IN DUBIO PRO CONVENTIONE? SOME THOUGHTS ABOUT OPT-OUTS, COMPUTER PROGRAMS AND PREËMPTION UNDER THE 1980 VIENNA SALES CONVENTION (CISG)

JOSEPH LOOKOFSKY*

INTRODUCTION[1]

The "CISG" is a shorthand expression for the 1980 United Nations Convention on **C**ontracts for the **I**nternational **S**ale of **G**oods.[2] Also sometimes referred to as the "Vienna Convention", the CISG is the first uniform sales law to win acceptance on a worldwide scale:[3] more than sixty States have ratified the Convention, representing more than two-thirds of all world trade.[4]

---

* B.A. Lehigh University; JD New York University School of Law; Cand.jur. & Doctor juris University of Copenhagen. Professor of Law University of Copenhagen.

1. With the permission of Kluwer Law International, this article includes certain material adapted from HERBERT BERNSTEIN AND JOSEPH LOOKOFSKY, UNDERSTANDING THE CISG IN EUROPE (2d ed. 2002) [hereinafter BERNSTEIN & LOOKOFSKY]. As the author of this article, I would add that Herbert Bernstein was not only co-author of UNDERSTANDING THE CISG IN EUROPE (1st ed. 1997); he also provided me with inspiration and constructive criticism as I wrote UNDERSTANDING THE CISG IN THE USA (1995) and the first (1996) edition of Understanding the CISG in Scandinavia (2d ed. 2002). During the spring of 2001 I spent five weeks with Herbert at the Duke University Law School, co-teaching Comparative Contracts and preparing the second edition of our book. At the very end of that happy and productive period, my dear friend and trusted colleague suddenly passed away. Left alone to complete our project, and given my other responsibilities at the University of Copenhagen, it took me a full year to tie countless loose ends and then re-write our 1997 text. As more fully acknowledged in the Preface to the Second Edition of our book, I was fortunate to secure valuable advice and help from Professor Harry Flechtner (University of Pittsburgh), Executive Secretary Albert Kritzer (Pace University) and Lecturer Morten Fogt (EuroFaculty, University of Vilnius). To the extent this article contains material these CISG-experts reviewed previously, I thank them once again.

2. Some say the four letters individually; some say the acronym as one word (with a "soft" C). No uniform usage has as yet developed with respect to an acronym designating the Convention; *see* PILTZ, B., INTERNATIONALES KAUFRECHT (Munich 1993), § 1 Rd.Nr. 17; SCHLECHTRIEM, P., INTERNATIONALES UN-KAUFRECHT (Tübingen 1996) at V note 3.

3. Regarding the ULIS and ULF Conventions, which preceded the CISG, *see* BERSTEIN & LOOKOFSKY, *supra* note 1, § 1-2.

4. As of 1 May 2002, 61 States had adopted the CISG. *See* http://cisgw3.law.pace.edu/cisg/countries/cntries.html. Please note: this www-address—and all other web-sites cited in this article—were successfully visited on March 3, 2003.

> *Illustration 1*: Merchant-buyer B in New York faxes an order for 10 dozen designer dresses to seller-manufacturer S in France, and S accepts the order by faxing a brief confirmation to B. Later, a dispute develops concerning the quality of the goods.

Simply because the parties to this sale of goods (dresses) have their places of business in different CISG Contracting States,[5] an American or French court or an arbitral tribunal asked to resolve the dispute in question will do so—not on the basis of UCC Article 2 or French domestic sales law, but —on the basis of the CISG.[6]

In a case like *Illustration 1* the application of the Convention (and, conversely, the non-application of domestic sales law) is a very straightforward affair. In other cases, we may need to ask and answer questions like these:

> 1. Does the CISG apply by default,[7] or have the parties exercised their right to *opt out* of the Convention regime (Article 6)?
>
> 2. Does an international transaction involving the supply of *computer software* qualify as a CISG *sale of goods* (Articles 1, 2 and 3)?
>
> 3. Is the particular *matter* (issue) in question *governed by the CISG* (Articles 4-5)? And if the matter is governed—or perhaps "governed-but-not-settled" under Article 7(2)—does the Convention then *preëmpt* the application of domestic rules of law?

According to some Convention commentators, *doubts* regarding CISG application are often best resolved *favor conventionis*, i.e., in favor of the Convention and its application (and at the expense of domestic law). The main rationale for such a pro-CISG bias is that the Convention—now accepted by the world community as a suitable default regime for international sales[8]—should be applied wherever sufficient reasons for its application exist, and where its language does not preclude such application.[9]

---

5. The first/main rule in CISG Article 1 provides: "(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States: (a) when the States are Contracting States . . ." United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3, 60 [hereinafter CISG].

6. First, courts and arbitrators will apply Part II of the Convention as regards the contract formation process, deciding whether or not the parties have reached an agreement. If, on this basis, a contract for the sale of goods has in fact been made, the CISG Part III will then be used to fill in contractual gaps as regards the obligations of the parties, their rights and remedies for breach, etc.

7. *See supra* note 5 and accompanying text.

8. *See supra* note 4 and accompanying text.

9. *See* WITZ, C., LES PREMIÈRES APPLICATIONS JURISPRUDENTIELLES DU DROIT UNIFORME DE LA VENTE INTERNATIONALE (Paris 1995) no. 30 for a discussion of what Witz calls the *favor conventionis* of the German courts.

Of course, not all issues which relate to the Convention's Sphere of Application (CISG Part I) are amenable to resolution by the use of legal maxims, mechanical allocation of proof-burdens or other simple means. Indeed, according to the *Understanding* I shared and developed with Herbert Bernstein,[10] at least *some* doubts regarding Convention application are best resolved "the other way", i.e., by—or in conjunction with—the application of domestic rules of law.

So, while it might sound catchy and convenient, the phrase *in dubio pro conventione* (which Herbert himself coined)[11] does not represent a principle to be applied blindly, to answer all controversial questions arising under CISG Part I.

I. INTERNATIONAL INTERPRETATION UNDER ARTICLE 7(1)

The various *in dubio* (sub)issues to be discussed here all involve questions of treaty interpretation, and CISG Article 7(1) is a General Provision which tells us how to interpret the whole Convention, including the rules which delimit its Sphere of Application:

"In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application . . ."

This CISG rule amounts to a (public international law) command to all Contracting States and their courts:[12] each such State *shall* have regard to the international character of the treaty and the need to promote uniformity in its application. Conversely, Contracting States ought not allow domestic conceptions to subvert a uniform application of CISG rules.[13] And yet, we have already seen some courts slip

---

10. *See supra* note 1.

11. With inspiration from Witz (*supra* note 9) for use in BERNSTEIN & LOOKOFSKY, *supra* note 1, § 2-3 with note 14.

12. The rule in Article 7(1) also contains another important passage which requires that the CISG needs to interpreted so as to promote *the observance of good faith in international trade*. So far, it would seem that the main impact of this part of the rule concerns—not (as one might have expected) interpretation of the treaty text, but rather—the emergence of a *duty* which impliedly *obligates the parties* to every CISG contract to *act in good faith*. *See generally* BERNSTEIN & LOOKOFSKY, *supra* note 1, § 2-10.

13. For instance, interpretation of the concept of "impediments" in Article 79 ought not be guided by (sometimes too narrow) notions of Anglo-American law; *accord* Stoll in SCHLECHTRIEM, P., KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT - CISG (3d ed. Munich 2000) Art. 79, Rd.Nr. 12, 17 with note 55 [hereinafter SCHLECHTRIEM, KOMMENTAR] and in SCHLECHTRIEM, P., COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) (Geoffrey Thomas trans., Clarendon Press 1998) [hereinafter SCHLECHTRIEM, COMMENTARY]; *see also* Witz, *supra* note 9, no. 86 with note 126. Instead, a

into a parochial kind of CISG interpretation, *inter alia*, when the relevant Convention terminology seems reminiscent of older local (domestic) law.[14] Worse yet, national courts sometimes simply overlook the new legislative message altogether, failing to recognize the fact that the previously applicable domestic authority (statute or case law) has been replaced by a different, international CISG rule.[15]

To discern the meaning of a given CISG rule, the text of that provision is the obvious place to start.[16] In many instances, however, no single plain meaning can be gleaned from the "letter of the law" (the six official and equally authentic versions of the treaty).[17] For this reason, courts and commentators regularly consult secondary sources of law.[18] Since the Convention was created by an international legislator, courts and commentators sometimes turn to the voluminous CISG legislative history (*travaux préparatoires*),[19] looking for evidence of legislative intent.[20] In many cases, however, this history

---

notion autonome should be applied: *see* Audit, B., LA VENTE INTERNATIONALE DE MARCHANDISES (Paris 1990) no. 180. Re. Article 79 *see also generally* BERNSTEIN & LOOKOFSKY, *supra* note 1, §§ 6-19 and 6-32.

14. For example, the "foreseeability" rule in CISG Article 74 is clearly reminiscent of domestic analogues: *see generally* BERNSTEIN & LOOKOFSKY, *supra* note 1, § 6-15.

15. Witz, *supra* note 9, no. 62 and Magnus in VON STAUDINGER, J., KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH MIT EINFÜHRUNGSGESETZ UND NEBENGESETZEN: WIENER UN-KAUFRECHT (CISG) (Neubearbeitund 1999 von Magnus, Berlin 2000) Art. 39, Rd.Nr. 36-41 [hereinafter MAGNUS] who both fault the German judges for their seeming failure to recognize that the CISG Article 39 rule is not the same as that under the ULIS (*supra* § note 3). Another example is the Beijing Metals case (BERNSTEIN & LOOKOFSKY, *supra* note 1, § 4-5 with notes 58, 64) which ignores the effect of Article 8 in relation to parol evidence. And then there are the not-so-few cases where *neither the court nor the parties lawyers knew* that the CISG applied: *see, e.g.* re. *GPL Treatment, Ltd. v. Louisiana-Pacific Corp.*, 894 P.2d 470 (Or.Ct. App. 1995), *rev. granted*, 898 P.2d 770 (or. 1995) *aff'd*, 914 P.2d 682 (Or. 1996); *see also* Harry M. Flechtner, *Another CISG Case in the U.S. Courts: Pitfalls for the Practitioner and the Potential for Regionalized Interpretations,* 15 J.L. & COMM. 127 (1995), available at http://www.cisgw3.law.pace.edu/ cisg/biblio/jlvcvol15.html.

16. *See* Vienna Convention on the Law of Treaties, May 23, 1969, Article 31 ("ordinary meaning"). *Accord*: Herber in SCHLECHTRIEM, COMMENTARY, *supra* note 13, Art. 7, Rd.Nr. 20.

17. Inevitably, these official texts differ on a (limited) number of substantive points; even greater variations have been occasioned by the numerous unofficial translations now in use (e.g.) in Germany and the Scandinavian States (Denmark, Finland, Norway & Sweden).

18. *See* Vienna Convention on the Law of Treaties, *supra* note 16, Article 32 (permitting recourse to "supplementary means").

19. For examples of decisions which cite the Convention *travaux*, *see* the decision (involving the quality of New Zealand mussels) by OLG Frankfurt (Germany), 20 April 1994, RIW 1994, 593 and BGH, 8 March 1995, RIW 1995, 595, both decisions available at http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=13353&x=1; for more details *see* BERNSTEIN & LOOKOFSKY, *supra* note 1, § 4-8.

20. Professor Honnold has performed a helpful task by organizing the most relevant

(which some date back to include the unsuccessful 1964 ULIS treaty)[21] proves ambiguous and inconclusive.[22] The *Secretariat Commentary* to the 1978 Draft Convention[23] is a helpful tool in some instances, but it is not the official authority (anywhere) as to what the 1980 Vienna Convention means.[24] Nor should we expect the mixed motives underlying the votes of Convention delegates to provide definitive solutions to complex questions which arise decades later as to the proper interpretation and application of the CISG rules.[25]

This brings us to a different secondary source—the CISG case law—though there are, to be sure, also difficulties here. When called upon to interpret a domestic statute, national courts consider themselves bound—or at least influenced—by local precedent, i.e., rele-

---

documents in a single-volume: *see* JOHN HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES (1989).

21. Many commentators trace the CISG "history" back to the first Uniform Sales Law, ULIS, but since that treaty was found unacceptable by many States which later became CISG States, the application of ULIS concepts, interpretations and precedents will not always advance an autonomous interpretation of the CISG. For examples of the use of ULIS as a CISG tool *see* BERNSTEIN & LOOKOFSKY, *supra* note 1, § 2-5 with note 49, § 2-6 with note 78 and § 2-9 with note 122.

22. *Compare*, for example, the U.S. Supreme Court's interpretation of the Hague Service Convention in *Volkswagenwerk A.G. v. Schlunk*, 486 U.S. 694 (1988), where the majority and minority opinions of the Court each found excerpts from the same legislative history in support of their own results. *See also* Franco Ferrari, *Uniform Interpretation of the 1980 Uniform Sales Law*, 24 GA. J. INT. & COMP. L. 183 (1994) at 206-08, available at http://cisgw3.law.pace.edu/cisg/biblio/franco.html.

23. U.N. Doc. A/CONF.97/5 (1979), reprinted in HONNOLD, *supra* note 20, at 404.

24. An *American proposal* to draft an *official* Commentary to the 1980 Convention was *rejected*: *see* Peter Winship, *The Scope of the Vienna Convention*, in INTERNATIONAL SALES (Nina M. Galston & Hans Smit eds., 1984) at 1-15 with note 29. A subsequent proposal set forth by James Bailey, *Facing the Truth: Seeing the Convention on Contracts for the International Sale of Goods as an Obstacle to a Uniform Law*, 32 CORNELL INT'L L.J. 273, 300 (1999), that the US adopt the UN Secretariat's *unofficial Draft Commentary* as the "official" American CISG commentary seems highly ill-advised.

25. Consider, for example, the "legislative history" surrounding the controversial and difficult-to-understand "gap-filling" formula in paragraph (2) of Article 7 (discussed *infra*, text accompanying note 94 *et seq*)—a subject not dealt with in the 1978 New York Draft: After a proposal by the Bulgarian representative to the 1980 Diplomatic Conference (that the seller's law should always govern questions for which the Convention provided no solution) found no support, the complex GDR proposal (combining suggestions made by the CSSR and Italy) which ultimately became Article 7(2) was adopted by a vote of 17:14 with 11 abstentions, perhaps indicating that a majority of the delegates present in Vienna felt the Convention would be better without any gap-filling rule. *Compare* Herber in SCHLECHTRIEM, COMMENTARY, *supra* 13, Art. 7, Rd.Nr. 1-4 and sources cited there. Even as regards the use of his own DOCUMENTARY HISTORY (*supra* note 20) as an interpretative aid, Professor Honnold urges restraint: "Interpretation based on discussions by a large legislative body is more meaningful for decisions of broad issues of policy than for detailed applications." JOHN HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 463 (3rd ed. 1999).

vant decisions previously rendered by the courts of that particular State. When it comes to decisions rendered pursuant to the Convention, however, the *stare decisis* issues are more complex. For one thing, courts in Contracting States cannot rely solely on local CISG precedent (i.e., even in a situation where such authority exists): regard *must* also be had to the international view.[26] This presents a formidable challenge,[27] but we now have reasonably comprehensive electronic access to a broad range of reported decisions.[28]

A related barrier which still stands in the way of uniform interpretation is the fact that CISG decisions rendered by the highest national courts cannot be appealed;[29] no international court sits atop the CISG "pyramid" with the authority to iron out differences in opinion among the national instances below.[30] Nor has any system or scale been established which courts or arbitrators might use to evaluate the

26. *See supra* notes 12-13 and accompanying text.

27. Especially considering the number of Contracting States: *see supra* note 4. As of this writing (early 2003) more than 1,000 CISG decisions have been *reported*: *see* (e.g.) http://cisgw3.law.pace.edu/cisg/text/caseschedule.html.

28. Having acknowledged the "information problem" early on, UNCITRAL took an important first step in 1993, establishing the CLOUT system for the collection and dissemination of court decisions and arbitral awards relating to the CISG (and other UNCITRAL texts). Under this system, national correspondents collect and prepare abstracts of available court decisions and arbitral awards which are then published by the UNCITRAL Secretariat in English and the other official U.N. languages. The decisions and awards themselves are also made available (in the language of origin) by the Secretariat. *See* http://www.uncitral.org/en-index.htm. The CLOUT system, though important, does not provide all the information we need. Not all CISG decisions reported in CLOUT (based on the abstracts prepared by national reporters and then edited by UNCITRAL) provide readers with adequate information. For one thing, the length and quality of the CLOUT abstracts varies considerably from case to case. *See also* MAGNUS, *supra* note 15, Art. 6, Rd.Nr. 64 (and authors cited there) and Audit, VENTE INTERNATIONALE, *supra* note 13, no. 44. Fortunately, CLOUT is not our only case-law source. *See, e.g.,* the CISGW3 website: http://cisgw3.law.pace.edu. Developed and maintained by the Pace Institute of International Commercial Law in New York, CISGW3 makes a wealth of CISG information, including English translations of many foreign-language cases, easily available. The UNILEX data base, developed and maintained by the Centre for Comparative and Foreign Law Studies in Rome, is another very convenient and useful source of CISG information which includes case-abstracts, cross referes and original language texts: *see* http://www.unilex.info/. Regarding the forthcoming (UNCITRAL) CISG Case Digets *see infra* note 36 with accompanying text.

29. CISG decisions rendered by arbitral tribunals (in the form of awards) cannot be appealed either. Depending on the *lex arbitri* of the jurisdiction concerned, however, they sometimes can be "set aside" (invalidated). *See generally* JOSEPH LOOKOFSKY & KETILBJØRN HERTZ, TRANSNATIONAL LITIGATION & COMMERCIAL ARBITRATION (2d ed. forthcoming Fall 2003) Ch. 6.

30. Contrast the authority granted to the European Court to answer questions submitted by the courts of EU Member States re. the proper interpretation of the 1968 Brussels Convention (as of 2002 the Brussels Regulation) on Jurisdiction and Judgments. *See generally* LOOKOFSKY & HERTZ, *id.*, ch. 2.2.

weight of foreign CISG precedents.[31] So, while we find many examples of harmonious Convention interpretation,[32] the CISG musicians do not all play the same tune;[33] indeed, domestic idiosyncracies sometimes make it difficult for outsiders to a given national system to even "hear" the message sounded by foreign precedent.[34] For these and other reasons, the courts in the various Contracting States resemble "members of an orchestra without a conductor."[35] Case-commentators may help clarify the situation, but they have no baton to make judges and arbitrators march in step.[36]

This is not to suggest that problems of Convention interpretation are insurmountable or that those international merchants who put a premium on "certainty" should avoid the CISG regime,[37] but it should

---

31. For a full discussion of this problem—and a proposed method for determining the precedential authority of foreign decisions—*see* Harry M. Flechtner, *Recovering Attorneys Fees as Damages under the U.N. Sales Convention: A Case Study on the New International Commercial Practice and the Role of Foreign Case Law in CISG Jurisprudence, with a Post-Script on Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co.*, 22 NW J. BUS. L. & POLICY (forthcoming 2002), available at http://cisgw3.law.pace.edu/cisg/biblio/flechtner4.html.

32. For an example of uniform interpretation *see infra* notes 48-59 and accompanying text (nearly all courts and arbitrators have required clear evidence of the parties' mutual intent to "contract out" of Convention applicability under Article 1).

33. Regarding the varied interpretations of the notice provisions in Articles 38-39 *see* BERNSTEIN & LOOKOFSKY, *supra* note 1, § 4-9.

34. *See, e.g.,* Flechtner, *supra* note 31, regarding the difficulties faced by an American court seeking foreign precedent on the question of whether the "full compensation" principle expressed in Article 74 requires courts in a Contracting States to award attorneys' fees to the prevailing party (or whether American courts ought still follow the "American" rule). *See also* the case-note by Lookofsky in 6 VINDOBONA J. OF INT. L. AND ARBITRATION 27 (2002), available at http://www.cisg.law.pace.edu/cisg/biblio/lookofsky5.html. The same question is discussed further by Flectner and Lookofsky, *Viva Zapata! American Procedure and CISG Substance in a U.S. Circuit Court of Appeal*, 7 VINDOBONA J. OF INT. L. AND ARBITRATION (Spring 2003).

35. Schlechtriem, P., *Uniform Sales Law in the Decisions of the Bundesgerichtshof*, http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem3.html at 2.

36. *Compare* Herber in SCHLECHTRIEM, COMMENTARY, *supra* note 13, Art. 7, Rd.Nr. 14, characterizing as "dangerous" the proposal (Report on UNCITRAL work on its 21st session, 11-22 April 1988, ch X sec. 98 *et seq.*) to form an Editorial Board to monitor and clarify published CISG decisions. Whether the forthcoming "Case Digests" (expected to be published by UNCITRAL in 2003) will confirm or allay such fears remains to be seen, but there is surely some danger that knowledgeable Digest commentators might be tempted to put a scholarly "spin" on the precedents they report. *See* Joseph Lookofsky, *CISG Foreign Case Law: How Much Regard Should We Have? A Commentary on the UNCITRAL Draft Digest of CISG Part I*, in THE UNCITRAL CASE DIGEST AND BEYOND (Ronald Brand, Franco Ferrari and Harry Flechtner eds., forthcoming 2003). For an oral intervention on the same topic, made at the University of Pittsburgh School of Law Conference *Beyond the UNCITRAL Digest* (February 7, 2003), *see* (the last 10 minutes of) Session One of http://www.law.pitt.edu/programs/international/UncitralDigestVideo.htm.

37. Unfortunately, some of the problems suggested here apparently encourage some contracting parties (with the requisite bargaining power) to "opt out" of the Convention regime

serve to remind us that the law of international commerce is still at a relatively early stage of development and that the interpretation and application of international statutory law is an even less exact science than the discipline which we lawyers practice at the domestic level.[38]

Having set forth these very general caveats, I shall now proceed to consider some specific issues regarding the interpretation and delimitation of the Convention's field of application, in each instance asking whether (or not) the *in dubio pro conventione* maxim should apply.

II. OPT-OUTS UNDER ARTICLE 6

The main rule regarding CISG application is Article 1(1)(a):[39] the Convention applies automatically to sales of goods contracts between parties whose places of business are in different Contracting States.[40] In most CISG jurisdictions this rule is supplemented by Article 1(1)(b),[41] so the Convention also applies "when the rules of private international law lead to the application of the law of a Contracting State."[42]

> *Illustration 2*: Merchant-buyer B in London faxes an order for 10 dozen designer dresses to seller-manufacturer S in France, and S accepts the order by faxing a brief confirmation to B. Later, a dispute develops concerning the quality of the goods.

In this situation, a French court would apply the CISG, even though the United Kingdom is *not* (as of 2002) a CISG Contracting State.[43]

The results reached in *Illustrations 1 and 2*—the application of the CISG "by default"—assume that the parties concerned have not otherwise agreed. Article 6 provides direct authority for contracting out of the CISG,[44] and this includes not only the authority to derogate

---

(and into their own domestic sales law); *see, e.g.,* Flechtner, *supra* note 31.

38. *Accord* Joseph Lookofsky, *Loose Ends and Contorts in International Sales: Problems in the Harmonization of Private Law Rules*, 39 AM. J. COMP. L. 403 (1991).

39. *See supra* note 5 and accompanying text.

40. Assuming the contract is made after the CISG has become effective in the Contracting States where the parties reside: *see* CISG Article 100.

41. Regarding the Article 95 declaration (reservation), made by the U.S., China and a few other States in respect of Article 1(1)(b) *see* BERNSTEIN & LOOKOFSKY, *supra* note 1, § 2-4.

42. Provided the two parties to the transaction have their places of business in *different* States (countries): *see* CISG Article 1(1) and the narrow exception in Article 1(2).

43. In all likelihood, an English court would too. For a more detailed discussion of CISG application in this situation, *see* BERNSTEIN & LOOKOFSKY, *supra* note 1, § 2-4.

44. CISG Article 6 provides: The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.

in part,[45] but also the power to *exclude* Convention application *entirely*.

> *Illustration 3*: S in France sells heavy machinery to B in Russia. The contract includes a term providing that the sale "shall be governed by the Swedish Sale of Goods Act of 1990 (*Köplagen*)".

In this case, the intent of the parties (and the understanding of reasonable persons in general) seems clear:[46] Swedish *domestic* sales law should displace the CISG regime, i.e., even though both French and Russian courts otherwise (absent the choice-of-law clause) automatically would have applied the Convention.[47]

> *Illustration 4*: S in Denmark sells heavy machinery to B in Russia. The contract includes a standard term providing that the sale "shall be governed by the law of the Vendor's country".[48]

The choice of law clause in this *Illustration* is very different, simply because the 1980 Vienna Convention *and* the Danish (domestic) Sales Act (*Køpeloven* of 1906) are *both part of* "the law of the Vendor's country." Since the clause is arguably amenable to differing interpretations, we might expect S (the Danish Vendor) to prefer the application of the Danish Sales Act, whereas B (and B's lawyers) would have good reason to prefer the CISG.[49]

---

45. *See* preceding note. If, for example, the seller's standard terms and conditions become *part* of that sales contract, they will almost surely provide a special set of remedies for breach; if so, this *part* of the parties' agreement will displace the CISG *remedial* rules.

46. Because the CISG applies by default, unless and until it is determined that the parties have contracted out, the choice-of-law clause should be interpreted in accordance with Article 8 which provides as follows:

> (1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.
>
> (2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.
>
> (3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

Regarding contract interpretation under Article 8 *see generally* MAGNUS, *supra* note 15, Art.8 Rd.Nr.7 and authors cited there; *see also* Joseph Lookofsky, *The 1980 United Nations Convention on the International Sale of Goods*, in INTERNATIONAL ENCYCLOPEDIA OF LAWS, CONTRACTS, ¶ 81-86 (J. Herbots ed., Supp. 29 2000).

47. Both courts would have otherwise applied the Convention because the parties reside in different Contracting States. *See supra* note 5.

48. The latest version of the Nordic General Conditions (NL 01: in English at http://www.vi.se/files/uploadfiles/nl01eb.pdf) contains an applicable law clause like this.

49. For example, B may prefer the CISG because Russians (and others outside Scandinavia) have no easy access to Danish domestic law. There is no official translation of Danish sales legislation, just as nearly all material relating to it is in Danish. *See, e.g.,* LOOKOFSKY, KØB.

Even if we assume that S (who probably supplied the standard term in question) intended that Danish domestic sales law apply, that subjective interpretation should not be decisive, unless it was actually shared by B at the time of contracting or unless a reasonable person in B's shoes would so have understood the term.[50] In this case, we would not expect that B "knew or could not have been unaware what [S's] intent was,"[51] nor would we expect a reasonable person standing in B's shoes to have read the clause as "narrowly" as S—i.e., so as to exclude the Convention, notwithstanding the hard fact that the CISG *is an integral part of* "the law of the Vendor's country"[52]— especially since Article 6 represents an exception to the rule which makes the Convention applicable to international sales by default.

For these reasons, we would expect a court or tribunal to interpret "the law of the Vendor's country" to *include the CISG* (at the expense of domestic sales law),[53] and the Convention case law clearly confirms that result. Indeed, a very large number of precedents show that an express contractual choice of (e.g.) "Austrian law,"[54] or "the laws of Switzerland"[55] or "the law of the seller's country"[56] should be

---

DANSK INDENLANDSK KØBSRET (2d ed. Copenhagen 2002).

50. Regarding CISG Article 8 *see* note 46 *supra*. Similar results follow if the rule in Article 8(2) is supplemented by the *contra proferentem* principle; *see* text *infra* with note 105 and UNIDROIT Principles of International Commercial Contracts, Art. 4.6, available at http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=13636&x=1. Re. *contra proferentem* and the interpetation of "agreed documents" *see* Junge in SCHLECHTRIEM, COMMENTARY, supra note 13, pp. 72-73 and in Schlechtriem, KOMMENTAR, *supra* note 13, p. 144. *See also* Lookofsky, UNITED NATIONS CONVENTION, *supra* note 46, ¶ 79.

51. *See* CISG Article 8(1).

52. As previously indicated, it would be difficult for a Russian buyer to even gain *access* to the statute in a non-Danish text, let alone understand the implications of its rules.

53. As a supplement to the CISG, domestic law rules may come into play. For example, since rules of contractual *validity* remain generally outside the CISG scope, the validity of (e.g.) a liability disclaimer in the Vendor's standard terms would have to be determined by domestic law rules—in this case Danish law.

54. *See* ICC Case 7660/JK of 23 August 1994, available at http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=13355&x=1. A more direct approach would be to simply interpret the parties' *choice* of "Austrian law" as *comprising* the CISG (the Austrian law applicable to international sales). *See also* ICC Case 6653/1993, JOURNAL DE DROIT INTERNATIONAL (1993), 1040, also available at http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=13355&x=1 (reference to "French law" in a sales contract between a Turkish seller and a Syrian buyer *means* the CISG); *see also* Witz, PREMIÈRES APPLICATIONS, *supra* note 9, no. 28.

55. *See* ICC CASE 7565/1994, available at http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=13355&x=1. *See also* Oberlandesgericht Frankfurt, decision of 30 August 2000, available at http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=13353 (invoice stated "all transactions and sales are subject to Swiss law"; to exclude application of CISG plaintiff would have had to refer to the relevant provisions of Swiss *domestic* law).

56. Provided that "country" is a Contracting State. *See, e.g.,* International Court of Com-

interpreted— not as a reference to domestic sales law, but rather—as the parties' *reaffirmation* of the (CISG) rule-set which, absent the clause, would apply by default.[57] So, when dealing with the question of opt-outs, we let the *in dubio pro conventione* maxim apply. The many CISG Contracting States have accepted the Convention as a well-balanced regime, fair to both parties and suitable for the regulation of international sales of goods,[58] and the Convention applies by default, unless the contract unmistakably precludes that result.[59]

III. COMPUTER SOFTWARE AS "GOODS" UNDER CISG ARTICLES 1, 2 AND 3

The determination that the Convention applies by virtue of Article 1 presupposes—not only that the parties have not opted out, but also—that the transaction in question can be classified as a (CISG) "sale of goods". Does the supply of a *computer program* qualify as such? If courts or arbitrators are in doubt as to Convention applicability, should the *in dubio* maxim apply?

---

mercial Arbitration, Chamber of Commerce & Industry of the Russian Federation, decision of 24 January 2000, reported and translated at http://cisgw3.law.pace.edu/cisg/wais/db/cases2/000124r1.html).

57. *Accord*: Franco Ferrari, *Specific Topics of the CISG in the Light of Judicial Application and Scholarly Writing*, 15 J. LAW & COMMERCE 1 (1995), text with note 627; Schlechtriem, *Bundesgerichtshof*, *supra* note 35, at 2, text with note 13. Nearly all reported CISG decisions support this view. *See, e.g.,* the decision of LG Düsseldorf (Germany), 11 October 1995 (No. 2 O 506/94), available at http://cisgw3.law.pace.edu/cisg/wais/db/cases2/951011g1.html, applying the CISG on the basis of Art. 1(1)(a), though seller's standard terms provided for application of "German law": the express choice of German law could *not* in itself amount to an implied exclusion of CISG, because the *CISG is part of the law of that State*. *Accord*: *Asante Technologies, Inc. v. PMC-Sierra, Inc.*, 164 F.Supp.2d 1142 (N.D. Cal. 2001). *See also* OLG Koblenz (Germany), 17 September 1993 (no. 2 U 1230/91), RIW 1993, 934-938, CLOUT Case 281, where the parties' choice of "French law", coupled with the 1(1)(b) rule, led to the CISG.

In situations like these, where the *starting point* is that the CISG applies by virtue of Article 1(1)(a)-(b), the *interpretation* of "statements" (clauses) like "German law" or "French law" should be governed by Article 8 (discussed in BERNSTEIN & LOOKOFSKY, *supra* note 1, § 2-12), so the *intention* of the party who "made" the statement (drafted the clause) will *not* lead to domestic law, unless that interpretation was *shared* by the *other* party or a *reasonable* person in his or her shoes would so understand the statement. Similar results follow if the rule in CISG Article 8(2) is supplemented by the *contra proferentem* principle; *see* UNIDROIT PRINCIPLES, *supra* note 50, Art. 4.6. Re. *contra proferentem* and the interpetation of *agreed documents* (drafted by representatives of *both* buyer and seller), *see* Junge in SCHLECHTRIEM, COMMENTARY, *supra* note 13, pp. 72-73 and in Schlechtriem, KOMMENTAR, *supra* note 13, p. 144.

58. *See also supra* notes 8 and 9, and accompanying text.

59. *See* Witz, PREMIÈRES APPLICATIONS, *supra* note 9, no. 30, for a discussion of what Witz calls the *favor conventionis* of the German courts.

> *Illustration 5*: Merchant S in Germany supplies a computer program to Merchant B in France. The program, designed to facilitate the billing of customers, is properly installed in B's computer system, but the software performs badly (it "shuts down" repeatedly and unpredictably), arguably doing B's business more harm than good.

To determine whether the CISG applies to the transaction described in this *Illustration* (by default),[60] we might start with the Convention text,[61] but the CISG provides no positive definitions of "sale" or "goods." To be sure, CISG Articles 2 and 3 expressly exclude certain transactions which might otherwise qualify as sales of goods. However, transactions in computer software are not specifically excluded, and the exclusion of *certain* "intangibles" (like electricity, shares of stock and securities)[62] does not lead to the conclusion that the subject matter of a CISG sale must always be a tangible thing,[63] nor does the refusal by a German court to characterize a "scholarly market analysis" as CISG goods lend logical support to such a (broad) generalization;[64] indeed, a market analysis and a computer program are very different things.[65]

---

60. For present purposes, we assume that the parties to this particular transaction have not agreed to exclude the entire Convention regime. It might, of course, be important to know whether S, in connection with the marketing and/or sale of this product, proffered a set of (shrink-wrapped/click-wrapped, fine-print) terms. Regarding the complex questions which sometimes surround the incorporation, interpretation and validity of standard terms *see generally* BERNSTEIN & LOOKOFSKY, *supra* note 1, ch. 7. Regarding the inappropriate "license" nomenclature which software suppliers sometimes employ in their standard terms *see infra* notes 76 and 81 and accompanying text.

61. *See supra* notes 16-25 and accompanying text.

62. CISG Articles 2(d) and 2(f).

63. Note that, while the sale of electricity is excluded from application of the CISG, the sale of gas is not (*see* Audit, *supra* note 13, no. 34), and commentators rightly reject analogous application of the rule to gas: *see* MAGNUS, *supra* note 15, Art. 2, Rd.Nr. 50.

64. *See* the decision of OLG Köln, 26 August 1994, RIW 1994, 970, CLOUT Case 122, available at http://cisgw3.law.pace.edu/cisg/wais/db/cases2/940826g1.html, holding that a contract calling for a "scholarly analysis of a certain segment of the German market for express delivery services" did not constitute a contract for the "sale of goods". In this connection, the court noted that a sale of goods is characterized by the transfer of property in an "object"; though the analysis results were embodied in a written report, the main concern of the parties was the *right to use the ideas* therein. *See also* WITZ, *supra* note 9, at 32-33. As with the software issue, the question of whether *know-how* is CISG goods should *not* depend on its "incorporation in a physical medium"; *accord* MAGNUS, *supra* note 15, Art. 1, Rd.Nr. 46; *but see* Ferrari in SCHLECHTRIEM, KOMMENTAR, *supra* note 13,Art. 1, Rd.Nr. 38; *compare* Herber in SCHLECHTRIEM, COMMENTARY, *supra* note 13, Art. 1, Rd.Nr. 21a.

65. *See* OLG Koblenz (Germany), *supra* note 57. *Accord*: Herber in SCHLECHTRIEM, COMMENTARY, *supra* note 13, Art.1 Rd.Nr. 21 with n. 37a. *But see* contrary *obiter dictum* in the German *non*-software case cited in the preceding note. *Compare* Ferrari, *supra* note 57, who (*id.* with note 430) combines that *dictum* with *ULIS terminology* to support the proposition that *only* "corporeal moveable goods" (*objets mobiliers corporels*) qualify as CISG goods.

As a starting point, even a contract for the supply of goods "to be manufactured or produced" is a CISG sale under Article 3(1), and this is true even if the value of the labor and services involved exceeds the value of the raw materials needed to manufacture the goods concerned. If a fancy restaurant (B) in Italy buys high-priced dishes from Royal Copenhagen (S) in Denmark, that transaction qualifies as a CISG sale-of-goods; the fact that the design on the dishes is painstakingly hand-painted by Danish craftswomen (at great expense to the manufacturer) does not turn the S-B transaction into a contract (mainly) for the provision of "services" under Article 3(2). By the same token, if S in Germany manufactures and delivers intangible software to B in France, the fact that the value of that product is mainly attributable to the intellectual efforts of brainy (and pricy) IT-nerds hired by S to produce it does not somehow render the S-B transaction "ineligible" as a CISG sale of goods.[66]

The treaty demands an autonomous (international) interpretation,[67] but when the text of the treaty leaves us in doubt, we need not blind ourselves to the "common core" of commercial wisdom re-

66. An arbitral award rendered in Stockholm, Sweden in 2003 involved a French supplier (of computers and computer-related systems and services) and a Russian recipient, i.e., parties in different CISG Contracting States. Although the contract was to be "governed, construed and interpreted in accordance with the Law of Russian Federation" (*compare Illustration 4 supra*), the parties disagreed as to whether the CISG should apply. The recipient argued, *inter alia*, that the Convention should apply by virtue of the "preponderant part" rule in Article 3(2), since the contract itself designated items amounting to 55% of the total contract price as "Goods" (including *standard software* designated "goods", but excluding *custom software* designated "services"). Noting that the (official) Russian language version of the CISG (which does not duplicate the English version on this point) places emphasis on whether the services to be provided constitute the "fundamental" (*osnovnoe*) contract part, the supplier argued, *inter alia*, that the contract fundamentally concerned the provision of services, that the software was provided in the form of licenses, and that (in any event) customized software ought not be considered as CISG goods. Although the Sole Arbitrator noted that the application or non-application of the CISG presented a "potential threshold issue", he also noted that "the Contract and its provisions take precedence both over the CISG and Russian law." And since he found that the Contract itself "provided solutions and answers" to the issues presented (regarding the alleged breach, claims for damages, etc.), the Arbitrator found it "not necessary to determine if, and to what extent, CISG is applicable, as opposed to Russian law proper, excluding CISG." In situations where the contractual provisions did not provide clear-cut solutions, he "looked both at Russian law and CISG and always [came] to the conclusion that application of Russian law would lead to the same result as application of the CISG." For this reason, the Arbitrator found it *not* "necessary to determine the potential threshold issue mentioned above, interesting as it may be from a scholarly point of view." As author of the present article, I thank the Arbitrator and the attorneys for the parties concerned for providing me with a copy of this Award and for granting me permission to convey the foregoing (limited) information in an academic context. Regarding "licensing" and "custom software" *see also infra*, notes 75-79 and accompanying text.

67. *See supra* notes 12-15 and accompanying text.

flected by the domestic sales laws of Contracting States.[68] In many (perhaps most) of these jurisdictions, "a sale of goods" is generally understood as the transfer of a property right in a moveable thing.[69] Computer programs should qualify as goods on both counts: property rights in a (copy of) a program are readily transferred,[70] just as (copies of) that program can be "moved" (by disk or by Internet) from place to place.

Though we cannot see or touch it, a computer program is not really all that different from a tractor or a micro-wave oven, in that a program—designed and built to process words, bill customers or play games—is also a kind of "machine". In other words, a computer program is a *real* and very *functional thing*; it is neither "virtual reality" nor simply a bundle of (copyrighted) "information."[71] Once we recognize the functional nature of a program, we begin to see that the CISG rules (on contract formation, obligations, remedies for breach etc.) are *well-suited* to regulate international sales of these particular "things."[72]

---

68. *Accord* Herber in SCHLECHTRIEM, COMMENTARY, *supra* note 13, Art. 7, Rd.Nr. 26(comparative law may help illuminate common meaning of term in Contracting States). *Compare* the similar approach of the European Court of Justice whose "autonomous" interpretation sometimes involves the search for a "common core" among the laws and jurisprudence of the various Member States. *See, e.g.*, the interpretation of Article 5(3) of the Brussels Convention in *Bier*, Case 21/76 [1976] ECR 1735, discussed in LOOKOFSKY & HERTZ, *supra* note 29, ch. 2.2.

69. *See* Lookofsky, *supra* note 49, ch. 2.3.a (re. goods/*løsøre* under Danish domestic sales law). The (original, as of this writing still applicable version of) American UCC § 2-105(1) defines goods as "*all things* . . . which are *movable* at the time of identification to the contract . . ." (my emphasis). In international sales a similar understanding of the "sale of goods" concept is supported by CISG Articles 30-31. According to the revised (2002) version of UCC § 2-102(4) a transaction in a product consisting of "computer information and goods that are solely the medium containing the computer information" is not a "transaction in goods"; similarly, the UCITA (not 76 infra) excludes such "information" (data, programs) from its definition of goods (§ 102, subsecs. 33 and 35).

70. *See infra* note 76 and accompanying text.

71. The word "virtual"—as in "virtual reality"—means "being in essence or effect but not in fact". To describe intangible goods as "virtual" goods wrongly implies that intangible goods are somehow "not real". In fact, an intangible computer program is every bit as "real" as a typewriter, tractor or other tangible thing. Unfortunately, the misnomer "virtual good" seems to be gaining currency: *see, e.g.*, *Legal Aspects of Electronic Commerce—Electronic Contracting: Provisions for a Draft Resolution*, U.N. Doc. A/CN.9/WG.IV/WP.95 (2001) (employing the term "virtual goods"). It seems that those who prefer to "lump" computer software (programs) together with other kinds of electronic "information" (e.g. the raw data in a database) fail to see the essential nature of a program as a "machine"—a highly *functional* thing with complex parts (codes etc.) that make it "work". *Accord* (as re. Danish law) KIM FROST, INFORMATIONSYDELSEN (Copenhagen 2002) pp. 106 ff.

72. It should be emphasized in this connection that a CISG seller's (implied-by-default) obligation to deliver goods fit for "ordinary"—and sometimes also buyer's particular— pur-

Clearly, the fact that the software in question may be protected by copyright does *not* change the nature of this invisible and intangible, yet highly functional beast.[73] If the particular (intangible) program-copy sold is "packaged" in/on a (tangible) floppy disk or CD, then that hybrid thing is (all) goods. The fact that the program is protected by copyright means "only" that the buyer cannot legally make copies of (his copy of) the program without the copyright-holder's permission; it does *not* change the fact that the subject matter of the transaction—i.e. the individual program-copy purchased—is (CISG) "goods".[74]

So, assuming the parties have not otherwise (validly) agreed,[75] the CISG *should* be applied to international *sales* of computer software, *including* transactions which program-sellers often inappropriately dub *"licenses"*:[76] not only sales of software on *disk*, but also

---

poses (BERNSTEIN & LOOKOFSKY, *supra* note 1, § 4-7) does *not* mean that software buyers can expect "perfect" (glitch-free) products. Re. (e.g.) Danish domestic law *see* MADS BRYDE ANDERSEN & JOSEPH LOOKOFSKY, LÆREBOG I OBLIGATIONSRET (Copenhagen 2000) at 69 f.

73. *Accord* (regarding American domestic/UCC sales law, at least as regards programs "implanted" in a physical medium) *Advent Systems Ltd. v. Unisys Corp.*, 925 F.2d 670 (3rd Cir. 1991). In connection with a discussion of the nature of "embedded software" Lorin Brennan concludes that "computer programs are not goods", but this conclusion seems unsupported by the arguments presented Mr. Brennan in the course of his discussion of *"Embedded Software"—Fact or Felony?*, UCC BULLETIN, May 2001.

74. I.e., notwithstanding the fact that the copyright holder retains its intellectual property rights in the program.

75. The right to contract out of the CISG, in whole or part, is of course extremely important, for example, as regards the right of software sellers to (validly) limit their liability for software not fit for ordinary or special purposes under Article 35. *See supra* notes 44-45 and accompanying text and *infra* notes 82-93 and accompanying text. *See also generally* BERNSTEIN & LOOKOFSKY, *supra* note 1, ch. 7 (regarding disclaimers and liability limitations and the right of buyers to "minimum adequate remedies"). Re. software "licences" *see infra* note 76 and accompanying text.

76. Though the manufacturing lobby continues its crusade in favor of legislation which would transform sales of goods into (reduced warranty) "licenses," it is still (in most places) up to the court or arbitral tribunal to determine whether the transaction in question qualifies as a "sale" or something else, e.g. a lease or "license". If B in State X orders, receives and pays for (e.g.) a disk containing a word-processing program from S in State Y, that transaction should be viewed as an (international) *sale*—not a "license"—of goods (*accord* as regards Danish domestic law FROST, *supra* note 71, 125-126), and this is true *even if* S provides B with fine-print, shrink-wrapped/click-wrapped standard terms which dub the transaction a "license". Copyright protection is one thing, but the fact that B can only (legally) use the goods purchased in ways which respect S's intellectual property rights in the software does *not* somehow turn a sale into a license, and if S supplies a term which attempts to escape the reality of the situation, that term ought not bind B. (The political nature of the issue is highlighted by "bombshelter" laws enacted in some American states which *invalidate contract clauses purporting to opt in* to the Uniform Computer Information Transactions Act (UCITA)*: see* 70 U.S.L.W. 2439 (2001) and 71 U.S.L.W. 2086 (2002). Regarding the incorporation, interpretation and validity of standard terms, *see generally* BERNSTEIN & LOOKOFSKY at *id*. In other words, *both* the *disk* and the *pro-*

purely intangible software sold and delivered/downloaded over the *Internet*.[77] And though the logic set forth here is mainly relevant as regards "standard" programs,[78] also less-common transactions providing for the development and sale of specialized (tailor-made) programs should be held to fall within the Convention ambit.[79]

---

gram-copy on it should become B's *property*, and B's *rights as* a buyer (with respect to *both*) should be governed by the CISG default rules. To this logic, I add the opinion by U.S. District Judge Dean D. Pregerson in *Softman Products Co., LLC v. Adobe Systems Inc.*, 171 F.Supp. 1075 (C.D. Cal. 2001) (holding that the transfer of bundled software to an end user was a sale and not a licence), which I was happy to stumble upon not long before I submitted the manuscript for this article to Duke.

77. *Accord* PILTZ, INTERNATIONALES KAUFRECHT, *supra* note 2, § 2 Rd.Nrn. 47-48; Herber in SCHLECHTRIEM, COMMENTARY, *supra* note 13, Art.1 Rd.Nr. 21 with n. 37a, with reference Diedrich, RIW 1993, 441; MAGNUS, supra note 15, Art. 1, Rd.Nr. 44, 46. *Compare* (re. American domestic sales law) the decision by the U.S. District Court in *Specht v. Netscape Communications Corp.*, 150 F.Supp. 2d 585 (D.C.N.Y. 2001)("parties' relationship essentially . . . that of a seller and a purchaser of *goods* . . . Plaintiff requested Defendant's product by clicking on an icon marked "*Download*," and Defendant then tendered the product"). Those who maintain that the CISG only applies to software contained in a "tangible medium" seem to be confusing the *intangible good* (the software) with the (tangible or intangible) *medium* which "carries" and/or "contains" that good. If B buys a *program on a disk*, she has really bought *two* "things": a program and a disk. Both are goods and either can be sold separately. If S sells a program to B and then "delivers" that program to B by making it downloadable over the Internet, the cyberspace "delivery" might be seen as a service (like the delivery of a package by post), but the *software* delivered remains a (real) *good*. The "commercial" (*wirtschaftliche*) approach taken by Piltz, *id*., Rd.Nr. 48, also accords with this view. *But see* Cox, T., *Chaos v. uniformity: divergent views of software*, 4 VINDOBONA J. OF INT. COMM. LAW & ARB. 3 (2000) and http://cisgw3.law.pace.edu/ cisg/biblio/cox.html text with note 17 (arguing that software is a good *because* it is "incorporated" into a *tangible* good) and Ferrari in SCHLECHTRIEM, KOMMENTAR, *supra* note 13, Art. 1, Rd.Nr. 38 (corporeal/*körperlichen* medium "necessary").

Article 2 of the European E-Commerce Directive (2000/31/EC) defines—(only) *for the purpose of this Directive*—"*information society service*s" as services provided at a distance by electronic means at the individual recipient's request: *see* Article 1(2) of the Technical Standards Directive (98/34/EC, 998/48/EC); Annex V of the Technical Standards Directive specifically *excludes* "Off-line services: distribution of CD-roms or software on diskettes". *Neither* the said definition *nor* the exclusion justify the conclusion reached by Cox (*id.*, Part III) that "[c]ourts and commentators will logically be forced to conclude that a transaction for electronic software is a service contract". Obviously, the E-Commerce Directive is "more focused on protecting and providing information than establishing rules for contract law" (Cox at *id.*), and if a given transaction—an on-line sale of software— qualifies as a *CISG sale of goods*, the definitions and exclusions in the European E-Commerce Directive will not compel anyone (anywhere) to conclude otherwise.

78. A German court has held that a contract for the sale of (standard) software is governed by the *CISG*: *see* the decision of LG München, 8 February 1995, no. 8 HKO 24667/93, CLOUT Case 131, also available at http://cisgw3.law.pace.edu/cisg/wais/db/cases2/950208g4.html.

79. *But see* Ferrari, *Specific Topics*, *supra* note 57, at 66 n.439 and accompanying text; Frost, *supra* note 71, 140-142. Since truly "tailor-made" software deals are increasingly rare (*see* ANDERSEN, M., IT RETTEN (Copenhagen 2001), section 21.5.b), this is probably the least important aspect of the software-as-goods controversy. In any case, the value of the (intangible) creativity, technology, information and/or man-hours needed to *produce any thing* is *irrelevant*

In dubio pro conventione? The international jury is still "out" on the software issue,[80] but faced with facts like those in *Illustration 5*, Herbert Bernstein and I shared the *Understanding* and conviction that the Convention *should* apply.[81]

IV. THE PREËMPTION ISSUE UNDER ARTICLES 4, 5 AND 7(2)

The Convention was not designed to deal with each and every problem which might arise in connection with an international sale. Even assuming that the transaction concerned qualifies as an international sale of goods under Articles 1, 2 and 3, we still need to ask whether the resolution of the particular *issue* is governed by the rules in CISG Parts II and III. If we find a Convention rule which "covers" the issue in question, we may then need to consider whether that rule *preëmpts* the application of a potentially "competing" domestic law rule.

According to Article 4, the Convention regulates issues (matters) concerning sales contract formation (CISG Part II) as well as the rights and obligations of the parties to the international sale (Part

---

when considering whether or not that "thing" is "goods". The tailor-made software discussion should not be confused with the separate question of "mixed" (sales and service) transactions: in cases where the *service element* (say, a supplier's post-delivery obligation to service and maintain computer hardware and/or software) *predominates*—i.e., where the value of maintenance is greater than the value of the computer and/or software)—then Article 3(2) will serve to ensure that the entire transaction is removed from the CISG scope. *See supra* note 66 and accompanying text.

80. Regarding the decision by OLG Koblenz *see supra* note 57. Similar issues arise regarding the application of *domestic* sales laws, and though the controversial, indeed "political" nature of the question has prompted considerable debate and a great divergence of views, most of the best reasoned decisions seem to support the idea that computer programs should qualify as goods. *Accord* (re. *German domestic* law) BGH of 4 November 1987 (BGHZ 102, 135), 18 October 1989 (BGHZ 109, 97). *See* also BGH, 14 July 1993, MDR 1993, 950 applying German domestic sales law to a transaction involving the delivery and installation of standard computer software. Also *American* (UCC) case law lends support to the position that (at least some) programs are "goods": *see, e.g., Advent Systems Ltd. v. Unisys Corp.*, 925 F.2d 670, 676 (3d Cir. 1991) (holding that sale of software was a UCC sale of goods); *Softman Prods. Co.,* 171 F.Supp. 2d at 1085 (referring to the sale of software as a sale of goods); *Specht,* 150 F.Supp. 2d at 591 (treating the downloading of software as a sale of goods). *But see* (re. the *English* Sale of Goods Act) St. Albans City & Distict Council v. International Computers Ltd., [1996] 4 All ER 481 (1996) (refusing to classify a computer program as SGA goods, while emphasizing the fact that there was not transfer to a physical medium, such as a disk).

81. *See* BERNSTEIN & LOOKOFSKY, *supra* note 1, § 2-5. During one of our last sessions at Duke in April 2001, *see supra* note 1, I asked my co-author whether he thought the "license issue" should affect our position on software-as-goods. His reply was disbelief: "*Licence? What the hell is that supposed that mean?*" I am therefore sure that Herbert would have been most pleased by Judge Pregerson's ruling in the *Softman* case, *supra* note 76.

III). Conversely, the CISG is simply "not concerned" with issues relating to sales contract validity; nor is it concerned with the effect which the contract may have on the property in the goods sold.[82] Such non-concern is, at least, the CISG general rule.[83] Indeed, the CISG drafters made no attempt whatsoever to prescribe the legal effect of a mutual mistake as to the existence of the subject matter of the contract,[84] a seller's negligent or fraudulent misrepresentation as to the quality of the goods, a seller's threat not to perform unless a price-increase is secured (i.e., economic duress), an allegedly unreasonable disclaimer or limitation of liability, a "penalty" clause,[85] etc.

Validity-issues arise, *inter alia*, when courts and arbitrators are asked to "police" sales contracts (and other agreements) "against unfairness by placing limits on their enforceability."[86] Since the CISG is generally not concerned with validity, most problems which fall under this heading—like, e.g., fraud, duress, mistake or the reasonableness of contract terms—must be resolved in accordance with domestic rules of law.[87]

> *Illustration 6*: S in Denmark sells goods to B in France on the basis of S's standard contract which purports to disclaim "all liability" in the event the goods do not conform. Later, S delivers defective goods, and B seeks to recover compensation for the loss caused by that breach.

---

82. The words "in particular" in CISG Article 4 indicate that validity and property are not the only subjects not covered by the CISG: *see* WITZ, *supra* note 9, no. 24; Herber in SCHLECHTRIEM, COMMENTARY, *supra* note 13, Art. 4 Rd.Nr. 19-24; Ferrari in SCHLECHTRIEM, KOMMENTAR, supra note 13, Art. 4, Rd.Nr. 12, 32-41.

83. As indicated by the so-called "except clause" in CISG Article 4, there are some exceptions: in other words, the Convention deals with *some* "validity" matters. One such matter—the lack of formal requirements—is expressly dealt with in CISG Article 11. Another such provision is Article 29 which provides that a CISG contract can be modified by mere "agreement"; for this reason, a CISG party's commitment to modify a contract—e.g., a seller's promise to accept a price lower that the price originally agreed— is valid and binding even in the absence of what Common lawyers call "consideration".

84. *See* the decision of Handelsgericht St. Gallen (Switzerland), 24 August 1995, available at http://cisgw3.law.pace.edu/cisg/wais/db/cases2/950824s1.html (buyer who believed it signed order of sample goods of much lower value held not liable to pay).

85. *See* the decision of Gerechtshof Arhem (Netherlands), 22 August 1995, available at http://cisgw3.law.pace.edu/cisg/wais/db/cases2/950822n1.html.

86. E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 4.1 (1999).

87. The private international law (choice-of-law rules) of the forum court determines which State's domestic validity rules to apply. If a clause in the CISG sales contract is held to be invalid by virtue of these domestic rules, the CISG (and not domestic sales law) should be used to fill the gap; *accord* HEUZÉ, V., LA VENTE INTERNTIONALE DE MARCHANDISES (Paris 1990) no. 100.

Some might find a disclaimer like this surprising and maybe even unreasonable—at least if measured by the Convention remedial yardstick[88] —but since the validity of a disclaimer is a matter which lies outside the CISG scope, the question of whether the buyer is actually bound by that term must ordinarily be resolved by domestic rules.[89] Although the parties have the freedom to formulate their obligations and even their remedies in the event of breach (etc.),[90] the validity of the parties' contract (and its individual terms) cannot be resolved (solely) on the basis of the CISG.[91] Since the applicable rules of private international law in this situation would probably point to the domestic law of S,[92] the disclaimer will be held effective (and displace CISG remedies ordinarily available to the buyer) if—and only if—it satisfies the reasonableness-test set forth in the General Clause of the Danish Contracts Act.[93]

In *Illustration 6* the application of a domestic rule serves to fill the "validity-gap" openly acknowledged by Article 4. A related, though in some respects more elusive and controversial provision is Article 7(2):[94]

> Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based **or**, in the absence of such

88. The CISG (default) starting point is *full compensation* for breach. Regarding the buyer's CISG remedies *see generally* BERNSTEIN & LOOKOFSKY, *supra* note 1, ch. 6B.

89. An alternative possibility is that parties' agreement can incorporate the UNIDROIT Principles of International Commercial Contracts, including its validity rules, so as to supplement the CISG on this point. It should also be noted that an onerous contract term which contravenes *CISG* "fundamental principles" (*Grundwertungen*) might be denied effect for *that* reason alone, i.e., *even if* the term would be valid under the otherwise applicable law. *See* BERNSTEIN & LOOKOFSKY, *supra* note 1, § 7-4 with note 67, citing Oberster Gerichtshof (Austria), 7 September 2000, available at http://cisgw3.law.pace.edu/cisg/wais/db/cases2/000907a3.html.

90. CISG Article 6. *See supra* text accompanying note 44.

91. The CISG remedial rules may be *relevant* in assessing the reasonableness of agreed remedies, as the CISG gap-filling solution is recognized as a reasonable solution in the "average" case. *See* BERNSTEIN & LOOKOFSKY, *supra* note 1, § 7-4. *See also supra* note 89.

92. In this situation, both Danish and French courts would apply the 1955 Hague Convention on the Law Applicable to International Sales of Goods to determine the law applicable to the validity question. *See* http://www.hcch.net/e/conventions/menu03e.html and BERNSTEIN & LOOKOFSKY, *supra* note 1, § 1-4.

93. For a comparison between Danish domestic validity rules and the validity provisions of the UNIDRIOT Principles of International Commercial Contracts, *see* Joseph Lookofsky, *The Limits of Commercial Contract Freedom* , 46 AM. J. COMP. LAW 485 (1998).

94. Regarding the stormy and inconclusive "legislative history" of this rule *see supra* note 25.

> principles, in conformity with the law applicable by virtue of the rules of private international law.

The less controversial part of this provision (after the word "or") tells us to use PIL (choice-of-law) rules to find *domestic* rules capable of plugging gaps in the Convention text (e.g., the validity-gap created by Article 4).[95] The first part of the rule in Article 7(2) is very different: it tells courts and arbitrators to use *general Convention principles* to plug certain gaps in the CISG text. Suppose, for example, that a CISG buyer (B) claims that S has committed a fundamental breach. If B sends S a *declaration of avoidance*, can B later change her mind and *revoke* that declaration?[96] The CISG provides no rule which deals directly with this particular question, but rather than resort to domestic rules unrelated to the CISG regime, we might apply the first rule in Article 7(2), regard the matter (the revocation issue) as governed by the CISG,[97] and then seek to "settle" that matter by means of CISG general principles, including good faith and estoppel.[98] If, for example, S unjustifiably refuses to accept B's (well-founded) avoidance declaration, this might mean B's subsequent revocation should be given effect.[99]

In other situations, the Convention will contain a remedial rule which expressly "covers" a given issue, but we still need to consider the possible application of *concurrent*, potentially "competing" remedies under domestic law. Assume, for example, that a CISG seller is guilty of a negligent (or even fraudulent) misrepresentation as to the

---

95. Of course, "matters" *not governed* by the Convention can *only* be "settled" by resorting to *non*-Convention rules and principles. Since the Convention is generally "not concerned" with matters relating to the "validity" of the sales contract and/or obligations grounded in delict, such matters are not "governed by" the Convention (and cannot be settled by the CISG or its general principles). See BERNSTEIN & LOOKOFSKY, *supra* note 1, §§ 2-6, 2-11.

96. In other words, keep the goods, and pursue other CISG remedies, including damages, instead. Because avoidance can have serious consequences for the party in breach, CISG Article 26 provides that a *declaration of avoidance* of the contract, e.g. under Article 49, is *effective* only if made by *notice* to the other party; the contract is avoided as of the point in time when the notice is given.

97. Since the narrow "matter" in question (whether a declaration of avoidance is binding upon the declaring party) was left untouched by the CISG drafters, it might seem difficult to regard it as "governed" thereby. On the other hand, it is clear that the larger question (matter) of *avoidance*, including (e.g.) the subject of when *declarations* of avoidance take effect, is governed thereby.

98. *See* BERNSTEIN & LOOKOFSKY, *supra* note 1, § 2-10, text with notes 143-44.

99. Thus providing B with the option to keep the goods and pursue other remedies. *See generally* Schlechtriem in SCHLECHTRIEM, COMMENTARY/KOMMENTAR, *supra* note 13, Art. 27, Rd.Nr. 14. *Compare* the similar result reached by Huber, using somewhat different reasoning, in SCHLECHTRIEM, COMMENTARY/KOMMENTAR, *supra* note 13, Art. 45, Rd.Nr. 28.

quality of the goods and that—for that reason, under the otherwise applicable domestic law—the buyer would be entitled to rescind (declare invalid and terminate) the contract. If so, the domestic (rescission) remedy might be seen to overlap with CISG avoidance rules which allow the buyer to avoid in the event of a fundamental breach.[100] Similarly, a seller's delictual (tort) liability for the economic consequences of such a negligent or fraudulent misrepresentation might—at least in some situations—overlap with the Convention damages regime.[101] In these and similar situations, a question of Convention interpretation arises: should the court or arbitral tribunal hold that the whole matter is *exclusively* "governed by [the] Convention",[102] i.e., with the result that the applicable CISG remedy works to *preëmpt* (displace, "trump") any domestic remedy which might otherwise apply?[103] Or should such a domestic remedy be allowed to *compete* (serve "side by side") with the relevant CISG rule?

In some cases, courts and arbitrators will have good reason to exercise restraint before they permit domestic rules to compete with (and possibly disturb) the uniform remedial solution provided by the CISG. Since, for example, the exemption "safety valve" in Article 79(1) provides a flexible tool for reaching fair solutions in cases of *force majeure* and other alleged "impediments" to performance—including situations which might (also) be subsumed under the sometimes redundant domestic headings of "impossibility" or "mistake"—the argument for preëmption of domestic remedies in this situation seems relatively strong.[104] In other cases, it may be appropriate to

---

100. Under, for example, American domestic law, avoidance might be allowed for a *fraudulent* misrepresentation *without concern for its materiality*, FARNSWORTH, *supra* note 86, §§ 4.10-4.15, whereas under CISG Article 49(1)(a), a *fundamental* breach is the *condicio sine qua non* for avoidance, Huber in SCHLECHTRIEM, COMMENTARY, *supra* note 13, at 416; Huber in SCHLECHTRIEM, KOMMENTAR, *supra* note 13, at 535.

101. For a discussion of this question *see* BERNSTEIN & LOOKOFSKY, *supra* note 1, § 4-6.

102. CISG Article 7(2).

103. *See also* the Detailed Analysis of Article 7(2) in ALBERT KRITZER, 2 GUIDE TO THE PRACTICAL APPLICATION OF THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, 77 (1994). While the (American) *term* "preëmption" may have no direct counterpart in continental European legal terminology, the *concept* is obviously familiar enough, as the discussion of Article 7(2) by French, German and other continental authors shows. Lawyers trained in the Civil law tradition are more used to a code-style of interpretation which is, arguably, what Article 7(2) calls for; *accord* AUDIT, VENTE INTERNATIONALE, *supra* note 13, nos. 53a, 54.

104. *See* e.g. Article 1108 of the French Civil Code (requiring an *objet certain*) and § 306 of the German Civil Code (dealing with "objective impossibility"). On the inapplicability of these and similar validity rules in "impediment" situations *see* (e.g.) the decision of Corte di Appello di Milano (Italy), 11 December 1998, available at http://cisgw3.law.pace.edu/cisg/wais/db/

distinguish between rules which *complement* and rules which *compete*. For example, although Article 8 contains rules which govern certain aspects of a larger problem— the interpretation of CISG contracts— we ought not conclude that the CISG governs the entire matter. In other words, Article 8 ought not displace (preëmpt) all other rules of contract interpretation. Courts and arbitrators should, for example, feel free to supplement Article 8 with the *contra proferentem* principle, as that (non-CISG) "common core" principle is generally understood in both domestic and international commercial law.[105]

So far, only a few reported decisions deal (overtly) with the competition/preëmption problem;[106] to help illustrate its many facets, we can consider a hypothetical or two:

> *Illustration 7*: B in Vienna asks S in Rome for information regarding the performance of a given machine. S, who is anxious to generate income for his fledgling business, negligently provides information which applies to a more costly model with a higher maximum capacity. Acting in reliance on this information, B orders the machine. After delivery, B makes repeated, unsuccessful attempts to run the machine at the stated capacity. Three weeks after the final attempt, B gives notice of non-conformity to S.

The Convention requires that S deliver goods which match the contract specifications. If S fails to perform the obligations set forth in the contract (and/or other obligations implied in Article 35), the buyer can claim the benefit of CISG remedies for breach.[107] To this extent, the CISG contractual regime supplants (replaces, preëmpts)

---

cases2/981211i3.html. *See also* Schlechtriem, P., INTERNATIONALES UN-KAUFRECHT (Tübingen 1996), Rd.Nr. 36 and BERNSTEIN & LOOKOFSKY, *supra* note 1, § 6-19 with note 234.

Since the *hardship* rules set forth in Ch. 6(2) of the UNIDROIT Principles do *not* "restate" *generally* applicable principles of international law, *see* Lookofsky, *supra* note 93, at 500-501, these rules should *not* be applied to supplement the CISG, even though, for example, a Finnish court might refer to CISG Articles 4 and 7 and supplement the Convention with *its* domestic "hardship" regime: *see* Tom Southerington, *Impossibility of Performance and Other Excuses in International Trade*, available at http://www.cisg.law.pace.edu/cisg/biblio/ southerington.html.

105. *See supra* notes 50 and 68 and accompanying text. *Accord* MICHAEL BONELL, AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW 73-82 (2d ed. 1997) (regarding the coexistence of the CISG and Unidroit Principles). Re. the applicability of domestic rules regarding letters of confirmation and the conclusion of CISG contracts by silence, *see* Morten Fogt, *Gerichtsstand den Erfüllungsortes*, IPRAX 2001, 358-364 (with reference to the decision of the Danish Supreme Court, 15 February 2001, reported in UfR 2001.1039 H).

106. *See, e.g.,*the decision of Corte di Appello di Milano, *supra* note 104. *See also* LG Aachen (Germany), 14 May 1993, RIW 1993, 760-761, available at http://cisgw3.law.pace.edu/cisg/wais/db/cases2/930514g1.html (application of CISG precluded recourse to domestic law regarding *mistake as to the quality* of the goods); *compare* the buyer's mistake in the case decided by Handelsgericht St. Gallen, *supra* note 84.

107. *See* BERNSTEIN & LOOKOFSKY, *supra* note 1, ch. 6.

corresponding domestic *sales law* remedies. But it does not necessarily follow that courts and arbitrators cannot allow a party access to other, non-contractual remedial rules. Under the domestic law of some countries (including some CISG Contracting States), a given set of facts can sometimes give rise to both a contractually based claim and to a tort-based, delictual liability claim as well.[108] Given this possibility of competition between rule-sets in purely domestic situations, some CISG buyers might seek to supplement a Convention-based claim with a non-contractual claim pursuant to the otherwise applicable domestic law of delict.[109] In Illustration 7, since B may not have notified S of the non-conformity within a "reasonable time," B may have lost the right to claim any CISG remedy,[110] and those commentators who maintain that the Convention remedial rules "occupy" the entire non-conformity field would deny B access to alternative domestic law remedies (e.g.) for negligent misrepresentation.[111] Other

108. In some of these systems, the contractual and delictual bases of liability are seen as "competing" with each other, at least in certain situations, so that (e.g.) a seller who makes a negligent or fraudulent "misrepresentation" concerning the quality of his goods might conceivably be sued in *both* contract and tort. Regarding English law *see* TREITEL, LAW OF CONTRACT, Ch. 9, Sec. 3; re. German law *see* Peter Schlechtriem, *The Borderland of Tort and Contract - Opening a New Frontier?*, 21 CORNELL INT. L. J. 469, 470 (1988). Regarding Scandinavian law *see* JOSEPH LOOKOFSKY, CONSEQUENTIAL DAMAGES IN COMPARATIVE CONTEXT (Copenhagen 1989) at 156-159 and ANDERSEN & LOOKOFSKY, *supra* note 72, sec. 5.1.e, 5.5.e. In other systems, the doctrine of *non-cumul* may prevent a buyer bound by contract, such as a sales contract, from bring a tort action against the seller for acts involving that relationship. Regarding French law *see* MAZEAUD & CHABAS, LÉÇONS DE DROIT CIVIL, OBLIGATIONS, THÉORIE GÉNÉRALE (8th ed. 1991) at p. 384-385 (no. 404). In most American jurisdictions, a similar view prevails as regards tort-based *product liablity* claims seeking compensation for "pure economic loss".

109. *See generally* Lookofsky, *supra* note 38. *See also* John Erauw, and Harry Flechtner, *Remedies under the CISG and Limits to their Uniform Character*, in, INTERNATIONAL SALE OF GOODS REVISITED 65 (Petar Šarčević & Paul Volken eds., 2001) (stating that overlap between claims and remedies in tort and in contract are "unavoidable").

110. Regarding the strict application of Article 39(1), especially by German courts, *see* BERNSTEIN & LOOKOFSKY, *supra* note 1, § 4-9.

111. *See* MAGNUS, *supra* note 15, Art. 45, Rd.Nr. 43; Huber in SCHLECHTRIEM, KOMMENTAR, *supra* note 13, Art. 45, Rd.Nr. 54; Schlechtriem, *supra* note 108, at 469, 473; Schlechtriem, *supra* note 105, Rd.Nr. 42; PILTZ, *supra* note 2, § 2 Rd.Nrn. 127-129; Heuzé, *supra* note 87, no. 282 with note 76. These same authorities would also disallow rescission of the contract on the theory that the CISG rules on non-conformity occupy the field to the exclusion of non-contractual liability rules. *Compare* AUDIT, VENTE INTERNATIONALE, *supra* note 13, no. 121 (somewhat undecided). *See also* the decision of LG Aachen (Germany), *supra* note 106, and the commentary by Witz, *supra* note 9, nos. 21, 87. The same commentators might, however, allow negligent misstatements relating to something *other than non-conformity* to trigger non-contractual claims under domestic law. For example, incorrect information about the chance to resell the goods at a profit, or a seller's statement concerning his production capability, or a buyer's financial statement would fall within this category. Regarding *culpa in contrahendo*, *see*

commentators, arguing that remedies for misrepresentation lie outside the CISG scope, would allow B alternate access to such a competing domestic law claim.[112]

Although we need to "have regard" to the need to "promote uniformity" in Convention application, the CISG hardly requires decision-makers to preëmpt (trump) domestic rules designed to provide remedies for unfair or culpable conduct; indeed, the CISG was not designed to deal with issues like these.[113] Contractual and delictual remedies have—for good reasons— coexisted in many jurisdictions for centuries,[114] and a given State's ratification of the *sales* Convention does *not* imply its intention to "merge" contract with tort. There is "no difficulty in regarding the imposition of a duty of care in tort as independent of any contractual liability,"[115] and the CISG was designed only to deal with the contractual side.[116]

A related competition-question arises when goods purchased in an international sale cause physical damage to the buyer's property:

> *Illustration 8*: Dentist (B) in Copenhagen purchases a combined chair-and-drill unit from a supplier (S) in Frankfurt. Soon after delivery, defective wiring in the unit causes a fire which destroys the unit and does damage to B's office. B brings an action in Germany against S—not only to recover the purchase price of the unit itself, but also for consequential loss (damage to the office, loss of profit etc.).

Since this is a "sale of goods" under Article 1(1)(a), and since the goods (the unit) delivered by the seller do not conform under Article 35,[117] the dentist clearly has a viable CISG (contractual) cause of action for damages, likely to include compensation for the (foreseeable)

Schechtriem, *supra* note 108, at 474-75 and Schlechtriem, *supra* note 2, Rd.Nr. 81.

112. *See* Lookofsky, *supra* note 108, at 276 ff; Lookofsky, *supra* note 38, at 409; Lookofsky, *supra* note 46, ¶ 63. *See also* JAN RAMBERG, KÖPLAGEN (Stockholm 1995) at 112 f. (arguing that sales contracts, like other contracts, are subject to general contract principles, and that domestic principles, such as *culpa in contrahendo*, can therefore supplement the CISG); *but compare* RAMBERG, J. & HERRE, J., INTERNATIONELLA KÖPLAGEN (Stockholm 2001) at 64 f. (adopting Honnold's position on misrepresentations).

113. *See supra* notes 82-87 and accompanying text and *infra* note 127 and accompanying text.

114. *See, e.g.*, Andrew BURROWS, UNDERSTANDING THE LAW OF OBLIGATIONS (Oxford 1998) at 24 ff. (explaining concurrent liability under English law).

115. *Id*. at 28 (emphasis added here). On this point Professor Burrows' logic (emphasizing, as regards misrepresentation, the presence or absence of reasonable *reliance*) seems more focused and compelling than that of Professor Honnold, UNIFORM LAW, *supra* note 25, § 65 (arguing on the basis of "operative facts").

116. *See* CISG Article 4.

117. *See* BERNSTEIN & LOOKOFSKY, *supra* note 1, § 4-7.

losses in question.[118] According to Article 5, the Convention does not apply to questions regarding the liability of the seller for death or personal injury caused by the goods; but this provision does not exclude all "product liability" issues from the Convention's scope. On the contrary, by clear implication (*argumentum e contrario*), Article 5 permits a CISG buyer like B to make a claim for compensation under the Convention regime in cases where non-conforming CISG goods cause damage to the buyer's property.[119]

Suppose, however, that B has reason to assert an alternative, delictual claim (e.g., because his notice of seller's breach might be held untimely under Article 39).[120] Since the German court, under its choice-of-law rule, would consider both Danish and German tort law to be applicable,[121] an action based on Danish or German product liability rules could—and should—be allowed, along with any CISG claim B might still have;[122] in such event a plaintiff seeking damages should be allowed to recover if he succeeds in proving the facts needed to support either claim.[123]

---

118. *See* CISG Article 74, discussed in BERNSTEIN & LOOKOFSKY, *id.,* § 6-15.

119. *Accord*: decision of Handelsgericht Zürich, 26 April 1995, available at http://cisgw3.law.pace.edu/cisg/wais/db/cases2/950426s1.html. Nor would Article 5 necessarily preclude an Article 74 indemnification claim by the buyer against the seller for sums payable to a third party (the buyer's buyer) who suffers personal injury as a result of defective goods: *see* OLG Düsseldorf, 2 July 1993, RIW 1993, 845, http://cisgw3.law.pace.edu/cisg/wais/db/ cases2/930702g1.html, and (approving the decision) Ferrari in SCHLECHTRIEM, KOMMENTAR, *supra* note 13, Art. 5, Rd.Nr. 6-8, and MAGNUS, *supra* note 15, Art. 5, Rd.Nr.7; *but see* Schlechtriem in 1993 EWiR, Art. 1 CISG 1/93 p. 1075, WITZ, *supra* note 9, no. 23. Absent a special agreement, a third party cannot assert a CISG *contract* claim against the (first) seller for losses due to a product defect, as might be possible in certain situations under Austrian or German domestic sales law; *see* MAGNUS, *id.* Rd.Nr. 14, and Stoll in SCHLECHTRIEM, KOMMENTAR, *supra* note 13, Art. 74, Rd.Nr.26.

120. Regarding the tough, pro-seller stance taken by German courts on the notice issue, *see* BERNSTEIN & LOOKOFSKY, *supra* note 1, § 4-9.

121. In tort cases, German courts allow the plaintiff to recover either under the law of the place where the relevant act occurred (here: presumably Germany), or under the law of the place of injury (here: Copenhagen).

122. This seems to be the prevailing view; *see* Ferrari in SCHLECHTRIEM, KOMMENTAR, *supra* note 13, Art. 5, Rd.Nr. 5; MAGNUS, *supra* note 15, Rd.Nr. 14 and authors cited in Rd.Nr. 13; Schlechtriem, *supra* note 108, at 473 f. But there is very strong opposition. *See* HONNOLD, *supra* note 25, § 73; HEUZÉ, *supra* note 87, no. 94; Audit, *supra* note 13, no. 40. One reason for this conclusion is that a tort action against the manufacturer is always available when the manufacturer did not sell the product directly to (and has no contract with) the injured party; the same result should prevail when the manufacturer also happens to be the seller. *Contra* Honnold, *supra* note 25, § 73; Huber, *Internationales Deliktsrecht und Einheitskaufrecht*, IPRax 1996, 91, 94 (discussing a ULIS case: BGH, 28 November 1994, IPRax 1996, 124).

123. The situation is obviously different in an international context if the CISG (contract) rules are interpreted as precluding a plaintiff (like the dentist in *Illustration 8*) from asserting an alternative tort claim under domestic law. *See also supra* note 108 and accompanying text.

The possibility that some domestic rules might be allowed to compete with (also applicable) CISG rules represents little threat to the goal of achieving a uniform Convention interpretation,[124] and the application of domestic rules should not be preëmpted simply because the operative facts of a given case seem "covered" by a given CISG rule. In a State where, under the pre-CISG scenario, (domestic) sales, tort and validity rules worked to supplement one another,[125] that State's accession to the Convention provides a clear indication of that State's willingness to substitute its *domestic sales law* with the CISG rules; it does not indicate that State's intention to place its contract, tort and validity regimes "under one [CISG] roof." Courts and arbitrators should therefore think twice before interpreting the Convention so expansively as to preëmpt domestic rules designed to provide parties to sales (and other) contracts with alternative bases of remedial relief.[126] Indeed, the Convention drafters themselves rejected a proposal to (expressly) limit Contracting States' recourse to competing rules of domestic law.[127]

---

124. If the courts in State A and State B, when faced with similar sets of facts, would both interpret the applicable Convention remedies as *non-exclusive*, that represents a *uniform interpretation of the relevant CISG remedial rules* which allows the concurrence of domestic remedies and which is not rendered "less uniform" by the possibility that the private international laws in these States differ, thus leading to the supplementary application of *different domestic* law rules.

125. *See* text *supra* with note 108.

126. *But see* Huber in SCHLECHTRIEM, COMMENTARY, *supra* note 13, at 370 and Huber in SCHLECHTRIEM, KOMMENTAR, *supra* note 13, at 476 (rejecting rule-concurrence in the absence of three "preconditions"). As regards *mistake* (*compare supra* notes 84 and 106) some commentators have argued that CISG *avoidance* rules displace (some) domestic rules permitting a mistaken buyer to rescind: for a comparison of the widely diverging views on this point *see* Helen Hartnell, *Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods*, 18 YALE J. INT. L. 72-78 (1993); *compare e.g.,* Peter Schlechtriem, *Uniform Sales Law—The Experience with Uniform Sales Laws in the Federal Republic of Germany*, JURIDISK TIDSSKRIFT VID STOCKHOLMS UNIVERSITET 11-12 (1992).

127. The ULIS Convention of 1964, which preceded the CISG (*see supra* note 21), *expressly excluded* the buyer's right of recourse to domestic law in the case of non-conforming goods (ULIS Article 34), except in cases of fraud (ULIS Article 89), whereas the Vienna drafters—*hoping* it would be possible to create a separate, internationally uniform set of validity rules—*intentionally refrained from including a similar provision in the CISG*: *see* Huber in SCHLECHTRIEM, COMMENTARY, *supra* note 13, Art. 45, Rd.Nr. 46-48 with n.86; Huber in SCHLECHTRIEM, KOMMENTAR, *supra* note 13, Art. 45, Rd.Nr. 46-48 with n.106. The subsequent failure of the international legislator to create and implement such a set of validity rules hardly provides courts interpreting the CISG with "implied authority" to censor potentially concurring domestic rules of law.

V. CONCLUSIONS

The 1980 Vienna Convention deserves our support, because it represents a basically sound contractual regime, fair to the interests of both buyers and sellers, and because this particular piece of transnational legislation represents a great step forward when compared to the provincialism of yesteryear.[128] For this reason, Herbert Bernstein and I would applaud the decisions which require clear and convincing evidence of the parties' intent to opt out of the CISG regime. By the same token, we saw no good reason to narrow the (international) "sale of goods" concept, so as to exclude transactions for the supply of computer programs.

On the other hand, Convention supporters need not—and should not—go "overboard" when interpreting the rules which delimit the CISG scope. Faced with difficult choices between preëmption (of) or competition with domestic rules of law, Herbert and I shared a cautious approach. The CISG is, to be sure, an elastic document, but it ought not be stretched beyond its essential design.

128. *See* Lookofsky, *supra* note 38, at 416.