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## SERVICE CONTRACTS AND THE CISG

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## SERVICE CONTRACTS AND THE CISG

*Professor Doctor Ingeborg Schwenzer,\* Julian Ranetunge,\*\*  
and Fernando Tafur\*\*\**

### I. INTRODUCTION

The story of the U.N. Convention on Contracts for the International Sale of Goods (“CISG” or “the Convention”) is one of worldwide success. It has been ratified by 89 states, potentially covering more than 80% of world trade. Its profound effect on the law governing the international sale of goods is well documented. Despite its name, however, the CISG has the potential to be much more than just a sales convention. It can also govern the international supply of services. Indeed, according to Article 3(2) CISG, mixed contracts<sup>1</sup> are subject to the CISG if the preponderant part of the obligations of the party who furnishes the goods does not consist in the supply of labor or other services.<sup>2</sup> In other words, the CISG already governs service obligations, albeit those contained within a contract characterized as one for the sale of goods.

Traditionally, when compared with goods, services were viewed by economists as non-storable, intangible and non-tradable.<sup>3</sup> Modern economic analysis takes a different view. Today, many economists point out that “the boundaries between manufacturing goods and services are blurring,” and regard the debate on the demarcation of services from goods as “inconclusive.”<sup>4</sup> The ambiguity of the divide between goods and services

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<sup>1</sup> Contracts containing both sale of goods and supply of services obligations.

<sup>2</sup> U.N. Comm’n on Int’l Trade Law, United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3, at art. 3(2) [hereinafter CISG].

<sup>3</sup> Broussolle Damien, *Services, Trade in Services and Trade of Services Industries, an Analysis Based on Hill’s Perspective*, 48 J. WORLD TRADE 2 (2014).

<sup>4</sup> *Id.* at 3.

becomes all the more pronounced when considered in light of major modern industries engaged in international trade—entertainment and mass media; telecommunications; and computer, information and financial services—and of the increasing amalgamation of goods and services in “smart” goods or the “internet of things.” This recent skepticism towards maintaining a strict distinction between sales and services in the field of economics has corresponded with a prominent rise in the prevalence of service contracts in international trade. The question now arises whether the distinction between sales and services can and should be maintained in law.

Thus far, there has been little discussion of this issue in the context of the CISG. Previous literature has focused either solely on arguments about the suitability of the CISG to govern service contracts,<sup>5</sup> or on the process of amending the CISG to include provisions which explicitly govern service contracts.<sup>6</sup> This Paper takes a different approach by considering the reasons why the CISG excludes service contracts from its scope, by undertaking comparative analysis of domestic legal systems in their attempt to grapple with the distinction between sales and services, and by providing an account of how the most contentious provisions of the CISG can be applied to service contracts.

Part Two argues that the most plausible reason why the CISG excludes service contracts from its scope is because domestic jurisdictions do the same, but that there is no valid reason why domestic jurisdictions do so. In fact, domestic jurisdictions continue to struggle with differential treatment between sales and service transactions because they have failed to provide a clear and consistent basis upon which to distinguish the two and impose starkly different consequences of classifying contracts as sales or services (Part Three). Part Four argues that there are good theoretical and practical reasons for applying the CISG to service contracts, in their guise both as pure service contracts and as mixed contracts which are predominantly for the supply of services. With reference to cases which apply, without difficulty, the CISG to service obligations, it argues that the CISG in its current form

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<sup>5</sup> ERNST KARNER & HELMUT KOZIOL, ZUR ANWENDBARKEIT DES UN-KAUFRECHTS BEI WERK-UND DIENSTLEISTUNGEN: AM BEISPIEL DER MASCHINEN-UND INDUSTRIEANLAGENLIEFERUNGSVERTRÄGE (Jan Sramek Verlag 2015).

<sup>6</sup> LEANDRO TRIPODI, TOWARDS A NEW CISG: THE PROSPECTIVE CONVENTION ON THE INTERNATIONAL SALE OF GOODS AND SERVICES 111 (Brill Nijhoff 2015).

can govern service contracts by considering the most contentious provisions of the CISG in this context.

## II. WHY DOES THE CISG EXCLUDE SERVICE CONTRACTS FROM ITS SCOPE?

Looking back at the historical development of the CISG, as far back as Ernst Rabel's seminal 1936 work *Recht des Warenkaufs*, there is a noticeable absence of discussion on why the CISG, a convention to promote international trade,<sup>7</sup> should be confined to contracts for the sale of goods. It was only at the Vienna Conference in 1980 that the issue received (brief) mention for the first time. The Czechoslovakian representative on the First Committee opened discussions by proposing that the CISG should govern both sales and service contracts.<sup>8</sup> He saw "no reason" why service contracts should be excluded from the scope of the Convention. Although the Committee rejected this proposal, its exact reasons for doing so are unclear. Those who rejected the proposal either did not provide reasons for their position or merely stated that it would be "[un]desirable."<sup>9</sup>

In many ways, the Czech proposal had no chance of gaining traction at the Vienna Conference. As Honnold reports, at the Conference,

the time for review of the [Draft Convention of 1978 was] limited . . . [.] Thus, proponents of amendments had a heavy burden: they needed to show not only that a change was needed but also that a proposed amendment was clearly drafted and would not lead to untoward consequences in relation to other provisions of the law.<sup>10</sup>

The proposal came too late. The delegates arrived in Vienna under the impression they were going to refine a draft convention on the international sale of goods, not one on the supply of services. More precisely, the proposal was 16 years too late. The 1964 Hague Conventions,<sup>11</sup> the predecessors of the CISG, contained similar (but not identical) provisions to Article 3(1)

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<sup>7</sup> United Nations Convention on Contracts for the International Sale of Goods pmbl., Apr. 11, 1980, S. Treaty Doc. No. 98-99 (1983), U.N. Doc. No. A/CONF. 97/19 (1981), 19 I.L.M. 671 (1980) (reprinted at 15 U.S.C.S. app.).

<sup>8</sup> U.N. GAOR, 33d Sess., 2d mtg. at 241-42, U.N. Doc. No. A/CONF.97/C.1/SR.2 (Mar. 11, 1980).

<sup>9</sup> *Id.*

<sup>10</sup> JOHN HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 11 (Kluwer Law Int'l 3d ed. 1999).

<sup>11</sup> Uniform Law for the International Sale of Goods (ULIS) and Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF).

CISG. For example, Article 6 ULIS (concerning the supply of materials by the buyer) pursues the same purpose: to exclude from the convention's scope any contracts in which the parties' obligations were substantially anything other than the delivery of goods for a price.

This does not mean, however, that the historical development of the CISG does not leave behind clues about the reasons for the exclusion of service contracts. In 1969, UNCITRAL made a pivotal decision to abandon the promotion of the Hague Conventions just five years after their conclusion because of a failure to command widespread adoption among states. This failure "stemmed from inadequate participation by representatives of different legal backgrounds in the preparation of the 1964 Conventions," which were seen as "essentially the product of the legal scholarship of Western Europe."<sup>12</sup> Thus, the decision to abandon the Hague Conventions was borne out of a desire to create a new instrument that would command acceptance across *all* states in order to enjoy universal adoption. But this desire for universal adoption came at a price. UNCITRAL had not only instructed the Working Group to produce legislation that would be acceptable "by countries of different legal, social and economic systems,"<sup>13</sup> it had also insisted that decisions be made by consensus. An increase in diversity of opinion usually shrinks the areas upon which consensus can be reached. Thus, despite having nine years to draft the new convention, the 14 member states of the Working Group had limited room for academic debate about the inclusion of service contracts within the scope of a convention on the sale of goods. They invariably avoided "contestable terms that [were] inconsistent with domestic law and thus potentially objectionable to some participants."<sup>14</sup>

These observations about the historical development of the CISG lend significant credence to Perales Viscasillas's suggestion that the CISG only excludes service contracts from its scope because Member States do the same: they exclude service contracts from the scope of their domestic laws on the sale of goods.<sup>15</sup> It is highly probable that the CISG's drafters, when faced with the particularly contentious issue over the scope of the

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<sup>12</sup> HONNOLD, *supra* note 10, at 9.

<sup>13</sup> *Id.*

<sup>14</sup> CLAYTON P. GILLETTE & STEVEN D. WALT, *THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS: THEORY AND PRACTICE* 8 (Matthew Bender 2014).

<sup>15</sup> Contracts for the Sale of Goods to Be Manufactured or Produced and Mixed Contracts (Article 3 CISG), CISG-Advisory Council Opinion, 2004 CISG (Oct. 24).

Convention, chose to simply reflect domestic legal tradition. This solution avoided the need to confront yet another divisive issue that may have compromised the overriding desire for universal adoption. As such, in order to understand why the *CISG* differentiates between sales and service contracts, it is necessary to consider why *domestic jurisdictions* differentiate between sales and service contracts. Why do domestic systems organize their laws such that sales transactions are governed by largely coherent, sale-specific laws or codes, while service transactions are not so governed? The answer to this question could hold the key to understanding why the *CISG* excludes service contracts from its scope and whether there is any good reason for doing so.

Unfortunately, domestic jurisdictions do not provide explicit reasons for differential treatment of sales and services either. Common sense suggests two possible reasons. Firstly, since trade in goods was much more commonplace in early civilization than trade in services, perhaps laws governing sales were developed long before those governing services, and the two were never unified. Differential treatment is a result of historical accident. However, while it may be true that trade in goods was more prevalent in the past, it is not true to suggest that laws governing the supply of services are new. Roman law developed its own body of law governing the supply of services, and Roman legal scholars themselves were vexed by the question of where to draw the line between sales (*emptio venditio*) and services (*locatio conductio*).<sup>16</sup> It is not plausible to argue that this failure to treat services and sales laws alike is really a failure to address a historical quirk that has prevailed for nearly two millennia. It seems more likely that their separation is intentional.

Secondly, it could be argued that sales and services are treated differently in law because of the different standards of liability they entail. Sales transactions entail strict liability, derived from contract law. Service transactions entail negligent or fault-based liability, traditionally derived from tort or delict law. Tort and contract pursue different aims. While contract governs voluntary transfers and protects expectations created after an exchange of promises, tort governs involuntary transfers and protects the

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<sup>16</sup> REINHARD ZIMMERMANN, *THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF CIVILIAN TRADITION* 234–35 (Oxford Univ. Press 1996).

*status quo* against wrongful harm. Indeed, it was on this basis that Roman law divided duties into those in contract and those in delict.<sup>17</sup> Similarly, it could forcefully be argued that it is unfair to impose a “duty of result” on a service provider. For example, a strict duty on a doctor to cure a patient. The problem with this reasoning is twofold. Firstly, unlike other relationships in which negligent liability arises, the supply of services does not arise in a tortious context. Even though liability in service transactions is frequently fault-based, every other characteristic of a service transaction is contractual: the parties negotiate, form a contract and seek to have their expectations upheld. And while it may be inappropriate to impose duties of result on certain types of service provider (*e.g.*, doctors), it may well be appropriate to impose such duties on other types of service provider (*e.g.*, construction contractors). A similar distinction between two kinds of service transaction was recognized in Roman law. While contracts for work and services (*locatio conductio operis*) entailed strict duties of result, contracts of personal services (*locatio conductio operum*) entailed fault-based liability.<sup>18</sup> Secondly, this argument does not account for civil law systems, in which sales do not necessarily entail strict liability. One approach in civil law is to impose strict liability on the seller only for hidden defects; the buyer accepts liability for obvious defects. Another civil law approach only imposes strict liability if the seller has either specifically guaranteed the presence of certain features or the goods are so defective as to substantially diminish their intended use.<sup>19</sup> As such, the argument that differential treatment is justified because of different standards of liability is unconvincing. In sum, there does not appear to be any good reason why domestic jurisdictions organize their laws such that sales are treated differently from services.

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<sup>17</sup> *Id.* at 10–11.

<sup>18</sup> *Id.* at 32, 397.

<sup>19</sup> INGBORG SCHWENZER, PASCAL HACHEM & CHRISTOPHER KEE, GLOBAL SALES AND CONTRACT LAW 367, *et seq.* (Oxford Univ. Press 2012).

### III. DOMESTIC DISTINCTIONS BETWEEN SALES AND SERVICE CONTRACTS

Thus far, it has been argued that there is no sound basis on which the CISG excludes service contracts from its scope. The Convention only excludes service contracts because domestic jurisdictions do the same, but the latter offer no sound basis on which service contracts are excluded from their sales laws. The following section explores this claim by considering (a) the basis on which domestic jurisdictions distinguish between sales and services contracts and (b) the consequences of classifying a contract as sales or services.

#### *A. On What Basis Do Domestic Jurisdictions Distinguish Between Sales and Service Contracts?*

The basic definition of a contract of sale is the reciprocal exchange of goods for a price.<sup>20</sup> While exact definitions vary from jurisdiction to jurisdiction—the common law, for instance, focuses on the notion of tangibility while civil law does not at the outset restrict the definition on this basis—the basic definition is the same across all jurisdictions and seems relatively clear. By contrast, the basic definition of a contract for the supply of services is far less precise. Most civil law systems are content to define a service contract as a “contract for the supply of services” without further defining what a “service” is.<sup>21</sup> The position in common law countries is more or less the same. Service contracts are defined widely as, for instance, “contract[s] under which a person . . . agrees to carry out a service.”<sup>22</sup> These wide definitions are usually circumscribed by the removal of discrete kinds

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<sup>20</sup> *Id.* at 96.

<sup>21</sup> ALAIN BÉNABENT, *DROIT DES CONTRATS SPÉCIAUX CIVILS ET COMMERCIAUX* 472 (Librairie Générale de Droit et de Jurisprudence 11th ed. 2015); PHILIPPE MALAURIE, LAURENT AYNÈS & PIERRE-YVES GAUTIER, *DROIT DES CONTRATS SPÉCIAUX* 72 (Librairie Générale de Droit et de Jurisprudence 8th ed. 2016); see also C. CIV. art. 1165 (“contrats de prestation de services” without any further definition); and 8 BÜRGERLICHES GESETZBUCH § 611.

<sup>22</sup> *Australian Consumer Law 2010* (Cth) s 2(1)(a) (Austl.); Supply of Goods and Services Act 1982 c.29, § 12 (Eng.); Consumer Protection Act, 1986, No. 68, § 2(o), Acts of Parliament, 1986 (India).



of services from the definition of a “services” contract,<sup>23</sup> but this does little to clarify the definition.

Given the vague definition of a service contract, it is unsurprising that courts have struggled to distinguish between sales and service contracts when classifying mixed contracts. There appear to be two ways of conducting classification—two types of tests that are used. The first type classifies the whole contract according to its “essence” or “substance.” If “work” is the essence of the contract, the entire contract is classified as a services contract; if the “delivery of goods for a price” is the essence of the contract, the entire contract is one for the sale of goods. This test is followed by most common law jurisdictions and a few civil law jurisdictions such as Spain and France.<sup>24</sup> The second type of test, referred to as the “gravamen of the action” test, involves splitting the contract into more than one part. The court then applies whichever law, sales law or services law, is relevant to the alleged problem. For example, in a contract for the removal of old cabinets and the supply and installation of new cabinets, the court would apply services law to defects in the removal and installation of the cabinets, and sales law to defects with the cabinets themselves.<sup>25</sup> This approach is followed by Germanic legal systems and some French and U.S. courts.<sup>26</sup>

Both tests suffer from flaws. The “substance” of the contract test is ineffective to deal with those contracts in which neither sales nor services dominates. In many ways, it does not make sense to assert that the

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<sup>23</sup> *E.g.*, *Australian Consumer Law 2010* (Cth) s 2(1)(b) (Austl.) (contracts of tenancy, the services rendered by an arbitrator, the services rendered by a director to a company); MICHAEL BRIDGE, *THE SALE OF GOODS* ¶¶ 7.150, 7.151 (Oxford Univ. Press 3d ed. 2014) (Eng.).

<sup>24</sup> CLIVE TURNER, *AUSTRALIAN COMMERCIAL LAW* 263 (LBC Information Services 21st ed. 1997) (Austl.); BENJAMIN’S *SALE OF GOODS* ¶ 1-041 (Michael Bridge ed., Sweet & Maxwell 9th ed. 2016) (Eng.); MALAURIE ET AL., *supra* note 21, at ¶¶ 11–16 (Fr.); NIMILA BHADBHADE, *CONTRACT LAW IN INDIA* 264 (Kluwer Law Int’l 2010) (India); CARLOS LASARTE, *CONTRATOS* 108 (Marcial Pons ed., 2008) (“characteristic obligation”) (Spain); LARY LAWRENCE, *LAWRENCE’S ANDERSON ON THE UNIFORM COMMERCIAL CODE* § 2-105:88 (Thomson Reuters 3d ed. 2016) (U.S.).

<sup>25</sup> *J.O. Hooker & Sons Inc. v. Roberts Cabinet Co. Inc.*, 683 So. 2d 396 (Miss. 1996).

<sup>26</sup> MALAURIE ET AL., *supra* note 21, at ¶¶ 12–21 (Fr.); BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE] § 311, ¶¶ 24–26 (G. Brudermüller, J. Ellenberger, I. Götz et al. eds., 78th ed., CH Beck München 2019) (Ger.); Bundesgericht [BGer] [Federal Supreme Court] Nov. 19, 2012, 139 *ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS* [BGE] III 49, E 3.3 (Switz.); Marc Amstutz & Ariane Morin, *Einleitung vor Art 184 ff.*, ¶ 23, in *BASLER KOMMENTAR OR I* (H. Honsell, N. Vogt, W. Wiegand eds., Helbing Lichtenhahn 6th ed. 2015) (Switz.); THOMAS QUINN, *QUINN’S UNIFORM COMMERCIAL CODE COMMENTARY AND LAW DIGEST* vol. 1, § 2-102[A][1][a] (Thomson Reuters 2d rev. ed. 2016) (U.S.).

“substance” of, for example, a delivery and installation contract is the delivery (sales) or the installation (services); one is just as important as the other. Indeed, in common law jurisdictions, the case law shows that some common law judges have exploited the difficulties with this test to prioritize fair outcomes for claimants over consistent classification “according to the book.” While there were no form requirements on service contracts, the English Statute of Frauds 1677 imposed form requirements on contracts of sale.<sup>27</sup> This affected judicial approaches to classification. Courts did not want contract-breakers to avoid the consequences of breach by claiming that their contracts never existed for want of form. As such, courts would classify contracts involving the sale of goods as contracts for the supply of services so that the lack of conformity with form requirements did not invalidate the contract. Thus, courts classified contracts not on the basis of their content or terms but on the basis of reaching fair outcomes.<sup>28</sup> This purposive classification led to the development of artificial, often conflicting, case law on determining whether a contract was for sales or services. Unfortunately, courts continue to use this old case law as the starting point in deciding how a contract should be classified.<sup>29</sup> As such, in common law, the classification of contracts as sales or services is “often rather fluid.”<sup>30</sup> While England has abolished these form requirements, some common law jurisdictions maintain such requirements (most notably the UCC in the United States)<sup>31</sup> and so likely continue to espouse a fluid approach to contract classification. The shorter limitation period which in the United States applies only to sales contracts may be a further factor affecting judicial approaches to classification.<sup>32</sup> Turning to the second test, the insurmountable difficulty with the gravamen of the action test is that parties will find it very difficult to plan

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<sup>27</sup> Joseph M. Perillo, *The Statute of Frauds in the Light of the Functions and Dysfunctions of Form*, 43 *FORDHAM L. REV.* 39, 41 (1974).

<sup>28</sup> Simon Whittaker, *Contracts for Services in English Law and in the DCFR*, in *SERVICE CONTRACTS 120* (R. Zimmermann ed., Mohr Siebeck 2010); *BENJAMIN’S SALE OF GOODS*, *supra* note 24, at ¶ 1-041.

<sup>29</sup> *See, e.g.*, the conflicting cases of *Lee v. Griffin* (1861) 30 LJ QB 252 (Eng.) and *Robinson v. Graves* (1935) 1 KB 579 (Eng.).

<sup>30</sup> Whittaker, *supra* note 28, at 121.

<sup>31</sup> U.C.C. § 2-201 (AM. LAW INST. & UNIF. LAW COMM’N 1977); Sale of Goods Act 1896 (Tas) § 9 (Austl.); Sale of Goods Act 1895 (WA) § 4 (Austl.).

<sup>32</sup> *Frommert v. Bobson Const. Co.*, 219 Mich. Ct. App. 735, 737–39 (1996).

for the legal effects of their transactions if more than one legal regime could operate to govern the transaction.<sup>33</sup>

In conclusion, neither civil nor common law has found a way to clearly and consistently distinguish between sales and services contracts. This suggests that there are more similarities than differences between the two, a view supported by the analogous application of sale of goods provisions to service contracts in the common law.<sup>34</sup> In practice, courts have relied on an assortment of factors to make a distinction, with little attempt to follow any particular rationale.<sup>35</sup>

Despite the absence of a clear distinguishing basis, it appears that a degree of consensus among legal systems is emerging about the kinds of contracts that should be considered “services contracts.” Agency contracts,<sup>36</sup> and consultancy and professional services contracts (rendered by, e.g., auditors and accountants)<sup>37</sup> are considered by most legal systems to be service contracts. It is very likely that franchising,<sup>38</sup> licensing,<sup>39</sup> distribution

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<sup>33</sup> 1 HAWKLAND’S UNIFORM COMMERCIAL CODE SERIES § 2-102:2 (W. Hawkland, F. Miller, L. Rusch et al. eds., Thomson Reuters 2016).

<sup>34</sup> Clark v Macourt [2013] HCA 56, ¶¶ 8, 30, 55, 68 (Austl.); BENJAMIN’S SALE OF GOODS, *supra* note 24, at ¶¶ 1-031, 1-041 (Eng.).

<sup>35</sup> CISG Advisory Council, *supra* note 15, at ¶ 1.4.

<sup>36</sup> PETER GILLIES, BUSINESS LAW 470 (The Federation Press 12th ed. 2004) (Austl.); BOWSTEAD & REYNOLDS ON AGENCY ¶ 6-012 (P. Watts ed., Sweet & Maxwell 20th ed. 2016) (Eng.); 4 MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH [MUNICH COMMENTARY ON THE CIVIL CODE] § 611, ¶¶ 1–2 (M. Arzt, K. Berger, H.-J. Bieber et al. eds., 6th ed., CH Beck 2016) (Ger.); BHADBHADE, *supra* note 24, at 264 (India); Alfred Koller, *Dienstleistungsverträge—Begriff, Arten, rechtliche Grundlagen* [Service contracts—term, types, legal bases] 12 AJP/PJA 1627, 1629 (2014) (Switz.); LAWRENCE, *supra* note 24, § 2-105:81 (U.S.).

<sup>37</sup> *Astley v Austrust Ltd* (1999) 197 CLR 1 (Austl.); *Honeychurch Management Pty Ltd v Deloitte Touche Tohmatsu* [2005] TASSC 13 (Austl.); *Stone James & Co. v Investment Holdings Ltd* [1987] WAR 363 (Austl.); CHITTY ON CONTRACTS ¶ 14-037 (H. Beale ed., Sweet & Maxwell 32d ed. 2015) (Eng.); MALAURIE ET AL., *supra* note 21, at 287 (Fr.); CORPORATE COUNSEL’S GUIDE TO WARRANTIES § 1.14 (2015) WESTLAW CCGWARR (last visited Dec. 1, 2016) (U.S.).

<sup>38</sup> Under Swiss Law, franchising contracts are considered mixed contracts with *inter alia* components of labour, rent, and mandate contracts (BASLER KOMMENTAR, *supra* note 26, at Einl vor art. 184 ff, ¶ 133). In German law, while the nature of franchising contracts is disputed, they are considered by some as mixed contracts with components of lease, sale, rent and contracts for management of affairs (BGB, *supra* note 26, at Einf v § 581, ¶ 22); LAWRENCE, *supra* note 24, § 2-105:81.

<sup>39</sup> Civil law countries tend to consider license contracts as mixed contracts with components of sale, lease, rent and corporate law: HUBERT BITAN, DROIT DES CRÉATIONS IMMATÉRIELLES para. 278, *et seq.* (Wolters Kluwer France 2010) (Fr.); BGB, *supra* note 26, at Einf v § 581, ¶ 7(Ger.); BASLER KOMMENTAR, *supra* note 26, at Einl vor art. 184 ff, (Switz.). Common law: LAWRENCE, *supra* note 24, § 2-105:81 (U.S.); H. HUNTER, MODERN LAW OF CONTRACTS § 9:12 (Thomson Reuters 2016) (U.S.).

and legal service contracts<sup>40</sup> are also so considered. Turnkey contracts,<sup>41</sup> construction contracts and contracts with architects, engineers and the like<sup>42</sup> are treated as service contracts by the common law, whereas civil law countries typically characterize such contracts as contracts for work and labor, for which there are special provisions in their respective civil codes.<sup>43</sup> Doctor-patient contracts are considered service contracts by the common law whereas the civil law position is unclear.<sup>44</sup> It is disputed by common law countries whether contracts for the development of software are sales or service contracts.<sup>45</sup> In civil law countries, such contracts are in principle

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<sup>40</sup> Though some legal systems may specifically exclude some types of legal services from regulation by the general law on supply of services *e.g.*, in England, the services of an advocate in court, and in carrying out preliminary work directly affecting the conduct of the hearing, are excluded from the supply of services regime (Supply of Services (Exclusion of Implied Terms) Order 1982/1771) (Eng.); *Giannarelli v Wraith* [1988] HCA 52 (Austl.). Under Swiss law, legal service contracts are in principle governed by provisions on mandate contracts (BASLER KOMMENTAR, *supra* note 26, at Einl vor art. 184 ff, ¶ 272).

<sup>41</sup> *Chocolate Factory Apartments v Westpoint Finance* [2005] NSWSC 784 (Austl.); JOSEPH HUSE, UNDERSTANDING AND NEGOTIATING TURNKEY CONTRACTS ¶ 2-04 (Sweet & Maxwell 1997) (Eng.); *Semler v. Knowing*, 325 N.W.2d 395, 398–99 (Iowa 1982); *Speight v. Walters Dev. Co. Ltd.*, 744 N.W.2d 108, 115–16 (Iowa 2008); *Guaranteed Constr. Co. v. Gold Bond Prods.*, 153 Mich. Ct. App. 385, 395 (1986); *Reilly Constr. Co. Inc. v. Bachelder Inc.*, 863 N.W.2d 302 (Iowa Ct. App. 2015) (U.S.).

<sup>42</sup> GILLIES, *supra* note 36, at 404; VIVIAN RAMSAY, KEATING ON CONSTRUCTION CONTRACTS ¶ 3-053 (Stephen Furst ed., Sweet & Maxwell 10th ed. 2016); ALFRED HUDSON, HUDSON'S BUILDING AND ENGINEERING CONTRACTS ¶ 2-011 (Robert Clay & Nicholas Denny eds., Sweet & Maxwell 13th ed. 2015) (Eng.); BHADBHADE, *supra* note 24, at 266 (India); JAMES WHITE & ROBERT SUMMERS, WHITE & SUMMERS' UNIFORM COMMERCIAL CODE 450 (Robert Hillman ed., Thomson Reuters 6th ed. 2010), CORPORATE COUNSEL'S GUIDE TO WARRANTIES, *supra* note 35, §§ 11.2–4, 11.11 (U.S.).

<sup>43</sup> CODE CIVIL [C. CIV.] [CIVIL CODE] arts. 1787–1799(1) (Fr.); BÜRGERLICHES GESETZBUCH [BGB] [Civil Code], §§ 631–651, *translation at* [https://www.gesetze-im-internet.de/englisch\\_bgb/index.html](https://www.gesetze-im-internet.de/englisch_bgb/index.html) (Ger.); CÓDIGO CIVIL [C.C.] [CIVIL CODE] arts. 1544, 1586–1600 (Spain); Obligationenrecht [OR] [Code of Obligations] arts. 363–79 (Switz.); Turnkey contracts: Méga Code Civil, art. 1787, para. 113 (Dalloz ed., 2012) (Fr.); H. PRÜTTING, G. WEGEN & G. WEINREICH EDS., BGB KOMMENTAR § 631, para. 19 (Luchterhand Verlag 11th ed. 2015) (Ger.); Lasarte, 283 n.23 (Spain); BGE 114 II 53; Zindel & Pulver, Basler Kommentar Obligationenrecht I [OR I] art. 353 n.25, para. 13 (Switz.).

<sup>44</sup> *Eyre v. Measday* [1986] 1 All ER 488 (CA) (Eng.); *State of Punjab v. Shiv Ram & Ors* [2005] INSC 447 (India); H. Flechtner, *Service Contracts in the United States (and from an Economic Perspective)*, in R. ZIMMERMANN, SERVICE CONTRACTS 158 (Mohr Siebeck 2010); WHITE & SUMMERS, UNIFORM COMMERCIAL CODE 448 n.40 (West Academic Publishing 6th ed. 2010) (U.S.) (though some kinds of medical contracts found to be sales contracts).

<sup>45</sup> TURNER, *supra* note 24; *St Albans City and DC v. International Computers Ltd* [1996] 4 All ER 481, 492–93 (heavily criticized) (Eng.); WHITE & SUMMERS, UNIFORM COMMERCIAL CODE § 2.1 n.40 (West Academic Publishing, 6th ed. 2010); *but see* *Micro Data Base Systems Inc. v. Dharma Systems Inc.*, 148 F.3d 649 (7th Cir. 1998).

considered contracts for work and services.<sup>46</sup> While employment can be considered a service, most legal systems place employment contracts outside the scope of the “services” regime because of the need for a more bespoke regime to protect employees.<sup>47</sup>

### *B. Consequences of Classification as Sales or Service Contracts*

The difficulty courts have with discerning between sales and services contracts suggests that there are more similarities than differences between the two. Despite this similarity, the classification of contracts as sales or services has wide-ranging implications on parties’ relationships. Four main consequences of classification are as follows.

Firstly, classification determines *how* the contract is regulated by the law: by, on the one hand, statute or code, and on the other, judicial discretion. Most common and civil law jurisdictions have extensive and well-settled codes on the sale of goods, such as the Sale of Goods Act in England, the UCC in the United States, the French, Spanish and German Civil Codes and the Swiss Code of Obligations.<sup>48</sup> By contrast, the laws regulating the supply of services are far less organized or coherent. In common law, the rules governing the supply of services remain largely uncodified. Such rules are found almost exclusively in case law or in general contract law principles.<sup>49</sup> It is true that, in civil law jurisdictions, there is greater codification of rules governing services. Codes usually contain specific chapters governing a

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<sup>46</sup> H. BITAIN, DROIT DES CONTRATS INFORMATIQUES ET PRATIQUE EXPERTALE [Computer Contracts Law and Expert Practice] para. 124 (Wolters Kluwer France 2007) (Fr.) (however, if mass-produced software is delivered with a lifetime license, then they are classified as sales contracts); Palandt & Weidenkaff § 433 n.25, para. 9 (Ger.); H. HONSELL ET AL., BASLER KOMMENTAR OBLIGATIONENRECHT I [OR I] art. 184 n.26, para. 267 (Helbing Lichtenhahn Verlag 6th ed. 2015) (Switz.).

<sup>47</sup> *Australian Consumer Law* § 2(1) (Austl.); Supply of Goods and Services Act 1982, at § 12(2) (Eng.); Code du Travail (Fr.); BGB, *supra* note 43, at §§ 611-630; Bhadbhade, *supra* note 24 (Kluwer Law International 2010) (India); Ley de Estatuto de Trabajadores art. 1 (Spain); Obligationenrecht [OR] [Code of Obligations] arts. 319–362 (Switz.).

<sup>48</sup> Goods Act 1958 (Austl.); Sale of Goods Act 1979 (Eng.); CODE CIVIL [C. CIV.] [CIVIL CODE] arts. 1582–1685 (Fr.); BÜRGERLICHES GESETZBUCH [BGB] [Civil Code] §§ 433–479, *translation at* [https://www.gesetze-im-internet.de/englisch\\_bgb/index.html](https://www.gesetze-im-internet.de/englisch_bgb/index.html) (Ger.); Sale of Goods Act 1930 (India); CÓDIGO CIVIL [C.C.] [CIVIL CODE] arts. 1445–1537 (Spain); Obligationenrecht [OR] [Code of Obligations] arts. 184–236 (Switz.); Uniform Commercial Code art. 2 (2002) (U.S.).

<sup>49</sup> WHITTAKER, *supra* note 28, at 116 (Eng.); BHADBHADE, *supra* note 24, at 263 (India); 20 RICHARD A. LORD, WILLISTON ON CONTRACTS § 26:20 (Thomson Reuters 4th ed. 2016) (U.S.).

handful of particular types of service contract, such as mandate (agency) contracts.<sup>50</sup> However, there is no overarching, comprehensive and coherent set of rules that govern all types of service contracts.<sup>51</sup> This means that, when faced with an *uncodified* service contract, a civil law judge looks to other parts of the code to find provisions that are most suitable to apply to the services contract. The “law” that is ultimately applied to the uncodified service contract is in fact a mishmash of provisions drawn from whichever chapters of the code the judge deems most suitable to apply—an approach that generates uncertainty for parties about the content of the law that will be applied to their dispute. For example, while a Swiss court might apply provisions from rent, corporate and labor law chapters to govern franchise contracts,<sup>52</sup> a German court might apply provisions from rent, lease, sale and management of affairs chapters.<sup>53</sup> Overall, this absence of codified rules in both civil and common law means that the law governing the supply of services is difficult to ascertain, unclear and inconsistently applied. Its development is left almost entirely to judicial discretion. Secondly, classification may have consequences relating to procedural rules, such as those mentioned above regarding different form requirements and limitation periods.<sup>54</sup>

Thirdly, classification usually defines the obligations of the parties. If a contract is classified as a sales contract (and, in civil law jurisdictions, as a contract for work and labor), the seller owes an *obligation de résultat* (obligation of result); if a contract is classified as a service contract, the service provider generally owes an *obligation de moyens* (obligation of means). Under the former, there is a breach of contract if the result has not been achieved, regardless of whether reasonable skill and judgment is exercised (i.e. strict liability). Under an *obligation de moyens*, the contract is not breached as long as the obligor has used reasonable skill and judgment,

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<sup>50</sup> CODE CIVIL [C. CIV.] [CIVIL CODE] arts. 1984–2010 (Fr.); BGB, *supra* note 43, at §§ 662–675b; CÓDIGO CIVIL [C.C.] [CIVIL CODE] arts. 1709–39 (Spain); Obligationenrecht [OR] [Code of Obligations] arts. 394–406 (Switz.).

<sup>51</sup> MAURITS BARENDRECHT ET AL., PRINCIPLES OF EUROPEAN LAW ON SERVICE CONTRACTS 135–36 (Sellier European Law Publishers 2007).

<sup>52</sup> H. HONSELL ET AL., BASLER KOMMENTAR OBLIGATIONENRECHT I [OR I] art. 184 n.26, para. 133 (Helbing Lichtenhahn Verlag 6th ed. 2015) (Switz.).

<sup>53</sup> Palandt & Weidenkaff n.25 Einf v § 581, para 22.

<sup>54</sup> *Id.* § 3(a).

in other words, was not at fault (i.e., negligence liability).<sup>55</sup> There are instances, however, where classification does not define the standard of liability; where, instead, service contracts attract *obligations de résultat*.<sup>56</sup> In common law jurisdictions, examples of the kinds of service contracts in which strict liability obligations have been implied include construction<sup>57</sup> and turnkey contracts<sup>58</sup> and contracts for the development of software.<sup>59</sup> Some civil law jurisdictions have also applied strict liability obligations to software contracts<sup>60</sup> and doctor-patient contracts.<sup>61</sup> Strict liability in these aforementioned types of service contracts is usually only implied if it is found that the service-recipient reasonably relied on the service provider's expertise.<sup>62</sup>

The fourth main consequence of classification relates to the availability of certain remedies. For instance, in most civil law jurisdictions, the remedy of price reduction in cases of non-conformity is only available with sales contracts.<sup>63</sup> The French Civil Code is the exception: the recent amendments which came into force on 1 October 2016 extend the availability of this remedy to all contracts.<sup>64</sup> In common law, the defence of contributory negligence is only available in service contracts.<sup>65</sup> This defence reduces the

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<sup>55</sup> P. MALAURIE, L. AYNÈS & P. STOFFEL MUNCK, *DROIT DES OBLIGATIONS* [Law of Obligations] para. 942 (LGDJ 8th ed. 2016) (Fr.) (the obliger owns "une diligence suffisante").

<sup>56</sup> CHITTY, *supra* note 37, at para. 14-37.

<sup>57</sup> *Greaves & Co (Contractors) Ltd v. Baynham Meikle & Partners* [1975] 1 WLR 1095 (CA) (Eng.); NILIMA BHADBHADE, *CONTRACT LAW IN INDIA* 266 n.23 (Kluwer Law International 2010) (India).

<sup>58</sup> HUSE, *supra* note 41, at para. 2-4; *Basildon DC v. JE Lesser (Properties) Ltd* [1985] QB 839 (Eng.); *see also Vancouver Water District v. North American Pipe & Steel Ltd and Moody International Ltd* [2012] BCCA 337 (Can.); *MT Hojgaard A/S v. E.ON Climate and Renewables UK Robin Rigg East Ltd* [2015] EWCA Civ 407 (Eng.); *Semler v. Knowling*, 325 N.W.2d 395 (Iowa 1982).

<sup>59</sup> *St Albans City and District Council v. International Computers Ltd*, [1996] All ER 4, 481 n.43 (Eng.).

<sup>60</sup> Cour de cassation [Cass.] [supreme court for judicial matters] com., 25 Nov. 1997; Cour d'appel de Bastia [regional court of appeal], 19 Nov. 2002, 2002/00772; Cour de cassation [Cass.] [supreme court for judicial matters] com., 1 Mar. 2005, 01-15.007.

<sup>61</sup> DANIEL MAINGUY, *CONTRATS SPÉCIAUX* [Special Contracts], para. 576 (Dalloz 10th ed. 2016).

<sup>62</sup> WILLIAM A. HANCOCK, *CORPORATE COUNSEL'S GUIDE TO WARRANTIES* § 11.16 n.34 (Chesterland, Ohio: Business Laws 1993) (U.S.).

<sup>63</sup> BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE] § 441 (Ger.); CÓDIGO CIVIL [C.C.] [CIVIL CODE] art. 1486 (Spain); OBLIGATIONENRECHT [OR] [CODE OF OBLIGATIONS] art. 205 (Switz.).

<sup>64</sup> CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1223 (Fr.).

<sup>65</sup> N. SEDDON, R. BIGWOOD, M. ELLINGHAUS, *CHESHIRE AND FIFOOT LAW OF CONTRACT* 1108 (LexisNexis Butterworths 10th Australian ed. 2012); *Forsikringsaktieselskapet Vesta v. Butcher* [1989]

liability of the breaching party to take account of the aggrieved party's contribution to the breach. For example, the liability of an architect who had negligently designed a fire suppression system was reduced by two-thirds because the claimants had provided inaccurate information to the architect about the appropriate type of fire-suppressing material that should have been used.<sup>66</sup>

In sum, despite the many factual similarities between sales and service transactions, the outcome of the classification exercise undertaken by domestic courts has wide-ranging legal consequences on the relationship between the parties. Parties to mixed contracts may face uncertainty about the extent of judicial discretion in the determination of their dispute, the validity of their contract in light of form requirements, applicable limitation periods, the standard of liability (*résultat* or *moyen*) and the availability of certain remedies or defences. This differential treatment runs contrary to the legal axiom that like cases should be treated alike unless there is a valid reason to treat them differently. It impugns the internal consistency of the law, undermines parties' legitimate expectations, and increases the costs of resolving disputes.

#### IV. IS THE CISG SUITABLE TO GOVERN SERVICE CONTRACTS?

Thus far, it has been shown that there is no sound basis on which the CISG excludes service contracts from its scope or, indeed, on which domestic jurisdictions exclude service contracts from the scope of their sales laws. Despite the wide-ranging consequences attached to the classification of mixed contracts, there are many similarities between sales and service transactions, and it is often difficult to discern between the two. In light of this, it is doubtful that sales and service contracts merit differential treatment to the extent that they currently do in domestic legal systems.

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AC 852 (HL) (Eng.); AVTAR SINGH, *LAW OF CONTRACT AND SPECIFIC RELIEF* 451 (Eastern Book Co. 9th ed. 2005); LAWRENCE, *supra* note 24, § 2-314:560 (This defence is not available where the supplier's obligation is one of strict liability.).

<sup>66</sup> *Sahib Foods Ltd v. Paskin Kyriakides Sands* [2003] EWCA (Civ) 1832 (Eng.).



*A. Should the CISG Govern Service Contracts?*

There are convincing reasons why the CISG should govern service contracts. Firstly, there are good doctrinal reasons. Not only would it align the CISG with modern economic thought,<sup>67</sup> it would also fulfil the wider purpose of the CISG to promote “development of international trade” and “contribute to the removal of legal barriers in international trade.”<sup>68</sup> Secondly, there are compelling practical and commercial reasons why the CISG should govern service contracts. Parties engaged in international commerce usually want the whole of their relationship to be governed by the same system of law.<sup>69</sup> However, a prevalent legal problem faced by such parties is the application by the court of multiple laws to the same transaction, against the parties’ wishes and against commercial sense. Parties to contracts governed by the CISG are not immune from these problems. For example, in a contract for the delivery, installation and initial maintenance of a factory, arbitral tribunals have been known to apply the CISG to the sales part of the contract (delivery) but apply domestic law to the services part (installation and maintenance).<sup>70</sup> Alternatively, the tribunal might find that the value of installation and maintenance exceeds—even by a fractional amount—the value of delivery, and consequently decline to apply the CISG altogether. This creates numerous problems for the parties: greater difficulty in pricing risk into contracts and greater uncertainty of outcome in the event of a dispute. In addition, the benefits that parties enjoy from the application of the CISG to their disputes—its international character, balance between different legal cultures and neutrality between the domestic laws of each party—are lost. The application of the CISG to service contracts would solve these problems. It would mean that a single set of rules would apply to a transaction in which goods and services are closely related.

This Paper, however, goes further than calling for the application of the CISG to mixed contracts. It also argues that the CISG should govern “pure”

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<sup>67</sup> See *supra* Introduction.

<sup>68</sup> United Nations Convention on Contracts for the International Sale of Goods, *supra* note 7, at pmb. para. 3.

<sup>69</sup> An assumption made by many legal systems (failing indication to the contrary). See, e.g., Mario Giuliano & Paul Lagarde, *Report on the Convention on the Law Applicable to Contractual Obligations*, 282 OFFICIAL J. OF THE EUR. COMMUNITIES 1, 17 (1980); *Sulamérica Cia Nacional de Seguros S.A. v. Enesa Engenharia S.A.* [2012] EWCA (Civ) 638 (Eng.).

service contracts—contracts for the supply of services which do not contain any sale of goods obligations. The primary argument in favor of this position is based on taking existing provisions in the CISG to their logical conclusion. If, as is widely acknowledged,<sup>71</sup> the CISG already applies to supply of service obligations (albeit those found within contracts classified as sales contracts) there is no reason why the CISG should not also govern pure service contracts. Similar problems call for similar solutions.<sup>72</sup> Exactly *how* the CISG would govern pure service contracts will be illustrated later in this part with reference to cases already decided under the CISG which apply the CISG to service obligations. The question then arises: to what kind of pure service contracts is the CISG most apt to govern? The answer to this question, this Paper suggests, should draw inspiration from those kinds of service contracts which domestic legal systems, by consensus, deem as service contracts. These are listed above in the final paragraph of part 3(a). This would mean that, for instance, cases such as *RT v WT*<sup>73</sup> (regarding a turnkey contract) and the *Market Study* case<sup>74</sup> would be decided differently and brought within the scope of the CISG. For the avoidance of doubt, parties may wish to specify in their pure service contracts that the CISG does indeed apply.<sup>75</sup>

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<sup>70</sup> A problem anticipated three decades ago by Peter Schlechtriem. See PETER SCHLECHTRIEM, *UNIFORM SALES LAW—THE UN-CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS* 31 (Manz 1996).

<sup>71</sup> *E.g.*, HONNOLD, *supra* note 10, at 58.

<sup>72</sup> *Id.* at 60.

<sup>73</sup> HG Zürich [HG] [Commercial Court] July 7, 2002, HG000120/U/zs (Switz.) (contract to plan, deliver, assemble, and initially operate a plant for the breaking down and separation of cardboard packaging).

<sup>74</sup> OLG Köln [OLG] Aug. 26, 1994, 19 U 282/93 (Ger.) (contract to conduct scientific study of specific segment of German express-services market).

<sup>75</sup> A course of action endorsed by many authorities, including Peter Schlechtriem. SCHLECHTRIEM, *supra* note 70, at 30; United Nations Commission on International Trade, *Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works* 304, U.N. DOC. NO. A/Cn.9/SER.B/2 (Aug. 1987).

### *B. Can the CISG Govern Service Contracts?*

Previous literature has given no more than cursory consideration to the issue of how the CISG's provisions might apply to non-sales contracts.<sup>76</sup> What follows is a more extensive consideration of this issue, together with examples of case law which applies the CISG to service obligations.

#### *1. Requirements to establish liability*

The following issues surrounding liability for breach of a services contract will be considered: determining conformity (Article 35 CISG), third party rights or claims to the services rendered (Articles 41 and 42 CISG), obligations to examine the service and give notice of defects (Articles 38, 39 and 43 CISG) and causation by the aggrieved party (Article 80 CISG).

Article 35 CISG, sub-articles (1) and (2) respectively, set out the two ways in which conformity of goods can be established. According to Article 35(1) CISG, goods must comply with the contractually stipulated quantity, quality, description and packaging. In the absence of contractual stipulation, Article 35(2) contains fallback provisions designed to objectively establish whether performance is in conformity with the contract. It asks what rights and duties reasonable persons in the shoes of the parties would have agreed to if they had put their minds to such a question. Goods must be fit for their ordinary or particular purpose, conform to any sample and be adequately packaged.

The primary objection to including pure service contracts within the ambit of the CISG is that the provisions of the CISG are not suitable for service contracts. In particular, Karner and Koziol argue that the CISG is not suitable to govern conformity in service contracts because of the absence of provisions on reasonable care and skill. The first point to note about these arguments is that they only concern one kind of breach of contract—non-conformity—and do not concern other types of breach, such as delayed performance and complete non-performance.<sup>77</sup> This is because the specific

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<sup>76</sup> See, e.g., FRITZ ENDERLEIN & DIETRICH MASKOW, *INTERNATIONAL SALES LAW* 37 (Oceana Publications eds. 1992). For slightly more detailed consideration, see generally PETER SCHLECHTRIEM, *INTERPRETATION, GAP-FILLING AND FURTHER DEVELOPMENT OF THE UN SALES CONVENTION* (Martin Koehler trans., Pace Law School Institute of International Commercial Law eds. 2004).

<sup>77</sup> KARNER & KOZIOL, *supra* note 5, at para. 79.

provisions with which Karner & Koziol take issue—Articles 35, 46(3) and 50 CISG—are only applicable if the goods do not conform to the contract. The significance of this is that their objections do not hold currency in cases of non-performance and delayed performance. It cannot be argued that non-performance and delayed performance merit different treatment as between sales and service contracts.<sup>78</sup> This is evidenced by civil law codes which apply rules on non-performance and delayed performance to all kinds of contracts, sales and services alike.<sup>79</sup>

It is still, of course, important to address Karner & Koziol's arguments as made in the context of non-conformity. It is submitted that the definition of liability in Article 35(1) CISG is appropriate for any kind of contract, including services contracts, because it is primarily the stipulations of the parties which determine their obligations. Conformity with stipulated quality will be the main issue in service contracts, but an issue with conforming quantity may also arise, for instance, if a service is contracted to be rendered twice a week but is instead rendered once a week. In rare cases packaging may also play a role in service contracts.<sup>80</sup> As the criterion of description was specifically included to address problems arising in the sales laws of civil jurisdictions,<sup>81</sup> it is unlikely to apply to service contracts.

The provisions in Article 35(2) CISG can also be applied to service contracts. It was noted above that service contracts can attract two kinds of implied terms: those of *résultat* and those of *moyens*. Firstly, in contracts in which it is reasonable to expect a service to produce a result, the Article 35(2) CISG provision on fitness for purpose can be used as a benchmark to determine conformity in the same way it is used in sale of goods cases. This raises the question: In what kinds of contracts would it be reasonable to expect a service to produce a result? Guidance can be found both in existing

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<sup>78</sup> *Id.* at paras. 73, 78 (referring to employment contracts).

<sup>79</sup> See in the respective civil codes the general provisions for contracts. OBLIGATIONENRECHT [OR] [CODE OF OBLIGATIONS] arts. 1–142 (Switz.); BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE] §§ 241–347 (Ger.); CODE CIVIL [C. CIV.] [CIVIL CODE] arts. 1101–1369-11 (Fr.); CÓDIGO CIVIL [C.C.] [CIVIL CODE] arts. 1088–1213 (Spain).

<sup>80</sup> *E.g.*, a service contract to repair a machine might require proper packaging before the machine's return.

<sup>81</sup> SCHWENZER, HACHEM & KEE, *supra* note 19, at para. 31.15 (the distinction between *aliud* and *peius*).

laws<sup>82</sup> and in harmonization projects. The Principles of European Law on Service Contracts extend *obligations de résultat* to construction, processing, storage and design contracts on the basis that, in these contexts, a reasonable service-recipient in the same circumstances as the service-recipient concerned would have no reason to believe there was a substantial risk that the result envisaged would not be achieved by the service.<sup>83</sup> This is useful guidance for a court which finds itself considering the kinds of service contracts which might attract strict liability standards found in Article 35(2) CISG. Article 35(2) CISG has already been applied to determine the conformity of service obligations where strict liability was imposed, for example, on obligations to develop software<sup>84</sup> or to dismantle a factory.<sup>85</sup>

Secondly, Article 35(2) CISG can also be used to determine conformity where the service provider owes an *obligation du moyen* or duty of reasonable care and skill. As mentioned above, Article 35(2) CISG provides an objective standard to evaluate conformity. In cases of *obligations de moyens*, one would simply ask: “what degree of reasonable care and skill would be expected in these circumstances from an objectively reasonable perspective?”. In each circumstance, this could encompass any particular purpose, sample or packaging. As such, courts applying Article 35(2) CISG to service contracts would essentially be replacing the word “goods” in the Article with the word “services.” This exercise of reading words into the CISG can be justified through one of two routes within the CISG. Firstly, according to Article 6 CISG, parties may vary the effect of any of the Convention’s provisions. As such, parties could agree to vary Article 35(2) CISG to replace the word “goods” with “services.”<sup>86</sup> Secondly, the tribunal could undertake common-sense gap-filling to arrive at such a reading of Article 35(2) CISG.<sup>87</sup> The argument for such an interpretation of Article 35(2) CISG would apply a fortiori if parties to service contracts expressly opt into the CISG.

Articles 41 and 42 CISG require the seller to deliver goods which are free from, firstly, *general* third-party property rights or claims and, secondly,

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<sup>82</sup> Some types of service contracts attract implied terms of strict liability in common law. *See supra* Part III.B.

<sup>83</sup> BARENDRECHT ET AL., *supra* note 51, at 134.

<sup>84</sup> Cour d’appel [CA] [regional court of appeal] Lyon, 3e civ., Dec. 18, 2003, 01/02620 (Fr).

<sup>85</sup> Cour d’appel [CA] [regional court of appeal] Grenoble, com., Apr. 26, 1995, 93/2879 (Fr).

<sup>86</sup> SCHLECHTRIEM, *supra* note 70, at 30.

<sup>87</sup> SCHLECHTRIEM, *supra* note 76.

third party *intellectual property* rights or claims. In the services context, while issues of general third-party rights will not usually pose a problem, third party intellectual property rights or claims are an especially important issue, one which the CISG is more adept than domestic systems at resolving. Take, for example, a scenario where a third-party developer has an intellectual property right to software that was developed in India and used in Germany. Domestic systems require the seller to guarantee that the goods are free from third party intellectual property rights worldwide.<sup>88</sup> This would impose on the Indian developer the onerous task of investigating all potentially conflicting intellectual property rights worldwide. By contrast, Article 42 CISG requires the seller to guarantee only that the goods are free from third party intellectual property rights *under the laws of narrow categories of countries*: the place where the goods would be resold or the place of the buyer's business. This resolves the issue faced by service providers who would otherwise be expected to have knowledge of all potentially conflicting rights worldwide. Thus, Articles 41 and 42 CISG are not only equally applicable to service contracts, they are also more suitable than domestic provisions which would otherwise govern this aspect of the contract.

The CISG obliges the buyer to examine the goods (Article 38 CISG) and give notice to the seller of any non-conformity (Article 39 CISG) or third-party rights or claims (Article 43 CISG). If the buyer fails to do so, it loses the right to rely on potential non-conformity of the goods or on Articles 41 and 42 CISG. Because of the absence of comprehensive, codified rules on service contracts in domestic jurisdictions, it might, at first glance, have seemed unlikely that legal systems would have considered the issue of notice requirements in service contracts. However, it appears that notice requirements do apply to service contracts in some contexts. For instance, under the Directive on Package Holidays,<sup>89</sup> the consumer must communicate any failure in the performance of a contract to the supplier of the service. If such a duty is appropriate to impose on consumers, it is *a fortiori* appropriate to impose on commercial service users. This is nothing more than an expression of the principle of good faith and fair dealing in international

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<sup>88</sup> RUTH JANAL, THE SELLER'S RESPONSIBILITY FOR THIRD PARTY INTELLECTUAL PROPERTY RIGHTS UNDER THE VIENNA SALES CONVENTION 205–26 (2008).

<sup>89</sup> Council Directive 90/314, art. 5, 1990 O.J. (L 158) 62 (EEC).

commerce. Thus it does not come as a surprise that the Principles of European Law on Service Contracts oblige the service-recipient to notify the service provider if it discovers that the service will fail or has failed to achieve the result it envisaged,<sup>90</sup> and that the consequences of the service-recipient's failure to notify range from losing the right to rely on non-conformity to compensating the service provider.<sup>91</sup> It is also unsurprising that courts have already applied the rights and duties under Article 39 CISG to service obligations, notably in a contract for the development of software<sup>92</sup> and in a contract for design, installation and waste management.<sup>93</sup>

According to Article 80 CISG, a party may not rely on a failure of the other party to perform to the extent that such failure was caused by the first party's act or omission. Underlying Article 80 is the general principle that each party must account for its own sphere of risk.<sup>94</sup> This principle is not restricted to sales contracts; it is generally applicable to any kind of contract,<sup>95</sup> including service contracts.

In conclusion, the CISG's provisions on conformity, third party rights and claims, examination and notice of defects and causation are equally suitable to establish whether contracts for the supply of services have been breached.

## 2. Remedies

The remedies provisions of the CISG are also suitable to govern service contracts. Both sale of goods and supply of service provisions are specialized rules of general contract law, and so it follows that the rules governing breach of a services contract are virtually the same as those governing breach of a sales contract.<sup>96</sup> There is no question that the seller's remedies against the

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<sup>90</sup> BARENDRECHT ET AL., *supra* note 51, at 278.

<sup>91</sup> *Id.* at 283–85.

<sup>92</sup> Cour d'appel [CA] [regional court of appeal] Lyon, 3e civ., Dec. 18, 2003, 01/02620 (Fr.).

<sup>93</sup> Landgericht [LG] [district court] Mainz, Nov. 26, 1998, 12 HKO 70/97 (Ger.); *see also* Rechtbanken van Koophandel [Kh.] [commerce tribunals] Hasselt, Feb. 4, 2004, AR 04/267 (Belg.) (stating that the rules on notice in the CISG applied to the services part of the relevant contract).

<sup>94</sup> PETER SCHLECHTRIEM & INGEBORG SCHWENZER, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS 1155–56 (Ingeborg Schwenzer ed., Oxford Univ. Press 4th ed. 2016); *see also* Contracts for the International Sale of Goods art. 42(2)(b), 1489 U.N.T.S. 3.

<sup>95</sup> Art. 7.1.2 UNIDROIT Principles 2010.

<sup>96</sup> Law Commission, *Law of Contr act: Implied Terms in Contracts for the Supply of Services* (1979), Law Com. No. 95 (U.K.).

buyer (set out in Article 61 CISG) are very well suited for the service provider too. Thus, the service provider may claim for the price (Article 62 CISG), fix additional time for the service-recipient's performance (Article 63 CISG), declare the contract avoided upon fundamental breach (Article 64 CISG) and specify certain features of the service itself in default of the service-recipient doing so as required under the contract (Article 65 CISG). It is suitability of the buyer's remedies against the seller for the service-recipient that is more controversial. Thus, the following remedies will be considered in the context of service contracts: specific performance (Articles 28, 46(2) and 46(3) CISG), avoidance (Articles 49(1)(a), 51 and 25 CISG), damages (Article 74 CISG), exemption (Article 79 CISG) and price reduction (Article 50 CISG).

Under the CISG, while specific performance is generally available, a court is not bound to enter a judgment for specific performance unless it would do so under its own law in respect of similar contracts (Article 28 CISG). The lack of case law on Article 28 CISG suggests that, in practice, commercial parties do not rely on this expansive remedy.<sup>97</sup> In cases of non-conformity, specific performance assumes the guise of replacement and repair, addressed in Articles 46(2) and 46(3) CISG. It has been argued that specific performance cannot be available in-service contracts because defective performance cannot be cured without contemporaneous cooperation from the aggrieved party.<sup>98</sup> This objection is misplaced. It is in the very nature of an order for specific performance, in a sales context or any other, that the aggrieved party's cooperation will be required, not least in its patience while the defective performance is cured. There does not appear to be any good reason why the CISG's remedy of specific performance cannot also be suitably applied to service contracts.<sup>99</sup> Indeed, Article 46(3) CISG has already been used to determine whether a seller had cured its defective dismantling of a factory by replacing the parts which were damaged during the dismantling.<sup>100</sup>

Avoidance is the most onerous remedy for breach of contract. Thus, in line with the common law approach, both the CISG and the UNIDROIT

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<sup>97</sup> SCHLECHTRIEM & SCHWENZER, *supra* note 94, at 483–85.

<sup>98</sup> KARNER & KOZIOL, *supra* note 5, at 138.

<sup>99</sup> *Id.* at para. 75.

<sup>100</sup> Cour d'appel [CA] [regional court of appeal] Grenoble, com., Apr. 26, 1995, 93/2879 (Fr).



principles grant avoidance only in cases of fundamental breach.<sup>101</sup> That many domestic legal systems follow this approach, applying it to all kinds of contracts including service contracts,<sup>102</sup> suggests it is equally appropriate for the CISG to approach the avoidance of service contracts on the same basis. Indeed, Articles 25 and 49 CISG have already been used to determine whether breach of an obligation to dismantle a factory can amount to fundamental breach and thereby justify avoidance.<sup>103</sup> As Schlechtriem rightly explains, if the non-performance itself constitutes fundamental breach, such as when installation is not completed by a stipulated date, the services portion of the contract can be avoided, enabling the buyer to purchase services elsewhere and claim the additional expenses as damages under Article 75 CISG.<sup>104</sup> Likewise the so-called *Nachfrist* principle,<sup>105</sup> according to which an original non-fundamental breach arising from non-performance may constitute a fundamental breach if the party does not adhere to the additional period fixed for performance, is suitable to apply to service contracts.<sup>106</sup>

Modern provisions on damages, such as those in Article 74 CISG or Articles 7.4.2 and 7.4.4 UNIDROIT Principles, provide for full compensation of reasonably foreseeable losses flowing from the breach. This rule can be traced to the seminal common law case *Hadley v. Baxendale*

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<sup>101</sup> Contracts for the International Sale of Goods arts. 49(1)(a), 51, 25, 1489 U.N.T.S. 3; arts. 7.3.1(1), (2) UNIDROIT Principles 2010.

<sup>102</sup> Civil law countries contain this remedy within the general part of their codes of obligations, thus it is applicable to all contracts: *See* CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1124-30 (Fr.); BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 323 (Ger.); CÓDIGO CIVIL [C.C.] [CIVIL CODE], § 1124 (Spain); OBLIGATIONENRECHT [OR], CODE DES OBLIGATIONS [CO], CODICE DELLE OBBLIGAZIONI [CO] [CIVIL CODE] Mar. 30, 1911, arts. 97, 107–09. Common law countries do not appear to differentiate between the operation of this remedy in the sales and services context, as seen in leading case law. *See Hong Kong Fir Shipping Co Ltd v. Kawasaki Kisen Kaisha, Ltd*, [1962] 1 All ER 474, [1962] 2 WL 474 (concerning an owner's services obligation to maintain the ship in "seaworthy condition"); *Koompahoo Local Aboriginal Land Council v. Sanpine Pty Ltd* (2007) 233 CLR 115; FREDERICK POLLOCK & DINSHAH FARDUNJI MULLA, INDIAN CONTRACT & SPECIFIC RELIEF ACTS 1488 (Butterworths 13th ed. 2006); *Printing Center of Texas, Inc. v. Supermind Pub. Co.*, 669 S.W.2d 779 (1984) (U.S.).

<sup>103</sup> Cour d'appel [CA] [regional court of appeal] de Grenoble, Apr. 26 1995, 93/4879, CISG-online 154.

<sup>104</sup> Peter Schlechtriem, *Interpretation, Gap Filling and Further Development of the UN Sales Convention*, 16 PACE INT'L L. REV. 279, 295–96 (2004).

<sup>105</sup> *United Nations Convention on Contracts for the International Sale of Goods*, U.N. Doc. A/CONF.97/18, art. 49(1)(b) (1983) (opened for signature Apr. 11, 1980); INT'L INST. FOR THE UNIFICATION OF PRIVATE L. [UNIDROIT], Principles of International Commercial Contracts arts. 7.3.1(3), 7.1.5.

<sup>106</sup> Schlechtriem, *supra* note 104, at 295–96.

which, incidentally, concerned the breach of a service obligation in a contract for the transport of a crankshaft.<sup>107</sup> Courts have not in the past had problems applying Article 74 CISG to service obligations in mixed contracts, for instance, in a contract for construction, transport, assembly and initial operation of a processing center.<sup>108</sup> There should be little dispute that the CISG damages provisions can be applied to service contracts.<sup>109</sup>

Article 79 CISG exempts a party from liability in damages if breach is due to an unforeseeable impediment beyond its control.<sup>110</sup> It represents a middle ground between the narrow common law doctrine of frustration and the wider fault principle found in most civil law jurisdictions. In most cases, the decisive element is whether the impediment was “beyond [the party’s] control.” As with its application in sale of goods cases, Article 79 CISG is equally capable of exempting a party to a services contract that is under an *obligation de résultat*. The question remains how Article 79 CISG would regulate an alleged breach of *obligations de moyens*. If a party complies with its duty to take reasonable care and skill, there is no breach under Article 35 CISG and so exemption under Article 79 CISG would not be in issue. If, however, a party does not comply with its *obligation de moyens* and so is in breach under Article 35 CISG, Article 79 CISG might be pleaded as a way of exempting the promisor from paying damages. This could happen in a situation where it is not only the service provider that is responsible for the breach. For instance, in a contract for the delivery, erection, and installation of wall partitions, the court applied Article 79 CISG to exempt the supplier from liability for the defective installation (unintended gaps between the top of the partitions and the ceiling) because the defective installation was carried out by a third party.<sup>111</sup> Thus, the service provider is exempted because the failure to perform is due to an impediment beyond its control. One of the deciding factors should, as with sale of goods cases, be the sphere of risk

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<sup>107</sup> [1854] EWHC J70.

<sup>108</sup> Tribunal de Commerce [Comm.] [Commerce Tribunal] de Namur, Jan. 15, 2002, RG No. 985/01, CISG-online 759; *see also* Obergericht [OGer] [Appellate Court] Aargau Mar. 3, 2009, ZOR.2008.16/eb (Switz.); Obergericht [OGer] [Appellate Court] Dec. 19, 2006, OG 2006/19 (Switz.).

<sup>109</sup> Schlechtriem, *supra* note 104, at 295.

<sup>110</sup> *See also* INT’L INST. FOR THE UNIFICATION OF PRIVATE L. [UNIDROIT], Principles of International Commercial Contracts art. 7.1.7; CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1218 (Fr.) now follows this approach.

<sup>111</sup> Tribunale d’appello [Court of Appeal] Lugano, Oct. 29, 2003, 12.2002.181, CISG-online 912 (Switz.).

service provider. Only external objective circumstances outside of the sphere of risk of the service provider should be taken into account. When defining the sphere of risk, the court should consider the contractual allocation of risk (alternatively, practices and usages of the parties), the reasonableness of the service provider's failure to take the impediment into account at the time of contract formation, and the difficulty for the service provider to overcome the impediment or its consequences.<sup>112</sup> Increased costs of performing the service should not suffice for exemption. As such, Article 79 CISG may govern service contracts.

In cases of non-conformity, the CISG gives the buyer a right to reduce the purchase price.<sup>113</sup> While this remedy is indispensable in civil law because of the exceptional nature of a damages award, it is not known to the common law. For this reason, it is disputed whether the price reduction remedy can be applied to service contracts. Some authors opine that price reduction is not suitable in a services context because there is no market price for services.<sup>114</sup> This argument is not convincing. Price reduction is nothing more than a partial avoidance of the contract. The French Civil Code now provides for price reduction in its general part of obligations thus applying it to all kinds of contracts, including service contracts.<sup>115</sup> Following this reasoning, the CISG price reduction remedy should also be applied to service contracts.<sup>116</sup>

A further argument made against the inclusion of services in the ambit of the CISG is that services are typically rendered under long-term contracts.<sup>117</sup> In these contexts, an important issue is the effect on long-term obligations of a short-term breach of contract—an issue, it is argued, the CISG is not suitable to govern. However, the CISG itself contains a provision dealing with installment contracts that is suitable for any long-term contract. According to Article 73(1) CISG, in a case of fundamental breach of contract, a partial non-conformity primarily allows the obligee to avoid the contract

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<sup>112</sup> Schwenger, *supra* note 94, art. 79, ¶¶ 12–15.

<sup>113</sup> *United Nations Convention on Contracts for the International Sale of Goods*, U.N. Doc. No. A/CONF.97/18, art. 50 (1983) (opened for signature Apr. 11, 1980).

<sup>114</sup> Kerstin Tillmanns, *Strukturfragen des Dienstvertrages: Leistungsstörungen im freien Dienstvertrag und im Arbeitsvertrag* 402, *et seq.* (Mohr Siebeck 2007); *cf.* Ernst Karner & Helmut Koziol, *Zur Anwendbarkeit des UN-Kaufrechts bei Werk- und Dienstleistungen*, note 4, ¶ 81.

<sup>115</sup> CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1223 (Fr.).

<sup>116</sup> *See* KARNER & KOZIOL, *supra* note 5; Schlechtriem, *supra* note 104.

<sup>117</sup> KARNER & KOZIOL, *supra* note 5, at ¶ 68 n.138.

with respect to the part concerned. If there are good grounds to conclude that a fundamental breach will occur with respect to future performances, the promisee may avoid the contract for the future (Article 73(2) CISG).<sup>118</sup> In addition, a buyer who declares the contract avoided in respect of any single performance may at the same time declare the contract void in respect of past or future performances of the same obligation if the respective obligations are interdependent (Article 73(3) CISG).<sup>119</sup> Evidently, these provisions are capable of governing services rendered under long-term contracts.

Finally, it is further argued that service contracts typically require both parties to work closely together, and that the sales provisions of the CISG are incapable of dealing with this kind of relationship.<sup>120</sup> However, practice shows that such close cooperation is also a common feature of complex sales contracts. Any questions of apportioning liability between the parties can be addressed using Article 80 CISG, which allows for an attribution of liability to the extent that the failure has been caused by the respective party.<sup>121</sup>

In sum, both the liabilities and remedies provisions of the CISG are suitable to govern service contracts. To overcome the obstacles posed by Article 3(2) CISG and for the avoidance of doubt, parties to contracts containing service obligations may wish to “opt-in” to the application of the CISG to their contracts.<sup>122</sup>

## V. CONCLUSION

Both the CISG and its earlier iterations envisaged a convention that would govern the international sale of goods. Despite allowing the Convention to govern service obligations, its drafters thus limited its application to those contracts that are, in the main, for the sale of goods. While the decision to exclude service contracts (in their guise either as pure service contracts or as mixed contracts which are predominantly for the supply of services) may have been a reasonable one, it was nonetheless a decision without valid justification. The exclusion aimed to secure the overriding aim of consensus by reflecting domestic legal tradition on the

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<sup>118</sup> CISG, *supra* note 1, at art. 73(2).

<sup>119</sup> *Id.*

<sup>120</sup> KARNER & KOZIOL, *supra* note 5, at ¶¶ 67, 86.

<sup>121</sup> Schwenger, *supra* note 92, at art. 80, ¶ 7 *et seq.*

<sup>122</sup> *Id.* at art. 6, ¶ 31.

issue of the scope of the Convention. Yet it failed to recognize the difficulties associated with such differential treatment that domestic jurisdictions themselves face: the absence of a clear and consistent basis upon which to distinguish sales and service contracts, and the failure to treat like cases alike by imposing starkly different consequences of classification.

Amidst the confusing and outdated distinctions drawn by domestic jurisdictions, the CISG holds great potential to lead the way in the application of a single legal instrument to contexts in which sales and services are closely intertwined and in contexts of pure service contracts. This approach makes theoretical and practical sense. Above all, it would greatly enhance predictability in international trade by avoiding conflict-of-laws disputes about the law applicable to the services part of the contract. The Convention was expressly designed to apply to service obligations, albeit those contained within sales contracts, and it has indeed been so applied without difficulty. This supports the proposition that the Convention in its current form is suitable to govern service contracts.