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Can you teach an old treaty new tricks? The CISG and its adaptability to modern sales contracts

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Abstract: *The United Nations Convention on Contracts for the International Sale of Goods (CISG) has been a valuable instrument of international trade law for decades. However, the rapid evolution of global commerce, particularly the rise of complex sales contracts, such as those involving significant technology licensing components or turnkey projects, raises questions about the Convention's continued relevance and applicability. This article examines the CISG's adaptability to these modern contractual arrangements, exploring its strengths and limitations in relation to hybrid contracts that blur the lines between goods, services, and intellectual property.*

Keywords: *CISG, sales contracts, turnkey projects, licensing, mixed contracts.*

Tratatul nu își schimbă părul, dar năravul...? CVIM și adaptabilitatea acesteia la contracte de vânzare moderne

Rezumat: *Convenția Organizației Națiunilor Unite privind contractele de vânzare internațională de mărfuri (CVIM) a fost un instrument valoros pentru dreptul comercial internațional timp de decenii. Cu toate acestea, evoluția rapidă a comerțului internațional, în special sporirea numărului de contracte de vânzare complexe, cum ar fi cele care implică componente semnificative de licențiere a tehnologiei sau livrarea de proiecte la cheie, ridică semne de întrebare cu privire la relevanța și aplicabilitatea actuale a Convenției. Acest articol examinează adaptabilitatea CVIM la aceste aranjamente contractuale moderne, explorând punctele forte și limitele acesteia în ceea ce privește contractele hibride, care estompează granițele dintre bunuri, servicii și proprietate intelectuală.*

Cuvinte-cheie: *CVIM, contracte de vânzare, proiecte la cheie, licențiere, contracte mixte.*

1. INTRODUCTION

The United Nations Convention on Contracts for the International Sale of Goods (hereinafter the "CISG", the "Convention" or the "Vienna Convention") was discussed at the Vienna Conference in 1980. A significant part of the provisions of the Vienna Convention were inherited from its predecessor, the Convention relating to a Uniform Law on the International Sale of Goods, adopted at The Hague in July 1964 (hereinafter "ULIS"). ULIS itself was the result of inter-war efforts by the European Institute for the Unification of Private Law in Rome (hereinafter "UNIDROIT") to draft a uniform law on international sales.

The entry into force of the Vienna Convention on 1 January 1988 represented a major step forward in the development of international trade, as it was adopted with the aim of striking a balance between the vision of countries applying a continental civil law system (Italy, France, Germany, Spain) and those applying an Anglo-Saxon common law system (the USA, United Kingdom, Australia)[1]. Today, 45 years after the text of the Convention was finalised at the Vienna Conference, 97 States are parties to the Vienna Convention.

Since the adoption of the Convention, technological and scientific developments have revealed a new dimension of trade, which is conducted at a distance, at a higher speed and often involves goods that have only an ideal, abstract existence, not perceptible to the naked eye - intangible goods. This category of goods slipped under the radar of the initiators of the project[2] and such transactions were not taken into account for the drafting of the Convention.

Problems arise from the absence of a definition of "goods" in Article 1 of the Convention, which merely states that its provisions apply to "contracts for the international sale of goods". Its scope of application is, therefore, subject to interpretation. The difficulty in determining the scope of application lies precisely in the international character of the Convention. Article 7 of the CISG provides that „[i]n the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade". Thus, in order to respect the desire of States to minimise the influence of their own national law on the application of the Convention, the sources of national law (which usually contain a definition of what represents "goods") occupy the last place in the hierarchy of sources for interpreting the CISG.

This article aims to demonstrate that, whereas the CISG was undoubtedly primarily designed for traditional goods-based sales, its flexibility and underlying principles may still offer value in addressing modern contract complexities.

In order to do so, we have first looked at the Convention's core principles and scope (**2**) as compared to the challenges brought by modern sales contracts (**3**). Within this dichotomy, we analysed the various strengths and limitations of the CISG (**4**) and proposed alternative approaches which may serve to overcome its disadvantages (**5**). Lastly, we proposed certain recommendations for drafters (**6**).

2. CORE PRINCIPLES AND SCOPE. ARE INTANGIBLES EXCLUDED FROM THE SPHERE OF APPLICATION OF THE CISG?

The Vienna Convention is silent on the meaning of the term "goods" in Article 1, which defines the scope of the CISG in general terms:

"*1. This Convention shall apply to contracts for the sale of goods between parties having their place of business in different States:*

(a) if those States are Contracting States; or

[1] *N. Chirilă*, Convenţia Naţiunilor Unite asupra contractelor de vânzare internaţională de mărfuri, vol. I, Ed. Universul Juridic, Bucharest, 2011, p. 26.

[2] *H. Sono*, The Applicability and Non-Applicability of the CISG to Software Transactions, in Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday, eds. *C. B. Andersen* and *U. G. Schroeter*, Ed. Wildy, Simmonds & Hill Publishing, London, 2008, p. 512.

(b) where the rules of private international law lead to the application of the law of a Contracting State".

The term "goods" in its dictionary meaning (something manufactured or produced for sale[3]) seems, at first glance, to limit the scope of the CISG strictly to tangible goods. This is particularly true for the French version of the Convention, which uses the term "*marchandises*" rather than "*biens*". Similarly, the Romanian translation opted for the term "*mărfuri*" to the detriment of the word "*bunuri*", which again indicates, at the very least, that tangible goods were the main focus of the drafters. However, to state that this category is the only one to which the CISG is applicable may prove too restrictive in relation to the purpose of the Convention and even the intention of the legislators[4].

For example, Article 2 of the Convention excludes from its scope certain categories of intangible goods: investment securities and negotiable instruments. To the extent that the intention of the legislature was to exclude all incorporeal property *en bloc*, such a specific exclusion of securities and negotiable instruments would be superfluous.

The common element of the various terms used to describe the notion of "goods" is that these objects (whether strictly tangible movable objects or a wider range) are produced, designed, and intended to be the subject of a sale, in the sense that ownership over the good is offered in exchange for a sum of money[5]. Items excluded from the scope of the Convention, such as electricity, consumer contracts, bills of exchange, etc., have been excluded to protect certain "domestic sensitivities" of the signatories[6].

The starting point for determining the scope of the concept of "goods" used by the CISG must be found in the provisions of the Convention, in order to comply with the signatory states' desire to create an instrument that applies autonomously, without interference from national laws. And the provisions of the Convention indicate two main features of the goods: they are handed over to the buyer and ownership is transferred to the buyer.

In other words, for a good to be included in the category of "goods", it must enable the seller to hand over the good and transfer ownership of the good and the buyer to take possession of the good. Indeed, the provisions of the Convention seem to have been drafted for use in relation to tangible goods, for which there are transportation obligations (in which context the buyer's obligation to hand over the documents relating to the goods is triggered). However, such a limitation is not expressly found in the wording of in the Convention. The source of this "need for tangibility" is to be found in the importance given to possession, as the link between the goods and the rights over the goods. Without detracting from the importance of possession (as a question of fact, rather than a matter of law), we believe that we should not differentiate between goods according to whether or not they are capable of being the subject of possession.

Legal authors have argued that the notion of goods must be interpreted broadly, in view of the balanced nature of the Convention in relation to the rights and obligations of the

[3] See, e.g., https://www.merriam-webster.com/dictionary/good.
[4] *J. Lookofsky*, Understanding the CISG in the USA, 2nd ed., Ed. Kluwer Law International, 2004, pp. 20-21.
[5] *J. F. Morrisey, J. M. Graves*, International Sales Law and Arbitration: Problems, Cases and Commentary, Ed. Kluwer Law International, 2008, p. 72.
[6] *Idem*, p. 73.

parties[7]. It was therefore held, for example, that the CISG may govern a sale based on a sample or model[8], a sale where delivery of the goods or payment of the price occurs in instalments[9], a conditional sale[10] or a sale subject to reservation of title[11], rights of redemption or rights of first refusal[12]. To the contrary, hire-purchase-agreements, leasing-contracts, or sale-and-lease-back-contracts might be deemed service agreements where the preponderant part of the obligations relates to the financing and rights of use[13].

In relation to intangibles, although goodwill is regarded as an intangible good, doctrine observes that the sale of goodwill may be governed by the CISG to the extent that most of the elements of goodwill are tangible movable goods[14]. In addition, certain categories of intangibles which form part of goodwill may be protected even though, disregarding the medium on which they are found, the subject-matter of the protection is a pure idea[15].

As regards computer programs, the views expressed in the literature are not uniform. Although there seems to be a firm opinion that computer programs delivered to the buyer embedded in a tangible medium (e.g. CD or memory stick) may be the subject of a contract governed by CISG[16], the same cannot be said for computer programs which are transmitted to the buyer online or which are developed by the seller according to the buyer's specifications[17].

To this effect, case law has been reluctant to apply the CISG to contracts for the sale of software components. Several distinctions have been made by the courts, most of which have concerned the way in which the computer program was transmitted to the buyer (the courts being more willing to accept the "goods" nature of a computer program which was incorporated in a physical, tangible medium such as a CD or memory stick[18]), the degree to which the program was adapted to the buyer's requirements (the courts being more willing to accept the application of the CISG to a standard program than to a program designed by the seller in accordance with a buyer's order[19]) or the preponderance which the value of the

[7] *I. Schwenzer, P. Hachem*, The CISG - Successes and Pitfalls, in The American Journal of Comparative Law, vol. 57, no. 2, 2010, pp. 457-478; see also *J. O. Honnold*, Uniform Law for International Sales under the 1980 United Nations Convention, 4th ed., 2009, Ed. Kluwer Law International.

[8] *I. Schwenzer*, commentary on Article 35 in *I. Schwenzer* (ed.), Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG), 4th ed., Oxford University Press 2016, pp. 592-638. See also Austrian Supreme Court (Oberster Gerichtshof), 2Ob 48/02a, 27 February 2003, summary accessed at: https://cisg-online.org/files/cases/6722/abstractsFile/794_33856280.pdf.

[9] Art. 73 CISG.

[10] *I. Schwenzer*, commentary on Article 1 in *I. Schwenzer* (ed.), *op. cit.*, p. 32.

[11] *M. Bridge*, The International Sale of Goods, 5th ed., Ed. Oxford University Press, 2023, pp. 630 - 632.

[12] *S. Kröll, L. Mistelis, P. Perales Viscasillas* (Eds.), UN Convention on Contracts for the International Sale of Goods (CISG): Commentary, 2nd ed., Ed. C.H. Beck/Hart/Nomos, 2018, pp. 31-33.

[13] *I. Schwenzer*, commentary on Article 1 in *I. Schwenzer* (ed.), *op. cit.*, p. 35.

[14] *P. Huber, A. Mullis*, The CISG: A New Textbook for Students and Practitioners, Ed. Sellier European Law Publishers, 2007, p. 41.

[15] *R. Dincă*, Protecția secretului comercial în dreptul privat, Ed. Universul juridic, Bucharest, 2009, p. 25 et. s.

[16] *F. Diedrich*, The CISG and Computer Software Revisited, in the Vindobona Journal of International Commercial Law and Arbitration, vol. 6, supplement, 2002, pp. 55-75.

[17] *I. Schwenzer*, commentary on Article 1 in *I. Schwenzer* (ed.), *op. cit.*, p. 34.

[18] Oberster Gerichtshof, decision dated June 21, 2006, issued in case no. 5 Ob 45/05m, published in *Internationales Handelsrecht* no. 5/2005, Ed. Sellier European Law Publishers, Münich, p. 195, accessed via https://www.unilex.info/cisg/case/1047.

[19] *I. Schwenzer*, commentary on Article 1 in *I. Schwenzer* (ed.), *op. cit.*, p. 35.

computer program had in the economy of the contract (i.e., whether equipment was being sold which also used a software component or whether the computer program was the main object of the sale[20]).

In a dispute concerning a contract whereby the seller undertook to carry out a market study for the buyer, the results and interpretations of which were to be transmitted to the customer on a physical medium, the Cologne Court of Appeal decided (reversing the judgment of the first instance) that the CISG was not applicable[21]. The court's reasoning was based on the lack of tangibility of the market research. The plaintiff had based its claim on a comparison between the legal nature of the market research and that of computer software arguing that, because software is deemed to fall within the scope of the CISG, the same reasoning must apply to the market research. The Court, however, did not agree with the plaintiff's view, finding that the notion of "goods" can be circumscribed at most to the category of standard computer programs, not tailor-made software.

As regards know-how, it has been held that if the information is not contained in a physical form, its transfer cannot be governed by the CISG, as it has no connection to the notion of "goods"[22].

Based on the above, we agree with the view expressed in the literature that, although a certain degree of tangibility, of corporeality, may be necessary in order to be able to discuss the transfer of ownership of a good in exchange for a price, "(...) legal notions of corporeality must be updated in order to accommodate the digital age"[23].

3. MODERN SALES CONTRACTS: NEW CHALLENGES

In today's economy, a significant part of a company's "added value" is intellectual capital. This reality has been called the "post-capitalist" or "knowledge-based economy"[24]. Several elements have emerged that distinguish today's market from the classic economy, based on the traditional factors of production - nature, labour and capital.

Today, intellectual capital can go so far as to replace nature and even labour in the hierarchy of factors of production[25] (and sometimes even capital, as some success stories of visionary software programmers show). There is also a paradox in the management of input - the main elements that make the company work are sometimes found exclusively in the minds of key employees[26].

Moving beyond the category of intellectual creations, the 2008 financial crisis has drawn attention to another category of intangibles that make up a large part of many sales:

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[20] Oberlandesgericht Koblenz, case no. 2 U 1230/91, decision dated September 17, 1993, published in Recht der Internationalen Wirtschaft (RIW), 1993, pp. 934-938, accessed via: https://www.unilex.info/cisg/case/64.

[21] Gerechtshof's Hertogenbosch, ICT GmbH v. Princen Automatisiering Oss BV, decision issued on November 19, 1996 in case no. 770/95/HE, accessed via: https://unilex.info/cisg/case/329.

[22] *I. Schwenzer*, commentary on Article 1 in *I. Schwenzer* (ed.), *op. cit.*, p. 37.

[23] *D. Saidov, S. Green*, Software as Goods in Journal of Business Law, March 2007, p. 164.

[24] *D. Volkov, T. Garanina*, Intangible Assets: Importance in the Knowledge-Based Economy and the Role in Value Creation of a Company, in The Electronic Journal of Knowledge Management, No. 4, Vol. 5, 2007, p. 539. See also *C. Munteanu*, Consideraţii asupra bunurilor incorporale în actualul şi în noul Cod civil, in Dreptul, no. 3/2010, p. 70.

[25] *D. Volkov, T. Garanina*, *op. cit.*, p. 539.

[26] see *D. Andrierssen*, Making Sense of Intellectual Capital: Designing a Method for the Valuation of Intangibles, Ed. Elsevier, Massachusetts, 2004, pp. 4-7.

receivables, or assimilated intangibles[27].

Even products which were considered basic some years ago have now become infused with technology. Refrigerators contain LED displays and sensors which detect changes in temperature, humidity, and even the amount of food inside. Cars now require the purchase of a separate subscription to use the seat heaters (and the embedded software can disable the heating function if the subscription is not paid). And even the basic software products are now marketed as "AI-powered". In all these scenarios, the contract is a mixed contract, containing not only a classical sale, but several ancillary services as well.

Regarding this type of contracts, domestic national laws are easily adapted because the general legal framework concerning contracts can be found in the same body of law. Therefore, where specific rules are needed to govern, for example, the services component for a sale of a product which includes tailor-made software, these rules can be found within the same system, reducing the risk of incompatibility.

The CISG does provide a framework for addressing mixed contracts through Article 3(2), which states that the Convention does not apply to contracts where the "preponderant part" of the obligations consists in the supply of labour or other services. However, determining the "preponderant part" of a contract can be challenging, especially in complex arrangements like turnkey contracts and particularly given the absence of a definition for the notion of "goods". Dividing the contract into its basic components is also a risky approach, as applying a mix of the CISG and domestic law to different parts of the contract can lead to bizarre solutions.

Turnkey contracts present particular challenges due to their comprehensive nature, involving design, manufacture, assembly, and installation. The significant labour component in these contracts often leads to uncertainty regarding the applicability of the CISG. Some courts have excluded turnkey contracts from CISG application[28], arguing that the substantial labour involved in assembly and supervision indicates a preponderance of services. However, this approach is not universally accepted, and many scholars advocate for a case-by-case analysis[29].

Two primary methods have emerged for assessing the preponderant part under Article 3(2) CISG. The first of which is the economic value criterion, which focuses on the relative values of the goods and services components. If the value of the services exceeds 50% of the contract's overall value, the CISG would not apply. The second approach is the overall assessment approach, which considers the weight parties placed on different obligations and the contract's purpose. It can potentially override the economic value criterion, especially when the contract's aim is to supply a fully functioning system[30].

4. STRENGTHS AND LIMITATIONS OF THE CISG

[27] see R. Rizoiu, *Ipoteca asupra bunurilor incorporale: Cum urmărești ceea ce nu vezi?*, Romanian Private Law Review, no. 4/2015, pp. 128-196.

[28] Handelsgericht des Kantons Zürich, decision issued on July 9, 2002 in case no. HG 000120/U/zs, accessed via: https://www.unilex.info/cisg/case/1515.

[29] See CISG-AC Opinion no. 4, Contracts for the Sale of Goods to Be Manufactured or Produced and Mixed Contracts (Article 3 CISG), 24 October 2004. Rapporteur: Professor Pilar Perales Viscasillas and the cases referenced therein.

[30] *Idem*.

Having determined that the CISG does not exclude from its scope contracts for which the subject-matter of the seller's performance consists (in whole or in part) of intangible goods, and that case law has also accepted (with certain reservations) the application of the CISG to complex or mixed contracts, we must consider possible obstacles arising from the fact that such contracts are "*terra incognita*, both for the CISG and for the *travaux preparatoires* of the Convention"[31].

In general, it has been held in the literature that the provisions of the CISG are sufficiently flexible to represent an "ideal compromise" in the sense that they can be successfully applied to such transactions, while giving the parties certainty as to the applicable law and its provisions[32].

The most important aspect that can cause one to hesitate is the intellectual property component that is often attached to such goods. We can see this in the case of computer programs, but also in the case of books, photographs or music. Although the ownership of a particular copy of the book/photograph/computer program is transferred to the buyer, with the exception of private copies for the buyer's personal use, the reproduction right of the work will remain with the seller.

For a society which generates its added value mostly through creation, it is important to protect intellectual property rights in order to stimulate development[33]. In this regard, the CISG offers solutions for adapting the content of the contract to the specific nature of the seller's performance.

Starting from the concept of intellectual property, the need to interpret the Convention as autonomously as possible means looking for a definition which does not form part of the national law of a particular State. In the legal literature, the definition formulated by the 1967 Convention establishing the World Intellectual Property Organization (WIPO) has been proposed, namely "the rights relating to: literary, artistic and scientific works; performances of performing artists, phonograms, and broadcasts; inventions in all fields of human endeavor; scientific discoveries; industrial designs; trademarks, service marks, and commercial names and designations, protection against unfair competition, and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields"[34].

First, Art. 41 CISG emphasizes the possibility for the buyer to purchase goods which are affected by a right or other claim of a third party. With regard to intellectual property, the seller's obligation to hand over goods free of any third-party claim is provided by Art. 42 CISG. Nothing within that text excludes the possibility that the intellectual property rights which are covered by Art. 42 CISG belong to the seller itself. Therefore, provided that the seller informs the buyer of the existence of intellectual property rights in the goods sold, the sale can validly operate even without the intellectual property rights representing a breach of contract by the seller.

With respect to distance contracts, where goods are transmitted to the buyer online, instantaneously (a process which is becoming applicable not only to computer programs, but

[31] *F. Diedrich,* The CISG and Computer Software Revisited, in Vindobona Journal of International Commercial Law and Arbitration no. 6/2002, p. 55.
[32] *F. Diedrich,* Maintaining Uniformity In International Uniform Law Via Autonomous Interpretation: Software Contracts And The CISG, in Pace International Law Review, no. 8/1996, p. 304.
[33] *F. Diedrich,* The CISG and Computer Software Revisited, cited *supra*, p. 55.
[34] Art. 2 (viii) of the 1967 WIPO Convention.

increasingly to books and magazines, databases, music or photographs), some of the provisions of the Convention (e.g. the seller's obligation to hand over the goods or the passing of risk) are qualified according to the specific nature of the goods.

Regarding the transfer of risk, Art. 67 CISG is drafted primarily with a view to contracts which include a transportation component, in which case the risk is transferred to the buyer when the goods reach the first carrier or the place designated by the contract. The importance of transport documents is also emphasized.

However, these obligations are related to the nature, and not to the essence of a contract of sale. "Where the exercise of the right conveyed does not involve a material contact with a particular good (e.g. in the case of a personal right) or where the asset is incorporeal (e.g. a patent or trademark), it is possible that the surrender of the documents may be the only performance due under the obligation to hand over the goods"[35].

Moreover, the CISG is able to accommodate such nuances. For the abovementioned example, the successful completion of the online connection and downloading of the program/book/picture to the buyer's device will be the point at which the risk is transferred.

Therefore, although not drafted with intangible goods or service-heavy contracts in mind, we believe that the CISG provisions are sufficiently adaptable to be used for this purpose. There may, of course, be national laws that are more appropriate for certain categories of goods, but the desirable provisions of such laws can be adopted either by the parties within their agreement, by virtue of art. 6 CISG, or even, as a last resort, by the court itself, by virtue of Art. 7 CISG.

5. ALTERNATIVE APPROACHES AND SUPPLEMENTS

In many cases, domestic law applies concurrently with the CISG for issues not covered by the Convention. This can lead to complex situations where courts must determine which legal regime governs specific aspects of a dispute.

Generally speaking, where the CISG does not explicitly address an issue, courts must first attempt to resolve it using the general principles underlying the Convention before resorting to domestic law. This approach, outlined in Article 7(2) of the CISG, aims to promote uniformity in application.

Essentially, the CISG pre-empts domestic law for matters within its scope. However, determining the exact boundaries of this pre-emption can be challenging. Courts must carefully analyse whether an issue falls within the CISG's purview or is governed by domestic law. For example, Article 4 of the CISG excludes questions of contract validity from its scope, leaving these to domestic law. However, the interpretation of what constitutes a "validity" issue is not always straightforward. Some courts have defined validity broadly as "any issue by which the domestic law would render the contract void, voidable, or enforceable"[36].

In this regard, courts have adopted various approaches to balance CISG and domestic law rights. While some courts interpret the CISG's scope broadly to promote uniformity and limit the application of domestic law, other courts show a tendency to interpret the CISG through the lens of their domestic legal concepts – a so-called "homeward trend bias".

[35] *R. Dincă*, Contracte civile speciale în Noul Cod Civil. Note de curs, Universul Juridic, Bucharest, 2013, p. 110.
[36] *S. Kröll*, Selected Problems Concerning the CISG's Scope of Application, in Journal of Law and Commerce, vol. 25 (2005-2006), pp. 39 – 58.

One possible approach, as we anticipated above, is to split complex transactions enshrined in one sole *instrumentum* into multiple contracts (as *negotium*). The CISG would apply to the sales part and the remaining services components would be subject to the relevant domestic law. Some scholars argue for applying CISG rules to the entire contract, including service obligations, to avoid fragmenting the legal regime applicable to a single transaction[37].

Another (and, we would argue, preferable) solution to avoid this dilemma is to look first towards principles of international commercial law, as prescribed by Article 7 of the CISG. Courts may, for example, use the UNIDROIT Principles of International Commercial Contracts (PICC) as a complementary tool to address general contract law issues not covered by the CISG, particularly for complex contracts involving IP rights.

6. RECOMMENDATIONS FOR PRACTITIONERS

Having determined that the CISG is potentially applicable and relatively compatible with complex contracts, the question remains – should we aim to apply it? We believe that the answer is a cautious "yes".

However, contract drafters working in scenarios where the CISG might apply should take several proactive steps to ensure clarity, minimize disputes, and appropriately balance the interplay between the CISG and domestic laws.

For starters, the drafting should clearly state whether the CISG applies or is excluded under Article 6. If exclusion is intended, unequivocal language should be used to avoid ambiguity. There is abundant case law stating that the simple reference to the "law of" or even to the "national law of" a contracting state is insufficient to conclude that the parties' intent was for the domestic law to apply[38]. Clearer drafting could consist of, for example, a choice of law clause stating: "This contract shall be governed by the domestic law of Romania. The application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) is expressly excluded".

The next step to consider is identifying any domestic laws that may override or conflict with the CISG. For example, some jurisdictions require written contracts for certain transactions, which may conflict with the CISG's allowance for consensual agreements (Art. 11). If such a scenario occurs, failure to produce a written document may invalidate certain obligations although the sales part would remain in effect. Moreover, contract terms should be cross-checked against mandatory domestic rules, particularly in regulated sectors like public procurement.

Incorporating standardized clauses that address common issues under the CISG, such as remedies, notice requirements, and risk allocation allows for customization to meet the specific needs of that transaction. These details can come in the form of references to industry standards. The CISG's interpretation rules, particularly Article 8, allow for consideration of relevant circumstances, including trade usages. By explicitly incorporating industry standards, parties can ensure these standards are given due weight in contract

[37] *I. Schwenzer, J. Ranetunge, F. Tafur*, Service Contracts and the CISG, in Journal of Law and Commerce, vol. 38 (2019-2020), pp. 305 – 332.

[38] See, e.g., the cases referenced by CISG-AC Opinion No. 16 "Exclusion of the CISG under Article 6" (Rapporteur: Lisa Spagnolo), adopted by the CISG Advisory Council following its 19th meeting in Pretoria (South Africa) on 30 May 2014.

interpretation. Industry standards often specify technical requirements, quality benchmarks, and best practices. Incorporating these into CISG-governed contracts can provide clear performance criteria, facilitate the quality control and inspection processes and align with the CISG's provisions on conformity of goods.

CONCLUSION

While it is transparent that the CISG was designed for traditional sales of goods, it is increasingly being applied to complex contracts, such as those involving mixed goods and services. The Convention has demonstrated remarkable resilience and adaptability in the face of evolving commercial realities, in no small part due to the remarkable scholars working to popularize it and offer creative solutions to its shortcomings. The omission of a descriptive, limitative definition of goods is partially what allowed courts and scholars to conduct creative case-by-case analysis wherever required and reach a suitable balance of interests[39].

Despite its strengths, the CISG faces limitations when dealing with highly specialized or service-dominated contracts. The Convention's silence on certain aspects of intangible goods and intellectual property rights can create ambiguities. In such cases, even if its provisions on contract formation, performance, and remedies remain relevant, its limited scope (e.g., exclusion of service-dominated contracts under Article 3(2)) may require supplementary agreements or reliance on domestic laws to address gaps.

While the CISG may not be a perfect fit for all modern sales contracts, its underlying principles and flexible framework continue to offer value in addressing contemporary commercial complexities. As international trade evolves, so too must our interpretation and application of this legal instrument. Nevertheless, we fully agree that, despite its elasticity, the Convention should not be „stretched beyond its essential design"[40].

[39] See, for different categories of legal definitions and their (dis)advantages, *P. Vasilescu*, Substanța normativă a definițiilor legale, Romanian Private Law Review, no. 1/2021, pp. 34 – 55.

[40] *J. Lookosfky*, In Dubio Pro Conventione? Some Thoughts About Opt-Outs, Computer Programs and Preemption Under the 1980 Vienna Sales Convention (CISG), in Duke Journal of Comparative & International Law, vol. 13, no. 3/2003, p. 289.