Chapter 2 APPLICATION OF THE CISG

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§2.01 INTRODUCTION

Initial determination as to CISG application and relevance begins with determining whether the CISG governs a contract as a whole or only a specific issue. This invokes several issues as to whether the contract is "international." Notably, the CISG will apply only when the parties to the contract are from Contracting States at the time when the proposal for concluding the contract is formulated. However, even if the contract is "international," a country's reservation, as prescribed in Part IV of the CISG may still limit its application. The reservations set forth in Part IV are discussed in this chapter in §2.03 and a complete list of Contracting States and applicable reservations can be found in Appendix A-3, Table 1—Table of Contracting States to the CISG and Declarations. The CISG is limited to contractual issues and only governs issues concerning contract formation, that is, the rights and obligations of the parties to the sale; in contrast, issues concerning sales contract validity, tort actions, or the effect which the contract may have on the property in the goods sold fall outside the scope of the CISG. However, if the issue is one that falls within the realm of the CISG, the terms of the contract itself govern resolution. To that extent, the CISG is a "gap-filler" as its application becomes relevant if an issue was not addressed by the parties in the contract. An examination as to what constitutes a "sale" and "goods" under the CISG is also discussed in this chapter.

Practical Application: Counsel should consult Table 4—Commercial Transactions Comparative Chart in Appendix A-11.

§2.02 INTERNATIONAL CONTRACT

The CISG does not preempt a private contract between parties; instead, it provides a statutory authority from which contract provisions are interpreted, fills gaps in contract language, and governs issues not addressed by the contract. Under the CISG, the terms of the parties’ agreement control provided the parties have addressed the issue. If a dispute arises during the course of the contract and the contract fails to address resolution, then the CISG should be applied to the contract.

Article 1(1) determines whether an issue is governed by the CISG or domestic law. Article 1(1) states the following:

(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.

Article 1 is often referred to as the “internationality” label as it provides the nomenclature that extracts the contract between parties, who have places of business in countries that are signatories to the CISG or “Contracting States,” into a unified international arena of commercial law, unless the parties have elected to exclude its application. See §2.02 [D] and Chapter 9.

Practical Application: As the CISG is federal law by means of the Supremacy Clause of the U.S. Constitution, counsel should not resort to “conflict of laws” rules in their analysis as the CISG “creates a private right of action in federal courts.” Moreover, a signatory country’s assent to the CISG necessarily incorporates the treaty as part of that nation’s domestic law. Therefore, the CISG preempts private domestic law unless affirmatively excluded by the parties.

Article 1(2) provides that parties that have their places of business in different States must be apparent from either the contract, any dealings between the parties, or any information disclosed by the parties at any time before or at the conclusion of the contract. If a party has more than one place of business, then that party’s “place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the

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conclusion of the contract.” See §2.02 [C] for further discussion on this topic. In accordance with Article 1(3), reference to the citizenship of the parties is irrelevant for determination as to whether the CISG applies to a case and only the place of business of the parties is relevant.⁶

[A] Article 1(1)(a)

Subsection 1(a) of Article 1 is most frequently cited by courts in the United States. This is due to the United States' filing of an Article 95 reservation electing that Section 1(b) of Article 1 does not apply to sales between U.S. companies and Non-Contracting States. See Appendix A-3, Table 1; see further discussion on Article 95 in §2.03. Determination as to parties and their places of business is relevant “at any time before or at the conclusion of the contract” provided said fact was known to the parties.⁷ Therefore, the CISG applies when the original parties to the contract had their places of business in Contracting States.⁸ If it is not known, then it is to be disregarded.⁹ If parties to a contract are from countries that are signatories to the CISG or “Contracting States,” then their contract is governed by the CISG.¹⁰ Application of the CISG will apply provided the parties have not opted out of the CISG pursuant to Article 6, which provides that parties are free to exclude the application of the CISG in their contract, in whole or in part. See generally §2.03 [D]. “Mere reference to domestic law in the parties' pleadings is not in itself sufficient to exclude the CISG. To this effect the parties must first of all be aware that CISG would be

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⁵ Article 10; see also American Mint LLC v. GOSoftware, 2005 WL 2021248 (M.D. Pa. 2005), also available at http://cigws3.law.pace.edu/cases/050816ul.html.
⁶ Article 1(3) CISG; see also Austria 15 October 1998 Supreme Court, available at http://cigws3.law.pace.edu/cases/981015sn3.html (identical citizenship of Austrian parties would not matter; focus was on whether the parties had their places of business in different countries—Italy (buyer) and Austria (seller) for CISG to apply); see also Germany 31 October 2001 Supreme Court, available at http://cigws3.law.pace.edu/cases/011031sg1.html (holding in dicta Article 1(3) CISG does not distinguish between merchants and other parties).
⁷ Article 1(2) CISG.
⁹ See Impuls I.D. Internacionial, S.L. v. Psion-Teklogix Inc., 234 F. Supp. 2d 1267 (S.D. Fla. 2002), available at http://cigws3.law.pace.edu/cases/021122u1.html (holding party defendant who was Canadian should be disregarded as it was not a party at the time of the contract).
¹⁰ 15 U.S.C. App., Art. 1(1)(a). See Supermicro Computer Inc. v. Digitechnic, S.A., 145 F. Supp. 2d 1147, 1151 (N.D. Cal. 2001), also available at http://cigws3.law.pace.edu/cases/010130u1.html; Hungary 24 March 1992 Metropolitan Court (Adami Video v. Alkotók Studiósa Kisszövetkezet), also available at http://cigws3.law.pace.edu/cases/920324hl.html; Germany 27 April 1999 Appellate Court Naumburg, available at http://cigws3.law.pace.edu/cases/990427g1.html (holding CISG governed sale of automobile between a German car retailer (buyer) and a wholesaler (seller) having its place of business in Denmark); Germany 21 August 1995 District Court Ellwangen, available at http://cigws3.law.pace.edu/cases/950821g2.html (CISG applied to installment contract between Spanish seller and German buyer); Germany 11 March 1998 Appellate Court München, available at http://cigws3.law.pace.edu/cases/980311g1.html (CISG applied to Italian seller's claim for purchase price but German buyer's set-off claim was determined pursuant to German law per their correspondence under Article 18 and in accordance with Article 40). Oberlandesgericht Köln (Germany), 13.02.2006, www.unilex.info. (Italian law applied secondarily; primarily the CISG applied to the contract as both parties—German buyer and Italian textile seller had their place of business in different contracting states under Article 1(1)(a)); Oberlandesgericht Köln (Germany), 03.04.2006, www.unilex.info. (Verbal agreement between German Buyer and Dutch Seller was governed by CISG, the applicability of which had not been excluded by the parties).
applicable and moreover intend to exclude it.\footnote{Italy 12 July 2000 District Court Vigevano (Rheinland Versicherungen v. Atlarex), available at http://cisc3. law.pace.edu/cases/000712113.html; Beltappo Inc. v. Rich Xiberta, S.A., 2006 WL 314338 (W.D. Wash), also available at http://cisc3. law.pace.edu/cases/060207u2.html.} The parties must also be from signatory countries at the time of the conclusion of the contract\footnote{See generally Articles 99-100; Italy 24 October 1988 Supreme Court (Kretschmer v. Muratori Enzo), available at http://cisc3. law.pace.edu/cases/991024i3.html (holding CISG did not apply to contract between German buyer and Italian seller since contract had been concluded before Italy's ratification of CISG); Impuls I.D. Internacional, S.L. v. Psion-Teklogix Inc., 234 F. Supp. 2d 1267 (S.D. Fla. 2002), also available at http://cisc3. law.pace.edu/cases/021122u1.html (holding verbal contract not governed by CISG where at time "proposal for concluding" contract was made between proposed distributors, which were Spanish and Argentine corporations, the United Kingdom was not signatory to treaty); Germany 24 May 1995 Appellate Court Celle, available at http://www.cisc. law.pace.edu/cisc/wais/db/cases/2/950525g1.html (holding Egyptian buyer and German seller were bound by CISG as both parties had their places of business in different CISG Contracting States (referencing Article 1(1)(a) CISG), the sales contract had been concluded after the CISG had come into force for these States (Article 100(2) CISG) and the application of the convention was neither excluded (Article 6 CISG) nor had the parties subsequently chosen a specific law to be applicable); German 9 July 1997 Appellate Court Köln, available at http://cisc3. law.pace.edu/cases/970709g3.html (holding CISG applied between Spanish seller and German buyer even though the parties had concluded dealer agreement in 1988 and CISG only became part of German law in 1991 by applying "dynamic reference" to the parties' purchase order in 1992); but see Italy 14 January 1993 District Court Monza (Nuova Fucinati v. Fondmetall International), available http://cisc3. law.pace.edu/cases/930114i3.html (CISG would not apply since at the time of conclusion of the contract the CISG had only entered into force in Italy and not in Sweden).} Although some courts have applied the CISG to parties who come from Non-Contracting States, concluding that the CISG is a component of their domestic law.\footnote{Russia 9 February 2001 Arbitration proceeding 161/2000, available at http://cisc3. law.pace.edu/cases/010209r1.html (applying CISG to contract between Russian seller and English buyer).\footnote{ICC Arbitration Case No. 7660 of 23 August 1994, available at http://cisc3. law.pace.edu/cisc/wais/db/cases/2/947660i1.html (applying Austrian law, which was CISG, between contact entered into between Italian seller and Czechoslovakian buyer even though Czechoslovakia was not then a Contracting State).} The parties mutually agree that pursuant to Article 6 of the UN Convention on Contracts for the International Sale of Goods ("the Convention") the parties express\textbf{ly opt out} of the Convention's application as to [all terms of this Contract or limit application in part].

See also \textsection 2.03[D] and Appendix B—Form B-1 Sample Contract for further drafting and litigation considerations.

**[B] Article 1(1)(b)**

As an alternative to Article 1(1)(a), Article 1(1)(b) provides that if by applying rules of private international law leads to the application of the law of Contracting State, then the CISG is the controlling law.\footnote{ICC Arbitration Case No. 7660 of 23 August 1994, available at http://cisc3. law.pace.edu/cisc/wais/db/cases/2/947660i1.html (applying Austrian law, which was CISG, between contact entered into between Italian seller and Czechoslovakian buyer even though Czechoslovakia was not then a Contracting State).} This is particularly true if a Contracting State adopted the CISG and through operation of its
domestic law becomes the governing law of a Contracting State. However, its application may be limited if one of the Contracting States filed an Article 95 reservation or if the parties failed to provide a choice of applicable law. See §2.03[E] for further discussion. “In cases where Subsection 1(b) is relevant, the trading partners of the Contracting States are in non-Contracting states.”

The implications of an Article 96 Reservation is that if a company from the United States (or other country making an Article 96 Reservation), enters into an agreement with a business that comes from another state that is from a Non-Contracting State, the CISG will not govern the contract unless the parties expressly agree otherwise. Consequently, a party from a Non-Contracting State is barred from asserting that application of private international law via Article 1(1)(b) would lead to the application of a Signatory country—the CISG when an Article 95 Reservation is asserted. The option to adopt Article 95 of the CISG specifically precludes this type of argument. Therefore, a party cannot circumvent the requirement of Article 1(1)(a) by relying on Article 1(1)(b). Instead, “the only circumstance in which the CISG could apply [when a U.S. company is involved] is if all the parties to the contract were from Contracting States.”

In general, Article 1(1)(b) and its provision as a multilateral agreement apply if the following criteria are met:

1. If any national conflicts of laws rules refer to any valid and binding State contracts of a State as the place of the forum;
2. The State of the forum has not implemented a reservation under Article 95 CISG; and
3. The parties have not explicitly or impliedly excluded the application of the CISG through the direct choice of any national substantive law.

[C] “Place of Business”

Issues arise with regard to application of the CISG when one or both of the parties have several offices and/or agents in different countries. The state of incorporation or residency of a company is irrelevant in determining whether the business is from a Contracting State. Instead, the CISG instructs that the “closest

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16 Germany 17 September 1991 Appellate Court Frankfurt, available at http://cisgw3.law.pace.edu/cases/910917g1.html (applying CISG as relevant Italian law pursuant to German private international law); Tribunale di Padova-Sez. Este, 10.01.2006, www.unilex.info.


23 Impuls I.D. Internacional, S.L. v. Psion-Teklogix Inc., 234 F. Supp. 2d 1267, 1272 (S.D. Fla. 2002) (emphasis added); see also Chateau Des Charmes Wineries Ltd. v. Sabate USA Inc., 328 F.3d 528, 530 (9th Cir. 2003) (stating the precondition that CISG applies “when the States are Contracting States”).

relationship theory” be facilitated to determine if the place of business is in a Contracting State. The place of business having the closest relationship with the contract is governed by Article 10. The issue of determining the relevant place of business of a party is an issue that frequently arises in a number of different provisions under the CISG. There are numerous applications of the place of business, in particular provisions of the CISG. However, the primary and most common usage of “place of business” as facilitated under Article 10 is its interpretive part in the unilateral conflict rule contained in Article 1(1)(a).

Hence, when both articles are read in conjunction they “form the lex specialis of conflicts of laws in contract applicable to contracts of sale of goods between parties whose places of business are in different Contracting States to the Convention.” Under Article 10, there is an overwhelming cognizance that the place of business is where “the center of the business activity directed to the participation is located,” which links the contracting party to the State where the business is conducted, provided the party has autonomous power. This has led many commentators and courts to conclude that a place of business, such as the location of an agent, representative, liaison or non-exclusive distributor, conference center or

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23 CISG exemplifies the drafters’ intent to adopt the “closest connection” principle in contract interpretation and supplementation when determining the relevant “place of business” of a party absent an express provision. Honnold states: “During the preparation of the Convention, some delegates were concerned lest ‘place of business’ be construed to extend to a hotel room or other temporary place where a traveling agent might conduct negotiations. Referring to a ‘permanent’ place of business presented drafting difficulties, and most delegates concluded that temporary sojourns would not establish a ‘place of business.’ The term that corresponds to ‘place of business’ in the official French text is établissement and in the official Spanish text is establecimiento—words that seem to be inconsistent with a temporary stopping place.” John Honnold, Uniform Law for International Sales, 3rd ed., Kluwer (1999) p. 132. In contrast, there is the “theory of the principal place of business,” which is that the relevant place of business is where the main seat is located. See generally Franco Ferrari, Specific Topics of the CISG in the Light of Judicial Application and Scholarly Writing, 15 Journal of Law and Commerce (1995), Section II. 4. “The ‘Place of Business’ under CISG,” available at http://cisgw3.law.pace.edu/cisg/biblio/2ferrari.html. The original intent of the drafters of the CISG to adopt the theory of “principal place of business” as evidenced by the proposal reprinted in UNCITRAL Yearbook, vol. II (1971) 52, available at http://www.unictral.org/english/yearbooks/yearbook-index-e.htm; however, this was later rejected.

24 See the examples offered in the Secretariat Commentary to the Draft Convention as manifestations of the concept (e.g., Articles 12, 20(2), 24, 31(c), 42(1)(b), 57(1)(a) and 96 CISG); Text of Secretariat Commentary on Article 9 of the 1978 Draft [draft counterpart of Art. 10 CISG], available at http://cisgw3.law.pace.edu/cisg/text/seccomm/seccomm-10.html.


26 See Ferrari, supra, note 23, referencing German Federal Supreme Court’s interpretation of “place of business” in ULIS Article 1. Judgment of June 2, 1982, BGH WM 846 = 83 IPRax 212. Notably, a business’s “autonomous power” appears to be the key component when courts have scrutinized this term.

27 Germany 13 November 2000 Landgericht [District Court] Köln, available at http://cisgw3.law.pace.edu/cases/001113g1.html (holding Italian agent in Germany had no authority to bind Italian company in German-Italian contract dispute).

28 Germany 28 February 2000 Oberlandesgericht [Appellate Court] Stuttgart, available at http://cisgw3.law.pace.edu/cases/000228g1.html (holding Spanish representative of manufacturer-seller in Spain was not a place of business absent legal authority to bind the German manufacturer to Spanish buyer).

29 France 4 January 1995 Cour de Cassation [Supreme Court]. Fauba France FDIS GC Electronique v. Fujitsu Mikroelektronik GmbH, translation available at http://cisgw3.law.pace.edu/cases/950104fl.html (holding liaison office of German company in France was not principal place of business absent corporate status in action against French buyer); ICC Arbitration Case No. 7531 of 1994, available at http://cisgw3.law.pace.edu/cases/9475321i.html (holding Austrian buyer liaison located in China was not place of business in Chinese-Austrian dispute, notwithstanding that the liaison office in China may have been involved in the negotiating process).

exhibition or a rented office(s) at an exhibition, fail to constitute a place of business for the purposes of Article 10, absent facts to the contrary. Notably, however, one court did find that a corporate branch was the place of business under Article 10 and not the company's headquarters located in a different country. This finding was based on the fact that the branch had the closest relationship to the contract and its performance.\(^{32}\)

Article 10(a) also establishes similar criteria for performance of a contract. When reference is made to the performance of the contract, it is referring to the performance that the parties knew or contemplated when they were entering into the contract. For example, if it was contemplated by a party that performance of the contract would be in State A, a determination that his or her place of business was in State A would not be altered by his or her subsequent decision to perform the contract at his or her place of business in State B. In judicial application of Article 10, however, the courts have routinely applied a subjective analysis by looking not only to the intent of the parties but also to the “totality of the contract,” which includes examining the parties' statements, performance, and conduct pursuant to Article 8(1) and 3; and the material terms of the contract including factors relating to the offer and acceptance of the contract.\(^{33}\) Hence, the fact that a third party negotiated a contract has had little significance to the courts when determining the “place of business.” However, certain factors that are not known or contemplated by both parties at the time of entering into the contract may not be taken into consideration. Such factors include, but are not limited to, supervision over the making of the contract by a head office located in another State, or the foreign origin or final destination of the goods.\(^{34}\) In certain circumstances, a factual determination is to be made as to the party's habitual residence provided the contract is for the sale of goods intended for commercial purposes and not simply for “personal, family, or household use” within the meaning of Article 2(a). Upon such finding, performance is to be effected at the party's habitual residence. “Habitual residence” is where the party actually lives. Notably, it is irrelevant as to whether he or she has a permit to live in the country or as to whether the party frequently visits another country, provided he or she normally returns to the first place.\(^{35}\)

\(^{31}\)ICC Arbitration Case No. 7531 of 1994, available at http://cigsw3.law.pace.edu/cases/9475311i.html (finding fact that Austrian buyer had conducted part of the negotiations through its liaison office situated in the Chinese seller's country was of no relevance as to CISG not applying); Austria 15 October 1998 Supreme Court, available at http://cigsw3.law.pace.edu/cases/981015a3.html (identical citizenship of Austrian parties would not matter; focus was on whether the parties had their places of business in different countries—Italy (buyer) and Austria (seller)—for CISG to apply).

\(^{32}\)Switzerland 20 February 1997 Zivilgericht [District Court] Saane, available at http://cigsw3.law.pace.edu/cases/970220s1.html. In this case, an Austrian company entered into a contract with the Swiss branch of a company with headquarters in Liechtenstein for the purchase and transport of spirits to Russia. At the time of contracting, Liechtenstein was not a Contracting State to the CISG. A contractual dispute arose between the parties and the contract was never performed. The court found that the CISG was applicable because the Swiss branch, not the Liechtenstein headquarters, was the place of business that had the closest relationship to the contract and its performance (Articles 1(1)(a) and 10(a) CISG).

\(^{33}\)Germany 28 February 2000 Appellate Court Stuttgart, available at http://cigsw3.law.pace.edu/cases/000228g1.html (holding CISG applied to contract between German company and Spanish buyer expressly rejecting that German stock corporation registered under Spanish law was not agent of German company). See also Secretariat Commentary on Article 9 of the 1978 Draft Convention [draft counterpart of CISG Article 10], Comment 6, which states: “Subparagraph (a) lays down the criterion for determining the relevant place of business: it is the place of business which has the closest relationship to the contract and its performance.”

\(^{34}\)Secretariat Commentary, op. cit., Comment 8.

\(^{35}\)See Secretariat Commentary, op. cit., Comment 9. See also, e.g., Austria 10 Oberster Gerichtshof [Supreme Court], 10 November 1994, available at http://cigsw3.law.pace.edu/cases/94110a3.html (finding
[D] Opting Out

Article 6 of the CISG provides the following:

The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provision.36

This provision provides parties with the "freedom to contract" not only to terms and conditions of the contract but also to governing law. It is through Article 6 that parties can elect to apply a specific law in lieu of the CISG; "[t]he total or partial exclusion of the CISG can be provided for in the form of an express disposition in the contract of sale or by the inclusion of such a clause in the general conditions validly incorporated into the agreement."38 Therefore, even if the CISG applies under Articles 1(1)(a) or that the rules of private international law lead to the application of the law of a Contracting State through Article 1(1)(b), the CISG may not apply if the parties either expressly or implicitly, notwithstanding the fact they had this option, to opt out of its application.39 Consequently, when two foreign nations are signatories to the CISG, the CISG governs contracts for the sale of goods between parties whose places of business are in these different nations absent a choice-of-law provision.40 Overall, commentators and case law have held that absent a choice-of-law provision or silence on behalf of the parties warrants application of the CISG. The CISG governs contracts for the sale of goods between parties whose places of business are in these Contracting States absent a choice-of-law provision.41 Parties that have included a choice-of-law provision often encounter challenges to the effectiveness of the provision. The majority of courts, if not all, have repeatedly held that choice-of-law provisions such as "the laws of State X"42 or "the laws of Country X"43 that an international sale occurred under CISG in a contract of sale of chinchilla furs between breeder and buyer).

36See Chapter 3 for additional discussion.
37Article 6.
41Id.
fail to effectively opt out of the CISG. The choice of law without an explicit declaration that the CISG be excluded does not constitute an implicit exclusion because the CISG is part of the chosen law; it is therefore included in the referral and takes precedence over the non-unified law that would otherwise be applicable.\footnote{Achilles, Kommentar zum UN-Kaufrechstitereinkommen, Art. 6 no. 4; Ferrari, op. cit., Art. 6 n. 22. Several U.S. federal courts have held that to exclude the CISG a party must not only provide that the law of a particular state will apply, it must also expressly state that the CISG will not apply. BP Oil Intl, Ltd., v. Empresa Estatal Petroleos De Ecuador, 332 F.3d 333 (5th Cir. 2003), also available at http://cisdw3.law.pace.edu/cases/0305771u1.html. See Asante Technologies, Inc. v. MC-Sierra, Inc., 164 F. Supp. 2d 1142; 2001 U.S. Dist. LEXIS 16000 and 2001 WL 1182401 (N.D. Cal.), also available at http://cisdw3.law.pace.edu/cases/010727u1.html; Ajax Tool Works, Inc. v. Can-Eng Mfg. Ltd., 2003 WL 223187 (N.D. Ill. 2003), also available at http://cisdw3.law.pace.edu/cases/030129u1.html.}

"Although the CISG is plainly limited in its scope, the CISG nevertheless can and does preempt state contract law to the extent that state causes of action fall within the scope of the CISG."\footnote{See Asante Technologies, Inc. v. MC-Sierra, Inc., 164 F. Supp. 2d 1142; 2001 U.S. Dist. LEXIS 16000 and 2001 WL 1182401 (N.D. Cal.), also available at http://cisdw3.law.pace.edu/cases/010727u1.html; but see American Biophysics v. Dubois Marine Specialties, 411 F. Supp.2d 61, 2006 WL 225778 (D.R.I.), 2006 U.S. Dist. LEXIS 3908, also available at http://cisdw3.law.pace.edu/cases/060130u1.html.} An affirmative opt-out requirement is also in conformity with the uniformity and observance of the good faith in Article 1—two principles that guide interpretation of the CISG.\footnote{BP Oil International Ltd., 332 F.3d 333 (S.D. Texas 2003), also available at http://cisdw3.law.pace.edu/cases/0306611u1.html (holding law of Ecuador insufficient to exclude CISG application). See Asante Technologies, Inc. v. MC-Sierra, Inc., 164 F. Supp. 2d 1142; 2001 US Dist. LEXIS 16000 and 2001 WL 1182401 (N.D. Cal.), also available at http://cisdw3.law.pace.edu/cases/010727u1.html; but see American Biophysics v. Dubois Marine Specialties, 411 F. Supp.2d 61, 2006 WL 225778 (D.R.I.), 2006 U.S. Dist. LEXIS 3908, also available at http://cisdw3.law.pace.edu/cases/060130u1.html.\footnote{Bolch, Commentary to the Convention on the International Sale of Goods (CISG) and the UCC, 2001 U.S. Dist. LEXIS 16000 and 2001 WL 1182401 (N.D. Cal.), also available at http://cisdw3.law.pace.edu/cases/010727u1.html; but see American Biophysics v. Dubois Marine Specialties, 411 F. Supp.2d 61, 2006 WL 225778 (D.R.I.), 2006 U.S. Dist. LEXIS 3908, also available at http://cisdw3.law.pace.edu/cases/060130u1.html.}} Courts have also included in their analysis submission of proof to the contrary. In other words, courts will permit parties to submit evidence of their intent.\footnote{See generally Switzerland 3 November 2004 Appellate Court Jura, available at http://cisdw3.law.pace.edu/cases/041103s1.html (finding choice-of-law provision in one invoice was insufficient to preclude application of the CISG).} This provides a more subjective analysis provided by a case-by-case determination with the true intention of the parties resolving this issue.\footnote{It is the opinion of this author that courts have adopted a "rebuttal" presumption, which "vanishes" if proof is not provided.} Case law suggests that evidence needed to prove intent is rather high. If the party attempting to enforce the choice-of-law provision fails to present evidence to prove that the parties intended to "opt out of the CISG" then courts will apply the CISG.\footnote{BP Oil International Ltd. v. Empresa Estatal Petroleos de Ecuador, 332 F.3d 333 (S.D. Texas 2003), also available at http://cisdw3.law.pace.edu/cases/0306611u1.html (holding laws of Ecuador insufficient to exclude CISG application). See Asante Technologies, Inc. v. MC-Sierra, Inc., 164 F. Supp. 2d 1142; 2001 US Dist. LEXIS 16000 and 2001 WL 1182401 (N.D. Cal.), also available at http://cisdw3.law.pace.edu/cases/010727u1.html; but see American Biophysics v. Dubois Marine Specialties, 411 F. Supp.2d 61, 2006 WL 225778 (D.R.I.), 2006 U.S. Dist. LEXIS 3908, also available at http://cisdw3.law.pace.edu/cases/060130u1.html.} The majority of U.S. courts have acknowledged preemption of domestic law via the federal supremacy clause while also acknowledging no evidence as to intent was presented to the contrary.\footnote{Bolch, Commentary to the Convention on the International Sale of Goods (CISG) and the UCC, 2001 U.S. Dist. LEXIS 16000 and 2001 WL 1182401 (N.D. Cal.), also available at http://cisdw3.law.pace.edu/cases/010727u1.html; but see American Biophysics v. Dubois Marine Specialties, 411 F. Supp.2d 61, 2006 WL 225778 (D.R.I.), 2006 U.S. Dist. LEXIS 3908, also available at http://cisdw3.law.pace.edu/cases/060130u1.html.} This has also applied to pleadings.
Mere reference to domestic law in the parties' pleadings is not in itself sufficient to exclude CISG. To this effect parties must first of all be aware that CISG would be applicable and moreover intend to exclude it.\textsuperscript{51}

**Practical Application:** Application of the CISG can be desirable for smaller firms who represent clients that are contracting with companies in countries whose law, and whose legal interpretation of their law, is uncertain or undesirable. Larger firms may desire to utilize the CISG but select certain applicable provisions. Counsel should take note of the three observations on the benefits of the CISG as noted by the American Bar Association: (1) U.S. businesses can avoid the difficulties of reaching agreement with foreign buyers on choice-of-law issues because the CISG text will be readily available for compromise; (2) use of the CISG as a body of law governing international sales in goods will decrease the time and legal costs otherwise involved in research of different unfamiliar foreign laws; and (3) the CISG will reduce the problems of proof of foreign law in domestic and foreign courts.

§2.03 RESERVATIONS AND OTHER PROVISIONS UNDER PART IV

Part IV of the CISG includes several provisions for exclusions and clarification as to the CISG's application.\textsuperscript{52} These provisions provide a means for a Contracting State to limit application of the CISG. There is also clarification as to the CISG relation to other treaties. Article 97 prescribes the procedure for declarations and withdrawal of a declaration. Notably, "[t]he only reservations (declarations) which Contracting State are permitted to make are those expressly authorized in CISG Part IV."\textsuperscript{53}

**Practical Application:** Prior to examining an issue under the CISG, practitioners should carefully examine any relevant declaration or reservation made by a Contracting State. See Appendix A-3, Table 1—Table of Contracting States to the CISG and Declarations.\textsuperscript{54}


\textsuperscript{52}See Article 92 (permitting States to declare that they will be bound only by the rules in Part II of CISG (Contract Formation) or the rules in Part III (Sale of Goods)); Article 95 (States right to declare that they will not be bound by the private international law rule in subparagraph 1(b) of Article 1); Article 94 (declaration that CISG does not apply conditioned on the Contracting States having the same or closely related legal rules on matters governed by the CISG).

\textsuperscript{53}Lookofsky, *supra*, note 3, p. 156.

[A] Relation to Other Treaties

Under the provisions of Article 90, all international agreements that have already been or may be entered into and which contain provisions concerning matters governed by the CISG prevail over the CISG. "The purpose of Article 90 is to avoid conflicts with other treaties in the same manner that there are rules on conflict of laws under private international law." Case law and commentaries from scholars have proven that any conflict or disparities in the CISG relations to other treaties are often resolved to the application of the CISG. This has included conclusions that the CISG and the 1955 Hague Conventions are complementary, and that no conflict exists between CISG and the Rome Convention, as well as permitting a third party to pursue a claim under the Lugano Convention. Such conclusions will be upheld provided a country ratified the CISG according to Articles 99-100 prior to a country's denunciation of a multilateral agreement. In contrast, bilateral treaties entered into prior to a country's adoption of the CISG have prevailed over the CISG. There is little, if any, case law from the United States addressing this issue since the United States was not a signatory to multilateral agreements prior to the CISG enactment. See generally Chapter 1.

[B] Reservation as to Application

Article 92 permits a Contracting State to declare that it will not be bound by the rules in Part II of CISG (Contract Formation) or the rules in Part III (Sale of Goods). Courts have honored such reservations but have observed the difference between formation and execution of an agreement as well

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56 Hornold, supra, note 23, at pp. 531-535; see also Lookofsky, supra, note 3, p. 156. Notably, the primary goal of the 1986 revision of the 1955 Convention was to eliminate potential conflicts with the CISG. Id. citing in general, P. Winship, "The Scope of the Vienna Convention . . .," in International Sales (Galston and Smit, eds. New York 1984) and John Hornold, Uniform Law for International Sales Under the 1980 United Nations Convention (Deventer 1989).
61 Notably, Scandinavian States, which include Denmark, Finland, Norway, and Sweden, have elected this reservation.
as application through conflict of law rules.\(^4\) Moreover, a declaration under Article 92 will not always preclude application of CISG formation issues as some rules relevant for the resolution of a conformity question are found in Articles 8, 9, and 35, which fall outside the scope of the declaration.\(^5\) Additionally, Article 55 in Part III recognizes a contract formation even if the contract does not expressly or implicitly fix or make provision for determining price. This point is further discussed in Chapters 2, 4, and 8. Alternatively, resort to national law may preserve the formation contract through equitable remedies.\(^6\)

[C] Territorial Reservation Article

Contracting States that do not have a federal system can facilitate Article 93, as it permits a Contracting State, upon ratification of the CISG, to declare that the CISG is to extend only some but not all of its territorial units. Canada originally had elected this reservation to preclude CISG application to Quebec and Saskatchewan, but it was later withdrawn. Denmark has declared a reservation declaring that the CISG did not apply to the Faeroe Islands and Greenland. See Appendix A-3, Table 1—Table of Contracting States to the CISG and Declarations.

[D] Closely Related Legal Rules Reservations

Contracting States that have similar sales laws may elect to preclude application of the CISG by


\(^5\)Italy 23 January 2001 Appellate Court Milano, available at http://cисgw3.law.pace.edu/cases/010123i1.html (holding reservation made by Finland under Part II of CISG (Art. 92 CISG) did not preclude application of the CISG in action by trustee of Italian seller as the Court further pointed out that the dispute was not related to the formation of contract but to the execution of the subsequent agreement made by the parties, concerning the terms of payment of purchase price).

\(^6\)See Bernstein & Lockofsky, Understanding the CISG in Europe (2d ed. 2002), §8-4, Kluwer Law International. See also Denmark 31 January 2002 Maritime Commercial Court (Dr. S. Sergueev Handelsagentur v. DAT-SCHAUB A/S), available at http://cисgw3.law.pace.edu/cases/020131d1.html (applying the CISG for formation issues under Articles 8, 9, and 35(1) despite Danish reservation under Article 92); see also application in Mitchell Aircraft Spares, Inc. v. European Aircraft Service AB, 23 F. Supp. 2d 915 (N.D. Ill. 1998), also available at http://cисgw3.law.pace.edu/cases/981087u1.html (ruling Article 8 of CISG was outside scope of Swedish 92 reservation as to formation and therefore the CISG governed the parol evidence issue); Germany 8 March 1995 Appellate Court München, available at http://cисgw3.law.pace.edu/cases/950308g.html (holding Finnish reservation as to Part II of the CISG would not impede on contract formation, thereby relying on Articles 14-24 of the CISG to conclude a mutually binding agreement).

declaring an Article 94 reservation. An implicit precondition to an Article 94 reservation is that the Contracting States have "essentially similar" legal rules on matters governed by the CISG. If established and a reservation is made, the CISG does not apply to contracts for sale where the parties have their place of business in those selected Contracting States. The Scandinavian States (Denmark, Finland, Norway, and Sweden) collectively made an Article 94 declaration at the time of their ratification of the CISG. Recent statutory amendments to Scandinavian sales statutes however have prompted several commentators to suggest that the countries withdraw their Article 94 reservation in accordance with Article 97 since Denmark has not adopted these revisions.

**[E] Reservation Under Article 1(1)(b)**

Article 95 provides that "[a]ny State may declare at the time of the deposit of its instrument of ratification, acceptance, approval, or accession that it will not be bound by subparagraph (1)(b) of Article 1 of this Convention." In 1980, the United States made an Article 95 reservation. The application of an Article 95 reservation means that a state or federal court in the United States would not be bound to apply CISG rules to a contract when another party comes from a Non-Contracting State. This is true even if the relevant forum rules of private international law lead to its application. In addition to the foregoing, several other variations in interpretation exist under this reservation. Germany's reservation under Article 95 provides that it would not apply Article 1(1)(b) in sales where Article 95 reservation states are involved. The other variation is the Dutch variation, which provides that pursuant to Article 2 of the Dutch Implementing CISG Act, foreign judges in Article 95 reservation have been requested not to apply the Dutch Civil Code provisions on sales but rather the CISG, if Dutch law were applicable by virtue of the local conflict rule. Although there is no mandatory language, statutory intent reveals that the Dutch sought "uniformity rather than one that relies on local Dutch law." In essence, most "Article 95 declarations narrow the applicability of the Convention [CISG] and enlarge the applicability of the domestic law of the declaring State."

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68Trade between parties from Scandinavian countries would not be governed by the CISG because of the Article 94 reservation. Effective June 1, 2002, Iceland filed an Article 94 reservation. Therefore, a transaction between an Icelandic party and a party located in Denmark, Finland, Norway, or Sweden is also covered by this reservation.
69Id.
70Other countries that have made an Article 95 reservation include China, the Czech Republic, and Slovakia.
71But see Matthew T. Davidson & Daisuke Terasaki, Editorial Remarks for 19 March 1998 Tokyo District Court (Nippon Systemware Kabushikigaisha v. O), available at http://www.cisg.law.pace.edu/cisg/wais/db/cases2/980319j1.html (applying CISG to contract between parties from United States (seller) and Japan (buyer), a Non-Contracting State, without reference to Article 95 declaration).
72See Philip De Ly, Variations in Interpretation of Article 95 Reservation, available at http://cisg.law.pace.edu/cisg/text/e-text-95.html. But see Albert Kritzer, Editorial Remarks to Germany 2 July 1993 appellate Court Düsseldorf, available at http://cisgw3.law.pace.edu/cases/930702g11.html (applying CISG through Article 1(1)(b) to transaction between United States (seller) and German (buyer) prior to effective date of CISG in Germany).
[F] Written Requirements Reservation

The CISG's adoption of the civil law concept that excludes the necessity of "writing" may be avoided by a Contracting State adopting Article 96, which provides for Contracting States to preserve these formal requirements via Article 12. As such, Contracting States that make an Article 96 reservation preserve their domestic formal writing requirements with regard to the CISG. However, if one of the parties resides in a declaring state, the forum court should resolve a conflict of laws. A forum court that applies the formal requirements of an Article 96 reservation "should only do so when its rules of private international law lead to the application of the declaring State." Notably, application of these reservations preserves the parol evidence rule and therefore can have a significant impact on a contract dispute if there is an issue as to its formation under Article 11, an offer and acceptance issue under Part II of the CISG, or a modification not evidenced in writing under Article 29.

§2.04 SCOPE OF APPLICATION

Assuming a contract is international and no reservation precludes its application, the CISG covers contract issues dealing with the formation of a sales contract and the rights and obligations of the seller and the buyer arising from such a contract—the substantive issues. Based on the language of Article 4.

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75See Chapter 3 for further discussion of Article 11 (eliminates formal requirement that sales contract be concluded in or evidenced by writing, Part II (no writing requirements for offer and acceptance), and Chapter 4 for discussion of Article 29 (eliminates writing requirement with regard to contract modification).

76Argentina, Belarus, Chile, China, Estonia, Hungary, Lithuania, Ukraine, and the Russia Federation have all elected to make an Article 96 declaration. See Appendix A-3, Table 1—Table of Contracting States to the CISG and Declarations.


82Belgium 2 May 1995 District Court Hasselt (Vital Berry Marketing v. Dira-Frost), available at http://cisgw3.law.pace.edu/cases/950502b1.html (holding modification between Chilean seller and Belgian buyer had to be in writing in accordance with Article 12 pursuant to Article 96 reservation made by Chile); Russia 16 February 1998 High Arbitration Court (or Presidium of Supreme arbitration Court) of the Russian Federation: Information Letter 29, available at http://cisgw3.law.pace.edu/cases/980216r1.html; Mexico 29 April 1996 Compromex arbitration proceeding (Conservas La Costena v. Lanin), available at http://cisgw3.law.pace.edu/cases/960429m1.html.

83Article 4.

831 This interpretation is based on the language found in Article 4, which states "... except as otherwise expressly provided in this Convention."
issues concerning sales contract validity, tort actions, or the effect which the contract may have on the property if the goods sold fall outside the scope of the CISG. Certain procedural issues also are excluded from CISG application and are governed by domestic law. See Chapter 9 for further discussion on U.S. civil procedure. The CISG does not apply to the liability of the seller for death or personal injury caused by the goods to any person. Yet, damages caused by the defective product are a question governed by CISG. Currency issues, validity of a penalty clause, set-off concerns, and issues governing the


85Id. (promissory estoppel and state tort claims outside realm of CISG). TeeVee Tunes, Inc. et al v. Gerhard Schubert GmbH, 2006 WL 2463537 (S.D.N.Y.), also available at http://cisgw3.law.pace.edu/cases/060823u1.html (negligence and fraud claims brought against the seller were assessed under the otherwise applicable law (i.e. the law of the State of New York).

86Article 4 (a)(b).


90Germany 20 April 1994 Appellate Court Frankfurt, available at http://cisgw3.law. pace.edu/cases/940420g1.html (holding that the parties are free to choose the currency, since the CISG does not deal with the issue).


passing of property of goods sold, as well as validity of retention title clauses, have been determined by the courts to fall outside the scope of the CISG. See Chapter 8 for further discussion. Notably, questions concerning matters governed by the CISG that are not expressly resolved are settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of the private international law.

§2.05 DEFINING “SALES”

A “sales” contract covered by the CISG is defined through Articles 30 and 53 as a contract “pursuant to which one party (the seller) is bound to deliver the goods and transfers the property in the goods sold and the other party (the buyer) is obliged to pay the price and accept the goods.” Courts have included within this definition installment contracts, goods sold directly from the supplier to the seller’s customer, modifications of sales contracts, and certain types of assignments. Distribution agreements, franchise


94 Counsel is to be advised that case law should not preclude challenges to said application. Application and limitation of the CISG should focus on the specific factual scenario of a case.


96 Switzerland 11 March 1996 Appellate Court Vaud [No. 01 93 0661], available at http://cisgw3.law.pace.edu/cases/960311s1.html (holding Austrian seller, acting as exclusive distributor of a company controlled by a Hungarian producer, was entitled to payment from Swiss buyer); Italy Tribunale [District Court] Rimini 26 November 2002, available at http://cisgw3.law.pace.edu/cases/021126g3.html.


100 Germany, Landgericht [District Court] Hellbrunn 15 September 1997, available at http://cisgw3.law.pace.edu/cases/970915g1.html (lessee, to whom the buyer/lessor assigned its rights as buyer, avoided contract); Switzerland, Obergericht [Court] Thurgau 19 December 1995, available at http://cisgw3.law.pace.edu/cases/951219s1.html (distributor could enforce contract even though manufacturer rather than its distributor was original party to contract because manufacturer had assigned its claim for breach to distributor); Germany, Oberlandesgericht [Appellate Court] Hamm 8 February 1995, available at http://cisgw3.law.pace.edu/cases/950208g3.html (assignee enforces seller's claim).

agreements, joint ventures, and barter agreements have been determined to fall outside the CISG's sphere of application; however, contracts concluded in execution of such agreements have been determined to fall within the scope of the CISG. Moreover, the contractual rights created under the CISG have been determined not to override a secured creditor's perfected security interest in goods.

§2.06 DEFINING “GOODS”

Even if the sale invokes an issue that is controlled by the CISG, its application may be excluded due to the nature of the goods. The CISG does not define what goods are covered although limitations are set forth in Article 2, which provides the following:

This Convention does not apply to sales:

(a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use:

(b) by auction;


103 Amco Ukrservice v. American Meter Co., 312 F. Supp. 2d 681 (E.D. Pa. 2004), also available at http://cisgw3.law.pace.edu/cases/040329u1.html (holding CISG joint venture agreements not covered under CISG but CISG may apply to discrete contracts for the sale of goods that the parties had entered into pursuant to the joint venture agreements).
(c) on execution or otherwise by authority of law;

(d) of stocks, shares, investment securities, negotiable instruments or money;

(e) of ships, vessels, hovercraft or aircraft;

(f) of electricity.

The legislative history of Article 2 reveals that it has its antecedent in Article 5 of ULIS.107 "The main changes consist in the elimination of the provision of Article 5(2) of ULIS relating to the exclusion of installment sales and the addition of a more comprehensive provision excluding consumer sales."108 The decision to exclude consumer purchases was based on the consensus that the CISG should not create a conflict between the CISG and the mandatory rules of domestic law implemented for either the mandatory protection of the consumer or implemented for public policy considerations.109

The character of the goods is not decisive as to consumer issues. As such, "[t]he structure of Article 2(a) and practical considerations applicable to the allocation of the burden of proof suggest that the buyer has the burden of proving that it bought the goods for personal, family or household use before or at the conclusion of the contract. This application has led to the CISG not applying to the sale of a car/ld. or a recreational vehicle specifically bought for personal use. See Switzerland 5 June 1996 District Court Nidwalden, available at http://cissaw3.law.pace.edu/cases/960605s1.html; Austria 11 February 1997 Supreme Court, available at http://cissaw3.law.pace.edu/cases/970211a3.html. If, however, the goods are purchased for professional or commercial purposes such as appliances and software programs as well as livestock then the CISG applies to the transaction. See Netherlands 27 May 1993 District Court Arnheim (Hunfeld v. Vos), available at http://cissaw3.law.pace.edu/cases/930527n1.html; TeeVee Tunes, Inc. et al. v. Gerhard Schubert GmbH, 2006 WL 2463537 (S.D.N.Y.), also available at http://cissaw3.law.pace.edu/cases/060823u1.html. The seller in a transaction has the burden of proving that it did not know (and had no means of knowing) the buyer's purpose.110

The exclusion of auctions is based in part on the fact that a seller would not know who the buyer was until the hammer is knocked down to the highest bidder;114 the seller would therefore not know whether the sale would be governed by the CISG.115 It is considered undesirable that the applicability of the Convention [CISG] should be determined in such a random fashion.116 Courts that have examined this issue have focused on the time of the transaction. For example, a straightforward auction has been determined to be outside the scope of the CISG;117 however, an order to sell by auction is governed by the CISG118 as well as a

108id.
109id.
112Honnold, supra, note 19 at 46-55.
113Khoo, supra, note 107.
114Id.
115Netherlands 9 February 1999 Appellate Court Arnhem (Kunsthaus Mathias Lempertz v. Wilhelmina van der Geld), available at http://cissaw3.law.pace.edu/cases/990209n1.html (holding CISG applied to order to sell by auction but claim was time barred).
transaction concluded privately outside the auction.  

Paragraph (c) of Article 2 excludes sales by execution and sales by authority of law generally. These sales often do not affect international trade and they are also usually subject to special rules of domestic law. The exclusion of negotiable instruments refers to instruments calling for the payment of money; documents controlling the delivery of goods (e.g., warehouse receipts, bills of lading) are subject to the CISG when they are employed to effect the delivery of goods. It serves the purpose of accommodating the thinking of legal systems which do not regard commercial paper and money as 'goods' and which therefore would find it unacceptable that their sale should be brought within the scope of the Convention [CISG]. Sales of commercial paper and money also present problems peculiar to themselves. This limitation would exclude CISG application for share purchase agreements and sale of shares, including the transfer of shares of a limited liability company.

Paragraph (e) of Article 2 excludes sales of ships, vessels, hovercraft, and aircraft from the Convention. The effect is that all vessels, ships, hovercraft, and aircraft are excluded whether or not they are subject to the registration requirement of any national law. However, courts have determined that the sale of parts for these types of craft falls within the sphere of application of the CISG.

The sale of electricity is excluded by paragraph (f) of Article 2. Although electricity is capable of being the subject of sale, there are difficulties in attributing it to all the legal qualities of a physical object; however, the sale of gasoline has been determined to be subject to the CISG.

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120 Id.
121 Honnold, supra, note 19.
122 Khoo, supra, note 107.
126 There is no registration requirement as the criterion for exclusion unlike the corresponding provisions in the ULIS. See Khoo, supra, note 107.
132 BP Oil International, Ltd. v. Empresa Estatal Petroleos de Ecuador, 332 F.3d 333 (5th Cir. 2003), also available at http://ciscw3.law.pace.edu/cases/030611u1.html; Austria 22 October 2001 Supreme Court [1 Ob 77/01g], available at http://ciscw3.law.pace.edu/0110022a3.html.
§2.07 CONTRACTS FOR SERVICES

Article 3 provides further guidance as to what constitutes a “sale of goods.” Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production under Article 3(1). Under Article 3(2), the CISG does not apply to a mixed contract in which labor or other services are involved if the labor or service form the preponderant part of the obligations of the party who furnished the goods. Each paragraph governs different matters, “though in complex transactions there may be some reciprocal influence in their interpretation and application.”

[A] Article 3(1) Materials for Contracts

The key phrase of focus under Article 3(1) is the proper application of the term “substantial part” of the materials necessary for manufacture or production. One interpretation followed by scholars and case law is that “substantial part” means “economic value.” Thus, materials provided by the buyer ought to be higher in value (price) as compared to those provided by the seller in order to exclude the CISG. In contrast, others have considered that the standard interpretation of the term “substantial part” should be based on the essentiality of the goods—the quality/functionality of the materials provided by the parties. There also exist opinions that one meaning should be the default of the other or both should apply. However, “[l]e legislative history of the Convention supports the conclusion that the essential criterion was rejected. Both Article 6 of the 1964 Uniform Law on International Sale of Goods (ULIS) and Article 1(7) of the 1964 Uniform Law on Formation (ULF) state that the Uniform Law is excluded if the party who orders the goods provides an essential and substantial part of the materials. The deletion of the term “essential” suggests that the essential criterion was rejected by the drafters of the CISG. However, others argue that the term survives via the French text of the CISG. Based on common law tradition of treaty interpretation, it would appear that the “economic value” would most likely be followed by a court in the United States.

133 Article 3(1).
134 Switzerland 7 May 1993 District Court Laufen, Canton Berne, available at http://cisgw3.law.pace.edu/cases/930507s1.html (Finnish seller’s obligation to furnish number of different services to Swiss buyer was not preponderant, thereby applying the CISG to contract dispute).
135 CISG-AC Opinion no. 4, Contracts for the Sale of Goods to be Manufactured or Produced and Mixed Contracts (Article 3 CISG), 24 October 2004, Rapporteur: Professor Pilar Perales Viscasillas, Universidad Carlos II de Madrid.
136 This conflict has arisen as well in regard to the term “preponderant.” Conflicting views as to interpretation are derived from and reflect national doctrines. Id.
137 Honnold, supra, note 19, n. 106.
138 These opinions rely on the French term “part essentielle,” which implies an interpretation based upon the quality/functionality of the materials provided by the parties. See, e.g., Germany 3 December 1999 Appellate Court München, available at http://cisgw3.law.pace.edu/cases/991203gl.html; Francisco Oliva Blazquez, Compraventa internacional de mercaderías (Ámbito de aplicación del Convenio de Viena de 1980), Valencia: Tirant lo Blanch, 2002, p. 194; ICC 11256/EBR/MS, 15 September 2003 (Los Angeles) (unpublished) (on file with the rapporteur) considered the CISG inapplicable on the basis of Article 3(1) (finding motors provided by the buyer were a substantial part of the materials necessary for the manufacture of the trucks); France 21 October 1999 Appellate Court Grenoble (Calzados Magnanni v. Shoes General International), available at http://cisgw3.law.pace.edu/cases/99102fl.html; Germany 3 December 1999 Appellate Court München, available at http://cisgw3.law.pace.edu/cases/991203g1.html. See CISG-AC Opinion no. 4, supra, note 135, stating “essential” criterion should be considered only where the “economic value” is impossible or inappropriate to apply, i.e., when the comparison of the materials provided for by both parties amounts to nearly the same value.
139 See CISG-AC Opinion no. 4, supra, note 135, stating “essential” criterion should be considered only where the “economic value” is impossible or inappropriate to apply, i.e., when the comparison of the materials provided for by both parties amounts to nearly the same value.
140 Id. at n. 2.5.
The term “material” as used in Article 3(1) includes raw materials and accessory elements, such as material needed for the packaging and transportation of the goods; materials needed for an acceptance test are excluded.\textsuperscript{141} Technology, technical specifications, drawings, formulas, and designs necessary for the production of the goods appear to be covered based on the legislative history of the CISG and impliedly by Article 42(2)(b).\textsuperscript{142} provided these items are enhancing the value of the materials and not merely accessory.\textsuperscript{143} Moreover, only designs or drawings that contribute originality, specialty, or exclusivity to the goods should be covered by the CISG.\textsuperscript{144} At least one court examined the collective effect by also reviewing the non-disclosure agreement, a license agreement, and various other agreements to conclude the sale came under Article 3(1).\textsuperscript{145}

[B] Article 3(2) Mixed Contracts

When a party to a contract agrees to perform services as well as deliver goods, the question arises as to whether the CISG applies to this situation. Article 3(2) addresses this matter by focusing on whether the “preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services.”\textsuperscript{146} Under the economic value approach as discussed, supra §2.07[A], courts have focused on the terms of the contract, and the intent of the parties, as well as on “the denomination and entire content of the contract, the structure of the price and the weight given by the parties to the different obligations under the contract.”\textsuperscript{147} Courts and scholars have agreed that a case-by-case analysis should also apply to turnkey contracts or work contracts or contracts in order to determine if the CISG applies to these contracts.\textsuperscript{148}

\textsuperscript{141} HG Switzerland 10 February 1999 Commercial Court Zürich, available at http://ciscw3.law.pace.edu/cases/990210s1.html (CISG applied in publishing contract as seller had to acquire material for execution of the contract).

\textsuperscript{142} France 25 May 1993 Appellate Court Chambéry (A.M.D. Electronique v. Rosenberger), available at http://ciscw3.law.pace.edu/cases/930525fi1.html (holding contract for designs was not considered basis of production, thereby falling outside scope of the CISG).

\textsuperscript{143} CISG-AC Opinion no. 4, supra note 135 at n. 2.11-2.13; see also A/CONF.97/C.1/L.26, p. 84. See impliedly Switzerland 17 October 2000 Federal Supreme Court (Severin Wagner AG v. Günter Lieber), available at http://ciscw3.law.pace.edu/cases/001017s1.html (in dicta discussion of a contract of sale of lockers to be manufactured by the seller following the buyer’s drawings but denied application of the CISG on the basis of Article 3(2) CISG); Germany 17 September 1991 Appellate Court Frankfurt, available at http://ciscw3.law.pace.edu/cases/910917s1.html (holding Italian seller’s supply of shoes in accordance with German buyer’s design within ambit of Article 3(1)).

\textsuperscript{144} Germany 26 November 1998 District Court Mainz, available at http://ciscw3.law.pace.edu/cases/981126g1.html (holding production and delivery of crepe-cylinder for production of tissue paper was covered under CISG).

\textsuperscript{145} Switzerland 7 May 1993 District Court Laufen, Canton Berne, available at http://ciscw3.law.pace.edu/cases/930507s1.html (Finnish seller’s obligation under terms of different agreements with Swiss buyer fell within term of Article 3(1)).

\textsuperscript{146} See Tribunale di Padova-Sez. Este, 10.01.2006, www.unilex.info (holding the fact that the Italian seller was also obliged to install the merry-go-rounds at the place of delivery was irrelevant since this latter obligation was not preponderant (Art. 3(2))).

\textsuperscript{147} Germany 16 November 2000 District Court München, available at http://ciscw3.law.pace.edu/cases/001116g1.html (Germany) (holding delivery and installation of pizzeria fittings covered by CISG based on terms of contract and pricing); ICC 7153/1992 (holding terms of contract for furnishing and assembling a hotel warranted application of the CISG); LG Mainz 26 November 1998 (Germany) (CISG applied based on the detailed production and delivery obligations set forth in contract as opposed to post-services obligations); see also, Germany 3 December 1999 Appellate Court München, available at http://ciscw3.law.pace.edu/cases/991203g1.html; Italy 9 June 1995 Supreme Court (Alfred Dunhill v. Tivoli), available at http://ciscw3.law.pace.edu/cases/950609i3.html; also available at http://www.unilex.info/case.cfm?pid=1&do=case&id=170&step =Abstract.

\textsuperscript{148} Switzerland 9 July 2002 Commercial Court Zürich, available at http://ciscw3.law.pace.edu/cases/020709s1.html (contract for work and materials was not a sales contract); see also, CISG-AC Opinion no. 4 supra 135 at n. 3.5, but see Schlechtriem/Herber, Art. 3, n. 8 (1st ed.).