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SELECTED CRITICAL ISSUES REGARDING THE SPHERE OF APPLICATION OF THE CISG

This contribution offers an analysis of the main rules and principles of the Vienna Sales Convention (CISG) on its application ratione materiae in the light of the criteria set out in Articles 1 and 3 of the Convention. This analysis calls for the examination of applicability of the CISG to contracts for goods to be manufactured and mixed contracts, distribution contracts, barter transactions, financial leasing as well as for the interpretation of notion of "goods" under the CISG. The analysis brings the author to the conclusion that divergences in interpretation of the CISG rules relevant for its application to certain types of contracts still exist, what may cause many problems in practice. In the perspective of these problems, the author suggests that the contracting parties solve all the questions of the Convention's ap plicability in their contract, in order to avoid the uncertainties which the application ratione materiae of the CISG usually imply in international commerce.

Key words: *Contract. International sale. CISG. Interpretation. Applica tion. applicability.*

1. INTRODUCTORY REMARKS

The UN Convention on Contracts for the International Sale of Goods (CISG) is one of the most important international uniform law instruments, as evidenced both by number of Contracting States (76) and number of cases in which it was applied worldwide. The CISG has been the centre of a tremendous interest in legal writing and has drawn the attention of domestic and international legislators. Thus, the understanding of the main rules regarding the sphere of application of the CISG is of great importance for the parties in international commerce and for the courts all over the world.

The sphere of application of the CISG is defined by Articles 1 – 6. The CISG governs the contract of sale of goods (application *ratione materiae*) between the parties whose places of business are in different States (application *ratione personae*) when the states are Contracting States (direct application) or when the rules of private international law lead to the application of the law of a Contracting state (indirect application). These basic requirements for application of the CISG are defined by Article 1. On the other hand, Article 2 excludes certain types of sales from the scope of the CISG and Article 3 establishes additional requirements for the application of the CISG to contracts for goods to be manufactured and mixed contracts. Furthermore, the extent to which sales transactions are governed by the CISG is determined by Articles 4 and 5. Finally, Article 6 precises that the CISG applies subject to contrary agreement by the parties ("opting–out" approach).

This article will focus on the practical problems which usually arise with respect to the application *ratione materiae* of the CISG in terms of Articles 1 and 3 of the CISG, in order to offer the optimal solutions for preventing the uncertainties which the divergences in interpretation of the CISG usually imply in international commerce.

2. CONTRACT OF SALE

2.1. Basic requirements

For the application of the CISG, first of all, the requirements concerning the contract of sale must be satisfied. The CISG does not expressly define the contract of sale. However, this definition can be established indirectly from the provisions regulating the obligations of the seller (Article 30) and of the buyer (Article 53). According to those provisions, the contract of sale is a contract in which the seller is obliged to deliver the goods, to hand over the documents relating to them and to transfer the property in the goods, and the buyer is obliged to pay the price for the goods and to take delivery of them as required by the contract. In that respect, it can be noted that the meaning of the contract of sale in the CISG does not differ from the relevant definitions of the national codes[1] and that the CISG governs most kinds of sales[2] in international commerce[3].

[1] This is a classic definition of sale. See B. Audit, *La vente internationale de marchandises Convention des Nations Unies du 11 avril 1980,* L.G.D.J, Paris 1990, 25; C.Witz, *Les premières applications jurisprudentielles du droit uniforme de la vente inter nationale Convention des Nations Unies du 11 avril 1980,* L.G.D.J, Paris 1995, 32; K.H. Neumayer, C. Ming, *Convention de Vienne sur les contrats de vente internationale de marchandises Commentaire,* Cedidac, Lausanne 1993, 38. See also V. Heuzé, *La vente internationale de marchandises, Droit uniforme, Traité des contrats sous la direction de Jacques Ghestin,* L.G.D.J, Paris 2000, 75. For the comparison with the elevant definition of the Serbian Code of Obligations, J. Perović, *Bitna povreda ugovora*, Belgrade 2004.

2.2. Additional requirements

The application of the CISG may be doubtful in case of contracts for goods to be manufactured and mixed contracts since they do not fall into the scope of the "classic" definition of contract of sale. Therefore, the CISG establishes additional requirements for its application to those types of contracts (Article 3).

2.2.1. Contracts for goods to be manufactured.

Under Article 3.1, contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.[4] In terms of this rule, the CISG in principle applies to contract for goods to be manufactured or produced[5] since such contract is basically treated as a contract of sale.[6] Only the cases where the party ordering the goods supplies a "substantial part" of the materials for manufacture or production of the goods are excluded from the application of the CISG.[7]

Exclusion from the application of the CISG on the basis Article 3.1 is not difficult in cases where the entire material necessary for manufacture or production is supplied by the party ordering the goods. This view was expressed for instance in the decision of Austrian Supreme Court where the Court found the CISG inapplicable to a contract for brooms

[2] See the view expressed by I. Schwenzer, P. Hachem, *"*Art.1", *Commentary on the UN Convention on the International Sale of Goods (CISG)* (eds. P. Schlechtriem, I. Schwenzer), Oxford University Press, Oxford 2010[3], 32, according to which "*Not ex pressly mentioned but regularly encompassed by the Convention are furthermore sales under conditions including the retention of title or time limits as well as contracts provid ing for the direct delivery of the goods to the customer or the buyer. The same hold true for contracts containing pre emptive options or rights to re purchase, buy back sales, counter purchases and offsets"*.

[3] Under Article 1.3 CISG neither the nationality of the parties nor the civil or commercial character of the parties of the contract is to be taken into consideration in determining the application of the CISG. In that resepect, one may conclude that, as a general rule, it is irrelevant whether the contract of sale is of civil or commercial nature. However, the exclusion of goods bought for personal, family or household use in terms of Article 2 limits the sphere of application of the CISG to commercial sales.

[4] Comp. Article 3.1 CISG with relevant solutions of ULIS (Article 6) and ULF (Articel 1(7).

[5] K. H. Neumayer, C. Ming, 61; V. Heuzé, 76; B. Audit, 25.

[6] I. Schwenzer, P. Hachem, *"*Art. 3",*Commentary on the UN Convention on the International Sale of Goods (CISG)* (eds. P. Schlechtriem, I. Schwenzer), Oxford Univer sity Press, Oxford 2010[3], 62.

[7] P. Schlechtriem, *"*Art. 3",*Commentary on the UN Convention on the Interna tional Sale of Goods (CISG)* (eds. P. Schlechtriem, I. Schwenzer), Oxford University Press, Oxford 2005[2], 54.

and brushes produced by the party from Yugoslavia from material supplied by the other party from Austria.[8]

However, in cases where *both* parties supply materials, the problems concerning the application of the CISG in the light of Article 3.1 usually arise since the nature of such contracts could be doubtful. In these cases, a dividing line between the sales and processing could be very flexible and uncertain having in mind the controversial formulation of the relevant test in the text of Article 3.1 CISG.[9] The main difficulties arise from the differences in languages. In that regard, ULIS (Article 6) used the formulation "essential and substantial part" but in the English version of the CISG the reference to "essential" was deleted. On the other hand, the French version of the CISG uses the term "*une part essentielle*" while the Spanish version states "*una parte sustancial*".[10]

Consequently, the courts in certain cases apply domestic law criteria in determining the distinction between sales and processing.[11] That approach was, for instance, adopted in the decision of *Cour d'appel de Chambéry*,[12] in case where the French company undertook the obligation to produce and deliver connection parts to the Italian company on the basis of the schemes and standards supplied by the Italian company. The Court held that the respective contract cannot be qualified as a contract for international sale of goods in terms of the CISG which is inapplicable in case where the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture. In view of the Court, the fact that connecting parts were produced on the basis of schemes and standards supplied by the client was the decisive criterion for interpretation of the term "*part essentielle*" and consequently, for the exclusion of the application of the CISG. This decision was severely criticized in French doctrine as an example of misapplication of Article 3.1 CISG by simple transposition of the domestic law criteria to the distinction between "*la vente*" and "*le contrat d'entreprise*".[13] However, the opposite view was expressed in the decision of *OLG Frankfurt* where the

[8] OGH, 27 October 1994, *Zeitschrift für Rechtsvergleichung,* 1995, 159 note V. Heuzé, 76. Also available on CISG online 133.

[9] See I. Schwenzer, P. Hachem, 64; P. Schlechtriem, 55.

[10] See J.O. Honnold, *Uniform Law For International Sales,* Kluwer Law International, The Hague 1999[3], 59.

[11] See the comment of C.Witz, 34, stating: "*Le juriste français devra ainsi veiller à ne pas étendre à la vente internationale des critères de distinction entre la vente et le contrat d'entreprise, auxquels il est habitué en droit interne*".

[12] Chambéry, 25.05.1993, *Bull. Inf. C. Cass.* 01.10.1993, 35, *Rev. jurispr. com*, juin 1995, note C.Witz, 34.

[13] See C. Witz, ibidem, stating: "*C'est dans ce piège que la Cour d'Appel de Chambéry est tombée*". In the comment of this decision, the author also refers to Article 42.2.b CISG; V. Heuzé, 77.

Court found the CISG applicable to a contract for delivery of shoes produced for the German buyer in accordance with indications provided by him.[14] The Court correctly held that the fact that producer, according to the contract, follows the technical instructions of the client for production of goods ordered by the client cannot justify the exclusion of that contract from the sphere of application of the CISG.[15]

Having in mind the mentioned problems of interpretation of Article 3.1, doctrine and case law use three main tests for determining the precise meaning of the term "substantial part": economic value test, volume test and the test based on the importance of the respective contribution for the end-product (essential test) as well as the approach of decision making on a case-by-case basis. These tests are used either individually or cumulatively or successively.[16] The prevailing criterion seems to be the economic value[17] at the time of formation of contract,[18] taking into consideration that the contributions of the parties should be compared with each other and not with the value of the end product.[19] In the view of the commentators of the CISG, adoption of the economic value test as a general rule "will regularly lead to appropriate results and in practice often be the sole test available"[20]. Furthermore, this test will secure a wide and uniform application of the CISG.[21] Nevertheless, one should note that: 1. the economic value test should be applied in the light of the relevant circumstances of each particular case; 2. the economic value test itself raises dilemmas such as, for instance, the question of calculation of the value – how big a proportion of the value of all the materials is substantial?[22] In that regard, one court may determine that 15% constitutes a substantial part while some other court may define that it is 50% and more; 3. although the majority of authors favour the economic value test, it is difficult to predict which criteria will be used by the courts in each particular case. In order to avoid uncertainties with respect to the application of Article 3.1, it would be advisable for the parties to solve the question of applicability of the CISG in the contract.[23]

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[14] OLG Frankfurt, 17.09.1991, *Recht der Internationalen Wirtschaft (RIW)* 1991, 950, note C. Witz, 35.

[15] See V. Heuzé, ibidem.

[16] I. Schwenzer, P. Hachem, 65; P. Schlechtriem, 56.

[17] CISG AC; V. Heuzé, 76; I. Schwenzer, P. Hachem, 65; K.H. Neumayer, C. Ming, 62; J. O. Honnold, 59.

[18] See P. Schlechtriem, 56, stating "*later decreases or increases in value should not decide the applicability of the Convention*".

[19] I. Schwenzer, P. Hachem, 65.

[20] *Ibid.*, 66.

[21] P. Schlechtriem, 57.

[22] J. O. Honnold, 59.

[23] In that sense *ibid.*

1.1.2. Mixed contracts.

Under Article 3.2, the CISG does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services. This rule applies only when the parties deal with both goods and services in a *single* contract. In other words, Article 3.2 excludes from the scope of the CISG the mixed contract by which the party who delivers the goods undertakes by the same contract also the obligation to provide services, if providing services constitutes the preponderant part of the obligations.

If there are two separate contracts, the CISG is to be applied to the contract of sale and domestic law to the contract of services.[24] However, domestic law cannot decide whether a transaction involving both goods and services is one contract governed by the CISG or is to be treated as separate agreements.[25] Therefore, in determining whether the respective transaction constitutes one single contract or two separate agreements, application of Article 8 (intention of the parties)[26] and Article 7.1 (interpretation of the Convention)[27] seems to be the optimal solution. Where it is considered that the parties concluded one single contract, the question is whether the CISG rules (created for the needs of international sale) are suitable for the breach of service obligation. In that respect particularly important is the question whether the breach of a service obligation justifies the avoidance of the entire contract. In that regard most commentators advocate for the application of the CISG as a single set of rules to the breach of service obligations as well, and when necessary, the gap-filling mechanism envisaged in Article 7.2 should be applied, particularly regarding the remedy of avoidance.[28]

In case where there is one single contract the key problem is the interpretation of the term "preponderant part" i.e. the criteria for evaluation whether the service obligation is of greater importance than the delivery obligation. In that regard, the prevailing opinion in doctrine and

[24] P. Schlechtriem, 60. But see the comment in I. Schwenzer, P. Hachem, 69: "*...it will be a rare exception that parties intend to have two possibly very different laws applied to agreements which may be separate but nevertheless relate to the same circum stances*".

[25] See J. O. Honnold, 59, stating. "*If a Contracting State applies domestic rules on "severability" that ignore the effective application of the Convention to a transaction that combines goods and services that State would scarcely be honoring its obligation to give full effect to the rules governing international sales or to the mandate of Article 7(1)*".

[26] In that sense P. Schlechtriem, 59; I. Schwenzer, P. Hachem, 68.

[27] See K. H. Neumayer, C. Ming, 64 advocating application of Article 7.1.

[28] J. O. Honnold, 59; I. Schwenzer, P. Hachem, 70; P. Schlechtriem, 60. K.H. Neumayer, C. Ming, 64 express certain reserve: "*...la Convention s'applique à la totalité des obligations, dans la mesure où elle s'adapte à la prestation de services*". Similar view, B. Audit, 26 27.

case law is that a starting point should be a comparison of the economic value of the goods and of the services on the basis of the prices that could have been obtained if there were separate contracts, taking into consideration the weight the parties themselves have attributed to each obligation.[29]

The economic value test in the context of Article 3.2 was, for instance, applied in one ICC award concerning a contract providing for delivery and installation of material for the construction of the hotel. The seller contested the applicability of the CISG stressing that he undertook the obligation to install the material. The arbitrator, however, applied the CISG to the respective contract since in his view it was a contract of sale. In the commentary of this Award it was noted that the price for installation of material was of the secondary importance comparing with the price of material itself. [30]

Concerning the economic evaluation of "preponderant part" of the obligations, the opinions expressed in the doctrine are divergent. While some authors consider that the service part of the contract has to amount only to more than 50% in order to be qualified as the preponderant part, some others advocate that the value of the services must significantly exceed 50%, so that the prognosis on the applicability of the CISG would be facilitated.[31] In any case, one should take into account that the value of the services has to be compared with the value of the whole contract and not with the price of the goods only.[32]

Having in mind the mentioned difficulties in application of Article 3.2 the parties should be advised to precise in the contract all the questions relevant for the application of the CISG.[33]

2. APPLICABILITY OF THE CISG TO INTERNATIONAL DISTRIBUTION CONTRACT

With regard to distribution contract, one has to distinguish between the framework distribution contract on the one side, and the individual contracts of sale concluded between the supplier and the distributor on the basis of the framework contract on the other side. The framework

[29] See detailed review of these opinions in I. Schwenzer, P. Hachem, 70 71.

[30] ICC no 7153, 1992, commented in J. J. Arnaldes, Y. Derains, D. Hacher, *Col lection of ICC Arbitral Awards 1991 1995,* Kluwer, 1997, 443 447.See also decision of *CA Grenoble*, 26.04.1995, *Recueil de jurisprudence concernant les textes de la CNUDCI*, no151, note V. Heuzé, 77.

[31] I. Schwenzer, P. Hachem, 70.

[32] See P. Schlechtriem, 61.

[33] See the recommendation in K. H. Neumayer, C. Ming, 66.

distribution contract which regulates the long-term relationship between the parties, which is mainly related to the rights and obligations of the parties arising from the *distribution* relation, in prevailing opinion is not governed by the CISG.[34] Contrary to that, the *individual sales contracts* which parties conclude each time when the goods are supposed to be supplied to the distributor, may fall under the CISG, if the other requirements for application are met.[35] Consequently, the international distribution contract is generally submitted to the different legal regimes.[36]

For instance, in the case of the District Court's Gravenhage[37], a Dutch company and a Swiss company concluded a framework agreement for the non exclusive distribution of certain products. The agreement contained no choice of law clause. On the same day, the parties concluded a sales contract for the same products. That contract was to be governed by Swiss law. The sales contract contained elements of distribution as for instance the clause on non-exclusivity. The buyer claimed that the seller did not fulfil its obligations deriving from the distribution agreement and therefore refused to make payment for the sale. The seller sued for payment. In counterclaim, the buyer asked for the setting aside of the distribution agreement. The court ruled that the CISG does not apply to distribution agreements. The framework contract could not be regarded as a sale because the most important elements of the sale contract were in fact laid down in the sale contract itself. The seller's claim was rejected under the applicable domestic law.

Similar was the ICC case where a German seller and a Spanish buyer concluded an agreement pursuant to which the buyer was to be the exclusive distributor in Spain of industrial equipment produced in Germany.[38] Several individual sales contracts were then concluded between the parties. Four years later the German company informed the Spanish buyer that, due to the insufficiency of the buyer's sales, it would sell its products in Spain through another company. Thereafter, upon the buyer's refusal to pay for some of deliveries, the seller started arbitral proceedings. The buyer counterclaimed damages arising from breach of the exclusive distributorship agreement as well as from lack of conformity of certain products. The sole arbitrator held that the CISG was not applica-

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[34] V. Heuzé, 75; C.Witz, 32. See the view expressed in F. Ferrari, *La compraventa internacional Aplicabilidad y aplicaciones de la Convención de Vienna de 1980,* Valencia 1999, 129

[35] P. Schlechtriem, *"*Art.1",*Commentary on the UN Convention on the Interna tional Sale of Goods (CISG)* (eds. P. Schlechtriem, I. Schwenzer), Oxford University Press, Oxford 2005[2], 27.

[36] See J. Perovic, "Applicability of the CISG to International Distribution Agree ment"*, Pravni život 12/2007, Vol. IV*, 359 369.

[37] Decision of 02.07.1997, CISG online.

[38] 23.01.1997. 8611/HV/JK

ble to the distribution agreement as such but to the individual sales contracts concluded pursuant to the distribution agreement.[39]

However, the problem could arise from the fact that the borderline between the framework distribution contract and the sales contracts may be uncertain if the framework contract already contains most of the typical obligations of a seller and a buyer (precisely formulated), so it is only up to the distributor to require delivery at a certain date, in a specified quantity, and just to confirm the seller's obligations which are already provided by the framework contract.[40] It is for this reason that some authors do not exclude possibility of application of the CISG rules relevant to the entire framework agreement, if such rules arise from the general rules of the law of obligations (i.e., if they are not specially adapted to the contract of sale).[41] In that regard, Professor Schlechtriem noted that the parties can also choose to make the CISG applicable to all obligations created by the distribution contract, such as service obligation of the supplier to provide advertising and merchandising, to abstain from direct sales in the distributor's country or region, and the distributor's obligations to stock spare parts, to promote the goods and the seller's brand name, etc.[42]

Application of the CISG to the framework distribution contract can be found in the case law.

For instance, in the case of the Italian *Corte di Cassazione* (14 December 1999),[43] an Italian company and a British company entered into an agreement providing for sale and the distribution of goods. The Italian company sued the British company claiming contract avoidance. The decision of the Italian Supreme Court relied on the assumption that the CISG is applicable not only to sales, but also to distribution agreements, provided that these can be construed as accessory clauses to the sale contract. Similar was the case of the Arbitral Tribunal Hamburg (21 June 1996).

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[39] The same views concerning this question were expressed in the decision of District Appeal Court of Amsterdam (16 July 1992) concerning exclusive distribution contract for the resale of shower cabinets, decision of the United States District Court in the case Viva Vino Import Corporation v. Farnese Vini (29 August 2000), decision of the Metropolitan Court of Budapest regarding the exclusive distribution of Swiss instruments in Hungary (19 March 1996), decision of the Appellate Court of Düsseldorf relating to an exclusive distribution of German engines for lawn mowers in Italy (11 July 1996), etc., CISG online.

[40] P. Schlechtriem, 27.

[41] See for example F. Visher, L. Huber, D. Oser, *Internationales Vertragsrecht*, Bern 2000^2, § 356.

[42] P. Schlechtriem, 28.

[43] Imperial Bathroom Company v. Sanitari Possi S.p.A., source: CISG online 895.

The similar view was expressed in the case of the Arbitral Tribunal Hamburg where the seller, a Hong Kong company, and the buyer, a German company, had concluded a general agreement for the exclusive delivery and distribution of Chinese goods.[44] Under this agreement, the seller was responsible for the business relations with Chinese producers while the buyer was responsible for the distribution of the goods in Europe. On this basis, the parties concluded separate sale contracts. Due to financial difficulties, a Chinese producer could not deliver the ordered goods to the seller, who consequently could not perform its contractual obligation to the buyer. The seller demanded payment of the sum due resulting from previously delivered goods. The buyer set off against the claim a damage claim for lost profit and refused to pay. The arbitral tribunal in this case applied the CISG as the relevant German law under Article 1.1.b. CISG and upheld the seller's demand for payment.[45]

In the light of the mentioned problems, one can note that the CISG is applicable to the individual sales contracts concluded between the supplier and the distributor on the basis of the framework distribution contract if the general conditions for the application of the CISG are met. On the other hand, regarding the applicability of the CISG to the *framework* distribution contract, certain reserve can be expressed. The CISG is created for the needs of international sale. It means that: a. it does not contain the rules adequate for the rights and obligations of the parties arising strictly from the distributorship (e.g. the distributor's obligation to promote the goods and the seller's brand name or the obligation of the supplier to provide advertising and merchandising); b. regarding the rights and obligations of the supplier and distributor arising from sale, the CISG rules could be inadequate in particular case since they do not take into consideration the specific characteristics of the distribution relation, like for instance the *intuitu personae* nature and the economic objectives to be achieved. On the other hand, the CISG rules which are of a "more general nature" like the one related to interpretation of the contract usages, formation of the contract, etc. could perfectly fit the distribution contract.

In sum, one may conclude that problems of applicability of the CISG to the international distribution contract are to be solved on the basis of the facts of each particular transaction and not under a general rule specifying *a priori* whether it is possible to apply the CISG or not. In case the dispute arises from the rights and obligations of *sale*, the judge/arbitrator may apply CISG, taking into consideration all relevant circum-

[44] 21.06.1996, CISG online

[45] The same view as about the applicability of the CISG to distribution agreement was expressed in the decision of the US District Court (17 May 1999) in case *Medical Marketing International* v. *Internazionale Medico Scientifica*, note P. Schlechtriem, 28, as well as in the decision of the OLG Koblenz (17 September 1993), CISG online 2 U 1230/91.

stances of the case. Contrary to that, if the dispute is related strictly to the *distributorship*, the application of the CISG could be inappropriate. Thus, in order to avoid uncertain situations, the parties should, by choice of law clause, precisely solve the question of applicable law to the framework contract as well as to the individual sale contracts.

3. APPLICABILITY OF THE CISG TO INTERNATIONAL BARTER

With regard to the applicability of the CISG to barter contract, doctrine and case law express controversial views. According to some highly respected opinions, barter contract is excluded from the CISG, as the CISG requires sales contracts to be an exchange of goods against money.[46] That view was also expressed in the Award of the Arbitration of Russian Federation regarding barter contract concluded between the party from Russia and the party from Lichtenstein, where the Tribunal found that "where there was a barter contract, which was governed by Russian substantive law in accordance with the parties' agreement, and where such contract did not involve any monetary payments between the parties, the CISG was inapplicable".[47] On the other hand, there are many opinions in favour of applicability of the CISG to barter contracts, starting from the point that the term "price" as used in the relevant CISG provisions is not restricted to money, so that both parties can be treated as sellers in regard to goods they deliver and as buyers to the goods they receive.[48] The application of the CISG to a barter contract could be found for instance in another Award of the Arbitration of Russian Federation where, concerning a barter transaction concluded between the party from Russia and the party form Cyprus, the Tribunal found the CISG applicable to the relation of the parties.[49]

In the context of applicability of the CISG to international barter contract, one may conclude that the CISG does not state any restriction as to the price. In other words, the term price as used in relevant articles of the CISG is not restricted to money[50] and in that respect one can note,

[46] See P. Schlechtriem, 28. expressly stating: "*Barter contracts are not covered by the CISG*".

[47] Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, 09.03.2004, 91/2003, CISG online 1184.

[48] I. Schwenzer, P. Hachem, 33; B. Audit, 137; V. Heuzé, 76. With reserve K. H. Neumayer, C. Ming, 38; J. O. Honnold, 53.

[49] Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry,17 June 2004, 186/2003, CISG online 1240.

[50] One should also take into consideration that most of the domestic laws equate barter contracts with sales contracts.

taking into consideration interpretation of the CISG in terms of Article 7.1, that barter contracts should not be excluded from the scope of the CISG subject to contrary agreement by the parties.[51] Nevertheless, it is difficult to predict the view of the courts in each particular case as it can be concluded from the completely opposite approaches in two indicated Awards relating to very similar cases. Therefore, if the parties wish their barter contract to be governed by the CISG, they should expressly provide for the application of the CISG.[52]

4. APPLICABILITY OF THE CISG TO INTERNATIONAL FINANCIAL LEASING

Application of the CISG to financial leasing transaction is doubtful. The main reason is the nature of financial leasing – the financing part of the leasing contract and its regulation of the possession and use of the equipment by the lessee regularly are of greater importance than the sale part of the transaction. In terms of Article 3.2, the CISG does not apply if the preponderant part of the obligations relates to financing and use of the goods available to the lessee. On the other hand, the rules of the CISG in most cases would be inappropriate for the rights and obligations of the parties with respect to the financial part of leasing contract.[53] The second reason lays in the fact that specific rules for financial leasing have been developed on international level, as for instance the 1988 UNIDROIT Convention on International Financial Leasing (Ottawa).[54]

However, one should note that financial leasing transaction includes three parties – the lessor, the lessee and the supplier, and two contracts – the supply contract and the leasing contract. The lessor enters into an agreement with the supplier under which the lessor acquires the equipment on terms approved by the lessee so far as they concern its interests (the supply contract). On the other hand, the lessor enters into an agreement with the lessee, granting to the lessee the right to use the equipment in return for the payment of rentals (the leasing contract).[55] In the frame

[51] J. O. Honnold, 53.

[52] See I. Schwenzer, P. Hachem, 33.

[53] See P. Schlechtriem, 27; I. Schwenzer, P. Hachem, 33, stating "*Operating and financial leasing contracts will save for exceptional circumstances in a particular case regularly be excluded from the CISG...*". But see V. Heuzé, 75.

[54] There are also more and more domestic rules regulating financial leasing. For instance, in Serbia, the Law on financial leasing is adopted on 2003. See J. Perović, *Ko mentar Zakona o finansijskom lizingu,* Beograd 2003.

[55] See Article 1 of the 1988 UNIDROIT Convention on International Financial Leasing.

of this transaction, the supply contract between the lessor and the supplier may be governed by the CISG since it is basically a contract of sale.[56] With regard to the leasing contract, two general rules constitute the main distinction between leasing and sale: 1. the rentals payable under the leasing contract are calculated so as to take into account in particular the amortisation of the whole or a substantial part of the cost of the equipment and 2. when the leasing contract comes to an end the lessee, unless exercising a right to buy the equipment or to hold the equipment on lease for a further period, shall return the equipment to the lessor (the result of the leasing contract is not the final acquisition of the equipment by the lessee unless otherwise agreed by the parties).[57] In the light of these and other specific characteristics of a leasing contract,[58] one should conclude that this type of contract generally does not fall into the scope of the CISG. Finally, one may note that, although there is no contract between the lessee and the supplier, the lessee in certain cases may be entitled to claim directly the supplier on the basis of the general rule that duties of the supplier under the supply contract shall also be owed to the lessee as if it were a party to that contract and as if the equipment were to be supplied directly to the lessee.[59] In that case, the problem of the applicability of the CISG may arise as well. Therefore, probably the safest solution would be to expressly stipulate the applicable law both in the leasing contract concluded between the lessor and the lessee and in the supply contract concluded between the lessor and the supplier where the lessee approves the terms so far as they concern its interests.

5. GOODS

The CISG applies to contracts of "sale of goods". Although the Convention does not define "goods",[60] it is undisputed that under the CISG "goods" are basically moveable, tangible objects.[61] The commentators of the CISG underline that the interpretation of the notion of goods has to be made autonomously and in the light of the CISG rules on non-

[56] See I. Schwenzer, P. Hachem, 33.

[57] See Articles 1.2.c and 9.2 of the 1988 UNIDROIT Convention on International Financial Leasing.

[58] See J. Perović, (2003), 20 27.

[59] See Article 10 of the 1988 UNIDROIT Convention on International Financial Leasing.

[60] Whilst the English text of both ULIS and the CISG uses the term "goods", the French term in the CISG "*marchandises*" differs from the relevant term used in ULIS "*objets mobiliers*".

[61] J. O. Honnold, 53; V. Heuzé, 75; K. H. Neumayer, C. Ming, 38; P. Schlechtriem, 28.

conformity[62] in order to understand this notion as widely as possible so as to cover all objects which form the subject-matter of commercial sales contracts,[63] with exception of items excluded by Article 2 CISG.[64]

The goods must be moveable at the time of delivery. Any possible doubt in respect of land is excluded[65] by many of the CISG provisions that are inapplicable to transactions with land.[66] Nevertheless, with regard to immovables in general, it is sufficient for them to become moveable as a result of the sale.[67] Although goods must be moveable, it is not necessary that goods are corporal. For instance, the classification of computer software had led to controversy.[68] It is suggested in that regard that if software is permanently transferred to the other party in all respects except for the copyright and restriction to its use by third parties and becoming part of the other party's property, it can be considered as "goods" in terms of Article 1 CISG. Contrary to that, mere agreements on temporary use against payment of royalties do not fall into the scope of the CISG.[69] In the context of software, LG München for instance expressed the view that the CISG is applicable to a standard software.[70] The sale of "know-how" that is not incorporated in the physical object,[71] the sale of a complete business undertaking[72] and the contract for scientific research[73] are excluded from the scope of the CISG.

6. CONCLUSION

The analysis of the rules on the application *ratione materiae* of the CISG brings to the conclusion that divergences in their interpretation still

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62 I. Schwenzer, P. Hachem, 34.

63 P. Schlechtriem, 28.

64 Even the items which are *extre commercium* remain "goods" in terms of Article 1 CISG. See I. Schwenzer, P. Hachem, 34.

65 J. O.Honnold, 53.

66 For example quality and packing (Article 35), shipment and damage during transit (Articles 67 69) delivery by installments (Article 73), etc.

67 See I. Schwenzer, P. Hachem, 35.

68 J. O. Honnold, 53.

69 I. Schwenzer, P. Hachem, 35.

70 *LG München*, 08.02.1995, CISG online 203. See also *OLG Koblenz*, 17.09.1993, CISG online 91.

71 I. Schwenzer, P. Hachem, 35; F. Ferrari, 149. But see G. de Nova, "L'ambito di applicazione "ratione materiae" della Convenzione di Vienna", *Rivista trimestrale di dir itto e procedura civile*, 1990, 752.

72 B. Piltz, *Internationales Kaufrecht. Das UN Kaufrecht (Wiener Übereinkommen von 1980) in praxisorientierter Darstellung*, C.H.Beck, München 1993, 46

73 See for instance *OLG Köln,* 26.08.1994, CISG online 132. Commented in C.Witz, 32 33.

exist, which may cause problems and uncertainties in international commerce. With regard to contracts for goods to be manufactured, in cases where both parties supply materials, the courts in certain cases apply domestic law criteria in determining the distinction between sales and processing. On the other hand, the prevailing economic value test itself raises certain dilemmas, such as, for instance, how big a proportion of the value of all the materials is "substantial". The mixed contracts cause difficulties in determining whether the respective transaction constitutes one single contract or two separate agreements; where there is one single contract the further problem lays is the interpretation of the term "preponderant part". Concerning distribution contracts, the courts take different approaches to the applicability of the CISG to the framework distribution contract in cases where the borderline between the framework contract and the sales concluded on the basis of the framework contract is flexible and uncertain. Controversial views were expressed with respect to barter transactions as well: while some authors find barter contract excluded from the CISG, the majority seems to favour the applicability of the CISG to this type of contract. With regard to financial leasing, one should note that although the leasing contract does not fall into the scope of the CISG, the supply contract may be governed by the CISG, in which case the unified financial leasing transaction would be submitted to different legal regimes. Finally, the interpretation of notion of "goods" under the CISG had led to controversy with respect to certain types of items.

In the context of these problems, one could suggest that the contracting parties should be aware that, despite the efforts to achieve the uniform and autonomous interpretation of the CISG, the courts still may express discrepancies in interpretation of the rules on the application of the CISG. Therefore, the parties should be advised to solve the question of the Convention's applicability in their contract in order to achieve certainty of law, one of the most important requests for international commerce.