

The applicability of the CISG on transactions of software

Anvendeligheden af CISG på transaktioner vedrørende software

by KRISTINA FAUSING KYLKJÆR

This thesis regards the applicability of the CISG on transactions of software.

First, it seeks to determine what constitutes 'goods' and whether software is included in this definition. Secondly, it seeks to establish the requirements for a contract to be a 'contract of sale', as difficulties can arise when a contract is termed a license agreement, or if the obligations in the contract are a mix of sales obligations and service obligations. Finally, this thesis determines whether the CISG is appropriate to govern contracts of sale of software. Throughout this thesis, lines are drawn between the approach of the CISG and the approach of the national sales laws, especially from common law legal systems as the UK and the US. The perspective of the civil law legal systems, including Denmark, is incorporated in a more general way.

Specialet omhandler anvendeligheden af CISG på kontrakter vedrørende software.

Specialet analyserer hvordan "goods" skal fortolkes, og om software dermed er omfattet af definitionen af "goods". Derefter går specialet ind og analyserer, hvordan man skal håndtere kontrakter, som er et mix imellem et salg og en ydelse af en service, hvilket tit er realiteten ved kontrakter vedr. software. Til slut vurderes om CISG overhovedet er passende til at regulere disse kontrakter vedr. software. Det hele sammenfattes i en konklusion. Igennem hele specialet perspektiveres der til, hvordan nationale købelove, herunder især i Storbritannien og USA, håndterer problemstillingerne. Civil law-retssystemer, herunder Danmark, er endvidere perspektiveret til, dog på en mere generel måde.

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Abstract

As the technology is developing and the market for online trading is expanding drastically on a worldwide scale, in recent year issues regarding transactions of software has emerged. There is a legal uncertainty on whether the CISG, as the default legislation on international sale of goods in the Contracting States, applies on contracts of sale of software. If the CISG does not apply, national law will apply.

To establish the applicability of the Convention in this specific situation, two essential terms, according to Art 1 CISG, must be examined. First, it needs to be determined what constitutes 'goods' and whether software is included in this definition. Secondly, as contracts for software can be drafted in a variety of ways, it is essential to establish in which situations these contracts are considered a 'contract of sale' and why.

After applying an autonomous interpretation on the provisions of the CISG and examining the relevant jurisprudence, it can be concluded that software is a 'good' in the sense of the Convention. On a national level in general, the same conclusion has been reached. However, as it is today, the UK Sale of Goods Act requires software to be contained on a tangible medium for it to constitute a 'good'.

The difficulties arising when classifying a contract of sale of software are, when a transaction of software can also be a licence agreement as a consequence of an underlying intellectual property right. Licence agreements are not governed by the CISG. In conclusion, the determination of whether a transaction is a sale or a licence will depend on the intention of the parties to transfer the property of the software.

Another issue parties may encounter is when the contract of sale of software includes service obligations. The CISG does not apply on contracts for the supply of services. Art 3 CISG regulates these situations and the essential factor is whether the preponderant part of the obligations in the contract is service obligations. If that is the case, the contract will be considered as a contract for the supply of services. Contracts for goods to be manufactured are considered contracts of sale unless the buyer undertakes to supply a substantial part of the necessary materials, as the obligations of the seller will then preponderantly be service obligations.

Finally, this thesis concludes that the CISG is appropriate to govern contracts of sale of software as the remedies provided by the Convention are appropriate on transactions of this sort.

Introduction

With its current 89 Contracting States¹, the United Nations Convention on Contracts for the International Sale of Goods (CISG) has from the day it was drafted been - and still is - of great importance on a national as well as international level, and there is one specific reason for that; the need for legal certainty. The value of the contracts governed by the CISG by default is of a magnitude difficult to imagine², and the parties entering these international contracts of sale of goods need to know their legal position.

The CISG is a uniform law, which means that an equal interpretation should be applied to the provisions in the Convention regardless of the domestic legal system in the Contracting States. Consequently, buyers and sellers all around the world enjoy the same rights, obligations and protection of the CISG. Thus, these provisions supply the frame to secure legal certainty.

¹ UNCITRAL Secretariat: *Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)*, 2019

² Lookofsky, Joseph: *Understanding the CISG*, Kluwer Law International B.V., 5th Edition, 2017, p. 1

However, a fundamental and rather crucial element in these contractual agreements, as well as agreements in general, is the ability for the parties to foresee which law is governing their individual contract. If the CISG is not applicable, national law will apply on the contract, but even then, the parties need to know which national law will be applicable.

Several requirements must be met for the CISG to apply on a contract. This thesis revolves around two of the most essential requirements; the contract must concern 'goods' and the contract must be a sales contract.

In recent years, the amount of international sales contracts concerning software has increased drastically. The software market has expanded in a way no one could have predicted in 1980 when the CISG was drafted. Most countries did not consider this situation when drafting their national sales laws either. Today, the consequences are that software has no certain legal identity because of its unique nature, which differs from the conventional 'good'³.

The most common way to trade software today is via the internet. The way the online trading market has turned out is something no one would have believed 40 years ago as well. The variety of ways to draft a contract for software was therefore not taken into account when the CISG was established. This is the reason for issues arising regarding the way the contract is drafted and what obligations the agreement involves.

This thesis analyses the abovementioned issues to reach a conclusion which are intended to contribute to the re-establishing of the legal certainty for the parties entering a contract regarding software on an international as well as national level.

Problem definition

For the time being there is a legal uncertainty to whether the CISG or the otherwise national law applies on transactions of software.

This thesis will first of all interpret the term 'goods' within the meaning of the CISG whilst drawing parallels to certain common law and civil law jurisdiction as well as relevant jurisprudence. The applicability of the CISG or the otherwise national law in the context of transactions of software will hereafter be determined.

In the case software is included in the definition of 'goods' and thus be governed by the CISG this thesis will as the next step examine the issue of how to classify a contract as a 'contract of sale'. Furthermore, this thesis will determine the appropriate way to handle mixed contracts containing an element of sale and an element of service, which is the typical reality for the parties when the object of the contract is digital.

Provided that CISG does apply to transactions of software, this thesis will as the last step raise the question of whether it is appropriate for the CISG to regulate these transactions or the better solution would be to leave it up to the national laws in the Contracting States to find the right approach to provide the legal certainty fitting their legal system.

Delimitation of the research subject

The scope of this thesis is limited to the legal issues concerning the applicability of the CISG on contracts of sale of software with regard to the terms 'goods' and 'contracts of sale'. Intangibles, other than software, with a similar nature as software are not taken into account in the discussion.

³ Green, Sarah & Saidov, Djakhongir: *Software as goods*, Journal of Business Law, 2007, p. 1

Thus, the conclusion of this thesis is not intended to be analogues to contracts for intangibles in general.

Given the commercial character of the CISG, only issues relating to the applicability of the CISG and the national laws in a commercial context are examined. Laws with a consumer perspective such as the Consumer Rights Act in the UK will not be included in the discussions.

Putting the CISG in the perspective of national sales laws makes it possible to get an insight in how the laws influence each other when being met by issues such as the ones in question. This thesis focuses on civil law jurisdictions in a more general sense as the CISG itself predominantly applies a civil law approach. The focus in the common law jurisdictions is in a more specific sense. The reason for this is that the UK is not a CISG Contracting State and it is therefore interesting to examine the mind-set and the methods used, when the legal system is not influenced by the provisions of the CISG. The US is interesting to study as well, as it is a CISG Contracting State but it applies a common law approach.

Methodology and literature

This thesis will apply a doctrinal analytical approach as the applicable laws will be described, analysed and interpreted. The analysis of the CISG will be based on an autonomous interpretation method including the examination of the wording, the connection between the provisions, the legislative history and the intention of the CISG. The relevant national laws will be interpreted in a similar manner but without the presumption of a uniform international law.

The analyses will contain the work of scholars such as Professor Frank Diederich, Professor Hiroo Sono, Professor Schwenger and Professor Schlectriem.

After a comprehensive analysis, including the examination of the relevant jurisprudence, this thesis will be capable of answering the question imposed by the problem definition.

The UN Convention on Contracts for the International Sale of Goods (CISG)

In the earlier days, attempts to establish a set of rules regulating international trade were made with conventions such as the Uniform Law on the International Sale of Goods (ULIS) and the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF). However, they did not have the expected impact on the area.

When the CISG was drafted in Vienna in 1980 and won the acceptance on a worldwide scale⁴ it was considered a great success.

The CISG is a uniform set of rules which regulates the rights of a buyer and a seller when entering an international contract of sale of goods. For the CISG to apply there has to be an international element between the parties and the law of a Contracting State must apply on the contract, cf. Art 1 CISG. While some situations are explicitly excluded from the sphere of application in Art 2 CISG, the parties have a right to derogate from the provisions in the Convention according to Art 6 CISG in the individual contract.

⁴ Lookofsky, Joseph: *op. cit.*, p. 1

What is a 'good'?

Interpreting the CISG

According to Art 1(1) CISG “*the Convention applies to contracts of sale of goods*”. These substantive prerequisites expressly limit the scope of application of the CISG, but no definition of the fundamental element ‘goods’ is to be found in the Convention. It is therefore important to examine which contracts of sale of goods the CISG was meant to govern when it was first drafted, and how these reasons should be interpreted in the light of current circumstances.

As explicitly mentioned in the Preamble, the CISG is a uniform sales law adopted by the Contracting States to govern the international sale of goods and to promote the development of international trade with respect to different social, economic and legal systems. Thereby said, there is no international court dealing with the parties’ disputes or discrepancies when the contract is governed by the CISG. This task lies with the national court. The courts have to look at the Convention with an international mind-set without letting the understanding and interpretation of certain terms from the domestic law of the country effect this mind-set. To be able to perform this task, it will acquire studies of other courts’ rulings from other Contracting States, translating and interpreting languages and legal terms with an international perspective in mind and so forth. Such a demanding task has led to the homeward-trend in favour of *lex fori*⁵ as a consequence of the Conventions lack of prescribing a method to achieve this international uniform interpretation.

When defining ‘goods’ from the perspective of CISG it is not a matter of trying to fill the gaps where the Convention leaves us with no answers. It is a matter of interpreting the Convention’s provisions with regard to its international character⁶ as the drafters intentionally used ‘open’ terms to accommodate the applicability in varying circumstances⁷. Thus it is left up to the courts to interpret these ‘open’ terms.

An autonomous interpretation

As the CISG is a complex piece of legislation which has to be enforceable across borders and in countries all over the world, it is a matter of finding the solution within the Convention itself by using an autonomous interpretation⁸. The meaning of a term in the CISG must be determined independently from any domestic assumption⁹. There are five different factors that must be taken into consideration when using this supranational interpretation method.

The wording of the authentic languages

The CISG exists in six equally authentic languages¹⁰; Arabic, Chinese, English, French, Russian and Spanish. All six languages have to be taken into consideration when determining the meaning and intentions behind a term such as ‘goods’. To make the interpretation of the provisions in the Convention more appropriate, some languages are more prevailed than others¹¹. By applying a supranational interpretation to the term in question, it is made certain that a similar term in the national law of the country and the domestic interpretation of said term is not “contaminating” the

⁵ Diedrich, Frank: *Maintaining Uniformity in International Uniform Law Via Autonomous Interpretation: Software Contracts and the CISG*, 8 Pace International L. Rev., 1996, p. 1

⁶ Schlectriem & Schwenger; *Commentary on the UN Convention on the International Sale of Goods*, Oxford University Press, 3th Edition, 2010, p. 121

⁷ *Ibid.*, p. 127

⁸ Diedrich, Frank: *The CISG and Computer Software Revisited*, 6 Vindobona Journal of International Commercial Law and Arbitration, Supplement, 2002, p. 2

⁹ Schlectriem & Schwenger: *op. cit.*, p. 123

¹⁰ Diedrich, Frank: “*Maintaining Uniformity...*”, *op. cit.*, 1996, p. 5

¹¹ *Ibid.*, p. 5

interpretation of the provisions in the Convention. The English term ‘good’ can be used as an example. There are many English speaking countries in the world. Some of them are common law jurisdictions, some are civil law jurisdictions and some is a mix between the two. These legal systems can differ in the way the law is made, the mind-set behind it and thereby the court rulings. Thus, how a ‘good’ is defined will therefore be different from one jurisdiction to another. This is the reason why the CISG needs to rise above the domestic interpretations and apply its own original interpretation, which Art 7(1) CISG and the Preamble seek to secure. By comparing some of the prevailing languages, which in the drafting process was mainly English and French, they underline the commercial character of the CISG¹². The French wording of ‘good’ is ‘marchandise’, which refers to goods sold by merchants¹³. However, this will only give an indication on how to interpret the term ‘good’, yet it will never be conclusive before the other factors in the autonomous interpretation method is considered.

The other section in the Convention

By looking at the other sections in the CISG it is possible to get an understanding of which characteristics ‘goods’ is meant to have according to the Convention itself.

The CISG uses a negative delimitation by citing which items are excluded from the sphere of application. According to Art 2 CISG, the Convention does not apply on items such as for example stocks, shares, ships, electricity etc. If the goods in question are not mentioned in Art 2 CISG it is likely that the Convention will apply. However, it is not conclusive as other acquirements must be met as well. In this way, the Art 2 CISG contributes to the understanding that the CISG is to be interpreted in a broad sense to include as many international commercial contracts as possible.

According to Art 3(1) CISG, goods to be manufactured or produced are considered as ‘goods’ in the sense of the Convention with an exception related to the classification of the individual contract and not the goods themselves. This exception is discussed further below under the chapter regarding mixed contracts.

By looking at the seller’s obligation to deliver the goods and transfer the property in the goods to the buyer according to Art 30 CISG, the Convention requires two characteristics in an item for it to be able to be a ‘good’.

The item has to be able to be the object of delivery and it therefore has to be moveable at the time of delivery. A moveable item can be moved from the seller to the buyer so the actual possession of the item is transferred from the seller to the buyer. Consequently, from getting the possession over said item, the buyer gains a physical control and a form of protection along with it. However, this is not enough. A legal control and protection is needed for the sale to be completed, which is why the transfer of the property in the item is also a requirement.

The property in the item has to be transferrable¹⁴. A third party’s intellectual property right, such as for example a copy right, does not prevent the seller from transferring the property in an individual copy of a book or a photo to the buyer. It should be kept in mind that according to Art 30 CISG the seller has to transfer the property “*as required by the contract*”. The parties are free to derogate from this obligation in their contract according to Arts 6 and 42 CISG. This is usually the practical solution when the object of the contract contains an intellectual property right, which in most cases is not intended to be transferred to the buyer at the conclusion of the contracts. As long

¹² Diedrich, Frank: “*The CISG...*”, *op. cit.*, p. 2

¹³ *Ibid.*

¹⁴ Diedrich, Frank: “*The CISG...*”, *op. cit.*, p. 3

as the buyer agrees to his or her property right being restricted by a third party's intellectual property right, the CISG will be applicable. As a consequence, the buyer will enjoy the protection of the provisions in the Convention. The effect an intellectual property right can have on a contract of sale is elaborated further below.

The legislative history

The intentions of the legislators when drafting the CISG can be revealed by studying the preparatory work also called "*travaux préparatoires*"¹⁵. As the CISG is a dynamic piece of legislation which makes it capable to adapt to changing circumstances of international trade, the intentions of the legislator can only be used in the interpretation of the CISG when combined with the other factors in the autonomous interpretation method.

Yet there is not much to discover by looking at the drafting process and the discussion on final Diplomatic Conference in Vienna in 1980¹⁶, as the term 'goods' was not up for debate. The CISG is based on the Hague Sale Convention, also known as the ULIS¹⁷, but the ULIS cannot be used as a source to the intentions of the legislators behind the CISG, as the two conventions did not involve the same draftsmen or the same countries¹⁸.

The intentions and goals of the Convention itself

The basic values of the CISG, as explicitly written in the Preamble, concerns the development of international trade "*on the basis of equality and mutual benefit*" and "*promoting friendly relations among States*".

Furthermore, Art 7(1) CISG seeks to endorse principles concerning the interpretation of the Convention where "*regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.*"

The international character of the Convention is promoted by excluding any domestic preconceptions and by focussing the interpretation on the specific purpose of the term in question within the context of the CISG¹⁹.

The promotion of uniformity in the Convention's application is primarily addressed to the national courts. When applying the CISG, the national courts have to take decisions of courts in other Contracting States into account to achieve a similar and hopefully identical interpretation of the CISG all over the world²⁰. It should be kept in mind when studying foreign decisions that the arguments must be carefully analysed and mere referencing should on the other hand be avoided²¹. For the knowledge of other courts' decisions to be distributed, the information system 'CLOUT' was established²². To further the task of promoting a uniform application, the Advisory Council on the CISG (CISG-AC), consisting of scholars taking up controversial topics and analysing cases and academic research in a critical manner, was established, and these are now considered as persuasive authority²³.

¹⁵ *Ibid.*

¹⁶ United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March – 11 April 1980, Official Records

¹⁷ Convention relating to a Uniform Law on the International Sale of Goods (ULIS), 1964, The Hague

¹⁸ Diedrich, Frank: "*The CISG...*", *op. cit.*, p. 2

¹⁹ Schlectriem & Schwenger: *op. cit.*, p. 124

²⁰ *Ibid.*

²¹ *Ibid.*, p. 126

²² *Ibid.*, p. 125

²³ Schlectriem & Schwenger: *op. cit.*, p. 125

'Good faith' is a broad term and it is therefore difficult to determine the standard of the good faith that needs to be observed. As there is no autonomous source of interpretation of the term, the characterization of 'good faith' in international trade is left up to the national courts as well. As Art 7(1) CISG is about "*the interpretation of the Convention*" the observance of good faith is only regarding the interpretation of the Convention itself and the requirement does thereby not directly concern the interpretation of the contractual relationship of the parties²⁴. However it may affect the contract indirectly.

The judgements of the courts in Contracting States and scholarly writings

The decisions made by national courts regarding the national law of the country should, as an interpretation tool, be used with precaution. For this to have any sort of merit in the interpretation of the CISG, it is essential that there is a substantial ground of comparison between the countries which judgements will be analysed. A straightforward solution would be to study the common law countries separate from the civil law countries. Another justifiable option would be to compare countries with a common focus on a particular area of law²⁵ if all of these countries pursue an interpretation in the light of the CISG.

Conclusion of the autonomous interpretation

Professor Frank Diederich came to the conclusion after using the autonomous interpretation method that "*any item that can be commercially sold and in which property can be passed on and which is not explicitly excluded from the CISG's sphere of application by virtue of Art 2 CISG can be the subject matter of a contract of sale*"²⁶. After careful consideration, this way of defining a good is appropriate. The characteristics are easy to understand and straightforward to apply to the item in question, and most importantly it fits within the provisions and the intention of the Convention so the protection of the contractual parties is secured.

Interpretation of national sales laws

The common law approach

The UK applies a common law approach and is not a CISG Contracting State. The reason why it is interesting to look at the UK is because it can provide in insight in how countries, which are not influenced by the CISG, defines 'goods'. The original definition of 'goods' in the Sale of Goods Act 1893 was "*all chattels personal other than things in action and money*". Scotland took a different approach and defined 'goods' as "*all corporeal moveables except money.*"²⁷ This is more similar to the civil law approach which will be discussed further below.

Traditionally, the distinction was drawn between a chose in possession and a chose in action²⁸. A chose, or now more commonly known as a thing, in possession is a thing of which one has possession, as the words indicate. A thing in action is a right to recover for example a debt of money by taking action²⁹. Both situations were originally included in the understanding of a 'personal chattel' but things in action were expressly excluded from the definition of 'goods'³⁰.

No changes in the definition of 'goods' have been made in the current Sale of Goods Act from 1979. There is a common understanding amongst most common law jurisdictions that an item

²⁴ *Ibid.*, p. 128

²⁵ Diederich, Frank: "*The CISG...*", *op. cit.*, p. 4

²⁶ *Ibid.*

²⁷ Sale of Goods Act, 1893, s. 62

²⁸ Schwenger, Hachem & Kee; *Global Sales and Contract Law*, Oxford University Press, 2012, p. 97

²⁹ *Ibid.*

³⁰ *Ibid.*

must have two characteristics in order for them to be considered as ‘goods’. These characteristics are tangibility³¹ and moveability.

Tangibility is simply defined as something that is capable of being perceived by the senses. The span of the interpretation applied to the phrase ‘perceived by the senses’ is up for discussion among scholars. Some believe it should be understood in a very literal way as something that can be seen, touched and carried. Others is of the opinion that as long as it can be perceived by the unaided senses, which do not necessarily mean that it has the ability to be touched, it should still be considered as a tangible item.

Moveability is connected to the requirement of delivery, which can be defined as voluntary transfer of possession from one person to another³². To the contrary, an item that is not moveable cannot be transferred from the seller to the buyer without losing its ability to be exclusively possessed³³. What also distinguishes a moveable item is the possibility of deleting or removing the item from the seller or the source³⁴ as the buyer should have the right to exercise absolute control over the good. The absolute control is what characterizes a property right.

The approach in the US is different from the approach in the UK, even though the US also has a common law legal system. The reason for this could be that the US is a CISG Contracting State and their approach has therefore been influenced by the Convention through the ratification of the CISG provisions. The Uniform Commercial Code (UCC) is applicable in most American States today. The definition of goods expressed in UCC § 2-105(1) refers to moveable items but has no requirement of tangibility³⁵.

The civil law approach

Most civil law jurisdiction tends to focus merely on the notion of moveability and not on tangibility. In fact, most civil law countries have acknowledged intangibles to fit within the definition of a ‘good’ and thus intangibles can be the object of a contract of sale³⁶. The question naturally arising from this controversy is whether tangibility should even matter when classifying an item as a ‘good’.

According to the authors I. Schwenger, P. Hachem and C. Kee, there are three possible approaches to justify sales law provisions to apply on intangible goods³⁷. Firstly, it can be argued that the term ‘goods’ is interpreted to include intangibles. Secondly, certain intangibles are expressly mentioned to be the object of a sales contract within the scope of the sales law in question. Therefore, tangibility should not be essential when defining a ‘good’. Thirdly, the focus is moving towards whether the object can fit within the scope of the sales law in the contrary to the earlier focus which concerned whether the object can fit within the terminology of ‘goods’. Following this third approach, the authors suggested that whether an item could be considered as a ‘good’ should not depend on semantics but it should rather be a matter of whether the respective law provides appropriate remedies for the object of the contract³⁸ regardless of whether the ‘good’ is tangible or moveable. The discussion will continue in the chapter concerning the appropriateness of the CISG.

³¹ Schwenger, Hachem & Kee: *op. cit.*, p. 97

³² Green, Sarah & Saidov, Djakhongir: *op. cit.*, p. 4

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ Lookofsky, Joseph: *op. cit.*, p. 17, note 38

³⁶ Schwenger, Hachem & Kee: *op. cit.*, p. 104

³⁷ Schwenger, Hachem & Kee: *op. cit.*, p. 103

³⁸ *Ibid.*, p. 98

The definition of a ‘good’

After a thorough analysis of the different approaches to defining the object of a sales contract, also commonly termed as ‘goods’, it seems the overall essential criteria is moveability. The item in question must be capable of physically moving from the seller to the buyer, which is connected with the requirement of delivery. Moveability is essential because the intention of the parties of a sales contract must be to transfer the property in the good to the buyer. Thus, the buyer needs to be able to exercise absolute control over the good. Physical control is gained when the good is in the buyer’s possession, but legal control is gained when the property of the good is transferred to the buyer either through delivery or through the handing over of documents. When having both the physical and legal right to the good, the buyer can exercise the absolute control. The fact that an intellectual property right exists in the good may restrict this absolute control, but as long as the buyer accepts this limited use, it will still be considered as a contract of sale. The same argument is valid concerning the capability of physically removing the good from the seller, as a copy of a book can be removed, but the actual book and the copyrights contained in it, will remain with the author.

Tangibility has been proved to not be of the essence when defining ‘goods’ in international sales today, as the examples of intangibles being perfectly capable of being the object of a contract of sale is rising, and most importantly, as the CISG does not explicitly excluded intangibles from its application.

In conclusion, when regarding the applicability of the CISG, ‘goods’ can be defined, as Professor Frank Diedrich put it, as “*any item that can be commercially sold and in which property can be passed on and which is not explicitly excluded from the CISG’s sphere of application by virtue of Art 2 CISG*”³⁹.

What is software?

The definition of ‘software’ is a collection of instructions and data, also known as programs, that allows computers to operate⁴⁰. Software is designed to provide machine-readable instructions to a computer-processor⁴¹.

There are different types of software which should be kept separate.

First, the distinction between standard, bespoke and customized software must be made. Standard software is an off-the-shelf product which meets the requirement of a large number of users⁴². To the contrary, bespoke software is specifically made to meet the requirement of one particular user⁴³. Customized software is the option in the middle of the two former types as it is an altered version of the standard software which meets the requirements of one user more closely than the standard software would have⁴⁴.

Secondly, there is a difference between system software and application software. System software organizes the way in which the hardware operates which is usually supplied by the hardware manufacturer as standard software⁴⁵. Application software performs the function required by the user

³⁹ Diedrich, Frank: “*The CISG...*”, *op. cit.*, p. 4

⁴⁰ Green, Sarah & Saidov, Djakhongir: *op. cit.*, p. 1

⁴¹ Lookofsky, Joseph: *op. cit.*, p. 19

⁴² Reed, Chris: *Computer Law*, 7th Edition, Oxford University Press, 2011, p. 47

⁴³ *Ibid.*

⁴⁴ *Ibid.*, p. 47-48

⁴⁵ *Ibid.*, p. 48

and this type of software can be supplied to the user as all three of the abovementioned types of software⁴⁶.

According to Professor Hiroo Sono, when speaking about ‘software’ as an object of a sale, it can mean three things⁴⁷. Firstly, it can mean the copyright in the software, when the author of the software sells the software to a buyer. Secondly, it can mean a sale of the tangible medium in which the software is obtained and the buyer is purchasing the property in the copy of the software, but not the copyright. Finally, ‘software’ can mean the information itself which is not capable of being owned but can only be copied and duplicated⁴⁸. Consequently the use and possession of the information cannot be sold but merely licenced.

The Supreme Court of Louisiana in the case of *South Central Bell Telephone Co v Sidney J Barthelemy* took the opposite stand on the matter⁴⁹. The judges’ opinion was that software is not merely an idea or knowledge. The corporal body of software takes form of massive strings of bits⁵⁰. The purchaser of computer software receives “*a certain arrangement of matter*” that makes the computer perform a desired function.

When putting this information into the context of the interpretation of the CISG it is possible to analyse and determine whether software can be considered as ‘goods’.

Is software a ‘good’?

The approach of the CISG

The CISG was drafted in 1980 in Vienna⁵¹. This was a time where the mere idea of trading software was unimaginable. Software was a concept most people did not know the meaning of. The software industry and technology in general was not nearly as evolved as it is today and the drafters of the CISG had no chance of predicting the impact the technological development would have on today’s international trade. This is the reason why the Convention’s applicability regarding contracts of software was not a subject of discussion in the drafting process. As the CISG is a dynamic piece of legislation created to adapt to changed circumstances, it is possible to find the answer of whether software can be considered as a ‘good’ in the Convention itself by applying the result of abovementioned autonomous interpretation method.

The Convention requires that an item must be moveable in order to be considered as a ‘good’, as it must be able to be the subject of delivery, cf. Art 30 CISG.

Software is capable of being delivered from the seller to the buyer for example via the internet or contained on hardware such as a computer disc. The possibility of deleting the good from the source is also what characterizes moveability⁵². This is connected with the fact that when a good is delivered, it is in the buyer’s possession and thereby in his or her control. This control also shows in the buyer’s property right over the good which the seller is obligated to transfer along

⁴⁶ Reed, Chris: *op. cit.*, p. 48

⁴⁷ Sono, Hiroo: *The Applicability and Non-Applicability of the CISG to Software Transactions*, Simmonds & Hill Publishing, 2008, p. 2

⁴⁸ Sono, Hiroo: *op. cit.*, p. 2

⁴⁹ No. 94-C-0499: *South Central Bell Telephone Co. v. Sydney J. Barthelemy*, Supreme Court of Louisiana, 17 October 1994

⁵⁰ Green, Sarah & Saidov, Djakhongir: *op. cit.*, p. 3

⁵¹ Lookofsky, Joseph: *op. cit.*, p. 1

⁵² Green, Sarah & Saidov, Djakhongir: *op. cit.*, p. 4

with the delivery of the good, cf. Art 30 CISG. Software is capable of being deleted from hardware without damaging or altering it, and the copy of the software is capable of ownership even though the original software program remains with the seller or the owner of the intellectual property right.

As summarized above, Professore Frank Diedrich defines a ‘good’ in the context of the CISG as any item that can be commercially sold and which has a transferable property right⁵³. Professor Diedrich sees no reason to limit the CISG’s sphere of application to only tangible items as the medium in which the item is transferred should be irrelevant. Thus, software, even in intangible form, can be considered as ‘goods’ and contracts concerning software are thereby governed by the Convention. Professor Diedrich went as far as to say that excluding computer software “*would be the same to exclude beer from the sphere of application if it is being sold in a bottle and from the tap.*”⁵⁴ The fact that the author’s intellectual property right is connected to the computer software does not exclude the possibility of categorizing the software as a ‘good’ and the transaction as a sale according to Art 1(1) CISG⁵⁵.

Professor Hiroo Sono is convinced that software is simply information which by nature is intangible⁵⁶. Professor Sono agrees that software could fit within the definition of ‘goods’ in the Convention even though it is intangible. On the other hand, Professor Sono is of the opposite opinion as Professor Diedrich as he believes that the CISG should not apply on contract of sales regarding software, but not because software does not fit the definition of a ‘good’, but because software as information cannot be sold but only licenced. This point of view will be discussed further below.

The growing amount of precedent on the area suggests that software should be considered as ‘goods’ in the context of the CISG regardless of whether the software is sold on a disk or downloaded from the internet⁵⁷.

The leading case on the area is *UsedSoft GmbH v Oracle International Corpn*⁵⁸ presented to the Court of Justice of the European Union. Oracle is developing and licencing software to customers who in exchange for a one-time fee receives a non-exclusive, non-transferable right to use the software for internal business purposes and for an unlimited period of time⁵⁹. The software is downloaded directly from the Oracle’s website⁶⁰. UsedSoft is a company buying software licences from companies such as Oracle⁶¹ and then selling them to a third party who downloads the software directly from Oracle’s website. Oracle wanted to prevent this practice as they thought their intellectual property right in the software was being infringed and as the agreement specifically expressed that the licence was non-transferable⁶². The court considered Oracle’s distribution right to be exhaust when the copy of the program was downloaded from the internet by the second acquirer⁶³ as the copy was sold to UsedSoft and not merely licenced. This issue concerning contracts of sale versus licence agreements is discussed further below. It made no difference to the classification of a contract of sale whether the copy of the computer program was made available

⁵³ Diedrich, Frank: “*The CISG...*”, *op. cit.*, p. 4

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*, p. 6

⁵⁶ Sono, Hiroo: *op. cit.*, p. 2

⁵⁷ Lookofsky, Joseph: *op. cit.*, p. 21

⁵⁸ Case C-128/11: *UsedSoft GmbH v Oracle International Corpn*, Court of Justice of the European Union, 3 July 2012

⁵⁹ *Ibid.*, para 23

⁶⁰ *Ibid.*, para 21

⁶¹ *Ibid.*, para 24

⁶² *Ibid.*, para 28

⁶³ *Ibid.*, para 30

to the buyer by means of a tangible medium or by download from the internet⁶⁴. In conclusion, software can despite its intangible nature be the subject of a sales contract.

The case of *Corporate Web Solutions v. Dutch company and Vendorlink B.V.*⁶⁵ is a similar ruling from a Dutch court. The Canadian software company Corporate Web Solutions entered into an online software agreement with a Dutch buyer who downloaded the software program and later transferred it to the company Vendorlink⁶⁶. As the CISG should be interpreted with regard to its international character, the need to promote uniformity and the observance of good faith, cf. Art 7 CISG and the Preamble, the Court argued that the term ‘goods’ must be given a broad definition and thereby include intangibles⁶⁷. Thus the Convention was found to apply on software contained in a tangible medium as well as software downloaded from the internet.

According to Professor Lookofsky there are four main reasons for all courts to follow this approach when being met with the issue of classifying software⁶⁸. First, tangibility is not required by the CISG for an item to be a good and the requirement of moveability is met concerning contracts of software⁶⁹. Secondly, an intangible program is a real and functional thing and not merely information or the equivalent to virtual reality⁷⁰. Thirdly, the CISG is suitable for regulating sales of software⁷¹. This view is further discussed below. Finally, any intellectual property right such as a copyright is irrelevant when classifying software as a ‘good’. Even though the buyer cannot legally copy the program-copy without the copyright holder’s permission, the buyer still has the ownership of the program-copy of which his use is unlimited⁷².

The approach of national laws

Categorizing software is a modern problem every legal jurisdiction is facing.

As mentioned above, as far as the Sale of Goods Act in the UK is concerned, a ‘good’ should be moveable and tangible for the law to apply. Sir Ian Glidewell in the case of *St. Albans City and District Council v International Computers Ltd* took a very literal approach to tangibility and was of the opinion that for software to be a good, it has to be contained on a tangible medium, such as a computer disc⁷³. That would consequently result in a situation where a contract for the very same program downloaded onto the computer directly from the internet would not be governed by the Sale of Goods Act. Sir Ian Glidewell’s argument is based upon the thought that software must be contained on a physical medium such as a form of hardware for its instructions and commands to work.

The focus on tangibility when defining ‘goods’ led to the understanding in most common law jurisdictions that software can only be the subject of a sales contract when there is a tangible element in the contract⁷⁴.

⁶⁴ *Ibid.*, para 47

⁶⁵ CLOUT case 1586: *Corporate Web Solutions v. Dutch company and Vendorlink B.V.*, Rechtbank Midden, Netherlands, 25 March 2015

⁶⁶ CLOUT Abstracts No. 170, A/CN.9/SER.C/ABSTRACTS/170, 28 June 2016, p. 11-12

⁶⁷ *Ibid.*, p. 12

⁶⁸ Lookofsky, Joseph: *op. cit.*, p. 20

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² *Ibid.*, p. 20, note 64

⁷³ [1997] F. S. R. 251: *St Albans City and District Council v International Computers Ltd*, Court of Appeal, 26 July 1996, pp 11-12

⁷⁴ Schwenger, Hachem & Kee: *op. cit.*, p. 104

Judge Akenhead argued in the case of *The Mayor and Burgesses of the London Borough of Southwark v IBM UK Limited*⁷⁵ in 2011 that software in principle could be goods within the meaning of the Sale of Goods Act. A computer disc without software would still be a good despite the low value. The fact that it contains software should make no difference in that aspect. As the definition of goods is more inclusive than exclusive, software could fall under the scope of the Sale of Goods Act.

The courts in the US are uncertain about how to classify software as well. The Supreme Court of Louisiana in the case of *South Central Bell Telephone Co v Sidney J Barthelemy* did not agree on Sir Ian Glidewell's approach to tangibility. They thought it was a mistake to make a distinction between software and hardware, because the definition of tangibility should not be limited to what can only be perceived by the unaided senses⁷⁶. As software in their opinion has a corporal body consisting of bits, it is something that can be perceived by our senses. Thus software can be considered as a tangible good.

The United Nations Commission on International Trade Law's (UNCITRAL) Working Group on Electronic Commerce raised the question whether the sphere of application of the CISG should include intangible virtual goods⁷⁷. The Report recommended a development of rules to govern international transaction other than the traditional sales of moveable tangible goods. However, the Report did not come to a conclusion whether these new rules should include software and computerised information⁷⁸. In contrast, the Uniform Computer Information Transaction Act (UCITA) in the US attempted to introduce a separate uniform legal regime for "*computer information transactions*", cf. s. 103(a) UCITA. The definition of these transactions were described in s. 102(11) UCITA as "*an agreement or the performance of it to create, modify, transfer, or license computer information or informational rights in computer information*"⁷⁹. Thus the UCITA is applicable to agreements regarding e.g. photos, books and also software in electronic, computer-readable form⁸⁰. The UCITA was not popular amongst the States in the US which resulted in it only being passed in two States. The UCITA can therefore not be used as a precise guideline on how to deal with contracts for software, but it can be used as inspiration together with the CISG in how to handle the issue through an international uniform law⁸¹.

As mentioned above, civil law jurisdiction is more concerned with an item being moveable than it being tangible. Consequently, intangibles have been deemed to be the object of a contract of sale. As an example, goodwill and know-how are considered goods under Danish law⁸². However, the legal position is still not certain among all civil law jurisdictions, as a market analysis was not characterized as a good in the CLOUT Case 122 presented to a German Court⁸³.

Conclusion

Software will generally be considered as a good according to Art 1 CISG. Regardless of a software program's intangible nature, there is nothing within the CISG that limits the sphere of application to only tangible goods. The only limitations to the application of the Convention concerning the definition of 'goods' is found in Art 2 CISG, in the obligations of the parties according to Arts 30

⁷⁵ [2011] EWHC 549: *Mayor and Burgesses of London Borough of Southwark v IBM UK Ltd*

⁷⁶ No. 94-C-0499: *op. cit.*

⁷⁷ Diedrich, Frank: "*The CISG...*", *op. cit.*, p. 6

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² Lookofsky, Joseph: *op. cit.*, p. 19, note 54

⁸³ CLOUT Abstracts No. 9, A/CN.9/SER.C/ABSTRACTS/9, 7 June 1996, p. 3

and 53 and in the intentions of the parties, cf. Art 8 CISG. Furthermore, Art 7 CISG along with the Preamble requires a broad and autonomous interpretation of the Convention regardless of the national law's approach in the Contracting State. The main goal for the CISG as a uniform law is to further international trade and promote friendly relations among the Contracting States. Bearing in mind the magnitude of software transaction today, regard must be taken to make these transactions as smooth as possible for the contracting parties and the applicability of the CISG would help ease these agreements as the parties now have a legal certainty on an international level. The CISG is also a dynamic "living" set of rules which is drafted with the intention of it being able to adapt in the event of changing circumstances. When the CISG was drafted, the drafters had no chance of foreseeing how the international trade would evolve and this is the main reason why no considerations were made regarding software transactions. It would not be appropriate to limit the application of the Convention only to contracts which was predictable in 1980. The international trade market today is in desperate need of a legal certainty on this area and the CISG can provide exactly that. Software programs are considered as being included in the definition of 'goods', according to Art 1 CISG, unless the structure of the contract or the parties' intentions expressly say otherwise.

As the CISG has been found to apply on contracts for software, the applicability of national law will not be relevant unless the parties intentionally excludes the application of the CISG according to Art 6 CISG.

There is a tendency for legal systems with a common law approach to focus on tangibility which is a requirement, software cannot meet. Some scholars like Sir Ian Glidewell is of the opinion that the Sale of Goods Act in the UK can only govern a contract for software if it is retained on a tangible medium such as a computer disc. The US, which also applies a common law approach, agrees that a good must be tangible to fit within the definition of such, but the Supreme Court of Louisiana came up with the solution to apply a wide interpretation of the term 'tangibility'. By using such an interpretation they argued that because software consists of bits which make the hardware work as intended it is something perceivable by the senses. Software will with that argument be considered as a tangible good on which the sales law will apply.

In civil law legal systems tangibility is not an essential requirement for something to fit within the definition of 'good'. Moveability is in these countries more important, so the issue of contracts for software is not causing a lot of trouble or discussion because the legal position is straight forward.

A country like Scotland who applies a "mix" between the common law and civil law approach in general, uses the words "corporeal moveables" and not "personal chattels" as the rest of the UK when defining 'goods'. This indicates that Scottish law is leaning more towards the civil law approach on the matter where moveability is the essential characteristic.

The overall perspective on the area provides a picture of software being considered as 'goods' on an international as well as national level. Despite the different arguments, the end result is the same; Software is included in the definition of a 'good'.

The contract

Another crucial element for the CISG to be applicable is the contract of which the parties have agreed upon. The contract must fit within the definition of a sales contract. In the context of transactions of software, the dispute arises when the contract are considered a service contract or a

licence agreement, which is not governed by the Convention, rather than a contract of sale. In these situations national law will be the governing law⁸⁴.

Contract of sale

By looking at the sellers and the buyers obligations when performing as required by the contract, it is possible to excerpt the essentials of a sales contract from the perspective of the Convention.

The seller is obligated to deliver the goods and transfer the property in the goods to the buyer, cf. Art. 30 CISG, and the buyer must pay the price for the goods, cf. Art 53 CISG. According to Art 42(1) CISG *“the seller must deliver goods which are free from any right or claim of a third party based on industrial property or other intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware”*.

For a transaction to be classified as a contract of sale, property of the good must pass. The good has to be capable of being the subject of ownership before the property right can be transferred. Having the property over a good is equal to having absolute control. The good must usually be in the possession of the one wishing to exercise this control.

One of the decisions on this area that dates furthest back is from the 8th of February 1995 in the Regional Court Munich/Landgericht München in Germany⁸⁵. The seller was a manufacturer and sole owner of a computer software program called Graphiplus. The program was installed at the buyer’s location. Afterwards, the contract was sent from the seller to the buyer and buyer stated that the contract was unacceptable. The buyer had in the meantime decided not to use the program. The program was simultaneously sent back to the seller. The seller argued that the buyer was obligated to pay the price for the program. The buyer pled that the claim of the seller should be dismissed, as a final contract had not come into existence between the parties and they argued avoidance of the contract as a result of defective goods as well. The Court ruled in favour of the seller and pointed out that *“according to the opinion of the Court, the sale of standard software for an agreed price is a “contract of sale of goods” within the meaning of Art. 1 CISG”*.⁸⁶

Thus, the judgement of the German Court can be used as a persuasive authority in the context of situations regarding a permanent transfer of standard software for a single price⁸⁷.

The next case was presented to the Dutch Court of Appeal Hertogenbosch/Gerechtshof te’s on the 19th of November 1996⁸⁸. The buyer purchased an all-inclusive data processing software package from the seller. After having paid half of the price for the program, the buyer ceased any further payment because of defects in the program⁸⁹. Without any reference to the application of the CISG on intangible goods, the Court focussed on the legal issues regarding the conclusion of the contract and therefore applied Arts 18 and 19 CISG⁹⁰. As the Court did not deal with issue of applying the Convention to a contract of software, it could indicate that there was a general understanding that a contract regarding software is not necessarily different from a traditional contract of sale⁹¹. However, the decision cannot be used as a persuasive authority as the issue is not directly dealt with.

⁸⁴ Lookofsky, Joseph: *op. cit.*, p. 19

⁸⁵ CLOUT Case 131: District Court of Munich (Landgericht), 8 HKO 24667/93,

⁸⁶ *Ibid.*, p. 4

⁸⁷ Diedrich, Frank: *“The CISG...”*, *op. cit.*, p. 7

⁸⁸ 770/95/HE: *Princen Automatisering Oss B.V. v. Internationale Container Transport GmbH*, Court of Appeal Hertogenbosch/Gerechtshof te’s-Hertogenbosch, The Netherlands, 19 November 1996

⁸⁹ Diedrich, Frank: *“The CISG...”*, *op. cit.*, p. 8

⁹⁰ Diedrich, Frank: *“The CISG...”*, *op. cit.*, p. 8

⁹¹ *Ibid.*

License agreements

A contract of sale is when the buyer pays a price, receives the software and retains it. In the situation where the buyer makes several regular payments in order to use the software without retaining it after each payment, the contract is to be regarded as a licence agreement⁹². The element separating the two situations is the intention of the parties to transfer property.

The abovementioned case *UsedSoft GmbH v Oracle International Corpn*⁹³ presented for the Court of the European Union is the leading case on this area. The case was reviewed with regard to whether software can be considered a good despite its intangible nature. When having to classify a contract as either a licence agreement, which is not governed by the CISG, or a contract of sale, this case has much to offer in regard to interpretation tools. To summarize, the wording of Oracle's licence agreement is as following: "With the payment for services you receive, exclusively for your internal business purposes, for an unlimited period a non-exclusive non-transferable user right free of charge for everything that Oracle develops and makes available to you on the basis of this agreement."⁹⁴ UsedSoft is a company buying software licences from Oracle⁹⁵ and then selling them to a third party who then downloads the software directly from Oracle's website⁹⁶. Oracle argued that UsedSoft violated their intellectual property right as the user licences were "non-transferable". The question presented before the court was whether the copy of the program was licensed or if it was in fact sold. This distinction is of vital importance as Oracle's distribution rights over the copy would be exhausted in the situation of a sale, as all rights should be transferred to the buyer. To prevent the seller from undermining the provisions concerning exhaustion of rights, the mere use of the word 'licence agreement' is irrelevant if the agreement is actually a contract of sale⁹⁷. The Court defined a 'sale' as "an agreement by which a person, in return for payment, transfers to another person his rights of ownership in an item of tangible or intangible property belonging to him."⁹⁸ When looking at the licence agreement, it was intended by Oracle as the holder of the intellectual property right to make the copy of the computer program permanently available and usable for the buyer UsedSoft in return for the payment of a one-time fee equivalent to the economic value of the copy⁹⁹. Thus, this agreement involved a transfer of the right to ownership¹⁰⁰ and it was therefore classified as a contract of sale.

The CISG was not the governing law in the case of *UsedSoft GmbH v Oracle International Corpn* as there was no international element in the parties' agreement as both parties were German companies. Nevertheless, the arguments in the case could be used as a persuasive authority in the interpretation of the CISG. An example of this is the case of *Corporate Web Solutions v. Dutch company and Vendorlink B.V.* where the Dutch court found – in line with the "UsedSoft"-decision – that the parties' agreement was not a licence agreement but instead a contract of sale despite the mere description of the agreement¹⁰¹. When classifying the agreement, the Court interpreted Art 8(3) CISG, where the intention of the parties or the understanding of which a reasonable person

⁹² Schwenger, Hachem & Kee: *op. cit.*, p. 105

⁹³ Case C-128/11: *op. cit.*

⁹⁴ *Ibid.*, para 23

⁹⁵ *Ibid.*, para 24

⁹⁶ *Ibid.*, para 26

⁹⁷ Case C-128/11: *op. cit.*, para 49

⁹⁸ *Ibid.*, para 42

⁹⁹ *Ibid.*, para 45

¹⁰⁰ Case C-128/11: *op. cit.*, para 46

¹⁰¹ CLOUT Abstracts No. 170: *op. cit.*, p. 12

would have had with regard to said contract, is the determining factor¹⁰². As the buyer was intended to have the right to use the software unlimited in return for a single payment, the parties intended to enter a contract of sale¹⁰³.

In the UK-case of *The Mayor and Burgesses of the London Borough of Southwark v IBM UK Limited*¹⁰⁴ Judge Akenhead established similar considerations when determining whether the Sale of Goods Act applies. First, it has to be considered whether there was an intention to transfer the property of the goods. Secondly, it has to be determined whether the goods were actually being sold¹⁰⁵. In this specific case IBM was supplying software to Southwark under the licence terms of Orchard. Even though there was a money consideration, there was no transfer of property because Southwark was only given a right from Orchard through IBM to use the software. The property of the software remained with Orchard, which consequently gave Orchard the right to request Southwark to return or destroy all copies, forms and parts of the software covered by the licence. Therefore, Southwark was never in absolute control and thus, the software was not sold.

Shrink-wrap licencing

As the most commonly known situation, software contains a copyright. The use of software can therefore require the grant of a licence¹⁰⁶. The licence gives the buyer the right to use the software without owning it. Through a method such as “shrink-wrap licencing” the copyright holder, which is usually the owner and creator of the original software, retains the right to impose restrictions on the buyer’s use of the copy of the software even after it is sold¹⁰⁷.

“Shrink-wrap licencing” provides the opportunity for the software owner to enter a “direct” contract with the buyer even when the software is purchased through a distribution chain¹⁰⁸. A shrink-wrap licence consists of terms set out on the outside of the packaging, visible through clear plastic film, and the terms are deemed to be accepted if the packaging is opened¹⁰⁹. The advantages of using this method are that the copyright holder becomes a contractual party and therefore gains the benefits of such, even when the “original” contract of sale was between the seller and the buyer. By using the case of *UsedSoft v Oracle* as an example, Oracle would be the copyright holder and UsedSoft would be the seller. Oracle sold the software licence to UsedSoft and had after the sale no right to impose restrictions on the use of the software as it was now UsedSoft’s property. The Court consequently found that UsedSoft had the right to distribute the software to the end buyer. The idea is that if Oracle had used shrink-wrap licencing, the end buyer would have to agree to Oracle’s terms when purchasing the software licence from UsedSoft. This way Oracle would have had a “direct” contract with the end buyer and Oracle would still have control over that copy of the software. This situation might therefore be considered a licence agreement and not a contract of sale. To clarify, Oracle sold their software online which would make the shrink-wrap licencing impossible as it requires a physical copy.

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ [2011] EWHC 549: *op. cit.*

¹⁰⁵ *Ibid.*, p 29

¹⁰⁶ Reed, Chris: *op. cit.*, p. 48

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*, p. 50

¹⁰⁹ *Ibid.*

The “direct” contract which would be made between the copyright holder and the buyer has intentionally been put in quotation marks because there is some doubt whether the shrink-wrap licencing method is enforceable¹¹⁰.

One problem is whether there has actually been entered a valid contract between the copyright holder and the buyer. A valid contract requires an offer, an acceptance and consideration¹¹¹. The requirements of an offer and consideration is met when using shrink-wrap licencing but the question is whether the buyer has validly accepted the offer by breaking the plastic and opening the package. It is a commonly known legal principle, not only in the UK but in all legal systems, that the acceptance of an offer should be communicated to the offeror¹¹². This is also expressed in Art 18(1) CISG but where there to the contrary is no general duty to give an actual reply to an offer¹¹³ but silence or inactivity does however not in itself amount to an acceptance. An offeror cannot on behalf of the end buyer waive the requirement of the communication of the acceptance when it regards enforcement against the buyer. It is also undesirable to force a buyer to enter a contract by an ultimatum¹¹⁴. The buyer has already agreed upon a contract with the seller and when the software is delivered the buyer has to agree upon another set of term from a third party before even being able to use the software. If the buyer cannot agree upon the terms, the software must be returned, and the buyer is left without a software program. That must be considered as a very intrusive way of doing business. Thus, the enforceability of a shrink-wrap licence agreement with the absence of a clear acceptance from the buyer is uncertain¹¹⁵.

Another issue consists of the doubt of whether the doctrine of privity in contract prevents the enforcement of a shrink-wrap licence¹¹⁶. This is a common law principle which provides that only parties of the contract can enforce their rights and benefit from the contractual agreement. Consequently, a third party, such as a copyright holder, cannot impose obligations upon the parties or enforce shrink-wrap licence terms without a direct contract with the end buyer. The civil law approach is different because of the principle of third party beneficiaries. The third party’s right to impose restrictions on the “original” parties can be deduced from the contract when this is agreed upon by the “original” parties.

The Scottish case *Beta Computers (Europe) Ltd v Adobe Systems (Europe) Ltd*¹¹⁷ is a perfect example of this particular dispute. It should be kept in mind that Scotland along with the rest of the UK is not CISG Contracting States, which is why the case cannot be used for the interpretation of the CISG but it will be used as a comparison on how to deal with this specific problem.

Adobe bought a standard software package from Beta which was produced by a third party, Informix. When Adobe received the package it showed that the software was subject to a strict end user licence. The conditions, which could be read through the wrapping, stated: “Opening the Informix S.I. software package indicates your acceptance of these terms and conditions”¹¹⁸. Adobe returned the package to Beta unopened, but Beta would not accept the return as they were of the opinion that they had delivered what was ordered¹¹⁹. Therefore, Beta sued Adobe for the payment

¹¹⁰ *Ibid.*

¹¹¹ Reed, Chris: *op. cit.*, p. 50

¹¹² *Ibid.*

¹¹³ Lookofsky, Joseph: *op. cit.*, p. 57

¹¹⁴ Reed, Chris: *op. cit.*, p. 50

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

¹¹⁷ 1996 S.L.T. 604: *Beta Computers (Europe) Ltd v Adobe Systems (Europe) Ltd*, Outer House, 14 December 1995

¹¹⁸ 1996 S.L.T. 604: *op. cit.*, p. 1

¹¹⁹ *Ibid.*

of the price¹²⁰. The Court held that the contract was not completed before the buyer had seen and accepted the terms in the shrink-wrap licence. As Adobe did not accept the terms or opened the package but returned the package instead, it was found that the contract had not been concluded¹²¹. Furthermore, the Court specified that if Adobe had accepted the shrink-wrap licence terms by breaking the seal, then it would have enabled Informix to enforce those terms as a third party beneficiary¹²² according to the Scottish doctrine of *jus quaesitum tertio* (Latin: *right on account of third parties*¹²³). Finally, the Court held that the acceptance of the licence terms were not enough to constitute an individual contract between Adobe and Informix separate from the original agreement between Adobe and Beta¹²⁴.

The Scottish approach is very similar to the civil law approach on the matter and Scots law thereby distances itself from the common law approach used in the rest of the UK. To accommodate the issue, the Contracts (Rights of Third Parties) Act 1999 was drafted¹²⁵. A third party will hereafter be entitled to enforce a term of the contract of other parties if one of the two requirements is met, cf. s 1(1)(a) and (b).

The obligation of the seller according to Art 42 CISG

To refresh the facts with regard to the CISG, the seller has an obligation to “*deliver goods which are free from any right or claim of a third party based on industrial property or other intellectual property*”, cf. Art 42 CISG, unless the buyer knows and accepts the third party’s intellectual property right as a part of the contract of sale between the seller and the buyer. The knowledge of an additional shrink-wrap licence agreement gained upon the delivery would be a breach of contract as the seller would not have fulfilled the obligation in Art 42 CISG.

Thus, an intellectual property right in a good such as software does not exclude CISG from governing the contract according to Art 42 CISG, as long as the buyer has been made aware of the fact that the good will be sold with the intellectual property right of the author still remaining.

Another situation is if the seller is the copyright holder. If the seller is the author and the owner of the intellectual property right in the good, the seller will at a starting point have an obligation to transfer all property in the good to the buyer, including the intellectual property right, cf. Art 30 CISG¹²⁶. The parties have the right to deviate from this obligation according to Art 6 CISG by either modifying the contract or entering into a licence agreement. The solution of entering a licence agreement instead of a contract of sale has its pros and cons regarding the buyer. The CISG is protecting the buyer from having delivered goods that does not conform with what was agreed upon in the contract, cf. Art 35 CISG. As the CISG does not apply on a licence agreement, the buyer will not have the advantage of such a protection¹²⁷. However, a similar protection could still be included in the licence agreement as long as both parties agree. To obtain an intellectual property right is a costly affair and the buyer would be spared from this extra expense if the seller did not have the obligation to transfer the intellectual property right along with the software¹²⁸.

¹²⁰ *Ibid.*

¹²¹ Reed, Chris: *op. cit.*, p. 51

¹²² *Ibid.*

¹²³ Oxford Reference: <http://www.oxfordreference.com/view/10.1093/oi/authority.20110803100027511>

¹²⁴ Reed, Chris: *op. cit.*, p. 51

¹²⁵ *Ibid.*

¹²⁶ Diedrich, Frank: “*The CISG...*”, *op. cit.*, p. 7

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

Professor Hiroo Sono also distinguishes between the situations where the seller is a retailer and where the seller is the copyright holder. Professor Sono argues that the CISG would apply to the typical sales contract, where the owner of a physical copy of standard software sells it to the buyer, who then gets the full property right over the physical copy. However, the use of the software is restricted by the intellectual property right¹²⁹. In another situation where the seller is the owner of the intellectual property right and by that right are able to impose other restrictions to the use of the software, Professor Sono would characterize this as a licence agreement of which the CISG does not apply, cf. Art 3(2) CISG¹³⁰, as the preponderant part of the obligations of the seller would then consist in supply of labour or other services. The reasoning behind this assumption is, as discussed in the section above, that the intention of the parties, when the seller is the author, would unlikely be to transfer the full property right including the intellectual property right to the buyer.

A response to Professor Sono's way of arguing is one of Professor Michael G. Bridge: "*To supply goods in one form or another is to sell them*"¹³¹. He continues by arguing that the only reason for a transaction to be excluded from the CISG is if a significant number of features make it unsuitable for inclusion¹³². Another argument against Professor Sono's reasoning is that the economic reality of the transaction, which is a matter of sale, should be the essential element when determining the application of the CISG¹³³. However, Professor Bridge doubts that such a functional reasoning could take place in the national courts as this method of legal reasoning is not broadly adopted yet¹³⁴.

Mixed contracts

The most common contracts to stumble upon are contracts of sale including elements of other types of contracts¹³⁵. The seller is thereby obliged to not only deliver the goods and transfer the property in the good to the buyer but also to provide a form of service to the buyer. Art 3 CISG determines in which situations these contract will still be considered sales contracts governed by the Convention. One of the question arising hereafter is: Should such a contract be considered in general as one single mixed contract or should the contract be split up into two parts where the laws governing contract of sale is applicable on one part and where the laws governing contracts for the supply of labour or other services applies on the other part?

The analyses below start with the examination of Art 3(2) CISG and afterwards moves on to Art 3(1) CISG. This is a deliberate choice. The Art 3(2) CISG excludes contracts for the supply of services from the Convention's sphere of application. This is determined by considering a preponderant part of the obligations in the contract to be the supply of services. Art 3(1) CISG includes contracts for goods to be manufactured or produced unless the buyer undertakes to supply a substantial part of the materials. The reason behind this can be referred to Art 3(2) CISG, as a contract for a good to be manufactured where the buyer supplies a large part of the materials, the preponderant part of the seller's obligations would consist in the supply of a service.

¹²⁹ Sono, Hiroo: *op. cit.*, p. 3

¹³⁰ *Ibid.*

¹³¹ Bridge, M. G.: *The International Sale of Goods*, 3rd Edition, Oxford University Press, 2013, p. 487

¹³² *Ibid.*

¹³³ *Ibid.*

¹³⁴ *Ibid.*

¹³⁵ Schwenzler, Hachem & Kee: *op. cit.*, p. 115

Art 3(2) CISG: Contracts for the supply of labour or other services

A service contract is usually defined as a continuous relationship of interaction between the parties. Services are not capable of being stored, and when determining whether the contract is fulfilled or not, the focus is on the performance and not on the qualifications of an item¹³⁶.

The prevailing position tends to be that a contract regarding standard software is classified as a sales contract¹³⁷. The situation where the software is customized to meet the requirements of one specific buyer is regulated in Art 3(1) CISG. If the software is standard but has been adjusted to a certain degree to meet the specific needs of the buyer, there is a higher amount of uncertainty regarding whether the contract will be considered as a sales contract or a service contract. In such a situation Art 3(2) CISG will be of relevance.

When discussing mixed contract consisting of elements of sale as well as service, legal jurisdictions take very different approaches regarding the applicable law on said contracts. Some countries view this as a choice between either the sales law or the law governing service contracts, but never both, and other countries like the US is applying both laws to the contract by distinguishing between the sales elements and the service elements of the contract¹³⁸.

The most popular approach to this issue is choosing either sales law or the law governing service contracts with regard to the weight of the respective sales and service obligations between the parties¹³⁹. It is essential to identify whether the substantial part of the contract is a service obligation. This can be done by using the relative economic value test along with taking consideration to factors such as the parties' intentions and characterization of the contract¹⁴⁰.

As expressly written in Art 3(2) CISG the Convention is using the latter approach. If the preponderant part of the obligations of the seller consists in supplying labour or other services, the Convention does not apply. A 'preponderant part' has been interpreted as if the service obligation exceeds 50 percent of all obligations. In these situations, national law would be governing the contract and not the CISG¹⁴¹.

Art 3(1) CISG: Contracts for the supply of goods to be manufactured or produced

According to Art 3(1) CISG the Convention are applicable on contract of goods to be manufactured or produced unless the buyer undertakes to supply a substantial part of the materials necessary for the manufacturing.

In the situations where the software is for example customized to one specific buyer, it can be considered as a manufactured good of which Art 3(1) CISG would determine the applicability of the Convention. Providing specifications or plans should not be considered as providing materials in the sense of Art 3(1) CISG, as Art 65 CISG expects the buyer to specify "the form, measurement or other features of the goods"¹⁴². Thus, providing plans and ideas for the structure and build-up of the software would not be considered as providing a substantial part of the materials and the CISG would in that situation be the governing law..

¹³⁶ Green, Sarah & Saidov, Djakhongir: *op. cit.*, p. 5

¹³⁷ Schwenzer, Hachem & Kee: *op. cit.*, p. 104

¹³⁸ *Ibid.*, p. 119

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

¹⁴² Bridge, M. G.: *op. cit.*, p. 483

The traditional approach is to determine the importance of the efforts necessary for the production. In civil law jurisdictions this approach is usually expressed by classifying a contract for manufacturing standard goods as a sales contract whereas the manufacturing of individually tailor-made goods is considered contracts for the supply of labour and other services¹⁴³. Common law countries have adopted similar approaches, as for example the US is using the predominant-factor test¹⁴⁴ when determining whether the contract is subject to Art 2 UCC, where features such as the ‘product’ itself, the way the contract is expressed and terms of payment is taken into consideration.

The modern approach focusses more on the outcome of the contract rather than the substance. With this approach it depends entirely on whether and to what extent the buyer has provided materials for the manufacturing of the goods¹⁴⁵. The civil law systems as well as the CISG are currently employing this modern approach¹⁴⁶. The preferred take on the approach by the common law jurisdictions is expressed through the rule “*if the contract is intended to result in transferring for a price from B to A a chattel in which A had no previous property, it is a contract for the sale of a chattel*”¹⁴⁷.

To summarize, when the seller is providing the materials for the manufacturing of the goods, the contract is a sales contract.

When the buyer supplies the materials it is essential to determine whether the buyer’s contribution constitutes a substantial part of the materials necessary for the manufacture¹⁴⁸. If that is the case, then it would be considered a contract for the supply of labour or other services. To use the words of the rule in *Lee v Griffin*, the contract will not be intended to transfer a chattel from B to A in which A had no previous property. Determining what constitutes a ‘substantial part’ is therefore of great importance.

The prevailing position in this dispute argues for an economic test which compares the values of the contributions of the seller and the buyer¹⁴⁹.

Most legal jurisdictions favour the approach where the focus is on the outcome of the contract due to two reasons. One, the distinction between standard software and customized software becomes obsolete¹⁵⁰ because the value of the production efforts has no influence on the evaluation of the buyer’s contribution to the production. Two, the approach provides a greater level of legal certainty¹⁵¹ as sales law is applied by default in Art 3(1) CISG where contracts for goods to be manufactured are to be considered sales unless the ordering party undertakes to supply a substantial part of the material. The ordering party is by this provision given the possibility to change the classification of the contract from a sales contract to a service contract on which the Convention is not applicable. The situation where the classification of the contract depends solely on whether the manufacturing party is regularly producing the goods in regard, which the ordering party has no chance of influencing, is therefore avoided.

¹⁴³ Schwenzer, Hachem & Kee: *op. cit.*, p. 116

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*, p. 117

¹⁴⁷ (1861) 1 B & S 272: *Lee v Griffin*

¹⁴⁸ Schwenzer, Hachem & Kee: *op. cit.*, p. 117

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*, p. 118

¹⁵¹ *Ibid.*

Professor Frank Diedrich highlights one case in his article “*The CISG and Computer Software Revisited*” concerning this issue. The case presented for the Federal Court of Justice/Bundesgerichtshof in Germany on the 4th of December 1996 regarded a buyer purchasing a printing system consisting of hardware as well as software from the seller. The buyer declared the contract avoided as a consequence of missing documentation, and because of the fact that the seller did not remedy the defects after an additional period of time than first agreed upon¹⁵². The appeal of the buyer was successful and thus the buyer was not obligated to pay the price. The Court held that it was uncertain whether the contract between the parties was a classical sales contract or it was a contract for the supply of goods to be manufactured or produced according to Art 3(1) CISG. A contract for the supply of goods to be manufactured or produced should generally be considered as a sales contract unless the buyer undertakes to supply a substantial part of the necessary materials. The Court did not discuss this issue as the buyer did not supply any kind of materials necessary for the manufacturing of the printing system. The contract was therefore deemed as a sales contract and the CISG was applicable in this situation. The Court did not address the issue of the application of the Convention on intangible goods nor did it distinguish between hardware and software¹⁵³.

This judgement is not conclusive on the matter, but it can be used as an indication of how a mixed contract regarding both tangibles and intangibles would be handled in the context of the applicability of the CISG¹⁵⁴.

One or two set of rules?

To answer the question asked in the start of this chapter regarding mixed contracts, it would seem that it would not be appropriate to apply different sets of rules on the same contract. The reason for this is that the contract is relating to the same intentions of the parties regardless of the existence of both sales and service obligations. An approach where each term in a contract had to be interpreted to determine the applicable law for that specific term is undesirable as it will result in a large amount of legal uncertainty. As seen in the examples above, the sales obligations and the service obligations of a contract does not have a clear line drawn between them, as they in most situations are mixed together for the whole agreement to make sense. In the end, the parties have the freedom of contract so they can decide the appropriate way for them to draw the contract, and the law should provide a legal frame to ease this process rather than complicate it.

In conclusion, acknowledging that, when mixed contracts are the reality of most situations when entering a contract regarding software, the most appropriate way to determine the applicability of the Convention is to either classify the contract as a sales contract or as a service contract according to Art 3 CISG. This way, only one set of rules will apply which would be the preferable solution.

Conclusion

For the CISG to be applicable, the agreement between the parties must be a contract of sale. A sale is when the buyer gets the good delivered and gets transferred the full property right over the good in exchange for the payment of the price. There must be no restriction to the buyer’s use of the good. A software program usually contains the author’s intellectual property right. When the software is sold, the good must be free of any restrictions to the use of the software unless the buyer is made aware of the intellectual property right, cf. Art 42 CISG. However, this will still be considered as a contract of sale, as for example a copy right will restrict the use of the copy of the program in some way, but the buyer agreed to this restricted use and it is the intention of the

¹⁵² 8 ZR 306/95: Federal Court of Justice/Bundesgerichtshof, Germany, 4 December 1996, CLOUT Abstract No. 229

¹⁵³ Diedrich, Frank: “*The CISG...*”, *op. cit.*, p. 8

¹⁵⁴ *Ibid.*

contracting parties that the buyer will be the owner of the copy of the program. The buyer will therefore be free to sell the particular copy of the software to another buyer as the author's distribution right of that particular copy is unenforceable.

After the conclusion of the sales contract, the owner of the intellectual property right no longer has the right to impose further restrictions other than the ones agreed upon in the contract. The author has no property right to that specific copy of the software and has therefore no control. The way that intellectual property owners usually remain in control of the software program is by entering a licence agreement instead of a contract of sale. The difference is that the intentions of the parties will not be to transfer the property right to the buyer but it will remain with the seller and the buyer purchases only the restricted access to use the program. The seller has the right to withdraw the access from the buyer if the buyer does not meet the requirements for the ongoing payments. Consequently, the CISG is not applicable on these agreements which can be a disadvantage to the buyer as he or she does not enjoy the protection of the provisions in the Convention. When an agreement is termed by the parties as a licence, it should be interpreted in light of Art 8 CISG¹⁵⁵ where the term "licence agreement" is irrelevant if the parties' intentions were to transfer the property to the buyer and thereby enter a contract of sale. If the seller is the author as well, it would be unusual if the intentions of the parties were to transfer property right over the goods along with the intellectual property right¹⁵⁶. These situations will generally be considered as a licence agreement on the basis of the parties' intentions and the CISG will not be applicable in the circumstance.

A few recent cases has regarded the use of shrink-wrap licencing, which is another way for the owner of the intellectual property right to impose further restrictions on the use of the sold copy of the software after the sale is completed. The problem with this approach is that the buyer, which usually purchases the software from a retailer and not directly from the author, has not had the terms of the licencing agreement disclosed to him before the time of delivery. That is inconsistent with the requirements in Art 42 CISG and it would result in a breach of contract as the goods delivered is not conforming with the goods contracted for. However, in some situations where the buyer is made aware of the terms of the contract he or she is entering, the buyer and the seller can legally make the author a third-party beneficiary.

In contrast, contracts for the supply of labour or other services are not considered a contract of sale as the object of the contract is not a good but a service which requires another set of rules. The reason for that is among other things the difference in liability for delivering a good versus a service as the determination of whether it is conforming with the contract regards different factors. In other words, the mind-set when entering a contract of sale is different than entering a contract for the supply of services. It is therefore essential when entering into a mixed contract with elements of both sale and service to have a legal certainty of when the contract is governed by the CISG and when it is not. Art 3 CISG was made to exclude transactions which could no longer be considered as sales contracts¹⁵⁷. Art 3(1) CISG excludes contracts for the supply of goods to be manufactured if the buyer undertakes to supply a substantial part of the materials because then it would no longer be a supply of a manufactured good but of a service consisting of the manufacturing itself from the materials already owned by the buyer. Contracts for the supply of labour or other services are generally not governed by the Convention which is expressed in Art 3(2) CISG. The exception to the main rule is, if the part of the obligation of the seller that consists in the supply

¹⁵⁵ Diedrich, Frank: "The CISG...", *op. cit.*, p. 9

¹⁵⁶ *Ibid.*

¹⁵⁷ Diedrich, Frank: "The CISG...", *op. cit.*, p. 9

of labour or other services is not preponderant compared to the sales element in the contract, then the CISG will apply.

As the applicability of the CISG on contracts of sale of software has been sorted, the final question arising is whether the CISG, as the *prima facie* applicable law on international transactions, is appropriate to handle these kinds of contract involving computer software when it was not originally drafted to deal with this particular issue which can be very different from a pure classic contract of sale of goods.

Is the CISG appropriate?

The Convention applies on international contracts of sale of goods.

In the previous chapters, the definition of the term ‘goods’ has been clarified and was found to include software programs. A ‘contract of sale’ governed by the CISG has been defined as well and the CISG can be applicable to a contract of sale of software.

Thus on all parameters, software programs seems to fit within the terminology of the CISG, but does that equal to the CISG, as an international uniform law, being the most appropriate set of rules to deal with contracts of this sort or should it rather be left up to the national law of the Contracting State to regulate this particular situation.

The tendency is moving slightly away from exclusively using the method of interpreting terminologies such as ‘goods’ and ‘contracts of sale’ and afterwards applying the interpretation to a specific situation when determining the applicability of the law. The fact that the applicability of a law depends on whether the individual situation can be forced within these boxes consisting of particular terms seems not to be the preferable way of handling it. With the right argument, as seen with the tangible-controversy within the common law countries, everything can be included in a definition. Of course, the preparatory work and the intentions of the drafters of a law provide some limitations to what can be included within the sphere of application of the law in question. However, with regard to the CISG, the intentions of the drafters can be used to very little as the issue of digital goods was not even up for discussion at that time, and as the CISG is a dynamic ever-evolving piece of legislation.

It would be preferable if, when interpreting the CISG in a specific situation, the Court turned its focus to whether the contract can fit within the scope of the Convention.

Authors such as I. Schwenzer, P. Hachem and C. Kee is of the opinion that it should be a matter of whether the respective law provides appropriate remedies to the object of the contract rather than be a matter of semantics¹⁵⁸.

If this approach is adopted, the remedies provided by the CISG should be analysed in the context of the good being software. From that analysis, the appropriateness of the applicability of the CISG to transactions of software can be determined.

The seller has an obligation to deliver the goods and hand over the documents relating to the goods, cf. Art 30 CISG. The regulation of delivery of the goods is to be found in Art 31-34 CISG. Furthermore, the seller has an obligation to deliver conforming goods as required by the contract, cf.

¹⁵⁸ Schwenzer, Hachem & Kee: *op. cit.*, p. 98

Art 35-44 CISG. The remedies for a breach of contract by the seller are regulated in Art 45-52 CISG.

According to Art 46(1) CISG the buyer can require performance by the seller of his obligations as agreed upon in the contract. When looking at this remedy in the perspective of a contract for software, performance would be an appropriate remedy for a buyer of a software program. If the seller does not deliver, the buyer can require the program to be delivered. If the software program does not conform with the contract because it, as an example, cannot be used for the intended purpose or has a defect, it will be appropriate for the buyer to require delivery of a substitute program, cf. Art 46(2) CISG, or require the seller to remedy the lack of conformity by repair, cf. Art 46(3). It is not unusual for computer software to have the need to be repaired after delivery. It is easy and straightforward to measure whether the program performs as agreed upon in the contract and if it does not, it will constitute a breach of contract.

Additionally, it is appropriate for a buyer of software to avoid the contract if the seller does not meet the obligations required by the contract, cf. Art 49 CISG. This can be the case with late delivery or non-delivery of the goods. No arguments can be made against that a buyer of software should not be able to avoid a contract only because the good is digital. Software can be an object of delivery and therefore it can be determined whether the software is delivered or not and whether it is on time.

In the situation of the software not conforming with what was required by the contract, the buyer will have the remedy of reducing the price according to Art 50 CISG. The reduction should be made *“in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time.”* The procedure of determining the value of the delivered software and comparing it with the conforming software is the same as it would be if the contract concerned a book.

The buyer's right to either take delivery or refuse to take delivery if the seller delivers the goods before the fixed date, cf. Art 52 CISG, will be just as possible with a software program as it would be with traditional goods.

When looking at the obligations of the buyer to pay the price, cf. Art 54-59 CISG, and to take delivery according to Art 60 CISG, the remedies of the seller in the situation of a breach of contract are very similar, cf. Art 61-65 CISG. The seller has the opportunity to require performance, which would result in the payment of the price, taking of delivery or the fulfilment of other obligations according to the contract, cf. Art 62 CISG. Art 34 CISG regulates the seller's right to avoid the contract when the buyer does not perform. The course of action when concerning a contract of software will be the same as the abovementioned situation regarding the remedies of the buyer.

Moreover, the seller has a right to make specifications regarding form, measurement and other features himself if the buyer fails to do so according to Art 65 CISG. This could easily be the case when entering a contract for software, as buyers may need to specify the qualification or features the software is required to have.

Beside the right and protection of remedies, the parties of a contractual agreement governed by the CISG can claim damages, cf. Art 74-77 CISG. Damages are usually economically measured by either the sum equal to the foreseeable loss or the difference between the contract price and the substitute transaction. In the event of no substitute purchase or resale has taken place, the market price of the good should instead be considered in the calculation. The fact that the good is a software program is irrelevant as the economic value can still be calculated.

In conclusion, the remedies provided by the CISG is appropriate to a contract of sale of software. The intention of the CISG is to provide a uniform set of rules applicable on international transactions between Contracting States and when the remedies are deemed appropriate by the courts and by this analysis, it would be preferable for the Convention to regulate these contracts. Therefore, there is no need to leave it up to the national sales laws when the CISG can provide a uniform law where the legal position on the area is known and equal to all Contracting States.

Conclusion

The CISG is an ever-adapting dynamic piece of legislation. When it was drafted in 1980 the main goal of the Convention was to establish a uniform set of rules governing contracts of international sale of goods. The international trade market is expanding and will keep doing so, and legal certainty is a necessity of the parties of these international transactions. In this way, obligations are imposed on both parties which consequently lead to a legal protection. This was the desired influence the Convention's provisions were intended to have on international trade. However, some issues regarding the legal certainty of the CISG have been encountered in the international trade market as it is today. The issues in question relates to one type of object of sale which has a unique nature and features of which transactions was unimaginable at the time where the Convention was drafted.

The impact the technological development has had on the world happened with such a rapidity, that legislation on a national as well as international level has had a difficult time catching up. Thus, there has not yet been time to consider or even realize some of these new issues arising from the fact that the world is developing.

The magnitude of transactions of software in international trade today has increased drastically within the recent years and will continue to do so in the future. As a result, parties entering international contracts of sale regarding software are in desperate need of knowing their legal position on the matter. To summarize the questions deduced from the introduction of this thesis: Will the CISG by default be applicable on a contract of sale of software, or should the parties explicitly agree upon the Convention's applicability in the individual contract? If the CISG is not applicable by default or by agreement, how is the issue dealt with on a national level?

As an international uniform law ratified by nearly half of the countries in the world, the CISG should be interpreted in an autonomous manner to secure the uniformity of the provisions. When interpreting the Convention, it is not to be influenced by preconceptions in the domestic legal systems. Though sounding relatively unproblematic, it is not such a straightforward task for the national courts, as the domestic understanding of a term can be difficult to deviate from. As the jurisprudence on the area grows, more stability in the court decisions will follow.

When applying the autonomous interpretation method on the provisions of the CISG, the essential factors taken into account have especially been the wording, the connection among the different sections, the intentions behind the CISG, the jurisprudence on the area and the comments scholars have made regarding the issue.

This interpretation led to a further understanding of the term 'goods' in Art 1 CISG. With regard to the Convention, the essential criteria to categorize an item as a 'good' are moveability and the ability to transfer property. Moveability is closely connected to the requirement of delivery, but it is not identical. Moveability concerns the ability of being able to be in the physical possession of the item in question. In contrast, delivery is not always equal to physical possession. This is the reason for the requirement of handing over of documents, as it is a way to give the buyer this

physical possession even when the item is being shipped. The physical possession enables the buyer to exercise physical control over the item. The ability to transfer the property right in the item concerns the legal right the buyer must possess to be able to exercise absolute control, which is a necessity for a contract to be considered as a sales contract. These two criteria conclude a contract of sale of goods in the sense of the CISG.

A requirement of tangibility has been subject to a large amount of discussion. Through the analysis of the CISG including recent jurisprudence and scholarly writing, it can with a confident amount of certainty be concluded, that despite the intangible nature of software, software can still be considered as a 'good' on which the CISG is applicable.

This conclusion is based upon the leading case of *UsedSoft GmbH v Oracle International Corpn*¹⁵⁹ from 2012. It made no difference whether the copy of the computer program was made available to the buyer through a tangible medium or through the internet.

In the case of *Corporate Web Solutions v. Dutch company and Vendorlink B.V.*¹⁶⁰ the Dutch court applied a wide interpretation to the CISG in accordance with Art 7 CISG and the Preamble, which consequently led to the Convention being applicable on contracts of sale regarding software regardless of software being intangible.

The conclusion – software is a 'good' – is equally consenting to the assumption of scholars like Professor Frank Diedrich and Professor Hiroo Sono although they do not agree on the argument supporting that conclusion. Professor Diedrich argues that excluding software from the Convention's sphere of application would be the same as excluding beer from the application when bought from in a bottle or from the tap. Thus, tangibility is irrelevant in the discussion. Professor Sono believes the arguments of Professor Diedrich is taken it a bit too far. Professor Sono considers software in its purest form as nothing else but information. He agrees, that the CISG could be applicable on a contract regarding software in other forms like when sold in addition to a piece of hardware, but a contract of software as information can only be considered a licence agreement.

On a national level, the civil law jurisdictions have applied an analogues approach to the CISG-approach where moveability is the key element. The reason for this is that the provisions in the CISG are more similar to civil law provisions than common law provisions. Software and other intangibles are therefore already acknowledged as 'goods' that can be the object of a sales contract. However, the dispute concerning tangibility is still ongoing in most common law jurisdiction, especially in the UK which is not a CISG Contracting State.

In the 1996-case regarding *St. Albans City and District Council v International Computers Ltd*¹⁶¹, Sir Ian Glidewell contributed to the understanding that for the UK Sale of Goods Act 1979 to apply, software must be contained on a piece of hardware as it would then constitute a tangible good. This approach was altered slightly in *The Mayor and Burgesses of the London Borough of Southwark v IBM UK Limited*¹⁶² in 2011, as a broader interpretation was applied to the Sale of Goods Act. Consequently, software was considered to have the abilities to be a subject of a contract of sale.

The US, as a CISG Contracting State and a common law jurisdiction, focusses generally on moveability rather than tangibility. However, in the case of *South Central Bell Telephone Co v Sidney*

¹⁵⁹ Case C-128/11: *op. cit.*

¹⁶⁰ CLOUT case 1586: *op. cit.*

¹⁶¹ [1997] F. S. R. 251: *op. cit.*

¹⁶² [2011] EWHC 549: *op. cit.*

*J Barthelemy*¹⁶³ the Court still interpreted the term ‘tangibility’ and argued that software has a corporal body consisting of bits. Thus, software could be perceived by the senses and was therefore determined to be a tangible good.

The applicability of the UK Sale of Goods Act on sales contracts regarding software today would likely depend on whether the software is contained on a tangible medium. The future legal position in common law jurisdictions are therefore difficult to predict, as the arguments seem to move back and forth from the potential requirement of tangibility. Legal systems do not apply the same solutions to an issue, neither do they have to. However, it would be desirable if the dispute involving tangibility could be settled. If this was to happen, it is probable that a legal jurisdiction like the UK would shelve the requirement of tangibility once and for all, as it seems the jurisprudence is moving towards that solution.

Following the increase in software transactions on a worldwide scale, online trading plays a dominating part in international sales today. The very nature of software programs makes it possible to enter and conclude a contract entirely via the internet. From this newer technology, parties encounter difficulties when the applicable law is uncertain about how to classify these new types of contractual agreements.

When this issue is put into the context of the CISG, it is essential for the agreement to be classified as a contract of sale according to Art 1 CISG. A contract of sale is defined through the obligations in Arts 30 and 53 CISG. The seller must deliver the goods, hand over documents and transfer the property in the goods as required by the contract. In totting to this, the seller must, according to Art 42 CISG, deliver the goods free from any right or claim of a third party based on intellectual property. In return, the buyer must pay the price and take delivery of the goods.

Furthermore, there has to be an intention to transfer the property right from the seller to the buyer. The intention of the parties, and not the title of the individual contract, is the fundamental element when classifying a contract according to Art 8 CISG. This is the situations where the issue involving licence agreements arises.

The author of the software in question usually has an intellectual property right to the software. This intellectual property right remains with the author even when a copy of the software is sold. According to Art 42 CISG, the remaining of an intellectual property right in a good cannot prevent the good from being a subject of a sales contract as long as the buyer accepts the existence of the intellectual property right and the restriction it imposes on the use. The buyer will still be considered to have the property right in the copy of the software. After the software is sold, the author no longer has a distribution right to that particular copy, cf. *UsedSoft GmbH v Oracle International Corpn*¹⁶⁴, and the author cannot impose further restriction on the use of the software than the ones already included in the intellectual property right, cf. *Corporate Web Solutions v. Dutch company and Vendorlink B.V.*¹⁶⁵.

If the author would like to keep the property right and remain in absolute control over the copies of the software, he or she has to enter a licence agreement with the buyer. What categorizes a licence agreement is the absence of the intention to transfer the property in the software to the buyer. The buyer simply purchases the right to use the software under restricted terms but the buyer will never gain ownership of that particular copy of the program as was the situation in *The*

¹⁶³ No. 94-C-0499: *op. cit.*

¹⁶⁴ Case C-128/11: *op. cit.*

¹⁶⁵ CLOUT case 1586: *op. cit.*

*Mayor and Burgesses of the London Borough of Southwark v IBM UK Limited*¹⁶⁶. As there is no intention of transferring the property in the good, the CISG is not the governing law of a licence agreement.

Software is not usually sold directly from the author to the end buyer, but is more likely to be distributed through a retailer. The author then sells the software to the retailer who sells it to the end buyer. A way for the author to enter a licence agreement with the end buyer and thus still be in absolute control over the use of the software, even when it is sold through several parties, is to apply a shrink-wrap licence to the software. This requires a physical package of the software, where the licence terms can be added and read by the end buyer upon arrival. The licence agreement is accepted by the buyer if the seal is broken. Shrink-wrap licencing has been the source of much discussion as it conflicts with the obligation in Art 42 CISG if the buyer, when entering the contract with the retailer, was not made aware that the use of the software would be restricted by a licence agreement. The Scottish case *Beta Computers (Europe) Ltd v Adobe Systems (Europe) Ltd*¹⁶⁷ concerned a similar situation, although the CISG was not the governing law as the UK is not a CISG Contracting State. The requirement of the buyer to enter into a licence agreement to be able to use the software was a breach of contract, as the buyer had no knowledge of the existence of such a licence agreement. If the buyer, upon conclusion of the contract, had agreed to the licence terms the author would have had right to impose restrictions on the use of the software as a third party beneficiary.

To summarize, when distinguishing a contract of sale from a licence agreement, the intention of the parties to transfer the property right in the software is the essential factor.

Software is a digital good and can therefore require installation services, among other things. The addition of a service to a sales contract results in a mixed contract. As the CISG only apply on contracts of sale and not on contracts for the supply of services, it is essential to establish when a contract can still be considered a sales contract even with a service obligation included. Art 3 CISG regulates this issue.

As a conscious choice, Art 3(2) CISG was examined before Art 3(1) CISG. Art 3(2) CISG excludes the applicability of the Convention if the preponderant part of the obligations of the seller consists of the supply of services. This should be the starting point. In the context of contracts regarding software, it would be a logical assumption that a contract of a standard software package with no alteration made, the CISG will apply. This was also the conclusion in the case presented to the Regional Court Munich/Landgericht München in Germany in 1995¹⁶⁸. When a contract concerns a customized software program to fit the specific needs of the buyer, the legal position is not as straightforward. It would depend on the individual contract and the obligations of the parties. If the service obligations are considered to exceed 50 percent, which has been classified as a 'preponderant part', of all the obligations in the contract, the contract would be deemed as a contract for the supply of services and the CISG would not apply.

Art 3(1) CISG regulates the situations where the software is to be manufactured or produced. Such a contract is as a starting point considered as a contract of sale of which the CISG apply. The exception is if the buyer undertakes to supply a substantial part of the materials needed as the preponderant part of the obligations in the contract would then be services consisting of the manufacturing of the goods. If the buyer undertakes to supply a part of the materials needed for the

¹⁶⁶ [2011] EWHC 549: *op. cit.*

¹⁶⁷ 1996 S.L.T. 604: *op. cit.*

¹⁶⁸ CLOUT Case 131: *op. cit.*

manufacturing of the software, whether it is a 'substantial' part depends entirely on the extent of the materials provided by the buyer. The way most legal systems determine this is by applying an economic test which compares the values of the contributions of the seller and the buyer.

In conclusion, it is perfectly possible for a contract of sale to contain service obligations and still be governed by the CISG. The essential is that the service obligations are not the prevailing part of the obligations in the contract.

Some national legal jurisdictions like the US are applying an approach where different laws are applied on the sales obligations and service obligations in the same contract. This approach cannot be recommended to apply when the CISG is the applicable law, as the classification of a contract according to Art 3 CISG is a manageable and straightforward solution which should not cause too much confusion.

As it has been established that the CISG is the governing law of contracts of sale of software, the question whether CISG is appropriate to handle these contracts should be answered. This thesis has come to the conclusion that when determining whether a law can be applied on a specific situation, it should be less of a matter of fitting this situation into the 'boxes' or terms of the provision in the law in question. With the right arguments, every situation can be interpreted into a term. Therefore, the fact that software transactions can be interpreted into the terms 'goods' and 'contracts of sale', it is not conclusive on the appropriateness of the Convention. The approach of determining whether the law in question provides appropriate remedies for the parties when entering a contract regarding software, has been found to be a more desirable way of handling the issue. After an examination of the remedies provided by the provisions of the CISG, it can be concluded that the Convention is appropriate to handle transactions of software.

The conclusions of this thesis has contributed to an overview of the issues parties may encounter when entering an international agreement regarding software, and which factors are likely to be of fundamental importance if a Court would be to determine the applicability of the Convention. Furthermore, it has brought upon some solutions to these issues and it can hopefully prevent some issues of actually becoming an issue in the contractual relationship.

Finally, it is important to highlight, that it is not possible to know how the courts will handle the issues regarding transactions of software in the future, so to gain legal certainty it is advised that the parties expressly 'opt out' of the CISG or 'opt in' the CISG according to Art 6 CISG.

Bibliography

Legislation

The United Nations Convention on Contracts for the International Sale of Goods (CISG), Vienna 1980

Convention relating to a Uniform Law on the International Sale of Goods (ULIS), 1964, The Hague

The Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF), 1964

Sale of Goods Act, 1979

Sale of Goods Act, 1893

The Uniform Commercial Code (UCC), 1952

The Uniform Computer Information Transaction Act (UCITA)

Travaux préparatoires (Preparatory work)

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 Meetings and of the Meetings of the Main Committees:

<http://www.uncitral.org/pdf/english/texts/sales/cisg/a-conf-97-19-ocred-e.pdf>

Books

Bridge, M. G.: *The International Sale of Goods*, 3rd Edition, Oxford University Press, 2013

Lookofsky, Joseph; *Understanding the CISG*, Kluwer Law International B.V., 5th Edition, 2017

Reed, Chris; *Computer Law*, 7th Edition, Oxford University Press, 2011

Schlechtriem & Schwenger; *Commentary on the UN Convention on the International Sale of Goods*, Oxford University Press, 3rd edition, 2010.

Schwenger, Hachem & Kee; *Global Sales and Contract Law*, Oxford University Press, 2012

Scholarly writings

Diedrich, Frank: *Maintaining Uniformity in International Uniform Law Via Autonomous Interpretation: Software Contracts and the CISG*, 8 Pace International L. Rev., 1996:

<https://www.cisg.law.pace.edu/cisg/biblio/Diedrich.html>

Diedrich, Frank: *The CISG and Computer Software Revisited*, 6 Vindobona Journal of International Commercial Law and Arbitration, Supplement, 2002:

<https://www.cisg.law.pace.edu/cisg/biblio/diedrich1.html>

Green, Sarah & Saidov, Djakhongir: *Software as goods*, Journal of Business Law, 2007.

Sono, Hiroo: *The Applicability and Non-Applicability of the CISG to software Transactions*, Camilla B. Andersen & Ulrich G. Schroeter eds., Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday, Wildy, Simmonds & Hill Publishing, 2008:

<https://www.cisg.law.pace.edu/cisg/biblio/sono6.html>

Journals

Case Law On Uncitral Texts (CLOUT) by the United Nations Commission on International Trade Law, Abstracts No. 9, A/CN.9/SER.C/ABSTRACTS/9, 7 June 1996:

<https://documents-dds-ny.un.org/doc/UNDOC/GEN/V96/842/23/IMG/V9684223.pdf?OpenElement>

Case Law On Uncitral Texts (CLOUT) by the United Nations Commission on International Trade Law, Abstracts No. 170, A/CN.9/SER.C/ABSTRACTS/170, 28 June 2016:

<https://documents-dds-ny.un.org/doc/UNDOC/GEN/V16/039/20/PDF/V1603920.pdf?OpenElement>

Websites

Oxford Reference on “*jus quaesitum tertio*”:

<http://www.oxfordreference.com/view/10.1093/oi/authority.20110803100027511>

UNCITRAL Secretariat: *Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)*, 2019:

http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html

Jurisprudence

CISG

CLOUT Case 131: District Court of Munich (Landgericht), 8 February 1995, 8 HKO 24667/93:
<http://cisgw3.law.pace.edu/cases/950208g4.html#cx>

CLOUT case 1586: *Corporate Web Solutions v. Dutch company and Vendorlink B.V.*, Rechtbank Midden, Netherlands, 25 March 2015

8 ZR 306/95: Federal Court of Justice/Bundesgerichtshof, Germany, 4 December 1996, CLOUT Abstract no. 229:

<http://cisgw3.law.pace.edu/cases/961204g1.html>

770/95/HE: *Princen Automatisering Oss B.V. v. Internationale Container Transport GmbH*, Court of Appeal Hertogenbosch/Gerechtshof te ‘s-Hertogenbosch, The Netherlands, 19 November 1996.

UK

(1861) 1 B & S 272: *Lee v Griffin*

1996 S.L.T. 604: *Beta Computers (Europe) Ltd v Adobe Systems (Europe) Ltd*, Outer House, 14 December 1995

[1997] F. S. R. 251: *St Albans City and District Council v International Computers Ltd*, Court of Appeal, 26 July 1996

[2011] EWHC 549: *Mayor and Burgesses of London Borough of Southwark v IBM UK Ltd*

US

No. 94-C-0499: *South Central Bell Telephone Co. v. Sydney J. Barthelemy*, Supreme Court of Louisiana, 17 October 1994:

<https://law.justia.com/cases/louisiana/supreme-court/1994/94-c-0499-6.html>

Court of the European Union

C-128/11: *UsedSoft GmbH v Oracle International Corpn*, Court of Justice of the European Union, 3 July 2012