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SALES LAW BEYOND SALES CONTRACTS: APPLICABILITY AND
APPLICATIONS OF THE CISG TO NON-SALES TRANSACTIONS
(THE CASE OF COUNTERTRADE AND BARTER TRANSACTIONS)

Marco Torsello



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I. INTRODUCTION

As thoughtfully noted by a prominent scholar in the field of supranational uniform commercial law:

These are not happy days for international commercial law. The anti-protectionist winds that started to blow in Bretton Woods back in 1945 have lost by now much of their vigour. With that, vast sectors of public opinion are no longer convinced that free commerce and multilateral economic cooperation at a global or regional level are a powerful factor of peace and prosperity.¹

Free commerce and multilateral economic cooperation have long played the role of economic premises and theoretical underpinnings of the international unification of private and commercial law and have consistently been invoked as justification for the efforts put into the legislative unification of contract law. The Preamble to the 1980 United Nations Convention on Contracts for the International Sale of Goods (hereinafter “CISG” or “Convention”) is an exemplary acknowledgment of the foregoing, in that, after referring to the objectives set forth in the resolutions adopted by the sixth special session of the General Assembly of the United Nations on the establishment of a “New International Economic Order,”² it states explicitly that the States parties to the CISG adopted the Convention:

Considering that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States, [and]

Being of the opinion that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade.³

The current political trend, however, seems to be moving toward the emergence of a form of *neo-sovereinism*, characterized by a focus on purely national interests, skepticism toward multilateral economic cooperation and

¹ Alberto Mazzoni, President, Int’l Inst. for the Unification of Private Law, International Commercial Law Today: Old Habits and New Challenges (Sept. 14, 2017), in 32 DIR. COMM. INT. 829, 829 (2018).

² See G.A. Res. 3201 (S-VI), Declaration on the Establishment of a New International Economic Order (May 1, 1974).

³ U.N. Comm’n on Int’l Trade Law, United Nations Convention on Contracts for the International Sale of Goods, pmbl. Apr. 11, 1980, 1489 U.N.T.S. 3 [hereinafter CISG].

a marked inclination toward using trade wars (i.e., tariffs, import restrictions and the like) in international relations.

An indirect confirmation of the loss of appeal of multilateral cooperation in international commercial law may be drawn from the decrease in attention paid by uniform-law-making agencies to the drafting of international uniform commercial law conventions.

Unlike the phase that followed the (successful) adoption of the CISG, when several other initiatives were promoted with the view to creating a web of international uniform contract law conventions,⁴ in recent times the attention has shifted to soft law instruments, such as the UNIDROIT Principles of International Commercial Contracts,⁵ the (2000) UNCITRAL Legislative Guide on Privately Financed Infrastructure Project,⁶ the (2007) UNCITRAL Legislative Guide on Secured Transactions,⁷ the (2008) UNIDROIT Model Law on Leasing,⁸ the (2011) UNCITRAL Model Law on Public Procurement,⁹ the (2015) UNIDROIT-FAO-IFAD Legal Guide on Contract Farming¹⁰ and the (2017) UNCITRAL Model Law on Secured Transactions: Guide to Enactment,¹¹ just to mention a few.

All in all, it is apparent that uniform-law-making agencies have shifted their attention to soft law instruments, which by definition are more flexible and adaptable instruments, yet lacking the enforceability and (possibly) normativity of hard law ones, as they express the aspiration toward their

⁴ For further references on the impact of the CISG on subsequent uniform law conventions, see MARCO TORSSELLO, COMMON FEATURES OF UNIFORM COMMERCIAL LAW CONVENTIONS: A COMPARATIVE STUDY BEYOND THE 1980 UNIFORM SALES LAW (2004).

⁵ Int'l Inst. for the Unification of Private Law [UNIDROIT], *UNIDROIT Principles of International Commercial Contracts* (4th ed. 2016), <https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-201> [hereinafter PICC].

⁶ U.N. COMM'N ON INT'L TRADE LAW [UNCITRAL], LEGISLATIVE GUIDE ON PRIVATELY FINANCED INFRASTRUCTURE PROJECTS, U.N. Sales No. E.01.V.4 (2001).

⁷ U.N. COMM'N ON INT'L TRADE LAW [UNCITRAL], LEGISLATIVE GUIDE ON SECURED TRANSACTIONS, U.N. Sales No. E.09.V.12 (2010).

⁸ Int'l Inst. for the Unification of Private Law [UNIDROIT], *UNIDROIT Model Law on Leasing* (2008), <https://www.unidroit.org/english/documents/2008/study59a/s-59a-17-e.pdf>.

⁹ U.N. COMM'N ON INT'L TRADE LAW [UNCITRAL], UNCITRAL MODEL LAW ON PUBLIC PROCUREMENT, U.N. Doc. A/66/17, U.N. Sales No. E.14.V.1 (2011).

¹⁰ Int'l Inst. for the Unification of Private Law [UNIDROIT] et al., *UNIDROIT/FAO/IFAD Legal Guide on Contract Farming* (2015), <https://www.unidroit.org/english/guides/2015contractfarming/cf-guide-2015-e.pdf>.

¹¹ U.N. COMM'N ON INT'L TRADE LAW [UNCITRAL], UNCITRAL MODEL LAW ON SECURED TRANSACTIONS: GUIDE TO ENACTMENT, U.N. Doc. A/71/17 (2017).

progressive transformation into hard law, whether in the form of domestic statutes (which may be regarded as the hard-law target of model laws) or in the form of supranational usages (which may be regarded as the main form of consolidation into law of collections of principles).¹²

The shift from the production of hard law legislative instruments in the form of treaties and conventions to that of soft law instruments, in the form of principles, codes of conduct, model laws, legal guides and the like, could be understood as the acknowledgment of the fact that more ambitious projects, aimed at the creation of hard law uniform instruments are doomed to fail. In fact, many examples may be put forward in support of this conclusion, offering a long list of conventions adopted after the CISG, which never reached the minimum number of ratifications necessary for their entry into force,¹³ or which barely made it to enter into force, but are applicable only in very few States and almost never applied in practice.¹⁴

With all this in mind, the observer turning back to the CISG is faced with a relevant interpretative question. Although the degree of success may be questioned on the grounds that parties often opt-out of the Convention,¹⁵ it is undeniable that the CISG is a significant example of a successful

¹² For an analysis of soft law, its genealogy and characters, and further bibliography, see Marco Torsello, *Storing Clouds in a Jar: Lex Mercatoria, Soft Law and Codification in Transnational Commercial Law*, 7 *EUROP. INT'L ARB. REV.* 101 (2018).

¹³ Examples of Conventions that never entered into force include the (1983) UNIDROIT Convention on Agency in the International Sale of Goods, adopted in Geneva on February 17, 1983; the (1988) United Nations Convention on International Bills of Exchange and International Promissory Notes; the (1991) United Nations Convention on the Liability of Operators of Transport Terminals in International Trade; the (2001) United Nations Convention on the Assignment of Receivables in International Trade; and the (2009) UNIDROIT Convention on Substantive Rules for Intermediated Securities.

¹⁴ Examples of Conventions that have formally entered into force but are rarely applied in practice include the (1988) UNIDROIT Conventions on International Factoring and International Financial Leasing, both adopted in Ottawa on May 28, 1988, which are both in force in France, Hungary, Italy, Latvia, Nigeria, Russian Federation, and Ukraine, while the Factoring Convention is also in force in Belgium and Germany and the Financial Leasing Convention is also in force in Belarus, Panama and Uzbekistan; the (1995) United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, which is in force only in Belarus, Ecuador, El Salvador, Gabon, Kuwait, Liberia, Panama, and Tunisia; the (2005) United Nations Convention on the Use of Electronic Communications in International Contracts, which is in force only in Azerbaijan, Cameroon, Congo, Dominican Republic, Fiji, Honduras, Montenegro, Paraguay, Russian Federation, Singapore, and Sri Lanka.

¹⁵ Statistical data on parties opting-out of the CISG are still not entirely clear, given the difficulty of assessing whether, for instance, the lack of a contractual choice of law, or the choice of the law of a contracting State, leading to application of the CISG, results from the mere failure to consider the issue of the applicability of the Convention, or is an implicit expression of consent to its application. Other papers in this same issue of the *J.L. & COMM.* address this aspect in greater detail.

convention, at least from the standpoint of the number of contracting States, in a general context of multiple failures and of growing generalized skepticism toward the international unification of commercial law through legislative instruments. The question thus arises whether, in the interpretation and application of the CISG, the context should at all be considered and, if so, whether it should lead to a restrictive interpretation of the Convention in light of an alleged generalized disfavor toward the legislative unification of commercial law, or, to the contrary, support a more expansive interpretation and application of the CISG in light of the fact that other international uniform commercial law conventions are unlikely to become available to business operators in the near future.

This Paper will proceed as follows: Section II will focus on the implications of the contextual interpretation of the CISG and will introduce the discussion on the applicability of the CISG to non-sales transactions. The section will then comment on Section II.A. the possibility of an interpretative extension of the CISG beyond what are typically qualified as sales contracts and Section II.B. the possibility to apply the CISG as a source of general principles of international contract law in cases where the Convention would not *per se* be applicable. Section III will then offer a practical overview of applications of the CISG to non-sales transactions by focusing, in particular, on countertrade and barter transactions. Section IV will draw some conclusions.

II. APPLICABILITY OF THE CISG TO NON-SALES TRANSACTIONS: CONTEXTUAL INTERPRETATION OF THE CISG AND ITS IMPLICATIONS

Although the literal interpretation of its text should be the starting point for the interpretation of the Convention,¹⁶ the fact that the context should also be taken into consideration seems to be confirmed by the reference contained in Article 7 of the CISG to the “*international character*” of the Convention for the purpose of its interpretation.¹⁷ However, what weight, if any, should be given to the (presumptively) prevailing political waves, which tend by nature to ebb and flow as time goes by, is a more troublesome question. In fact, no answer to that question may be drawn from the other interpretative

¹⁶ Sieg Eiselen, *Literal Interpretation: The Meaning of the Words*, in CISG METHODOLOGY 61 (Andre Janssen & Olaf Meyer eds., 2009).

¹⁷ Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. PA. L. REV. 687 (1998).

criteria set forth in Article 7 of the CISG. Both the “*need to promote uniformity*” in the application of the Convention and the need to promote “*good faith in international trade*” are, in principle, compatible with either a restrictive or an expansive interpretation of the Convention. Additionally, this does not provide guidance as to the relevance to be attributed to political trends and attitudes. It seems, instead, more convincing to posit that the “international character” of the CISG requires the interpreter to take into account the context in which the Convention is applied, thus giving weight, directly or indirectly, to the socio-political situation—to the same extent, for instance, the socio-political context has an inevitable (although indirect) impact on the notion of public policy relevant to a conflict-of-laws or judgment recognition analysis.

The conclusion that the socio-political context should be taken into account when interpreting the CISG, however, does not *per se* support any specific conclusion as to what type of implications the current socio-political context should entail. In fact, it is posited here that the current socio-political context of emerging *neo-souverainisme* does not imply, nor does it require, a restrictive interpretation of the CISG, whereas the analysis of the needs and demands of commercial operators and the stalemate in the process of international unification of commercial law through conventions may support the opposite conclusion that an expansive interpretation and application of the Convention is appropriate.

Indeed, the emerging wave of *neo-souverainisme* cannot contradict the position that supports the benefits of the international unification of substantive commercial law. Unification eliminates legal barriers between legal systems by creating a “common bridge” between different jurisdictions.¹⁸ As spelled out in the Preamble of the CISG and of most other uniform law conventions, the adoption of uniform rules, by removing legal barriers, promotes the development of international trade in that it reduces uncertainty and unpredictability as to the applicable law.¹⁹ In turn, the reduction of uncertainty and unpredictability reduces the costs and risks involved in any international transaction. On the other hand, the CISG contains only supplemental, default rules, which may be derogated from or

¹⁸ Peter M. Gerhart, *The Sales Convention in Courts: Uniformity, Adaptability and Adoptability*, in *THE INTERNATIONAL SALE OF GOODS REVISITED* 77, 79 (P. Šarčević & P. Volken eds., 2001).

¹⁹ CISG, *supra* note 3, at pmb1.; see also René David, *The International Unification of Private Law*, in *2 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW* 212 (1969).

entirely excluded by the parties under Article 6 of the CISG, whereas the “validity exception” under Article 4 of the CISG is conceived so as to let the uniform text give way to domestic law whenever public policy concerns are at stake.

Furthermore, in light of the foregoing considerations, it seems correct to affirm that the unification of substantive law is to be preferred over the unification of private international law.²⁰ Indeed, whether the private international law rules applicable in a given case are uniform ones or domestic ones, it is apparent that private international law requires a two-step process in order to determine the rules governing an international transaction. First, the private international law rule applicable to the transaction must be identified; second, the applicable domestic substantive rule applicable by virtue of the relevant private international law provision must be interpreted and applied.²¹ Even if one did not consider either the intrinsic difficulties and uncertainties involved in the concrete application of the private international law approach, or those accompanying the interpretation and application of the foreign substantive law when the forum’s private international law rules dictate application of foreign law, one would still acknowledge the much lower complexity of the process when uniform substantive law is applied “directly.” In fact, uniform substantive law directly provides for the rules governing the international transaction, thus making identification of the law governing the transaction a single-step process. Hence, if one assumes that the costs and risks involved in the interpretation and application of both the uniform and domestic substantive rules are equal, one must conclude that the costs and risks involved in the private international law’s two-step process are higher, the difference being those associated with the additional preliminary step (i.e., the identification of the private international law rule applicable to the case at hand).

As far as the methods of unification are concerned, as already remarked, it is undeniable that in recent years the attention has largely shifted from legislative unification through conventions to principles-based unification

²⁰ See Franco Ferrari, *CISG and Private International Law*, THE 1980 UNIFORM SALES LAW: OLD ISSUES REVISITED IN THE LIGHT OF RECENT EXPERIENCES 20 (F. Ferrari ed., 2003).

²¹ For a similar analysis in case law, see Tribunale [District Court] di Vigevano, Italy, 12 luglio 2000 (It.), <http://cisgw3.law.pace.edu/cases/000712i3.html>.

instruments in the form of soft law.²² While this can be seen as an indication of skepticism toward legislative unification, it is posited here that the difficulties arose primarily as a result of the specific, very time-consuming and burdensome process of law-making by virtue of an international treaty, to be first agreed upon at the international level, and then accepted and adopted at the level of the individual contracting states.²³ The risk of investing considerable energy, time and resources on international conventions that might never come into force has understandably led international law-making agencies, such as UNCITRAL and UNIDROIT, to invest more on soft law instruments, as the basis of a more flexible approach toward unification of commercial law, which results in the immediate availability of the instrument among the sources of international commercial law (although with limited enforceability), without prejudice to the possible future transformation thereof in a hard law treaty or convention.

On the other hand, the shift from unification of commercial law through conventions to unification through soft law instruments confirms the need for the unification of international commercial law, while suggesting that the methods of unification deserve careful reconsideration. The foregoing comment may also be deemed relevant from a different perspective. Soft law instruments are primarily meant to be sources of rules to be incorporated by reference by the parties in their contract, or to be applied on the basis of their persuasive force as expression of general principles of commercial law. In the latter case, national courts or (more often) arbitral tribunals may look at soft law instruments as persuasive sources of law to be weighed against each other, as well as against sources of hard law, including national domestic laws and international conventions, irrespective of whether or not they are *per se* applicable in the case at hand. Therefore, not only does the shift from legislative unification to principles-based unification not support the conclusion that the CISG and other international uniform commercial law conventions should be given a more limited weight in the resolution of international commercial disputes, but, to the contrary, the increasing resort to soft law instruments as persuasive sources of law in the adjudication of

²² See Jürgen Basedow, *International Economic Law and Commercial Contracts: Promoting Cross-Border Trade by Uniform Law Conventions*, 23 UNIFORM L. REV. 1 (2018) (supporting international unification).

²³ See KATHARINA BOELE-WOELKI, UNIFYING AND HARMONISING SUBSTANTIVE LAW AND THE ROLE OF CONFLICT OF LAWS 64 (2010).

international disputes offers an additional approach, possibly leading to the application of the CISG in cases where it would not *per se* be applicable.

Against this backdrop, critiques on the benefits of the international unification of commercial law have typically focused on three aspects, none of which appear convincing.

The first critique stresses the genesis of uniform law conventions, which is the result of a compromise between competing legal cultures and interests, often reached to the detriment of the quality of the rules set forth in the convention in question,²⁴ thus increasing the impact of inefficient rules. However, arguments focusing on the quality of the final text of a uniform law convention, as relevant as they may be, appear to be misleading with respect to the issue at stake. Indeed, on the one hand, any new piece of legislation, even at the national level, brings about changes that, in a democratic legislative process, are largely the result of a compromise between (at the very least) competing interests and divergent social, political and cultural perspectives. On the other hand, arguments focusing on the purported inferior quality of the rules set forth in international conventions are misleading, as they do not consider uniform laws themselves, but rather the process of creating uniform law. It is certainly true that an inefficient uniform law increases the impact of inefficient rules, as it is true that a good uniform law increases the impact of efficient rules. In this respect, the question as to whether the methods that are, thus far, adopted to produce uniform law are appropriate is, beyond doubt, a crucial one. However, it is apparent that the debate about the intrinsic qualities of the legislative model to be adopted at the international level stands separate from the debate surrounding the advantages of uniform law *vis-à-vis* the traditional private international law approach.

The second critique to uniform law stresses the relational profile: uniform law reduces pluralism, cultural diversity and competition among legal systems,²⁵ thus hindering the possibility of developing and improving the law, and of adapting it to new circumstances on the basis of other legal systems' experience and expertise. This criticism may sound appealing to

²⁴ See, e.g., Barry Nicholas, *The United Kingdom and the Vienna Sales Convention: Another Case of Splendid Isolation?*, Address at Centro di Studi e Ricerche di Diritto Comparato e Straniero 3ff. (March 1993), <https://www.cisg.law.pace.edu/cisg/biblio/nicholas3.html>.

²⁵ See, e.g., Pierre Legrand, *Counterpoint: Law is Also Culture*, in *THE UNIFICATION OF INTERNATIONAL CONTRACT LAW* 245 (Franco Ferrari ed., 1998).

supporters of *neo-souverainiste* positions in light of its focus on the alleged protection of local cultural identities. However, this argument is unconvincing, in that it fails to take into due consideration the unification technique that is being adopted in the CISG and most other uniform law conventions. In particular, the argument seems to overlook the fact that the need for harmonized rules reflects the need for certainty and predictability of business operators. In this context, uniform law conventions make a distinction, which is relevant as to the instrument's sphere of application, between domestic and international transactions. The distinction is of great relevance, since only those transactions which qualify as international ones are governed by the uniform rules. It follows from this "two-tier" approach that uniform law does not displace domestic law regarding the transactions that fall outside the conventions' sphere of application. In this respect, the benefits of competition among different legal systems and those of legal diversity would seem to be better served by legislative unification of international commercial law, which pursues the reconciliation of different legal traditions,²⁶ rather than by other "spontaneous," yet less visible, forms of harmonization of the law, which often lead to the mere transplant of legal rules from more economically influential jurisdictions to other, less influential, ones. Furthermore, it is also relevant to recall that in the CISG and most other uniform commercial law conventions, the parties can exclude any applicable convention in its entirety and submit the transaction to the law of any specific jurisdiction, thus preserving the valuable mechanism of regulatory competition between legal systems.

The third critique to the legislative unification of commercial law stresses the operational profile of uniform law. Uniform law produces new rules which business operators and national courts are, most likely, not familiar with.²⁷ The "novelty" brought by a new Convention may thus lead to uncertainty as to how the uniform rules will be concretely implemented by the decentralized national courts that will be applying the Convention, resulting in additional transaction costs and "learning externalities." Although the difficulties arising from the "novelty" of uniform law conventions are undeniable, the long experience acquired with the CISG and with the promotion of its uniform interpretation now supports the conclusion

²⁶ See Alejandro Garro, *Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods*, 23 INT'L L. 443 (1989).

²⁷ See Steven Walt, *Novelty and the Risks of Uniform Sales Law*, 39 VA. J. INT'L L. 671, 672 (1999).

that this criticism is ill-grounded. It is now common knowledge, and a broadly accepted interpretative approach, that the decentralized national courts called upon to apply the CISG must take into account its international character, which in turn requires the courts to take into account the pre-existing international case law, not only in the jurisdiction of the adjudicating court, but also in other jurisdictions.

With the above caveats, it is confirmed that courts called upon to apply the Convention should construe the uniform text in the light of the broader context which the Convention is apart. In particular, in interpreting the CISG “regard is to be had to its *international character* and to the need to *promote uniformity*.” “Uniformity” represents the ultimate goal of the interpretative process, enhancing the autonomous interpretation of the Convention, which must therefore be conducted irrespective of any domestic notion.²⁸ However, while the ultimate goal of uniformity contributes little to the positive definition of the interpretive methodology to be adopted, the required regard to the “international character” seems a more fertile criterion.²⁹ The criterion at hand is of interest to those seeking positive methodological guidelines, not only because it imposes regard to court decisions irrespective of the location of the forum, but also because it suggests that there is an international context to consider, within which the Convention stands.

This argument does not overlook the fact that the interpretation of any uniform law convention must move from the text of the international instrument itself, and primarily search for the intention of its drafters.³⁰ On the contrary, it emphasizes the intention of the drafters by attempting to demonstrate that the drafters themselves took the international context into consideration, and in the text of any convention largely sought for solutions which either were coherently in line with those adopted in previous instruments, or were aimed at overcoming problems and inconsistencies which had emerged in the application of previous instruments.

Therefore, the CISG cannot be treated as a monad living its own life in the universe of international business transactions. The very fact that the CISG is not an exhaustive instrument and that it contemplates, and even

²⁸ See Franco Ferrari, *Homeward Trend: What, Why and Why Not*, 9 INTERNATIONALES HANDELSRECHT 8 (2009).

²⁹ For a similar distinction between the two criteria, see Gerhart, *supra* note 18, at 81–82.

³⁰ See Gary F. Bell, *Taking the Languages of the CISG Seriously*, in PRIVATE LAW, NATIONAL—GLOBAL—COMPARATIVE 143 (Andrea Büchler & Markus Müller-Chen eds., 2011).

requires, resort to external sources (namely, the domestic law applicable by virtue of the private international law rules of the forum) suggests that the Convention is meant to be interpreted and applied in conjunction with other sources of commercial law. Whether directly or indirectly, the context affects the way in which the Convention is interpreted and applied in practice.

It is argued here that the foregoing has relevant implications, not only with respect to the way in which relevant notions contained in the CISG are to be interpreted (including the notion of “sale” that is critical to describe the Convention’s sphere of application *ratione materiae*), but also in respect of the possible application of the CISG beyond its temporal or geographical sphere of application, in cases where the CISG would not *per se* be applicable, but can nonetheless be applied as an expression of general principles of international contract law.

A. The Interpretative Extension of the CISG’s Sphere of Application Ratione Materiae Beyond Sales Contracts: Notion of “Sale,” Mixed Contracts and More

Keeping in mind the ultimate goal of uniformity in the interpretative process and the need to consider the international character of the Convention, it seems correct to conclude that the interpretation of the CISG should favor the adoption of notions and solutions that promote the adoption of a common solution, rather than notions and solutions drawn from the domestic legal systems of the contracting states involved.

The foregoing is confirmed, for instance, by the largely prevailing view about the way in which the validity exception under Article 4 of the CISG must be interpreted. In most domestic legal systems issues such as fraud, mistake and misrepresentation are issues concerning the validity of a contract. However, this is not, in itself, sufficient to conclude that domestic law—and not the CISG—applies whenever an issue of this kind arises.³¹ To determine the pre-emption or concurrence of CISG’s and domestic law’s remedies and defenses, it is necessary to determine the scope of the so-called

³¹ Cf. Patrick C. Leyens, *CISG and Mistake: Uniform Law vs. Domestic Law: The Interpretative Challenge of Mistake and the Validity Loophole*, in *REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS* 3 (Pace Int’l Law Review ed., 2005).

“*validity exception*” laid down in Article 4(a) of the CISG.³² Scholarly writings and court decisions agree that the meaning of “validity” in Article 4(a) of the CISG must not be construed in light of domestic law, but rather in line with Article 7(1) of the CISG (i.e. in an autonomous and uniform fashion).³³ Therefore, validity issues pursuant to Article 4(a) are only those that are not dealt with—explicitly or implicitly—under the CISG, as confirmed by the carve-out “*except as otherwise expressly provided in this Convention*” contained in the *chapeau* of Article 4.³⁴ In other words, for a resort to domestic law to be admitted, there must be no solution to a given problem that can be derived from the CISG. Accordingly, where, in relation to a specific set of facts, the CISG provides solutions that are exhaustive and functionally equivalent to the otherwise applicable domestic remedies, the CISG pre-empts recourse to those domestic remedies, independent of any domestic labelling of the specific issue. In practice, this means that once a court or arbitral tribunal is confronted with an issue of “validity” as autonomously defined under the CISG, the court or arbitral tribunal has to identify the domestic law applicable to the contract and determine whether domestic remedies or defenses are available to the parties in the specific case. The court or arbitral tribunal then has to look into whether the CISG makes available solutions that are functionally equivalent to the domestic law remedies and defenses available to the parties. If so, the CISG pre-empts the corresponding domestic remedies and defenses. Where no functionally equivalent solutions are available under the CISG, the domestic law determines what remedies and defenses the parties can rely on *in concreto*.

If (1) domestic law is admitted solely because no solution to a given problem can be derived from the CISG and (2) the ultimate goal of the CISG is to promote uniformity by limiting the resort to domestic law, then interpretation of the CISG should favor a construction that broadens the

³² Franco Ferrari, *The Interaction Between the United Nations Conventions on Contracts for the International Sale of Goods and Domestic Remedies (Rescission for Mistake and Remedies in Tort Law)*, RABEL J. COMP. & INT’L PRIV. L. 52, 65–67 (2007).

³³ Ulrich G. Schroeter, *Defining the Borders of Uniform International Contract Law: The CISG and Remedies for Innocent, Negligent, or Fraudulent Misrepresentation*, 58 VILL. L. REV. 553, 557–58, 563 (2014); PETER HUBER & ALASTAIR MULLIS, *THE CISG: A NEW TEXTBOOK FOR STUDENTS AND PRACTITIONERS* 21, 23 (2007); Ferrari, *supra* note 32, at 63–64, 67.

³⁴ Milena Djordjević, *Article 4*, in UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG): A COMMENTARY 63 (Stefan Kröll et al. eds., 2011); HUBER & MULLIS, *supra* note 33, at 23.

Convention's sphere of application *ratione materiae*, thus limiting resort to domestic law.

The foregoing interpretative guideline should apply, in the first place, to the notion of a sale. In fact, the sphere of application *ratione materiae* of the CISG seems to be limited, by definition, to contracts for the sale of goods, although the Convention does not require the parties to label their contract as such.³⁵ The first question to be dealt with, therefore, is what constitutes a "sale."³⁶ The CISG, does not define the sales contract.³⁷ However, it does not make it impossible to define "sales contract" autonomously under the Convention.³⁸ A definition of "sales contract" can be inferred from Articles 30 and 53,³⁹ the provisions laying down the obligations of the parties to a sales contract governed by the CISG. Thus, independent from the civil or commercial character of the parties or of the contract itself (Article 1(3)), the "sales contract" can be defined as the contract "pursuant to which one party—the seller—is bound to deliver the goods and transfer the property in the goods sold and the other party—the buyer—is obliged to pay the price and accept the goods."⁴⁰ Accordingly, the essence of the sales contract lies in goods being exchanged for a price.

However, the sales contract as defined above, is not the only type of contract governed by the CISG. Contracts modifying an international sales contract also fall under the CISG's sphere of application, since they directly affect the rights and obligations of the parties to the international sales contract. Similarly, the agreement to conclude a contract for the international sale of goods subject to the CISG can also be governed by the CISG. Contracts for the delivery of goods by installments are also governed by the

³⁵ Foreign Trade Court of Arbitration, Serbian Chamber of Commerce, July 15, 2008, <http://cisgw3.law.pace.edu/cases/080715sb.html>.

³⁶ See CLAYTON P. GILLETTE & STEVEN D. WALT, THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS: THEORY AND PRACTICE 43 (2d ed. 2016).

³⁷ See RB Midden-Nederland (Netherlands), Mar. 25, 2015, <http://www.globalsaleslaw.org/content/api/cisg/display.cfm?test=2591>; Tribunale [District Court] di Forlì, 6 marzo 2012, <http://www.globalsaleslaw.org/content/api/cisg/urteile/2585.pdf>.

³⁸ See Martini E Ricci Iamino—Consortile Societa Agricola, an Italian Co. v. Trinity Fruit Sales Co., 30 F. Supp. 3d 954 (E.D. Cal. 2014).

³⁹ See Bundesgerichtshof [BGH] [Federal Court of Justice] May 28, 2014 (Ger.), <http://cisgw3.law.pace.edu/cases/140528g1.html>.

⁴⁰ Tribunale [District Court] di Forlì, 16 febbraio 2009 (It.), <http://cisgw3.law.pace.edu/cases/090216i3.html>.

CISG,⁴¹ as confirmed by the fact that Article 73 of the CISG deals with the consequences of a breach of such contracts.

In many other instances, the interpretative extension of the Convention's sphere of application *ratione materiae* beyond what is broadly accepted to be a contract of sale is more problematic and less accepted.

In commercial practice, it is undeniable that business transactions, even when they keep the basic structure of a sale, increasingly involve some form of service or other obligations "to do" something (rather than merely "to give"). In particular, this change may be regarded as a result of the fact that modern trade not only calls for ready-made goods, but also for goods to be manufactured, and therefore by extension, for the "sale" of labor and services. The tendency to also consider as sales those contracts which require further activities besides the traditional exchange of goods with money goes back many years. That is why one cannot be surprised that the drafters of the CISG extended its applicability also to contracts which, under some domestic laws, are work contracts. Indeed, Article 3(1) of the CISG deals with the CISG's applicability to contracts for the supply of goods to be manufactured or produced, whereas Article 3(2) of the CISG deals with contracts that include the supply of labor or other services amongst the obligations of the seller. Thus, the CISG contains some provisions which "confront the scholar with contractual schemes which have uncertain functional characteristics" and "which therefore raise the problem of whether such contracts fall under its sphere of application." This is true, above all, in those cases where the seller is liable not only for the transfer of title and the delivery of the goods, but also for providing labor or services.⁴² It is also true for those cases where the buyer has to supply part of the materials needed for the production of the goods.⁴³

Among the contracts falling under the latter category are those for the supply of goods to be manufactured or produced. By analogizing these contracts to the more "classical" contracts for the sale of goods, the drafters of the CISG made clear that the sale of goods to be manufactured or produced is as much subject to the CISG as the sale of ready-made goods. Domestic

⁴¹ See Supreme Court of France, Jan. 12, 2016, <http://www.globalsaleslaw.org/content/api/cisg/display.cfm?test=2698>.

⁴² CISG, *supra* note 3, art. 3(2).

⁴³ *Id.* art. 3(1); see also FRANCO FERRARI & MARCO TORSSELLO, INTERNATIONAL SALES LAW: CISG IN A NUTSHELL 113–19 (2d ed. 2018).

peculiarities are irrelevant for the purposes of determining whether the CISG applies to the international sale of made-to-order goods.

Under Article 3(1) of the CISG, contracts for the supply of goods to be manufactured or produced are, as a general rule, governed by the Convention. This conclusion is supported by the language of the provision, which states that “[c]ontracts for the sale of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.”⁴⁴ Therefore, unless the exception applies, the rule confirms the applicability of the CISG to contracts for the supply of goods to be manufactured or produced.⁴⁵

The applicability of the CISG extends not only to contracts for the sale of made-to-order goods. Article 3(2) of the CISG also extends to contracts pursuant to which the seller undertakes to supply labor or other services alongside the obligations to deliver the goods, transfer the property and hand over the documents, as long as the supply of labor or services does not constitute the “preponderant part” of the seller’s obligation.⁴⁶

The criterion provided by the CISG to determine whether the Convention applies to contracts which imply the supply of goods, along with labor or services is “preponderance.” However, it is important to stress that the provision is drafted in negative terms. In other words, Article 3(2) of the CISG indicates the conditions under which the CISG does not apply, rather than indicating when it applies. Accordingly, the Convention seems to have a negative, exclusionary effect (providing guidance as to when the CISG does not apply), rather than the positive, conclusive effect as to the applicability of the CISG.

Moreover, the notion of “preponderance” seems to justify the conclusion that not only must the quantity or importance of the labor or service-type of performance be greater than the sale-type of performance, but

⁴⁴ GILLETTE & WALT, *supra* note 36, at 46 (describing this type of transaction as a form of “bailment for services”).

⁴⁵ As far as the determination of the concept of “substantial part” is concerned, it is suggested that one should not only use a quantitative criterion, but also a qualitative one, as suggested by the French version of the Convention (which reads “*partie essentielle*”), as well as by the comparison with Article 3(2), which speaks of “*preponderant part*,” a concept referring to a quantitative determination.

⁴⁶ See PETER SCHLECHTRIEM & INGEBORG SCHWENZER, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 58 (Ingeborg Schwenzer ed., 2d ed. 2005).

it must be *significantly greater* in quantity or importance in order for the CISG to be excluded.

The foregoing conclusion may offer important guidance beyond the scope of Article 3(2) of the CISG. In fact, it is posited here that Article 3(2) of the CISG expresses a general principle on “mixed contracts,” applicable in all circumstances where a contract provides for a type of exchange which is compatible with the typical sales contract’s exchange of goods for money, while at the same time providing for additional obligations which are usually absent in the stereotypical sales contract.

A distinction must be made in this respect between *severable* and *unified* contracts, as the analysis that is being proposed is possible only with respect to unified (mixed) contracts.⁴⁷ This view, in turn, requires one to determine how to decide whether the transaction is unified or severable. Although the Secretariat’s Commentary suggests that this question should be decided based on applicable domestic law,⁴⁸ it is suggested here that the issue of the unitary or severable nature of the transaction must be dealt with on the basis of the Convention itself. This solution seems more in line with the mandate set forth in Article 7(1) of the CISG to promote the CISG’s uniform application. That said, it must be pointed out that the parties’ intention should, in any event, be taken as the guiding element to assess whether the contract is unified or severable.

Article 3(2) of the CISG is thus deemed to provide guidance only in the event of a (single) mixed contract—that is, when the contract is to be treated as a single entity by virtue of the parties’ will or as a result of the objectively unitary economic function pursued by the parties. This conclusion, however, does not *per se* also imply that a single set of rules should apply to the entire unitary contract, according to a sort of “predominance” test. This approach, which reflects the approach common to many jurisdictions, is not satisfactory with respect to the CISG, because it does not take into due consideration the non-exhaustive character of the Convention, with which the rule under Article 3 of the CISG has to be coordinated. In particular, the non-exhaustive character of the CISG entails that a contract governed by the CISG may well be subject to the application of other sources of law with respect to issues

⁴⁷ See *id.* at 58.

⁴⁸ See U.N. Conference on Contracts for the International Sale of Goods (CISG), *Official Records: Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committees*, 16–17, U.N. Doc. A/CONF.97/5 Part II (1991).

which are covered by the CISG. The (extensive) interpretation of the CISG may limit the need to resort to domestic law, but it cannot eliminate that need.

If the CISG were an exhaustive piece of legislation, the statement that a contract is governed by the CISG could imply the exclusion of all concurrent sources. However, given the non-exhaustive character of the CISG, application merely implies that the CISG is applicable to the contract insofar as it contains rules dealing with the several contractual aspects relevant in a given case. However, when issues are at stake that are not governed by the CISG, the CISG itself instructs the interpreter to apply different law to the contract, either supranational (whenever a different instrument exists that deals with the issue not covered by the CISG), or domestic (whenever the CISG's external gap is to be filled by resorting to the domestic law applicable by virtue of the private international law rules of the forum).

What has just been said leads one to suggest a different reading of Article 3(2) of the CISG, dealing with mixed contracts. It is safe to assert (and in line with the traditional reading of the provision) that Article 3(2) of the CISG has a negative (exclusionary) implication, in that it excludes the application of the CISG when the "preponderant" part of the supplier's obligations is constituted by the supply of "labour or other services."⁴⁹ The provision in question, however, cannot be deemed to also have a positive implication, in that the preponderance (or mere coexistence) of the supply of goods does not prevent—given the non-exhaustive character of the Convention—the severability of the contract and the concurrent application of different sources of law to the several obligations undertaken under the unitary contract. In short, the non-exhaustive character of the CISG makes the contractual *dépeçage* possible, and often necessary, in accordance to a sort of *gravamen of the action* test. By and large, nothing in Article 3(2) of the CISG (nor in any other CISG provision) prevents the concurrent application of the CISG to part of the contract (the part providing for sale-type rights and obligations) and different sets of rules to other parts of the same contract (the parts relating to non-sale-type right and obligations).

Moving along this line of thinking, one may reach the conclusion that whenever an international transaction (falling within the CISG's sphere of application) requires one of the parties to perform sale-type obligations, it is

⁴⁹ GILLETTE & WALT, *supra* note 36, at 61 (noting that the "preponderance" test should be based on economic standards).

appropriate to consider the possibility of subjecting those obligations to the CISG.

B. The Applicability of the CISG Beyond Its Geographical Sphere of Application

From a rather different perspective, a broader application of the CISG may result from taking the Convention into consideration in situations where the transaction at hand does not fall within its sphere of application.

As a matter of fact, supranational commercial law is an incomplete puzzle of multiple, often uncoordinated pieces of legislation of different nature, origin and degree of normativity. Whenever the CISG happens to not be *per se* applicable to an international transaction, the most likely consequence is not that another international uniform law convention applies (given that the number of international uniform commercial law conventions is still relatively limited), but rather that a different, heterogeneous source of law applies, it being either the domestic law applicable by virtue of the private international law rules of the forum (a solution that supporters of the benefit of the international unification of commercial law view with disfavor) or a national general principles of law.

This distinction reflects the difference between the “*conflictualist*” approach and the “*internationalist*” approach in the adjudication of international commercial disputes.⁵⁰ In the latter context, it is not unlikely that the CISG may be resorted to as a source of legal rules in situations where it would not *per se* apply. In particular, this can result from: (a) the parties’ choice of the CISG as law applicable to their contract in cases where the Convention would not *per se* apply, (b) the resort to the CISG in the context of inter-conventional interpretation, when another convention is being applied, (c) the resort to the CISG as expression of general principles of contract law applicable also in non-sales transactions, or (d) the resort to the CISG as a source of the new *lex mercatoria*.

Parties to an international contract not governed by the CISG may opt into the Convention, thus choosing it as the law applicable to their contractual

⁵⁰ Friedrich K. Junger, *The Lex Mercatoria and Private International Law*, 5 UNIF. L. REV. 171 (2000).

relationship.⁵¹ No one objects to the possibility of opting into the Convention, although in this the CISG is incorporated by reference as part of the terms of the contract, subject to application of the domestic law to be determined by virtue of the private international law rules of the forum. Opting-in may occur both when the requirements for the application of the CISG are not met and when the type of transaction in question does not qualify as a sale under the Convention.

The need for inter-conventional interpretation, on the other hand, seems to be well-grounded in the text of international uniform law conventions, including the CISG and most subsequent conventions, and therefore fully justified in the light of the intention of the drafters of those conventions.⁵² I have argued elsewhere that the usefulness and effectiveness of inter-conventional interpretation of uniform law stems from the fact that the various texts that were adopted after the CISG were drafted in accordance with a common and coherent unification strategy.⁵³ On those grounds, it seems correct to conclude that notions and rules from the CISG, including the specific rules arising from the judicial application thereof, may be applied in the context of other international conventions, whose text is less clear, or which cannot rely on extensive scholarly writings and court decisions. Accordingly, just to provide a few examples, it is possible to resort to the notion of “place of business” drawn from scholarly writings commenting on Article 1 and 10 of the CISG⁵⁴ when applying the corresponding provisions in subsequent conventions. Similarly, it is possible (and appropriate) to resort to the extensive case law under Article 25 of the CISG on fundamental breach⁵⁵ when interpreting and applying the notion of “default” under Article 11 of the UNIDROIT Cape Town Convention on International Interests in Mobile Equipment, especially in the event of application of the latter convention to a security interest (*e.g.*, a retention of title clause) granted in the context of an international contract for the sale of goods.

⁵¹ Cf. PETER MANKOWSKI, *Article 7 CISG*, in *COMMERCIAL LAW: ARTICLE-BY-ARTICLE COMMENTARY* § 15 (2019).

⁵² F. FERRARI, *I rapporti tra le convenzioni di diritto materiale uniforme in materia contrattuale e la necessità di un'interpretazione interconvenzionale*, *RIV. DIR. INT. PRIV. PROC.* 669ff. (2000) (proposing the adoption of a methodology leading to inter-conventional interpretation).

⁵³ TORSELLO, *supra* note 4 *passim*.

⁵⁴ See SCHLECHTRIEM & SCHWENZER, *supra* note 46, at 31–32.

⁵⁵ See Ulrich Magnus, *Beyond the Digest: Part III (Articles 25–34, 45–52)*, in *THE DRAFT UNCITRAL DIGEST AND BEYOND: CASES, ANALYSES AND UNRESOLVED ISSUES IN THE U.N. SALES CONVENTION* 319, 320 (Franco Ferrari et al. eds., 2004).

In other circumstances the CISG is applied in situations where it would not *per se* be applicable and irrespective of the possible concurrence of any other convention and of any inter-conventional interpretation. In this type of case the CISG is resorted to as expression of general principles of contract law, which may exercise a persuasive influence on the adjudicator faced with contractual questions. Although this could potentially lead to the application of any provision of the CISG, it is more likely for this to happen with respect to the rules on the formation of contract (Articles 14–24 of the CISG), given the character of these rules as capable of being applied to any type of contract, as well as with respect to the general provisions relating to the sale of goods in general (Articles 25–29 of the CISG), or the provisions common to the obligations of the seller and of the buyer (Articles 71–88 of the CISG). To provide just one recent example of resort to the CISG in a case where the Convention was not *per se* applicable, one can refer to a recent decision rendered by the Supreme Court of the United Kingdom (a state that has not ratified the CISG) regarding a dispute over a license agreement that contained a “No Oral Modification” (NOM) clause.⁵⁶ In his opinion (with whom Lady Hale, Lord Wilson and Lord Lloyd-Jones agreed), Lord Sumption, after reviewing the position in other common law jurisdictions, including the United States and Australia, overruled the (partly unsettled) precedential English case law by referring primarily to Article 29 of the CISG, not only in regards to the general rule that “[a] contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement,” but also in regards to the additional provision according to which “a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.”

Extending further the possibility that the CISG be applied in cases where it would not *per se* be applicable, one must consider the situation where the Convention is applied as an expression of the new *lex mercatoria*. This phenomenon is likely to occur primarily (if not exclusively) in international commercial arbitration.⁵⁷ In fact, this has been the case, for instance, where

⁵⁶ *Rock Advertising Limited v. MWB*, [2018] UKSC 24, 2 WLR 1603.

⁵⁷ Cf. Jeffrey Waincymer, *The CISG and International Commercial Arbitration: Promoting a Complimentary Relationship Between Substance and Procedure*, in SHARING INTERNATIONAL

the CISG could not be applied because the contracts in question were concluded before the Convention entered into force.⁵⁸ In other cases, however, what prevents the proper application of the CISG is not a temporal issue, but rather the fact that the transaction does not fall within the Convention's sphere of application. In this case, the internationalist approach sometimes adopted in international commercial arbitration might justify seeking a solution through a comparative review of available supranational sources and the analysis of their respective persuasive strength. In this context, the CISG might be a very valuable source to resort to whenever the interpreter is seeking a balanced set of contract law provisions supported by extensive scholarly writings and case law and drafted with the view to producing a sound compromise between different national legal traditions. If one agrees that resort to the *lex mercatoria* by arbitral tribunals serves primarily the goal of avoiding application of the domestic law of either party, in the absence of an express choice, to avoid the impression that one party is being favored, one could easily agree that the contents of the *lex mercatoria* may be deduced from the text of the CISG, even in cases where the Convention does not *per se* apply, or where the contract is not a sales contract according to the Convention's definition.

III. APPLICATIONS OF THE CISG TO NON-SALES TRANSACTIONS: THE CASE OF COUNTERTRADE AND BARTER TRANSACTIONS

After having identified the two most relevant approaches possibly leading to the expansion of the applicability of the CISG beyond its sphere of application, it is now appropriate to test the said approaches against the possibility of applying the Convention to non-sale transactions—that is, to contracts which are normally regarded and treated as separate from sales. The example that will be commented on hereafter is that of countertrade and barter transactions.

Countertrade transactions are usually defined as a form of trade that involves the exchange of goods or services between two parties without (in

COMMERCIAL LAW ACROSS NATIONAL BOUNDARIES: Festschrift for Albert H. Kritzer on the occasion of his eightieth birthday 582 (Camilla B. Andersen & Ulrich G. Schroeter eds., 2008).

⁵⁸ Case No. 5713 of 1989, 15 Y.B. Comm. Arb. 70 (ICC Int'l Ct. Arb.).

whole or in part) payment of money.⁵⁹ The absence of a clear exchange of goods for money has often led commentators and courts to conclude that countertrade and barter transactions are not governed by the CISG.⁶⁰

It seems appropriate, however, to review this conclusion in light of the analysis that has thus far been conducted, and it should be noted that the notion of countertrade is often used to describe very different types of transaction, which have been used for different purposes at different times.

Resort to barter transaction was common in cross-border trade with the Soviet Union and other socialist countries in the sixties and seventies.⁶¹ Moreover, in the eighties, cases of Government-mandated countertrade were not isolated, especially in South America and Southeast Asia.⁶² A revival of barter transactions, however, has occurred in recent times (partly as a result of the financial crisis)⁶³ and these types of transactions are now often resorted to by operators based in countries that rely on imports (in particular of technology) to offer a pay-back more attractive than their unstable local currencies.⁶⁴ Moreover, to the extent that one believed that cryptocurrencies

⁵⁹ See Ingeborg Schwenzer, *Countertrade and the CISG*, 9 INTERNATIONALES HANDELSRECHT 229 (2009).

⁶⁰ See Case No. 91/2003, Trib. Int'l Com. Arb. of Russ. Fed'n. Chamber of Com. & Indus. (2004), <http://cisgw3.law.pace.edu/cases/040309r1.html>.

⁶¹ Cf. POMILIU VERZARIU, COUNTERTRADE PRACTICES IN EAST EUROPE, THE SOVIET UNION AND CHINA: AN INTRODUCTORY GUIDE TO BUSINESS (1980); RAZUMOV, *Les contrats sur la base de compensation entre organismes soviétiques et firmes étrangères*, in CLUNET 91 (1984). See William G. Frenkel & Michael Y. Sukhman, *New Foreign Investment Regimes in Russia and Other Republics of the Former U.S.S.R.: A Legislative Analysis and Historical Perspective*, 16 B.C. INT'L & COMP. L. REV. 321 (1993) (regarding the use of these types of contracts after the fall of the Soviet Union).

⁶² See, for instance, the cases of Columbia (Decree No. 370 of 15 February 1984 on imports), Dominican Republic (Decree No. 2005 of 17 May 1984), Ecuador (Regulation No. 215 of December 11, 1984). In South-East Asia, see, e.g., the case of Indonesia (Statute of April 8, 1983 on the execution of the connection between Government imports and non-oil exports). Cf. also WTO Secretariat, *Trade Policy Review: Indonesia*, at 48, WTO Doc. WT/TPR/S/117 (May 28, 2003). Cf. Terence P. Stewart & Margaret L. H. Png, *The Growth Triangle of Singapore, Malaysia and Indonesia*, 23 GEORGIA J. INT'L & COMP. L. 59 (1993). Also, in Thailand for some time the Government imposed on foreign companies the counterpurchase of national Thai commodities for a value of at least 50% of the main contract. Cf. OFFICE OF THE PRIME MINISTER, *Regulation on Countertrade*, B.E. 2543 (2000). See also WTO Secretariat, *Trade Policy Review: Thailand*, at 51, WTO Doc. WT/TPR/S/123 (Oct. 15, 2003).

⁶³ See Schwenzer, *supra* note 59, at 230 (reviewing recent countertrade transactions).

⁶⁴ Cf. George A. Zaphiriou, *Unification and Harmonization of Law Relating to Global and Regional Trading*, 14 N. ILL. UNIV. L. REV. 407, 412 (1994); ACEO (ASSOCIATION POUR LA COMPENSATION DES ECHANGES COMMERCIAUX), GUIDE PRATIQUE DE LA COMPENSATION (2003); A. COACCIOLI, *Gli scambi in compensazione*, IL DIRITTO PRIVATO NELLA GIURISPRUDENZA. I NUOVI CONTRATTI NELLA PRASSI

do not qualify as money, one would conclude that a sale of goods in which cryptocurrency is the form of payment is not a sale, but rather a barter transaction—a solution which may leave many commentators unsatisfied.

Notwithstanding some criticism, including that expressed by authoritative entities such as FMI, WTO and OECD (who emphasize the possible anti-competitive effects),⁶⁵ many commentators look at barter transactions favorably. A positive view of these transactions, in particular, is offered by the UNCITRAL *Legal Guide on International Countertrade Transactions* adopted in 1992⁶⁶ which deals extensively with these types of transactions.

The *Legal Guide* definition of countertrade transactions is based on the link between obligations exchanged by the parties. Accordingly, countertrade transactions are “those transactions in which one party supplies goods, services, technology or other economic value to the second party, and, in return, the first party purchases from the second party an agreed amount of goods, services, technology or other economic value.”⁶⁷ This definition is very broad, in that it is merely based on the absence, in whole or in part, of a payment obligation. However, it is also a definition capable of shedding light on a critical aspect of these types of transactions, in that it requires a determination of whether the transaction is the result of separate contacts, which are contracts linked to one another by virtue of the will of the parties, a result of their functional connection, or of a unitary (possibly mixed) contract.

Therefore, the first problem raised by these types of transactions is whether the exchange is performed by a single contract or two separate, although linked, contracts. The solution, of course, should first be based on the will of the parties. However, in some cases resort to the will of the parties may prove ambiguous so that the interpreter will need to refer (additionally or exclusively) to the unitary function of the transaction and the objective

CIVILE E COMMERCIALE. XI. FIGURE DELLA CONTRATTAZIONE INTERNAZIONALE 487 (P. CENDON ed., 2004).

⁶⁵ Cf. Jerzy Rajski, *Some Legal Aspects of International Compensation Trade*, 35 INT’L COMP. L. Q. 128 (1986).

⁶⁶ U.N. COMM’N ON INT’L TRADE LAW [UNCITRAL], LEGAL GUIDE ON INTERNATIONAL COUNTERTRADE TRANSACTIONS, U.N. Doc. A/CN.9/SER.B/3, U.N. Sales No. E.93.V.7 (1993) [hereinafter UNCITRAL Legal Guide]; see James C. Nobles, Jr. & Johannes Lang, *The UNCITRAL Legal Guide on International Countertrade Transactions: The Foundation for a New Era in Countertrade?*, 30 INT’L L. 739 (1996) (commenting on the *Legal Guide*).

⁶⁷ UNCITRAL Legal Guide, *supra* note 66, at 6.

connection between the obligations exchanged. Accordingly, the interpreter needs to determine whether the transaction qualifies as a unitary and indissoluble transaction for the exchange of goods or services, or as a “double sale” (*Doppelkauf*), with respect to which each one of the two sales is capable of autonomous consideration and of independent performance, and likely to be governed by the CISG, provided that the other conditions for the application of the Convention are met.

In fact, whenever the countertrade transaction is the result of a “double sale,” which entails the subsequent set-off of the corresponding payment obligations,⁶⁸ there is no reason to exclude the application of the CISG to all aspects of the transactions which are capable of being governed by the CISG, including, in particular, the reciprocal obligations to deliver goods and the consequences of the breach thereof. This conclusion is not affected by the fact that the CISG does not govern the set-off of reciprocal payment obligations, which will be governed by the domestic rules applicable by virtue of the private international law rules of the forum.

At times, however, the parties intend to make each delivery obligation strictly conditional upon the performance of the corresponding counter-delivery. In this scheme, the price of each performance, if at all indicated, is indicated as a mere measurement of the value of the goods to be exchanged, often for purposes unrelated with the exchange itself (*e.g.*, insurance, customs declaration and clearance, etc.).

Keeping the foregoing in mind, it seems appropriate to proceed in the analysis by taking into account separately the different types of transactions identified in the UNCITRAL Legal Guide as falling within the broad notion of countertrade transaction,⁶⁹ although it should be noted that in most cases, irrespective of the type of transaction in question, the exchange takes the form of a preliminary framework agreement followed by separate agreements for the reciprocal delivery of goods.⁷⁰

(i) Under a *buy-back* transaction (*achat en retour* in French, *Produktabnahme* in German), the importer of technology (and related equipment) pays (in part) the purchase price by means of the delivery of

⁶⁸ Cf. J.E. Elenbaas & J.G. Kreuze, *International Countertrade: Is It a Sale Yet?*, CPA J. 66 (1992).

⁶⁹ Cf. Jean-Francois Hennart, *Some Empirical Dimensions of Countertrade*, 21 J. INT'L BUS. ST. 243 (1990).

⁷⁰ Paul Mishkin, *Countertrade and Barter: The Basic Legal Structure*, 14 INT'L BUS. L. 7 (1986).

goods manufactured or produced by means of the acquired technology.⁷¹ In a buy-back transaction, the reciprocal obligations of the parties are always expressed in monetary value. The supplier/exporter supplies technology and related equipment of a certain value, while agreeing to accept in return (as partial consideration for the goods and technology supplied) goods manufactured or produced by means of the technology, which the importer undertakes to sell back to the exporter under a “most favoured customer” or “preference” clause.⁷²

According to the UNCITRAL *Legal Guide*, a “buy-back” transaction refers to a transaction in which one party supplies a production facility, and the parties agree that the supplier of the facility, or a person designated by the supplier, will buy products resulting from that production facility. The supplier of the facility often provides technology and training and sometimes component parts or materials to be used in the production. The supply of a production facility usually requires bank financing.⁷³

Given the role played in a buy-back transaction by the transfer of technology, the supply of training and the possible supply of parts or materials to be used in the manufacture or production of goods, whether or not the back-sale of products by the importer is governed by the CISG, is to be determined in accordance with Article 3(1) of the Convention, whereas the nature of the counter-performance rendered by the back-purchaser does not create a problem, given its monetary character. In many (possibly most) cases Article 3(1) of the CISG will lead to the exclusion of the Convention, due to the “essential” character of the technology transferred to the back-seller. However, if a different conclusion is reached with regard to the essential nature of the transfer of technology, there is no impediment to the application of the CISG, to the extent that the other criteria of application are met and to the extent that the CISG provides rules suitable to be used to govern the various aspect of the transaction.

The foregoing is without prejudice to the possible concurrence of different sources of law applicable to aspects of the transaction which are not

⁷¹ Cf. LIANA FADDA, *IL COUNTERTRADE: ASPETTI ECONOMICO-AZIENDALI* 23 (1988); ANTONIO FOGGIO, *COUNTERTRADE E COMMERCIO ESTERO 2000: STRATEGIE E TECNICHE DEGLI SCAMBI IN COMPENSAZIONE* 60 (1996); HANS VAN HOUTTE, *THE LAW OF INTERNATIONAL TRADE* 345 (2d ed. 2002).

⁷² CLIVE M. SCHMITTHOFF, *SCHMITTHOFF'S EXPORT TRADE: THE LAW AND PRACTICE OF INTERNATIONAL TRADE* 276 (C. Murray et al. eds., 12th ed. 2012).

⁷³ UNCITRAL LEGAL GUIDE, *supra* note 66, at 9.

governed by the CISG, such as in the case of royalties payable for the license of technology.

(ii) Under a counter-purchase transaction (“contre-achat” in French, “Gegenkauf” in German), the counter-performance of the (importing) purchaser is effected partly in cash and partly (according to the counter-purchase ratio) through the counter-sale of different goods.

According to the UNCITRAL *Legal Guide*, the notion of “counter-purchase”

is used to refer to a transaction in which the parties, in connection with the conclusion of a purchase contract in one direction, enter into an agreement to conclude a sales contract in the other direction, i.e., a counter-purchase contract. Counter-purchase is distinguished from buy-back in that the goods supplied under the first purchase are not used in the production of the items sold in return.⁷⁴

Under the reported definition it is apparent that the counter-purchase transaction is characterized as the combination of two linked sales transactions, both of which may be subject to the CISG, provided that the other criteria of application of the Convention are met. In fact, although both contracts aim at pursuing the same economic function, the parties treat them as capable of being considered distinctly⁷⁵ and the Legal Guide specifies that “when the parties wish to avoid the interdependence of obligations between the export contract and the countertrade agreement, or when they wish to limit interdependence to particular obligations, it is advisable that they embody the export contract and the countertrade agreement in separate instruments.”⁷⁶

The foregoing conclusion, in particular the conclusion that counter-purchase transactions are governed by the CISG, is not affected by the fact that counter-purchases sometimes contain provisions which are not covered by the CISG, such as clauses limiting access to certain markets or posing quantitative limitations in those markets. Indeed, these clauses are not infrequent, as they serve the importer’s interest to protect its output markets. Their presence, however, is not *per se* conclusive of an overall function of

⁷⁴ *Id.*

⁷⁵ The separation may also, at times, serve as a tax of monetary control purposes. Cf. G.C. MARCHESI, GUIDA AGLI SCAMBI IN COMPENSAZIONE 100 (2d ed. 1986).

⁷⁶ UNCITRAL Legal Guide, *supra* note 66, at 17.

the transaction incompatible with the application of the CISG to the sales-type obligations.

A peculiar type of counter-purchase occurs when the importer of products, equipment and technology requires the exporter to purchase for manufacturing purposes or for incorporation in the final products goods, materials or components by the importer or by third parties in the importer's country. This transaction, which is at times qualified as offset,⁷⁷ serves the purpose of facilitating the development of the importer's country's industry, thus reducing the latter's technological dependence.

Whether or not an offset transaction may be governed by the CISG depends largely on the review of the reciprocal obligations in light of Article 3(1) of the CISG, keeping in mind that the transaction results, in most cases, from the combination of two separate, although linked, contracts for the sale of goods.

(iii) Under a barter transaction ("troc" in French, "Tauschgeschäft" in German) the parties trade goods exclusively for other goods.⁷⁸

Although according to the UNCITRAL Legal Guide, "in practice the term 'barter' is used with different meanings,"⁷⁹ this notion is used here to refer to transactions that involve trade without money,⁸⁰ or with a limited use of money, for the sole purpose of value adjustment.⁸¹ In many instances it may be difficult to distinguish a barter transaction from a commercial compensation (also known as compensation deal, or *contrat de compensation*), which is characterized by the fact that the exchange results from a single contract and the counter-performance is partly in goods and partly in money.⁸²

⁷⁷ Cf. Schwenger, *supra* note 59, at 230.

⁷⁸ Richard E. Caves & Dalia Marin, *Countertrade Transactions: Theory and Evidence*, 102 *ECON. J.* 1171 (1992).

⁷⁹ UNCITRAL Legal Guide, *supra* note 66, at 8.

⁸⁰ See, Mishkin, *supra* note 70, at 7 ("Pure barter transactions involve trade without money; moreover, in pure barter transactions the parties always trade directly with each other and consequently each party to a transaction must want what the other party offers."). For a specific use of barter transactions in advertising contracts, see, M. Fusi, *Considerazioni sul contratto di bartering pubblicitario*, *RIV. DIR. IND.* 133 (2007).

⁸¹ Laura B. Foraker, *Purchasing's Views on Countertrade*, 28 *INT'L J. OF PURCHASING & MATERIALS MGMT.* 10 (1992).

⁸² Cf. COACCIOLI, *supra* note 64, at 494.

The need for money adjustment, however, may be a relevant hint as to the actual intention pursued by the parties and, ultimately, as to the (possibly different) type of barter transaction that the parties envisaged.

In fact, many commentators observe that two different types of barter exist⁸³: in the pure (non-adjusted) barter transaction (also referred to as “first generation” barter⁸⁴) the exchange occurs between goods irrespective of their objective economic value and, therefore, without need for a money adjustment.⁸⁵ Under these circumstances, some commentators and arbitral decisions have denied the possibility to apply the CISG as a result of their holding that the CISG requires necessarily a monetary payment as “price” of the sale.⁸⁶ Alternatively, parties may enter into a (“second generation”) adjusted barter only after having attributed an economic value to the goods to be exchanged and usually provide that the difference in value be equalized by virtue of the payment of a sum of money corresponding to the difference in value.

To the extent that the barter transaction implies an assessment of the value of the goods to be exchanged and an adjustment in money of the difference in value (that is, to the extent that it is a “second generation” barter), the conclusion should be that the CISG may apply to the transaction, as long as the other requirements for application are met. This is the case even if the monetary payment represents merely the adjustment of the difference in value of the parties’ performances rather than the “price” of the most valuable performance. In fact, it is apparent that the parties have agreed on the attribution of a value, and therefore, of a “price” to the goods exchanged, whereas there would be no reason to maintain that the Convention necessarily requires the price to be paid in money⁸⁷ where the parties have agreed that the price would be paid otherwise—namely, by an adjusted barter transaction.

This solution may also be applied in the event of an international sale of goods providing for payment by means of cryptocurrency, irrespective of the

⁸³ Cf. Nigel M. Healey, *A Beginner’s Guide to Corporate Barter*, 48 ILL. BUS. REV. 13 (1991).

⁸⁴ See MARCHESI, *supra* note 75, at 26.

⁸⁵ SCHMITTHOFF, *supra* note 72, at 275.

⁸⁶ Cf. Franco Ferrari, *The CISG’s Sphere of Application: Articles 1–3 and 10*, THE DRAFT UNCITRAL DIGEST AND BEYOND 21, 63–64 (Franco Ferrari et al. eds. 2004); *Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry*, Mar. 9, 2004, Case No. 91/2003, <http://cisgw3.law.pace.edu/cases/040309r1.html>.

⁸⁷ See also GILLETTE & WALT, *supra* note 36, at 56.

characterization of cryptocurrencies as money. In fact, in the situation in question, it is undeniable that the parties attribute an economic value to the goods to be exchanged and, by virtue of their freedom of contract under Article 6 of the CISG, they agree to use cryptocurrency as a substitute for money providing consideration for the exact value of the goods purchased.

Conversely, notwithstanding the fact that the individual obligation to deliver goods under a barter transaction corresponds to the obligation to deliver goods under a sales transaction, the prevailing view regarding “first generation” barter transactions is in the sense that they are not governed by the CISG.⁸⁸

This conclusion, however, does not *per se* preclude the possibility to refer to the CISG as a source of general principles of law governing “delivery of goods” in general, thus applicable also to a “first generation” barter transaction. In support of this conclusion is the fact that, in the absence of application of the CISG, the matter would not be subjected to an alternative instrument of international uniform commercial law, but rather to the domestic law applicable by virtue of the private international law rules of the forum.⁸⁹ Somewhat paradoxically, most national domestic rules would end up referring to the domestic law of sales as the primary source of rules applicable to the delivery of the products and all other sale-type obligations. This being the alternative, it is apparent that it would be all but absurd or inappropriate to support, instead, the application of the CISG, at least to obligations, such as the delivery obligation, which are structurally identical to the corresponding obligation in a sales contract.

This application of the CISG, however, is not supported by the interpretation of the Convention’s sphere of application *ratione materiae*, but rather by a radically different approach to the identification of the law applicable to international business transactions. In contrast, the traditional (conflictualist) approach to the problem would lead to the conclusion that a “first generation” barter is too profoundly different from the scheme of exchange of goods for a price to justify the application of the CISG, and that

⁸⁸ Cf. B. Piltz, *New Developments Under the CISG*, 11 VINDOBONA J. INT’L COMM. L. & ARB. 135 (2007); for an arbitral award excluding the applicability of the CISG to barter transactions, see *Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry*, Feb. 19, 2004, Case No. 65/2003, <http://cisgw3.law.pace.edu/cases/040219r1.html>.

⁸⁹ See also Schwenger, *supra* note 59, at 232.

the transaction must be subjected to the domestic law applicable by virtue of the private international law rules of the forum.

IV. CLOSING REMARKS

The analysis that has been carried out has taken the view that the interpretation of the CISG must consider the general socio-political context in which the Convention is applied. This position, however, should not be misunderstood. In fact, even in the current state of the world, notwithstanding the wave of *neo-souverainisme* that seems to be expanding globally, and notwithstanding the shift of attention of uniform law-making agencies from hard law treaties and conventions to soft law instruments, the reasons supporting the need for a broad interpretation and expansive application of the CISG still deserve full support.

Accordingly, it has been posited that in the interpretation of the CISG an expansive approach should be favored, aimed at broadening the sphere of application of the Convention *ratione materiae* beyond the rigid limits of what are qualified as sales contracts under many domestic laws. Similarly, the application of the Convention should be favored in cases where the CISG would not *per se* be applicable, in light of its limited sphere of application from a temporal or geographical point of view. This, in particular, may be the result of the parties' opting-in; an inter-conventional interpretation in cases where different uniform law instruments apply; resort to the CISG as a persuasive source of general principles of international contract law; or of the new *lex mercatoria*.

As an example of actual application of the CISG beyond sales contracts, it has been posited that the CISG may be applied to counter-trade transactions, although a distinction has been made between different types of contracts that are usually referred to as countertrade or barter. In general counter-trade and barter transactions may be governed by the CISG, not only when the exchange of goods is preceded by a precise determination of the respective values of the exchanged goods (and adjustment payments are provided to equalize the value of the performances), but also when the transaction is truly intended to take the form of an exchange of goods. Unlike in the former case, however, in the latter one this conclusion can be reached only by referring to the CISG as the source of persuasive supranational principles on delivery of goods and other relevant aspects of the transaction to be applied in the case at hand, an approach which may prove particularly

complicated before national courts, which are bound to adopt a conflictualist approach leading to the application of the national law identified by virtue of the private international law rules of the forum.