The Black Hole: Where are the Four Corners of the CISG?

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Introduction

Article 7 CISG stipulates that the Vienna Convention must be interpreted having regard to its international character and the need to promote uniformity in its application. It is well established in literature and case law that the 'international character' of the CISG demands that its terms and concepts be interpreted autonomously; that is 'in the context of the Convention itself and not by referring to the meaning, which might traditionally be attached to them within a particular domestic law.'[1] Courts are also expected to abandon the literal or grammatical approach in favor of a purposive one because, in interpreting the CISG, regard must be had to the 'underlying purposes and policies of individual provisions as well as of the Convention as a whole'.[2]

The application of the CISG is limited due to the fact that it was consciously drafted so as not to cover all aspects of a sale of goods. For example, Art 4 expressly excludes matters of 'validity' and other matters are simply left out of the sphere of application of the CISG. This paper examines whether terms such as 'validity' of contract are clear and definable within the four corners of the CISG or whether they have 'elastic' corners. If such 'elastic' corners are discovered do the rules contained in Art 7, mandating interpretation in accordance with 'international character' and 'general principles', assist in including matters within the CISG, which at first glance are excluded? In the application of Art 7, it is necessary to be mindful of the possible criticism that laws are being fabricated or invented, which are not within the mandate of Art 7 or the Convention as a whole.[3] The real question is where the boundary lies between interpretation and the making of law.

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1 Bianca, CM and Bonell, MJ, *Commentary on the International Sales Law, The 1980 Vienna Sales Convention*, 1987, Milan: Giuffre, at 74.

2 *Ibid* at 73.

3 In the context of 'fabricating' laws it is interesting to note a Swiss decision of 10 October 1997 in the Cour de Justice Geneve, (*Filinter v Moulinages Poizat*, C/21501/1996) [http://cisgw3.law.pace.edu/cases/971010s1.html]. The question was whether the one-year limitation period under Article 210 of the Swiss Civil Code, overruled a two-year limitation period provided under the CISG. The court invoked Article 1(2) of the Swiss Civil Code, which allows a judge to lay down a law in cases of ambiguities, as though the judge were a legislator. The court extended the one-year period under Swiss law to two years and brought it in line with the CISG. By bringing Swiss Law into line with the CISG, the judge bypassed the application of Article 4.

Many commentators point to important gaps and ambiguities within the CISG, such as the uncertain status of good faith as a behavioral norm and the meaning of validity in Art 4.[4] Louis and Patrick Del Duca record that of 142 reported cases, 52 involved disputed issues of law, which had to be settled according to domestic provisions.[5]

Excessive reliance on domestic law would undermine the primary purpose of the CISG, which, simply stated, is to overcome the 'awesome relics from the dead past'[6] by creating a law which overcomes the serious obstacles for free trade created by municipal laws. Predictability of outcome and clear and simplified norms, the most important goals of any law, can only be achieved through uniformity of application at an international level as opposed to a national one. When properly applied, the CISG will overcome the danger posed by municipal law of a 'parachute drop into the darkness'.[7] Through the correct application of Art 7, the CISG has the ability to produce a jurisprudence that will achieve uniform and predictable outcomes.

This paper seeks solutions to some of the complex problems facing courts by using the interpretative tool provided by the Convention in Art 7. In other words it considers how far the influence of domestic law can be pushed back in favor of an international interpretation of the CISG.

International sales laws

Before considering the CISG, it is important to examine other international sales laws such as the UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles) and the Principles of European Contract Law (European Principles) to see how these principles can assist in filling gaps in the CISG. Both sets of Principles declare that they may be used as a tool in helping to interpret and fill gaps within other legal instruments such as the CISG.[8] The UNIDROIT Principles and the European Principles could potentially resolve many ambiguities and fill gaps within the CISG. However, a direct application of these laws would not be legitimate because in the absence of express provision by the parties, they would not be the governing

4 Ziegel, JS, 'The UNIDROIT Contract Principles, CISG and National Law' [http://cisg.law.pace.edu/cisg/biblio/ziegel2.html].

5 Del Duca, L and Del Duca P, 'Practice Under the Convention on International Sale of Goods (CISG): A Primer for Attorneys and International Traders (Part II)' (1996) 29 Uniform Commercial Code Law Journal: 99.

6 Rabel, E, 'The Hague Conference on the Unification of Sales Law' (1952) 1 American Journal of Comparative Law 58 at 61.

7 Diedrich, F, 'Maintaining Uniformity in International Uniform Law via Autonomous Interpretation: Software Contracts and the CISG' (1996) 8 Pace International Law Review: 303–38, at 305.

8 Preamble to the UNIDROIT Principles: 'They may be used to interpret or supplement international uniform law instruments.' Article 1:101(4) European Principles: 'These principles may provide a solution to the issue raised where the system or rules of law applicable do not do so.'

law of an international sales contract. Furthermore, direct application to fill gaps would contravene Art 7(2), which requires unsettled issues to be resolved by application of the 'general principles' of the CISG. The UNIDROIT Principles and the European Principles have the advantage that their provisions were constructed by relying on the CISG, which was already in operation. The other advantage was that the sponsors of the two Principles were not representatives of States but were eminent jurists not bound by political considerations. For that reason they tried to overcome the perceived shortcomings of the CISG and where possible built on its strengths.

Despite the fact that the European Principles or the UNIDROIT Principles would provide an attractive solution to an interpretative problem neither can be used unless the CISG does not supply an answer. It has been argued that functionally similar rules can be used to interpret the CISG, at least by analogy. Ziegel considered this possibility and stated:

> The post-CISG generation of lawyers may feel impatient with this fussy approach and may prefer to resolve ambiguities by going directly to the Principles. While I understand and sympathize … it is nevertheless unacceptable.[9]

Scholars and judges alike have expressed similar views. For example, Meagher JA in *Kotsambasis v Singapore Airlines Ltd*[10] considered that:

> The interpretation of a particular phrase used in municipal law and the change over the years in that interpretation cannot guide an interpretation of the same phrase that might appear in an international agreement.[11]

There is a middle ground, which is to apply functionally similar principles to help in the interpretation and filling of gaps, provided that the intellectual process of reasoning is adopted and not the outcome of the process, which would amount to the direct application of a law external to the CISG. The UNIDROIT Principles and the European Principles have a distinct role to play in this regard. The interesting debate however, when we are testing the flexibility of the CISG, is whether to match provisions of the CISG with provisions of the European Principles and the UNIDROIT Principles. Such an approach is defendable, as we know that both alternative sets of sales law 'reflect a more rounded view of contractual principles'.[12] It is therefore conceivable that within the mandate of Art 7 an interpretation of the CISG can be 'stretched' to include reference to matters upon which the European Principles and the UNIDROIT Principles have managed to legislate. At the very least these international sales laws can assist in providing a possible direction for interpretation without falling into the trap of 'manufacturing' laws.

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9 Ziegel, JS, *supra* note 4.

10 Matter No CA 40154/96 (13 August 1997) [http://austlii.edu.au] last update 27 Feb 1998.

11 Ziegel, JS, *supra* note 4.

12 Ziegel, JS, *supra* note 4.

Article 4: the validity issue

Article 4 CISG states:

> This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:
>
> (a) the validity of the contract or of any of its provisions or of any usage;
>
> (b) the effect, which the contract may have on the property in the goods sold.

Article 4(b) has posed few problems and has been applied without difficulty. For example, the *Oberlandesgericht Koblenz*[13] ruled that retention of title clauses are outside the scope of the CISG, pursuant to Art 4(b), and must be ruled upon under domestic law. The issue that poses problems is the meaning of validity under Art 4(a).

A total elimination of domestic law from international sales contracts will never eventuate, as the drafters were not willing or able to develop a compromise when discussing general principles of contract law. The general principle of validity of contract is a prime example. Drobnig describes the reasons for the impasse by stating that: 'The difficulties in this area are due in part to the legal complexities and to divergent social policies, in part also to conceptual complications.'[14] Article 4 has been described as a 'contractual scheme [of] uncertain functional characteristics'.[15] This points to the exact problem and it is not surprising to see different views emerging in relation to the interpretation and function of Art 4.

Hartnell suggests that the validity question poses a danger to the development of a coherent jurisprudence of international trade by giving courts and tribunals wide discretion to determine when to apply domestic law.[16] This view is far too narrow and ignores the application of Art 7, which in effect sets the boundaries between issues within the CISG and those where the CISG permits the application of domestic law. It certainly can be argued that principles such as good faith are nebulous and incapable of definition. However, in the fullness of time the question will not be whether vague principles are capable of definition but rather the manner in which courts and tribunals will apply these principles. The jurisprudence of Art 7 to this point

13 Germany 16 January 1992, 5 U 534/91 [http://cisgw3.law.pace.edu/cases/920116g1.html].

14 Drobnig, U, in Sarcevic and Volken (eds), *International Sales of Goods*, 1986, Dubrovnik Lectures. Oceana Publishing, at 313.

15 Ferrari, F, 'Specific Topics of the CISG in the Light of Judicial Application and Scholarly Writing' (1995) 15 Journal of Law and Commerce: 1-126 [http://cisg.law.pace.edu/cisg/text/franco3.html].

16 Hartnell, HE, 'Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods, (1993) 18 Yale Journal of International Law: 1 at 3 [http://cisg.law.pace.edu/cisg/biblio/hartnell.html].

has shown that there is a remarkable similarity between decisions of different national jurisdictions when applying the CISG.[17]

There are about 100 decisions worldwide applying Art 4 and the majority deal with set-off, or agency and distribution agreements. At first glance it can certainly be argued that Art 4 allows a wide discretion, however, in practice Art 4 has been limited to very few scenarios. Agency and distribution agreements are a case in point. Tribunals and courts have recognized that distribution agreements or agency contracts are not covered by the CISG. In *Box Doccia Megius v Wilux International BV*,[18] the judge correctly decided that the Convention would be applicable 'if the dispute between the parties concerned the individual contracts of sale under the "frame agreement" [but would not be applicable to disputes] concerning the frame contract itself'.[19] The view expressed by the Dutch court is by no means isolated. The *Oberlandesgericht Düsseldorf*[20] amongst others reached the same conclusion.

The Court in *Helen Kaminski Pty Ltd v Marketing Australia Products Inc d/b/a Fiona Waterstreet Hats*[21] summed up the debate by stating:

> [The defendant] maintains that the Distributor agreement is merely a 'frame work agreement' and that such agreements are not covered by the CISG. The Distributor Agreement requires the [defendant] to purchase a minimum quantity of total goods, but does not identify the goods to be sold by type, date or price. In contrast, the CISG requires an enforceable contract to have definite terms regarding quantity and price.

In other words, frame agreements or agency are matters determined by domestic law whereas sales of goods are governed by the CISG. This point is clearly confirmed by the German *Bundesgerichtshof*,[22] which reached the correct conclusion that it did not matter whether a franchise agreement violated German or European antitrust laws. That was an issue for domestic law. The important point was that each supply contract had to be examined under the CISG in accordance with which the disputed contract was valid and the buyer was obliged to pay the seller.

In the European Principles, the classes of validity that fall outside the scope of the law are defined in Art 4:101 which states that, '[t]his chapter does not deal with invalidity arising from illegality, immorality or lack of

17 See *Tribunale di Vigevano*, 12 July 2000 (*Rheinland Versicherungen v Atlarex Sr1*) [http://cisgw3.law.pace.edu/cases/000712i3.html]. In this Italian decision, no less than 42 cases were cited from different countries including the United States, Austria, Holland, France, Germany and Switzerland.

18 *Gerechtshof* Amsterdam 16 July 1992, 550/92SKG [http://cisgw3.law.pace.edu/cases/920716n1.html].

19 *Ibid.*

20 Germany, 11 July 1996, 6 U 152/95 [http://cisgw3.law.pace.edu/cases/960711g1.html].

21 United States District Court, Southern District of New York, 21 July 1997, M-47 (DLC) [http://cisgw3.law.pace.edu/cases/970721u1.html].

22 Germany 23 July, 1997, VIII ZR 134/96 [http://cisgw3.law.pace.edu/cases/970723g2.html].

capacity'.[23] The UNIDROIT Principles are nearly identical in this respect and also exclude questions of lack of capacity, lack of authority, immorality and illegality.[24] One could argue that the European Principles and UNIDROIT Principles are an improvement over the CISG as validity is clearly defined.

The question arising out of the above is whether the variables listed in the European Principles can be used to define validity within the CISG. When looking at Art 4 with the aid of Art 7, a tribunal or court could deal with the issue of validity in two ways. First, questions of validity could be excluded if they relate to illegality, immorality and capacity in the sense described by the European Principles. However, the better approach is that validity questions should only be excluded from the scope of the Convention if through the gap filling procedure a general principle is found to be lacking and hence recourse to domestic law is unavoidable.

Good faith and the international goals expressed in Art 7(1) demand that Art 4 be approached with a mind set that is conducive to uniformity of international laws. On the one hand, it is suggested that 'the drafting history of CISG, Art 4(a) demonstrates a clear concern for preserving the applicability of certain domestic laws'.[25] Parochial interests are undoubtedly present and were intended to be treated carefully by the drafters of the CISG. However to draw the line between application of the CISG or domestic law at a point where 'any provisions of the contract are inconsistent with the mandatory rules of the national law of the parties'[26] is certainly not correct. If that were so the interpretation of Art 4 could vary from one domestic system to another. As a result this view would be in direct conflict with the mandate of Art 7, namely uniformity of interpretation. Furthermore the CISG itself proceeds on the assumption that 'certain facts do not constitute a reason for nullifying a contract'.[27] An example within the CISG is Art 35(2)(a), which requires that goods be fit for their purpose. Any breach of this requirement will give the buyer the right to seek remedies such as avoidance of the contract due to a fundamental breach.

The suggestion could be made that conformity of goods is an issue of validity[28] and should be excluded from the Convention despite the fact that there are functionally equivalent solutions within the CISG. It is obvious that such a solution was not envisaged and must be rejected. Enderlein and Maskow believe that 'national law on validity will not apply when the CISG

23 Article 4:101 Principles of European Contract Law.

24 Article 3.1 UNIDROIT Principles.

25 Enderlein E and Maskow D, 'International Sales Law, United Nations Convention on Contracts for the International Sale of Goods', 1992, Oceana Publications, at 19.

26 Enderlein, E, in Dubrovnik Lectures, *supra* note 14, at 137.

27 Enderlein and Maskow, *supra* note 25, at 41.

28 This would be the case for example if the goods had perished at the time the contract was made. See Goods Act 1958 (Vic), s 11 and equivalent provisions in other Australian States.

provides a functionally adequate solution to the problem which has been settled nationally by questioning the validity of the contract'.[29] The broadest argument that can be mounted is that, if there is a general principle contained in the CISG having a counterpart in domestic law, the CISG would prevail in case of conflict therefore restricting the scope of Art 4.

It is 'fatal' for the CISG to remain static instead of evolving and moving with the needs of those for whom the CISG was written. At the same time it must be said that it is also inappropriate to 'invent' areas of concern within the CISG where they do not exist. In other words fabrication of law is not within the mandate of the CISG.

Nevertheless, Art 4 must be read in a different light than is envisaged by the drafting history of the CISG in any situation where the words of the CISG contradict the drafting history. Of importance is the directive that the Convention governs the 'rights and obligations of the seller and the buyer'[30] arising from a contract. Any matter falling within this phrase that is specifically provided for in the Convention is not excluded as a question of validity. The argument that Art 4(a) will determinatively exclude some issues that could be governed by the CISG[31] is false on two grounds. First, it places too much emphasis on the drafting history. The fact that a matter was a question of validity in 1980 is not necessarily conclusive in 2001 because circumstances change. The significance of this point cannot be overstated because there is no supra-national body or committee that can alter the Convention.

Second, as Honnold correctly points out the 'substance rather than the label' of the domestic rule of validity is relevant.[32] The Cour d'appel Paris[33] recognized this point and did not apply Art 4 to an issue dealing with the validity of standard terms and conditions, which were printed on the reverse side of an order. The court stated that: 'in the absence of an explicit reference on the front side of the buyer's form to the sales conditions indicated on the reverse side, the seller could not be deemed to have accepted those conditions.' Pursuant to Art 19(1) the document had to be interpreted as a counter offer that was rendered inapplicable due to lack of acceptance by the seller and so did not raise an issue of validity.

29 Enderlein and Maskow, *supra* note 25, at 41.

30 Article 4 CISG.

31 Hartnell, *supra* note 16, at 22.

32 Honnold, J, *Uniform Sales for International Sales*, 1991, Boston: Kluwer Law and Taxation Publishers, at 115 and 120–24.

33 13 December 1995, *Ste ISEA Industrie SpA/Companie d'Assurances Generali v Lu SA et al*, 95-018179 [http://cisgw3.law.pace.edu/cases/951213f1.html].

Conformity of goods as a question of validity

Article 4 CISG must be interpreted with the aid of Art 7. Article 4 does not purport to exclude validity in total since it uses the phrase: 'Except as otherwise expressly provided in this convention.' Article 7(2) expands the definition of 'expressly provided in this Convention' by allowing the use of general principles to settle matters governed by the Convention but not expressly settled in it. If the CISG governs matters but does not expressly settle those matters then general principles will aid in the construction and interpretation of these matters within the four corners of the CISG. Matters of validity are only excluded if they are not related to either the formation of contract or the rights and obligations of buyers and sellers. For example, the CISG treats the question of conformity of goods as a question of breach of contract rather than validity. This argument is supported by several decisions. In a Hungarian ruling[34] the court rejected the buyer's argument that the seller's claim as to lack of conformity must be settled according to the Hungarian Civil Code. The court held that the matter was covered by the CISG and hence applied Art 39. A German court came to the same conclusion holding that the 'application of the CISG precludes recourse to domestic law regarding mistake as to the quality of goods as the matter is exhaustively covered by the CISG.'[35] More telling is the opinion of an ICC arbitration ruling where the arbitrator found that: '[t]he Convention applies … also to the question whether or not a contract has been validly made [which] is apparent from the fact that the Convention contains a section entitled "Formation of Contract".'[36]

In sum, the Convention governs the formation of contracts and the rights and obligations of the seller and buyer arising from such a contract. This indicates that any breach of a contract or any direct contravention of any Articles within the Convention is covered by the CISG. Pursuant to Art 4(a) the Convention does not concern itself with questions of the validity of a contract or of its provisions or of any usage. However validity as such is not excluded, as the proviso does not extend to matters expressly provided for in the Convention. In simple terms and pursuant to Article 7(2), if a matter is governed by the CISG then, irrespective of its label, the CISG is applicable to the exclusion of domestic law. The ICC arbitral decision cited above indicates that matters of conformity of goods are to be dealt with by the Convention.

In domestic laws, validity is sometimes used synonymously with breach of contract, which is covered by the CISG. However, domestic law will only apply if the matter is not covered either expressly or by recourse to the gap filling provision of Art 7(2). Whether domestic law labels any matter as an

34 FB Budapest, July 1 1997 [http://cisgw3.law.pace.edu/cases/970701h2.html].

35 *Landgericht* Aachen, 14 May 1993, 43 O 136/92 [http://cisgw3.law.pace.edu/cases/930514g.1.html].

36 *ICC Arbitration* Case No 7399 of 1993 [http://cisgw3.law.pace.edu/cases/937399i1.html].

issue of validity of contract is of no consequence as far as validity pursuant to the CISG is concerned. To restate Professor Honnold, substance rather than the label is of consequence.[37] Validity as a general principle is not governed by the CISG but validity must be carefully distinguished from breaches of contracts or actions which will render a contract void. Validity in the context of Art 4 refers only to matters that go to the root of the contract making it void *ab initio*. This narrows the field considerably.

As Drobnig suggests, validity is one of the general principles of contract law and comes in three forms: the binding effect of contractual promises, defects of consent; and illegality and immorality.[38] In common law countries the binding effect of contractual promises depends on the existence of consideration.[39] This issue is expressly dealt with in the CISG under the provision on formation of contract and hence validity due to the lack of consideration is not to be settled in accordance with domestic law. The questions of consent, immorality and illegality are clearly not covered by the CISG and hence they are subject to domestic law.

In sum it can be seen that 'validity' is a misleading term and cannot be invoked merely because of a label. Article 4 alludes to the fact that issues which domestic law treats as issues of validity will not be excluded if they relate to formation of contract or the obligations of buyers and sellers arising out of a contract.

The jurisprudence of Article 4

To test the above conclusions we must return to the jurisprudence of Art 4. The distributorship issue has already been discussed above. Another area frequently in dispute is the question of set-off. A number of courts have explained their disallowance of set-offs by reference to Art 4. The *Oberlandesgericht* Stuttgart[40] as well as the *Amtsgericht* Frankfurt[41] noted that set-off was excluded due to Art 4. In addition, the *Oberlandesgericht* München[42] held that both set-off and restitution are excluded from the scope of the CISG by Art 4.

37 Honnold, *supra* note 32.

38 Drobnig, *supra* note 14, at 313.

39 *Ibid.*

40 Germany 21 August 1995, 5 U 195/94 [http://cisgw3.law.pace.edu/cases/950821g1.html].

41 Germany 31 January 1991, 32 C 1074/90-41 [http://cisgw3.law.pace.edu/cases/910131g1.html].

42 *Oberlandesgericht* München, 28 January 1998, 7 U 3771/97 [http://cisgw3.law.pace.edu/cases/980128g1.html].

(a) Set-off

In *PT Van den Heuvel v Santini Maglificio Sportivo de Santini P&C SAS*,[43] the court distinguished between two types of set-off. One concerned overcharging, and the other concerned damages. In relation to a set-off for overcharging the claim was allowed as neither party contested the value of the invoices. The court implied that the set-off was allowable because the claims were subject to the CISG.[44] Damages due to a breach of the contract were considered to be outside the scope of the CISG and hence to be covered by domestic laws pursuant to Art 7(2). However, in a later ICC Arbitration case[45] the arbitrator held that the buyer was allowed a set-off for damages suffered due to the seller's breach of the contract, pursuant to Art 74.

The Dutch court, unlike the ICC arbitrator, did not read Art 74 correctly. Article 74 allows for damages due to a breach of contract including loss of profit. Therefore, provided that the set-off pertains to damages due to breach of contract or loss of profits it will be within the scope of the CISG. A set-off due to other reasons, such as punitive damages not contained within the contract, is outside the scope of the Convention and in accordance with Art 7(2) recourse must be had to domestic law. Some courts have misinterpreted Art 4 as defining all those matters, which are not included in the CISG. However, this question must be solved pursuant to Art 7(2).

Careful attention must be given to set-off provisions if they are in breach of some domestic law, which could make them invalid. In such a case Art 4 could be used to implement domestic law. However in the cases described above the set-off was not a question of a breach of domestic laws and therefore Art 4 was misinterpreted.

A Swiss decision explains the issue well. The Court of Freiburg[46] noted that the only question at hand was the amount of set-off. The right of set-off was based on one party's General Terms and Conditions and the question was whether these terms formed part of the sales contract. The court correctly noted that the question was one of validity and pursuant to Art 4 was not governed by the CISG. Domestic law, in this case German law, had to be applied. Under German law the set-off was not excluded. The interesting part of the decision was the fact that in making its interpretation the court tried to solve the issue within the CISG. Article 8 was consulted and it was found that if the statement made by the parties in relation to set-off corresponded with the intent of the parties then the CISG was applicable. The Court stated that: 'If the interpretation of statements made by both parties does not lead to a

43 Netherlands 25 February 1993, 1992/182 [http://cisgw3.law.pace.edu/cases/930225n1.html].

44 The same decision was reached in *Oberlandesgericht* München, 9 July 1997, 7U 2070/97 [http://cisgw3.law.pace.edu/cases/970709g1.html].

45 1997, 8611/HV/JK [http://cisgw3.law.pace.edu/cases/978611i1.html].

46 *Kantonsgericht* Freiburg, 23 January 1998 [http://cisgw3.law.pace.edu/cases/980123s1.html].

congruent result, the intent of the parties has to be elicited in accordance with the principles of domestic law.'[47]

In conclusion, it can be said that rulings on set-off have produced the correct result but in some instances for the wrong reasons. Generally speaking set-offs, which are due to breaches of contract that are not covered by Art 74, have been recognized as being excluded by Art 4.

(b) Other issues

The above analysis illustrates that courts and tribunals confuse the application of Art 7(2) with the application of Art 4. Several other issues can be used to demonstrate this point. For the time being this examination is restricted to the burden of proof, currency payments and assumption of debt. The *Handelsgericht* Zürich[48] noted that the question concerning the burden of proof is not governed by the CISG. This determination has been repeated by the *Bezirksgericht der Saane*[49] and the *Tribunale d'appelo del Cantone del Ticino*.[50]

All three courts decided that the CISG does not determine the burden of proof however 'due to its underlying systematic structure, certain principles may be inferred'.[51] The three Swiss courts in the end came to the correct decision however they should have used Art 7(2) to determine the issue. Burden of proof as the courts correctly pointed out is not explicitly ruled upon within the CISG. However by applying Art 7(2) a gap is discoverable. The above courts expressed correctly that according to Art 35 the buyer must notify defects to the seller and therefore the burden of proof as to defects rests with the buyer. The *Bezirksgericht der Saane*[52] came to an interesting decision. It ruled that the burden of proof as to the means of transportation is not settled in the CISG. Through the application of Art 7(2) the court applied domestic law and as the buyer could not meet the burden of proof Art 32(2) was used. It declares that the choice of the mode of transportation is left to the seller. This decision nearly reflects a correct application of the CISG. The only flaw is the use of Art 4 in declaring that the burden of proof is not settled in the CISG. The court should have bypassed Art 4 and directly applied Art 7(2).

In contrast, a decision by the *Kantonsgericht Wallis*[53] exhibits an undesirable approach to the CISG. The ruling hinged upon the currency in which the purchase price had to be paid. Again Art 4 instead of Art 7(2) was

47 *Ibid.*

48 Switzerland 30 November 1998, HG 930634/O [http://cisgw3.law.pace.edu/cases/981130s1.html].

49 Switzerland 20 February 1997, T 171/95 [http://cisgw3.law.pace.edu/cases/970220s1.html].

50 Switzerland 15 January 1998, 12.97.00193 [http://cisgw3.law.pace.edu/cases/980115s1.html].

51 Drobnig, *supra* note 14.

52 *Supra* note 49.

53 Switzerland 30 June 1998, CI 98 9 [http://cisgw3.law.pace.edu/cases/980630s1.html].

applied. Rather than discovering a general principle under Art 54, which deals with the buyer's obligation to pay the price, the court applied Italian law, which incidentally led to the same conclusion as the CISG. This approach is incorrect because the court did not follow Art 7(2) and search for general principles to fill a gap.

(c) Concluding the argument

The above discussion has shown that the CISG cannot be applied Article by Article. Rather it has to be read in its entirety taking a holistic approach. Article 4 contains two important expressions: 'in particular' and 'except as otherwise expressly provided in this convention'. Ferrari in his commentary on OGH, April 24, 1997[54] came to the conclusion that the above expressions delineate the spheres of influence of the CISG and domestic law. This is also the goal of Art 7(2). However, priority must be given in any interpretation or question of delineation to Art 7(2).

This should not be taken as acceptance of the narrow view that Art 4 deals only with the issue of validity. Understood correctly, Art 4 has a much wider application as it assists courts and tribunals in a determination of the scope of the CISG. When a French court[55] had to deal with the question of privity of contract in an action by a sub-purchaser against the initial seller, the court directed its attention to Art 4. Pursuant to Art 4, the CISG only governs rights and obligations of the buyer and seller arising out of their contract. As there is no contract between a sub-purchaser and an initial seller, the CISG was not applicable. In *KSTP-FM,LLC v Specialized Communications, Inc and Adtronics Signs, Ltd*[56] the plaintiff alleged that in Minnesota the UCC expressly allows certain parties the right to sue for breach of implied conditions in the absence of contractual privity. The court relied on Art 4 and concluded, like the French court above, that the CISG is limited to rights under the contract between buyer and seller.

However, many courts have applied Art 4 within the domain of Art 7(2). The expression 'in particular' in Art 4(a) 'only serves to emphasise that, apart from matters listed in article 4(a) and (b), there are other matters not governed by the CISG'.[57] As an example Art 5 can be cited. It excludes product liability as far as personal injury is concerned. At the same time the other important expression – 'except as otherwise provided in this convention' – alerts us to the fact that not all matters in relation to validity are excluded. For example, Art 11 lays down the principle that contracts do not have to be evidenced in

54 Austria, *Oberster Gerichtshof*, 2 Ob 109/97 [http://cisgw3.law.pace.edu/cases/970424a3.html].

55 5 January 1999, *Cour de Cassation*, P 96-19.992 [http://cisgw3.law.pace.edu/cases/990105f1.html].

56 United States 9 March 1999, Minnesota District Court CT 98-013101 [http://cisgw3.law.pace.edu/cases/990309u1.html].

57 *Ibid*.

writing. Furthermore, courts have also held that validity issues such as conformity of goods are dealt with in Art 35.[58] Schlechtriem comments that:

> The uniformity reached by the Convention would be in grave danger if … national provisions could be applied [simply] because [their] application leads to invalidity or avoidance of a contract and thereby could be brought under article 4(a).[59]

It is quite obvious that the CISG does not intend for a matter to be brought under domestic laws when the matter is regulated by the Convention. Furthermore, if we examine the list of matters excluded from the CISG through Art 4 namely: statute of limitation, set-off, agency, distributorship and frame contracts, validity of penal clauses, assignment of receivables, assumption of debts, and others, it can be seen that these matters need not be treated as questions of validity.

For instance, agency and distributorship agreements would be excluded under Art 3(2), which states that the CISG does not apply to service contracts. This point can be illustrated by a decision of the Obergericht Luzern,[60] which interpreted Art 3(2) in a wide fashion. It noted that if elements other than those relating to the contract of sale were preponderant then the CISG would not apply.[61] The court specifically referred to exclusive distribution or franchise contracts but noted that a single sale of goods pursuant to the franchise agreement would be governed by the CISG.[62]

The solution as indicated above is that Art 7(2) must be consulted first and an examination of the CISG as a whole must be undertaken to determine if general principles can be divined. What then is the purpose of Art 4? It can be argued that Art 4 expressly draws a line in the sand where the CISG is not applicable. Validity of contract is excluded but the concept of validity requires definition and substance. By analogy to the UNIDROIT Principles and the European Principles, validity can be reduced to questions of illegality, immorality, or lack of capacity.

In conclusion it can be observed that courts have not generally used domestic law in preference to the CISG, with the proviso that a full understanding of the capacity of Art 7(2) has not been achieved. However, this does not undermine the fact that national courts are, by and large, interpreting the CISG in a uniform manner and that decisions have tended towards a converging jurisprudence of international sales law.

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58 *Supra* notes 34, 35 and 36.

59 Schlechtriem,. P, 'Uniform Sales Law – The Experience with Uniform Sales Law in the Federal Republic of Germany' Juridisk Tidskrift (1991/92) 12–13

60 Switzerland 8 January 1997, 11 95 123/357 [http://cisgw3.law.pace.edu/cases/970108s1.html].

61 *Ibid*.

62 *Ibid*.