Contract validity and the CISG

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Abstract

The article discusses the standards that determine the validity of contracts that are governed by the United Nations Convention on Contracts for the International Sale of Goods of 1980 (CISG). While Article 4(a) of the—CISG the so-called 'validity exception'—generally excludes the validity of the contract from the Convention's material scope, it does so incompletely by adding a 'except as otherwise expressly provided in this Convention' caveat. Against this background, the article sets out to develop a novel validity definition. According to this definition, provisions concerned with the 'validity of the contract' in the sense of Article 4(a) of the CISG are legal limits to party autonomy. The article continues by applying this definition to various potential validity issues as discussed in case law and legal writings. In doing so, it distinguishes between validity issues clearly not covered by the CISG (as legal limits on what to sell, legal limits on who to sell to or to purchase from, and legal limits on how to sell) and validity issues clearly covered by the CISG, as the formal validity of contracts, the validity of open-price contracts and the effect of an initial objective impossibility of the agreed performance on the contract. Finally, the article discusses a more complicated group of borderline issues that may or may not be governed by the Sales Convention, as mistakes or misrepresentations by a contracting party, the effect of contract clauses limiting a party's rights under the contract, surprising contract clauses and the effect of legal prohibitions of interest.

I. Introduction

1. Contract validity in the history of international sales law unification

'The issue of substantive validity of international commercial contracts' has been described by Ulrich Drobnig as 'the most sensitive crossroad of uniform law and of domestic legal systems'.[1] It is therefore not entirely surprising that in the history of uniform sales law, matters of contract validity have mostly been excluded

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[1] Ulrich Drobnig, 'Substantive Validity' (1992) 40 *American Journal of Comparative Law* 635.

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from the unification of sales provisions. To what extent that has been the case and which problems this causes will be addressed in more detail below.[2]

Before turning to the current state of affairs, it is worth looking briefly at the reasons that caused the mothers and fathers of uniform sales law to eventually refrain from including a comprehensive set of validity rules in both the Hague Uniform Sales Convention of 1 July 1964[3] and its successor, the United Nations Convention on Contracts for the International Sale of Goods (CISG), adopted in Vienna on 11 April 1980,[4] although the inclusion of such rules had been considered.[5] The reasons were essentially three-fold. First and foremost, it was felt that the subject of validity was complex in view of the different traditions in different States and because it touched upon sensitive issues of domestic policy.[6] The law governing the validity of contracts was seen as an 'important vehicle by which the political, social and economic philosophy of the particular society is made effective in respect of contracts'.[7] This made the adoption of uniform rules or, in any event, their uniform interpretation difficult.[8] It made little difference that this sceptical assessment did not apply to all validity issues with equal force; while some were generally considered unsuitable for uniform regulation,[9] others were at least regarded as unsuitable for a uniform solution within the available time.[10] Second, the drafters found that 'all available evidence suggests that. . .problems of validity are relatively rare events in respect of contracts for the international sale of goods'; in short, that validity issues were of only minor practical importance.[11]

[2] Sections II–V of this article.

[3] Convention Relating to a Uniform Law on the International Sale of Goods, 1964, 834 UNTS 107 (ULIS).

[4] Convention on Contracts for the International Sale of Goods (1980) 1489 UNTS 3 (CISG).

[5] See the respective comments by UNCITRAL delegates in (1972) 3 *UNCITRAL Yearbook* 74, no 37; (1975) 6 *UNCITRAL Yearbook* 6, no 40; (1976) 7 *UNCITRAL Yearbook* 5, no 16, 6 no 40; (1977) 8 *UNCITRAL Yearbook* 5, no 15; (1978) 9 *UNCITRAL Yearbook* 6, no 25; the discussions within the UNCITRAL Working Group on the International Sale of Goods in (1975) 6 *UNCITRAL Yearbook* 62, no 118; (1976) 7 *UNCITRAL Yearbook* 12, no 24, 88 nos 12–14, (1977) 8 *UNCITRAL Yearbook* 15, nos 33–4, 74, nos 9–10, 87, nos 169–74; the decisions taken by UNCITRAL in (1974) 5 *UNCITRAL Yearbook* 24, nos 89–93; (1975) 6 *UNCITRAL Yearbook* 11–12, nos 13 and 16; (1976) 7 *UNCITRAL Yearbook* 12, nos 25–28.

[6] (1968–70) 1 *UNCITRAL Yearbook* 196, no 52; (1977) 8 *UNCITRAL Yearbook* 93, no 25; Drobnig (n 1) 635; Ernst A Kramer, 'Contractual Validity According to the UNIDROIT Principles' (1999) 1 *European Journal of Law Reform* 269.

[7] (1977) 8 *UNCITRAL Yearbook* 93, nos 25–6.

[8] André Tunc, *Commentary of the Hague Conventions of 1st July 1964 on the International Sale of Goods and on the Formation of Contracts of Sale* (The Hague 1966) 20.

[9] (1977) 8 *UNCITRAL Yearbook* 93, no 25 (addressing statutory prohibitions and public policy); see also Konrad Zweigert and others, 'Der Entwurf eines Einheitlichen Gesetzes über die materielle Gültigkeit internationaler Kaufverträge über bewegliche Sachen' (1968) 32 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 201, 207 (addressing illegality and immorality).

[10] (1977) 8 *UNCITRAL Yearbook* 93, no 27; Rolf Herber and Beate Czerwenka, *Internationales Kaufrecht* (Munich 1991) art 4, para 3; Ingeborg Schwenzer and Pascal Hachem, 'Article 4' in Ingeborg Schwenzer (ed), *Schlechtriem and Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG)* (4th edn, Oxford University Press 2016) para 3.

[11] (1977) 8 *UNCITRAL Yearbook* 92, no 18.

2. *The 1972 UNIDROIT Draft Law on Validity*

During the drafting of the CISG, a third factor may have played a role, namely the wish to avoid an overlap between different uniform law projects and an undesirable duplication of unification efforts.[12] The reason was that, in 1972, the Governing Council of the International Institute for the Unification of Private Law (UNIDROIT) had approved a Draft of a Law for the Unification of Certain Rules Relating to the Validity of Contracts for the International Sale of Goods (Draft Law on Validity).[13] This Draft Law on Validity had been worked upon within UNIDROIT since 1967,[14] based on a comparative law study prepared by the Max-Planck Institut für ausländisches and internationales Privatrecht at Hamburg.[15] Already before the Draft Law on Validity's final text had been approved, the Secretary-General of UNIDROIT announced that the eventual Draft Law might be submitted to the United Nations Commission on International Trade Law (UNCITRAL) for consideration.[16]

In March 1973, the president of UNIDROIT then transmitted the 1972 Draft Law on Validity to UNCITRAL and invited UNCITRAL to include the consideration of this draft as an item on its agenda[17]—an early example of cooperation between two organizations both working on the international unification of commercial and private law.[18] Subsequently, the 1972 UNIDROIT Draft Law on Validity was indeed analysed[19] and discussed[20] within the UNCITRAL Working Group on the International Sale of Goods, but, eventually, the decision was made not to include rules on validity in the draft Sales Convention.[21] After UNCITRAL's decision, UNIDROIT in turn reconsidered and generalized the rules of its Draft Law so as to make them suitable for international contracts of any type.[22] They thereby even-

[12] See (1968–70) 1 *UNCITRAL Yearbook* 196–7, nos 50–2 on a 'possible consolidation' of the envisaged reform of the 1964 Hague Sales Convention 'with other projects for unification with respect to the international sale of goods'.

[13] Draft of a Law for the Unification of Certain Rules Relating to the Validity of Contracts for the International Sale of Goods approved by the Governing Council of UNIDROIT (31 May 1972), reprinted in (1973) *Uniform Law Review* 61; (1977) 8 *UNCITRAL Yearbook* 104 (1972 UNIDROIT Draft Law on Validity).

[14] See (1977) 8 *UNCITRAL Yearbook* 91, no 8.

[15] (1966) *UNIDROIT Yearbook* 175–410. See Zweigert and others (n 9) 201.

[16] (1972) 3 *UNCITRAL Yearbook* 28, nos 113–14.

[17] (1973) 4 *UNCITRAL Yearbook* 28, nos 144–8.

[18] See also (1975) 6 *UNCITRAL Yearbook* 23, no 120; more generally, José Angelo Estrella Faria, 'Future Directions of Legal Harmonisation and Law Reform: Stormy Seas or Prosperous Voyage?' [2009] *Uniform Law Review* 5, 21–3.

[19] (1977) 8 *UNCITRAL Yearbook* 92–3, 104–9.

[20] *Ibid* 65–6.

[21] *Ibid.*

[22] Ulrich Drobnig, 'General Principles of European Contract Law' in Petar Sarcevic and Paul Volken (eds), *International Sale of Goods: Dubrovnik Lectures* (Oceana 1986) 305, 316.

tually inspired and influenced the rules on validity in today's UNIDROIT Principles of International Commercial Contracts (PICC).[23]

II. The 'validity exception' in Article 4(a) of the CISG

The result of the somewhat reserved approach among the drafters of the CISG towards validity matters was the so-called 'validity exception' found in Article 4(a) of the CISG.[24] This provision states that—subject to a very important qualification that the present contribution will touch upon a number of times—'the Convention. . .is not concerned with. . .the validity of the contract or of any of its provisions or of any usage'.

1. Prevailing focus on 'validity': a source of uncertainty

The part of Article 4(a) of the CISG just cited in essence declares contractual validity to be an 'external gap', a matter the Convention is not concerned with.[25] It is interesting to note that the drafters of the Convention never agreed upon, or even discussed in detail, what they meant by 'validity'.[26] The CISG does not expressly define the term. The resulting uncertainty has continued until this very day and has led to controversial discussions between commentators who want to look to domestic law in order to define 'validity'[27] and others who argue for an internationally uniform interpretation of the

[23] Matthias E Storme, 'Harmonisation of the Law on (Substantive) Validity of Contracts (Illegality and Immorality)' in Jürgen Basedow, Klaus J Hopt and Hein Kötz (eds), *Festschrift für Ulrich Drobnig zum siebzigsten Geburtstag* (Mohr Siebeck 1998) 195. *UNIDROIT Principles of International Commercial Contracts* (UNIDROIT 2010) (PICC).

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

[25] Edoardo Ferrante, 'Validity of Contract Terms' in Larry A DiMatteo and others (eds), *International Sales Law: Contract, Principles and Practice* (CH Beck, Hart, Nomos 2016) para 42; Peter Huber, 'Artikel 4 CISG' in *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (7th edn, CH Beck 2016) para 5.

[26] Hartnell (n 24) 20.

[27] Franz Bydlinski, 'Das allgemeine Vertragsrecht' in Peter Doralt (ed), *Das UNCITRAL-Kaufrecht im Vergleich zum österreichischen Recht* (Manz 1985) 57, 85–6; Drobnig (n 1) 636; Horacio A Grigera Naón, 'The UN Convention on Contracts for the International Sale of Goods' in Norbert Horn and Clive Schmitthoff (eds), *The Transnational Law of International Commercial Transactions: Studies in Transnational Economic Law*, vol 2 (Kluwer Law and Taxation 1982) 89, 123; Vincent Heuzé, *La vente internationale de marchandises: Droit uniforme* (2nd edn, LGDJ 2000) n 94; Rudolf Lessiak, 'UNCITRAL-Kaufrechtsabkommen und Irrtumsanfechtung' (1989) *Juristische Blätter* 487, 492–3; Laura E Longobardi, 'Disclaimers of Implied Warranties: The 1980 United Nations Convention on Contracts for the International Sale of Goods' (1985) 53 *Fordham Law Review* 863, 874, 877; Karl H Neumayer and Catherine Ming, *Convention de Vienne sur les contrats de vente internationale de marchandises: Commentaire* (CEDIDAC 1993) art 4, paras 2, 6, 7; Gert Reinhart, *UN-Kaufrecht. Kommentar zum Übereinkommen der Vereinten Nationen vom 11. April 1980 über Verträge über den internationalen Warenkauf* (CF Müller 1991) art 4, para 5; Denis Tallon, 'Article 79' in Cesare M Bianca and Michael J Bonell (eds), *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (Giuffrè 1987) n 2.4.3; Jacob S Ziegel, 'The Vienna International Sales

term.[28] The latter view, which is the majority today, can point in support to Article 7(1) of the CISG.

2. *Reading Article 4(a) of the CISG in its entirety*

It is submitted that little if anything turns on this point.[29] The reason is that when reading Article 4(a) of the CISG in its entirety it becomes apparent that the term 'validity', however defined, cannot be decisive when determining what the Convention is not concerned with, because the term is preceded by two exceptions that both undermine its usefulness as a line of demarcation, albeit it in different directions:

The phrase 'in particular' indicates that even if a certain issue is not covered by the term 'validity', it can nevertheless not be governed by the Convention,[30] while the phrase 'except as otherwise expressly provided in this Convention' means that even if an issue is covered by the term 'validity', it can still be governed by the

Convention' in Jacob S Ziegel and William C Graham (eds), *New Dimensions in International Trade Law: A Canadian Perspective* (Butterworths 1982) 38, 43.

[28] Michael Bridge, *The International Sale of Goods* (3rd edn, Oxford University Press 2013) paras 10.28, 10.31; Milena Djordjevic, 'Article 4' in Stefan Kröll, Loukas Mistelis and Pilar Perales Viscasillas (eds), *UN Convention on Contracts for the International Sale of Goods (CISG)* (CH Beck 2011) para 14; Fritz Enderlein and Dietrich Maskow, *International Sales Law* (Oceana 1992) art 4 note 4.3.1; Ferrante (n 25) paras 42–5; Franco Ferrari, 'Artikel 4' in Ingeborg Schwenzer (ed), *Schlechtriem/Schwenzer Kommentar zum Einheitlichen UN-Kaufrecht (CISG)* (6th edn, CH Beck 2013) para 16; Clayton P Gillette and Steven D Walt, *The UN Convention on Contracts for the International Sale of Goods: Theory and Practice* (2nd edn, Cambridge University Press 2016) 78; Urs Peter Gruber, *Methoden des internationalen Einheitsrechts* (Mohr Siebeck 2004) 86, 285; Christoph R Heiz, 'Validity of Contracts under the United Nations Convention on Contracts for the International Sale of Goods, April 11, 1980, and Swiss Contract Law' (1987) 20 *Vanderbilt Journal of Transnational Law* 639, 660–1; John O Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, edited and updated by Harry M Flechtner (4th edn, Kluwer 2009) paras 204.2, 234; Peter Huber, 'UN-Kaufrecht und Irrtumsanfechtung: Die Anwendung nationalen Rechts bei einem Eigenschaftsirrtum des Käufers' (1994) *Zeitschrift für Europäisches Privatrecht* 585, 594; Huber (n 25) paras 3, 16; Warren Khoo, 'Article 4' in Cesare Massimo Bianca and Michael Joachim Bonell (eds), *Commentary on the International Sales Law* (Giuffrè 1987) note 3.3.5.; Stefan Kröll, 'Selected Problems Concerning the CISG's Scope of Application' (2005) 25 *Journal of Law and Commerce* 39, 40; Ulrich Magnus, 'Art 4 CISG' in *Staudinger's Kommentar zum Bürgerlichen Gesetzbuch* (Sellier de Gruyter 2013) para 20; Thomas Murmann and Marius Stucki, 'Art 4' in Christoph Brunner (ed), *UN-Kaufrecht – CISG* (2nd edn, Stämpfli 2014) para 5; Pilar Perales Viscasillas and David Ramos Muñoz, 'CISG & Arbitration' in Andrea Büchler and Markus Müller-Chen (eds), *Private Law: National – Global – Comparative: Festschrift für Ingeborg Schwenzer zum 60. Geburtstag* (Stämpfli 2011) 1355, 1365–6; Burghard Piltz, *Internationales Kaufrecht. Das UN-Kaufrecht (Wiener Übereinkommen von 1980) in praxisorientierter Darstellung* (2nd edn, Beck 2008) paras 2-147ff; Luis Rojo Ajura, 'Articulo 4' in Luis Díez-Picazo (ed), *La compraventa internacional de mercaderías: comentario de la Convencion de Viena* (Civitas 1998) 77; Schwenzer and Hachem (n 10) para 31; Peter Winship, 'Commentary on Professor Kastely's *Rhetorical Analysis*' (1988) 8 *Northwestern Journal of International Law and Business* 623, 637.

[29] Peter Schlechtriem and Ulrich G Schroeter, *Internationales UN-Kaufrecht* (6th edn, Mohr Siebeck 2016) para 116; Ulrich G Schroeter, 'The Validity of International Sales Contracts: Irrelevance of the "Validity Exeption" in Article 4 Vienna Sales Convention and a Novel Approach to Determining the Convention's Scope' in Ingeborg Schwenzer and Lisa Spagnolo (eds), *Boundaries and Intersections: 5th Annual MAA Schlechtriem CISG Conference* (Eleven International Publishing 2015) 95, 101–3.

[30] Gillette and Walt (n 28) 78.

Convention.[31] Accordingly, the interpretation of the term 'validity' alone in essence says nothing about the CISG's substantive scope in validity-related matters, because it is neither exclusive nor inclusive in nature.[32]

A. An illustration: coin fishing at the Trevi Fountain

The way in which Article 4 of the CISG works when applied to issues of contract validity can be compared to an adventurous citizen of Rome who goes to the *Fontana di Trevi* (the Trevi Fountain) in order to fish some of the coins out of the fountain. The coins are the various matters that the CISG does or does not govern. As a tool, he brings a bucket, but the bucket's bottom that bears the word 'validity' written across has various smaller and larger holes in it. The bucket is Article 4 of the CISG. When our Roman drags the bucket over the bottom of the fountain and then lifts it up, some coins (or matters) are not caught by the bucket but remain outside. This resembles the effect of the 'in particular' phrase. Others fall into the bucket onto the validity bottom, but even among those some fall through the various holes. The holes resemble the 'except as otherwise expressly provided' phrase. Only those coins that remain on the bottom of the bucket are the validity matters that the Convention is not concerned with.

B. 'Except as otherwise expressly provided in this Convention'

Under Article 4 of the CISG, the phrase 'except as otherwise expressly provided in this Convention' is therefore, in most cases, the decisive test that determines whether a certain validity issue is governed by domestic law and not the term 'validity'. In fact, it does not seem to go too far to say that this phrase is generally the most important part of Article 4 of the CISG's second sentence.[33] The decisive question therefore is: what does 'otherwise expressly provided' refer to?

It is clear and undisputed that this term does not only refer to CISG provisions that explicitly speak of the 'validity' of the contract,[34] as there is not a single provision that does.[35] There is some controversy surrounding the word 'expressly'

[31] Ferrante (n 25) para 39; Ferrari (n 28) para 13; Magnus (n 28) para 18; Schroeter (n 29) 100. But see Khoo (n 28) n 2.2: 'By specifically enumerating these matters [issues of validity and property in the goods sold], the article places it beyond doubt that they are entirely outside the ambit of the Convention.'

[32] Ulrich G Schroeter, 'Defining the Borders of Uniform International Contract Law: The CISG and Remedies for Innocent, Negligent or Fraudulent Misrepresentation' (2013) 58 *Villanova Law Review* 553, 557; Schroeter (n 29) 101–2.

[33] Schlechtriem and Schroeter (n 29) para 116.

[34] Enderlein and Maskow (n 28) art 4, n 3.1; Ferrari (n 28) para 13; Gillette and Walt (n 28) 79; Magnus (n 28) para 27; Peter Schlechtriem, *Uniform Sales Law: The UN Convention on Contracts for the International Sale of Goods* (Manz 1986) 33; Ulrich G Schroeter, *UN-Kaufrecht und Europäisches Gemeinschaftsrecht: Verhältnis und Wechselwirkungen* (Sellier European Law Publishers 2005) sect 6, para 147; but see Khoo (n 28) n 2.5.

[35] Commentary on the Draft Convention on Contracts for the International Sale of Goods, prepared by the Secretariat, Doc A/CONF.97/5 (14 March 1979) (Secretariat's Commentary), reprinted in *United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March – 11 April 1980, Official Records: Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committees* (United Nations 1981) 17, art 4, no 2 (*Official Records*).

that mostly has to do with the drafting history of Article 4 of the CISG. One view among commentators argues that by using 'expressly', the respective phrase in Article 4 means to refer only to issues explicitly addressed in the Convention's provisions, but not those settled in the Convention by way of general principles in accordance with Article 7(2) of the CISG.[36] This view accordingly equates the term 'expressly provided in this Convention' under Article 4 of the CISG with 'matters expressly settled in this Convention' as used in Article 7(2) of the CISG.

The opposing view considers domestic validity rules as also pre-empted where a given question is settled in the Convention through its underlying general principles.[37] It therefore does not distinguish between the different manners in which the CISG settles the questions that it governs but, rather, looks to the Convention as a whole. One could say that this approach considers Article 7(2) of the CISG itself to be one of the 'express provisions' referred to in Article 4.[38] It is submitted that this interpretation is more convincing because it better takes into account the only reason why Article 4 of the CISG uses the term 'expressly', namely its drafting history. Its wording was essentially copied from its predecessor provision in the 1964 Hague Sales Convention, namely Article 8 of the Uniform Law on the International Sale of Goods (ULIS).[39] In this earlier provision,[40] the term 'except as otherwise expressly provided therein' had made sense, as the ULIS, in its Articles 34 and 53, indeed contained two provisions that expressly addressed the relationship between the ULIS and certain types of domestic 'validity' rules, namely provisions on error (mistake).[41] During the discussions within UNCITRAL, it was later decided to include neither Article 34 nor Article 53 of the ULIS in the CISG, although no change in law was intended. The reason was rather that Article 9 of the 1972 UNIDROIT Draft Law on Validity, which was being discussed in UNCITRAL at that time,[42] contained a similar rule,[43] and that the UNCITRAL Working Group

[36] Enderlein and Maskow (n 28) art 4, n 3.1; Harry M Flechtner, 'Selected Issues Relating to the CISG's Scope of Application' (2009) 13 *Vindobona Journal of International Commercial Law and Arbitration* 91, 93; Honnold (n 28) para 64; Piltz (n 28) para 2-125.

[37] Christoph Benicke, 'Artikel 4 CISG' in *Münchener Kommentar zum Handelsgesetzbuch* (3rd edn, CH Beck 2013) para 4; Huber (n 25) para 21; René Franz Henschel, 'The CISG Rules and Principles as a Yardstick When Determining the Validity of Contractual Agreements Limiting Remedies for Breach of Contract: Are We Stretching Arguments Too Far?', in Mads Bryde Andersen and René Franz Henschel (eds), *A Tribute to Joseph Lookofsky* (Copenhagen 2015) 173, 182; Khoo (n 28) note 2.1; Manuel Lorenz, 'Artikel 4' in Wolfgang Witz, Hanns-Christian Salger and Manuel Lorenz (eds), *International Einheitliches Kaufrecht* (2nd edn, Recht und Wirtschaft 2016) para 3; Schroeter (n 29) 102–3; Schroeter (n 34) sect 6, paras 149–51.

[38] Schlechtriem and Schroeter (n 29) para 116; Schroeter (n 32) 557; Schroeter (n 29) 102.

[39] ULIS (n 3).

[40] *Ibid* art 8: 'The present Law shall govern only the obligations of the seller and the buyer arising from a contract of sale. In particular, the present Law shall not, except as otherwise expressly provided therein, be concerned with the formation of the contract, nor with the effect which the contract may have on the property in the goods sold, nor with the validity of the contract or of any of its provisions or of any usage.'

[41] *Ibid* arts 34, 53.

[42] See already section I.2 of this article.

[43] Karin Flesch, *Mängelhaftung und Beschaffenheitsirrtum beim Kauf* (Nomos 1994) 142. See in detail on the approach adopted by the 1972 UNIDROIT Draft Law on Validity: Zweigert and others (n 9) 231–3.

was trying to keep the new Sales Convention's text as brief as possible. When the plan to include provisions from the 1972 UNIDROIT Draft Law in the CISG was subsequently dropped, the word 'expressly' in what became Article 4 of the CISG was nevertheless retained, although all provisions it could have referred to had gone.

Against this background, the wording of Article 4 of the CISG essentially appears as the result of a historical oversight. Its reference to validity matters 'expressly' provided for elsewhere in the Convention should therefore not be interpreted as narrowing down the rules in, or underlying, the CISG that it seeks to respect.[44] At the end of the day, the 'except as' caveat in Article 4 of the CISG is therefore a reference to the need to establish the Convention's material scope by way of interpreting all of its provisions as well as looking for underlying general principles.

C. Conclusion

In order to cut a long story short, it is submitted that the CISG 'expressly provides otherwise' whenever it contains a provision that is invoked by the same operative facts and is also regulating the same matter as the domestic provision concerned because it distributes the same particular risk between the parties.[45] How this approach works is best demonstrated by applying Article 4 of the CISG to selected validity issues. This will be done further below.[46]

3. *Defining validity*

Although the point appears to be a nicety more than a necessity within the CISG's framework as just described, it may still to be useful for the discussion of uniform private law in general to attempt a definition of what the 'validity' of international sales contracts actually is. In order to do so, two approaches presently discussed under the CISG will be outlined (sections A and B), before a novel 'validity' definition will be developed (section C).

A. Defining validity in accordance with the PICC

As a first possible approach, it has been suggested that guidance on the general scope of validity may be derived from the PICC, although the respective author stresses that validity has to be given an autonomous meaning under the CISG.[47] Some support for this approach can be found in the history of Article 4 of the CISG that was outlined earlier,[48] because the drafters of the Convention took into

[44] For further arguments supporting this interpretation, see Schroeter (n 29) 102–3.

[45] Schroeter (n 32) 563–8; Schlechtriem and Schroeter (n 29) paras 124–31. For comparable, though not necessarily identical approaches, see Drobnig (n 1) 637; Piltz (n 28) para 2-147; Ingo Saenger, 'Artikel 4 CISG' in Franco Ferrari, Eva-Maria Kieninger, Peter Mankowski (eds), *Internationales Vertragsrecht* (2nd edn, CH Beck 2011) para 1.

[46] In sections III–V of this article.

[47] Bridge (n 28) para 10.34.

[48] Section I.2 of this article.

account the 1972 UNIDROIT Draft Law on Validity that later also formed the basis of the PICC's rules on validity—in short, both sets of rules were inspired by the same UNIDROIT draft. In spite of this similarity, better reasons speak against deriving guidance from the PICC: first, construing the CISG's 'validity' term in accordance with the PICC would arguably be incompatible with the Convention's autonomous interpretation that Article 7(1) of the CISG calls for.[49] Second, if one were to combine guidance from the PICC with an autonomous construction of Article 4 of the CISG,[50] it is difficult to see what the Principles could contribute. And, third, it should not be overlooked that the PICC's position on validity matters is still evolving. While the Principles' 1994 and 2004 editions had expressly excluded the invalidity of contracts arising from illegality or immorality from their scope, their 2010 edition now addresses these issues,[51] besides also amending the content of earlier validity provisions.[52] Were one to define 'validity' under Article 4(a) of the CISG in accordance with the PICC, it would therefore effectively result in drafters of the Principles rewriting the CISG's validity definition every time the Principles are redrafted—an unfortunate state of affairs, to say the least.

B. Validity definitions in CISG case law and scholarship

Apart from the approach just discussed, there have until now not been many attempts at arriving at an abstract definition of 'validity' under the CISG. In court practice under the Convention, two US federal district courts held that 'validity' encompasses 'any issue by which the domestic law would render the contract void, voidable or unenforceable'.[53] Peter Schlechtriem used a somewhat more elaborate definition when he wrote that:

> if a contract is rendered void *ab initio*, either retroactively by a legal act of the state or of the parties such as avoidance for mistake or revocation of one's consent under special provisions protecting certain persons such as consumers, or by a 'resolutive' condition (i.e., a condition subsequent) or a denial of approval of relevant authorities, the respective rule or provision is a rule that goes to validity and therefore is governed by domestic law and not by the CISG.[54]

Both definitions have in common the fact that they focus on the effect spelled out in the domestic provision, not on the circumstances triggering that effect.[55] It is,

[49] See Schlechtriem and Schroeter (n 29) para 95.

[50] In this sense, Bridge (n 28) para 10.34.

[51] See Michael Joachim Bonell, 'The New Provisions on Illegality in the UNIDROIT Principles 2010' [2011] *Uniform Law Review* 517.

[52] PICC (n 23) vii–viii.

[53] *Geneva Pharmaceuticals Technology Corp v Barr Laboratories, Inc and Others*, 201 F Supp 2d 236, 282 (SDNY 2002), citing Hartnell (n 24) 45; *Barbara Berry, SA de CV v Ken M Spooner Farms, Inc*, 59 UCC Rep Serv 2d 443 (WD Wash 2006).

[54] Peter Schlechtriem, 'Article 4' in Peter Schlechtriem and Ingeborg Schwenzer (eds), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (2nd edn, Oxford University Press 2005) para 7; followed by Schwenzer and Hachem (n 10) para 31.

[55] Longobardi (n 27) 881; Piltz (n 28) para 2-150; Schroeter (n 29) 100.

however, telling that followers of this approach often adopt a rather flexible understanding of 'validity' effects whenever domestic law deals with a question that is clearly not covered by the CISG. In doing so, not only domestic rules making a sales contract voidable (that is, authorizing a party to trigger an invalidity effect by way of a party declaration)[56] but also rules that render a contractual right unenforceable[57] as well as domestic provisions saying that a party 'may not invoke' contract clauses with a certain content[58] or even that such a clause 'does not become part of the contract'[59] have been considered validity provisions, as long as the reason triggering that effect lay outside of the CISG's material scope.

C. Proposal of a different definition

It is therefore suggested that in applying the validity exception of Article 4(a) of the CISG, most courts and authors do not in fact look to the effect spelled out in a given domestic law, but to the reasons triggering that effect and whether it is already addressed in the CISG. I believe this to be the right approach and that it should guide us in finding a more suitable 'validity' definition. Recalling that 'validity' describes only one sector among the matters not governed by the Convention,[60] I propose the following definition: 'by provisions concerned with 'the validity of the contract', Article 4(a) of the CISG refers to *legal limits to party autonomy*.'

This definition is based on the role of party autonomy within the Convention. The importance of party autonomy is a defining—maybe even the most characteristic—feature of the CISG.[61] This is first of all demonstrated by Article 6 of the CISG, which provides that '[t]he parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions'. However, the Convention does not stop there but uses multiple times phrases like '[e]xcept where the parties have agreed otherwise',[62] 'unless

[56] Honnold (n 28) para 65; Saenger (n 45) para 4.

[57] Huber (n 25) para 16; Magnus (n 28) para 22.

[58] On para 444 of the German Bürgerliches Gesetzbuch (BGB), reprinted in Ingeborg Schwenzer, 'Article 35' in Schwenzer (n 10) para 45.

[59] On para 3 of the former German Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen and art 8 of the 1964 Hague Sales Convention, see Friedrich Graf von Westphalen, 'Allgemeine Geschäftsbedingungen und Einheitliches Kaufgesetz' in Peter Schlechtriem (ed), *Einheitliches Kaufrecht und nationales Obligationenrecht* (Nomos 1987) 49, 60; Peter Schlechtriem, 'Einheitliches UN-Kaufrecht: Das Übereinkommen der Vereinten Nationen vom 11: April 1980 über Verträge über den internationalen Warenkauf (CISG)' (1988) *JuristenZeitung* 1037, 1040.

[60] See already section II.2 of this article.

[61] Ulrich Magnus, 'Art 6 CISG' in *Staudinger's Kommentar zum Bürgerlichen Gesetzbuch* (Sellier de Gruyter 2013) para 1; Michael Joachim Bonell, 'Article 6' in Cesare M Bianca and Michael J Bonell (eds), *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (Giuffrè 1987) n 1.1., 1.2. This point was already stressed by Ernst Rabel, 'Der Entwurf eines einheitlichen Kaufgesetzes' (1935) 9 *Zeitschrift für ausländisches und internationales Privatrecht* 1, 2.

[62] CISG (n 4) art 35(2).

otherwise agreed',[63] 'agreed upon'[64] or 'agreed upon by the parties',[65] 'in accordance with the contract',[66] 'required by the contract',[67] 'under the contract',[68] and the like,[69] all of them designed to grant priority to party autonomy. In addition, party autonomy has been recognized as a general principle on which the Convention is based in the sense of Article 7(2) of the CISG.[70] Against this background, it is striking that the CISG nowhere defines any limits to the parties' autonomy: while the Convention's default rules contain numerous requirements of 'reasonableness' for a party's behaviour or for the time available for certain party actions,[71] it sets no such standard (or any other standard for that matter) for agreements between the parties. This silence makes sense because legal limits to party autonomy are the same as 'validity' that the Convention, according to its Article 4(a), has generally left to domestic law.

That a certain issue is covered by this validity definition does nevertheless not always mean that it is governed by domestic law, and not by the CISG. In addition, it is necessary that the Convention itself does not 'provide otherwise'.[72] In the following sections, I will try to demonstrate the present approach by addressing three groups of validity issues under CISG contracts: validity issues clearly not covered by the CISG (section III); validity issues clearly covered by the CISG (section IV); and, finally, some more complicated borderline issues (section V).

III. Validity issues clearly not covered by the CISG

In terms of numbers, the majority of validity issues are clearly not governed by the CISG and are accordingly left to domestic law.

[63] *Ibid* art 9(2).

[64] *Ibid* art 65(1).

[65] *Ibid* art 58(3).

[66] *Ibid* arts 32(1), 36(1), 58(1), 67(1).

[67] *Ibid* arts 30, 34, 35(1), 53.

[68] *Ibid* arts 25, 45(1), 49(1)(a), 54, 61(1), 64(1)(a), 65(1), 83, 86(1).

[69] A number of other provisions of the CISG, *ibid*, (also) refer to prevailing contractual agreements through the terms 'is bound to' (arts 32(2), 34, 67(1), 69(2)) or 'is not bound to' (arts 31, 32(3), 57, 58(1), 67(1)).

[70] Hof van Beroep Ghent (Belgium), 15 May 2002, CISG-online no 746; Polimeles Protodikio Athinon (Greece), 2009, Docket no 4505/2009, CISG-online no 2228; Tribunale di Padova (Italy), 25 February 2004, CISG-online no 819; Tribunale di Rimini (Italy), 26 November 2002, CISG-online no 737, reprinted in (2003) *Giurisprudenza italiana* 896; Rechtbank Koophandel Ieper (Belgium), 29 January 2001, CISG-online no 606; Rechtbank van Koophandel Ieper (Belgium), 18 February 2002, CISG-online no 747; Landgericht Stendal (Germany), 12 October 2000, CISG-online no 592, reprinted in (2001) *Internationales Handelsrecht* 32; Foreign Trade Court of Arbitration attached to the Yugoslav Chamber of Commerce (Serbia), 9 December 2002, CISG-online no 2123; Piltz (n 28) para 2-144; Schlechtriem and Schroeter (n 29) para 143; Ingeborg Schwenzer and Pascal Hachem, 'Article 7' in Schwenzer (n 10) para 32.

[71] Throughout its text, the CISG (n 4) uses the term 'reasonable time' no less than fifteen times (in arts 18(2), 33(c), 39(1), 43(1), 46(2), (3), 48(2), 49(2)(a), (b), 64(2)(b), 65(1), (2), 73(2), 75(2), 79(4)).

[72] See section II.2 of this article.

1. Legal limits on what to sell

These are restrictions on what to sell that are imposed by domestic law, such as, for example, prohibitions against the sale of drugs (such as heroin),[73] weapons, alcohol, human organs,[74] protected animals,[75] or cultural objects.[76] Similar legal limits are set by prohibitions against the unauthorized import of medical products[77] or of goods containing, for example, asbestos or radioactive[78] or chemical[79] substances.

In order to concern the contract's 'validity' as defined earlier,[80] the respective provision must intend to limit party autonomy—that is, the parties' ability to enter into a binding contract and to create contractual obligations. In contrast, some domestic provisions set legal limits that merely affect the performance of binding contractual obligations—for example, by requiring an import license that, if not granted by the government authorities, may make delivery of certain goods difficult or impossible for the seller. Their effect is usually discussed in the context of Article 79(1) of the CISG—for example, the question of whether the denial of an import license constitutes an impediment beyond the buyer's (or the seller's) control that could be neither foreseen nor overcome.[81] Provisions of this type do not, however, intend to limit party autonomy, but leave the binding nature of the parties' agreement untouched. Determining the intended legal effect of a given domestic provision is a matter of its interpretation. In this respect, Article 3.3.1(3) of the PICC provides useful guidance by listing a number of factors that may be taken into account, such as the purpose of the rule that has been infringed and the category of persons for whose protection the rule exists. (Note that the PICC are used here in interpreting domestic law, not the CISG).

[73] Eg para 29(1), no 1, of the German Betäubungsmittelgesetz in conjunction with para 134 of the German Civil Code; see Bundesgerichtshof (Germany), 4 November 1982, reprinted in (1983) *Neue Juristische Wochenschrift* 636; Benicke (n 37) para 6; Honnold (n 28) para 64.

[74] Schwenzer and Hachem (n 10) para 39.

[75] Benicke (n 37) para 6.

[76] Huber (n 25) para 17. See generally (but without discussing validity issues) Kurt Siehr, 'UN-Kaufrecht von 1980 und der Handel mit Kulturgütern' in Andrea Büchler and Markus Müller-Chen (eds), *Private Law: National – Global – Comparative: Festschrift für Ingeborg Schwenzer zum 60. Geburtstag* (Stämpfli 2011) 1593.

[77] Oberlandesgericht Karlsruhe (Germany), 29 November 2001, CISG-online no 1099, reprinted in (2002) *Neue Juristische Wochenschrift Rechtsprechungs-Report* 1206: contracts for the sale of drugs for the prevention and treatment of cardiovascular diseases and circulatory disorders in violation of para 73 of the German Arzneimittelgesetz.

[78] *Malaysia Dairy Industries Pte Ltd v Dairex Holland BV*, Arrondissementsrechtbank s'-Hertogenbosch (Netherlands), 2 October 1998, CISG-online no 1309, reprinted in (1999) 17 *Nederlands International Privaatrecht* 70: prohibition imposed by the Singapore Ministry of the Environment on the import of foodstuffs contaminated with radioactive Iodine 131, Caesium 134, Caesium 137, and Strontium 90 (but the court concluded that this prohibition did not affect the sales contract's validity).

[79] Bridge (n 28) para 10.31, referring to *Sumner Permain & Co Ltd v Webb & Co* [1922] 1 KB 55 CA (prohibition on import of salicylic acid—that is, aspirin—in tonic water).

[80] Section II.3.C of this article.

[81] See Ingeborg Schwenzer, 'Article 79' in Schwenzer (n 10) para 18 with numerous references to case law; Schlechtriem and Schroeter (n 29) para 684.

2. Legal limits on who to sell to or to purchase from

On the other hand, regulations outside of the CISG may provide legal limits on who to sell to or to purchase from. This may be so in cases of domestic rules requiring a government permit for traders in certain goods—of embargoes[82] or of domestic or international sanctions—against certain countries and commercial parties residing therein.[83] In cross-border government procurement, provisions restricting the authority of government employees to create financial obligations for the public or imposing requirements for approval for contracts made by governmental units may set legal limits to sell to (or buy from) the governments concerned.[84]

At first sight, this category may be regarded as also including rules on the capacity of parties and on agency. Both are almost uniformly viewed as not being governed by the CISG,[85] but opinions differ as to whether they concern the validity of the contract[86] or not.[87] Nevertheless, the CISG occasionally extends to questions also addressed in laws on agency, as demonstrated by case law. In cases in which it was unclear whether a person had made an offer or acceptance in his own name or as agent of a principal,[88] or in which it was uncertain which company he had purported to act for,[89] courts have frequently applied the rules on interpretation in Article 8 of the CISG—more often than not, without even mentioning the domestic law on

[82] Djordjevic (n 28) para 16.

[83] See Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, 10 December 1996, CISG-online no 774 (UN sanctions against Yugoslavia).

[84] See Honnold (n 28) para 127; Cesar Pereira, 'Application of the CISG to International Government Procurement of Goods' in Ingeborg Schwenzer (ed), *35 years CISG and beyond* (Eleven International Publishing 2016) 205, 214.

[85] Oberster Gerichtshof (Austria), 22 October 2001, CISG-online no 613, reprinted in (2003) *Zeitschrift für Europarecht, Internationales Privatrecht und Rechtsvergleichung* 22; Amtsgericht Sursee (Switzerland), 12 September 2008, CISG-online no 1728, reprinted in (2009) *Internationales Handelsrecht* 63; Benicke (n 37) para 5; Djordjevic (n 28) paras 17–18; Hartnell (n 24) 64; Herber and Czerwenka (n 10) art 4 para 14; Huber (n 25) para 17; Lorenz (n 37) paras 9, 32; Murmann and Stucki (n 28) paras 6, 33; Piltz (n 28) para 2-149; Saenger (n 45) para 4; Schwenzer and Hachem (n 10) para 32; Kurt Siehr, 'Artikel 4' in Heinrich Honsell (ed), *Kommentar zum UN-Kaufrecht* (2nd edn, Springer 2010) para 11.

[86] As to capacity Benicke (n 37) para 5; Djordjevic (n 28) para 17; Hartnell (n 24) 64; Huber (n 25) para 17; Murmann and Stucki (n 28) para 6; Piltz (n 28) para 2-149; Saenger (n 45) para 4; Schwenzer and Hachem (n 10) para 32. As to agency Amtsgericht Sursee (Switzerland), 12 September 2008, CISG-online no 1728, reprinted in (2009) *Internationales Handelsrecht* 63; Benicke (n 37) para 5; Piltz (n 28) para 2-149; Saenger (n 45) para 4.

[87] As to capacity Lorenz (n 37) para 32. As to agency Djordjevic (n 28) para 12; Murmann and Stucki (n 28) para 33.

[88] Gerechtshof Arnhem (Netherlands), 14 October 2008, CISG-online no 1818, reprinted in (2009) *European Journal for Commercial Law* 40; Obergericht des Kantons Thurgau (Switzerland), 19 December 1995, CISG-online no 496, reprinted in (2000) *Swiss Review of International and European Law* 118; Handelsgericht St. Gallen (Switzerland), 5 December 1995, CISG-online no 245.

[89] Oberlandesgericht Stuttgart (Germany), 28 February 2000, CISG-online no 583, reprinted in (2001) *Internationales Handelsrecht* 65, 66; Oberlandesgericht Koblenz (Germany), 1 March 2010, CISG-online no 2126, reprinted in (2010) *Neue Juristische Wochenschrift Rechtsprechungs-Report* 1004; Landgericht Hamburg (Germany), 26 September 1990, CISG-online no 21, reprinted in (1990) *Recht der Internationalen Wirtschaft* 1016, 1017.

agency.[90] Under this approach, Article 8 of the CISG governs, although laws on agency may (and frequently do) contain rules on the same question that employ a different standard, such as Articles 12 and 13 of the 1983 UNIDROIT Agency Convention.[91] This shows that the CISG sometimes contains 'express provisions' in the sense of Article 4(a) of the CISG that may not immediately be obvious and that govern sub-issues of what many authors consider an issue of validity.

3. *Legal limits on how to sell*

The third group of validity-related rules impose legal limits on how to sell. They cover a wide variety of issues, such as prohibitions against corruption[92] or against agreements with anti-competitive effects (for example, Article 101 of the Treaty on the Functioning of the European Union),[93] or currency regulations[94] (for example, Article VIII, section (2)(b), of the Bretton Woods Agreement).[95] The same is true for provisions addressing a gross disparity between the parties' respective obligations,[96] as Article 3.2.7 of the PICC does.[97] The CISG says nothing about these issues, leaving them to the applicable domestic law or other rules of law.[98]

[90] Such application of Article 8 of the CISG has also found support among scholars; see Thomas Petz, 'Anmerkung' (2003) *Zeitschrift für Europarecht, Internationales Privatrecht und Rechtsvergleichung* 29; Saenger (n 45) para 27.

[91] Convention on Agency in the International Sale of Goods (17 February 1983) 22 ILM 249 (1983) (1983 UNIDROIT Agency Convention).

[92] On the United Nations Convention against Corruption, 31 October 2003, see Bundesgericht (Switzerland), 16 July 2012, CISG-online no 2371, reprinted in (2014) *Internationales Handelsrecht* 99, para 6.4.

[93] Treaty on the Functioning of the European Union, as adopted by the Treaty of Lisbon [2010] OJ C83/49. On art 101 of the Treaty on the Functioning of the European Union, see Bundesgerichtshof (Germany), 23 July 1997, CISG-online no 276, reprinted in (1997) *Neue Juristische Wochenschrift* 3309, 3310; Tribunal cantonal de Vaud (Switzerland), 8 December 2000, CISG-online no 1841; on the unenforceability of an exclusivity agreement under Michigan law *Shuttle Packaging Systems v Tsonakis et al,* 17 December 2001, CISG-online no 773, 2001 WL 34046276 (WD Mich.). In scholarly writing, Honnold (n 28) para 64; Lorenz (n 37) para 16.

[94] See Bundesgericht (Switzerland), 16 July 2012, CISG-online no 2371, reprinted in (2014) *Internationales Handelsrecht* 99 paras 6.5, 6.6 (violation of currency regulations held not to trigger invalidity of Swiss–Indonesian sales contract); Drobnig (n 1) 636; Herber and Czerwenka (n 10) art 4, para 11; Saenger (n 45) para 4.

[95] Art VIII, sect 2(b) of the Articles of Agreement of the International Monetary Fund, 22 July 1944 (as subsequently amended): 'Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member.' On this provision's nature as a validity rule in the sense of art 4(a) of the CISG, see Benicke (n 37) para 6; Huber (n 25) para 16; Magnus (n 28) para 22.

[96] Schwenzer and Hachem (n 10) para 40. On the potential invalidity of a CISG contract because of its excessively high contract price (*wucherähnliches Geschäft* according to para 138(1) of the German BGB), see Oberlandesgericht Saarbrücken (Germany), 30 May 2011, CISG-online no 2225, reprinted in (2011) *Neue Juristische Online-Zeitschrift* 1363. See also Ferrante (n 25) para 10.

[97] See Kramer (n 6) 282–5.

[98] On contractual limitations of liability, see section V.2 of this article.

The same applies to cases of threat, deceit, or fraud committed by a contracting party when concluding or executing a contract, thereby triggering domestic law remedies for duress, common law fraud, fraudulent misrepresentation, *arglistige Täuschung*, *dol*,[99] and the like.[100] The reason is that the CISG does not attempt to regulate the consequences of violating the obligation of honesty.[101] However, it does regulate the consequences of breaches of contracts, including those fraudulently concluded or fraudulently breached; the party to a CISG contract that is a victim of fraud can therefore choose between domestic law and remedies under the CISG,[102] which can, for example, be attractive in cases in which domestic law limits damages to the reliance interest (as Article 3.2.16 of the PICC also does), while the CISG under its Article 74 compensates the performance interest.[103]

4. Conclusion

In summary, the validity issues just described are mostly regulated because of reasons that reside outside the area of sales law and contract law. Those reasons can lie in the particularities of certain goods (prohibition of the sale of drugs), of certain countries (sanctions), or certain type of deals (fight against corruption), with the law of sales being merely one among various areas of law affected. Validity issues of this type are also likely to be the ones driven by 'the political, social and economic philosophy of a particular society'.[104] Accordingly, they tend to be unsuitable for an internationally uniform regulation.

Indirectly, validity 'carve outs' such as the one found in Article 4(a) of the CISG, as well as comparable provisions in other uniform law projects, contribute to the longevity of uniform commercial law texts; due to their topic, validity issues of the type addressed above are frequently subject to changes over time, much more so than the interests underlying the rather legal technical rules about the parties' rights and obligations under commercial contracts. Sanctions against certain countries are dropped or extended, transactions in foreign currencies are restricted or allowed depending on macroeconomic developments, and prohibitions against the export or import of certain goods are tightened or loosened in accordance with political considerations. As domestic laws are much easier changed and adapted to such evolving factual circumstances than international uniform law conventions, it is sensible to leave such validity issues to the domestic level. Even if an internationally uniform regulation for 'political, social or economic' validity matters could be found, it would likely either remain very abstract

[99] On *dol* according to Article 1116 of the French Code civil Cour de Cassation (France), 13 September 2011, CISG-online no 2311.

[100] Benicke (n 37) para 22; Djordjevic (n 28) para 23; Honnold (n 28) para 65; Huber (n 25) para 28; Lorenz (n 37) para 25; Schlechtriem and Schroeter (n 29) para 194; Schroeter (n 32) 583; Schwenzer and Hachem (n 10) para 19; Siehr (note 85) para 10.

[101] Schlechtriem and Schroeter (n 29) para 194; Schroeter (n 32) 585.

[102] Schlechtriem and Schroeter (n 29) para 196; Schroeter (n 32) 585; but see Magnus (n 28) para 52.

[103] Kantonsgericht St. Gallen (Switzerland), 13 May 2008, CISG-online no 1768, (2009) *Internationales Handelsrecht* 161, 163.

[104] See note 7 above.

or, if drafted in more specific terms, run the risk of 'petrifying' the uniform law concerned in the face of changing circumstances, which would be unfortunate. Or, as Lord Denning famously wrote (albeit in a different context), '[t]he law will stand still whilst the rest of the world goes on; and that will be bad for both'.[105]

IV. Validity issues clearly covered by the CISG

At the reverse end of the 'validity universe', so to say, are a few validity issues that are clearly covered by the CISG. These are accordingly the cases that fall into the 'except as otherwise expressly provided in this Convention' clause of Article 4 of the CISG. They are described here as issues 'clearly' covered by the CISG in order to distinguish them from borderline issues that may or may not be covered by the Convention, and that will be addressed separately afterwards.[106]

1. Formal validity

The first validity issue clearly covered by the CISG is the formal validity of sales contracts that the Convention expressly addresses through its freedom of form principle in Article 11 of the CISG.[107] Article 29(1) of the CISG extends the freedom of form to contract modifications by declaring the 'mere agreement' of the parties to be sufficient, with the existence of such an agreement being determined according to all circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages, and any subsequent conduct of the parties (Article 8(3) of the CISG).[108] This means that neither a specific form nor any equivalent requirement (as notably consideration under common law[109] or cause respectively *causa* in civil law jurisdictions)[110] needs to be observed. In determining what domestic laws relating to formal validity are pre-empted by the express provisions in Articles 8, 11, and 29(1) of the CISG, case law and legal writing have construed the notion of 'form' rather widely and have concluded that also statutes of frauds[111] and the *parol*

[105] *Packer v Packer* [1953] 2 All ER 127, 129.

[106] In section V.

[107] Secretariat's Commentary (n 35) 17, art 4, n 3; Michael Bridge, 'The CISG from the Common Lawyer's Point of View' in Peter Mankowski and Wolfgang Wurmnest (eds), *Festschrift für Ulrich Magnus zum 70. Geburtstag* (Sellier European Law Publishers 2014) 161, 165; Djordjevic (n 28) para 19; Ferrante (n 25) para 40; Gillette and Walt (n 28) 79; Herber and Czerwenka (n 10) art 4 para 10; Honnold (n 28) para 64; Piltz (n 28) para 2-148; Saenger (n 45) para 4; Schwenzer and Hachem (n 10) para 29. But see Huber (n 25) paras 18, 21 (no validity issue).

[108] Bundesgerichtshof (Germany), 27 November 2007, CISG-online no 1617, reprinted in (2008) *Internationales Handelsrecht* 49, 51; Ulrich G Schroeter, 'Article 29' in Schwenzer (n 10) para 2.

[109] Bridge (n 107) 165; Djordjevic (n 28) para 20; Lorenz (n 37) para 9. One case that decided differently (*Geneva Pharmaceuticals* (n 53) 283–4) has been criticized as 'clearly wrong' (Bridge (n 28) para 10.31, n 255).

[110] Bridge (n 28) para 10.31; Djordjevic (n 28) para 20.

[111] *MCC-Marble Ceramic Center, Inc v Ceramica Nuova D'Agostino, SpA*, 114 F 3d 1384, 1388 (11th Cir); *Calzaturificio Claudia v Olivieri Footwear Ltd,* 6 April 1998, 1998 WL 164824 (SDNY); Gillette and Walt (n 28) 83; Schlechtriem and Schroeter (n 29) para 228.

evidence rule (section 2–202 of the Uniform Commercial Code (UCC))[112] are displaced by the Convention.

2. *Open-price contracts and* pretium certum

The second issue to be mentioned in the 'clearly covered' category—maybe a little boldly—is the validity of open-price contracts. Domestic rules requiring offers or contracts to contain a determinable price, such as, notably, Article 1591 of the French Code Civil and similar provisions in other jurisdictions,[113] are legal limits to party autonomy because they set minimum requirements for the use of this autonomy. Although they therefore concern the validity of the contract,[114] such domestic provisions cannot be applied to CISG contracts[115] because the Convention 'expressly provides otherwise' in its Article 14(1), where it defines its own minimum requirements for sufficiently definite offers.

3. *Initial objective impossibility*

The third issue concerns cases of initial objective impossibility of performance—that is, cases in which the goods sold were non-existent or had already been destroyed at the moment the contract for their sale was concluded. Quite a number of domestic laws[116] declare such contracts invalid, based on the Roman law principle *impossibilium nulla obligatio est.*[117] Again, the Convention expressly provides otherwise,[118] albeit in a somewhat hidden provision on the

[112] *MCC-Marble Ceramic Center* (n 111); *Shuttle Packaging Systems* (n 93); CISG Advisory Council, 'Opinion No 3: Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG' (Rapporteur: Richard Hyland) [2005] *Internationales Handelsrecht* 81; Gillette and Walt (n 28) 149–53; Schlechtriem and Schroeter (n 29) paras 123, 228; Zweigert and others (n 9) 213.

[113] See Ingeborg Schwenzer, Pascal Hachem and Christopher Kee, *Global Sales and Contract Law* (Oxford University Press 2012) paras 10.5–10.16.

[114] Drobnig (n 1) 637; Piltz (n 28) para 2-148.

[115] Hartnell (n 24) 66; Ulrich Magnus, 'Art 55 CISG' in *Staudinger's Kommentar zum Bürgerlichen Gesetzbuch* (Sellier de Gruyter 2013) para 7; Florian Mohs, 'Article 55' in Schwenzer (n 10) para 11; Piltz (n 28) para 2-148; Schlechtriem and Schroeter (n 29) para 156. But see (1976) 7 *UNCITRAL Yearbook* 100, art 7, no 3; Alejandro Miguel Garro and Alberto Luis Zuppi, *Compraventa internacional de mercaderías* (Ediciones La Rocca 1990) 106, 218; compare also Khoo (n 28) n 2.6.

[116] See eg art 1346 of the Italian Codice civile, arts 1184, 1272, 1460 of the Spanish Código Civil, para 878 of the Austrian Allgemeines Bürgerliches Gesetzbuch, art 20 of the Swiss Obligationenrecht.

[117] Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford University Press 1996) 686–97; Zweigert and others (n 9) 252–4.

[118] Similarly arguing for the displacement of domestic provisions on the initially impossible performance of obligations, see Herber and Czerwenka (n 10) art 68, para 8; Lorenz (n 37) para 20; Magnus (n 28) para 44; Barry Nicholas, 'Article 68' in Cesare M Bianca and Michael J Bonell (eds), *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (Giuffrè 1987) note 3.1; Piltz (n 28) para 2-148; Saenger (n 45) para 14; Schlechtriem (n 34) 90, n 368; Schlechtriem and Schroeter (n 29) para 163; Schwenzer and Hachem (n 10) para 33; Siehr (note 85) para 19; Wolfgang Witz, 'Artikel 68' in Wolfgang Witz, Hanns-Christian Salger and Manuel Lorenz (eds), *International Einheitliches Kaufrecht* (2nd edn, Recht und Wirtschaft 2016) para 3. But see Tribunal cantonal de Vaud (Switzerland), 8 December 2000, CISG-online no 1841; Helga Rudolph, *Kaufrecht der Import- und Exportverträge* (Haufe 1996) art 4, para 14; Denis Tallon, 'Article 79' in Cesare M Bianca and Michael J Bonell (eds), *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (Giuffrè 1987) n 2.4.3.

passing of risk. By explicitly allocating the risk in cases in which 'at the time of the conclusion of the contract of sale. . .the goods had been lost', Article 68 of the CISG, in its third sentence, makes clear that such a contract is valid under the Convention.[119] At the Vienna Conference, this was noted, and it prompted the delegation of India to make a proposal to expressly preserve the rule of '*res extincta*' by adding a paragraph to this end to today's Article 68 of the CISG.[120] During the ensuing discussions, it was said that the Indian proposal raised the very important question of the interaction between the Convention and the provisions of national law governing the validity of the contract.[121] Eventually, the proposal was rejected, thereby not preserving respective domestic rules on validity. [122] Furthermore, Article 79 of the CISG is frequently read as confirming that initially impossible performances can be validly agreed upon under the Convention.[123] The same position was already taken in Article 16 of the 1972 UNIDROIT Draft Law on Validity[124] and is today contained in Article 3.1.3 of the PICC.[125]

4. Conclusion

In conclusion, the three validity issues clearly covered by the CISG are in one respect different from the much larger group of validity issues clearly left to domestic law: they are not primarily based on policy considerations that have their source outside of the law of sales, but aim at the allocation of risk between two contracting parties. This is most obvious with respect to insufficiently definite price terms and initially impossible contract performances that Roman law treated as invalidity triggers, while the CISG mostly treats such contracts as valid. Within the realm of sales law, the respective policies have thus changed over time.[126]

The same is true for form requirements and contract validity, because the CISG again treats oral contracts as valid. In this regard, however, the Convention authorizes a reservation (under Articles 12 and 96 of the CISG) that was used by a number of States in the early years of the CISG[127] but, recently, has more and more been withdrawn, as possible under Article 97(4) of the CISG.[128] This fits

[119] Herber and Czerwenka (n 10) art 68, para 8; Nicholas (n 118) n 3.1; Schlechtriem (n 34) 90, n 368.

[120] Doc A/CONF.97/C.1/L.244, *Official Records* (n 35) 127.

[121] Remarks by delegate Ziegel (Canada), *Official Records* (n 35) 406, no 39.

[122] *Official Records* (n 35) 406, no 41–2.

[123] Ferrante (n 25) paras 47–8; Saenger (n 45) para 14; Schwenzer and Hachem (n 10) para 33.

[124] Note that the UNCITRAL Working Group had decided against including a comparable provision in the draft of the CISG; see (1978) 8 *UNCITRAL Yearbook* 66, no 69.

[125] Stressing that the UNIDROIT Principles' position is in line with that of the CISG, see Peter Huber, 'Article 3.1.3' in Stefan Vogenauer (ed), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (2nd edn, Oxford University Press 2015) para 3.

[126] See on invalidity of contracts because of initial impossibility Drobnig (n 1) 641: '[T]his ground of invalidity is based on too naturalistic a conception of a contract.'

[127] See Ulrich G Schroeter, 'The Cross-Border Freedom of Form Principle under Reservation: The Role of Articles 12 and 96 CISG in Theory and Practice' (2014) 33 *Journal of Law and Commerce* 79, 87–9.

[128] See Ulrich G Schroeter, 'The Withdrawal of Reservations under Uniform Private Law Conventions' [2015] *Uniform Law Review* 1.

into the general picture because this form reservation accommodates policy considerations that have their source outside of the law of sales, such as notably in the requirements of the planned economy of Socialist States.[129]

V. Borderline issues

Finally, there are a number of issues that make it more difficult to decide whether they concern a contract's validity and/or whether the Convention contains applicable rules; in short, whether they are governed by domestic law or by the CISG.

1. Mistake (error) or misrepresentation

The first of these issues are cases of a party's mistake when concluding a CISG contract. They have been lumped together here—maybe somewhat unusually—with cases of innocent or negligent misrepresentation by the other party at the contract conclusion stage. (In contrast, domestic rules on fraudulent misrepresentation belong to the category of fraud already addressed earlier).[130]

By treating cases of mistake and misrepresentation together, I do not mean to suggest that they are in a narrow sense the same; there are clearly various differences (as well as between the respective rules under domestic laws). They are, however, functionally equivalent[131] insofar as they both concern a contracting party's state of mind at the moment of contract conclusion, although their focus is not identical; while rules on mistake look to the erroneous assumption of one party, rules on misrepresentation look to the false statement of material fact made by the other party that has caused that assumption and thereby induced the first party to enter into the contract.

In case law and legal writings on the CISG, mistake is widely viewed as a validity issue,[132] although misrepresentation less so.[133] Under the validity definition presented earlier,[134] the same result can be reached, because both instruments limit party autonomy by allowing one party to avoid a binding contract. The controversial question is whether, and to what extent, the Convention 'expressly provides otherwise', thereby preventing domestic rules on mistake from being applied. The answer depends on what a buyer's mistake was about;[135] if he was mistaken about the quality of the goods he bought, Articles 35 and 38–44 of the

[129] Schroeter (n 127) 81–4.

[130] See the discussion in section III.3 of this article.

[131] Schwenzer, Hachem, and Kee (n 113) para 17.07.

[132] Djordjevic (n 28) para 21; Huber (n 25) para 24; Lorenz (n 37) paras 21–24; Saenger (n 45) para 4; Schwenzer and Hachem (n 10) para 36.

[133] Against regarding misrepresentation as a validity issue as long as the party affected does not seek to annul the contract Khoo (n 28) n 3.3.4.

[134] See section III.3.C of this article.

[135] Patrick C Leyens, 'CISG and Mistake: Uniform Law vs Domestic Law: The Interpretative Challenge of Mistake and the Validity Loophole' [2003–4] *Review of the Convention on Contracts for the International Sale of Goods (CISG)* 3, 28; Schroeter (n 29) 109.

CISG pre-empt domestic laws on mistake,[136] because both of these sets of rules regulate the same matter, namely the buyer's state of knowledge about features of the goods at the moment of contract conclusion.[137] A similar overlap exists in case of a mistake about the contracting partner's ability to perform and his creditworthiness,[138] because a party's respective state of knowledge at contract conclusion is addressed in Articles 71 and 72 of the CISG.[139] This result, which is admittedly controversial under the CISG,[140] accords with the approach to the same problem adopted by Article 3.2.4 of the PICC.

2. *Contract clauses limiting a party's rights under the contract*

The second issue concerns domestic law provisions designed to 'police' contract clauses that limit a party's rights under the contract. Rules of this type are legal limits to party autonomy and therefore concern a validity matter.[141]

A. Domestic laws declaring excessive limitations of liability ineffective

Such domestic provisions come in a variety of designs and most of them do not conflict with express CISG provisions.[142] This is notably true for rules of domestic law denying the validity of limitation of liability clauses with a specific content[143]—for example, by providing 'grey lists' or 'black lists' of contract clauses that are considered ineffective. The same is also true for domestic legal standards of a more general type triggered by the 'unfair' or 'one-sided' content or 'unconscionable' nature of contractual liability limitations.[144]

Whether contract clauses of such a design are incorporated into a CISG contract—a question that logically precedes the control of a clause's content—must nevertheless be determined by applying the Sales Convention's contract formation rules (Articles 14–24 of the CISG).[145] This follows indirectly from Article 19(3) of the CISG, which states that '[a]dditional or different terms relating, among other things, to the. . .extent of one party's liability to the other. . .are considered to alter the terms of the offer materially'. Where an acceptance does not in contrast alter the offer's terms on the extent of contractual liability, the limitation of liability clause must therefore become part of the contract in accordance with Articles 14 and 18 of the CISG.

[136] Djordjevic (n 28) para 21; Lorenz (n 37) para 22; Schwenzer and Hachem (n 10) para 36; Siehr (n 85) para 9.

[137] On mistake, see Schroeter (n 29) 109; on misrepresentation, see Schroeter (n 32) 572–5.

[138] Djordjevic (n 28) para 21; Lorenz (n 37) para 24; Schwenzer and Hachem (n 10) para 36.

[139] Schroeter (n 29) 110.

[140] See Schroeter (n 29) 108–9.

[141] Piltz (n 28) para 2-150; Schwenzer and Hachem (n 10) para 38.

[142] Hartnell (n 24) 83–6.

[143] *MSS, Inc v Maser Corporation*, 2011 WL 2938424 (MD Tenn 2011) in respect of the enforceability of a contractual limitations on consequential damages provision; Schwenzer (n 58) para 45.

[144] On domestic laws of this type, see further section V.2.C below.

[145] Ulrich G Schroeter, 'Intro to Articles 14–24' in Schwenzer (n 10) para 5.

B. Domestic laws imposing a particular interpretation on warranty disclaimers

Something different may be true where domestic rules regulate 'warranty disclaimers' by relying on a certain interpretation of exclusion language. A notable example is section 2–316 of the UCC, which, *inter alia,* provides that '[w]ords or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other', that a 'negation or limitation is inoperative to the extent that such construction is unreasonable',[146] and that 'unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty'.[147] Can section 2–316(1) and (3) of the UCC or similar domestic provisions be applied to CISG contracts?

Their application would first require their own intention to be applied to international sales contracts governed by the CISG and not only to sales contracts governed by the domestic sales law they form part of. With respect to section 2–316 of the UCC, such an intention to police CISG contracts has been doubted, as the provision deals with categories like 'merchantability' or 'warranties' that are foreign to the CISG.[148] If we assume *arguendo* that section 2–316(1) and (3) of the UCC desire their application to CISG contracts, we need to ask next whether these provisions are displaced by provisions in the CISG. This question is disputed; a number of authors have argued that section 2–316(1), (3) of the UCC are preserved by the validity exception in Article 4(a) of the CISG because they concern the 'validity' of warranty disclaimers that section 2–316(1) of the UCC declares 'inoperative'.[149] The better view, however, points to the 'except as' caveat in Article 4 of the CISG, given that Article 8 of the CISG expressly provides its own rules of interpretation that trump section 2–316(1) and (3) of the UCC.[150] Whether terms like 'as is' or 'with all faults' sufficiently inform a foreign buyer (who may or may not be fluent in English) about the seller's intention to restrict his liability for non-conforming goods has to be judged against the standards in Article 8 of the CISG (in particular, Article 8(2)), because these were designed for cross-border interpretation scenarios. Accordingly, section 2–316(1) and (3) of the UCC cannot be applied to CISG contracts.

[146] UCC § 2–316(1).

[147] UCC § 2–316(3)(a).

[148] Honnold (n 28) para 230; Schlechtriem and Schroeter (n 29) para 400.

[149] Hartnell (n 24) 86; Longobardi (n 27) 878–9.

[150] John O Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (2nd edn, Kluwer International Law 1991) para 234; Henschel (n 37) 185; Schroeter (n 145) para 4.

C. Mandatory standards of fairness and the CISG

Controversial questions are also raised by domestic provisions that 'police' contractual liability limitations by applying general standards of fairness, such as 'reasonability'. Does or should the CISG have any effect in this context? The matter is relatively easy if the domestic provision itself refers to, for example, 'essential principles of statutory law' and assumes that a clause unreasonably disadvantages a party if it deviates from such essential principles;[151] if the contract concerned is a CISG contract, the essential principles of statutory law referred to are those of the CISG.[152] Here, the CISG and its standards apply because the domestic law says so.

Some authors have gone a step further and have argued that even where the domestic law on validity makes no such reference, a decision to set aside contractually agreed remedies must be measured by a yardstick provided by the rules and principles of the Convention, including good faith.[153] Under this approach, the CISG's role in determining a contract clause's validity is not being deduced from domestic law, but from the CISG itself. A decision by the Austrian Supreme Court seems to point in the same direction, although it is arguably not very clear in this regard.[154]

I find it difficult to agree with this approach because I fail to see any support for it in the Convention. The CISG says nowhere that a contractual derogation from its provisions must be reasonable. Rather, it contains no provision—explicit or implied—about such legal limits of party autonomy, but leaves this question intentionally to the domestic legislators. Accordingly, the domestic law is free to either make reference to the CISG's standards or to choose a different, purely domestic test. In my opinion, both options are compatible with the Convention and its Article 4.

[151] See in German law BGB, para 307(1): 'Provisions in standard business terms are ineffective if, contrary to the requirement of good faith, they unreasonably disadvantage the other party to the contract with the user.' BGB, para 307(2), no 1: 'An unreasonable disadvantage is, in case of doubt, to be assumed to exist if a provision. . .is not compatible with essential principles of the statutory provision from which it deviates'.

[152] Oberster Gerichtshof (Austria), 7 September 2000, CISG-online no 642, reprinted in (2001) *Internationales Handelsrecht* 42, 43; Oberlandesgericht Düsseldorf (Germany), 21 April 2004, CISG-online no 915, reprinted in (2005) *Internationales Handelsrecht* 24, 28; Oberlandesgericht Linz (Austria), 23 March 2005, CISG-online no 1376, reprinted in (2007) *Internationales Handelsrecht* 123, 127; Benicke (n 37) para 5; Lorenz (n 37) para 18; Ulrich Magnus, 'Art 14 CISG' in *Staudinger's Kommentar zum Bürgerlichen Gesetzbuch* (Sellier de Gruyter 2013) para 42; Schroeter (n 145) para 4.

[153] Henschel (n 37) 180–2; Djordjevic (n 28) para 25; Schwenzer and Hachem (n 10) para 38; also Herber and Czerwenka (n 10) art 4, para 12; Piltz (n 28) paras 2-150, 2-153.

[154] Oberster Gerichtshof (Austria), 7 September 2000, CISG-online no 642, reprinted in (2001) *Internationales Handelsrecht* 42, 43: 'This rule [of domestic German law on the validity on limitations of liability] does not contradict the core values of the CISG; only national provisions contradicting these core values could be considered inadmissible.'

3. Surprising contract clauses

Only briefly, I want to touch upon the rules policing 'surprising' clauses in CISG contracts. Insofar, the opinions are divided; while some regard this as a validity issue exclusively governed by domestic law,[155] others want to exclusively look to the Convention's formation of contract rules.[156] In my opinion, it is preferable to distinguish according to the reason triggering a clause's surprising nature;[157] if it is the surprising content of the clause because of its unfairness to one party or its deviation from core statutory rules of law, domestic provisions on validity apply. If, on the contrary, the clause is deemed 'surprising' because of its language or presentation, for example its 'hidden' position in a standard form's text, Article 8 of the CISG expressly provides the applicable standard of control. The above distinction is very similar to the one found in Article 2.1.20(2) of the PICC.

4. Prohibitions of interest

The last issue to be addressed are prohibitions of interest as can be found in certain religious systems of law. Such prohibitions concern the validity of contracts,[158] as (or, as far as) they limit party autonomy by providing that contracting parties may not agree on interest to be paid.[159] Does the CISG expressly provide otherwise, thereby preventing an application of such prohibitions? At first sight, Article 78 of the CISG indeed seems to do so by providing that a party is entitled to interest whenever the other party fails to pay any sum that is in arrears, thereby, by law, granting a right to interest.[160] On the other hand, it is widely accepted under Article 78 of the CISG that domestic law may limit the amount of interest that parties can agree on,[161] notably through the prohibition of unreasonably high

[155] Benicke (n 37) para 5; Sebastian Kühl and Kai-Michael Hingst, 'Das UN-Kaufrecht und das Recht der AGB' in Karl-Heinz Thume (ed), *Transport- und Vertriebsrecht 2000: Festgabe für Rolf Herber* (Luchterhand 1999) 50, 61; Joseph Lookofsky, *Understanding the CISG* (4th edn, Kluwer 2012) para 7.2; Magnus (n 152) para 42; Burghard Piltz, 'AGB in UN-Kaufverträgen' (2004) *Internationales Handelsrecht* 133, 138; Elisabeth Sauthoff, 'Lieferverzug als wesentliche Vertragsverletzung bei Vereinbarung sofortiger Lieferung und wirksame Einbeziehung fremdsprachiger AGB' (2005) *Internationales Handelsrecht* 21, 23; Schlechtriem (n 59) 1040; Wolfgang Witz, 'Vor Artt 14–24' in Wolfgang Witz, Hanns-Christian Salger & Manuel Lorenz, *International Einheitliches Kaufrecht* (2nd edn, Recht und Wirtschaft 2016) para 11.

[156] Wolfgang Drasch, *Einbeziehungs- und Inhaltskontrolle vorformulierter Geschäftsbedingungen im Anwendungsbereich des UN-Kaufrechts* (Schulthess 1999) 6, 11ff; Urs Peter Gruber, 'Artikel 14 CISG' in *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (7th edn, CH Beck 2016) para 34; Arnd Lohmann, *Parteiautonomie und UN-Kaufrecht* (Mohr Siebeck 2005) 224; Murmann and Stucki (n 28) para 46; Martin Schmidt-Kessel, 'Article 8' in Schwenzer (n 10) para 63.

[157] Schroeter (n 145) para 7; Schlechtriem and Schroeter (n 29) para 167.

[158] CISG Advisory Council, 'Opinion No 14: Interest under Article 78 CISG' (Rapporteur: Yesim Atamer) (2014) *Internationales Handelsrecht* 204, 210, para 3.22; Piltz (n 28) para 2-148.

[159] See Kilian Bälz, 'Zinsverbote und Zinsbeschränkungen im internationalen Privatrecht' [2012] *Praxis des Internationalen Privat- und Verfahrensrechts* 306, 309.

[160] See CISG Advisory Council (n 158) paras 3.19–3.21; Enderlein and Maskow (n 28) art 78, n 2.1: 'The entitlement to interest under the CISG is, in our view, characterized above all by two features: its normativity and its absoluteness.'

[161] Klaus Bacher, 'Article 78' in Schwenzer (n 10) para 50; Piltz (n 28) paras 2-151, 5-499; Wolfgang Witz, 'Artikel 78' in Wolfgang Witz, Hanns-Christian Salger & Manuel Lorenz, *International Einheitliches Kaufrecht* (2nd edn, Recht und Wirtschaft 2016) para 13. But see Enderlein and

interest rates amounting to usury.[162] Must domestic law therefore also be able to say that any agreed interest above zero per cent is invalid?

And should we furthermore take into account that Article 78 of the CISG, in cases where the parties have not agreed on an interest rate, leaves the interest rate to domestic law? If the domestic law applicable in this context[163] prohibits interest, the interest rate would be zero,[164] and the same result—which would have been considered absurd just a few years ago—could also be caused by Central Banks setting interest rates at a zero per cent level. (In recent times, there has even been talk of a 'negative' interest rate for loans—that, if applied under Article 78 of the CISG, would mean that the party entitled to interest has to pay interest. As Article 78 of the CISG is predominantly read as implicitly referring to the legal (statutory) interest rate,[165] such developments in the market interest rate do not immediately cause trouble under the CISG—which is different under the PICC that refer to the average bank short-term lending rate). At the end of the day, Article 78 of the CISG is probably a provision that prevents the application of domestic interest prohibitions.[166] But I have to admit that I am not quite certain about this result.

VI. Conclusion

Contract validity under the CISG does not rank among the most elegant areas of uniform contract law but, rather, resembles a patchwork. The majority of validity issues are not governed by the CISG, notably those that arise because of problems particular to certain trades or certain countries or because of political questions. They are mostly addressed and governed by domestic law, and therefore remain non-unified.[167] A surprising number of other validity issues are in fact governed by rules in the CISG, although the respective line is sometimes difficult to draw. To find a uniform approach in this respect will remain a task for the upcoming years.

Maskow (n 28) art 78, n 2.2, who argue that Article 78 of the CISG takes precedence over domestic law due to its nature as a more specific rule.

[162] Oberster Gerichtshof (Austria), 26 January 2005, CISG-online no 1045, reprinted in [2005] *Internationales Handelsrecht* 198: contractually agreed interest rate of 0.2 per cent per day (amounting to 107.35 per cent interest annually) held invalid under Austrian law; CISG Advisory Council (n 158) para 3.22.

[163] See CISG Advisory Council (n 158) paras 3.22–3.44; Bacher (n 161) paras 34–47.

[164] But see Witz (n 161) para 10, who wants to have recourse to the borrowing costs in the respective country.

[165] CISG Advisory Council (n 158) para 3.39. On negative legal interest rates, see Christoph Coen, 'Der negative Basiszinssatz nach § 247 BGB' [2012] *Neue Juristische Wochenschrift* 3329; Kai-Michael Hingst and Karl-Alexander Neumann, 'Negative Zinsen – Die zivilrechtliche Einordnung eines nur scheinbar neuen geldpolitischen Phänomens' [2016] *Zeitschrift für Bank- und Kapitalmarktrecht* 95.

[166] Bridge (n 28) para 10.31; Enderlein and Maskow (n 28) art 78, n 2.2; Piltz (n 28) para 2-148.

[167] Compare Drobnig (n 1) 643: '[I]n a future revision of CISG which, I suppose, may be called for after 15 or 20 years of practical experience, a genuine effort should be made to integrate certain causes of invalidity.'

Article 4(a) of the CISG, the provision designed to give guidance in this area, has not ideally fulfilled its purpose. Due to the way it was drafted,[168] it hardly qualifies as a boundary marker[169] that exactly tells us where the border between uniform law and domestic law runs but, merely, as a warning sign that signals: 'There is a border somewhere around here.'[170] The rest is left to courts, arbitrators, and academia.

[168] See also Gillette and Walt (n 28) 78: '[N]ot a model of clarity.'
[169] But see Khoo (n 28) n 3.1: '[G]uide-post.'
[170] Schroeter (n 29) 116.