

Article 1

- (1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:
 - (a) when the States are Contracting States; or
 - (b) when the rules of private international law lead to the application of the law of a Contracting State.
- (2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.
- (3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.

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FORERUNNERS AND DRAFTS: Article 1(1), (3) and (5) ULIS; Articles 2 and 7 ULIS; Article 1(1), (2) and (3) ULF; Geneva Draft 1976, Articles 1 and 6; Vienna Draft 1977, Article 1; New York Draft 1978, Article 1.¹

I. History

The sphere of application of the Hague Sales Law was essentially criticized on two grounds: 1
on the one hand, because of its application to sales contracts with no connection to any Contracting State, and on the other hand, because of the confusion created by various 'subjective' and 'objective' tests² and alternatives as well as by a number of reservations included to limit the broad sphere of application.³ With most Contracting States having exercised their option to declare a reservation,⁴ no uniform application could be achieved.⁵

Accordingly, the UNCITRAL Working Group⁶ and UNCITRAL itself⁷ decided to 2
make significant changes to the Hague Sales Law even before work on the CISG began,⁸ particularly to simplify the rules on the sphere of application and depart from the principle of universal application.⁹ This led on the one hand to the location of the parties being the sole criterion for the internationality of the contract.¹⁰ On the other hand, the sphere of application of the Convention was restricted to contracts where the parties involved are located in Contracting States (Article 1(1)(a)).¹¹ The 'universality principle', however, partly survived in Article 1(1)(b) but has its counterweight in the reservation of Article 95.¹²

¹ See also Arts 2, 3 Limitation Convention 1974.

² Cf Dölle/Herber, Art 1 EKG, paras 2, 15; Bianca/Bonell/Jayme, Art 1, note 1.3.

³ See Schlechtriem, previous edition of this work, Art 1, para 1; Ferrari, 5th German edition of this work, Art 1, para 1.

⁴ See Dölle/Herber, Einf vor Arts 1–8 EKG, para 4.

⁵ On the problems caused by the reservations, cf Dölle/Herber, Einf vor Arts 1–8 EKG, para 3 *et seq.* Cf also Honnold, Art 1, para 40.

⁶ YB I (1968–1970), p 178, No 10 *et seq.*; p 180, No 30 *et seq.*; YB II (1971), p 51 *et seq.*, No 11 *et seq.*; p 82 Annex II, No 1 *et seq.*

⁷ YB I (1968–1970), p 132 *et seq.*, No 22 *et seq.*, No 50 *et seq.*; YB II (1971), p 18 *et seq.*, No 57 *et seq.*

⁸ YB I (1968–1970), p 164, No 25 *et seq.*; p 167, No 58 *et seq.*; p 178 *et seq.*, No 14.

⁹ See Schlechtriem, previous edition of this work, Art 1, para 2; Ferrari, 5th German edition of this work, Art 1, paras 2, 3; Winship, *Scope*, pp 1–20.

¹⁰ YB II (1971), p 52, No 12 *et seq.*, in particular No 14 *et seq.* Criticism is expressed by Volken, *Scope*, pp 25–7. Incomprehensible MünchKomm/Westermann, Art 1, para 5 who believes that the internationality of the contract requires the contract to be about a sale of goods, rightly criticized by Ferrari, 5th German edition of this work, Art 1, para 40.

¹¹ See in more detail Schlechtriem, previous edition of this work, Art 1, paras 3–5; Staudinger/Magnus, Art 1, paras 7–11.

¹² The introduction of Art 1(1)(b) CISG was severely criticized, see eg the statement by Herber, O R, pp 236, 237, Nos 9–12 who stated that it was such mechanism that had caused reluctance amongst States to accede to the Hague Sales Law and that subparagraph (b) would have to be expected to raise serious problems of interpretation and application. Consequently, he suggested to delete the rule. The subsequent German proposal was, however, rejected with 25:7 votes and 10 abstentions (O R, p 83). Cf also Schlechtriem, previous edition of this work, Art 1, para 6; Bianca/Bonell/Jayme, Art 1, note 1.4.

II. General remarks on Article 1

1. Territorial sphere of application

- 3 With regard to the territorial sphere of application of the Convention, Article 1(1) first of all requires the places of business of the parties in the sense of Article 10 to be in different States at the time of the conclusion of the contract.¹³ In this regard neither the nationality of the parties nor the civil or commercial character of their contractual relationship is of relevance (Article 1(3)). This broad rule is, however, restricted by subparagraphs (a) and (b) as well as by Article 1(2) according to which the internationality of the contract is to be disregarded, where it was not apparent to both parties from the contract or surrounding circumstances when concluding the contract.¹⁴ Actual knowledge on the side of the parties of the relevant places of business being in different States is, however, not required.¹⁵
- 4 In addition to the internationality of the contract, Articles 1(1)(a), 100(2) require the different States in which the parties involved have their places of business to be Contracting States at the time of the conclusion of the contract.¹⁶ With currently 73 Contracting States,¹⁷ including nine out of the 10 largest trade nations in the world,¹⁸ this is the most important scenario for the applicability of the Convention today.
- 5 But even if the relevant places of business are not located in Contracting States, the Convention may—subject to the reservation in Article 95—still apply by virtue of Article 1(1)(b). This provision holds the Convention applicable where the rules of private international law (conflict of laws rules) of the forum lead to the application of the law of a Contracting State.¹⁹ Although the sphere of application of the Convention is thus extended beyond Article 1(1)(a), it is still less broad than the Hague Sales Law as the contract must have a connection to at least one Contracting State.²⁰

¹³ See RB Hasselt, 20 September 2005, CISG-online 1496; Ferrari, 5th German edition of this work, Art 1, para 8; Staudinger/Magnus, Art 1, para 69; Honsell/Siehr, Art 1, para 19.

¹⁴ This provision applies to both subparagraphs of Art 1 CISG, see Ferrari, 5th German edition of this work, Art 1, para 48; Staudinger/Magnus, Art 1, para 72. It can be called a subjective characteristic, which is a departure from the terminology used with regard to ULIS, see Schlechtriem, previous edition of this work, Art 1, para 7. See on this provision also paras 39–45 *et seq* below.

¹⁵ See Schlechtriem, previous edition of this work, Art 1, para 50; Ferrari, 5th German edition of this work, Art 1, para 48; Staudinger/Magnus, Art 1, para 51; Staudinger/Magnus, Art 1, para 72; MünchKomm/Westermann, Art 1, para 12; Herber/Czerwenka, Art 1, para 74; but see Bianca/Bonell/Jayme, Art 1, note 2.4. requiring awareness of the internationality.

¹⁶ See in more detail paras 28, 29 below and the comments on Article 100 below.

¹⁷ See for a list of current Member States Appendix I. For a continuously updated account, see www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html. The last State acceding to the Convention was Albania on 13 May 2009, with the Convention entering into force on 1 June 2010. On 1 July 2008, Japan became a Member State, the Convention entered into force on 1 August 2009, cf for Japan's accession also Sono, (2008) 20 *Pace Int'l L Rev* 105 *et seq*.

¹⁸ The sole current exception is the United Kingdom.

¹⁹ See in more detail paras 30–5 below.

²⁰ See Ferrari, 5th German edition of this work, Art 1, para 5.

2. Subject matter

The subject matter of Article 1(1) is contracts for the sale of goods. It is irrelevant whether the respective contract is of civil or commercial nature (Article 1(3)).²¹ The Convention in Article 2 rather uses the purpose of sales contracts, the circumstances under which they were concluded or their object as criteria to exclude contracts it does not intend to govern. It follows that domestic requirements or definitions of merchants, consumers, entrepreneurs, or any other such categorization have no impact on the applicability of the CISG.²²

3. Supplementary rules

Article 1(1) is supplemented by other provisions dealing with the various concepts set out in this provision. With regard to the territorial sphere of application of the Convention, the concept ‘place of business’ is clarified by Article 10. Article 92(2) adapts the concept ‘Contracting State’ to reservations made under Article 92(1) and Article 93(3) establishes the requirements for a territorial unit to be ‘Contracting State’ where it is one of at least two units belonging to one Contracting State. Article 99(2) defines the time as of which a State is to be regarded a ‘Contracting State’. Finally, Article 100 defines the temporal scope of the Convention. With regard to the subject matter of Article 1(1), paragraphs 2, 3 of Article 1 as well as Articles 2, 3 further outline the concept of ‘international sale’.

III. General requirements of Article 1(1)

1. Contract of sale

(a) **General.** In the same way as its predecessor ULIS, the CISG does not expressly define ‘contract of sale’. The general obligations arising under contracts envisaged by the Convention are established in Articles 30, 53 with the delivery of the goods, documents and transfer of property on the side of the seller and the payment of the purchase price and taking delivery on the side of the buyer. ‘Contracts of sale’ in the sense of the CISG are thus reciprocal contracts directed at the exchange of goods against the ‘price’.²³

Following from this definition, Article 1(1) encompasses most kinds of sales. Contracts involving the carriage of the goods (Articles 31(a), 67), sales by sample or model

²¹ See also paras 46–8 *et seq* below.

²² See Schlechtriem, previous edition of this work, Art 1, para 60; Ferrari, 5th German edition of this work, Art 1, para 60; Honnold, Art 1, para 48; MünchKomm/Westermann, Art 1, para 22; MünchKommHGB/Benicke, Art 1, para 4.

²³ See Schlechtriem, previous edition of this work, Art 1, para 14; Ferrari, 5th German edition of this work, Art 1, para 13; Staudinger/Magnus, Art 1, para 14; Winship, *Scope*, pp 1–22. In essence, this definition seems to be common ground around the world. This does also hold true for countries in which property is transferred with the conclusion of the contract such as in France (Art 1583 Cc), as the obligation to transfer property also exists in these countries and the CISG is not concerned with the modalities of the transfer, Article 4, sentence 2(b) CISG. Cf Ferrari, 5th German edition of this work, Art 1, para 14; Staudinger/Magnus, Art 1, para 14.

(Article 35(2)(c)) or in accordance with specifications made by the buyer (Article 65), and instalment contracts (Article 73) are expressly addressed by the Convention. In view of Articles 33, 49, this is also commonly held for contracts where time is of the essence.²⁴

- 10 Not expressly mentioned but regularly encompassed by the Convention are furthermore sales under conditions²⁵ including the retention of title or time limits²⁶ as well as contracts providing for the direct delivery of the goods to the customer of the buyer.²⁷ The same holds true for contracts containing pre-emptive options or rights to re-purchase,²⁸ buy-back-sales,²⁹ counterpurchases,³⁰ and offsets. Article 3 establishes additional requirements for the application of the CISG to contracts for goods to be manufactured (Article 3(1)) and mixed contracts (Article 3(2)).
- 11 (b) **Barter.** With regard to its obligations the concept of barter strongly resembles sales contracts and, consequently, domestic laws regularly equate barter contracts with sales contracts.³¹ Although the suitability of the CISG to such contracts is not contested,³² the prevailing opinion under the CISG nevertheless excludes barter contracts from the

²⁴ See Ferrari, 5th German edition of this work, Art 1, para 20; Staudinger/Magnus, Art 1, para 20. For CIF contracts see OLG Hamburg, 28 February 1998, CISG-online 261: use of the INCOTERM CIF shows that time was of the essence rendering delay a fundamental breach of contract.

²⁵ See ICC Ct Arb, 7844/1994, CISG-online 567: effectiveness of contract dependent on whether buyer is awarded sub-contract by a third party. OLG Schleswig, 29 October 2002, CISG-online 717: final amount of the purchase price dependent on the price achieved in a resale. See also Ferrari, 5th German edition of this work, Art 1, para 15; Staudinger/Magnus, Art 1, para 14. This includes contracts where the effectiveness of the contract depends on the buyer being satisfied with the goods received, see Staudinger/Magnus, Art 1, para 21.

²⁶ See Staudinger/Magnus, Art 1, para 14.

²⁷ See for this constellation BGH, 24 March 1999, CISG-online 396: direct delivery of the vine wax sold from the producer to the buyer. See also OGH, 24 October 1995, CISG-online 166; Ferrari, 5th German edition of this work, Art 1, para 18; Staudinger/Magnus, Art 1, para 18; Witz/Salger/Lorenz/Lorenz, Art 1, para 6; MünchKomm/Westernmann, Art 1, para 6; Brunner, Art 2, para 8.

²⁸ See Schroeter, Intro to Arts 14–24, para 66 below; Ferrari, 5th German edition of this work, Art 1, para 18; Staudinger/Magnus, Art 1, para 18;

²⁹ See MünchKomm/Gruber, Art 14, para 3; Enderlein/Maskow/Strohbach, Art 1, note 1.; Schwenzer/Mohs, *IHR* 2006, 239, 240.

³⁰ These are usually two legally distinct contracts, see Ferrari, 5th German edition of this work, Art 1, para 30.

³¹ See eg for Afghanistan, Art 1173 Cc; Algeria, Art 415 Cc; Argentina, Art 1356 Cc; Austria, Art 1046 ABGB; Bahrain, Art 450 Cc; Belarus, Art 538(2) Cc; Bolivia, Art 654 Cc; Brazil, Art 533 Cc; Chile, Art 1794 Cc; China, Art 175 Contract Law; Colombia, Art 1850 Cc; Costa Rica, Art 1100 Cc; Cuba, Art 370 Cc; Czech Republic, § 611 Cc; Ecuador, Art 1760 Cc; Egypt, Art 485 Cc; El Salvador, Art 1598 Cc; France, Art 1707 Cc; Georgia, Art 523 Cc; Germany, § 480 BGB; Greece, Art 573 Cc; Guatemala, Art 1853 Cc; Honduras, Art 1606 Cc; Jordan, Art 556 Cc; Kuwait, Art 522 Cc; Latvia, Art 2092 Cc; Lebanon, Art 503 Cc; Libya, Art 475 Cc; Lithuania, Art 6.432(2) Cc; Mexico, Art 2250 Cc; Moldavia, Art 824 Cc; Nicaragua, Art 2536; Paraguay, Art 756 Cc; Philippines, Art 1641 Cc; Russia, Art 567(2) Cc; South Korea, Art 597 Cc; Spain, Art 1446 Cc; Switzerland, Art 237 OR; Syria, Art 453 Cc; Taiwan, Art 399 Cc; for the US UCC, see *Wheeler v Sunbelt Tool Co, Inc*, Ill Ct App (4th Dist), 17 March 1989, 181 Ill App 3d 1088, 1098; Venezuela, Art 1.563 Cc; Vietnam, Art 463(4) Cc; Yemen, Art 585 Cc. The Islamic Shari'a law also considers barter contracts to be equal to sales contracts. An express exclusion of the application of sales provisions to barter contracts can be found in Art 465 of the Iranian Civil Code.

³² See Schlechtriem, previous edition of this work, Art 1, para 18, n 33: 'concepts of the CISG would be entirely suitable for application to barter transactions, particularly as regards the warranties given'.

Convention, as the CISG would require sales contracts to be an exchange of goods against money.³³ However, it is advocated here that barter contracts are not excluded from the CISG.³⁴ The term 'price' as used in Articles 14(1) Sentence 2, 53, 55 does not have to be restricted to money.³⁵ Rather, both parties can be treated as sellers in regard to the goods they deliver and as buyers in regard to the goods they receive. It is in any case advisable for parties to expressly stipulate for the CISG to apply.

(c) **Sales contracts with special financing agreements.** Whether the obligations set out in Articles 30, 53 CISG form the essential part of a contract can, however, be particularly doubtful, where the acquisition of the goods is intertwined with special financing agreements. Typical examples of such contracts include hire-purchase-agreements, leasing-contracts or sale-and-lease-back-contracts. In analogy to Article 3(2) CISG, the decisive criterion for the qualification of these agreements is the weight of the purchase part in the particular case.³⁶ Where the preponderant part of the obligations agreed upon by the parties relates to the financing and use of the goods, the Convention is not applicable.

Against this background hire-purchase-agreements may fall into the scope of the CISG where the economic result of the contract is the final acquisition of the goods by the buyer or where the value of the use of the goods is completely exhausted at the end of the contract.³⁷ Operating and financial leasing-contracts will—save for exceptional circumstances in a particular case—regularly be excluded from the CISG, as the preponderant part of the obligation is to make the use of the goods available to the lessee.³⁸ This is also supported by the fact that meanwhile specific rules for leasing contracts have been developed.³⁹ However, the contractual relationship between the seller and the lessor may very well be governed by the CISG.⁴⁰ The same holds true for the sales contract in a sale-and-lease-back transaction, as this consists of two legally distinct transactions.⁴¹

³³ See Int Ct Russian CCI, 9 March 2004, CISG-online 1184; Schlechtriem, previous edition of this work, Art 1, para 18; Ferrari, 5th German edition of this work, Art 1, para 30 with further references; MünchKomm/Westermann, Art 1, para 6; MünchKommHGB/Benicke, Art 1, para 8; Herber/Czerwenka, Art 1, para 5; Winship, *Scope*, pp 1–24.

³⁴ See also Int Ct Russian CCI, 17 June 2004, CISG-online 1240; CIETAC, 13 June 1989, CISG-online 865; Bridge, *Int'l Sale of Goods*, para 11.19; Bianca/Bonell/Maskow, Art 53, note 2.5.; probably also Honnold, Art 2, para 56.1. Cf also Int Ct Ukrainian CCI, 10 October 2003, CISG-online 923: the claim was held to be time-barred based on the 1974 Limitation Convention which sets out the same requirements as the CISG.

³⁵ Honnold, Art 2, para 56.1.

³⁶ See Schlechtriem, previous edition of this work, Art 1, para 16.

³⁷ See MünchKomm/Westermann, Art 1, para 6; Schlechtriem, *Internationales UN-Kaufrecht*, para 25; Piltz, *Internationales Kaufrecht*, paras 2-40, 2-37. Less guardedly Staudinger/Magnus, Art 1, para 33; Honsell/Siehr, Art 1, para 5: CISG generally applicable. But see also Ferrari, 5th German edition of this work, Art 1, para 27; Enderlein/Maskow/Strohbach, Art 1, note 1.

³⁸ See Schlechtriem, previous edition of this work, Art 1, para 16; Ferrari, 5th German edition of this work, Art 1, para 27; Staudinger/Magnus, Art 1, para 34. But see for financial leasing Soergel/Lüderitz/Fenge, Art 3, para 6.

³⁹ See the 1988 UNIDROIT Convention on International Financial Leasing (Ottawa). The 2008 Draft Common Frame of Reference prepared by the Study Group on a European Civil Code also contains specific provisions on leasing contracts.

⁴⁰ See Ferrari, 5th German edition of this work, Art 1, para 30.

⁴¹ See Ferrari, 5th German edition of this work, Art 1, para 30.

- 14 (d) Framework contracts.** Distributorship, dealership, agency, or franchise contracts are excluded from the scope of the CISG.⁴² This may only be different where the framework contract already specifies the sales obligations of the parties and the parties intend these obligations to form the main part of the contract.⁴³ The supply orders can be sales contracts and may fall under the CISG, even if the framework contract already contains specific terms (eg for the sales contracts to be concluded by ordering the goods, or as to price per unit, warranties, particulars of shipment, jurisdiction, and arbitration clauses, and the like).⁴⁴
- 15 (e) Modification and avoidance agreements.** Agreements to modify, avoid or change in any other way the initial sales contract are subject to the CISG (Article 29).⁴⁵

2. Goods

- 16 (a) General.** Whilst the official English text of both ULIS and the CISG uses the same term ('goods'), the French term used in the CISG ('*marchandises*') differs from that in ULIS ('*objets mobiliers*'). In determining the scope of this notion it is suggested that the interpretation of the concept of 'goods' has to be made autonomously and the suitability of the rules on non-conformity (Articles 35 *et seq*) has to be the decisive criterion.⁴⁶ This criterion allows for a broad understanding of the notion of 'goods' so as to cover all objects—new or used⁴⁷—which form the subject-matter of commercial sales contracts and those which the drafters of the Convention could not have foreseen.⁴⁸ An express exclusion of certain items is made by Article 2(d)–(f).⁴⁹ Even if items are *extra commercium* or trade with them is otherwise restricted, they remain 'goods' in the sense of Article 1.⁵⁰ Contracts for such

⁴² See Cass com, 20 February 2007, CISG-online 1492; OLG Hamm, 5 November 1997, CISG-online 381; *Viva Vino Import Corp v Farnese Vini Srl*, US Dist Ct (ED Pa), 29 August 2000, CISG-online 675: CISG not applicable to distributorship agreement, even if domestic sales law—UCC Pennsylvania—generally applies to such contracts; Schlechtriem, previous edition of this work, Art 1, para 16a; Ferrari, 5th German edition of this work, Art 1, para 31 with numerous references.

⁴³ See Supreme Court Poland, 27 January 2006, CISG-online 1399; OLG München, 22 September 1995, CISG-online 208; Bridge, *Inter Sale of Goods*, para 11.19: 'there seems no good reason to exclude such contracts and every reason to avoid if possible an uncomfortable clash between the CISG in its application to individual sales and any law applicable to the framework contract'.

⁴⁴ See Cass com, 20 February 2007, CISG-online 1492; BGH, 23 July 1997, CISG-online 285, 276, N/W 1997, 3304 and 3309 (Benetton I and II); OLG München, 22 September 1995, CISG-online 208; Gerichtshof Arnhem, 27 April 1999, CISG-online 741; Hamburg Chamber of Commerce, 21 March 1996, CISG-online 187.

⁴⁵ Cf on the legal consequences following avoidance by agreement, AGer Sursee, 12 September 2008, CISG-online 1728, note 6.1.

⁴⁶ Cf Schlechtriem, previous edition of this work, Art 1, para 21 who advocates the suitability of the CISG for sales of software on the grounds that 'the core provisions on rights and remedies can be applied, if necessary with appropriate accommodation in the light of the directive for the Convention's interpretation in Article 7(1)'.

⁴⁷ See Ferrari, 5th German edition of this work, Art 1, para 39.

⁴⁸ This approach also does justice to the change in the French, the principal reason for which was the desire to replace a specific 'sale of goods' term by one which had been rather less clearly defined by domestic law and which was therefore more suitable for interpretation on an international basis, see Schlechtriem, previous edition of this work, Art 1, para 20.

⁴⁹ For details of the comments on these provisions.

⁵⁰ Domestic legal systems may hold contracts for *res extra commercium* to violate statutory prohibitions. Such rules functionally establish provisions relating to the validity of the contract. These rules are not pre-empted by the CISG on account of Article 4, sentence 2(a) (see also below Art 4, para 39).

goods may, however, be invalid under the applicable domestic law.⁵¹ Against this background 'goods' are first of all—at the time of delivery—moveable, tangible objects.⁵² This includes livestock,⁵³ human organs, artificial limbs, cultural items, and pharmaceuticals.⁵⁴

Although it is not always necessary that goods be corporeal, they must be moveable at the time of delivery. It is sufficient for them to become moveable as a result of the sale (for example, minerals or growing crops⁵⁵) or that, although intended by the buyer to be subsequently attached to real estate, they are nevertheless moveable at the date of delivery.⁵⁶ However, the position is different if the contract is for the construction of a fixture (eg a building or a bridge).⁵⁷ 17

(b) **Software.** If software is permanently transferred to the other party in all respects except for the copyright and restrictions to its use by third parties and becoming part of the other party's property—as opposed to mere agreements on temporary use against payment of royalties—it can be the object of a sales contract governed by the CISG.⁵⁸ In this case, the situation is comparable to the sale of a machine, where the seller retains the intellectual property rights necessary for the operation of the machine (patents etc).⁵⁹ It does not matter whether the software is standard software, software adjusted to the customer's needs, or fully customized software, since Article 3(1) makes clear that this distinction does not matter in determining the sphere of application of the Convention.⁶⁰ As in the case of other goods to be manufactured, the 'services' (work etc) necessary for the manufacture of goods are to be disregarded.⁶¹ The mode in which software is delivered (eg via disc or electronically via the internet) is irrelevant.⁶² Provisions of the CISG tailored to the handling of 18

⁵¹ See Ferrari, 5th German edition of this work, Art 1, para 39; Staudinger/Magnus, Art 1, para 49.

⁵² Undisputed. This understanding also corresponds with the meaning of 'goods' and 'marchandises' in English and French law respectively; detailed Czerwenka, *Rechtsanwendungsprobleme*, p 147.

⁵³ See OLG Thüringen, 26 May 1998, CISG-online 513 (fish); CA Paris, 14 January 1998, CISG-online 347 (circus elephants); LG Flensburg, 15 January 2001, CISG-online 619 (sheep); Ferrari, 5th German edition of this work, Art 1, para 34; Staudinger/Magnus, Art 1, para 48; Schlechtriem, *Internationales UN-Kaufrecht*, para 29.

⁵⁴ See Staudinger/Magnus, Art 1, para 48 with references for these examples.

⁵⁵ See Schlechtriem, previous edition of this work, Art 1, para 23; Bridge, *Int'l Sale of Goods*, para 11.18.

⁵⁶ Cf ICC Ct Arb, 7153/1992, CISG-online 35, *JDI* 1992, 1005, 1006 (materials destined for the construction of a hotel).

⁵⁷ See Schlechtriem, previous edition of this work, Art 1, para 23.

⁵⁸ See OGH, 21 June 2005, CISG-online 1047; Gerichtshof 's-Hertogenbosch, 19 November 1996, CISG-online 323; OLG Koblenz, 17 September 1993, CISG-online 91; OLG Köln, 26 August 1994, CISG-online 132; LG München, 8 February 1995, CISG-online 203; Schlechtriem, previous edition of this work, Art 1, para 21.

⁵⁹ See Schlechtriem, previous edition of this work, Art 1, para 21.

⁶⁰ Some authors advocate the application of CISG in the case of standard software only, see in particular Ferrari, 5th German edition of this work, Art 1, para 38; Staudinger/Magnus, Art 1, para 44; MünchKomm/Westermann, Art 1, para 6. But see Gerichtshof 's-Hertogenbosch, 19 November 1996, CISG-online 323; Schlechtriem, *Internationales UN-Kaufrecht*, para 32; Green/Saidov, (2007) *J Bus L* 170; Diedrich, (2002) 6 *VJ (Supplement)* 65; *idem*, (1996) 8 *Pace Int L Rev* 303 *et seq*, 325, 326.

⁶¹ See Art 3, para 3 below. The view expressed by Ferrari, 5th German edition of this work, Art 1, para 38 according to which the CISG will regularly not apply to contracts for customized software due to Article 3(2) can therefore not be followed.

⁶² See RB Arnhem, 28 June 2006, CISG-online 1265; Schlechtriem, previous edition of this work, Art 1, para 21; Bamberger/Roth/Saenger, Art 1, para 7; Brunner, Art 2, para 4; Karollus, p 21; Schmitt, *CR* 2001, 150; but see Ferrari, 5th German edition of this work, Art 1, para 39; Staudinger/Magnus, Art 1, para 44.

tangible objects, eg in regard to the transfer of risk (Articles 66–70), preservation of goods (Articles 85, 86) have to be adapted accordingly.⁶³ In many cases, the seller may be contractually obliged to render further services, eg instructing the buyer or its employees. The CISG remains applicable also in these cases unless the services to be rendered form the ‘preponderant part’ (Article 3(2)) of the seller’s obligations.⁶⁴

- 19 (c) **Know-how etc.** On the other hand, the sale of ‘know-how’ that is not incorporated in a physical medium does not fall under the CISG—it has no link whatsoever to the notion of ‘goods’.⁶⁵ A contract to conduct a ‘market research study’ is not about ‘goods’ even if it is ‘materialised’, ie printed on paper to be handed over to the customer.⁶⁶
- 20 (d) **Documentary sales.** The CISG also governs contracts which oblige the seller to ship the goods sold, even though the subject matter of the contract is a document of title (bill of lading, warehouse receipt). In these cases the goods themselves are purchased as represented by the document of title or any other such document.⁶⁷
- 21 (e) **Companies.** The sale of a complete business undertaking does not fall under the CISG;⁶⁸ it does not constitute goods. This goes without saying in the case of a sale of shares, partnership interests, etc because the objects of this sale are rights (of the shareholders, partners, etc) which are expressly excluded by Article 2(d). In case of an ‘asset deal’ matters may be different, in particular if the assets of the enterprise consist only of movables like machines, rolling stock, raw materials, etc. Then, the acquisition of these items might be the real object of the buyer’s share purchase.⁶⁹ As a general rule the CISG will, however, be precluded even in the case of an ‘asset deal’, as real property and/or rights usually make up the major part of the subject-matter of the sale; moreover, goodwill and other intangibles such as patents, copyrights etc will also play a considerable role.⁷⁰
- 22 (f) **Rights.** The sale of rights is not covered by the CISG. However, as Articles 41, 42 demonstrate, the mere fact that items are subject to property or intellectual property rights

⁶³ See Schlechtriem, previous edition of this work, Art 1, para 21.

⁶⁴ On the notion of ‘preponderant part’, see Art 3, paras 18–20 below.

⁶⁵ See Schlechtriem, previous edition of this work, Art 1, para 21a; Ferrari, 5th German edition of this work, Art 1, para 38; Staudinger/Magnus, Art 1, para 46; MünchKomm/Westermann, Art 1, para 6; Honnold, Art 2, para 56; Achilles, Art 1, Rn. 4; Schlechtriem, *AJP* 1992, 346; but see MünchKommHGB/Benicke, Art 1, para 18; Enderlein/Maskow/Strohbach, Art 1, note 2.

⁶⁶ OLG Köln, 26 August 1994, CISG-online 132; Schlechtriem, previous edition of this work, Art 1, para 21a; Ferrari, 5th German edition of this work, Art 1, para 38; Staudinger/Magnus, Art 1, para 46; MünchKomm/Westermann, Art 1, para 6.

⁶⁷ See Schlechtriem, previous edition of this work, Art 1, para 22 referring to the German term ‘Abladegeschäft’. Also Ferrari, 5th German edition of this work, Art 1, para 37; Staudinger/Magnus, Art 1, para 47; MünchKomm/Westermann, Art 1, para 6; Herber/Czerwenka, Art 1, para 8.

⁶⁸ See Schlechtriem, previous edition of this work, Art 1, para 24; Ferrari, 5th German edition of this work, Art 1, para 36; Staudinger/Magnus, Art 1, para 51.

⁶⁹ Excluding the CISG altogether: Ferrari, 5th German edition of this work, Art 1, para 36; Achilles, Art 1, para 4; Witz/Salger/Lorenz/Lorenz, Art 1, para 8; Bamberger/Roth/Saenger, Art 1, para 6; Herber/Czerwenka, Art 1, para 7; see also Merkt, *Internationaler Unternehmenskauf*, para 875 (pointing out contributions by American practitioners advocating application of the CISG); *idem*, *ZVerglRW* 1994, 353, 361, 370. For the application of the CISG in certain cases, see Schlechtriem, previous edition of this work, Art 1, para 24; *idem*, *Internationales UN-Kaufrecht*, para 31.

⁷⁰ See Schlechtriem, previous edition of this work, Art 1, para 24; Staudinger/Magnus, Art 1, para 51.

does not influence their character as goods even though they may not be in conformity with the contract. Against this background claims, licenses, patents, copyrights, broadcasting time, tickets for events etc are not 'goods' in the sense of Article 1.⁷¹ By contrast, eg machines carrying out patented processes are 'goods'.

3. Places of business

In determining its applicability, the CISG for the internationality of the contract (see on this issue below paragraphs 26, 27) relies on the 'places of business' of the parties.⁷² In this regard Article 1 is supplemented by Article 10. The Convention does not define this term. It is to be defined autonomously having regard to Article 7(1).⁷³ Recourse to domestic law is excluded.⁷⁴ In line with the general view a 'place of business' exists, if a party uses it openly to participate in trade and if it displays a certain degree of duration, stability, and independence.⁷⁵ Although there is no presumption in this regard,⁷⁶ for corporations this will first of all be the place of its administrative centre.⁷⁷ It is, however, not necessary for a place of business to represent the centre of a party's business activities, ie the management of the undertaking does not have to be carried out from a place of business.⁷⁸ On the other hand, if a party merely intends to conclude some sales contracts at a particular place, eg at factory premises, that does not make it a place of business.⁷⁹ A branch office is generally sufficient for the notion of 'place of business' but has to fulfil the mentioned requirements.⁸⁰ It follows that booths at an exhibition or fair are not 'places of business'.⁸¹ The same holds true for the location of the server used, if the contract is concluded via the internet.⁸²

⁷¹ See Ferrari, 5th German edition of this work, Art 1, para 36; Staudinger/Magnus, Art 1, para 56, both with further references.

⁷² This term is also used in Articles 10(a), 12, 20(2), sentence 2, 24, 31(c), 42(1)(b), 57(1)(a) and (2), 69(2), 90, 93(3), 94(1), sentence 1, and (2), and 96.

⁷³ See Schlechtriem, previous edition of this work, Art 10, para 2.

⁷⁴ See Schlechtriem, previous edition of this work, Art 10, para 2; Staudinger/Magnus, Art 10, para 4.

⁷⁵ See OGH, 10 November 1994, CISG-online 117; OLG Köln, 13 November 2000, CISG-online 657; OLG Stuttgart, 28 February 2000, CISG-online 583; Trib Padova, 25 February 2004, CISG-online 819; Trib Rimini, 26 November 2002, CISG-online 737; Schlechtriem, previous edition of this work, Art 1, para 26; Ferrari, 5th German edition of this work, Art 1, para 46; Staudinger/Magnus, Art 1, para 63; Witz/Salger/Lorenz/Lorenz, Art 1, para 9; Honnold, Art 1, para 43; MünchKommHGB/Benicke, Art 1, para 23; Bamberger/Roth/Saenger, Art 1, para 10; A Butler, (2002) 6 VJ 277.

⁷⁶ See Schlechtriem, previous edition of this work, Art 10, para 4.

⁷⁷ See Staudinger/Magnus, Art 1, para 65.

⁷⁸ See Schlechtriem, previous edition of this work, Art 1, para 27; Staudinger/Magnus, Art 1, para 65; Schlechtriem, *AJP* 1992, 346; Herrmann, *Anwendungsbereich des Wiener Kaufrechts*, p 86. But see *Cedar Petrochemicals, Inc v Dongbu Hannong Chemical Co, Ltd*, US Dist Ct (SD NY), 19 July 2007, CISG-online 1509: 'The CISG governs the sale of goods between parties whose principal places of business are in different nations as long as those nations are signatories to the treaty'.

⁷⁹ See Schlechtriem, previous edition of this work, Art 1, para 27; Ferrari, 5th German edition of this work, Art 1, para 46; Staub/Koller, Vor § 373 HGB, para 623. But see Padovini, *ZfRVgl* 28 (1987), 87, 89.

⁸⁰ See Schlechtriem, previous edition of this work, Art 1, para 27.

⁸¹ See Ferrari, 5th German edition of this work, Art 1, para 46; Staudinger/Magnus, Art 1, para 64; Enderlein/Maskow/Strobbach, Art 1, note 2.

⁸² See Staudinger/Magnus, Art 1, para 67; Schlechtriem, *Internationales UN-Kaufrecht*, para 9.

- 24 Where there are several places of business, it is not necessary to focus on the principal place of business.⁸³ That follows from Article 10(a), which assumes that a party may have several places of business. If a party is a natural person its habitual residence is substituted for a place of business (Article 10(b)).
- 25 A place of business with an independent legal personality (for example, a subsidiary company) is not relevant for the purposes of Article 10; if the subsidiary company is itself a party to the contract, its own place of business is decisive.⁸⁴ Nor does the fact that a company has obligations to its holding company alter the fact that the contract is to be attributed solely to the legal person which has concluded it.⁸⁵ Consequently, contracts between parent companies and their subsidiaries are encompassed by the CISG, provided that they have their places of business in different States.⁸⁶

4. Internationality

- 26 (a) **General.** The CISG's basic requirement that a contract to which it applies must be an international one is shown by the fact that the parties' places of business must be in different States. This requirement is not satisfied if the places of business (or, if one or both parties have several places of business, the relevant places of business under Article 10(a)) are situated in the territory of the same State. It is also not satisfied, if the contract was concluded in one State by parties located in this State even if it is then to be performed in another State. Whether the parties have their places of business in different States is to be decided at the time of the conclusion of the contract.⁸⁷ The burden of proof of this 'international' character is on the party claiming that the CISG applies.⁸⁸
- 27 (b) **Agency.** Whether a contract of sale is international may be doubtful in case the parties use agents. The decisive place of business here is that of the party bound by the acts of the agent. In this regard the domestic law applicable to questions of agency has to be consulted.⁸⁹ If this law binds the principal only in case the agent reveals that it is acting on behalf of the principal (disclosed agency), the latter's place of business will only be decisive if the agent does so.⁹⁰ If the applicable domestic law acknowledges undisclosed agency, ie the agent does not have to reveal that it is acting on behalf of the principal but the principal

⁸³ See Schlechtriem, previous edition of this work, Art 1, para 27.

⁸⁴ See Schlechtriem, previous edition of this work, Art 1, para 28; Ferrari, 5th German edition of this work, Art 1, para 47; Staudinger/Magnus, Art 1, paras 66–7; Witz/Salger/Lorenz/Lorenz, Art 1, para 9; Honnold, Art 1, para 43; MünchKomm/Westermann, Art 1, para 9; MünchKommHGB/Benicke, Art 1, para 24; Herber/Czerwenka, Art 1, para 15.

⁸⁵ See Schlechtriem, previous edition of this work, Art 1, para 28; Ferrari, 5th German edition of this work, Art 1, para 47; Honnold, Art 1, para 42.

⁸⁶ See Ferrari, 5th German edition of this work, Art 1, para 47; Staudinger/Magnus, Art 1, para 66.

⁸⁷ See Staudinger/Magnus, Art 1, para 69.

⁸⁸ Ferrari, 5th German edition of this work, Art 1, para 42.

⁸⁹ See Schlechtriem, previous edition of this work, Art 1, para 29; Ferrari, 5th German edition of this work, Art 1, para 41; Staudinger/Magnus, Art 1, para 68; Ferrari/Saenger, *Int VertragsR*, Art 1, para 12; Honsell/Siehr, Art 1, para 7.

⁹⁰ See Schlechtriem, previous edition of this work, Art 1, para 30; Ferrari, 5th German edition of this work, Art 1, para 51; Staudinger/Magnus, Art 1, para 68; Enderlein/Maskow/Strohbach, Art 1, note 7.2.; Ferrari/Saenger, *Int VertragsR*, Art 1, para 12.

is nevertheless bound to the contract, it is also the latter's place of business which is decisive. Naturally, in this latter case, the internationality of the contract will not be apparent to the other party as is, however, required by Article 1(2) and the CISG thus will regularly be excluded.⁹¹ In all cases where the applicable law binds the agent to the contract, it is the agent's place of business which is of relevance.⁹² If the applicable domestic law binds the principal as well as the agent, they should be regarded as one party with several places of business—this situation is then addressed by Article 10.

IV. Specific requirements of Article 1(1)(a): Contracting States

Under Article 1(1)(a) the places of business of the parties must be in a different Contracting States. A Contracting State is any State which has implemented the CISG by ratification or accession under Articles 91(2)(3) and by its entry into force under Articles 99(2), 91(4).⁹³ The numerous cases where State courts or arbitral tribunals have applied the Convention on the basis of its Article 1(1)(a) without any difficulty⁹⁴ cannot and must not be cited here; it suffices to repeat that Article 1(1)(a) sets 'autonomous' requirements for the application of the Convention, dispensing with recourse to domestic conflict of laws rules of the forum for matters regulated in the Convention.⁹⁵

The concept of a Contracting State is, however, modified in the special cases falling under Articles 92(2) and 93(3):⁹⁶ if a Contracting State declares that Part II or Part III of the CISG is not binding on it, it is to that extent not a Contracting State;⁹⁷ if it declares that the Convention is not to apply to certain of its territorial units, those units do not have the status of Contracting States. Article 94 contains a substantially similar limitation, but does not remove a State's characteristic as a Contracting State.⁹⁸ Instead, Article 94 provides that States with the same or similar sale of goods legislation may exclude the application of the CISG as between themselves.

⁹¹ See Schlechtriem, previous edition of this work, Art 1, para 31; Staudinger/Magnus, Art 1, para 68.

⁹² See Schlechtriem, previous edition of this work, Art 1, para 31 using commission as example and with reference to undisclosed agency under domestic German law.

⁹³ See Schlechtriem, previous edition of this work, Art 1, para 32. Cf also Intro to Arts 1–6, para 18 *et seq* above. As to the date of 'implementation' as date of entering into force in the respective State, see Ferrari, 5th German edition of this work, Art 1, para 64 (ratification, approval, or acceptance alone are not sufficient); Staudinger/Magnus, Art 1, para 86; Bamberger/Roth/Saenger, Art 1, para 14; Ferrari, *Applicabilità ed applicazioni*, p 61; but see Herber, 1st edition of this work, Art 1, para 32.

⁹⁴ See as examples the particularly clear decisions in *BP International, Ltd and BP Exploration & Oil, Inc v Empresa Estatal Petroleos de Ecuador, et al*, US Ct App (5th Cir), 11 June 2003, CISG-online 730 (parties in Pennsylvania, USA, and Ecuador), and BGH, 15 February 1995, CISG-online 149 (parties in Switzerland and Germany).

⁹⁵ See Intro to Arts 1–6, paras 7–10 above; for arbitral tribunals Intro to Arts 1–6, para 13 above. Ferrari, 5th German edition of this work, Art 1, paras 63, 64.

⁹⁶ Cf also the comments made relating to these provisions.

⁹⁷ See *Mitchell Aircraft Spares Inc v European Aircraft Service AB*, US Dist Ct (ND Ill), 28 October 1998, CISG-online 444; OLG Rostock, 27 July 1995, CISG-online 209; Fovarosí Bírószág, 21 May 1996, CISG-online 252; overlooked by RB Arnhem, 17 January 2007, CISG-online 1455; OLG Naumburg, 27 April 1999, CISG-online 512; OLG Frankfurt, 4 March 1994, CISG-online 110.

⁹⁸ Cf also the comments relating to this provision.

V. Specific requirements of Article 1(1)(b): Conflict of laws rules lead to the law of a Contracting State

1. General

- 30** The Convention is also to be applied where the parties do not have their places of business in different Contracting States, but the rules of private international law of the forum lead to the application of the law of a Contracting State.⁹⁹ Naturally, the general requirements of Article 1(1) as outlined above must also be met, ie there must be a contract for the sale of goods with the parties having their places of business in different States. Also under Article 1(1)(b) the internationality of the contract must be apparent in the sense of Article 1(2).¹⁰⁰ If the relevant rules of private international law (which in this case—in contrast with Article 1(1)(a)—are to be applied by a court before it can apply the CISG) refer to the law of a Contracting State, then the CISG applies also to contracts of sale in which neither, or only one, of the parties to the contract has its place of business in a Contracting State.¹⁰¹ With the growing number of Contracting States Article 1(1)(b) has lost most of its importance as the basis for the application of the CISG.¹⁰²
- 31** Article 1(1)(b), of course, does not have to be applied by courts in non-Contracting States, nor are arbitral tribunals obliged to apply it.¹⁰³ But courts in non-Contracting States and arbitral tribunals may have to apply the Convention as foreign law, if their conflict rules refer to the law of a Contracting State.¹⁰⁴ The situation where both parties have their places of business in (different) non-Contracting States, but on account of the forum's conflict of laws rules find their contract subject to the CISG, which does not have the force of law in either of their countries, at first glance seems abnormal.¹⁰⁵ But one has to recognize that in such a case the parties' contract would be governed by an alien law anyway, be it a foreign domestic or the uniform sales law.¹⁰⁶ This will often make the CISG a reasonable solution as it is easily accessible for both parties.¹⁰⁷

⁹⁹ For arbitral tribunals, see Intro to Arts 1–6, para 13 above.

¹⁰⁰ See Schlechtriem, previous edition of this work, Art 1, para 35; Ferrari, 5th German edition of this work, Art 1, para 48; Staudinger/Magnus, Art 1, para 72; Brunner, Art 1, para 5; Czerwenka, *Rechtsanwendungsprobleme*, p 160; Karollus, p 29; Siehr, *RabelsZ* 52 (1988), 591. But see Soergel/Lüderitz/Fenge, Art 1, para 17.

¹⁰¹ See Schlechtriem, previous edition of this work, Art 1, para 35.

¹⁰² See Schlechtriem, previous edition of this work, Art 1, para 35.

¹⁰³ See Intro to Arts 1–6, para 4 above; for arbitral tribunals, see Intro to Arts 1–6, para 11 above.

¹⁰⁴ See eg Int Ct Russian CCI, 18 July 2005, CISG-online 1502: Russian buyer and Indian seller included a choice of law clause designating Russian law. The Tribunal applied the CISG on the basis of Article 1(1)(b).

¹⁰⁵ Not surprisingly, Article 1(1)(b) has received severe criticism already at the Vienna Conference, see eg the statement by Herber, O R, pp 236, 237, Nos 9–12 who stated that it was such mechanism that had caused reluctance amongst States to accede to the Hague Sales Law and that subparagraph (b) would have to be expected to raise serious problems of interpretation and application. Consequently, he suggested to delete the rule. The subsequent German proposal was, however, rejected with 25:7 votes and 10 abstentions (O R, p 83). Cf also Schlechtriem, previous edition of this work, Art 1, para 6; Bianca/Bonell/Jayme, Art 1, note 1.4.

¹⁰⁶ See Schlechtriem, previous edition of this work, Art 1, para 40.

¹⁰⁷ See Schlechtriem, previous edition of this work, Art 1, para 40.

2. Mechanism of Article 1(1)(b)

The first requirement for an application of the CISG on the basis of Article 1(1)(b) is that the rules of private international law (rules of conflict of laws) of the forum State lead to the application of the law of a Contracting State.¹⁰⁸ The conflict of laws rules of the forum can be purely domestic rules or uniform rules enacted pursuant to international conventions such as the 1955 Hague Convention on the Law Applicable to Contracts for the International Sale of Goods, the 1980 Rome Convention on the Law Applicable to Contractual Obligations,¹⁰⁹ or now the 2008 Rome Regulation on the Law Applicable to Contractual Obligations.¹¹⁰ If the forum State itself is a non-Contracting State, the CISG may be applicable on account of Article 1(1)(b) if the law which the court or arbitral tribunal is referred to is that of a CISG Contracting State.¹¹¹

The conflict of laws rules of the forum may allow a choice of law by the parties referring any dispute to the law of a Contracting State or they may use an objective test such as the closest relationship, the place of the seller's business, etc, leading to the law of a Contracting State. A choice of law clause may cause problems, however, if it is not clear, whether it was meant as a derogation from the CISG as allowed under Article 6.¹¹² If the conflict of laws rules of the forum prohibit or restrict a choice of law by the parties,¹¹³ their choice of the law of a Contracting State may be ineffective and, therefore, may not provide an avenue to the CISG and its Article 1(1)(b).¹¹⁴

The conflict of laws rules of the forum can also result in a *dépeçage*, ie a splitting of the applicable law(s), if, for example, in regard to the formation of the contract they refer to a non-Contracting State whereas in regard to rights and remedies under the sales contract to a Contracting State (or vice versa).¹¹⁵ If the conflict of laws rules of the Contracting State contain a norm, however, that refers back to the forum State or to the law of a third State, this *renvoi* should not be followed, because the relevant rule is superseded by Article 1(1)(b); this provision to this extent functions as a conflict of laws rule preventing a *renvoi*.¹¹⁶

¹⁰⁸ See Trib Padova, 25 February 2004, CISG-online 819; Trib Rimini, 26 November 2002, CISG-online 737; Trib Vigevano, 12 July 2000, CISG-online 493; Schlechtriem, previous edition of this work, Art 1, para 37; Ferrari, 5th German edition of this work, Art 1, para 71; Staudinger/Magnus, Art 1, para 93. For arbitral tribunals see Intro to Arts 1–6, para 13 above.

¹⁰⁹ As to the relation of these Conventions to the CISG, see Intro to Arts 1–6, para 6 above; Art 90, paras 12, 13 below; Bridge, *Int'l Sale of Goods*, paras 11.14–11.15.

¹¹⁰ See Schlechtriem, previous edition of this work, Art 1, para 37.

¹¹¹ See Schlechtriem, previous edition of this work, Art 1, para 37.

¹¹² See on choice of law clauses designating the law of a Contracting State Art 6, paras 13–8 below.

¹¹³ This is eg the case in Brazil, see Stringer, (2005–06) 44 *Col J Transnat'l L* 960.

¹¹⁴ See Schlechtriem, previous edition of this work, Art 1, para 39; Ferrari, 5th German edition of this work, Art 1, para 71.

¹¹⁵ See Schlechtriem, previous edition of this work, Art 1, para 39; Ferrari, 5th German edition of this work, Art 1, para 71; Staudinger/Magnus, Art 1, para 107.

¹¹⁶ See Schlechtriem, previous edition of this work, Art 1, para 39; Staudinger/Magnus, Art 1, para 106; Honnold, Art 1, para 46; but see Ferrari, 5th German edition of this work, Art 1, para 71; Czerwenka, *Rechtsanwendungsprobleme*, pp 161, 162. In Germany (as a forum State) this result would also follow from Art 35 EGBGB, qualifying the reference to a foreign law as restricted to substantive law, excluding the application of foreign conflict of law rules; see LG Hamburg, 26 September 1990, CISG-online 21; LG Aachen, 3 April 1990, CISG-online 12; Staudinger/Magnus, Art 1, para 105.

- 35** Once the law of a Contracting State is deemed applicable it is up to this State to decide which of its (perhaps) several sales laws apply—a decision it has made in favour of the CISG by enacting the Convention and its Article 1(1)(b), unless it has declared a reservation under Article 95 (below at paras 36, 37).¹¹⁷ Within the domestic law of a CISG Contracting State, Article 1(1)(b) thus has the function of allocating sales issues to the CISG like (other) norms allocating sales matters to a special commercial code or consumer regulations etc.¹¹⁸ If the forum State is a CISG Contracting State, the Convention is not applied as foreign law, but as law created by an international convention and enacted by the forum State as its own law.¹¹⁹ This follows already from the wording of Article 1(1): ‘this Convention’. If the forum State is a CISG Contracting State and the conflict of laws rules of that State refer to the law of that State, the CISG also has to be applied on the basis of Article 1(1)(b) as the law of that State.¹²⁰

3. Reservation under Article 95

- 36** (a) **General.** Article 1(1)(b) extends the applicability of the CISG considerably which had raised fears of an ‘imperialistic claim’ of the Convention (and its drafters) during the preparation of the Convention.¹²¹ This has led to the introduction of Article 95, allowing a reservation permitting a State to declare that it ‘will not be bound by Article 1(1)(b)’.¹²²
- 37** (b) **Effects.** The effects of Article 95 are controversial. The core principle, however, is clear. A court in a reservation State will apply the CISG only if both parties have their places of business in CISG Contracting States, ie if the requirements of Article 1(1)(a) are met.¹²³ If this is not the case but its conflict of laws rules lead to the law of a Contracting State that has not declared a reservation under Article 95, the CISG is nevertheless to be applied if the Convention’s basic requirements are met.¹²⁴
- 38** The central debate revolving around Article 95 concerns the question, whether a court in a CISG Contracting State that has not declared a reservation under Article 95 has to apply the Convention, if its conflict of laws rules lead to the law of a CISG Contracting State that

¹¹⁷ See Schlechtriem, previous edition of this work, Art 1, para 37.

¹¹⁸ Herber, 1st edition of this work, Art 1, para 44; Schlechtriem, *Internationales UN-Kaufrecht*, para 13; Teklote, p 50 (internal conflict rule).

¹¹⁹ See Schlechtriem, previous edition of this work, Art 1, para 37; Ferrari, 5th German edition of this work, Art 1, para 76; Staudinger/Magnus, Art 1, para 84; Witz/Salger/Lorenz/Lorenz, Art 1, para 12; Herber/Czerwenka, Art 1, para 17; Czerwenka, *Rechtsanwendungsprobleme*, p 162. This has consequences in some countries for the question of whether the parties or the court must investigate the interpretation of the CISG in the law of the State referred to by the court’s conflict rules, and for the authority of higher courts such as the German BGH to review the interpretation of the law by lower courts, which would be restricted, if the CISG were applied as foreign law.

¹²⁰ See Schlechtriem, previous edition of this work, Art 1, para 37.

¹²¹ See Schlechtriem, previous edition of this work, Art 1, para 41; for the drafting history and the discussions leading to Art 95 see paras 1, 2 above; Winship, *Scope*, pp 1–3 *et seq.*

¹²² Cf also the comments relating to this provision.

¹²³ See Schlechtriem, previous edition of this work, Art 1, para 41; Staudinger/Magnus, Art 1, para 108.

¹²⁴ See Schlechtriem, previous edition of this work, Art 1, para 41; Ferrari, 5th German edition of this work, Art 1, para 80; MünchKommHGB/Benicke, Art 1, para 40; Ferrari/Mankowski, *Int VertragsR*, Art 95, para 5; G Bell, (2005) 9 *Singapore YB Int’l L* 65; Winship, *Scope*, pp 1–32; but see Ferrari/Saenger, *Int VertragsR*, Art 1, para 19.

has made such a declaration. The question arises in the rare¹²⁵ case where a State court in a non-reserving Contracting State has to deal with one party coming from a reserving Contracting State and one party from a non-Contracting State. In this case the CISG is not applicable on account of Article 1(1)(a). The court therefore has to apply its conflict of laws rules and may thereby be referred to the law of the party located in the reservation State. As this State is generally a contracting State, the requirements of Article 1(1)(b) are met. The current majority of authors, however, holds that the court still may not apply the CISG but advocate that the court has to apply the same sales law a court in the reservation State would apply to the case.¹²⁶ Germany has supported this view in Article 2 VertragsG.¹²⁷ The preferable view, however, holds the Convention applicable.¹²⁸ Article 95 only refers to the Contracting State making the declaration ('it') and—contrary to Articles 92(2), 93(3), and 94(2)—does not indicate any effect on the reserving State's status as Contracting State.¹²⁹ Moreover Article 1(1)(b) obliges the court to apply 'this Convention' and not the law of the Contracting State to which it is referred.¹³⁰

VI. Article 1(2): CISG applies only if the internationality of the contract is apparent

1. General

The CISG requires no additional objective connecting factors, and—as regards the requirement that the contract be international in nature—merely requires that the parties have their places of business in different States.¹³¹ This broad sphere of application is limited by a subjective test in Article 1(2) restricting both alternatives of paragraph (1)(a) and (b):¹³² if the fact that the place of business is in a different State is not apparent at the time of the formation of the contract,¹³³ it is to be disregarded. The contract of sale is then subject to

¹²⁵ With now 74 Member States, among which nine out of the ten major trade nations are to be found and a growth in the number of Member States to be expected, this issue will come to be of rather theoretical nature.

¹²⁶ See Schlechtriem, previous edition of this work, Art 95, para 4; Staudinger/Magnus, Art 1, para 110; Honnold, Art 1, para 47.5; MünchKommHGB/Benicke, Art 1, para 39; Bianca/Bonell/Evans, Art 95, note 3.4.; Soergel/Lüderitz/Fenge, Art 1, para 16; Neumayer/Ming, Art 1, note 8.; Bamberger/Roth/Saenger, Art 1, para 19; Ferrari/Saenger, *Int VertragsR*, Art 1, para 20; Schmidt-Kessel, *ZEuP* 2002, 684; Vékás, *IPRax* 1987, 346; Winship, *Scope*, pp 1–27, 31.

¹²⁷ See in general on and for criticism towards this provision Schlechtriem/Schroeter, 5th German edition of this work, Art 2 VertragsG, para 3 *et seq.* and Schroeter, *FS Kritzer*, p 454 *et seq.*

¹²⁸ See Ferrari, 5th German edition of this work, Art 1, para 78; Czerwenka, *Rechtsanwendungsprobleme*, p 159; Schroeter, *FS Kritzer*, p 446 *et seq.*

¹²⁹ See Schroeter, *FS Kritzer*, p 446 *et seq.*; G Bell, (2005) 9 *Singapore YB Int'l L* 63.

¹³⁰ See Schroeter, *FS Kritzer*, p 447.

¹³¹ See Schlechtriem, previous edition of this work, Art 1, para 48.

¹³² See Schlechtriem, previous edition of this work, Art 1, para 48; Ferrari, 5th German edition of this work, Art 1, para 48; Staudinger/Magnus, Art 1, para 72; Brunner, Art 1, para 5; Czerwenka, *Rechtsanwendungsprobleme*, p 160; Karollus, p 29; Siehr, *RebelsZ* 52 (1988), 591. But see Soergel/Lüderitz/Fenge, Art 1, para 17.

¹³³ See Schlechtriem, previous edition of this work, Art 1, para 48; Ferrari, 5th German edition of this work, Art 1, para 48; Staudinger/Magnus, Art 1, para 80; Witz/Salger/Lorenz/Lorenz, Art 1, para 14; Achilles, Art 1, para 6; Schlechtriem, *IPRax* 1990, 278.

domestic sales law.¹³⁴ The scope of Article 1(2) is largely restricted because most cases envisaged will concern goods bought for personal use (eg a camera or clothes by a tourist) which will be excluded by Article 2(a) anyway.¹³⁵

- 40 Despite the fact that the wording of the provision only refers to ‘place of business’, it is sufficient for a foreign connection to have been discernible from a ‘habitual residence’.¹³⁶ If the other party to the contract—as a private individual—has no place of business but only a habitual residence, Article 10(b) provides that reference is to be made to his habitual residence instead of his place of business in Article 1(1). The other party to the contract cannot be required to correctly evaluate which of the two concepts is relevant.¹³⁷

2. Requirements of Article 1(2)

- 41 Article 1(2) does not require that the fact that the parties’ places of business are in different States is discernible. Rather, this fact must not have been concealed.¹³⁸ The difference between these approaches becomes visible with regard to the burden of proof. Even if the CISG does not contain express rules on the burden of proof,¹³⁹ it follows from the relationship between rule and exception that the party relying on the fact that the internationality of the contract was not apparent must also prove that fact.¹⁴⁰
- 42 Whether the fact that the parties’ places of business were in different States was indiscernible is to be decided using objective criteria.¹⁴¹ The wording originally intended made reference to knowledge or negligent lack of knowledge.¹⁴² This wording was, however, deliberately dropped.¹⁴³ Therefore, if the respective residence of the parties is not ‘apparent’, but one of the parties had knowledge of that fact, while the other was ignorant and believed that both parties resided in the same State, the Convention does not apply.¹⁴⁴ On the other hand, the objective ‘apparentness’ suffices; subjective knowledge of the parties

¹³⁴ See Schlechtriem, previous edition of this work, Art 1, para 48; Staudinger/Magnus, Art 1, para 72.

¹³⁵ See Schlechtriem, previous edition of this work, Art 1, para 57.

¹³⁶ See Schlechtriem, previous edition of this work, Art 1, para 58; Ferrari, 5th German edition of this work, Art 1, para 57; Staudinger/Magnus, Art 1, para 81.

¹³⁷ See Schlechtriem, previous edition of this work, Art 1, para 58.

¹³⁸ See Schlechtriem, previous edition of this work, Art 1, para 49.

¹³⁹ Cf on this issue Art 4, paras 25, 26 below.

¹⁴⁰ See Trib Vigevano, 12 July 2000, CISG-online 493; Schlechtriem, previous edition of this work, Art 1, para 49; Ferrari, 5th German edition of this work, Art 1, para 48; Staudinger/Magnus, Art 1, para 82; Witz/Salger/Lorenz/Lorenz, Art 1, para 15; MünchKommHGB/Benicke, Art 1, para 27; Herber/Czerwenka, Art 1, para 20; Brunner, Art 1, para 5; Bamberger/Roth/Saenger, Art 1, para 22; Czerwenka, *Rechtsanwendungsprobleme*, p 136; Heuzé, note 103.; T M Müller, *Beweislast*, p 45; Pünder, *RfW* 1990, 869.

¹⁴¹ See Schlechtriem, previous edition of this work, Art 1, para 50; Ferrari, 5th German edition of this work, Art 1, para 49; Staudinger/Magnus, Art 1, para 73; Soergel/Lüderitz/Fenge, Art 1, para 6; Bamberger/Roth/Saenger, Art 1, para 26; Achilles, Art 1, para 7; Czerwenka, *Rechtsanwendungsprobleme*, p 136; Karollus, p 29.

¹⁴² YB II (1971), p 52, No 13 (Art 2(a)) (‘neither knew nor had reason to know’); Schlechtriem, previous edition of this work, Art 1, para 50;

¹⁴³ YB III (1972), p 83, No 9 *et seq*; Schlechtriem, previous edition of this work, Art 1, para 50.

¹⁴⁴ See Schlechtriem, previous edition of this work, Art 1, para 50; Ferrari, 5th German edition of this work, Art 1, para 48; Staudinger/Magnus, Art 1, para 75.

is not required.¹⁴⁵ Nevertheless, as Article 1(2) intends to protect the parties from their contract being subject to a set of rules not foreseeable to them, this protection is not necessary where both parties knew of their places of business being in different States, even if it was not objectively discernible. In no event must they have been aware of the Convention's applicability as such.¹⁴⁶

Article 1(2) sets out—not as an exhaustive list¹⁴⁷—three sources from which the international nature of the contract must be apparent. First, previous contacts may point to the different place of business. This does not require previous contracts of sale; any correspondence suffices.¹⁴⁸ Secondly, the foreign connection may be apparent from dealings between the parties.¹⁴⁹ That includes not only correspondence and direct contractual declarations, but also the entire image and appearance presented by the other party or—if e-mails are used—a Toplevel-Domain which is different from the one used by the respective counterparty.¹⁵⁰ Finally, regard must be had to information disclosed by the other party to the contract.¹⁵¹ It is not necessary for it to refer expressly to the foreign connection;¹⁵² the position is the same as that for dealings between the parties. Information provided by the respective counter-party eg includes advertisements.¹⁵³

On the whole, Article 1(2) will have to be interpreted narrowly.¹⁵⁴ Its purpose is to prevent the CISG from applying in circumstances which in no way could have been foreseen by one

¹⁴⁵ See Schlechtriem, previous edition of this work, Art 1, para 50; Ferrari, 5th German edition of this work, Art 1, para 51; Staudinger/Magnus, Art 1, para 74; but cf Bridge, *Int'l Sale of Goods*, para 11.10, who favours 'in the interests of justice' that only dual knowledge of the residences in different States should lead to the Convention's application: this goes much too far in replacing the objective 'apparent' test by a fully subjective 'knowledge' test.

¹⁴⁶ See Schlechtriem, previous edition of this work, Art 1, para 50; Ferrari, 5th German edition of this work, Art 1, para 51; Staudinger/Magnus, Art 1, para 74; MünchKommHGB/Benicke, Art 1, para 26. But see *Impuls ID Internacional, SL, Impuls ID Systems, Inc., and PSIAR, SA v Psion-Teklogix, Inc.*, US Dist Ct (SD Fla), 22 November 2002, CISG-online 783.

¹⁴⁷ See Schlechtriem, previous edition of this work, Art 1, para 53; MünchKommHGB/Benicke, Art 1, para 26; Soergel/Lüdenitz/Fenge, Art 1, para 7; *contra*: Herber, 1st edition of this work, Art 1, para 53; probably also Ferrari, 5th German edition of this work, Art 1, para 52; left open by Staudinger/Magnus, Art 1, para 76.

¹⁴⁸ See Schlechtriem, previous edition of this work, Art 1, para 54; Ferrari, 5th German edition of this work, Art 1, para 53; Staudinger/Magnus, Art 1, para 79 MünchKomm/Westermann, Art 1, para 13.

¹⁴⁹ See Schlechtriem, previous edition of this work, Art 1, para 55. Cf *Impuls ID Internacional, SL, Impuls ID Systems, Inc. and PSIAR, SA v Psion-Teklogix, Inc.*, US Dist Ct (SD Fla), 22 November 2002, CISG-online 783 where the contract between the Spanish/Argentinian/Florida plaintiffs and the Canadian defendant was negotiated and concluded in England on the defendant's side by English corporations: the court held that at the time of the conclusion of the contract, the place of business of the defendant was not known to the parties.

¹⁵⁰ See Schlechtriem, previous edition of this work, Art 1, para 55; Ferrari, 5th German edition of this work, Art 1, para 54; Staudinger/Magnus, Art 1, para 77.

¹⁵¹ See Schlechtriem, previous edition of this work, Art 1, para 56; Ferrari, 5th German edition of this work, Art 1, para 56; Staudinger/Magnus, Art 1, para 78.

¹⁵² See Schlechtriem, previous edition of this work, Art 1, para 56; Ferrari, 5th German edition of this work, Art 1, para 56; Staudinger/Magnus, Art 1, para 78;

¹⁵³ See Ferrari, 5th German edition of this work, Art 1, para 56; Staudinger/Magnus, Art 1, para 78.

¹⁵⁴ See Schlechtriem, previous edition of this work, Art 1, para 57; Herber, 1st edition of this work, Art 1, para 57; Ferrari, 5th German edition of this work, Art 1, para 58.

party to the contract.¹⁵⁵ It is thus sufficient that there were indications of the party's place of business being in a different State, but not necessarily a particular State.¹⁵⁶ Nor is it necessary for such indications to point to a different Contracting State. It is sufficient that the party concluding the contract could have been aware of its international nature; however, it is not necessary that it was able to foresee the applicability of the CISG.¹⁵⁷

- 45 The most important situation in which the rule will need to be applied is undisclosed agency, ie where the agent concludes a contract in one State with another party in that State without disclosing that it is acting on behalf of a principal in a different State.¹⁵⁸ If the domestic law applicable to agency acknowledges undisclosed agency and binds the principal rather than the agent, the application of the CISG depends upon whether or not there were indications that one of the parties to the contract had its place of business in a different State.¹⁵⁹

VII. Article 1(3): Nationality of the parties or civil or commercial character of the parties or of the contract is irrelevant

- 46 The clarification in Article 1(3) CISG has been taken from Articles 1(3) and 7 ULIS. The irrelevance of nationality avoids difficulties in the case of parties with dual nationality; it also dispenses with the need to determine the 'nationality' of a legal entity such as a corporation.¹⁶⁰ This part of Article 1(3) has not caused any problems.¹⁶¹
- 47 The application of the CISG to non-commercial transactions does, however, give rise to some doubts. The rules of the CISG are largely tailored to commercial sales of goods.¹⁶² However, because the scope of special rules for merchants is not uniformly defined internationally and such distinction between commercial and 'private' contracts and special rules for merchants is unknown in a number of legal systems, it was not possible to focus

¹⁵⁵ See Schlechtriem, previous edition of this work, Art 1, para 57; Ferrari, 5th German edition of this work, Art 1, para 58; Staudinger/Magnus, Art 1, para 72; MünchKomm/Westermann, Art 1, para 12; Enderlein/Maskow/Strohbach, Art 1, note 7.1.

¹⁵⁶ See Schlechtriem, previous edition of this work, Art 1, para 52; Ferrari, 5th German edition of this work, Art 1, para 51.

¹⁵⁷ See Schlechtriem, previous edition of this work, Art 1, para 50; Ferrari, 5th German edition of this work, Art 1, para 51; Staudinger/Magnus, Art 1, para 74; MünchKommHGB/Benicke, Art 1, para 26. But see *Impuls ID Internacional, SL, Impuls ID Systems, Inc, and PSJAR, SA v Psion-Teklogix, Inc*, US Dist Ct (SD Fla), 22 November 2002, CISG-online 783.

¹⁵⁸ See Schlechtriem, previous edition of this work, Art 1, para 51; Ferrari, 5th German edition of this work, Art 1, para 50; Secretariat's Commentary, Art 1, No 9; Schlechtriem, *Einheitliches UN-Kaufrecht*, p 12; Czerwenka, *Rechtsanwendungsprobleme*, p 135; Reinhart, Art 1, para 11; Hermann, *Anwendungsbereich des Wiener Kaufrechts*, p 85.

¹⁵⁹ See Schlechtriem, previous edition of this work, Art 1, para 51; Staudinger/Magnus, Art 1, para 75.

¹⁶⁰ See OGH, 15 October 1998, CISG-online 380; Schlechtriem, previous edition of this work, Art 1, para 59; Staudinger/Magnus, Art 1, para 123; Schlechtriem, *Internationales UN-Kaufrecht*, para 12.

¹⁶¹ See Schlechtriem, previous edition of this work, Art 1, para 59; Ferrari, 5th German edition of this work, Art 1, para 60; cf BGH, 31 October 2001, CISG-online 617, for further examples of application, see Ferrari, *ibid*, n 265.

¹⁶² See Schlechtriem, previous edition of this work, Art 1, para 60; Ferrari, 5th German edition of this work, Art 1, para 60.

on merchants.¹⁶³ The ensuing excessively broad sphere of application of the CISG is, however, restricted by Article 2(a) which excludes purchases for personal use. In that way, objections to a possible excessive burden on private individuals have largely been removed.¹⁶⁴

It follows from the above that, in those cases where the Contracting States distinguish 48 civil and commercial natures of contracts, it is irrelevant for the application of the CISG, whether a contract of sale is classified as falling under general civil law or under commercial law.¹⁶⁵

<http://www.pbookshop.com>

¹⁶³ See Schlechtriem, previous edition of this work, Art 1, para 60; Ferrari, 5th German edition of this work, Art 1, para 60.

¹⁶⁴ See Schlechtriem, previous edition of this work, Art 1, para 60; Ferrari, 5th German edition of this work, Art 1, para 60.

¹⁶⁵ See Schlechtriem, previous edition of this work, Art 1, para 61.