

SELECTED PROBLEMS CONCERNING THE CISG'S SCOPE OF APPLICATION

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I. INTRODUCTION

The CISG's scope of application is defined in Articles 4 and 5. Like most other Conventions that aim to harmonize particular areas of law, the CISG is not a comprehensive code regulating all matters falling within its sphere of application. Certain matters were considered to be too controversial for inclusion in the CISG since the national laws differed too much to harmonize the various approaches.¹ To ensure maximum support for the Convention, the drafters decided to leave these issues outside the CISG's scope of application. They opted for a widely acceptable Convention instead of a complete but controversial text. In light of the broad description of the matters covered by the CISG and the non-exhaustive list of issues excluded from the CISG's scope of application, the interpretation of the various notions and concepts used in Articles 4 and 5 have an important bearing on the unifying effect of the CISG. A narrow interpretation of the concepts "formation of the contract" and "rights and obligations of the seller and the buyer" could limit the CISG's scope of application considerably.² Important issues such as the burden of proof might then not be covered by the CISG. As a consequence, they would in general³ be governed by the non-harmonized provisions of the national law that is applicable by virtue of the conflict of laws rules.⁴ The following article analyzes the case law as reported in the Digest in respect to some of the major issues discussed within the framework of Article 4.

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1. See 1978 UNCITRAL Y.B. 65f, U.N. Sales No. E.80.V.8.

2. The same applies if a broad meaning is given to the notion of "validity." Cf. JOHN A. SPANOGLE, JR. & PETER WINSHIP, INTERNATIONAL SALES LAW: A PROBLEM ORIENTED COURSEBOOK 83, 130 *et seq.* (2000).

3. Unless there is a different harmonizing Convention applicable such as the 1988 UNIDROIT Convention on International Factoring as there was in a French case: *Société française de Factoring international Factor France v. Roger Caiato*, CLOUT Case No. 202 [Cour d'appel de Grenoble (Appellate Court), France, 13 Sept. 1995].

4. See CLOUT Case No. 97 [Handelsgericht Zürich (Commercial Court), Switzerland, 9 Sept. 1993].

II. GENERAL REMARKS CONCERNING THE CASE LAW

1. *Lack of In-Depth Analysis*

A look at the Digest reveals that there is an abundant number of cases where reference is made to Article 4. Most of these decisions, however, mention Article 4 only in passing. An in-depth analysis of the provision and the notions or concepts used is generally lacking. It is widely accepted that, in accordance with Article 7(1) CISG, the notions should be interpreted autonomously.⁵ However, only in very few cases have the courts actually tried to give such an autonomous interpretation of any of the three central notions of Article 4 “formation of the contract,” “rights and obligations of the seller and buyer” or “validity.” One exception with reference to the notion of “validity” is the U.S. District Court for the Southern District of New York’s decision in *Geneva Pharmaceuticals Tech. v. Barr Lab.*⁶ It held that by validity the “CISG refers to any issue by which the domestic law would render the contract void, voidable, or enforceable.” In light of this definition the court considered that the issue of the need for consideration is governed by the applicable national law. The decision is an example of the proposition that even an autonomous interpretation of the notions used in Article 4 may not suffice to guaranty a uniform application of the CISG. If the issue of qualification of certain legal concepts is left to the national law it will, in the end, be the national law which determines the scope of application of the CISG.⁷ Consequently the qualification of national legal institutes should also be governed by the principles set out in Article 7(1) CISG.

2. *Lack of Distinction Between Article 4 and the Second Alternative of Article 7(2)*

Another problem in analysing the case law is that where courts do resort to national law, they rarely explain clearly their reason for doing so. National law may be applicable by virtue of Article 4, where the matter is outside the scope of the CISG, or by virtue of the second alternative of Article 7(2), in

5. Franco Ferrari, in *THE DRAFT UNCITRAL DIGEST AND BEYOND: CASES, ANALYSIS AND UNRESOLVED ISSUES IN THE U.N. SALES CONVENTION 100* (Franco Ferrari et al. eds., 2004).

6. *Geneva Pharmaceutical Technology Corp. v. Barr Laboratories, Inc.*, 201 F. Supp. 2d. 236 (S.D.N.Y. 2002), available at <http://cisgw3.law.pace.edu/cases/020510ul.html>.

7. See SPANOGLE & WINSHIP, *supra* note 2, at 130 *et seq.* (expressing concerns).

regard to matters “governed by this Convention which are not expressly settled in it. . . .” Consequently, applying national law on the basis of Article 7(2) implies that the court considered the matter as such to be governed by the CISG but could find neither an express nor implied regulation for a particular question.⁸ While the final result, the application of a national law, may be the same under these two provisions, the underlying legal reasoning is different. In the case of Article 7(2) CISG, even if a question is not explicitly regulated, before resorting to the application of a national law, a court first has to search for an answer to the question on the basis of the general principles underlying the CISG according to the first alternative of Article 7(2).

In practice, the exclusion of a certain matter from the scope of the Convention is often deduced from the lack of an explicit regulation for a particular question. While there may be a strong indication for such a conclusion, it is not compelling. In relation to the lack of regulation, the CISG distinguishes between a matter falling outside the CISG in the sense of Article 4 and a question not regulated by the CISG and its underlying principles in the sense of Article 7.

III. ISSUES EXPRESSLY REGULATED BY THE CISG: FIRST SENTENCE OF ARTICLE 4

1. *Content and Limitations of the Wording*

The first sentence of Article 4 CISG defines broadly the two main areas of law governed by the CISG, the “formation of the contract” and the “rights and obligations of the seller and the buyer.” The wording of the first sentence of Article 4 has been criticised as being too narrow, since it does not mention matters clearly covered by the Convention such as the interpretation of statements regulated in Article 8 or the modification of contracts mentioned in Article 29.⁹ At the same time, matters which are considered in many jurisdictions to relate to the formation of contracts are not covered by the Convention.

8. BETTINA FRIGGE, EXTERNE LÜCKEN UND INTERNATIONALES PRIVATRECHT IM UN-KAUFRECHT 11 *et seq.* (1994); INGO JANERT, DIE AUFRECHNUNG IM INTERNATIONALEN VERTRAGSRECHT 53 *et seq.* (2002).

9. Ferrari, *supra* note 5, at 97.

2. "Formation of Contracts"

Courts and commentators agree widely that the notion "formation of contracts" only refers to the technical process of concluding a contract.¹⁰ The relevant provisions of the CISG only deal with offers and acceptances and the required consent by the parties. By contrast questions as to the validity of a contract are explicitly excluded by virtue of the second sentence of Article 4. In addition, the exclusion of other issues pertaining to the formation of contracts is often derived from the lack of provisions. From the abundant case law three topics connected with the "formation of contracts" will be examined more closely. These are the conclusion of a contract by an agent, the agreement on an arbitration clause, and the inclusion of standard terms.

a. Agency

Agency belongs to the matters generally considered to be excluded from the CISG's scope of application for the lack of provisions within the CISG.¹¹ While agency as a legal concept is definitively outside the scope of application of the CISG, certain issues pertaining to the law of agency under national laws may be covered by the CISG. This is well evidenced by a decision of the Austrian Supreme Court.¹² The case concerned the purchase of Spanish fruits by the subsidiary of an Austrian company. Since the Spanish seller could not obtain default insurance coverage for contracts concluded directly with the subsidiary, it insisted that orders should be made on the letterhead of the parent company. Furthermore, invoices were addressed to

10. See Oberster Gerichtshof (Supreme Court), Austria, 22 Oct. 2001, available at <http://www.cisg.at/CISGframee.htm>; Ferrari, *supra* note 5, art. 4, ¶ 3.

11. See Landgericht Berlin (Regional Court), Germany, 24 Mar. 1998, abstract available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=440&step=Abstract>; CLOUT Case No. 80 [Kammergericht Berlin (Appellate Court), Germany, 24 Jan. 1994]; CLOUT Case No. 251 [Handelsgericht Zürich (Commercial Court), Switzerland, 30 Nov. 1998]; CLOUT Case No. 334 [Obergericht Thurgau (Appellate Court), Switzerland, 19 Dec. 1995]; CLOUT Case No. 335 [Tribunale d'appello de Lugano (Appellate Court), Switzerland, 12 Feb. 1996], published in SCHWEIZERISCHE ZEITSCHRIFT FÜR INTERNATIONALES UND EUROPÄISCHES RECHT (SZIER) 135 (1996); CLOUT Case No. 189 [Oberster Gerichtshof (Supreme Court), Austria, 20 Mar. 1997]; but see CLOUT Case No. 333 [Handelsgericht Aargau (Commercial Court), Switzerland, 11 June 1999] (where the national agency provisions were considered to be applicable by virtue of Article 7(2) CISG).

12. Oberster Gerichtshof (Supreme Court), Austria, 22 Oct. 2001, available at <http://www.cisg.at/CISGframee.htm>; see also CLOUT Case No. 5 [Landgericht Hamburg (Regional Court), Germany, 26 Sept. 1990], published in PRAXIS DES INTERNATIONALEN PRIVAT UND VERFAHRENSRECHTS (IPRAX) 400-03 (1991), EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (EuZW) 188-92 (1991).

the parent company but often paid by the subsidiary which used the same premises. When the subsidiary went bankrupt, the Spanish seller claimed the outstanding amount from the parent company, alleging that it was its contract partner. The main issue determined by the Austrian courts was whether the orders made by the managing director of the subsidiary bound the parent company. The courts distinguished in this respect between the question of whether the managing director acted in the name of the parent company and the question of whether he had the necessary power of agent to do so. While the latter question was to be determined by the national law applicable by virtue of the conflicts of law rules, the former question is governed by the CISG. Whether a person acts in its own name or in the name of another person is a question of interpretation of its declaration. Consequently, it is governed by the CISG irrespective of the fact that in many countries the requirement of “acting in the name of a third party” is part of the rules on agency.¹³

The case shows that broad statements as to the exclusion of certain questions from the CISG's scope of application should be regarded with suspicion. They have a tendency to conceal that certain issues connected with the question of whether one party has acted as an agent for the other party are covered by the CISG.

b. Conclusion of an Arbitration Agreement

It is widely agreed that the CISG does not govern the question of jurisdiction of the courts.¹⁴ Forum selection clauses and arbitration clauses, however, often form part of a general contract. As a consequence, the often controversial question of whether the parties agreed upon such a procedural clause is closely related to the question of the conclusion of the contract in general.

In light of this connection it seems at first sight logical that in cases where the contract is governed by the CISG, the relevant provisions of the CISG also determine whether the arbitration or forum selection clause was validly agreed upon. This is the approach adopted in relation to an arbitration clause by the

13. That is for example the case in Germany. See Bürgerliches Gesetzbuch [BGB] [Civil Code] § 164; Münchener Kommentar Vor § 164 BGB, ¶ 1 (2001).

14. See Dörken-Gutta Pol., Ewald Dörken AG v. Gutta-Werke AG, Schweizerisches Bundesgericht (Federal Supreme Court), Switzerland, 11 July 2000 (CISG-online No. 627), available at <http://cisgw3.law.pace.edu/cases/000711s1.html>; CLOUT Case No. 196 [Handelsgericht Zürich (Commercial Court), Switzerland, 26 Apr. 1995]; Ferrari, *supra* note 5, at art. 4, ¶ 13.

U.S. District Court for the Southern District of New York in *Filanto v. Chilewich*.¹⁵ To fulfill its obligation under a contract with a Russian party, Chilewich, an American import-export company, had entered into a contract for the purchase of boots with Filanto, an Italian footwear producer. The purchase contract provided that it would be governed by “the conditions which are enumerated in the standard contract in effect with the Soviet buyers.” This standard contract provided for arbitration in Russia. Five months after having received the offer for the contract in question, Filanto declared that it considered itself only bound by certain clauses of the standard contract. In its latest letter submitted after it had initiated proceedings in New York, however, Filanto relied on provisions of the standard contract which it earlier had tried to exclude and stated that its relationship with Chilewich was governed by the provisions of the standard contract. Chilewich in turn asked the court to stay the action and refer the parties to arbitration in Russia, in accordance with the terms of the standard contract. In determining whether the parties actually agreed on arbitration the courts held that the question is not governed by the U.C.C. but by the CISG. In relying on Article 18(1) and Article 8(3) CISG, the court held that Filanto was under an obligation to reject Chilewich’s offer, which included the arbitration clause, within a reasonable time if it did not want to be bound by it. Consequently, it considered Filanto to be bound by the arbitration agreement, since it took Filanto five months to reply to the offer and accept it with modifications which would have excluded the arbitration clause.

The problem with such an approach is that arbitration clauses, even when incorporated into the main contract, are considered to be separate contracts. This doctrine of separability can be found for example in Article 17 of the Model Law and comparable provisions in other national arbitration laws.¹⁶ One of the consequences of this separability is that the arbitration agreement

15. *Filanto, S.p.A. v. Chilewich International Corp.*, 789 F. Supp. 1229 (S.D.N.Y. 1992), CLOUT Case No. 23 (CISG-online No. 45); for the same approach in relation to a forum selection clause see *Chateau des Charmes Wines Ltd. v. Sabaté USA, Inc.*, 328 F.3d 528 (9th Cir. 2003); in favour of such an approach see also WOLFGANG DRASCH, EINBEZIEHUNGS- UND INHALTSKONTROLLE VORFORMULIRTER GESCHÄFTSBEDINGUNGEN IM ANWENDUNGSBEREICH DES UN-KAUFRECHTS 49 (1999); BURGHARD PILTZ, INTERNATIONALES KAUFRECHT § 2, ¶ 119 (1993).

16. For an extensive discussion of the doctrine see *Sojuznefteexport (SNE) v. Joc Oil Ltd.*, Court of Appeal of Bermuda, 7 July 1989, ICCA YEARBOOK OF COMMERCIAL ARBITRATION XV (1990) 384, 407 *et seq.* (Albert Jan van der Berg ed.); *cf.* Adam Samuel, *Separability of arbitration clauses—some awkward questions about the law on contracts, conflict of laws and the administration of justice*, 9 ADRLJ 36 (2000); COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION ¶¶ 6-8 *et seq.* (Julian D.M. Lew, Loukas A. Mistelis & Stefan M. Kröll, 2003) [hereinafter Lew].

may be submitted to a different law than the main contract. Even in cases where the main contract contained an explicit choice of law clause and the parties did not determine a different law to apply to the arbitration clause, courts have not always extended the effect of the choice of law for the main contract to the arbitration clause.¹⁷ Furthermore, in the absence of a choice of law clause in the main contract, there is a strong view that the key factor for determining the law applicable to the arbitration agreement is the place of arbitration.¹⁸ This will, however, often result in different laws being applicable to the main contract and the arbitration clause. Consequently, the fact that the main contract is governed by the CISG does not automatically lead to the conclusion that the arbitration clause contained in this contract is also submitted to the CISG.

Furthermore, the question arises whether the CISG is at all intended to regulate the conclusion of arbitration agreements. According to Articles 1 through 3 CISG, its sphere of application is limited to contracts of sale. Consequently, no one would apply the CISG to an arbitration agreement concluded as a separate agreement after a dispute has arisen or after the main contract has been concluded. That the arbitration agreement is incorporated into a contract in the form of an arbitration clause does not change its nature as a separate contract, as is evidenced by the doctrine of separability.

As a result, the question of whether the parties agreed upon an arbitration clause, while being potentially within the CISG's scope of application, is outside its sphere of application.¹⁹ At first sight it may appear odd that different clauses of the same contract can be governed by different laws.²⁰ However, this is nothing but a necessary consequence of the doctrine of separability. In addition, it is widely accepted that the arbitration agreement must be in writing irrespective of whether a form requirement exists for the

17. *E.g.*, *XL Insurance Ltd v. Owens Corning*, (2000) 2 Lloyd's Rep. 500 (Q.B.) (U.K.), *published in ICCA YEARBOOK OF COMMERCIAL ARBITRATION XXVI*(2001) 869, 878 *et seq.* (Albert Jan van der Berg ed.).

18. *Lew*, *supra* note 16, ¶¶ 6-23 *et seq.*; *Dow Chemical France v. Isover Saint Gobain*, Interim Award in ICC Case No. 4131 of 1982, *published in ICCA YEARBOOK OF COMMERCIAL ARBITRATION IX* (1984) 131, 133 *et seq.*; ICC Case No. 5730 of 1988, 117 *CLUNET* 1029, 1034 (1990); KLAUS PETER BERGER, *INTERNATIONAL ECONOMIC ARBITRATION* 158 (1993); ALBERT JAN VAN DEN BERG, *NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION* 293 (1980).

19. For the same conclusion see *Landgericht Duisburg* (Regional Court), Germany, 17 April 1996 (CISG-online No. 186), *published in Recht der Internationalen Wirtschaft (RIW)* 774-75 (1996); Ulrich Magnus, *Das UN Kaufrecht: Fragen und Probleme seiner praktischen Bewährung*, 5 *ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT (ZEUP)* 823, 838 (1997).

20. *See DRASCH*, *supra* note 15, at 49. *PILTZ*, *supra* note 15, § 2, ¶ 119.

main contract in which a clause is included.²¹ Consequently, at least for the form requirement, different clauses of the same contract will be governed by different regimes.

c. Incorporation of Standard Terms into a Contract

The question of whether standard terms are included into a contract is regulated in many national laws by specific provisions that deviate from the general rules on contract formation.²² Though the CISG does not contain such specific provisions, it has been held by several courts that the question of incorporation is within the CISG's scope of application.²³ It is governed by the general rules on contract formation. To determine whether standard terms are incorporated into a contract it is therefore necessary to interpret the declarations of the parties (Article 8). According to a decision of the German Supreme Court, the inclusion of standard terms generally requires that the other party has the opportunity to take cognisance of their content. This requires that a party not only refers to its standard terms in the contract itself, but also makes them available to the other party. The German court found that—contrary to the position under domestic law—the autonomous conception for the inclusion of standard terms under the CISG requires that the party who wants to rely on its standard terms must send them to the other party.²⁴

21. For this and the criticism of the form requirement see Lew, *supra* note 16, ¶¶ 7-7 *et seq.*

22. *E.g.*, Bürgerliches Gesetzbuch [BGB] [Civil Code] § 305 (2); Law No. 95-96 of 1 Feb. 1995 (Fr.).

23. Oberster Gerichtshof (Supreme Court), Austria, 6 Feb. 1996 (CISG-online No. 224); Oberster Gerichtshof (Supreme Court), Austria, 17 Dec. 2003 (CISG-online No. 828) INTERNATIONALES HANDELSRECHT (IHR) 168 (2004); CLOUT Case No. 445 [Bundesgerichtshof (Supreme Court), Germany, 31 Oct. 2001], INTERNATIONALES HANDELSRECHT (IHR) 14-15 (2002); Bundesgerichtshof (Supreme Court of Germany), Germany, 9 Jan. 2002, *available at* <http://cisgw3.law.pace.edu/cases/020109g1.html>, INTERNATIONALES HANDELSRECHT (IHR) 17 (2002); Oberlandesgericht Düsseldorf (Higher Regional Court), Germany, 21 Apr. 2004, *available at* <http://cisgw3.law.pace.edu/cases/040421g3.html>, INTERNATIONALES HANDELSRECHT 24 (2005); Peter Schlechtriem, in COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) art. 14, ¶ 16 (Peter Schlechtriem ed., Geoffrey Thomas trans., 2d ed. 1998); Ulrich Magnus, in STAUDINGER, WIENER UN-KAUFRECHT (CISG) art. 14, ¶ 40 (1999).

24. *See also* CLOUT Case No. 176 [Oberster Gerichtshof (Supreme Court), Austria, 6 Feb. 1996], *published in* RECHT DER WIRTSCHAFT (RdW) 203 (1996); in favour of such a solution see Martin Karollus, LM H. 3/2002 CISG Nr. 9; critical Mertin Schmidt-Kessel, *Einbeziehung von Allgemeinen Geschäftsbedingungen unter UN-Kaufrecht*, 47 Neue Juristische Wochenschrift 3444 (2002); but see on the basis of well known industry standard terms, S.A. Gantry v. Research Consulting Marketing, Tribunal Commercial de Nivelles (District Court), Belgium, 19 Sept. 1995, *available at* <http://cisgw3.law.pace.edu/cases/950919b1.html>. Schlechtriem, *supra* note 23, art. 14, ¶ 16; Magnus, *supra* note 23, art.

That the inclusion of standard terms falls within the CISG's scope of application, despite the lack of specific rules, can be justified by the fact that standard terms generally deal with questions covered by the CISG, namely, the rights and the duties of the parties. In this respect, they differ from the arbitration clauses and forum selection clauses treated above, which are procedural agreements.

3. *Rights and Obligations of the Seller and the Buyer*

The second matter expressly mentioned in Article 4 as falling within the CISG's scope of application is the "rights and obligations of the seller and buyer." The emphasis put on buyer and seller is a clear indication that rights of third parties were not meant to be covered. So far, no universally accepted definition of what is meant by the concept "rights and obligations" has been developed in the case law. Quite the contrary, it seems doubtful whether a workable definition is feasible at all. The Digest lists a number of issues that are generally considered to fall within the scope of what is meant by "rights and obligations."²⁵ The following sections focus on two issues of considerable practical importance where the law seems to be less clear, i.e., burden of proof and set-off.

a. *Burden of Proof*

The burden of proof is not explicitly mentioned as one of the matters covered by the CISG. According to the UNCITRAL Digest, burden of proof is one of the areas where conflicting case law exists. There are two cases reported where the lack of explicit regulation resulted in the application of domestic law to the question of burden of proof.²⁶ The reasoning at least in one of these cases reveals that this finding was not based on the assumption that the issue of burden of proof was considered to be outside the scope of application of the CISG. The Bezirksgericht der Saane based its application of the Swiss burden of proof rules on the second alternative of Article 7(2), which shows that it considered the matter to be within the CISG's general

14 ¶ 40.

25. See Ferrari, *supra* note 5, art. 4, ¶ 3 *et seq.*

26. CLOUT Case No. 261 [Bezirksgericht der Saane (District Court), Switzerland, 20 Feb. 1997]; CLOUT Case No. 103 [Court of Arbitration of the International Chamber of Commerce, Case No. 6653, 1 Jan. 1993]; for further cases see Tobias Malte Müller, *Die Beweislastverteilung im Rahmen des Art. 40 CISG*, 1 INTERNATIONALES HANDELSRECHT (IHR) 16-17 n.8 (2005).

scope of application.²⁷ Whether the second decision is based on the same reasoning, or actually considers the matter to already be outside the scope of application cannot be determined with certainty from the published reasons of the award.

The prevailing and correct view is that the burden of proof falls within the CISG's scope of application and the relevant rules can be deduced from the general principles upon which the CISG is based, pursuant to the first alternative of Article 7(2).²⁸ The reasoning underlying the prevailing case law is well summarized by the Tribunale de Vigevano which held:

To support the argument that the burden of proof issue is not excluded from the reach of the Convention, so that the issue of the burden of proof is not beyond the scope of the regime of international sales law introduced by the Convention, these authorities refer (correctly, in the view of this Tribunal) to Article 79(1) of the Convention, which expressly refers to the burden of proof concerning exemption from damages for breach. According to this provision, "A party is not liable for a failure to perform any of his obligations *if he proves that* the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences." Thus, the issue of the burden of proof cannot be deemed beyond the ambit of the Convention, in contrast to e.g., the issue of set-off. . . ."²⁹

Article 79 shows clearly that, at least with regards to certain questions, the burden of proof is regulated expressly in the CISG. Consequently, the burden of proof cannot be considered to be a matter outside the CISG's scope of application. The burden of proof is not only a procedural question, but is inextricably linked with the rights and obligations of the parties. The legislative history of the CISG reveals that—with the exception of Article 79—special provisions governing the burden of proof were considered to be

27. In addition, the Swiss Supreme Court has confirmed in a recent decision that the burden of proof is a matter not only within the CISG's scope of application but also regulated by the general principles of the CISG. See Bundesgericht (Supreme Court), Switzerland, 7 July 2004 (CISG-online No. 848), INTERNATIONALES HANDELSRECHT 252 (2004).

28. Bundesgerichtshof (Supreme Court), Germany, 9 Jan. 2002, available at <http://cisgw3.law.pace.edu/cases/020109g1.html>, INTERNATIONALES HANDELSRECHT (IHR) 17 (2002); Rheinland Versicherungen v. S.r.l. Atlarex and Allianz Subalpina S.p.A., CLOUT Case No. 378 [Tribunale de Vigevano (District Court), Italy, 12 July 2000]; CLOUT Case No. 380 [Tribunale di Pavia (District Court), Italy, 29 Dec. 1999]; Bundesgericht (Supreme Court), Switzerland, 7 July 2004 (CISG-online No. 848), INTERNATIONALES HANDELSRECHT (IHR) 252 (2004); CLOUT Case No. 97 [Handelsgericht Zürich (Commercial Court), Switzerland, 9 Sept. 1993]; CLOUT Case No. 196 [Handelsgericht Zürich (Commercial Court), Switzerland, 26 Apr. 1995]; the question was left open by CLOUT Case No. 253 [Tribunale d'appello Tessin (Court of Appeal), Italy, 15 Jan. 1998].

29. CLOUT Case No. 378 [Tribunale de Vigevano, Italy, 12 July 2000] (¶ 23 of decision), translation available at <http://cisgw3.law.pace.edu/cases/000712i3.html> (emphasis added).

superfluous since they would only repeat the general principles to be derived from the other provisions.³⁰

It goes without saying that only the burden of proof concerning matters falling into the CISG's scope of application is regulated. For example, the burden of who has to prove the factual requirements of an acknowledgment—which as such is outside the CISG's scope of application—is not covered.³¹

The allocation of the burden of proof is one of the best examples of how courts have, after determining that a matter falls within the CISG's scope of application, derived the necessary rules from the general principles underlying the Convention in accordance with the first alternative of Article 7(2). Courts have inferred from the provisions of the CISG the following basic principle: the party that wants to rely on a provision must prove the existence of the factual prerequisites of the provision, or, in the words of the Tribunal de Vigevano in *Altarex v. Rheinland Versicherung*, “*ei incumbit probatio qui dicit, non qui negat.*”³² As a consequence, parties who want to rely on an exception from a general rule must prove the facts that would entitle them to claim this exception.

The general principles underlying the CISG are also relevant in determining the exceptions from the above-mentioned rule.³³ A good example is provided by a recent decision of the German Supreme Court rendered after the publication of the Digest in the context of Article 40 CISG. The dispute arose out of a sale of ground paprika from Spain to Germany. It was later discovered that, contrary to the express stipulations in the contract, the paprika had been submitted to a preservative radiation treatment. When the Spanish seller claimed for the contract price, the German buyer declared as a set-off its damage claims for non-conforming goods. The issue was whether the German defendant had lost its rights due to a non-timely notice of non-conformity or whether he could rely on Article 40. As the seller denied any knowledge of the radiation treatment, the question arose as to who bears the burden of proof under Article 40. The German Supreme Court held that in the

30. See Müller, *supra* note 26, at 16-17.

31. Bundesgerichtshof (Supreme Court), Germany, 9 Jan. 2002, available at <http://cisgw3.law.pace.edu/cases/020109g1.html>, INTERNATIONALES HANDELSRECHT (IHR) 17 (2002).

32. *Altarex v. Rheinland Versicherungen*, CLOUT Case No. 378 [Tribunal di Vigevano (District Court), Italy, 12 July 2000]; see also CLOUT Case No. 107 [Oberlandesgericht Innsbruck (Higher Regional Court), Austria, 1 July 1994]; Bundesgerichtshof (Supreme Court), Germany, 9 Jan. 2002, available at <http://cisgw3.law.pace.edu/cases/020109g1.html>, INTERNATIONALES HANDELSRECHT (IHR) 17 (2002).

33. Franco Ferrari, in *KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT*, art. 4, ¶ 51 (Peter Schlechtriem & Ingeborg Schwenzer eds., 4th ed. 2004).

context of Article 40, the burden is generally on the buyer to show that the seller knew or ought to have known that the goods were defective. According to the Court, the buyer's burden could be alleviated by factors such as the seller's proximity to the production process into which the buyer has no insight or an undue difficulty for the buyer to prove the factual requirements of Article 40. In justifying these exceptions the Court reasoned as follows:

The law allows for this aspect within the framework of Art. 40 CISG in that it does not always demand proof of the seller's knowledge of the facts on which the contractual breach is based, but rather deems it sufficient that the seller "could not have been unaware of" those facts; thus, Art. 40 CISG also covers cases of negligent ignorance. Under certain circumstances, the required proof can already be deduced from the type of defect itself so that, in the case of extreme deviations from the contractually stipulated condition, gross negligence is assumed if the breach of contract occurred in the seller's domain. According to the principles mentioned above, it may be necessary to limit the buyer's burden of proof in the case of a gross breach of contract and in view of the aspect of "proof-proximity" in order to avoid unreasonable difficulties in providing proof.³⁴

This case as well as other decisions rendered in connection with Article 40,³⁵ show that despite the lack of express regulation of certain questions, appropriate rules can be deduced from the principles underlying the CISG. Consequently, the mere absence of any express regulation does not ineluctably lead to the conclusion that a matter falls outside the CISG's scope of application.

4. *Set-off*

The question of set-off is another area where the Draft Digest reports conflicting decisions as to whether the issue falls within the scope of application of the CISG or is completely excluded from its scope.³⁶ There are three different situations in which a set-off may be declared. The first is where the claim to be set-off arises from a different contract that is governed

34. Bundesgerichtshof, Germany, 30 June 2004 (§ II(2)(b) of the decision), translation *available* at <http://cisgw3.law.pace.edu/cases/040630gl.html> (citations omitted).

35. *See in particular* Beijing Light Automobile Co. v. Connell Limited Partnership, Arbitration Institute of the Stockholm Chamber of Commerce, Sweden, 5 June 1998 (CISG-online No. 379); *cf.* Fallini Stefano & Co., S.N.C. v. Foodio BV, Arrondissementsrechtbank Roermond, Netherlands, 19 Dec. 1991 (CISG-online No. 29); Court of Arbitration of the International Chamber of Commerce, Case No. 9187, 1 June 1999 (CISG-online No. 705); CLOUT Case No. 341 [Ontario Superior Court of Justice, Canada, 31 Aug. 1999], INTERNATIONALES HANDELSRECHT (IHR) 46 (2001). All cases cited by the German Supreme Court.

36. *See* Ferrari, *supra* note 5, art. 4, ¶ 13 nn.36-37.

by a different law. In the second, the claims arise from different contracts, which however are both governed by the CISG. In the third constellation, both claims arise from the same contractual relationship, which is governed by the CISG.

The prevailing view in case law and literature is that the issue of set-off lies generally outside the CISG's scope of application.³⁷ Consequently, in all three situations described above, the admissibility and the requirements for a set-off are determined by national law. The majority of decisions do not give any specific reasons for the exclusion, but rather simply refer to previous decisions or to the literature.

The same applies for those German courts that have considered the issue of set-off to fall within the scope of CISG, at least in cases where the claim to be set-off against the main claim arose from the same transaction.³⁸ The Munich Higher Regional Court had to deal with such a situation in an action by an Italian seller against a German buyer for payment of the goods. The buyer declared a set-off with a claim for damages based on alleged defects of the goods. The Court came to the conclusion that the set-off is generally admissible since it involved two money-claims between the parties that arose out of a contract governed by the CISG. The court did not give any further

37. See Oberster Gerichtshof (Supreme Court), Austria, INTERNATIONALES HANDELSRECHT (IHR) 27 (2002); Rheinland Versicherungen v. S.r.l. Atlarex and Allianz Subalpina s.p.a, CLOUT Case No. 378 [Tribunal di Vigevano (District Court), Italy, 12 July 2000]; Bundesgericht (Supreme Court), Switzerland, 7 July 2004 (CISG-online No. 848), INTERNATIONALES HANDELSRECHT (JHR) 252 (2004); CLOUT Case No. 282 [Oberlandesgericht Koblenz (Higher Regional Court), Germany, 31 Jan. 1997], OLG REPORT KOBLENZ 37 (1997); Oberlandesgericht Düsseldorf (Higher Regional Court), Germany, 22 July 2004, available at <http://cisgw3.law.pace.edu/cases/040722g1.html>, INTERNATIONALES HANDELSRECHT (IHR) 29-30 (2005); for further examples see Ferrari, *supra* note 5, at 107 n.69; Ferrari, *supra* note 33, art. 4, ¶ 39; Peter Schlechtriem, *Commenting on OLG München, Urteil vom 11 March 1998*, 14 ENTSCHEIDUNGEN ZUM WIRTSCHAFTSRECHT 549-50 (1998).

38. CLOUT Case No. 360 [Amtsgericht Duisburg (Lower Court), Germany, 13 Apr. 2000], INTERNATIONALES HANDELSRECHT (IHR) 114 (2001); CLOUT Case No. 273 [Oberlandesgericht München (Higher Regional Court), Germany, 9 July 1997]; CLOUT Case No. 348 [Oberlandesgericht Hamburg (Higher Regional Court), Germany, 26 Nov. 1999], INTERNATIONALES HANDELSRECHT (IHR) 19, 22 (2001). See also a number of other decisions which just assume the admissibility of a set-off without any reference to a national law, for e.g. Landgericht Trier (Regional Court), Germany, 12 Oct. 1995 (CISG-online No. 160), published in NEUE JURISTISCHE WOCHENSCHRIFT-RECHTSPRECHUNG REPORT (NJW-RR) 546 (1996); CLOUT Case No. 166 [Schiedsgericht der Handelskammer Hamburg (Arbitral Tribunal of the Hamburg Chamber of Commerce), Germany, 21 Mar. 1996], published in NEUE JURISTISCHE WOCHENSCHRIFT (NJW-RR) 3219-220 (1996) (which just presumes that set-off is possible under the Convention); for further cases see Magnus, *supra* note 19, at 831 n.83; other courts have left the question open since they had to deal with cases where the claims arose out of different contracts not all covered by the CISG; see, e.g., Oberlandesgericht Karlsruhe (Higher Regional Court), Germany, 20 July 2004, available at <http://cisgw3.law.pace.edu/cases/040720g1.html>.

reasons why it considered the set-off to be admissible under the Convention, but merely stated: “A set-off is admissible, since there exist opposing money claims between the parties, which are both based on the contractual relationship governed by the CISG.”³⁹

While in the case of the Munich Higher Regional Court both claims were based on the same transaction, the Amtsgericht Duisburg appears to have gone even a step further. That case arose out of several contracts between a German and an Italian party for the delivery of pizza boxes. When the Italian seller brought an action for payment the buyer, situated in Germany, declared a set-off with claims arising out of an earlier contract. The court held that it “[r]ecognized that a set-off with mutual claims arising out of the same contract in the sense of the CISG is admissible,”⁴⁰ however, in the case before it no such situation existed, since the set-off was declared with a claim arising from a different contract. It then went on: “Where the CISG contains gaps that cannot be filled by an interpretation of the convention, that national law is relevant, which is applicable according to the conflict of laws rules of the country in whose courts the remedy is sought, Art. 7 para. 2 CISG.”⁴¹

The Duisburg court’s reference to Article 7(2) implies that it generally considered the issue of set-off to be covered by the CISG, but that the Convention did not contain provisions or principles addressing the specific situation. Moreover, the Amtsgericht Duisburg gives no further reasoning for its view, but simply cites Ulrich Magnus’ commentary in Staudinger. Magnus relies primarily on Article 84(2) CISG to justify including set-off of receivables arising from the same transaction governed by the CISG into the CISG’s scope of application. This provision explicitly provides that the buyer must account for all benefits which it derived from the delivered goods, which is another way of saying that any benefit may be set-off against the buyer’s claim for refund of the price paid.⁴² Another argument in support of this view

39. Translation from the German original: “Die Aufrechnung ist zulässig, da sich Geldansprüche der Vertragspartner gegenüberstehen, die jeweils aus dem der Konvention unterliegenden Vertragsverhältnis folgen.” Magnus, *supra* note 23, art. 4, ¶ 46; in the case the court, however, came to the conclusion that the declared set-off was without merits since the alleged damage claim did not exist.

40. Translation from the German original: “Anerkannt ist, dass eine Aufrechnung mit wechselseitigen Ansprüchen aus demselben Kaufvertrag i.S.d. CISG möglich ist.” Magnus, *supra* note 23, art. 4, ¶ 47.

41. Translation from the German original: “Enthält das CISG Lücken, die durch eine Auslegung des Übereinkommens nicht geschlossen werden können, kommt es auf das nationale Recht an, das nach dem internationalen Privatrecht des Staates Anwendung findet, vor dessen Gerichten Rechtsschutz begehrt wird, Art. 7 Abs. 2 CISG.” Magnus, *supra* note 23, art. 7, ¶ 58.

42. Magnus, *supra* note 23, art. 4, ¶ 47; see also JANERT, *supra* note 8, at 72 *et seq.*

can be drawn from the fact that Articles 58 and 81 both provide for concurrent performance of the mutual obligation. In addition, Magnus relies on aspects of practicality. Deriving the admissibility of a set-off directly from the CISG in cases where both claims are based on the same contractual relationship makes the sometimes cumbersome conflict of laws process obsolete in his view.

The arguments brought forward against this view are not convincing. In a recent decision, the Tribunale di Padova criticized this view as a threat to the uniform application of the CISG that finds no support in the drafting history.⁴³ It is true that the question of set-off as such was not mentioned as one of the issues to be covered by the CISG; however, the articles cited above provide for an effect equivalent to a set-off. They show that the drafters of the CISG wanted to avoid an unnecessary back and forth of payments, but preferred that reciprocal payment obligations should be settled in a single claim. Franco Ferrari submits that the provisions relied upon to justify the inclusion of set-off into the scope of application of the CISG do not provide any guidance as to such important questions as whether the set-off operates automatically or whether it must be declared.⁴⁴ While this observation is true, it also applies to various other issues which are considered to fall within the scope of the CISG but for which the CISG does not contain any specific regulation or general principle. This is exactly the situation which the second alternative of Article 7(2) is meant to cover. Consequently, such issues are governed by the national law applicable by virtue of the relevant conflict of laws provisions. To this extent, both views lead in practice largely to the same results, i.e. the application of a non-harmonized national law. They may differ in those cases where both claims arise from the same transaction and the applicable national law does not allow for a set-off, while under the CISG a set-off is possible.

43. SO.M.AGRIs.a.s. di Ardina Alessandro & C. v. Erzeugerorganisation Marchfeldgemüse GmbH & Co. KG, Tribunale di Padova (District Court), Italy, 25 Feb. 2004 (CISG-online No. 819), INTERNATIONALES HANDELSRECHT (IHR) 31 (2005).

44. Ferrari, *supra* note 33, art. 4, ¶ 39; *cf.* Schlechtriem, *supra* note 38, at 549-50; for a different view deducing answers to these questions from the general principles underlying the CISG see JANERT, *supra* note 8, at 81 *et seq.*

IV. ISSUES EXPRESSLY EXCLUDED FROM THE SPHERE OF THE CISG: THE SECOND SENTENCE OF ARTICLE 4

The second sentence of Article 4 lists issues which are expressly excluded from the CISG's scope of application. Even on its face, it is clear from the wording of the provision that the list is not intended to be exhaustive. The second sentence of Article 4 limits itself to defining the two most obvious examples, namely, the validity of the contract and the transfer of property. Furthermore, questions concerning the validity of contracts are only excluded "except as otherwise provided." Consequently, even where matters relate to the validity of a contract it is first necessary to see whether the CISG provides for the matter, either expressly or implicitly.

The most obvious example relates to questions of form. Article 11 CISG contains an express regulation of the matter, even though questions of form are generally considered as pertaining to the validity of a contract. As already mentioned above, at least one American court has tried to define the concept of "validity" as used in the Convention. While the court tried to give an autonomous interpretation to the concept, it still heavily relied on the national law, defining "validity" as: "[A]ny issue by which the 'domestic law would render the contract void, voidable, or unenforceable.'"⁴⁵

From the various matters discussed under the heading of validity this article will concentrate on whether and to what extent questions concerning the validity of standard terms and mistake fall within the CISG's scope of application.

1. *Validity of Standard Terms*

Questions as to the validity of a contract often arise in connection with standard terms. While the inclusion of standard terms is governed by the CISG, the question of whether the terms thus included are valid is generally considered to fall within the ambit of Article 4(a), and therefore to be governed by the applicable national law.⁴⁶

The Austrian Supreme Court (OGH), however, made clear that irrespective of the general rule in Article 4(a), the CISG may play a role in

45. *Geneva Pharmaceutical*, 201 F. Supp. 2d at 282-83.

46. See *Amtsgericht Nordhorn* (Lower Court), Germany, 14 June 1994, available at <http://cisgw3.law.pace.edu/cases/940614g1.html>, abstract available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=114&step=Abstract>.

determining the validity of a standard term. That case arose out of a contract for the sale of gravestones between a German seller and an Austrian buyer. The seller's standard conditions limited the buyer's rights for defective goods and provided *inter alia* that even in case of defective goods, the buyer had no right to withhold payment. The Court held that the question of whether such an exclusion of the right to withhold payment is valid is in general regulated by the applicable national law and not by the CISG. In that case it was German law that permitted such an exclusion in commercial contracts. The Court, however, did not stop there but examined whether the German rule that governed the issue was compatible with the basic principles underlying the CISG. It held that one such principle was the right to terminate the contract in extreme cases, which could only be excluded if the buyer had a right to damages. Though in the case itself the OGH considered the principle not to have been violated, the Court's general understanding of the interplay between the CISG and the national law governing the validity of a contract or contract terms is interesting. According to the correct view of the OGH, the CISG—while leaving the question of validity of terms to a national law—nevertheless imposes certain limits on the applicable law. Within these limits it is the applicable national law that determines whether a provision is valid or not. If the national law, however, goes beyond those limits and permits standard terms that derogate from basic principles of the CISG, those terms would be invalid on the basis of the CISG.

2. Mistake

In many national laws a party that errs in relation to the quality of goods may avoid a contract for mistake. This is often considered to be a question of validity of a contract. In light of this, some authors even consider that questions of mistake as to the quality of goods fall outside the scope of application of the CISG.⁴⁷

The better and prevailing view, however, is that this type of mistake falls within the scope of the CISG, with the consequence that the rules for defective goods are the only remedy available to persons that err about the quality of

47. Rudolf Lessiak, *UNCITRAL Kaufrechtsabkommen und Irrtumsanfechtung*, 111 *Juristische Blätter* 487, 492 (1989); MARTIN KAROLLUS, *UN KAUFRECHT. EINE SYSTEMATISCHE DARSTELLUNG FÜR STUDIUM UND PRAXIS* 42 (1991); Karl H. Neumayer, *Offene Fragen zur Anwendung des Abkommens der Vereinten Nationen über den internationalen Warenkauf*, 40 *RECHT DER INTERNATIONALEN WIRTSCHAFT* 99, 101f (1994).

goods.⁴⁸ The application of national rules on mistake may conflict with the general principles underlying the remedies provided for in the CISG. The avoidance of a contract in case of defective goods is considered to be a remedy of last resort. According to Article 49 CISG, avoidance may only be declared in case of a fundamental breach of contract. By contrast, the national rules on avoidance for mistake often do not contain such limiting requirements, but allow avoidance for any mistake in relation to the quality of the goods. Furthermore, it appears doubtful whether the wording of Article 4(a) actually supports the contrary view. This would require that the second sentence of Article 4 is truly a negative delimitation of the scope of application. The wording of the second sentence of Article 4, however, appears to be more in favour of the opposite view, that the second sentence just provides some examples of issues not covered by the CISG, but does not have any further effect, and in particular does not constitute a negative delimitation of the scope of application.⁴⁹

V. CONCLUSION

In commenting on his own summary of the case law on Articles 4 and 5 in the Draft Digest, Ferrari comes to the conclusion that the Draft Digest is only of limited help in determining the scope of application of the CISG. The reasons given for this statement are that some of the decisions “acritically cited” in the Digest are incorrect, that the case law is contradictory, and that on certain issues no case law exists.⁵⁰ In my view, the biggest obstacle, however, is that in most cases no detailed reasoning is given why certain issues fall within or outside the scope of application of the CISG. The courts usually limit themselves to mere statements that the CISG does or does not regulate a certain matter without any further argument. Furthermore, broad statements based on national concepts of legal instruments may often not be

48. CLOUT Case No. 47 [Landgericht Aachen (Regional Court), Germany, 14 May 1993], published in *RECHT DER INTERNATIONALEN WIRTSCHAFT (RIW)* 760, 761 (1993); Peter Huber, *Vertragswidrigkeit und Handelsbrauch im UN-Kaufrecht*, *Praxis des Internationalen Privat und Verfahrensrechts* 358, 360 (2004); Peter Huber, in *COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) art. 45, ¶ 54* (Peter Schlechtriem ed., Geoffrey Thomas trans., 2d ed. 1998); Magnus, *supra* note 19, art. 4, ¶¶ 48, 50; JOHN HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES* ¶ 240 (1999); see also CLOUT Case No. 426 [Oberster Gerichtshof (Supreme Court), Austria, 13 Apr. 2000], *PRAXIS DES INTERNATIONALEN PRIVAT UND VERFAHRENSRECHTS* 149 (2001) (where a conclusion of the Court of Appeal coming to this result was not criticised).

49. Huber, *supra* note 48, at 358, 360.

50. Ferrari, *supra* note 5, at 96.

precise, since certain issues under a national concept may be governed by the CISG while others are not. In this respect, Ferrari's criticism is correct that the case law as presented in the Digest may not be very helpful in determining the actual scope of application of the CISG. Irrespective of that, the compilation of cases in combination with the commentary provided by some of the Digest's drafters are a very useful tool for practitioners and academics alike.