

6 THE VALIDITY OF INTERNATIONAL SALES CONTRACTS

Irrelevance of the 'Validity Exception' in Article 4 Vienna Sales Convention and a Novel Approach to Determining the Convention's Scope

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6.1 INTRODUCTION

The relationship between the international unification of contract law and domestic rules on matters of contract validity has always been an uneasy one. Already at the drafting stage of the Hague Uniform Sales Laws,¹ predecessors to the 1980 Vienna Sales Convention (CISG),² it was noted that 'questions of great importance, such as the validity of the contract' had been left for the domestic laws to govern but that this decision had been inevitable because of the 'difficulties of unifying the law in this area'.³

These difficulties may have somewhat diminished in the 60 years since then, but they have certainly not disappeared; the draft for a Common European Sales Law published in 2011, for example, also provides that a significant number of issues – among them 'the invalidity of a contract arising from lack of capacity, illegality or immorality' – would continue to be governed by the pre-existing rules of national law applicable under conflict of laws rules.⁴

Under the CISG, the matter of validity of contracts is expressly addressed in Article 4, which is meant to define the substantive coverage⁵ of the Convention. Article 4 provides

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1 Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, The Hague, Netherlands, 1 July 1964 (ULF); Convention Relating to a Uniform Law on the International Sale of Goods, The Hague, Netherlands, 1 July 1964 (ULIS).

2 United Nations, Convention on Contracts for the International Sale of Goods, Vienna, 11 April 1980 (CISG).

3 'Observations Of The Government Of Federal German Republic On 1956 Draft ULIS', in *Diplomatic Conference on the Unification of Law Governing the International Sale of Goods (Documents)*, The Hague, Netherlands, 2-25 April 1964, p. 82.

4 Recital 27, Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law of 11 October 2011, Brussels, COM(2011) 635 final.

5 This term is used in the Secretariat's Commentary on the 1978 Draft Convention; see United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March–11 April 1980, Official Records: Documents of the Conference and Summary Records of the Plenary Meeting and the Meetings of the Main Committees, New York, United Nations, 1981, p. 17.

(in short) that the Convention ‘is not concerned with the validity of the contract’, a statement that has been dubbed ‘the validity exception’.⁶ Many authors have expressed fear that this exception may constitute a ‘loophole’ that greatly undermines the unifying effect of the CISG,⁷ and much has been written about how the term ‘validity’ should precisely be interpreted.⁸ The common concern among commentators is not so much the existence and desirability of the validity exception – which is generally accepted – but rather the uncertainties about its application.

In this chapter, I will try to demonstrate that these concerns are based on a misconstruction of Article 4 CISG and that the uncertainties surrounding the ‘validity exception’ can easily be avoided by applying an alternative approach to determining the Sales Convention’s scope that I have attempted to develop.

6.1.1 *The Stawski Case*

As a means of demonstration, I would like to use the *Stawski* case that was decided by a US Federal District Court in 2003.⁹ It concerned a long-term distribution contract between a Polish brewery (Zywiec) and a Chicago-based beer wholesaler (Stawski), which – according to the Court – was governed by the CISG. When the brewery tried to terminate the contract, the wholesaler in response relied on a local law, the Illinois Beer Industry Fair Dealing Act,¹⁰ and argued that this Act governed the question whether and under which conditions the long-term sales contract could be terminated. The Act contained a number of provisions in this regard, among them a rule that no brewer or beer wholesaler may cancel or otherwise terminate an agreement unless the party intending that action has (1) good cause for the cancellation or termination, has (2) made good faith efforts to resolve disagreements and has (3) furnished the other party a prior notification and has allowed that party 90 days to eliminate the reasons specified in the notification for cancellation.¹¹

The Polish brewery replied by insisting that the Convention pre-empted the application of that Act.¹²

6 See H.E. Hartnell, ‘Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods’, *Yale Journal of International Law*, Vol. 18, No. 1, 1993, p. 1.

7 See, e.g., *id.*, p. 21; P.C. Leyens, ‘CISG and Mistake: Uniform Law vs. Domestic Law – The Interpretative Challenge of Mistake and the Validity Loophole’, *Rev. CISG*, 2003-04, p. 28; N. Bar and N. Har-Sinay, ‘Contract Validity and the CISG: Closing the Loophole’, 2008, available at <www.articlesbase.com/law-articles/contract-validity-and-the-cisg-international-treaty-closing-the-loophole-315561.html>.

8 See discussion *infra* at Part 2.2.

9 *Stawski Distributing Co. Inc. v Zywiec Breweries PLC*, 2003 WL 2290412 (N.D. Ill.), US District Court, 6 October 2003, CISG-online No. 1225.

10 815 ILCS 720 *et seq.*

11 See §§ 3 and 4 Illinois Beer Industry Fair Dealing Act.

12 *Stawski Distributing Co. Inc. v Zywiec Breweries PLC*, *supra* note 9, p. 3.

In deciding the question, the Court made no reference to the CISG but rather relied on the US Constitution, so that the *Stawski* case may seem like an unlikely choice of an example for present purposes. Commentators, however, have argued that the Act constituted a ‘validity-related regime’ and that this was the true reason why it could be applied alongside the CISG.¹³ This difference in approaches already indicates that very different views can be adopted when matters of ‘validity’ arise under an international sales contract and suggests that the choice of subject is not without practical relevance.

6.1.2 Outline

This chapter will proceed as follows: I will first try to demonstrate that the so-called ‘validity exception’ in Article 4 CISG is in truth irrelevant for our purposes¹⁴ and will then go on to present a novel approach to determining the Convention’s scope,¹⁵ one that works without reliance on Article 4 CISG. Subsequently, I will further demonstrate the approach’s application using three pertinent examples,¹⁶ before I conclude.¹⁷

6.2 THE IRRELEVANCE OF THE ‘VALIDITY EXCEPTION’ IN ARTICLE 4 CISG

The validity exception in Article 4 CISG, to which I turn first, is widely viewed as an important border post between the territory of uniform sales law and that of domestic law. Its role has been described both as ‘posing a particular danger to the development of a uniform and coherent jurisprudence under the Convention’¹⁸ and as a potential ‘black hole’ removing issues from the Convention’s universe.¹⁹

In my opinion, these voices somewhat overstate the risks inherent in Article 4 CISG, which – as it stands – is in truth both useless and harmless (if properly construed).

13 J.M. Lookofsky, ‘CISG Case Commentary on Preemption in *Geneva Pharmaceuticals* and *Stawski*’, *Rev. CISG*, 2003–2004, p. 121; Leyens, *supra* note 7, p. 23; *see also* M. McQuillen, ‘The Development of a Federal CISG Common Law in U.S. Courts: Patterns of Interpretation and Citation’, *University of Miami Law Review*, Vol. 61, No. 2, 2007, pp. 525–528.

14 Discussed *infra* at Part 2.

15 Discussed *infra* at Part 3.

16 Discussed *infra* at Part 4.

17 Discussed *infra* at Part 5.

18 Hartnell, *supra* note 6, p. 7.

19 P. Winship, ‘Commentary on Professor Kastely’s Rhetorical Analysis’, *Northwestern Journal of International Law & Business*, Vol. 8, No. 3, 1988, p. 636.

6.2.1 'This Convention Governs Only' Matters Listed in Article 4 Sentence 1 CISG (and Validity Is Not One of Them)?

When dealing with validity issues under Article 4 CISG, the first point of reference suggested in legal writing is – maybe somewhat surprisingly – not subparagraph (a), but the first sentence of the provision.²⁰ Since the Convention – according to this reasoning – 'governs only' the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract, the validity of contractual provisions can by definition not be governed by the CISG, because a contract itself cannot be the source of the very rules meant to control it.

Upon closer scrutiny, however, it becomes clear that the words 'arising from such a contract' in Article 4 sentence 1 CISG do not *per se* reserve validity issues for domestic law. The *Stawski* case²¹ is a case in point: The Illinois Beer Industry Fair Dealing Act at stake in these proceedings contains a clause providing that '[t]his Act shall be incorporated into and shall be deemed a part of every agreement between brewers and wholesalers'.²² It therefore makes the domestic law provisions a part of the contract itself, so that the Act's rules on the allowable termination of sales contracts were technically 'arising from such a contract'. Since Article 4 CISG states that the Convention governs the rights and obligations arising from sales contracts (and not the domestic law), this would mean that the rules stipulated by the Illinois Act would be pre-empted because they were deemed to be part of such contracts, no matter what the content of the rules themselves. I believe it to be obvious that this cannot be decisive.

Furthermore, the rather strict wording of Article 4 sentence 1 CISG ('governs only')²³ has to be taken with a grain of salt because it is – strictly speaking – incorrect.²⁴ In addition to the formation of sales contracts and the rights and obligations arising from such a contracts, the Convention also governs, for example, the interpretation of party declarations (in Art. 8 CISG), the modification and termination by agreement of sales contracts (in

20 See Hartnell, *supra* note 6, p. 4.

21 Discussed *supra* at Part 1.1.

22 § 2(B) Illinois Beer Industry Fair Dealing Act.

23 See Lookofsky, *supra* note 13, p. 115: "seemingly clear-cut delimitation".

24 See M. Djordjevic, in S. Kröll, L. Mistelis & P. Perales Viscasillas (Eds.), *UN Convention on Contracts for the International Sale of Goods (CISG)*, C.H. Beck Publishing, Munich, 2011, Art. 4, para. 6; F. Ferrari, in I. Schwenzer (Ed.), *Schlechtriem & Schwenzer: Kommentar zum Einheitlichen UN-Kaufrecht – CISG*, 6th edition, C.H. Beck Publishing, Munich, 2013 ('Schlechtriem & Schwenzer 6th German edition'), Art. 4, para. 8; A. Lüderitz & A. Fenge, in *Soergel, Bürgerliches Gesetzbuch, Vol. 13: Schuldrechtliche Nebengesetze*, 13th edition, Kohlhammer, Stuttgart, 2000, Art. 4 CISG, para. 2; I. Schwenzer & P. Hachem, in I. Schwenzer (Ed.), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)*, 3rd edition, Oxford University Press, Oxford, 2010 ('Schlechtriem & Schwenzer 3rd English edition'), Art. 4, para. 2.

Art. 29 CISG) and the obligations of Contracting States under public international law arising from the Convention (in Arts. 89–101 CISG).²⁵

Even the terms used in Article 4 sentence 1 CISG are of course, as are any legal terms, open to and in need of interpretation. What the formation of a contract of sale (including possible pre-contractual obligations of the parties?²⁶) or rights and obligations ‘arising from’ a contract of sale are is a question not susceptible of easy answers in any but the simplest of cases²⁷ and will often require a careful assessment in accordance with the principles of interpretation laid down in Article 7(1) CISG.²⁸ In this context, it is sufficient to remember that courts and commentators have in the past derived general obligations of buyers and sellers (as, e.g., a duty of cooperation and information as a general obligation²⁹ or an additional obligation of both parties to ensure full performance of their main obligations³⁰) directly from the Convention including its general underlying principles (Art. 7(2) CISG),³¹ although it could be argued that the wording of Article 4 sentence 1 CISG – which mentions only obligations ‘arising from such a [sales] contract’, but not from the Convention itself – stands in the way of this approach. It is submitted that such a narrow reading should not be adopted, although this discussion underlines the fact that the first sentence of Article 4 CISG provides limited guidance about the scope of the Convention, with respect to ‘validity’ issues or otherwise.

6.2.2 The ‘Validity Exception’ Proper (Article 4 Sentence 2 CISG)

In its second sentence, Article 4 CISG then goes on to list two issues it is in particular ‘not concerned with’, namely, the effect which the contract may have on the property in the goods sold (subparagraph (b)) and, in subparagraph (a), the validity of the contract or of any of its provisions or of any usage. Notably this particular ‘validity exception’ has gained widespread recognition as a supposedly important carve-out from the Convention’s

25 P. Schlechtriem & U.G. Schroeter, *Internationales UN-Kaufrecht*, 5th edition, Mohr Siebeck, Tübingen, 2013, para. 115.

26 See U.G. Schroeter, in Schlechtriem & Schwenger 3rd English edition, *supra* note 24, Intro to Arts. 14–24, paras. 54–64.

27 W. Khoo, in C.M. Bianca & M.J. Bonell (Eds.), *Commentary on the International Sales Law; The 1980 Vienna Sales Convention*, Giuffrè, Milano, 1987 (‘Bianca & Bonell’), Art. 4, para. 3.2.

28 Schwenger & Hachem, *supra* note 24, Art. 4, para. 4.

29 Bundesgerichtshof [Federal Supreme Court] (BGH), Germany, 31 October 2001, VIII ZR 60/01, *Neue Juristische Wochenschrift*, 2001, p. 370, at 372, CISG-online No. 617; accord U. Magnus, ‘Wiener UN-Kaufrecht (CISG)’, in J. von Staudinger (Ed.), *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen*, (Revised edition), de Gruyter, Berlin, 2013, Art. 7, para. 48.

30 Schwenger & Hachem, *supra* note 24, Art. 7, para. 35.

31 Magnus, *supra* note 29, Art. 4, para. 17; Schwenger & Hachem, *supra* note 24, Art. 4, para. 15.

material scope,³² and a heated discussion has developed about the need to interpret the ‘validity’ concept of subparagraph (a) autonomously³³ or in accordance with domestic law.³⁴

6.2.2.1 How to Determine What ‘Validity’ Is

In court practice under the Convention, a US court has held that ‘validity’ under Article 4 sentence 2(a) CISG encompasses ‘any issue by which the domestic law would render the contract void, voidable or unenforceable’.³⁵ Professor Schlechtriem used a somewhat more elaborate definition when he wrote that ‘if a contract is rendered void *ab initio*, either retroactively by a legal act of the state or of the parties such as avoidance for mistake or revocation of one’s consent under special provisions protecting certain persons such as consumers, or by a “resolutive” condition (i.e., a condition subsequent) or a denial of approval of relevant authorities, the respective rule or provision is a rule that goes to validity and therefore is governed by domestic law and not by the CISG’.³⁶

Both of the attempts at an abstract ‘validity’ definition that I just cited have in common that they focus on the *effect* that a domestic law has on the sales contract and not on the *reasons* that give rise to such an effect. In pursuing this approach, legal writers have generally adopted a generous construction of validity-related effects. This has primarily been achieved by not limiting domestic laws on ‘validity’ to those that declare the contract ‘invalid’ or ‘void’ by operation of law but also including laws that require a judicial decision, a government intervention or even a decision and/or act by one of the parties (such as a declaration towards the other party) for the invalidity effect to occur.³⁷ In other words, even if domestic law characterizes a contract as ‘voidable’ rather than ‘invalid’ and gives one of parties a

32 See Hartnell, *supra* note 6, pp. 4-5; J. Lookofsky, ‘In Dubio Pro Conventione? Some Thoughts About Opt-Outs, Computer Programs and Preemption under the 1980 Vienna Sales Convention (CISG)’, *Duke Journal of Comparative & International Law*, Vol. 13, No. 3, 2003, pp. 280-281.

33 Djordjevic, *supra* note 24, at Art. 4, para. 14; F. Enderlein & D. Maskow, *International Sales Law*, Oceana, New York, 1992, Art. 4, para. 4.3.1; C.R. Heiz, ‘Validity of Contracts Under the United Nations Convention on Contracts for the International Sale of Goods, April 11, 1980, and Swiss Contract Law’, *Vanderbilt Journal of Transnational Law*, Vol. 20, No. 4, 1987, pp. 660-661; Schwenger & Hachem, *supra* note 24, Art. 4, para. 31.

34 K.H. Neumayer & C. Ming, *Convention de Vienne sur les Contrats de Vente Internationale de Marchandises: Commentaire*, CEDIDAC, Lausanne, 1993, Art. 4, paras. 2, 6, 7; D. Tallon, in Bianca & Bonell, *supra* note 27, Art. 79, para. 2.4.3; see also *Geneva Pharmaceuticals Tech. v Barr Laboratories*, 201 F.Supp.2d 236, at 285 (S.D. N.Y. 2002), US District Court, 10 May 2002, CISG-online No. 653.

35 *Geneva Pharmaceuticals Tech. v Barr Laboratories*, *supra* note 34, at 282-283 (citing Hartnell, *supra* note 6, p. 45).

36 P. Schlechtriem, in P. Schlechtriem & I. Schwenger (Eds.), *Slechtriem & Schwenger: Commentary on the UN Convention on the International Sale of Goods (CISG)*, 2nd edition, Oxford University Press, Oxford, 2010 (‘Schlechtriem & Schwenger 2nd English edition’), Art. 4, para. 7, maintained by Schwenger & Hachem, *supra* note 24, Art. 4, para. 31.

37 See P. Schlechtriem, *Uniform Sales Law – The UN Convention on Contracts for the International Sale of Goods*, Manz, Vienna, 1986, p. 33. Accord Enderlein & Maskow, *supra* note 33, Art. 4, para. 5.1.

choice as to whether to avoid the contract, these rights have been viewed as undisturbed by the Convention.³⁸

It can hardly be denied, however, that the focus on the domestic laws' effects does not necessarily lead to a foreseeable interpretation of Article 4 CISG's validity exception, simply because the Convention provides no clear indication as to the ultimate extent of any uniform 'validity' concept. A recent indication is the position taken by two influential German CISG authors who argue that a domestic law which states that certain contractual terms 'cannot be relied upon' by one party does *not* concern the contract's 'validity' as employed in Article 4 sentence 2(a) CISG.³⁹ The difference between the 'voidable' type of effect on the one hand and the 'cannot be relied upon' type of effect on the other may not be immediately apparent to everyone, and it could be assumed that the true reasons for trying to keep the domestic provision concerned outside the Convention's 'validity exception' lay not in its effect upon the contract, but rather in the reasons that triggered such an effect under the provision.

The latter observation serves as an indication that the legislative purpose underlying a domestic validity-related rule (or any other domestic legal rule) should be taken into account when determining its relationship with the Convention, a goal that is not easily pursued within the framework of Article 4 CISG, but will be addressed in more detail below⁴⁰ when the alternative approach suggested here is discussed.

6.2.2.2 ...And Why It Doesn't Matter Anyway

In my opinion, Article 4 second sentence CISG in truth lacks any delimiting utility, irrespective of how its terms are interpreted.⁴¹ This is so because the mention of 'validity' that it contains is neither exclusive nor inclusive in nature.

First, it is not exclusive because the sentence's introductory phrase ('In particular, ...') makes clear that issues not covered by the term 'validity' – however interpreted – may nevertheless be outside the Convention's scope. Even if a domestic rule addresses a matter that is found not to qualify as a 'validity' matter, it can therefore potentially still apply to CISG contracts.

38 J.O. Honnold, in H.M. Flechtner (Ed.), *Uniform Law for International Sales Under the 1980 United Nations Convention*, 4th edition, Kluwer, Deventer, 2009, para. 65.

39 B. Piltz, 'Gestaltung von Exportverträgen nach der Schuldrechtsreform', *Internationales Handelsrecht*, 2002, p. 5; P. Schlechtriem, *Internationales UN-Kaufrecht*, 4th edition, Mohr Siebeck, Tübingen, 2007, para. 147 – both with reference to § 444 of the German Civil Code as in force since 1 January 2002.

40 See discussion *infra* at Part 3.2.

41 U.G. Schroeter, *UN-Kaufrecht und Europäisches Gemeinschaftsrecht – Verhältnis und Wechselwirkungen*, Sellier European Law Publishers, Munich, 2005, § 6, para. 145; Schlechtriem & Schroeter, *supra* note 25, para. 116; K. Wartenberg, *CISG und deutsches Verbraucherschutzrecht: Das Verhältnis der CISG insbesondere zum VerbrKrg, HaustürWG und ProdHaftG*, Nomos, Baden-Baden, 1998, p. 61. Contra J.M. Lookofsky & H.M. Flechtner, 'Zapata Retold – Attorneys' Fees Are (Still) Not Governed by the CISG', *Journal of Law & Commerce*, Vol. 26, 2006-2007, p. 7.

Second, and more importantly, the ‘validity exception’ in subparagraph (a) is not inclusive in nature, because it does not provide that all questions concerning the validity of sales contracts or of a usage are *per se* outside the Convention’s scope⁴² – on the contrary, it specifically assumes that the CISG may govern such questions elsewhere in its provisions (‘except as otherwise expressly provided in this Convention’).⁴³ The difficult part of this phrase is ‘expressly provided’. What it precisely means is disputed. There is agreement only insofar as the CISG provisions envisaged must not expressly say that they address a matter of ‘validity’, since the Convention does not contain a single article with such a wording.⁴⁴ Beyond this point, two schools of thought exist. One of them argues that the phrase only refers to issues explicitly addressed in the Convention’s provisions, but not those settled in the Convention by way of general principles in accordance with Article 7(2) CISG.⁴⁵ This approach accordingly equates the term ‘expressly provided in this Convention’ under Article 4 CISG with ‘matters expressly settled in this Convention’ as used in Article 7(2) CISG.

The other – and, I believe, more convincing – approach considers domestic validity rules are also pre-empted where a question is settled in the Convention through its general principles.⁴⁶ It therefore does not distinguish between the different manners in which the CISG settles the questions that it governs but rather looks to the Convention as a whole. One might say that this approach considers Article 7(2) CISG itself to be one of the ‘express provisions’ referred to in Article 4 CISG.⁴⁷ A number of reasons speak for this approach.

First, there are the Convention’s *travaux préparatoires*. The wording of Article 4 CISG was copied from a predecessor provision in the 1964 Hague Sales Laws,⁴⁸ and the Hague Sales Laws indeed contained express provisions addressing their relationship with certain types of domestic ‘validity’ rules.⁴⁹ The Secretariat’s Commentary on the draft CISG makes clear that the term ‘expressly’ was not considered to have a limiting effect under Article 4, as it pointed out the following: ‘Although there are no provisions in this Convention which

42 Ferrari, *supra* note 24, Art. 4, para. 13; Magnus, *supra* note 29, Art. 4, para. 18.

43 H.M. Flechtner, ‘Selected Issues Relating to the CISG’s Scope of Application’, *Vindobona Journal of Commercial Law and Arbitration*, Vol. 13, No. 1, 2009, p. 92.

44 Enderlein & Maskow, *supra* note 33, Art. 4, para. 3.1; Ferrari, *supra* note 24, Art. 4, para. 13; Magnus, *supra* note 29, at Art. 4, para. 27; Schlechtriem, *supra* note 37, p. 33; Schroeter, *supra* note 41, § 6, para. 147.

45 Enderlein & Maskow, *supra* note 33, Art. 4, para. 3.1; Flechtner, *supra* note 43, p. 93; B. Piltz, *Internationales Kaufrecht*, 2nd edition, C.H. Beck Publishing, Munich, 2008, para. 2-125.

46 C. Benicke, in *Münchener Kommentar zum Handelsgesetzbuch*, 3rd edition, C.H. Beck Publishing, Munich, 2013, Art. 4 CISG, para. 4; Khoo, *supra* note 27, Art. 4, para. 2.1; Schroeter, *supra* note 41, § 6, paras. 149-151.

47 Schlechtriem & Schroeter, *supra* note 25, para. 116.

48 Art. 8 ULIS: “The present Law shall govern only the obligations of the seller and the buyer arising from a contract of sale. In particular, the present Law shall not, except as otherwise expressly provided therein, be concerned with the formation of the contract, nor with the effect which the contract may have on the property in the goods sold, nor with the validity of the contract or of any of its provisions or of any usage.”

49 Arts. 34 and 53 ULIS.

expressly govern the validity of the contract or of any usage, some provisions may provide a rule which would contradict the rules on validity of contracts in a national legal system. In case of conflict the rule in this Convention would apply'.⁵⁰ And finally, the distinction between applying general principles underlying the Sales Convention in accordance with Article 7(2) CISG on the one hand and 'extensively' interpreting a CISG provision or applying it 'by analogy' on the other hand is often very difficult to draw⁵¹ and therefore should not be decisive for the relationship between the CISG and domestic 'validity' provisions. Therefore, at the end of the day, the 'except as' caveat makes Article 4's second sentence a mere reference to the need to establish the Convention's material scope by way of interpreting all of its provisions as well as looking for general principles.⁵²

Through the intricate combination of two opposed exceptions, Article 4 subparagraph (a) is thus eventually deprived of any regulatory meaning, rendering moot which issues it applies to and how its terms should be interpreted. In summary, Article 4 CISG neither reveals with certainty which questions – those concerning 'validity issues' as well as those concerning other issues – are governed nor which questions are not governed by the Convention. In all but the most obvious cases, courts and arbitrators must look elsewhere for guidance.

6.3 A NOVEL TWO-STEP APPROACH TO DETERMINING THE CONVENTION'S SCOPE

The arguments just presented suggest that we have to look for a new and different approach in order to define the boundary of the CISG towards domestic laws. To this end, I propose a two-step approach.⁵³

Its basic formula runs as follows: A domestic law rule is displaced by the Convention if:

1. it is triggered by a factual situation to which the Convention also applies (the 'factual' criterion) and
2. it pertains to a matter that is also regulated by the Convention (the 'legal' criterion).⁵⁴

50 Secretariat's Commentary, *supra* note 5, p. 17.

51 Schlechtriem & Schroeter, *supra* note 25, para. 139; *cf. also* J. Hellner, 'Gap-Filling by Analogy: Art. 7 of the U.N. Sales Convention in Its Historical Context', in *Studies in International Law: Festschrift til Lars Hjerner*, Norstedts, Stockholm, 1990, p. 219 *et seq.*

52 Schlechtriem & Schroeter, *supra* note 25, para. 116.

53 The following part of the present article is very closely based on another recently published article of mine, namely U.G. Schroeter, 'Defining the Borders of Uniform International Contract Law: The CISG and Remedies for Innocent, Negligent or Fraudulent Misrepresentation', *Villanova Law Review*, Vol. 58, No. 4, 2013, p. 563 *et seq.* Similarities between the two pieces (including verbatim identity) are not coincidental, but intended.

54 Schroeter, *supra* note 53, p. 563; *see also* Schlechtriem & Schroeter, *supra* note 25, paras. 124-131.

Only if both criteria are cumulatively fulfilled will the domestic law rule concerned overlap with the Convention's sphere of application in a way that will generally result in its pre-emption.

The development of this approach has been based on the assumption that the Convention's rules must serve as the starting point in establishing the relationship between the Convention and concurrent legal rules, and not domestic law.⁵⁵ Within the Convention, Article 7(1) is the primary provision from which guidance can be drawn. The directive it provides – to have regard to the Convention's international character and to the need to promote uniformity 'in its application' – also needs to be observed when determining the Convention's scope of application,⁵⁶ because any recourse to a domestic rule of law in place of the CISG effectively means that the latter is not being applied at all. I contend that the desirable uniform outcome in this context can best be achieved by combining a factual criterion with a legal criterion.

I might add that this approach should not only work for 'validity-related' issues but for any issue which may be governed by the Convention or domestic law. It should therefore also be able to address the relationship between the CISG and tort law or delict, as well as other relationships between uniform law and provisions of domestic law.

6.3.1 First Step: The Factual Criterion

If we investigate the two criteria somewhat closer, we notice that the factual criterion has been frequently mentioned by other authors in a way at least comparable to the description I suggest. Professor Honnold notably argued that domestic rules are displaced where they turn on 'the very same operative facts that invoke the rules of the Convention',⁵⁷ and many writers have followed his approach or have used a similar test.⁵⁸

At least two reasons speak in favour of focusing on the facts of cases covered by two concurring legal rules in order to establish their relationship. First, this focus avoids difficulties which inevitably arise when dogmatic categories of domestic law like 'contracts' or 'torts' are being relied upon in an international setting.⁵⁹ By looking to the substance of

55 *Pamesa Ceramica v Yisrael Mendelson Ltd* [2009] IsrLR 27, para. 53, Supreme Court, Israel, 17 March 2009, CISG-online No. 1980; U. Huber, in P. Schlechtriem (Ed.), *Commentary on the UN Convention of the International Sale of Goods (CISG)*, Oxford University Press, Oxford, 1998, Art. 45, para. 50.

56 Schroeter, *supra* note 53, p. 563; Schlechtriem & Schroeter, *supra* note 25, paras. 114, 130.

57 Honnold, *supra* note 38, para. 65.

58 Enderlein & Maskow, *supra* note 33, Art. 4, para. 3.1; C.P. Gillette & S.D. Walt, *Sales Law: Domestic and International*, Foundation Press, New York, 2000, p. 49; Heiz, *supra* note 33, p. 641: "factual situations that trigger both the Convention and [domestic] contract law"; M. Köhler, *Die Haftung nach UN-Kaufrecht im Spannungsverhältnis zwischen Vertrag und Delikt*, Mohr Siebeck, Tübingen, 2003, p. 67; Piltz, *supra* note 45, para. 2-148; I. Schwenzer & P. Hachem, 'The CISG – Successes and Pitfalls', *American Journal of Comparative Law*, Vol. 57, No. 2, 2009, p. 471; Winship, *supra* note 19, p. 638; *see also* Leyens, *supra* note 7, p. 9.

59 *See* Schroeter, *supra* note 53, pp. 558-563.

the rules rather than their label⁶⁰ and with this substance being identified by factual standards, an internationally uniform solution will be easier to reach. And second, a factual criterion is arguably more attuned to the viewpoint of merchants, for whose benefit the Convention's rules were ultimately written. From a merchant's perspective, it is first of all important to know which factual behaviour in the conduct of his or her business will result in what kind of legal consequences, so that the merchant can adjust his actions accordingly.

It is submitted, however, that in many cases the factual criterion is not enough and that it will often require a second step in order to decide whether a given domestic law rule is being displaced by the Convention. This second step is necessary because one and the same factual situation may well be regulated by different rules from different perspectives and for different purposes, not all of which are exhaustively covered by the Convention. The factual criterion alone may therefore be too blunt an instrument for an assessment that does not stop at finding *that* a factual setting has at all been regulated but also takes into account *why* and *to which end* it has been regulated.

When returning to the *Stawski* case,⁶¹ we find the factual criterion addressed above was clearly fulfilled. This is so because the Illinois Beer Industry Fair Dealing Act's applicability is triggered by a factual situation to which the Convention also applies; according to its § 2(B), the Act 'shall be incorporated into and shall be deemed a part of every agreement between brewers and wholesalers and shall govern all relations between brewers and their wholesalers', thereby also including agreements and relations between wholesalers and foreign brewers. Since the Convention in turn also applies to contracts for the sale of beer between brewers and wholesalers⁶² as long as they have their respective places of business in different states,⁶³ the applicability of both the Act and the CISG is triggered by the same factual situation.

Authors who exclusively rely on a factual test – as Professor Honnold and many others⁶⁴ – would therefore have to conclude that the Illinois Beer Industry Fair Dealing Act

60 Honnold, *supra* note 38, para. 65.

61 Discussed *supra* at Part 1.1.

62 See Regional Court Nitra, Slovak Republic, 12 November 2008, 3 Obo 194/2007, CISG-online No. 1955 (Convention applied to sale of beer by Slovak seller to Czech buyer); Oberlandesgericht [Court of Appeal] (OLG) Brandenburg, Germany, 18 November 2008, 6 U 53/07, *Internationales Handelsrecht*, 2009, at 105 *et seq.*, CISG-online No. 1734 (Convention applied to sale of beer by Germany brewery to Belgian buyer); Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, 28 April 2010, T -9/03, CISG-online No. 2263 (Convention applied to sale of beer by Serbian brewery to buyer in Bosnia-Herzegovina).

63 See Art. 1(1) CISG.

64 See *supra* notes 57 and 58.

is being displaced by the Convention.⁶⁵ This result, however, seems premature,⁶⁶ since the Act was not necessarily enacted in order to address the same type of risks as the CISG.

6.3.2 Second Step: The Legal Criterion

As a second step within the two-step approach proposed here, it is therefore necessary to determine whether the domestic law rule covering the factual situation at hand also pertains to a ‘matter’ regulated by the Convention. This second step enables courts and arbitral tribunals to take into account the regulatory purpose and focus of the overlapping legal rules, limiting the Convention’s pre-emptive effect to domestic laws that pertain to a matter already regulated by the CISG but allowing for their parallel application where the regulated matters are different, which raises the question: What is the ‘matter’?⁶⁷

In our context, a ‘matter’ can be described as a particular risk that is being addressed by the Convention and thereby allocated between the parties.⁶⁸ For this purpose, it is not decisive through which legal tools the risk is addressed and allocated and whether any of the competing rules – for example – provide for an effect upon the ‘validity’ of the contract. In other words, it is only relevant *that* the matter is governed, but not *how*.

The matter regulated by the CISG in its Article 27, for example, is therefore the risk that communications get lost during transmission, independent of the legal consequences attached to such loss. The matter regulated in its Article 45 is not the buyer’s right to claim damages or to rely on other remedies, but rather the risk of the seller’s obligations not being fulfilled and the allocation of the consequences.

In defining the Convention’s material scope of application, this ‘legal’ criterion is useful because it allows us to make a reasoned assessment of the Convention’s relationship towards domestic rules of law, including those that bear the label ‘validity’.

When being applied to the constellation of facts in *Stawski*,⁶⁹ it confirms that the District Court was eventually right in holding that the Illinois Beer Industry Fair Dealing Act could be applied, although the agreement between brewer and wholesaler was governed by the

65 This was the position taken by the Polish brewery in *Stawski Distributing Co. Inc. v Zywiec Breweries PLC*, *supra* note 9, at 3.

66 Lookofsky, *supra* note 13, p. 121.

67 See in more detail Schroeter, *supra* note 53, pp. 566-568.

68 For approaches comparable to (though not necessarily identical with) the position taken here see *Pamesa Ceramica v Yisrael Mendelson Ltd*, *supra* note 55, para. 70, where the Supreme Court of Israel held that “the interests which [the buyer] is struggling to protect are not identical to the interests which the uniform law of the convention seeks to protect, a distinction which I think should be given weight when making the decision as to whether to allow a claim in tort to be heard alongside the arrangements in the convention”; see also M. Müller-Chen, in Schlechtriem & Schwenzler 3rd English edition, *supra* note 24, Art. 45, para. 32: “the [concurrent] remedy cannot be in conflict with the regulatory goals of Uniform Sales Law”.

69 Discussed *supra* at Part 1.1.

CISG:⁷⁰ The Act aims at promoting the public's interest in fair, efficient and competitive distribution of malt beverage products by regulating the business relations of brewers and wholesaler vendors, notably in order to assure that beer wholesalers are free to manage their business enterprises and maintain the right to independently establish their selling prices⁷¹ (despite the typically overwhelming bargaining power of breweries). As the Convention neither attempts to regulate these specific issues arising in the area of beer distribution nor similar issues in other regulated industries,⁷² the legal criterion was therefore not fulfilled.

6.4 FURTHER DEMONSTRATING THE APPROACH

In order to further demonstrate the application of the two-step approach outlined above, I will address two legal issues that have often been qualified as 'validity matters' when arising under CISG contracts, namely, mistakes (errors) made by a party when entering into the sales contract⁷³ and consumer rights of withdrawal that can also affect sales transactions governed by the CISG, although only in exceptional circumstances.⁷⁴ A third and last potential 'validity' issue then to be discussed concerns a recent phenomenon in e-commerce regulation, namely, the so-called 'button solution' that is currently making its way into the domestic laws of EU member states.⁷⁵

6.4.1 Mistakes and Their Effect upon CISG Contracts

The relationship between the law of sales and remedies for 'mistakes' – a term used here as a category covering both defects of intention (error in motive) and defective expressions of a correctly formed intention (error in expression)⁷⁶ – has traditionally been an area of discussion in many civil law jurisdictions, and the approaches adopted in the various jur-

70 The District Court based this result on a reasoning different from the one developed here, namely the fact that the State of Illinois had promulgated the Act pursuant to the power reserved to states by the twenty-first amendment to the United States federal constitution: A duly ratified treaty could not, therefore, override this reserved power. Upon appeal, the United States Court of Appeals (349 F.3d 1023 (7th Cir. 2003)) characterized the district judge's suggestion that the twenty-first amendment entitles states to trump the nation's treaty commitments to its trading partners as "wholly novel" and vacated the judgment.

71 See § 2(A) Illinois Beer Industry Fair Dealing Act.

72 See Schwenzer and Hachem, *supra* note 24, Art. 4, para. 39.

73 Discussed *infra* at Part 4.1.

74 Discussed *infra* at Part 4.2.

75 Discussed *infra* at Part 4.3.

76 K. Zweigert & H. Kötz, *Introduction to Comparative Law*, 3rd edition, Oxford University Press, Oxford, 1998, p. 411.

isdictions differ until this very day.⁷⁷ It is therefore not surprising that the same discussion arose soon after preparations for a uniform sales law had commenced,⁷⁸ the only difference being that it now not only concerned the relationship between two different areas within the same domestic legal order but rather the relationship between an international body of sales law rules and non-unified domestic laws on mistake.

A draft to the later 1964 Hague Uniform Sales Law had initially suggested an express provision preventing the buyer from recourse to any other domestic remedy for non-conforming goods upon which he ‘might otherwise have relied, and in particular those based on mistake’,⁷⁹ but already Article 34 of the Hague Sales Law as eventually adopted replaced this specific formula by the more vague reference to ‘all other remedies based on lack of conformity of the goods’ that were excluded by the uniform law. Since the CISG, as already pointed out earlier,⁸⁰ lacks any provision specifically addressing its relationship to domestic law, the discussion about the application of domestic remedies for mistakes has been ongoing ever since.⁸¹

6.4.1.1 Applying Article 4 CISG

In its context, most authors have – again – looked to Article 4 CISG for guidance, and there is at the outset wide agreement that domestic rules about mistakes concern a ‘validity’ issue.⁸² Less agreement exists when it comes to the legal consequences of this assessment. Some writers stop at the statement in Article 4 sentence 2(a) CISG that the Convention is (presumably) ‘not concerned’ with matters of validity and conclude that all domestic remedies for party mistakes can therefore be applied alongside the Convention.⁸³ The majority of commentators instead draws a distinction between different types of mistakes, and only applies domestic remedies for certain mistakes to CISG contracts, while

77 For a very brief overview limited to German-speaking jurisdictions, see Schlechtriem & Schroeter, *supra* note 25, para. 171.

78 For a more detailed historical overview, see Hartnell, *supra* note 6, at 22 *et seq.*

79 Art. 41 of the 1956 Draft Uniform Law on the International Sale of Goods, U.N. Doc. V/Prep./1, *Diplomatic Conference on the Unification of Law Governing the International Sale of Goods (Documents)*, *supra* note 3, p. 3.

80 See discussion *supra* at Part 2.2.2.

81 See notably the thoughtful elaborations by Hartnell, *supra* note 6, pp. 71-78; Heiz, *supra* note 33, pp. 651-663; Leyens, *supra* note 7, pp. 14-51.

82 See the extensive references listed by Ferrari, *supra* note 24, Art. 4, para. 22.

83 F. Bydliński, ‘Das allgemeine Vertragsrecht’, in P. Doralt (Ed.), *Das UNCITRAL-Kaufrecht im Vergleich zum österreichischen Recht*, Manz, Vienna, 1995, p. 83; G. Eörsi, in Bianca & Bonell, *supra* note 27, Art. 14, para. 2.2.3; M. Karollus, *UN-Kaufrecht*, Springer, New York, 1991, p. 42; R. Lessiak, ‘UNCITRAL-Kaufrechtsabkommen und Irrtumsanfechtung’, *Juristische Blätter*, 1989, p. 487; H. Mather, ‘Choice of Law for International Sales Issues Not Resolved by the CISG’, *Journal of Law & Commerce*, Vol. 20, No. 2, 2001, pp. 161-162; K.H. Neumayer, ‘Offene Fragen zur Anwendung des Abkommens der Vereinten Nationen über den internationalen Warenkauf’, *Recht der Internationalen Wirtschaft*, 1994, pp. 101-102.

others are considered pre-empted by the Convention.⁸⁴ The reasons underlying the majority approach are not always clearly pointed out by its proponents; some authors refer to the ‘except as otherwise expressly provided in this Convention’ *caveat* in Article 4 sentence 2 CISG⁸⁵ but do not further explain where and in which way the Convention ‘expressly provides’ rules dealing with defects of intention (mistakes). This silence is remarkable, since there is general agreement that the CISG only governs the parties’ ‘external consensus’, but not their ‘internal consensus’⁸⁶ (which may be affected in case of a mistake). Others seem to simply ignore the textual framework of Article 4’s validity exception and directly resort to policy arguments like the need in international commerce for a uniform, damage-based system of remedies for non-conforming goods.⁸⁷

6.4.1.2 Applying the Two-Step Approach

Under the alternative two-step approach developed above,⁸⁸ the ‘factual criterion’ is generally fulfilled, since the Convention also applies to factual situations that trigger domestic remedies for mistake; the contract formation rules in Articles 14–24 CISG cover the exchange of party declarations expressing the intention to conclude a contract *irrespective* of how this intention has been formed and whether it has been correctly expressed by those declarations. They accordingly also apply to factual situations involving a defect of intention or a defective expression of a correctly formed intention (i.e. mistakes), although their scope is not limited to such situations.

The ‘legal criterion’⁸⁹ that focuses on the particular risk addressed by the competing legal rules and thereby allocated between the parties (the regulated ‘matter’) requires us to look to the specific facts to which the mistake relates. The decisive question thus is: ‘Mistake (error) about what?’⁹⁰

One matter that is being regulated in both rules is the *buyer’s state of knowledge about features of the goods at the moment of contract conclusion*.⁹¹ While domestic rules about mistake address this matter by providing a party with remedies where its intention about the quality of the goods bought deviated from their actual quality, the Convention covers

84 Djordjevic, *supra* note 24, Art. 4, paras. 21-22; Enderlein & Maskow, *supra* note 33, Art. 4, para. 3.1; Ferrari, *supra* note 24, Art. 4, paras. 22-23; Heiz, *supra* note 33, pp. 651-663; Honnold, *supra* note 38, paras. 65, 240; Leyens, *supra* note 7, p. 37 *et seq.*; Magnus, *supra* note 29, Art. 4, paras. 48, 50; Schlechtriem, *supra* note 37, p. 33; A.-K. Schluchter, *Die Gültigkeit von Kaufverträgen unter dem UN-Kaufrecht*, Nomos, Baden-Baden, 1996, p. 45; Schwenger & Hachem, *supra* note 24, Art. 4, para. 36.

85 See, e.g., Schlechtriem, *supra* note 37, p. 33.

86 See Djordjevic, *supra* note 24, Art. 4, para. 7; Magnus, *supra* note 29, Art. 4 para. 13; Schwenger & Hachem, *supra* note 24, Art. 4, para. 8.

87 See Hartnell, *supra* note 6, pp. 77-78.

88 Discussed *supra* at Part 3.

89 Discussed *supra* at Part 3.2.

90 See Leyens, *supra* note 7, pp. 9, 38.

91 Schroeter, *supra* note 53, pp. 572-575.

the same matter through its Article 35 (governing the contractual standards for the goods' conformity), its Articles 38–40 (governing the parties' respective knowledge about non-conformities of the goods delivered) and its Articles 41–44 (which provide comparable rules where third-party rights or claims relating to the goods are concerned). Whenever these provisions refer to information that was or should have been exchanged between the parties, they thereby employ the rules about the interpretation of declarations and party behaviour contained in Article 8 CISG, which – by looking primarily to the objective (i.e. reasonably discernible) content of declarations, and not to the subjective intent of the maker of a declaration – uses a standard that may be different from those in national laws about mistake.⁹² Taken together, Articles 35 (with Art. 8) and 38–44 CISG therefore install a delicate web of awareness-related rules based on a balanced distribution of informational risks.⁹³ This distribution should not be disturbed by the application of rules governing mistakes about the quality of the goods, which may (and often will) allocate these risks differently.⁹⁴

Another matter regulated both by domestic rules about mistake and by the Convention is *the parties' state of knowledge at contract conclusion about their contracting partner's ability to perform and his creditworthiness*, which the uniform sales law addresses in Articles 71 and 72 CISG.⁹⁵ These provisions should be read as an exhaustive regulation of the informational risk distribution about the parties' ability to perform, thereby pre-empting concurrent rules of domestic law that deal with the same matter.⁹⁶ And finally, the *risk that party communications get lost during transmission* is – as already pointed out earlier⁹⁷ – a matter regulated in Article 27 CISG, so that national provisions about defective expressions of a correctly formed intention (errors in expression) are pre-empted as far as they allocate the same risk.⁹⁸

92 M. Schmidt-Kessel, in Schlechtriem & Schwenger 3rd English edition, *supra* note 24, Art. 8, paras. 6-7.

93 See Schroeter, *supra* note 53, p. 575; see also Köhler, *supra* note 58, pp. 231, 256.

94 The same result is reached by the majority opinion among legal commentators (see *supra* at 4.1.1); Djordjevic, *supra* note 24, Art. 4, para. 21; Enderlein & Maskow, *supra* note 33, Art. 4, para. 3.1; Ferrari, *supra* note 24, Art. 4, para. 24; Heiz, *supra* note 33, pp. 652-653; Honnold, *supra* note 38, paras. 65, 240; Leyens, *supra* note 7, p. 48; Magnus, *supra* note 29, Art. 4, paras. 48, 50; Schlechtriem, *supra* note 37, p. 33; Schwenger & Hachem, *supra* note 24, Art. 4, para. 36.

95 See in more detail Schroeter, *supra* note 53, pp. 575-577.

96 Oberster Gerichtshof [Supreme Court] (OGH), Austria, 12 February 1998, 2 Ob 328/97t (*Umbrella Case*), CISG-online No. 349; Oberlandesgericht [Appellate Court] Köln, Germany, 19 May 2008, 16 U 62/07, *Internationales Handelsrecht*, 2008, p. 181, CISG-online No. 1700; W.A. Achilles, *Kommentar zum UN-Kaufrechtsübereinkommen (CISG)*, Luchterhand, Neuwied, 2000, Art. 71, para. 1; C. Fountoulakis, in Schlechtriem & Schwenger 3rd English edition, *supra* note 24, Art. 71, para. 35; R. Herbert & B. Czerwenka, *Internationales Kaufrecht*, C.H. Beck Publishing, Munich, 1991, Art. 71, para. 16; U. Magnus, *supra* note 29, Art. 71, paras. 40-43; Lessiak, *supra* note 83, at p. 493.

97 Discussed *supra* at Part 3.2.

98 Magnus, *supra* note 29, Art. 27, para. 25; Schlechtriem & Schroeter, *supra* note 25, para. 170; Schmidt-Kessel, *supra* note 92, Art. 8, para. 7; Schroeter, *supra* note 26, Art. 27, para. 14; Schwenger & Hachem, *supra* note 24, Art. 4, para. 36.

Whenever domestic remedies for mistake relate to other matters, such as, for example, the identity of the seller or of the buyer,⁹⁹ they can on the contrary be applied to CISG contracts. In conclusion, I freely admit that my approach largely results in the same outcome as that of the prevailing view among commentators would reach based on Article 4 CISG,¹⁰⁰ although it explains the relationship between the Convention and domestic rules on mistake differently.

6.4.2 Consumer Rights of Withdrawal

Under some modern consumer protection laws, ‘consumers’ – defined, for example, as any natural person who is acting for purposes which are outside his trade, business, craft or profession¹⁰¹ – are given the right to freely withdraw from a concluded contract without giving any reason, as long as this right is being exercised within a certain period of time (usually 14 days) after contract conclusion or after acquiring physical possession of the goods sold.¹⁰² It should be noted that the rights of withdrawal discussed here have nothing to do with the offeror’s right to withdraw his offer in accordance with Article 15(2) CISG or the offeree’s right to withdraw his acceptance in accordance with Article 22 CISG. Rather, they are designed to protect non-professional contracting partners by providing them with a chance to have ‘second thoughts’ when a contract has been concluded under certain, specifically enumerated circumstances and to cancel these contracts if they so wish. (There is thus no general right of withdrawal from every contract, not even for consumers.)

6.4.2.1 Applying Article 4 CISG

In the context of the Convention, the clear majority approach holds that such consumer rights of withdrawal are a ‘validity’ matter in the sense described by Article 4 sentence 2(a) CISG and can therefore be applied to CISG contracts.¹⁰³ In support of this approach, it is

⁹⁹ Honnold, *supra* note 38, para. 240; Leyens, *supra* note 7, p. 40.

¹⁰⁰ See discussion *supra* at Part 4.1.1.

¹⁰¹ See the definition in Art. 2(1) Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, *Official Journal of the European Union* of 22 November 2011, No. L 304/64 *et seq.* (‘EU Consumer Rights Directive’).

¹⁰² See Art. 9(1), (2) EU Consumer Rights Directive.

¹⁰³ B. Audit, *La Vente Internationale de Marchandises*, L.G.D.J., Paris, 1990, para. 37, n. 3; Benicke, *supra* note 46, Art. 4 CISG, para. 7; J.-P. Béraudo & P. Kahn, *Le Nouveau Droit de la Vente Internationale de Marchandises: Convention de Vienne – 11 Avril 1980*, Chambre de Commerce et d’Industrie de Paris, Paris, 1989, p. 36; T. Dornis, in H. Honsell (Ed.), *Kommentar zum UN-Kaufrecht: Übereinkommen der Vereinten Nationen über Verträge über den Internationalen Warenkauf (CISG)*, 2nd edition, Springer Publishing, Berlin, 2010, Vorbem. 14-24, para. 4; Ferrari, *supra* note 24, Art. 2, para. 25 (but see also Art. 4, para. 23a); Lüderitz & Fenge, *supra*

argued that absence of withdrawal qualifies as a negative prerequisite for the valid formation of the contract¹⁰⁴ or that the ‘pending invalidity’ which results from a party’s right of withdrawal, is a minor form of invalidity.¹⁰⁵ It is somewhat surprising that the view among legal commentators is much more uniform in this respect than with regard to the Convention’s relationship towards domestic rules on mistake discussed above.¹⁰⁶ In fact, hardly any author has argued against the prevailing classification of rights of withdrawal as a ‘validity’ question under Article 4 sentence 2(a) CISG.¹⁰⁷

6.4.2.2 Applying the Two-Step Approach

The two-step approach advocated here not only uses a different reasoning but also leads to a different outcome where withdrawal rights are concerned. Its factual criterion will, however, usually not be met since sales contracts concluded by ‘consumers’ in the sense described above are generally excluded from the Convention’s scope of application by Article 2(a) CISG, which provides that the Convention does not apply to sales of goods ‘bought for personal, family or household use’. A limited overlap between the Convention and domestic consumer protection laws nevertheless exists.

First, the so-called discernability requirement contained in Article 2(a) CISG *in fine* (‘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’) means that the Convention may apply to contracts concluded by ‘consumers’,¹⁰⁸ and such cases have grown in number, since more and more international sales contracts are concluded via e-commerce, that is, without the seller ever having personally interacted with the buyer (which may leave the seller with limited or no knowledge about the purpose for which the goods were bought).¹⁰⁹ Second, Article 2(a) CISG does not exclude sales of goods from the Convention’s scope which are bought for a ‘dual’ purpose, that is, a partially personal and

note 24, Art. 2, para. 5, Art. 4, para. 5; Magnus, *supra* note 29, Art. 4, para. 21; R. Martis, ‘Die Anwendbarkeit des Verbraucherkreditgesetzes’, *Monatsschrift für Deutsches Recht*, 1998, p. 1189; Schlechtriem, *supra* note 37, p. 28; Schluchter, *supra* note 84, p. 89; H.P. Westermann, ‘Zum Anwendungsbereich des UN-Kaufrechts bei internationalen Kaufverträgen’, *Deutsche Zeitschrift für Wirtschaftsrecht*, 1995, p. 5. But see J.O. Honnold, *Uniform Law for International Sales Under the 1980 United Nations Convention*, 2nd edition, Kluwer, Deventer, 1991, para. 236.

104 Ferrari, *supra* note 24, Art. 2, para. 25; Piltz, *supra* note 45, para. 2-70.

105 Lüderitz & Fenge, *supra* note 24, Art. 4, para. 5.

106 See discussion *infra* at Part 4.1.1.

107 Exceptions are J. Daun, ‘Grundzüge des UN-Kaufrechts’, *Juristische Schulung*, 1997, p. 813 and J. Meyer, ‘Verbraucherverträge im UN-Kaufrecht und EU-Vertragsrecht’, in H.-E. Rasmussen-Bonne (Ed.), *Balancing of Interests: Liber Amicorum Peter Hay*, Verlag Recht und Wirtschaft, Frankfurt, 2005, p. 304, who both regard all consumer rights of withdrawal as preempted by the Convention.

108 Bundesgerichtshof [Federal Supreme Court] (BGH), Germany, 31 October 2001, VIII ZR 60/01, *Neue Juristische Wochenschrift*, 2002, pp. 370, 372, CISG-online No. 617.

109 See in more detail Schroeter, *supra* note 41, § 6, para. 117 *et seq.*

partially professional use.¹¹⁰ A classic example frequently arising in practice is the purchase of a car by a businessperson who also intends to use the car privately. Since more recent consumer laws also cover such ‘dual’-purpose purchases,¹¹¹ these cases are covered by both sets of rules. The factual criterion under our two-step approach is therefore fulfilled, albeit only under limited circumstances.

It is accordingly once more the legal criterion that determines the applicability of consumer rights of withdrawal to CISG contracts. The decisive question remains; does the right of withdrawal involved concern a ‘matter’ already governed by the CISG? The answer is not necessarily the same for every right of withdrawal,¹¹² but rather depends on the wording, scope and purpose of the particular right.¹¹³

Among those which may be applied to CISG contracts are rights of withdrawal which serve the purpose of granting a ‘cooling-off period’ to consumers who have entered into a contract of sale in certain circumstances qualified as ‘risky’ due to the potential surprise element and/or psychological pressure involved,¹¹⁴ such as in the case of contracts negotiated away from business premises.¹¹⁵ The same applies to consumer rights that allow for the rescission of a contract if circumstances which are significant for the consumer’s consent and which the entrepreneur has represented in the course of the contract negotiations as being highly likely to come to pass, are found not to occur at all, or only to a substantially lesser degree,¹¹⁶ as long as the quality of the goods – governed by Article 35 CISG – is not among the ‘circumstances’ covered.¹¹⁷ Finally, rights of withdrawal which grant a ‘cooling-off period’ if a consumer credit agreement has been concluded in connection with a purchase and, once exercised, release the consumer from both the financial contract and the

110 Benicke, *supra* note 46, Art. 2 CISG, para. 4; Ferrari, *supra* note 24, Art. 2, para. 12; Karollus, *supra* note 83, p. 26; Magnus, *supra* note 29, Art. 2, para. 17; Wartenberg, *supra* note 41, p. 55 *et seq.*; Westermann, *supra* note 103, p. 5.

111 Recital 17 EU Directive on Consumer Rights: “The definition of consumer should cover natural persons who are acting outside their trade, business, craft or profession. However, in the case of dual purpose contracts, where the contract is concluded for purposes partly within and partly outside the person’s trade and the trade purpose is so limited as not to be predominant in the overall context of the contract, that person should also be considered as a consumer.”

112 Accord G. Benedick, *Die Informationspflichten im UN-Kaufrecht (CISG) und ihre Verletzung unter Berücksichtigung des Zusammenspiels mit dem nationalen schweizerischen Recht*, Sellier, Munich, 2008, para. 933; Ferrari, *supra* note 24, Art. 4, para. 23a.

113 See Schroeter, *supra* note 26, Intro to Arts. 14-24, paras. 13-15.

114 See Recital 37 EU Directive on Consumer Rights.

115 This group includes the domestic rights of withdrawal introduced in EU countries by way of the EC Doorstep Selling Directive 85/577/EEC of 20 December 1985 (and now prescribed by the EU Directive on Consumer Rights, *supra* note 101), as well as the right of withdrawal according to Art. 40b Swiss Law of Obligations (OR).

116 As granted by § 3a(1), (2) Austrian Konsumentenschutzgesetz (KSchG).

117 The latter is the case under § 3a(2) Austrian KSchG; see P. Apathy, in M. Schwimann (Ed.), *ABGB Praxiskommentar*, 3rd edition, LexisNexis, Vienna, 2006, Vol. 5, §§ 859–1089 ABGB, WucherG, UN-Kaufrecht at § 3a KSchG para. 1.

connected contract of sale¹¹⁸ also concern matters not addressed in the Convention, and are accordingly not pre-empted.

Among the rights of withdrawal which relate to a matter also regulated by the Convention are those which provide consumers with the right to cancel so-called 'distance contracts'. These are contracts concluded between a trader and a consumer under an organized distance sales or service-provision scheme without the simultaneous physical presence of the trader and the consumer, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded.¹¹⁹

Such right of cancellation is provided in case consumers do not like the goods delivered, even if the goods are in perfect conformity with the contract under Article 35 CISG. Such a right of withdrawal was first introduced into the domestic laws of EU member states through the EC Distance Selling Directive and has been maintained in the recently issued EU Directive on Consumer Rights.¹²⁰ Its purpose has been described by the EU lawmakers as follows: 'Since in the case of distance sales, the consumer is not able to see the goods before concluding the contract, he should have a right of withdrawal. For the same reason, the consumer should be allowed to test and inspect the goods he has bought to the extent necessary to establish the nature, characteristics and the functioning of the goods'.¹²¹

The right of withdrawal under distance contracts therefore concerns the matter already regulated in Articles 35 and 49(1) CISG, namely, *the buyer's risk of being bound by a contract of sale although he subjectively does not like the goods delivered in accordance with the contract*. While a consumer right of withdrawal allows the buyer to distance itself from the contract in such a situation (leaving the seller with the burden of taking back the goods which it will often not be able to sell to any other buyer), the Convention intentionally restricts the buyer's right to avoid the contract to narrow circumstances, all of which require a breach of contract by the seller. The Convention thereby pre-empts the application of such domestic rights of withdrawal,¹²² irrespective whether they have been introduced in order to transform an EU Directive or not.¹²³

118 As those introduced in EU countries by way of Art. 14(1) Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on Credit Agreements for Consumers and Repealing Council Directive 87/102/EEC, *Official Journal of the European Union*, 22 May 2008, No. L 133/66 *et seq.*, and the right of withdrawal in §§ 16(1), 21 Swiss Konsumkreditgesetz (KKG).

119 See the definition of the term 'distance contract' in Art. 2(7) EU Directive on Consumer Rights.

120 Art. 9(1) EU Directive on Consumer Rights.

121 Recital 37 EU Directive on Consumer Rights.

122 Benedick, *supra* note 112, para. 960; Schwenzler & Hachem, *supra* note 24, Art. 4, para. 35; Schroeter, *supra* note 41, § 15, paras. 78-83. Contra P. Kindler, 'Ob Walzfräsmaschine oder Schreibtischsessel: Keine Obliegenheit zur AGB-Übersendung beim Vertragsschluss nach CISG!', in *Festschrift für Andreas Heldrich zum 70. Geburtstag*, C.H. Beck Publishing, Munich, 2003, p. 231.

123 See on the relationship between the Convention and EU Law: Schlechtriem & Schroeter, *supra* note 25, paras. 819-827; Schroeter, *supra* note 41, §§ 5-15.

6.4.3 The 'Button Solution' and the Validity of E-Commerce Contracts under the CISG

My last example relates to an upcoming new feature in the domestic law of EU member states, namely, specific legal requirements governing the placement of orders by electronic means under distance contracts.¹²⁴ Whenever such an order – usually an order for goods placed via a seller's Internet website – is concerned, Article 8(2) of the EU Directive on Consumer Rights requires the law of EU member states to ensure that in turn the trader ensures that 'the consumer, when placing his order, explicitly acknowledges that the order implies an obligation to pay. If placing an order entails activating a button or a similar function, the button or similar function shall be labelled in an easily legible manner only with the words "order with obligation to pay" or a corresponding unambiguous formulation indicating that placing the order entails an obligation to pay the trader' – a requirement that, at least in Germany, has been dubbed the 'button solution' (*Button-Lösung*). The legal 'teeth' that the EU member states have to provide the button solution with when transposing the directive¹²⁵ are therein described as follows: 'If the trader has not complied with this subparagraph, the consumer shall not be bound by the contract or order'.¹²⁶

The factual criterion under the two-step approach is again met in the circumstances described above,¹²⁷ in which purchases by 'consumers' are exceptionally governed by the Convention. Since the 'button solution' also applies to orders that are placed internationally, that is, by a buyer residing in a CISG Contracting State with a seller having its place of business in another CISG Contracting State (thereby constituting an 'offer' falling into the sphere of application of the Sales Convention and accordingly being governed by Art. 14 CISG), both sets of rules can cover one and the same factual scenario.

When it comes to the legal criterion, the result must in my opinion be that domestic laws prescribing a 'button solution' address matters already governed by the Convention and are accordingly displaced.¹²⁸ The reason is that the 'button solution', by requiring the button to be labelled in an easily legible manner only with the words 'order with obligation to pay' or a corresponding unambiguous formulation, installs a form requirement for international sales contracts so concluded – the official title to Article 8 EU Directive on Consumer Rights in fact reads 'Formal requirements for distance contracts'. The formal validity of CISG contracts, however, is exhaustively governed by Articles 11, 12 and 29 CISG, which only allow for the application of domestic form requirements when a

124 See the definition of 'distance contract', *supra* at 4.2.2.

125 According to Art. 28(1) EU Directive on Consumer Rights, the member states shall adopt and publish, by 13 December 2013, the laws, regulations and administrative provisions necessary to comply with the Directive and shall apply those measures from 13 June 2014.

126 Art. 8(2) EU Directive on Consumer Rights.

127 Discussed *supra* at Part 4.2.2.

128 Schlechtriem & Schroeter, *supra* note 25, paras. 158, 824.

declaration in accordance with Article 96 CISG has been made, pre-empting all other domestic formal requirements, however framed.¹²⁹ The matter has therefore already been settled by the Convention itself, allowing international distance contracts to be concluded free of form.

6.5 CONCLUSION

The relationship between the CISG and domestic provisions on issues of contract validity has been a much discussed issue since the Convention entered into force.¹³⁰ The primary point of reference has usually been the so-called ‘validity exception’ in Article 4 sentence 2(a) CISG, which states that ‘[i]n particular, except as otherwise expressly provided in this Convention, it is not concerned with [...] the validity of the contract or of any of its provisions or of any usage’. As has been argued above,¹³¹ the introductory phrase of this provision in truth deprives it of any usefulness in determining the Convention’s scope in validity matters, rendering the ‘validity exception’ irrelevant. By including two opposed exceptions (‘in particular’ and ‘except as otherwise expressly provided’), Article 4 CISG in effect provides no more guidance than a border sign which reads: ‘The border runs somewhere around here’.

Against this background, a novel two-step approach to determining the Convention’s scope has been developed with its Article 7(1) in mind.¹³² According to this approach, a domestic law rule is displaced by the Convention if (1) it is triggered by a factual situation to which the CISG also applies (the ‘factual criterion’) and (2) it pertains to a matter that is also regulated by the CISG (the ‘legal criterion’). Only if both criteria are cumulatively fulfilled does the domestic law rule concerned overlap with the CISG’s sphere of application in a way that will generally result in its pre-emption.

In applying this approach to three ‘validity’ related issues, it has been demonstrated that domestic remedies for mistakes (errors) are pre-empted by the Convention if – and only if – they pertain to matters already regulated by the Convention, notably the buyer’s state of knowledge about features of the goods at the moment of contract conclusion or the parties’ state of knowledge about the other party’s ability to perform.¹³³ The same applies to consumer rights of withdrawal that may occasionally be available under international sales contracts, leading to consumer/buyer rights to withdraw from distance contracts

129 Magnus, *supra* note 29, Art. 11 paras. 4, 7; P. Perales Viscasillas, in *UN Convention on Contracts for the International Sale of Goods (CISG)*, *supra* note 24, Art. 11, paras. 7-10.

130 Discussed *supra* at Part 1.

131 Discussed *supra* at Part 2.

132 Discussed *supra* at Part 3.

133 Discussed *supra* at Part 4.1.

at will to be displaced by the CISG.¹³⁴ Finally, domestic laws prescribing a 'button solution' for the formation of e-commerce contracts are also pre-empted because this requirement pertains to a 'matter' already regulated by the Convention in its rules about the freedom of form.¹³⁵

134 Discussed *supra* at Part 4.2.

135 Discussed *supra* at Part 4.3.

