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QUO VADIS CISG? – INTERACTION BETWEEN THE VIENNA CONVENTION ON INTERNATIONAL SALES OF GOODS OF 1980 AND MIXED CONTRACTS

1. INTRODUCTION

It is undeniable that one of the obstacles that frustrate the development of international trade is the divergence of rules among legal systems. This gives rise to litigation and increases transaction costs for all parties. However, the tendency to unify the rules through international conventions is seen by some intellectuals and economists as a solution to eliminate this barrier while others find it harmful to domestic laws and does not achieve its whole objectives. The United Nations Convention on Contracts for the International Sale of Goods (CISG) is an example of this method of unification.[1] As of 26 September 2014, UNCITRAL reports that 83 States have adopted the CISG. Congo, Madagascar and Guyana are the last contracting parties. They have adopted the CISG in 2014. [2]

The CISG applies to contracts of sale of moveable goods between parties which have their place of business in different states when these states are contracting states or when the rules of private international law lead to the application of the law of a contracting state.[3] Hence in order for CISG to be applied in a specific contract two main requirements should be fulfilled – first the requirement of "*internationality*" and second – the requirement of "*contract for sales of goods*".

Example I - Contract for sales of colton concluded between Seller with principle place of business in Skopje (Macedonia) and Buyer with principle place of business in Vienna (Austria). Since the contract is concluded between parties whose place of business is in different

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[1] Azzouni Ahmad, *The adoption of the 1980 Convention on the International Sale of Goods by the United Kingdom*, Pace essay submission, 27 may 2002, available at: http://www.cisg.law.pace.edu/cisg/biblio/azzouni.html.
[2] For chronological table of actions see:
http://uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status_chronological.html
[3] Article 1, para. 1 (a) (b) of CISG.

Contacting States, CISG will be applicable to the contract for sales of colton under Article 1 para. 1 (a). In such case, the CISG would apply directly, avoiding recourse to rules of private international law to determine the law applicable to the contract.

As for the second requirement – *sales of goods*, from the text of the Convention it is evident that there is no definition of term "goods" in the CISG.[4] However, under Article 2 there is exclusion of the application of CISG as to type of sale (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; (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.[5]

Example II: Contract for sales of aircraft concluded between Seller with principle place of business in Istanbul (Turkey), and Buyer with principle place of business in Skopje (Macedonia). Although the contract is concluded between concluded between parties whose place of business is in different Contacting States, application of CISG will be excluded by virtue of Article 2 (e).

With regard to the substantive issues, the CISG basically governs three areas: the conclusion of the contract, the obligations of the seller including the respective remedies of the buyer and the obligations of the buyer including the respective remedies of the seller. The CISG therefore provides both a substantial "law of sales" and a regulation of certain issues of the general law of contract, albeit limited to those international sales transactions which fall under its scope of application.[6]

2. APPLICATION OF CISG TO CONTRACTS FOR THE SUPPLY OF SERVICES

From the provisions of the CISG it may be concluded that CISG applies to the sales of goods and does not in general apply to services contracts. However, under article 3.2, CISG apply to certain types of "mixed" contracts - "*this Convention does not apply to contracts in*

[4] See also Deskoski Toni, T*he Vienna Convention on Contracts for International Sale of Goods of 1980 as Applicable Law for resolving disputes arising out of contracts for International Sales of Goods*, Proceeding on Honour of professor Todor Pelivanov, University Ss. Cyril and Methodius in Skopje, Iustinianus Primus Faculty of Law, 2012, pg. 226-237.
[5] See Article 2 of CISG.
[6] Schlechtirem Peter, *Some introductory remarks on the CISG,* Internationales Handelsrecht (6/2006), pg. 227.

which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services."

This paragraph deals with contracts under which the seller undertakes to supply labour or other services in addition to selling goods. An example of such a contract is where the seller agrees to sell machinery and undertakes to set it up in a plant in working condition or to supervise its installation. In such cases, paragraph (1) *[paragraph (2)]* provides that if the "preponderant part" of the obligation of the seller consists in the supply of labour or other services, the contract is not subject to the provisions of this Convention.[7]

The apparent simplicity of Article 3(2) of the CISG is based on the concept that each part of the mixed transaction forms a fragment of a single unitary contract, whereby such contract is either entirely within the CISG or is entirely excluded by the application of Article 3(2). However, because the CISG is not meant to be an exclusive body of law applicable to any sales of goods transaction, the insistence on the all or nothing approach to mixed contracts may not be the most appropriate solution except in case of unified (not divisible) contracts.[8]

2.1. Single or multiple contracts – question for interpretation in accordance with Article 7 (1)

The interpretation of a uniform law is of particular importance. Any legislation, whether of national or international origin, raises questions concerning the precise meaning of its individual provisions. Moreover, such legislation, by its very nature, is unable to anticipate all of the problems to which it will be applied. In applying domestic statutes, one can rely on long established principles and criteria of interpretation to be found within each legal system.[9]

A number of attempts to explain the difference between goods and services have been made. For instance, it has been pointed out that service contracts, unlike sales transactions, are based on a continuing relationship and call for close co-operation and interaction between parties. These two phenomena, however, can also be applicable to sales transactions, some of which are themselves performed over a long period and may also require mutual co-operation. It has also been argued that services are not capable of being stored, and this point perhaps reflects the main difference between goods and services, namely the intangible nature of the latter. It is

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[7] Secretariat Commentary (closest counterpart to an Official Commentary), Guide to Article 3, available at: http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-03.html.

[8] Tsuneyoshi Tanaka, Newhouse Adam, CISG – A Tool for Globalization (1):American and Japanese Perspectives, Ritsumeikan Law Review, No. 29, 2012, pg. 14-15.

[9] Bonell, in Bianca-Bonell Commentary on the International Sales Law, Giuffrè: Milan (1987), pg. 65.

possible that the law treats goods and services differently on pragmatic grounds because of the different ways in which they are traded. Thus, as far as tangible products are concerned, the emphasis is placed on the product itself "because it is possible to track its physical transfer from the producer to the consumer". By contrast, the intangible nature of a service might explain why an emphasis is placed on the way a service is provided rather than on the product resulting from it.[10]

As mixed contracts are common in international trade, the drafters of the Vienna Sales Convention had to address the question under which circumstances such a contract is to be considered an "international contract of sale" in the sense employed by the CISG, thus rendering the Convention's rules applicable.[11] The rule contained in Article 3.2 applies only when the parties deal with both goods and services in a *single* contract.[12] According to the Secretariat's Commentary that question must be determined under domestic law. Also, there is different view regarding this question (for example there is a view under which CISG is also applicable to decide whether or not a contract falls within it scope). However, the difference of opinion is unlikely to have any practical consequence, because under both domestic law and CISG the matter will depend upon the intention of the parties. It is advocated that for interoperating purpose Article 8 should apply, so that a uniform canon of interpretation is applied.[13]

Problems can arise if there is one single contract which obliges the "seller" both to deliver goods and to provide other objects (e.g. rights, immovable's, know-how). This particular issue is not addressed specifically in the CISG although of course the CISG does govern the general question of the object of the sale ("goods").[14] This leads to the conclusion that when there is a long standing business relation between two B2B parties, which results in different contracts, one for sales of goods and other for contract for services, their contracts will not be within the scope of Article 3.2. Moreover, the contract for sales of goods will be governed under the CISG.

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[10] Green Sarah, Saidov Djakhongir, *Software as Goods*, Journal of Business Law, (March 2007), pg. 169.
[11] Honnold John, *Uniform Law for International Sales under the 1980 United Nations Convention*, 3rd ed., 1999 Kluwer, The Hague, para 58.
[12] Perovic Jelena, Selected Critical Issues Regarding the Sphere of Application of the CISG, Belgrade Law Review, (2011), no.3, pg. 186.
[13] See: Schlechtriem Peter, Schwenzer Ingebord, *Commentary on the UN Convention on the International Sale of Goods (CISG) Second Edition*, Oxford University Press, 2005, pg. 58-59. para. 5.
[14] Hubber Peter, Mulis Alastair, The CISG, A New textbook for students and practitioners, Sellier. European Law Publishers, 2007, pg. 41.

Example III: Seller with principle place of business in Skopje (Macedonia) and Buyer with principle place of business in Belgrade (Serbia) have concluded two contracts – one for sales of 800 pairs of jeans, and one contract for services. It is undisputed that for the first contract, CISG will be applicable, but for the second contract national rules of Private International Law will determine which domestic law shall be applied (if there is no choice of law made by parties).

However, today in the international commercial trade, in many cases a seller is involved in more than simply the conveyance of goods such as installation, training, performing services to deliver the goods, packaging of goods etc. This "types" of services performed by Seller did not alter ego the contractual relations between seller and buyer as sales and CISG will not be excluded under Article 3.2. On the contrary, when seller undertake services that can also be subject of an independent contract such as training of the employers of buyer how to use new medical technology sold by seller, a question can arise whether CISG is applicable. If such services are undertaken in the same contract that contains the obligation to deliver goods and transfer property, the question arises whether such a mixed contract is governed by the Convention. Article 3(2) CISG is meant to solve this question.[15]

Therefore, whether delivery and services are contained in one contract or in two is primarily a matter of the interpretation of the contracts. In determining whether the respective transaction constitutes one single contract or two separate agreements, application of Article 8 (intention of the parties) and Article 7.1 (interpretation of the Convention) seems to be the optimal solution.[16]

Paragraph (1) of Article 7 emphasizes that in the interpretation of the CISG, one must pay close attention to three points:

(a) the "international character" of the CISG;

(b) "the need to promote uniformity in its application"; and

(c) "the observance of good faith in international trade."

It is the opinion of many scholars that the first two of these points are not independent of each other but that, in fact, the second "is a logical consequence of the first." The third point is

[15] CISG Advisory Council Opinion No. 4: Contracts for the Sale of Goods to Be Manufactured or Produced and Mixed Contracts (Article 3 CISG), para. 3.1.

[16] Op. cit. Perovic, pg. 186.

of a rather special nature, and its placement in the main interpretation provision of the CISG has caused a lot of argument as to its precise meaning and scope.[17]

2.2. "Preponderant part"- Condition or necessity for applicability of CISG?

As it is stated above, the CISG provides that it applies to contracts of sale of goods between parties whose places of business are in different States. However, under Article 3.2 it does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services. Hence, it is necessary by single case approach, the court or the arbitral tribunal to determine whether the supply of labour or other services is a preponderant part in a mixed contract in order to exclude the application of CISG and to apply domestic choice of law provisions. In the ordinary meaning of the word, it signifies that in order for the contract to be excluded from the Convention, the provision of labour and services must form a major part of the obligations under the contract.[18]

The word "preponderant" should not be quantified by predetermined percentages of values but on the basis of an overall assessment. In its interpretation, as well as in the interpretation of the parties' agreements, the intention of the parties as expressed in the documents and the formation of the contract should be taken into account as well. Among the relevant factors to be considered by courts and arbitral tribunals are: 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. If, however, a fixed percentage of value is used, a percentage of 50% or below should be disregarded in order to exclude the Convention. Furthermore, a percentage slightly above 50% would not be generally decisive to exclude the CISG. The value of the services rendered ought to be preponderant.[19]

An example of such a contract is where the seller agrees to sell machinery and undertakes to set it up in a plant in working condition or to supervise its installation. In such cases, paragraph (1) *[paragraph (2)]* provides that if the "preponderant part" of the obligation of the

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[17] Felemegas John, *The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation*, available at: http://www.cisg.law.pace.edu/cisg/biblio/felemegas.html#ch3.
[18] Khoo Warren in Bianca-Bonell Commentary on the International Sales Law, Guffree: Milan, 1987, pg. 42.
[19] Op. cit. Advisory Council Opinion No. 4 para. 3.4.

seller consists in the supply of labour or other services, the contract is not subject to the provisions of this Convention.[20]

In the case *Recycled Asphalt case*, District Court of Rotterdam did not apply CISG under Article 3.2. since the contract was predominantly for the service of draining the asphalt, not the sale of the asphalt, although the condition for internationality was fulfilled (seller's country: Netherlands, buyer's country: Spain).[21]

On the contrary, in *ICC Case No. 7153 of 1992 (Hotel materials case),* the Arbitral Tribunal had stated that: "It is true that [seller] alleged that she did not only undertake the obligation of delivery [of the goods] but also that of assembling the installation. However, given that the text of the contract is unequivocal in this respect, and that no contrary provision emerges from [buyer], the court of arbitration assumed that the type of contract in question here was a sales contract, such that the Convention applies."[22]

The criterion to be employed in deciding whether the CISG is applicable to contracts for the supply of goods and labor or services is the "preponderance" of the obligations regarding the supply of services or labor. It seems merely to refer to the comparison between the economic value of the obligations regarding the supply of labor and services and the economic value of the obligations regarding the delivery of the goods. Thus, where the economic value of the obligation regarding the supply of labor or services is "preponderant," *i.e.*, where it is more than 50 per cent, the CISG is inapplicable.[23]

We may conclude that in such situations more valuable part of the goods or services is decisive. However, when determining the "preponderant part", the court or arbitral tribunal shall compare the sale price of the goods to be delivered as "one contract" and the fee for labour and services as "separate contract". If the value of the "second contract" is more than 50 per cent, than this contract prevails the contract for delivering of goods and the application of the CISG will be excluded.

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[20] Guide to CISG Article 3, Secretariat Commentary on the 1978 Draft of CISG (paragraph 1 of the Draft Text became paragraph 2 of the Official CISG Text).

[21] Holding Transmediterraneo De Contrucciones S.L., v. [Defendant], available: http://cisgw3.law.pace.edu/cases/130522n1.html.

[22] ICC Arbitration Case No. 7153 of 1992 (*Hotel materials case*), available: http://www.cisg.law.pace.edu/cisg/wais/db/cases2/927153i1.html.

[23] Ferrari Franco, Specific topic of the CISG in the Light of Judicial Application and Scholarly Writing, Journal of Law and Commerce, 1995, pg. 61-62.

According to the rule in paragraph (2) where a supplier undertakes to supply a mixture of goods and services – for example, a contract whereby the supplier not only undertakes to provide the buyer with a computer system, but also promises to service and/or upgrade the system at regular intervals – the CISG will apply if sales elements is clearly preponderant part of the total transaction. If a purely financial means of measurement were to be applied, this would translate to more than 50% of the total value of the obligations concerned.[24]

Cour d'appel Grenoble, 26 April 1995 in the case *Marques Roque Joachim v. Manin Rivière* held that: "A company with its place of business in France sold to an individual resident in Portugal a used warehouse for the price of 500,000 French francs, including the cost of dismantling and delivery, the price of the warehouse being 381,200 francs and the dismantling and delivery costs amounting to 118,800 francs. Following the buyer's refusal to pay the last part of the price on the grounds that the dismantled metal elements were defective, the court of Appeal of Grenoble found that the disputed contract covered the sale of a used warehouse together with its dismantling and that it was apparent from the invoices submitted that the supply of services did not constitute the preponderant part of the contractual obligations".[25] The court concluded that the contract therefore fell within the scope of application of CISG.

The question whether, apart from the obligations' value, regard is to be had to additional factors arises under Article 3 (2) CISG in the same way as it does under (1) of the provision. The OLG places the emphasis on the value of each element, but additionally allows the purchasing party's particular interest to be taken into account. This approach seems to be in conformity with the dominant opinion among scholarly writers.[26] There were, for example, cases dealing with the delivery of mining equipment that had to be assembled at the buyer's place or contracts for the delivery, installation and the operation of a machine in which the respective contracts were regarded as sales contracts.[27]

For example in the *Stove case*, the Appellate Court Zug applied CISG and ruled that conditions set in Article 3.2. are not met in order to exclude the application the CISG. The Court of First Instance qualified the contractual relationship between the parties as a contract of sale

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[24] Lookofsky Josefm Convention on Contracts for the International Sale of Goods (CISG), Kluwer Law International, 2012, pg. 41.

[25] Case no. 93/4879, available at: http://cisgw3.law.pace.edu/cases/950426f2.html

[26] Schroeter G. Urlich, Vienna Sales Convention: *Applicability to "Mixed Contracts" and Interaction with the 1968 Brussels Convention*, 5 Vindobona Journal of International Commercial Law and Arbitration, 2001, pg. 78.

[27] Schlechtriem Peter, *Uniform Sales Law - The Experience with Uniform Sales Laws in the Federal Republic of Germany*, Juridisk Tidskrift (1991/92), pg. 9.

and assessed the dispute according to the provisions of the United Nations Convention on Contracts for the International Sale of Goods (CISG) which has been ratified by Germany and Switzerland. Also, the court stated that "Apart from being obliged to effect delivery, [Seller] had an obligation to install the stove. Such contracts generally fall within the scope of application of the CISG since the installation is often of only minor relevance when compared to the whole transaction volume. Even if, pursuant to [Seller]'s offer, the installation took three days for a technician, this does not imply that the installation should be regarded as more expensive than the delivered good itself. Therefore, the present dispute is to be governed by the provisions of the CISG. The question of applicable law must be settled *ex officio*. Thus, it is irrelevant that [Buyer] did not contest the applicability of the CISG".[28]

It seems that the main criteria whether the goods or services are preponderant part of the contract, the economic value of the goods and the economic value of services should be taken into account. If the obligation regarding the production and sale of goods is more than 50 per cent, the CISG will be applicable. On the contrary, if the obligation regarding the supply of labor or services in more that 50 per cent, than CISG will be excluded under Article 3.2. Although this seems very "economical solution" problems may arise when in different states, the value of the services and labor are different. It shall be noted that the value of services and labour in Macedonia, Bulgaria or Albania are centrally different than the value of services and labour in Germany, France or Italy.

Example IV: *Mixed contract, concluded between seller with principle place of business in Skopje (Macedonia) and buyer with principle place of business in Vienna (Austria), different result regarding the application CISG may be rendered. Thus, if the economic value of the services or labour is analyzed within the value of services and labour in Macedonia it may result with application of CISG since the value of the services and labour is lower than in Austria for example. Thus, if the economic value of the services or labour is analyzed within the value of services and labour in Austria, than the CISG may be excluded.*

This leads to the conclusion that different conclusions on the application of CISG may results as a matter of characterization of the economic value of the services or labour. It is undisputed that the intention of the parties should be taken into account. This is just illustration

[28] Case no. OG 2006/19 available at: http://cisgw3.law.pace.edu/cases/061219s1.html.

of what may happened and with what kind of problems companies from developing countries may be faced.

The economic value test in the context of Article 3.2 was, for instance, applied in one award of Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce in the *Steel protective fence case* where the tribunal held that CISG is applicable since the value of services was lower that the value of the goods. The tribunal compared the value of the goods (Protective Steel Fence) which was 490.000 EUR on one side and the value of the installation of the goods which was 60.000 EUR on the other side. By applying the economic value test, tribunal applied CISG in the Steel protective fence case.[29]

This conclusion can also be confirmed in the Russian Arbitration Practice. In the case no. 356/2999 the seller, in addition to its obligation to supply equipment, undertook an obligation to render a number of services such as construction work, balancing and commissioning, geodetic work, feasibility study of the project. The International Commercial Arbitration Court determined that the price of the equipment amounted to more than fifty percent of the entire price of the contract. Therefore, the Tribunal held that the dispute was to be governed by the CISG.[30]

However, in situations where economic test cannot be used, or where a clear economical calculation of the value is impossible, other circumstances of the contract should be taken into account in order for court or arbitral tribunal to decide whether CISG is applicable or not. This approached was followed by District Court Mainz in the *Cylinder case*. The court was faced with a situation where the economical test was impossible to be tested. He found that in order to decide whether the preponderant part of the obligations of the seller consisted in the supply of labour or other services a comparison of the value of each performance in question was not admitted. In other word, the court stated: "The Court therefore needs to assess whether the parties saw the preponderant part of [seller]'s obligations in the delivery of the crepe-cylinder (the sales element) or in the services accompanying the delivery (installation etc.). As it is impossible to ascertain the value of [seller]'s various obligations under the contract, both the contractual documents and the circumstances of the formation of the contract have to be taken into account. The wording of the contract and the resulting legal proceedings make it obvious to

[29] Foreign Trade Court attached to the Serbian Chamber of Commerce (*Steel protective fence case*), available: http://cisgw3.law.pace.edu/cases/110302sb.html.
[30] Saidov Djakhongir, *Cases on CISG Decided in the Russian Federation*, 7 Vindobona Journal of International Commercial Law and Arbitration, 2003, pg. 10.

the Court that the preponderant part of the contract was the sale and the delivery of the crepe-cylinder itself and that [seller]'s other services were of lesser importance."[31]

Similar approach, where the economic test was inappropriate to be performed can be found in *Pizzaria restaurant equipment case.* The District Court München was faced with the question - whether services are preponderant part of seller's obligation in order to exclude the application of CISG under Article 3.2. Therefore, the court stated that "Under Art. 3(2) CISG, the Convention would not apply if the preponderant part of the obligations of the [seller] consisted in the supply of labor. This was not the case in the present dispute. According to the written contract, the price for the "entire delivery" was determined by the addition of the individual prices for individual articles. The "construction", that is, the installation of the fittings, was included in the overall price, as was the shipping; a service fee was not invoiced. This indicates that the preponderant part of the [seller]'s obligations was the delivery of the fitting articles and not the work rendered during the installation… While it is true that the contract contained measurements of various articles which were based upon the customer's requests, respectively the nature of the restaurant, the [seller] was nevertheless able to definitely determine the price of the individual objects. The [seller] neither made a costs estimate nor did it draw up a list of obligations with standard prices, which were then to form the basis of the final price of its performance…Consequently, the production of the objects also did not constitute a performance of works or services, which is in the fore in contrast to the delivery of goods".[32]

If we look in the *Recycling machine case*, we may conclude that problems arising out of Article 3.2. may result with delay of proceedings. This delay is a direct result of the problems for courts to determine the preponderant part. Goods that are involved in the case are recycling machines. The parties have not agreed on the applicable law. The Court of First Instance, in accordance with Art. 4(1) and (2) of the Rome Convention, applied Italian law as the law of the State in which the [Seller] (being the party rendering the characteristic performance) has its seat, or, as the case may be, its main place of business at the time of formation of the contract. The Court of Appeal, characterizing the contract as the purchase of goods to be manufactured or produced in the sense of Art. 3(1) CISG, applied the CISG….According to Art. 3(2) CISG, however, the Convention does not apply to contracts in which the preponderant part of the

[31] Case no. 12 HKO 70/97, available at: http://cisgw3.law.pace.edu/cases/981126g1.html.
[32] Case no. 12 HKO 3804/00, available at: http://cisgw3.law.pace.edu/cases/001116g1.html.

obligations of the party who furnishes the goods consists in the supply of labor or other services. Contracts of a mixed type are not encompassed by the CISG if the proportion of non-sale obligations clearly preponderates in monetary terms or according to the intentions of the parties … The lower instances have not discussed the question of whether obligations typical for sales contracts or uncharacteristic for sales contracts preponderate in the contract between the parties. The applicability of the CISG, however (as shown above), depends on the answer to this question.[33]

Therefore we may conclude that in regard to the test for what part is preponderant in economic terms, there is a strong opinion that the service part of the contract must amount only to more than 50 per cent to be the preponderant part, while others advocate that the value of the services must "significantly" exceed 50 percent, if only in order to facilitate a prognosis on the applicability or non-applicability of the CISG. In any case it is advisable for the parties to make clear whether they intend their contract to be governed by the CISG or not.[34]

2.3. Turnkey-contracts

There are many problems in international trade: The language and concepts can be different (for example, the terms termination and avoidance). Foreign cultures may cause difficulties, as well as different legal systems. Normally the parties are legal persons. The forum of disputes is perhaps in a foreign state or arbitration tribunal. The rules are often unknown and the economic value of the sale and dispute can be enormous. We also must remember that there is not only one contract but a net of contracts (financing, transport, taxes, etc.).[35]

One of problems is also the application of CISG to the turnkey-contracts. A turnkey contract is a business arrangement in which a project is delivered in a completed state. Rather than contracting with an owner to develop a project in stages, the developer is hired to finish the entire project without owner input. The builder or developer is separate from the final owner or operator, and the project is turned over only once it is fully operational. In effect, the developer is finishing the project and "turning the key" over to the new owner.[36] This type of arrangement is commonly used for construction projects ranging from single buildings to large-

[33] Case no. 4 Ob 179/05k, available at: http://cisgw3.law.pace.edu/cases/051108a3.html.
[34] Op. cit. Schlechtriem, Schwenzer, pg. 61.
[35] Ämmälä Tuula, International Trade in Finland - the Applicable Rules, 5 *Turku Law Journal* (1/2003), pg. 85.
[36] For more see: http://www.wisegeek.org/what-is-a-turnkey-contract.htm.

scale developments. They are also used as normally project contracts which contain elements that are alien to sales. Concerning turnkey contracts, it shall be compared if the part of the work or other service is a *preponderant part* of the contract.

Whether the so-called turnkey contract (contratos llave en mano, clé en main, Lieferverträge mit Montagverplichtung) falls under Article 3(2) CISG is highly controversial. Although some authors have stated that Article 3(2) was introduced in order to exclude those types of contracts from the Convention, a case-by-case analysis is needed.[37]

Precisely how turnkey contract is to be defined is not clear. As a rule it involves a bundle of obligations on both sides, a pure economic comparison in value terms being almost impossible, the decisive factor being rather the weight which the parties attribute to a particular aspects of performance. With turnkey-contracts, such an appraisal will result in the CISG not applying, because the sale of goods elements are rarely to the forefront in the case of a genuine turnkey-contract.[38]

In the *Turnkey plant case,* the court does seem to automatically exclude the Convention in the presence of a turnkey contract. In the case, the seller had the obligation to plan, deliver, assemble, supervise the assembly, and put into operation a complete plant for the breaking down and separation of food-cardboard packaging. The tribunal regarded this as a turnkey contract that was not governed by the Convention (Art. 3(2)): "It goes without saying that the supply of labour for the assembly, supervision of the assembly and the putting into operation of the plant plays a very important role in such a project. Oftentimes, the functioning, respectively the correct adjustment of the various plant parts and their coordination with each other can only be undertaken when the plant is already effectively in operation (...).Accordingly, the assembly, adaptation, instruction and similar works constitute a considerable part of the contractual performance.[39]

2.4. Seller's Services in Producing Custom-Made Goods — Relationship between Article 3(1) & Article 3(2)

It is undisputed that paragraphs (1) and (2) of Article 3 CISG govern different matters. A contract for work done and material or labor supplied is basically treated as a contract for sale.

[37] Op. cit. Advisory Council Opinion No. 4 para. 3.5.
[38] Op. cit. Schlechtriem, Schwenzer, pg. 61.
[39] Case no. HG 000120/U/zs, available at: http://cisgw3.law.pace.edu/cases/020709s1.html.

Neither of the adjuncts to goods can be "a substantial part" of the contract. Courts have interpreted this section with the widest possible view and have not restricted the "substantial part" to only monetary values but also looked in their determination to the intention of the parties concerned.[40]

It was already stated above that under Article 3(2), the Convention applies to contracts for the supply of goods and labour or other services, unless the supply of services represents a "preponderant part" of the obligation. However, when the services supplied by the seller consist in the manufacture or production of the goods -- without the buyer's supplying a "substantial part" of the materials necessary for such production (for this hypothesis comes under Article 3(1) CISG) -- the contract comes very close to being a works contract. It is however disputed whether works contracts, in their entirety or in part, should be considered among the contracts Article 3 CISG assimilates to sales contracts.[41]

In the *SA P. v. AWS* Tribunal de commerce de Namur, 15 January 2002 (Belgium), in a contract of sale of a "processing center" where the parties agreed to the construction of the machine in the seller's workshops; provisional receipt; the dissembling and the transport of the parts in the establishment of the buyer; the assembling of the machine and the putting in service and the final receipt held that "The disputed contract falls within the sphere of application of the CISG which provides, in its Article 3, that 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, which is not the case in the present suit".[42] Hence, the Court considered the contract within Art. 3(1) and did not discuss the application of Art. 3(2) CISG.

Therefore the question here is - should labor and services performed by the seller in manufacturing or producing the goods be considered in analyzing whether services constitute the 'preponderant part' of the seller's obligations under Article 3(2)? This question is particularly salient if the goods are customized or otherwise 'specially-made' for the buyer: in that case, the

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[40] Zeller Bruno, *Four-Corners - The Methodology for Interpretation and Application of the UN Convention on Contracts for the International Sale of Goods*, available at: http://www.cisg.law.pace.edu/cisg/biblio/4corners.html.

[41] Bonell Michael Joachim, Liguori Fabio, *The U.N. Convention on the International Sale of Goods: A Critical Analysis of Current International Case Law -- 1997 (Part 1)*, Revue de droit uniforme/Uniform Law Review, 1997, pg. 388.

[42] Case no. R.G. no. 985/01, available at: http://cisgw3.law.pace.edu/cases/020115b1.html.

seller's production services are contemplated by (and may even be expressly described in) the contract.[43]

In situations where the work, labour or other services obligations ought to be considered as part of the obligations to manufacture or produce the goods referred to in Article 3(1) CISG.

Example V: Seller with principle place of business in Skopje (Macedonia) and buyer with principle place of business in Vienna (Austria) in 2014 concluded contract for sale of customized software. The labour and services performed by the seller in Macedonia during the process of manufacturing the software are to be considered under Article 3.1. in order to determine the "substantional part". If the value of the goods is for example 50 per cent of the price, the value of the "material" provided by the buyer is 40 per cent and the labour and services 10 per cent, the CISG will be applicable since the goods, labour and services will amount 60 per cent of the price.

2.5. Burden of proof

Despite a recent court decision stating that the 1980 Vienna Sales Convention on Contracts for the International Sales of Goods (CISG) constitutes "an exhaustive body of rules," the contrary is true. The CISG does not deal with all the issues that arise from international sales contracts. This can be easily derived from the text of the CISG itself. [44]

The exceptions in Article 3 (1) and 3 (2) – a substantial part of materials supplied by the party ordering the goods and a preponderant part of the seller's obligation constituting services – must be proved by the party relying on the exception.[45] Burden of proof principles, in other words, usually come embedded in particular litigation procedure. The Convention generally does not address procedural issues — and certainly does not create a litigation system of its own. It must be applied in the myriad of procedural contexts that exist in courts and arbitral tribunals around the world.[46]

Example VI: Seller with principle place of business in Skopje (Macedonia) and buyer with principle place of business in Turin (Italy) conclude contract for sale of medical equipment.

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[43] Flecther M. Harry, *Issues Relating to the Applicability of the United Nations Convention on Contracts for the International Sale of Goods ("CISG")*, text availbe at: file:///C:/Users/Ultimate/Downloads/SSRN-id1118118%20(1).pdf.

[44] Ferrari Franco, *Burden of Proof under CISG*, Review of the Convention on Contracts for the International Sale of Goods (CISG), Kluwer Law International (2000-2001), pg. 1.

[45] Op. cit. Schlechtriem, Schwenzer, pg. 62.

[46] Op, cit Flecther.

The contract is a mixed contract. If the buyer want the arbitral tribunal not to apply CISG under the exception in Article 3.2., then the buyer need to prove that the preponderant part of the contract are the services and labour supplied by the seller.

3. CONCLUSION

The United Nations Convention for the International Sale of Goods applies to contracts for the sale of goods between parties whose places of business are in different States [countries] and either both of those States are Contracting States or the rules of private international law lead to the law of a Contracting State. Under the CISG, contracts of sale are distinguished from contracts for services. A contract for the supply of manufactured goods is a sale unless the ordering party supplies a substantial amount of the materials necessary for the manufacture of the goods. In that instance, the CISG would not apply. [47]

Most importantly, the success of the CISG shows that pursuing the unification of laws is the right way forward. The harmonizing effect the Convention has had on domestic legal systems, as well as its influence on other uniform instruments and projects, prove the superiority of the CISG. At the same time, these developments disprove the argument that the competition of domestic legal systems alone offers a viable perspective for the future of commercial law.[48]

The application of CISG can be excluded as a result of certain type of contract. Such exclusion is within the scope of Article 3. There can be two different situations under which CISG may be excluded: when the contract includes some act in addition to the supply of goods – first situation – contracts for goods to be manufactured (Art. 3.1) - and second situation – contracts for the supply of services (Art. 3.2.).

Under Article 3(1) CISG it can also apply to contracts for work and materials as well as, under Art. 3(2) CISG, contracts with mixed goods and service obligations as long as the goods component is preponderant. In a submission to the European Court of Justice regarding the question of legal venue of the place of performance pursuant to Art. 5 No. 1 EuGVÜ [*Europäisches Gerichtsstands- und Vollstreckungsübereinkommen* (European Convention on

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[47] Henry D. Gabriel, *A Primer on the United Nations Convention on the International Sale of Goods: From the Perspective of the Uniform Commercial Code*, 7 Indiana International & Comparative Law Review (1997), pg. 279.

[48] Schwenzer Ingeborg and Hachem Pascal, *The CISG - Successes and Pitfalls*, 57 American Journal of Comparative Law (Spring 2009) pg. 478.

Jurisdiction and the Enforcement of Judgments)], the *Bundesgerichtshof* presupposed the application of the CISG for the compensation claim of an English purchaser arising out of a work and materials contract.[49]

The determination of the "preponderant part" is to tested under the economic value test and if such test is inapplicable to be performed, the courts and arbitral tribunal should considered all aspects of the contract. In all cases, there should be a Pro-Convention approach.

The "preponderant part" is not defined in the CISG, nor does it identify its referent, for example costs, price or value. Legal scholars have mostly been in opinion that in order for the contract to be excluded from the CISG, the provision of labour and services must form a major part of the obligations under the contract. Sometimes this seems merely to refer to the comparison between the economic value of the obligations regarding the delivery of the goods, which means that the sale price of the goods to be delivered should be compared with the fee for labour and services, as if two separate contracts had been made. [50]

SUMMARY

One of the most successful international conventions in the field of International Trade Law is the Vienna Convention on International Sales of Goods of 1980 (CISG). The merits of the CISG can be measured not only in terms of the high number and the economic weight of the countries that have ratified the Convention, but also by the quality and novelty, of the worldwide solutions it achieved from a pure technical and legal perspective.[51] More than 2500 decisions by state courts and arbitral tribunals have been reported so far.

This article deals with the question of the (non)-applicability of the CISG to mixed contracts. In the text the authors underlines that the Vienna convention represents a major success in the field of unification of substantive rules for international sale of goods. The authors also emphasized the pro-convention approach regarding the mixed contracts.

Key words: CISG, service contracts, preponderant part, burden of proof, custom-made-goods.

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[49] Schlechtirem Peter, *Uniform Sales Law, in the Decisions of the Bundesgerichtshof*, 50 Years of the *Bundesgerichtshof* , A Celebration Anthology from the Academic Community, available at: http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem3.html.

[50] For more see:
http://www.jus.uio.no/pace/international_trade_in_finland_the_applicable_rules.tuula_ammala/3.html

[51] Viscasillas Pilar Perales, Applicable law, the CISG, and the future convention on International Commercial Contracts, Villanova Law Review, Vol. 58., pg. 733.