion of good faith by means of national law. If compliance with a general principle of good faith were treated as an exceptional example of validity retained by the CISG, and if Article 6 nevertheless allowed contracting out, the answer should be that national law would have no role to play. The contrary approach would allow national law to make deep inroads into the area covered by the CISG and would imperil uniformity.

Penalty clauses A useful example for the playing out of general principles is the subject of penalty clauses, already discussed in connection with validity.[367] The question now concerns their permissibility under the CISG, which has nothing explicit to say about them, in cases where they do not give rise to validity issues. The first question is whether penalty clauses play no part in the law of sale but are rather part of general contract law.[368] If they are, then they will be dealt with in terms of the applicable law and not under the CISG. No confident answer can be given to this question because there is no uniform text on general **10.47**

[362] See Arts 74 and 78; Tribunale di Padova, 25 February 2004 (Italy), translated at <http://cisgw3.law.pace.edu/cases/040225i3.html>; Oberster Gerichtshof, 9 March 2000 (Austria), translated at<http://cisgw3.law.pace.edu/cases/000309a3.html> (full compensation).

[363] See Arts 46(1) and 62. This brings in also the so-called *favor contractus* principle, that is, the intrinsic bias towards upholding and maintaining agreements as binding contracts: see Oberster Gerichtshof, 7 September 2000 (Austria), translated at <http://cisgw3.law.pace.edu/cases/000907a3.html>; Bundesgericht, 28 January 1998 (Switzerland), translated at <http://cisgw3.law.pace.edu/cases/981028s1.html>.

[364] Good faith as a duty resting on the parties may for example be seen, without a demonstration of how it has emerged, in Oberlandesgericht München,14 January 2009 (Germany), translated at <http://cisgw3.law.pace.edu/cases/090114g1.html>; Cour d'appel de Grenoble, 22 February 1995 (France), translated at <http://cisgw3.law.pace.edu/cases/950222f1.html>. In other cases, courts are not very explicit about the distinction between Art 7(1) and an implied duty of good faith on the parties via Art 7(2): see, eg Oberlandesgericht Celle, 24 July 2009 (Germany), translated at <http://cisgw3.law.pace.edu/cases/090724g1.html>; Audiencia Provincial de Navarra, 27 December 2007 (Spain), translated at <http://cisgw3.law.pace.edu/cases/071227s4.html>.

[365] See, eg Art 40.

[366] Art 1.7(2). See also the draft Common European Sales Law, Annex I, art 2.

[367] See para 10.32.

[368] For the view that they are not dealt with in the CISG, see Nira District Court, 29 June 2006 (Slovakia), translated at <http://cisgw3.law.pace.edu/cases/060629k1.html>; China International Economic and Trade Arbitration Commission (CIETAC), 20 September 2006, translated at <http://cisgw3.law.pace.edu/cases/060920c1.html>; Foreign Trade Court of Arbitration, 30 October 2006 (Serbia), translated at <http://cisgw3.law.pace.edu/cases/061030sb.html>; Hof van Beroep,18 June 1996 (Belgium), translated at <http://cisgw3.law.pace.edu/cases/960618b1.html>. Other cases have declined to look for general principles under Art 7(2), including the Tribunal of International Commercial Arbitration of the Russian Federation Chamber of Commerce on numerous occasions, eg 13 January 2006, 1 March 2006 and 13 April 2006, translated at <http://cisgw3.law.pace.edu/cases/060113r1.html>, <http://cisgw3.law.pace.edu/cases/060301r1.html>, and <http://cisgw3.law.pace.edu/cases/060413r1.html>; Oberlandesgericht München, 8 February 1995 (Germany),translated at <http://cisgw3.law.pace.edu/cases/920414g1.html>. The national law was simply applied by the Rechtbank van Koophandel Hasselt, 21 January 1997 (Belgium), translated at <http://cisgw3.law.pace.edu/cases/970121b1.html>. Penalties were said in one case not to be inconsistent with the CISG:

contract law that can be compared with the CISG. Moreover, different legal systems will define the border between sale and contract law in different ways. Some of the damages rules in the CISG are specifically relevant to the parties as buyer and seller but others are couched in general terms and could just as easily be located in a uniform law on contract. There is a good argument that penalty clauses are impliedly covered by the CISG as part of the law of sale which in Article 4 is defined in broad terms. It is, moreover, for the CISG itself to determine the extent of its coverage and definition of sale matters. On the assumption that penalty clauses are impliedly covered, a search is needed under Article 7(2) to discover the relevant general principles. The starting point should be Article 74, the general damages provision. This states that damages may be awarded in respect of loss both caused by the breach and foreseeable by the party in breach at the contract date. The causation element could be seen as a particular manifestation of an unstated broader principle that the goal of damages is to compensate for loss and not to enrich.[369] From this broad principle alone, one could infer the particular rule that penalties should be disallowed because they punish rather than compensate.

10.48 **Contrary reasoning** Yet Article 6[370] permits contracting parties to derogate from one or more provisions of the CISG as well as the whole Convention. It does not demand that they do so explicitly. It may therefore be seen as promoting freedom of contract. By this reasoning, if the parties have provided for a penalty, then this should be respected by the tribunal. In addition, it might be argued that freedom of contract is the paramount principle in the CISG that prevails over all others in the event of a conflict. Furthermore, it is expressly recognized in Article 6. The CISG applies only to commercial parties who operate at an international level and does not deal with issues arising out of inequality of bargaining power. Nevertheless, if a clause in a contract operates as a penalty, this does not mean that the parties *intended* it to have this effect, in the sense that they consciously departed from the compensation principle. If they did not positively intend to depart from that principle, it might then be said that they were not intending to exercise their rights under Article 6 to derogate from Article 74 and its expression of the compensation principle. Different opinions may therefore be entertained about the legitimacy of penalty clauses under the CISG, but on balance the case for supporting them under the CISG is a powerful one. They provide a degree of certainty to the parties and may actively expedite settlements and avoid the unnecessary incurring of legal costs. Nevertheless, it seems fair to say that the reported cases dealing with penalty clauses are bereft of any attempt to handle the CISG in an intelligent way as a source of general principle.

10.49 **Role of Unidroit Principles** Shortage of time and the need for compromise meant that the CISG suffers from brevity, and sometimes vagueness, of expression and a number of omissions. It is here that the Unidroit Principles, assuming the legitimacy of their use, might assist tribunals to fill gaps in the CISG[371] despite the lack of any particular or general mention of

see Tribunal of International Commercial Arbitration, No 3 of 1996 (Russia), translated at <http://cisgw3.law.pace.edu/ cases/970513r1.html>. In another case, they were said to be supported by the practice stated in the Unidroit Principles: see Tribunal of International Commercial Arbitration, No 229 of 1996 (Russia), translated at <http://cisgw3.law.pace.edu/cases/ 970605r1.html>.

369 This would tend against the award of restitutionary (or gain-based) damages.

370 Discussed at para 10.51 et seq.

371 See A Garro, 'The Gap-Filling Role of the Unidroit Principles in International Sales Law: Some Comments on the Interplay between the Principles and the CISG' (1995) 69 Tulane Law Review 1149;

them[372] in the text of Article 7(2).[373] Except where they would contradict the CISG, the Unidroit Principles may stimulate the search for unstated general principles in the CISG. There is a clear need for them: the CISG can be changed only by means of a diplomatic conference. Nothing in the CISG corresponds to the continuing editorial work provided for in the American Uniform Commercial Code. The Unidroit Principles are not the product of a diplomatic conference and may be modified with relative ease in the future. Moreover, they are drafted in much the same way as the Uniform Commercial Code with hypothetical illustrations and comment attached to each Article. It is possible that tribunals may bring some of their provisions in under Article 9(2) of the CISG as 'widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade'. Nevertheless, whilst this may be an appropriate thing to do for provisions dealing with the manner and method of performance, such as the means by which payment must be made, general contract rules hardly qualify as usages, which are trade practices and understandings. The Unidroit Principles may also contradict the CISG in a way that is not obvious. The test for a fundamental breach in Article 25 of the CISG is clearly an effect-based test and only an effect-based test, but a reference to the Unidroit Principles would permit a court to take account of an obligation being 'of essence under the contract' (*sic*).[374] Furthermore, the architects of the Unidroit Principles have made it very clear that they have favoured the better rule over the more widespread rule in the event of a conflict,[375] which makes it harder still to present the rules contained in the Unidroit Principles, at least in their totality, as general usage. Returning to the issue of penalties, the Unidroit Principles state that the injured party is entitled to 'full compensation'.[376] They explicitly allow damages for physical suffering and emotional distress.[377] Comment 3 to Article 7.4.2 is headed 'Damages must not enrich the aggrieved party'. Furthermore, as stated above, Article 7.4.13(2) disallows penalty clauses. Although, if they are invoked, the Unidroit Principles cannot be allowed to contradict the CISG, the position they adopt may be helpful in providing for a fuller discussion on this subject in the CISG, without departing from the conclusion that would otherwise be reached.

F Ferrari, 'Defining the Sphere of Application of the 1994 "Unidroit Principles of International Commercial Contracts" ' (1995) 69 Tulane Law Review 1225; MJ Bonell, 'The Unidroit Principles of International Commercial Contracts: Why? What? How?' (1995) 69 Tulane Law Review 1121; id, 'The Unidroit Principles of International Commercial Contracts and CISG—Alternatives or Complementary Instruments?' [1996] (1) Uniform Law Review 26. For further detail on the Unidroit Principles, see MJ Bonell, 'The Unidroit Principles of International Commercial Contracts and the Principles of European Contract Law: Similar Rules for the Same Purposes?' [1996] (2) Uniform Law Review 229; id, 'The Unidroit Principles in Practice: The Experience of the First Two Years' [1997] (1) Uniform Law Review 30; id, 'Unification of Law by Non-Legislative Means: The Unidroit Principles for International Commercial Contracts' (1992) 40 American Journal of Comparative Law 617; J Ziegel, 'The UNIDROIT Contract Principles, CISG and National Law' (a 1996 seminar paper available at <http://cisgw3.law.pace.edu>).

[372] Now in their 2010 edition, they date from 1994 and were re-edited with very minor changes to the existing text, apart from additions, in 2004.

[373] Indeed, Art 7(2) requires general principles to underpin the CISG and not be brought in from the outside: U Magnus, 'General Principles of UN-Sales Law' (1997) 3 International Trade and Business Law Annual 33, 39. Because of the correspondence between the provisions of the CISG and of the Unidroit Principles, the same author (at 54–55) favours bringing in the latter under Art 7(2). It may be, however, that the Principles have a more legitimate role to play in the interpretation of the CISG under Art 7(1) unless they are used to amplify a general principle divined in the CISG under Art 7(2).

[374] Art 7.4.1(2)(b).

[375] Introduction to the first edition (1994).

[376] Art 7.4.2 (but this is subject to the foreseeability rule in Art 7.4.4).

[377] Art 7.4.2(2).

10.50 Private international law Finally, in the absence of a ruling general principle to determine a matter covered by the CISG but not expressly settled by it, Article 7(2) directs a reference to the rules of private international law.[378] With a modicum of creative energy, as seen above,[379] a tribunal ought not to have to adopt this expedient but should find the answer to a problem within the CISG itself. A readiness to turn to rules of private international law in this way is destructive of uniformity. Suppose, on the subject of penalty clauses, that a national law is brought in under Article 7(2). If that *lex causae* is English law, a clause will be classified as a penalty at the contract date, taking account of the range of possible outcomes produced by a breach. If the *lex causae* is French law, then it will be struck down only if the judge in his discretion finds the amount manifestly excessive.[380] There is a significant difference between these two approaches. If the resolution of the penalty clause and similar problems is kept within the CISG, this can only advance certainty and reinforce business confidence. And if this process can be assisted by the Unidroit Principles, then so much the better. There is no good reason why they should not assist the development of the CISG any less than legal writing and judicial decisions.

I. Excluding and Varying the CISG

10.51 Express and implied exclusion Unlike the ULIS,[381] the CISG applies automatically when Article 1 is satisfied. The parties do not opt into it. It may therefore catch some contracting parties and their advisers by surprise. Nevertheless, Article 6 of the CISG, besides allowing the parties to vary or modify particular provisions of the CISG, also allows for the exclusion of the CISG altogether. This possibility has been anticipated by the leading oil companies and the major trading associations sponsoring standard form contracts governed by English law.[382] They exclude all conventions, even the predecessors of the CISG, namely the 1964 Hague Conventions that produced the ULIS and the ULF. New law introduces uncertainty where previously there existed a tolerable measure of certainty. In addition, the CISG is tolerant of breaches of contract to a degree that might not suit the harsher environment of international commodity sales.[383] The CISG rules on risk, moreover, could have a considerable upsetting effect on the transfer of risk in both FOB and CIF commodities contracts.[384] The argument that sales on named standard terms, such as CIF and FOB, are impliedly excluded from the risk provisions may ultimately prove to be correct, but between the uncertainty and the positive proof of such exclusion falls the shadow of doubt and concern. Apart from unequivocal and express exclusions of the CISG by name, by the major trading associations and oil companies, it is a nice question what parties will have to do to exclude it.[385] The

[378] See the forum's rules. This has been the expedient adopted in some cases dealing with penalty clauses: see ICC Court of Arbitration (No 7197 of 1992), available at <http://cisgw3.law.pace.edu/ cases/927197i1.html>; Hof Arnhem, 22 May 1995 (Netherlands), translated at <http://cisgw3.law.pace.edu/cases/950822n1.html>.

[379] See para 10.46.

[380] C civ Art 1152.

[381] As adopted in the UK.

[382] For example, GAFTA, FOSFA, and Refined Sugar Association, as well as the major oil companies.

[383] See Art 25 on fundamental breach and ch 12.

[384] See ch 8.

[385] For an extensive discussion of Art 6, see F Ferrari, 'CISG Rules on Exclusion and Derogation: Article 6', in F Ferrari, H Flechtner, and R Brand, *The Draft UNCITRAL Digest* (2004).

problem lies with implied exclusions.[386] Some forum States are bound to be more exacting than others in matters of form; they might demand an explicit written exclusion. The ULIS, in allowing the parties freedom to exclude the Convention in whole or in part, stated that such exclusion could be express or implied.[387] An attempt to introduce similar language into the CISG failed.[388] Although this raises some doubts about implied exclusions, they are nevertheless permissible. The ULIS language of implied or express exclusion was excised from the CISG in order to discourage courts from being too prepared to infer an intention to exclude the CISG,[389] and not to rule out implied exclusions altogether.[390]

Exclusion and choice of law clauses An issue that has already presented itself is the meaning of choice of law clauses. Suppose that a contract provides that English law shall be the applicable law. The forum State should see in this choice a clear exclusion of the CISG because the United Kingdom is not a Contracting State. If the United Kingdom should subsequently become a Contracting State, this should not affect the interpretation of the earlier choice of law provision. But suppose that the contract calls for the application of German law. Do the parties mean German domestic law only, or German law in its totality, which includes the CISG? The case law has hardened in support of the view that choice of law clauses in favour of the law of a Convention State do not exclude the CISG.[391] This cannot be correct as a bald proposition for ultimately, the issue turns upon whether the parties have sufficiently clearly expressed their intention to exclude the CISG under Article 6, and intention is a creature of circumstance. Statements in some of the cases expressed in universal terms that clauses of a particular type do not exclude the CISG are therefore to be deprecated. Moreover, since the issue depends upon party intention, judicial statements that a choice of the national law of a Contracting State cannot exclude the CISG, because the CISG is part of the internal law of that State, are missing the point. Taking the case of parties resident in different Contracting States, where in the absence of the clause the courts of Contracting States would have applied the CISG, it has to be asked what the parties could have meant by incorporating the choice of law clause if they did not mean the contract to be governed by the chosen law as it applies to domestic contracts. The purpose of the choice of law clause might be to designate German law without the CISG as applicable to matters falling out of the CISG or to matters not explicitly resolved in the CISG that are not susceptible to resolution according to the general principles on which the CISG is based. It is also possible that the contracting parties had in mind the prospect of enforcement of the contract in the courts of a non-Contracting State, **10.52**

386 A proposal by the Government of Pakistan that exclusions of the CISG should have to be express was rejected by the First Committee: at its fourth meeting in Vienna on 13 March 1980: J Honnold, *Documentary History of the Uniform Law for International Sales* (1989), pp 469–71.

387 Art 3.

388 See J Honnold, *Documentary History of the Uniform Law for International Sales* (1989), pp 468–71 for the rejection of proposals that the exclusion might be express or implied, the Chairman noting that the present text supported both types of exclusion.

389 Secretariat Commentary on Article 4 of the 1978 Draft, para 2.

390 A number of decisions, mainly American, have wrongly demanded that the exclusion of the CISG be express: eg, *Travelers Property Casualty Company of America v Saint-Gobain Technical Fabrics Canada Ltd*) Federal DC (Minnesota), 31 January 2007 (US), available at <http://cisgw3.law.pace.edu/cases/070131u1.html>.

391 See C Witz, 'Droit uniforme de la vente internationale de marchandises' D.1998, Somm. 307, 308 (commenting on a decision of the German Bundesgerichtshof of 23 July 1997), who observes the emergence of a dominant strain of case law to this effect. But see F Ferrari, 'CISG Rules on Exclusion and Derogation: Article 6', in F Ferrari, H Flechtner, and R Brand, *The Draft UNCITRAL Digest* (2004), p 124, noting that the cases are contradictory.

in which case the choice of law clause would serve the purpose of showing that the law of the forum State was not to apply. The forum in that non-Contracting State would of course not be bound by the CISG and would interpret the choice of law clause in order to find its way to the relevant portion of (in this case) German law. It is possible too that the express choice of law clause reposed in the contract form used by the contracting parties, without any thought being given by them to the part it was supposed to play, while they in the course of discussions or negotiations got on with the real business of constructing a working commercial agreement. It might have lingered in that contract form for a number of years. Some of the earlier cases on Article 6 concerned standard forms that predated the CISG. For the purpose of discerning party intention, the longer the CISG is in force the more contracting parties should be taken to know of its existence. This points to something more explicit than a choice simply of, say, German law if the contracting parties wish to exclude the CISG.[392] There is above all the conclusive argument that, if parties want to declare their intention to exclude the CISG, the onus is on them to demonstrate that intention clearly.[393] If they plead their case, without reference to the CISG, the question of their intention shades into the companion question whether the forum will take judicial notice of the CISG on the basis of the *jura novit curia* principle. A forum acknowledging this principle might conclude that the intention of the parties not to have their contract governed by the CISG is inconclusive.[394] The parallel behaviour of litigants conducting their affairs without reference to the CISG may fall short of the agreement necessary to exclude it[395] though this issue may be confused by local procedural law preventing amendments at a late stage of the proceedings. No court or tribunal should conclude that the CISG has been impliedly excluded if there is real doubt about the meaning of the parties.[396]

[392] A clause stipulating that 'Australian law applicable under exclusion of UNCITRAL law' was held to exclude the CISG in *Olivaylle Pty Ltd v Flottweg GmbH & Co KGAA*, Federal Court, 2 May 2009 (Australia), available at <http://cisgw3.law.pace.edu/cases/090520a2.html>. The following clause, 'All claims are subject to Austrian law, excluding the rules on the conflict of laws, and the CISG', was held to be sufficient to exclude the CISG in Oberster Gerichtshof, 2 April 2009 (Austria), translated at <http://cisgw3.law.pace.edu/cases/090402a3.html>. The placing of the comma after the reference to the conflict of laws was a mistake. (The seller had argued that it was 'generally known that people do rarely know how to correctly use commas'.)

[393] The exclusion of the CISG is based on the joint intention of the parties. It is clearly wrong, as one court did, to base exclusion on the objection to the CISG of one of the contracting parties: Shanghai People's Court, 17 May 2007 (China), translated at <http://cisgw3.law.pace.edu/cases/070517c1.html>.

[394] On tacit exclusion of the CISG, see Oberlandesgericht Innsbruck, 18 December 2007 (Austria), translated at <http://cisgw3.law.pace.edu/cases/071218a3.html>.

[395] Although the parties argued on the basis of domestic German law in their memoranda, this was held not to be a waiver of the CISG in Landgericht Bamberg, 23 October 2006 (Germany), translated at <http://cisgw3.law.pace.edu/cases/061023g1.html>. See also Landgericht Saarbrücken, 1 June 2004 (Germany), translated at <http://cisgw3.law.pace.edu/cases/040601g1.html>; Oberlandesgericht Hamm, 9 June 1995 (Germany), translated at <http://cisgw3.law.pace.edu/cases/950609g1.html>. But a tacit waiver was found in Tribunal Supremo, Sala de lo Civil (first section), 24 February 2006 (Spain (CLOUT No 733), so it was too late for the seller to raise the applicability of the CISG at the final stage in the judicial proceedings. To the same effect, see Corte Suprema, 22 September 2008 (Chile), summarized at <http://cisgw3.law.pace.edu/cases/080922ch.html>.

[396] Hence, the decision is defensible that applied the CISG notwithstanding a clause expressly excluding ULIS and ULF. The parties might have had objections to certain of the provisions in the uniform laws, and not to uniform law as such: Oberlandesgericht München, 19 October 2006 (Germany), translated at <http://cisgw3.law.pace.edu/cases/061019g1.html>. Likewise, where the parties' choice of law provision subjected the contract to 'the laws and regulation of the International Chamber of Commerce of Paris, France', this was not enough to amount to an implied exclusion of the CISG: Tribunale de Padova, 11 January 2005 (Italy), translated at <http://cisgw3.law.pace.edu/cases/050111i3.html> (where the court somewhat confuses this reason with the invalidity of the choice of law provision under the Rome Convention).

Opting directly into the CISG In an earlier discussion, the conclusion was reached that conventions and other instruments allowing the parties to choose the applicable law of a State did not permit the direct choice of the Unidroit Principles of International Commercial Contracts, whereas legislation dealing with arbitration was likely to permit this.[397] The question now is whether contracting parties may opt directly into the CISG and the response has to be the same in the case of the CISG as a free-standing instrument. For private international law rules supporting autonomy, contracting parties will be able to subject their dealings to the CISG by the simple expedient of selecting as the applicable law the law of a Contracting State. Opting in was explicitly allowed under Article 4 of the Uniform Law on the International Sale of Goods but a proposal to this same effect for the CISG was rejected.[398] There remains, nevertheless, the possibility that an attempt to have the CISG apply directly to a contract of sale might survive under national law, or some national laws, as evincing in shorthand terms an exclusion of non-mandatory national rules on sale coupled with their supersession by the corresponding rules in the CISG itself. This seems a more elegant than a practical way for contracting parties to proceed if they are able instead to select as an applicable law the law of a State that is party to the CISG. A related question, involving a type of opting in, is presented by the provisions of Part 1 of the Convention. Article 6, allowing the parties full freedom to vary or exclude the CISG, is not to be taken at face value. Contracting parties may not amend Article 1 so as to enlarge the operation of the CISG. This would be opting in by another name. A slightly more difficult question, because the actions of the contracting parties are a little less extreme, is posed by Articles 2–5. Could for example contracting parties subject their contract for the sale of a boat or of electricity to the CISG? Or deem a work and materials contract to be governed by the CISG? Or agree that the seller should be liable for personal injuries notwithstanding Article 5? In the case of Article 5, they have already concluded a contract of sale governed by the CISG, whereas, in the other cases the parties' efforts fail *in limine* because their contract is not a contract for the sale of goods as understood in Article 1. In all cases, nevertheless, the contracting parties are interfering with fundamental rules of the CISG's application that stand outside the zone accorded by Article 6 to party autonomy. In a similar way, the parties should not be at liberty to dispense with the latitude given by Article 28 of the CISG to courts that are unwilling to order direct performance of the contract. The contracting parties, finally, are expressly prevented from opting out of an Article 96 declaration concerning the rule of informality.[399] **10.53**

J. Reservations

Reservations and declarations According to Article 98 of the CISG: 'No reservations are permitted except those expressly authorized in this Convention.' The CISG nowhere else deals with 'reservations', but it does allow in a number of instances States to make 'declarations', which appear to serve the same purpose as reservations.[400] The various permissible **10.54**

[397] Paras 10.36–38.

[398] By the First Committee at its fourth meeting in Vienna on 13 March 1980: J Honnold, *Documentary History of the Uniform Law for International Sales* (1989), pp 473–74.

[399] See Art 12.

[400] The United Nations Convention on the Law of Treaties (Vienna 1969) in Art 2(1)(d) defines a reservation as 'a unilateral statement, however phrased or named, made by a State, when signing, ratifying,

declarations allow States to opt out of either Part II or Part III of the CISG;[401] to provide for the partial application of the CISG where States have two or more territorial units and different systems of law;[402] to exclude the application of the CISG as regards other States that have 'closely related legal rules on matters governed by' the CISG;[403] to depart from the rule of informality in contractual formation and variation;[404] and not to apply the CISG, further to Article 1(1)(b), when their rules of private international law lead to the law of a Contracting State.[405]

10.55 **Article 95** Certain States (the United States, China, Armenia, the Czech Republic, Singapore, St Vincent and the Grenadines, and Slovakia) have made Article 95 declarations against Article 1(1)(b).[406] According to Article 95:

> A State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that *it* will not be bound by subparagraph (1)(b) of article 1 of this Convention.[407]

The origins of this are a little obscure but, apart from a certain degree of hostility to the private international process playing a part in a uniform law convention, they are explained in a Message from the United States President to the Senate.[408] Briefly, the concern of the United States was as follows. If the United States were to implement the CISG in full,[409] and if the parties were not resident in different Contracting States,[410] then, in a case involving parties resident in different States, a US court led by its private international law rules to the law

accepting, approving or acceding to a treaty, whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that State'. It is not quite clear how this language should be read so far as the CISG applies to private contracting parties in their mutual dealings as seller and buyer under the CISG, especially if the CISG is being interpreted and applied by the courts of a non-reserving State or by an arbitral tribunal. See below for further discussion of this point. For the status of the CISG, in respect of the various permissible declarations, see <http://www.uncitral.org>.

401 Art 92. Part III concerns formation; Scandinavian countries made declarations here. One reason may have been their pre-existing uniformity amongst themselves in the area of contract formation. Another reason was the abandonment of the rule (see Art 16) that contractual offers were binding without exception. Sweden has now withdrawn its declaration. No States have made a declaration in respect of Part III, which concerns the substantive law of sale.

402 Art 93. The different systems of law are required to exist under the State's constitution. It is not clear how this would affect States with unwritten and semi-written constitutions, but it is submitted that the UK could if it wished (which is very unlikely) make an Art 93 declaration given the status of Scots law under the Act of Union 1707. The real utility of Art 93 is to allow a federal State (eg Canada) to adopt the CISG incrementally as the adopting legislation goes through the separate legislatures of each of the territorial units of that State.

403 Art 94. This declaration, which requires concerted action by the relevant States, could be used by a Contracting State in respect of its relations with non-Contracting States. As between Contracting States, they do not have to declare at the same time. One State can declare and then wait for another State to declare likewise so as to make their two congruent declarations effective.

404 Art 96. See further discussion in para 10.58 et seq.

405 Art 95. For further discussion, see J Fawcett, J Harris, and M Bridge, *International Sale of Goods in the Conflict of Laws* (2005), pp 981–84.

406 Had the UK acceded to the CISG in the 1990s, it would probably have made an Art 95 declaration. See Law Com No 250 (1997), *Thirty-Second Annual Report*, para 2.17 (referring to a response of 28 November 1997 sent to the Department of Trade and Industry).

407 Emphasis added.

408 US Senate Treaty Doc No 98–9, 98th Cong, 1st Sess 1–18 (1983), reprinted at (1984) 22 International Legal Materials 1368. See also B Nicholas, 'The Vienna Convention on International Sales Law' (1989) 105 LQR 201, 205, for the view that this reasoning is relevant also for the UK.

409 Including Art 1(1)(b).

410 Pursuant to Art 1(1)(a).

of a US State would have to set aside UCC Article 2 and apply the CISG instead. If, however, those same rules led to the application of the law of a non-Contracting State,[411] the US court would apply the law of that non-Contracting State and not the CISG. Article 2 of the Uniform Commercial Code would therefore be sacrificed without a corresponding sacrifice of the law of that non-Contracting State. The Article 95 declaration is certainly effective in sparing US courts from applying the CISG, pursuant to Article 1(1)(b), instead of UCC Article 2. Curiously, however, US courts will, because of the declaration, have to apply in appropriate cases a foreign substantive law as the applicable law, in which case they would not be preserving the operation of Article 2. A case might arise in a US court concerning foreign parties (say, a Canadian seller and an Irish buyer), only one of whom is resident in a Contracting State. If the applicable law were held to be Ontario law, a literal interpretation of Article 95 would compel the American court to apply Ontario domestic sales law minus the CISG, when an Ontario court would apply the CISG. This seems an unusual outcome and argues a case for the US courts interpreting their country's Article 95 declaration in the light of the reasons for it advanced at the time. Taking this and other considerations into account, it is therefore to be wondered why it was so important to enter a declaration destructive of uniformity.[412] The Article 95 declaration places the US courts in real difficulties if their private international law rules lead to the law of a Contracting State that is not the United States. It seems perverse to apply that other State's domestic law in such a case,[413] particularly if that State has not entered an Article 95 declaration itself. The real difficulty with the Article 95 declaration, however, comes with litigation in the courts of a non-declaration State.

Example For example, suppose a contract has been concluded between a New York seller and an English buyer with proceedings in the Netherlands. The Dutch court concludes that New York law is the applicable law of the contract. What is the Dutch court to do? The Netherlands has not made an Article 95 declaration, nor has it pledged itself[414] to respect the US declaration. It is submitted that the Dutch courts should not respect the US declaration any more than they would have respected it if the applicable law had been Dutch[415] **10.56**

[411] The few reported cases on the Article 95 declaration (see UNCITRAL *Digest of Case Law on the United Nations Convention on the International Sale of Goods* (2012), Art 95 note 4) have not led a court in a declaring State to the application of a foreign domestic law.

[412] See G Bell, 'Why Singapore Should Withdraw Its Reservation to the United Nations Convention on Contracts for the International Sale of Goods' (2005) 9 Singapore Year Book of International Law 55 (available at <http://cisgw3.law.pace.edu>).

[413] See H Flechtner (ed), *Honnold: Uniform Law for International Sales under the 1980 United Nations Convention* (4th edn, 2009), pp 42–43 for a criticism of the application of a foreign State's domestic law in such a case and for the view that the CISG should be applied instead. This view is based upon the author's assessment of the private international law rules of the forum State and not of its treaty obligations under the CISG. For a similar conclusion, see CM Bianca and MJ Bonell, *Commentary on the International Sales Law[:] The 1980 Vienna Sales Convention* (1987) (Art 95 commentary by Evans), criticized for its reasoning by P Schlechtriem, *Commentary on the UN Convention on the International Sale of Goods 1980 (CISG)* (1998) (Herber), p 698, in that a reserving State's courts cannot be under an obligation to apply the CISG.

[414] As Germany declared when it ratified the CISG: UNCITRAL *Yearbook* Vol XXI (1990), p 294. Might this action of Germany be construed as an unlawful reservation that infringes Art 98? But note that, prior to Germany becoming a Contracting State, a contract was concluded between an American seller and a German buyer. The court concluded that US (Indiana) law applied, which, since the US at that time was a Contracting State, meant the CISG: Oberlandesgericht Düsseldorf, 2 July 1993 (Germany), translated at <http.cisgw3.law.pace.edu/cases/930702g1>.

[415] This seems contrary to the views of H Flechtner (ed), *Honnold: Uniform Law for International Sales under the 1980 United Nations Convention* (4th edn, 2009), pp 44–45. See also P Winship, 'Private International Law and the U.N. Sales Convention' (1988) 21 Cornell International Law Journal 487.

Dutch courts are bound to apply the CISG in full; the Netherlands has made no declarations at all. Article 1 states quite categorically that the CISG applies when the forum's rules of private international law lead to the law of a Contracting State. It does not say that the CISG is applicable as the law of that Contracting State. The fact that the United States declared that it would not be bound by Article 1(1)(b) is an incidental matter as far as the Dutch court is concerned. If a comparison is made with other declaration articles in the CISG, Article 92 commands attention. It allows a State to opt out of Part II[416] or Part III.[417] It then goes on to provide in para (2) that a State that opts out of the relevant Part is not to be considered a Contracting State for the purpose of that Part. No similar addition is made to Article 95 and the omission is striking. The Dutch court, in our example, is therefore led by its private international law rules to the law of a Contracting State.

10.57 **Declarations and reservations under treaty law** The part that might be played by the Vienna Convention on the Law of Treaties 1969 in the resolution of this problem needs to be considered. It permits States to enter reservations to treaties,[418] provides for other States to accept or object to reservations[419] and recites the effect of such reservations and objections.[420] A reservation not objected to within a stated period is deemed to be accepted.[421] According to Article 21.1(b), a 'reservation established with regard to another party... modifies those provisions[422] to the same extent for [the accepting] party in its relations with the reserving State'. So far, there is some comfort for the view that, in the above example, the Netherlands would have to defer to the US reservation. But it should be noted that a reservation is defined in Article 2.1(d) as a 'unilateral statement... made by a State... whereby it purports to exclude or modify the legal effect of certain provisions of the treaty *in their application to that State*'.[423] Now, a judgment of the Dutch court deals with the affairs of private litigants. They may or may not be citizens of the United States and the judgment may never be executed in the United States. Consequently, it is difficult to see how the CISG is being applied *to* the State of New York.[424] Finally, if it is estimated that the Dutch court is not as such applying New York law, but that New York law has been displaced from its place in Dutch private international law rules upon the adherence of the Netherlands to the full text of the CISG, the conclusion is again reached that Dutch courts have no need to adopt the US reservation under Article 95. The Article 95 problem is a dying one, the victim of the success of the CISG, which has attracted nearly seventy ratifications. The prospect of both parties not being resident in Convention States is diminishing from day to day.

10.58 **The Article 96 declaration** According to Article 96, a Contracting State whose legislation requires contracts of sale to be concluded or evidenced in writing may declare against Articles 11 and 29. The rules in question are those that provide for informal contracts to be binding and for unwritten contractual variations to be effective. The effect of the declaration is that those rules do not apply 'where any party has his place of business' in the

416 On formation.
417 On performance and remedies.
418 Art 19.
419 Art 20.
420 Art 21.
421 Art 20.5.
422 viz. the ones subject to the reservation.
423 Emphasis added.
424 Enforcement in New York of the Dutch judgment is a different (and difficult) matter.

declaring State. The purpose behind the declaration is unclear, namely, whether it is to protect parties who are used to the cautionary protection of writing in their home legal systems, or whether it is for the sake of legal systems that have a preference for written contracts in their national systems of civil procedure and hence may lack the means of dealing with oral evidence.[425] Declarations have so far been made by a number of States.[426] Taking the case of a contract where only one of the parties is resident in a State making an Article 96 declaration, the declaration will be respected if the matter comes before the courts of that State.[427] Suppose, in the event of the United Kingdom's accession to the CISG, one of the parties does reside in one of these States. It need hardly be said that the courts of that State will respect its Article 96 declaration, but what should the courts of a non-declaring State do if seised of the matter?

Response of courts of non-declaring State The odd feature of the Article 96 declaration is that it does not confine itself to cases where the law of the forum State would, under its rules of private international law, apply the law of the declaring State to issues arising under the contract.[428] Nor is it confined to cases where the declaring State, if seised of the matter, would apply its own law. Nor does it provide that the contract is to be subject to the writing rules contained in the law of the declaring State. Not all writing rules are alike. State A, for example, may impose a writing requirement that requires the signature of an attesting witness, but may permit an exception in the case of part performance of the contract. State B, on the other hand, may have a full writing requirement without the need for the signature of a witness, and may not recognize part performance but may grant an exception for contracts below a stipulated amount in value. The Article 96 declaration is therefore incompletely expressed. A sensible reading of it would bring it into play in the case of any State that subjects at least some commercial (but not consumer) sales writing requirement.[429] The Secretariat Commentary to what became Article 12 considered 'writing' in the case of declaring States to be a matter of their public policy, which explained the inability of parties to derogate from that provision. It should not lead to the conclusion, however, that in any case involving those States the matter has become one of excluded 'validity' in accordance with Article 4. A State may in its domestic law require writing as a matter of formal validity and yet, like the United States, not enter an Article 96 declaration. It is submitted that a court in a non-declaring State, faced with this intractable difficulty, should conclude that matters of form have been excluded from the CISG in those cases where an Article 96 declaration is applicable.[430] The CISG does not provide a rule of formality that would apply in **10.59**

[425] The Cour d'appel de Paris, 6 November 2001 has held that the contracting parties are not at liberty to exclude Art 12 as between themselves (available at <http://witz.jura.uni-saarland.de>) (CLOUT No 482).

[426] All former or present socialist States (Armenia, China, Russia, Ukraine, Latvia, Belarus, Hungary, and Lithuania) with the exceptions of Chile, Paraguay, and Argentina.

[427] But see Fovárosi Bíróság Budapest, 24 March 1992 (Hungary), noted at <http://www.unilex.info>, where a Hungarian court upheld a contract concluded by telephone, because the applicable law was German law.

[428] The Rome I Regulation upholds the contract's formal validity according to a number of possible laws; it does not isolate one particular law and demand formal compliance with that law (Art 11).

[429] But a State may not make a partial declaration that disapplies Arts 11 and 29 only in respect of certain contracts: see J Honnold, *Documentary History of the Uniform Law for International Sales* (1989), pp 494 et seq.

[430] This matter cannot be treated as a gap to be filled in accordance with Art 7(2). Furthermore, it is not a case of the declaring State being for present purposes a non-party to the Convention. The State making a declaration under Art 96 is empowered unilaterally to alter the scope of the CISG in such a way as to bind other Contracting States.

those cases where an Article 96 declaration gas been made. A court in a non-declaring State should therefore apply its own choice of law rules on formal validity,[431] with a court in the EU taking account of the overriding mandatory provisions of another State to whatever extent is consistent with the provisions of the Rome I Regulation.[432] If the forum is in a declaring State, and if its private international law rules lead to the law of a State that permits informality, the *de facto* outcome is that the rules of informality expressed in Articles 11 and 29 are reinstated.[433]

K. Usages and Practices

10.60 General Contracts are amplified not just by implied terms but also by usages and practices.[434] These usages and practices come into play to the extent that the contract itself does not otherwise provide.[435] In making provision for usages and practices, Article 9 complements Article 7(1) on interpretation and should not be regarded as a radical provision. Article 9 consists of two parts. The first, Article 9(1), draws upon the behaviour of the parties themselves, which may include their previous dealings. The second, Article 9(2), concerns established trade usages, more particularly, usages of the particular trade in which the parties are engaged.[436] The latter aspect of Article 9 did touch upon certain sensitivities in the process leading to the CISG. Unstated usages are capable of upsetting the predictions of those running planned economies, of which a necessary instrument is the written contract. They are also vulnerable to the reproach that they are the creation of developed economies and legal systems, which thus are favoured by them. Developing countries, able to play a full part in the creation of the CISG, cannot be retrospectively accorded a role in the definition and incorporation of usages that have already hardened. Usages are nevertheless indispensable ingredients in commercial contracts and the world cannot wait for them to develop afresh before they can apply their vital force to international sale agreements. Indeed, as constantly evolving items, they will in time take account of the needs and interests of developing countries as the latter engage increasingly in world trade.

---

[431] *Forestal Guarani SA v Davos International Inc*, Federal DC (NJ), 7 October 2008 (US), available at <http://cisgw3.law.pac e.edu/cases/081007u1.html> (where the choice lay between the formal requirements of New Jersey law and Argentinian law). This is also the view of J Rajski, commenting on Art 12 (see para 2.3) in CM Bianca and MJ Bonell, *Commentary on the International Sales Law* (1987).

[432] See the discussion of this matter in para 1.32.

[433] See U Schroeter, 'Backbone or Backyard of the Convention? The CISG's Final Provisions', in CB Andersen and U Schroeter (eds), *Sharing International Commercial Law Across National Boundaries* (2008). cf *Zhejiang Shaoxing Yongli Printing and Dyeing Co Ltd v Microflock Textile Group Corp*, Federal DC (Florida), 19 May 2008 (US), available at <http://cisgw3.law.pace.edu/cases/080519u2.html>, where the court wrongly concluded that a writing requirement is imposed on the contract.

[434] See A Goldstajn, 'Usages of Trade and Other Autonomous Rules of International Trade According to the (1980) Sales Convention', in P Volken and P Sarcevic, *International Sale of Goods[:] Dubrovnik Lectures* (1986); S Bainbridge, 'Trade Usages in International Sales of Goods: An Analysis of the 1964 and 1980 Sales Conventions' (1984) 24 Virginia Journal of International Law 619.

[435] Hof van Beroep Antwerpen, 24 April 2006 (Belgium), translated at <http://cisgw3.law.pace.edu/cases/060424b1.html>.

[436] For the view that Article 9 'can also apply to contract content outside the Convention's sphere of application', see I Schwenzer (ed), *Schlechtriem and Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd edn, 2010), p 184 (Schmidt-Kessel).

Established practices According to Article 9(1), the parties are bound by any usage to which they have agreed[437] and by any practices which they have established between themselves.[438] It will obviously depend upon the circumstances whether there has occurred sufficiently regular or recurring conduct for practices to have been 'established'. Furthermore, the precise meaning of 'established', as well as 'practices', demands consideration. Article 9(1) does not require practices to have been established before the contract. Consequently, there is no reason why it may not be applied to contracts that call for continuing performance. This interpretation accords with Article 8(3), which permits the subsequent conduct of the parties to be examined in construing the contract.[439] It also accords with the view that estoppel (*non venire contra factum proprium*) is an established general principle for the purpose of Article 7(2). Suppose that a contract calls for instalment deliveries on a stated date in each month, or for payment to be made on a stated date. The seller is consistently late in delivering, or the buyer late in paying. May the party who has condoned the other's late performance serve notice that in future timely performance is necessary?[440] To the extent that such condonation could amount to a waiver or estoppel at common law, notice to this effect permits the party serving it to revert to his contractual rights. The question therefore is whether behaviour that might amount in English law to a retractable waiver is to be regarded under the CISG as giving rise instead to an irrevocable contractual entitlement.[441] It is quite possible that it does, unless the conclusion is reached that a practice is not 'established between' the parties when one of them reacts passively to the other's repeated breaches of contract, especially where there is an imbalance of power in favour of the breaching party. **10.61**

Usages and Incoterms The word 'usage' is not defined in the CISG.[442] Is it capable of embracing standard terms such as Incoterms 2010? If this is the case,[443] Article 9(1) states **10.62**

[437] Agreement can be inferred from conduct pursuant to Art 8(2): see Oberster Gerichtshof, 2 February 1995 (Austria) (CLOUT No 176). The agreement may modify general usage otherwise applicable under Art 9(2): *Treibacher Industrie AG v Allegheny Technologies Inc*, 11th Cir, 12 September 2006 (US), available at <http://cisgw3.law.pace.edu/cases/060912u1.html>.

[438] The incorporation of one party's standard terms, discussed in para 11.16 et seq, is capable of being regarded as an Art 9(1) issue: see Oberlandesgericht Düsselfdorf, 3 January 2004 (Germany), translated at <http://cisgw3.law.pace.edu/cases/040130g1.html>, asserting that this must be done by means of Arts 8(3) and 9. The importance of Article 9(1) is especially marked if it is well-established over a course of dealings: see Oberster Gerichtshof, 31 August 2005 (Austria), available at <http://cisgw3.law.pace.edu/cases/050831a3.html>, where the court noted: 'Practices are conduct that occurs with a certain frequency and during a certain period of time set by the parties, which the parties can then assume in good faith will be observed again in a similar instance. Examples are the disregard of notice deadlines, the allowance of certain cash discounts upon immediate payment, delivery tolerances, etc.'

[439] On Art 9(1) as confirming the approach to interpretation in Art 8(3), see Hovioikeus/Hovrätt Helsinki, 31 May 2004 (Finland), translated at <http://cisgw3.law.pace.edu/cases/040531f5.html>.

[440] Another case is that of the instalment buyer who has caused to be opened a revocable instead of an irrevocable credit: see *Panoutsos v Raymond Hadley Corp of New York* [1917] 2 KB 473, CA.

[441] See H Flechtner (ed), *Honnold: Uniform Law for International Sales under the 1980 United Nations Convention* (4th edn, 2009), p 169, for the view that 'a course of conduct that creates an expectation that this conduct will be continued' amounts to an established practice.

[442] See Note, 'Trade Usages in International Sales of Goods: An Analysis of the 1964 and 1980 Sales Conventions' (1984) 24 Virginia Journal of International Law 61; A Goldstajn, 'Usages of Trade and Other Autonomous Rules of International Trade According to the UN (1980) Sales Convention' in Volken and Sarcevic (eds), *International Sales of Goods[:] Dubrovnik Lectures* (New York: Oceana, 1986); F Ferrari, 'Trade Usages and Practices Established between the Parties: Article 9' in F Ferrari, H Flechtner, and R Brand, *The Draft UNCITRAL Digest and Beyond* (2004).

[443] For the view that this might be true of individual rules in instruments such as Incoterms 2010 and UCP 600, but not necessarily of the collection of rules as a package, see I Schwenzer (ed), *Schlechtriem and*

the obvious in saying that Incoterms bind the parties if the parties have agreed them. A more difficult point comes in Article 9(2), which states that parties impliedly agree to apply to the formation and content of their contract 'a usage of which [they] 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'.[444] These usages do not have a supra-national binding force in their own right, but are ultimately of binding force between the parties as a matter of implied agreement between them,[445] though, to the extent that Article 9(2) governs also in respect of contract formation, that agreement should be seen as the sum of individual consents prior to the agreement being concluded.[446] If usages do include Incoterms,[447] this means that Incoterms are capable of applying to a contract without being expressly incorporated in it.[448] Although widely known to and regularly observed by parties engaged in international trade, however, this might not be true of particular trades. Article 9(2) demands knowledge and observance in the particular trade. Incoterms seem to be commonly incorporated in bulk oil sales; even if they were not expressly incorporated in such contracts, they might therefore be brought in under Article 9(2). In dry commodities contracts, however, they are rarely to be seen and so should not apply in the absence of express incorporation. At the heart of this discussion lies a paradox. Incoterms are so well known that it is entirely to be expected that parties would expressly incorporate them in their mutual dealings if they wanted them to apply. If Incoterms, therefore, are not expressly incorporated, this might be seen as evidencing a desire by the parties that they not apply. It certainly seems incorrect to apply Incoterms just because the parties use a shipping term like CIF.[449] The CIF term has a well-developed meaning and history in legal systems and was not invented in Incoterms, which were first promulgated in 1936. The

Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG) (3rd edn, 2010), p 196 (Schmidt-Kessel), noting the existence of cases that have dealt with them as a package (eg *St Paul Guardian Insurance Co v Neuromed Medical Systems*, Federal DC (NY), 26 March 2002 (US), available at <http://cisgw3.law.pace.edu/cases/020326u1.html>); *BP International Ltd v Empresa Estetal Petroleos de Ecuador*, 5th Cir, 11 June 2003 (US), available at <http://cisgw3.law.pace.edu/cases/ 030611u1.html>.

444 These usages need not refer to a particular compilation, like Incoterms 2010, but might, for example, extend to the practice of according particular significance to letters of confirmation so as to render them binding as to new content, even if the recipient is silent after receiving the letter: Landgericht Kiel, 27 July 2004 (Germany), translated at <http://cisgw3.law.pace.edu/cases/040727g1.html>.

445 The agreement need not be express: *Treibacher Industrie AG v Allegheny Technologies Inc*, 11th Cir, 12 September 2006 (US), available at <http://cisgw3.law.pace.edu/cases/060912u1.html>.

446 See I Schwenzer (ed), *Schlechtriem and Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd edn, 2010), pp 185–89 (Schmidt-Kessel).

447 Or the UCP 600 Rules on letters of credit: see ch 6.

448 The CISG does not contain a provision corresponding to ULIS Art 9(3): 'Where expressions, provisions or forms of contract commonly used in commercial practice are employed, they shall be interpreted according to the meaning usually given to them in the trade concerned.' Although the words 'expressions, provisions' may more clearly include Incoterms than 'usage', the absence of this provision from the CISG should not be taken to mean that its Art 9 does not include Incoterms.

449 As has wrongly been done in a number of American cases, including *St Paul Guardian Insurance Co v Neuromed Medical Systems & Support*, Federal DC (NY), 26 March 2002 (US), available at <http://cisgw3.law.pace.edu/cases/020326u1.html>; *BP International Ltd v Empresa Estetal Petroleos de Ecuador*, 5th Cir, 11 June 2003 (US), available at <http://cisgw3.law.pace.edu/cases/ 030611u1.html>; and *Cedar Petrochemicals Inc v Dongbu Hannong Chemical Ltd*, Federal DC (NY), 28 September 2011 (US), available at <http://cisgw3.law.pace.edu/cases/110928u1>. A Spanish court comes close to the same conclusion: Audiencia Provincial de Valencia, 7 June 2003 (Spain), translated at <http://cisgw3.law.pace.edu/cases/030607s4.html> ('INCOTERMS constitute a common and universal international trade language which results from international commercial practice, easily understandable for the parties involved, voluntarily accepted by them, and which determine the scope of the clauses of international contract of sales by means of acronyms

use of a shipping term invented by Incoterms, like CPD, would be a quite different matter. So too might be the use of CFR, instead of the previously established abbreviation of C&F. In these two cases, especially the former, there is a quite compelling argument that the parties intended Incoterms to apply to their contract.

Shipping terms Suppose that a contract on FOB or CIF terms is subject to the CISG. **10.63**
Shipping terms like these are shorthand expressions of a list of presumptive rights and duties which the parties are free to modify or depart from in their contract, so long as the sum of rights and duties remains consistent with the shorthand used. If the contract no longer fits the expression used, a different expression will more appropriately sum up the contract. The CISG contains general provisions dealing with documents but nothing dealing with the meaning of these expressions or with particular aspects of the performance of these contracts. A CIF seller is bound, for example, to tender a clean bill of lading. An FOB buyer is presumptively bound to find an effective ship. Examples like these could be multiplied. To the extent that a rich source of decisions on these and similar questions exists in English law, do they assist in the treatment of CIF and FOB contracts subject to the CISG?[450] English decisions on FOB, CIF and similar shipping terms have no intrinsic transnational authority. If they have a part to play in the CISG, it will have to be a part defined by the CISG itself. First of all, English law could only be brought in as the *lex causae* of the contract, under Article 7(2), to the extent that the question raised is neither expressly settled in the CISG nor settled with the aid of general principles therein. If Article 9(2) is capable of bringing in answers to detailed questions on the rights and duties of FOB and CIF buyers and sellers, there is no reason to go to English law by way of Article 7(2) instead. Secondly, although the meaning of FOB and CIF could be seen as a matter pertaining to 'expressions' or 'provisions', which were the subject of a special provision in the ULIS[451] that has no counterpart in the CISG, the word 'usage' in Article 9 is also capable of extending to them. Thirdly, English decisions as such may not be brought in under Article 9(2). Nevertheless, to the extent that they espouse rules akin to those of other jurisdictions, and indeed may have been influential in instilling those rules in other jurisdictions, it is submitted that they can be brought in on the terms allowed for by Article 9(2). There is enough uncertainty, however, about the process to explain the practice of excluding the CISG in international commodity contracts.

L. Limitations

General The CISG does not contain rules on the limitation of actions, though Article 39 **10.64**
(with its requirement that defects be notified within a reasonable time, subject to a maximum of two years,[452] if the buyer is to retain the right to rely upon a lack of conformity in the goods) plays a similar role. If the rules on the limitation of actions contained in the

and abbreviations which indicated their content'). See also an FOB case to similar effect: Corto d'appelo Genova of 24 March 1995 (Italy), translated at <http://cisgw3.law.pace.edu/cases/950324i3.html>.

[450] JD Feltham, 'C.I.F. and F.O.B. Contracts and the Vienna Convention on Contracts for the International Sale of Goods' [1991] JBL 413. See also P Winship, 'Export-Import Sales Under the 1980 United Nations Sales Convention' (1980) 8 Hastings International Comparative Law Review 197.

[451] Art 9(3).

[452] See para 11.37 et seq.

United Nations Convention on the Limitation Period in the International Sale of Goods 1974[453] had been incorporated in the CISG, then they would have commanded a much greater implementation rate than they have experienced as part of a separate convention.[454] The basic rules are as follows.[455] The limitation period is four years[456] from the date that the claim accrues,[457] which is the date that the breach of contract occurs[458] or, in the case of defective or non-conforming goods, the date that the goods are handed over or tendered to the buyer.[459] In the case of fraud, the date of commencement is deferred to the date the fraud was discovered or could reasonably have been discovered.[460] For claims based on an express undertaking stated to have effect for a stipulated period, time runs from the date the buyer notifies the seller of the fact on which the claim is based.[461] As a general rule, the contracting parties are not free to modify the limitation period.[462] The limitation period is arrested when judicial proceedings are commenced, or a claim is made in subsisting proceedings, as determined by the *lex fori*.[463] For arbitral proceedings, time stops running when either party commences proceedings or when a request for arbitration to settle the dispute is made.[464] There is provision for extending the period where *force majeure* prevents a claimant from taking proceedings, to a point one year from the time the *force majeure* circumstances cease to exist.[465] Nevertheless, the various rules affecting or postponing the start of time[466] are subject to an expiry date that lays down a maximum period of ten years.[467]

[453] Hereinafter the Limitation Convention. An Amending Protocol was adopted in 1980 to take account of the final version of the CISG. Its rules of application (internationality, types of contract) are the same as for the CISG, though, in Art 5, it excludes claims in addition to personal injury claims (eg, claims arising out of nuclear accidents).The rules in Art 39 of the CISG are preserved by Art 1(2) of the Limitation Convention.

[454] To date, there are 29 Contracting States. Generally, see I Schwenzer (ed), *Schlechtriem and Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd edn, 2010) (Müller-Chen).

[455] This work does not deal with a number of other rules concerning matters such as counterclaims, set-off, joint debts and recourse actions, acknowledgment of obligations, interest, holidays, the precise calculation of time on the terminal date etc.

[456] Art 8.

[457] Art 9(1).

[458] Art 10(1). In the case of 'termination' of the contract before performance falls due, which appears to be avoidance under another name, time is stated to run from the date the declaration of termination is made to the other party: Art 12(1). This rule applies also to instalment contracts: Art 12(2).

[459] Art 10(2).

[460] Art 10(3).

[461] Art 11.

[462] Art 22.

[463] Art 13.

[464] Art 14.

[465] Art 21.

[466] Arts 9–12.

[467] Art 23.