The Borders Between the CISG and Domestic Law on Issues of the Validity of the Contract

An Examination of the Validity Exception in Article 4(a) CISG Illustrated by Mistake and Fraud

Grænserne mellem CISG og national ret i relation til spørgsmål om aftalens gyldighed

En undersøgelse af gyldighedsundtagelsen i Artikel 4(a) CISG illustreret ved vildfarelse og svig

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Formålet med denne afhandling er at undersøge grænserne mellem CISG og national ret i relation til spørgsmål om gyldigheden af aftaler om internationale løsørekøb. Ifølge CISG Art 4(a) gælder konventionen ikke for "gyldighed af aftalen" "[m]edmindre andet udtrykkeligt er bestemt i konventionen". Spørgsmål om aftalens gyldighed er således som udgangspunkt udelukket fra CISG's anvendelsesområde, men bestemmelsen angiver samtidig en undtagelse til gyldighedsundtagelsen. I denne afhandling undersøges CISG' anvendelsesområde i lyset af CISG Art 4(a) illustreret navnlig af spørgsmål om vildfarelse og svig ved aftaleindgåelsen.

I afhandlingen redegøres indledningsvist for CISG Art 4, herunder ordlyden og forarbejderne. Det følger af redegørelsen, at ordlyden af CISG Art 4 ikke udtømmende definerer CISG's materielle anvendelsesområde. Ifølge forarbejderne blev en harmonisering af spørgsmål om aftalens gyldighed anset for unødvendig og for vanskelig i betragtning af forskellene i national ret.

Gyldighedsundtagelsen i Art 4(a) CISG undersøges dernæst nærmere for at definere hvilke spørgsmål, der vedrører aftalens gyldighed i CISG's forstand, og som dermed i udgangspunktet falder udenfor CISG's anvendelsesområde. Med udgangspunkt i den autonome fortolkningsmetode fastsat i CISG Art 7(1) foretages en analyse og diskussion af forskellige metodiske tilgange samt retspraksis. Konklusionen er, at begrebet gyldighed kan defineres ved at kombinere en autonom og national tilgang. Gyldighedsspørgsmål kan herefter defineres autonomt som ethvert spørgsmål, hvor national ret ville gøre aftalen ugyldig, anfægtelig eller uden retskraft. Definitionen af specifikke gyldighedsspørgsmål henvises dog til den nationale ret, der konkret finder anvendelse på aftalen.

Herefter undersøges undtagelsen til gyldighedsundtagelsen for nærmere at fastlægge CISG's anvendelsesområde i forhold til to specifikke spørgsmål om gyldighed: vildfarelse og svig. Baseret på en retsdogmatisk analyse af forarbejderne og retspraksis konkluderes det, at CISG tilsidesætter national ret, hvis bestemmelserne i CISG foreskriver en funktionelt ækvivalent løsning. Således tilsidesætter CISG national ret for visse typer af vildfarelser, herunder vildfarelser omkring varernes kvalitet, da varernes kontraktmæssighed reguleres af CISG. Med hensyn til spørgsmål om svig finder national ret dog anvendelse parallelt med CISG, uanset hvad svigen vedrører, da CISG's

bestemmelser ikke regulerer svigagtig hensigt. I sidste ende defineres grænserne mellem CISG og national ret således ikke blot af CISG Art 4 men autonomt af anvendelsesområdet for CISG's øvrige bestemmelser.

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Abstract

This thesis examines the borders between the United Nations Convention on Contracts for the International Sale of Goods (the CISG) and domestic law in relation to issues of contractual validity. The CISG is a uniform sales law convention, but according to the validity exception in Art 4(a) CISG, the Convention '*is not concerned with the validity of the contract*' '*except as otherwise expressly provided*' in the Convention. Thus, Art 4(a) generally excluded issues of validity of the contract from the scope of the CISG, but it does so incompletely, as the except clause provides a counter exception to the validity exception. This thesis examines the substantive scope of the CISG by an analysis of the validity exception and the counter exception in Art 4(a) illustrated by issues of mistake and fraud.

Art 4 CISG is first introduced to provide a preliminary overview of the substantive scope of the CISG. It is concluded that the wording of Art 4 is not in itself sufficient to define the borders of the CISG. Furthermore, through an analysis of the drafters' intention behind the adoption of Art 4(a), it is concluded that issues of validity were excluded from the scope of the CISG due to the complexity of unifying matters of validity.

The general rule in the validity exception in Art 4(a) CISG is examined to determine the starting point as to which matters are excluded from the scope of the CISG. Based on an analysis and discussion of three different methodical approaches and case law, the section attempts to define which matters constitute issues of validity. It is concluded that the concept of validity can be defined by combining an autonomous and domestic approach. Thus, the term validity can be defined autonomously as *any issue by which the domestic law would render the contract void, voidable, or unenforceable* but the definition of specific validity issues is deferred to the applicable domestic law.

The exception to the validity exception is examined to determine the scope of the CISG in relation to issues of validity. This is done by a legal-dogmatic analysis of the applicability of the CISG to two specific validity issues: mistake and fraud. Based on an analysis of the preparatory works and case

law, it is concluded that the CISG preempts domestic law remedies if the provisions in the CISG provides a functionally equivalent solution. Specifically, it is concluded that the CISG preempts domestic law remedies for some types of mistakes, but in relation to issues of fraud, domestic law remedies remain applicable in concurrence with the CISG.

1. Introduction

The United Nations Convention on Contracts for the International Sale of Goods (hereinafter the *CISG* or the *Convention*) aims to promote the harmonization and unification of international sales law. With its current 95 Contracting States[1] the CISG provides a far-reaching default regime for contracts for the international sale of goods.

However, the CISG does not provide an exhaustive body of rules as it explicitly leaves some matters to be governed by the applicable domestic law. One such matter is the validity of the contract, which according to Art 4(a) CISG is generally excluded from the scope of the uniform sales law and left to non-uniform domestic sales law.

Ever since the CISG came into force in 1988, the exclusion of validity issues and the relationship between the Convention and domestic rules of contract validity have been the subject of heated discussions. Art 4(a) CISG has been described as a '*potential "black hole" removing issues from the Convention's Universe*'[2] and as a '*loophole*' which undermines the Convention's unifying effect.[3] These descriptions illustrate the importance of defining the borders between the territory of the CISG and domestic law in relation to issues of contractual validity. These borders are not, however, easily defined.

Art 4(a) CISG poses several difficult tasks for adjudicators in deciding on how matters governed by the CISG are distinguished from matters not governed by the CISG. The difficult task of defining the borders between domestic law rules of contract validity and the international rules of unified contract law represents a balancing between domestic interests and interests of internationality and uniformity. For these reasons, the issue of validity of international sales contracts has been described as '*the most sensitive crossroad of uniform law and of domestic legal systems*.'[4]

As such, Art 4 CISG serves as a border stop between two legal regimes and an adjudicator faced with the interpretation of the provision serves as a legal border control. Against this backdrop, this thesis seeks to define the borders between the CISG and domestic law on matters of contractual validity.

1.1. Research Question and Delimitation

The purpose of this thesis is to examine the substantive scope of the CISG in relation to Art 4(a) CISG according to which the Convention '*is not concerned with the validity of the contract*' '*except as otherwise expressly provided*' in the Convention. Specifically, it will be examined how matters governed by the Convention are distinguished from matters governed by domestic law in relation to issues of the validity of the contract. First, it will be examined what is understood by the validity of

[1] UNCITRAL, *CISG Status*.
[2] Winship, *Commentary* (1988) p 636.
[3] Hartnell, *Rousing the Sleeping Dog* (1993) p 21.
[4] Drobnig, *Substantive Validity* (1992) p 635.

the contract. Second, it will be examined whether and to what extent the CISG applies to issues of validity, specifically mistake and fraud.

Matters of contractual validity cover a wide range of different issues. The analysis of all possible issues of validity in all the Contracting States therefore extends far beyond the purpose of this thesis. Consequently, the analysis will not provide a general overview or exhaustive analysis of all possible validity issues in every Contracting State. Instead, specific issues of validity will be used for illustrative purposes to examine Art 4(a) CISG.

As such, the analysis in *section 3* will be limited to examine how to identify matters of validity on an abstract level and specific issues of validity will be used as examples. Additionally, the analysis in *section 4* of the applicability of the CISG to issues of validity is limited to two specific validity issues: mistake and fraud. Other issues of validity, such as capacity, impossibility, illegality, etc. will not be analysed or discussed.

Although the thesis will focus on issues of mistake and fraud, the purpose of this thesis is not to distinguish such issues from other overlapping doctrines. Furthermore, the thesis will not provide a complete comparative overview of domestic rules of mistake or fraud, nor will it provide an exhaustive analysis of the application of the CISG to all types of issues of mistake or fraud.

1.2. Methodology and Sources of Law

This thesis employs the legal dogmatic method to describe, analyse, and systematise the existing law to answer the legal questions presented in the problem statement.[5] The conclusion will be reached by using the relevant sources of law and by interpreting the CISG according to its own principles of interpretation. These differ from domestic interpretational principles as the CISG is an international convention that is not bound to a single legal tradition.

The interpretation of the CISG is regulated by Art 7(1) CISG which provides that

> *In the interpretation of this Convention, 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 principles of interpretation set out in Art 7(1) require that the provisions and principles of the CISG must be interpreted and applied autonomously. An autonomous interpretation entails that the interpretation of the CISG should be done from an international perspective and independently from domestic interpretive methods and domestic legal terms.[6]

The primary source of law and starting point of interpretation is the text of the Convention itself.[7] The literal interpretation of the CISG in this thesis focuses on the official English version of the Convention, which is representative for Art 4 CISG.

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[5] Evald, *Juridisk teori, metode og videnskab* (2020) pp 209-210; Munk-Hansen, *Retsvidenskabsteori* (2022) pp 211-230.
[6] Perales Viscasillas in Kröll/Mistelis/Perales Viscasillas, *Commentary* (2018) Art 7 paras 7-20; Honnold/Flechtner, *Uniform Law* (2021) para 111; Hachem in Schwenzer/Schroeter, *Commentary* (2022) Art 7 paras 7-15 and 20.
[7] Ferrari/Torsello, *CISG in a Nutshell* (2018) p 15; Perales Viscasillas in Kröll/Mistelis/Perales Viscasillas, *Commentary* (2018) Art 7 para 37; Hachem in Schwenzer/Schroeter, *Commentary* (2022) Art 7 para 21; Lookofsky, *Understanding the CISG* (2022) p 34.

The legislative history of the Convention (the *travaux préparatoires*) is also a relevant source of law.[8] The preparatory works of the CISG is rich and well documented as it consists of the work of its predecessors, the Hague Conventions of 1964 (ULIS and ULF), the 1970-1978 UNCITRAL Working Group, the 1979 Secretariat Commentary, and the Official Records of the 1980 Vienna Diplomatic Conference. The *travaux préparatoires* provides guidance as to the drafters' legislative intent, but it does not provide a binding or conclusive authority for the interpretation of the CISG. Hence, it is often possible to find arguments in favour of different views in the legislative history.[9] Moreover, the preparatory works often consists of declarations from the Contracting States, which do not necessarily reflect the joint opinion of the drafters of the final version of the CISG.[10]

Another primary source of law in the interpretation of the CISG is case law from domestic courts and arbitral tribunals from different Contracts States.[11] Since there is no international supreme court to decide on diverging interpretations of the CISG, case law is an important tool in achieving uniformity. Domestic courts and tribunals are therefore required to take foreign case law, i.e., decisions by courts and tribunals in other Contracting States, into account when interpreting the CISG.[12] Case law on the CISG is not a binding authority but is merely persuasive. Therefore, a critical assessment and evaluation of each case is required to determine its persuasiveness.[13]

Finally, scholarly writings from both civil law and common law countries will be cited and the arguments of sometimes diverging scholarly opinions will be weighed against each other. While the opinions of legal scholars are not a legal source per se, scholarly writings are an important secondary source in the interpretation of the CISG. As such, legal scholars are widely used and cited by courts and tribunals to aid in the interpretation of the CISG.[14] Scholarly writings thus ensure uniformity as they provide a useful comparative view based on perspectives from diverse legal backgrounds, which is especially useful for the interpretation of an international convention like the CISG.[15]

2. Introduction to Art 4 CISG

In any sales contract dispute, the first task of the adjudicator is to decide on which legal rules to apply to solve the dispute. In relation to the applicability of the CISG it must first be determined whether the *transaction* qualifies as an international sale of goods under Arts 1-3 CISG and, thus, fall within the CISG's *sphere* of application. In addition, it must be determined whether the particular *matter* or

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[8] Ferrari/Torsello, *CISG in a Nutshell* (2018) pp 18-19; Perales Viscasillas in Kröll/Mistelis/Perales Viscasillas, *Commentary* (2018) Art 4 paras 40-42; Honnold/Flechtner, *Uniform Law* (2021) para 112; Hachem in Schwenzer/Schroeter, *Commentary* (2022) Art 7 para 22.

[9] Perales Viscasillas in Kröll/Mistelis/Perales Viscasillas, *Commentary* (2018) Art 7 para 41; Lookofsky, *Understanding the CISG* (2022) pp 35-36.

[10] Ibid.

[11] Perales Viscasillas in Kröll/Mistelis/Perales Viscasillas, *Commentary* (2018) Art 7 para 44; Honnold/Flechtner, *Uniform Law* (2021) para 114; Lookofsky, *Understanding the CISG* (2022) pp 36-37.

[12] *Medicaments Case*; Lookofsky *U.2005B.45*.

[13] Perales Viscasillas in Kröll/Mistelis/Perales Viscasillas, *Commentary* (2018) Art 4 para 39; Hachem in Schwenzer/Schroeter, *Commentary* (2022) Art 7 para 13; Lookofsky, *Understanding the CISG* (2022) p 39.

[14] UNCITRAL Digest Art 7 no 6; see e.g., *Pamesa Ceramica Case*; *Electronic Electricity Meters Case* (analysed infra *sec 4.2.3.2.*) which contains 100+ references to legal scholars.

[15] Perales Viscasillas in Kröll/Mistelis/Perales Viscasillas, *Commentary* (2018) Art 7 para 47-48; Honnold/Flechtner, *Uniform Law* (2021) para 116; Hachem in Schwenzer/Schroeter, *Commentary* (2022) Art 7 para 24; Lookofsky, *Understanding the CISG* (2022) pp 40-41.

issue in dispute falls within the CISG's *scope* of application.[16] Matters not governed by the Convention are identified in Arts 4 and 5 CISG which explicitly excludes some issues from the legal scope of the CISG.[17] In this section, Art 4 CISG will be introduced to provide a preliminary overview of the substantive scope of the Convention. Art 4 CISG provides:

> *This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:*
>
> *(a) the validity of the contract or of any of its provisions or of any usage;*
>
> *(b) the effect which the contract may have on the property in the goods sold.*

Art 4 CISG is a delimitation rule, which identifies both the matters governed as well as the matters not governed by the Convention. At first sight, the analysis under Art 4 appears to be straightforward since the scope of the CISG is both positively and negatively defined. However, despite the seemingly clear delimitation in Art 4, the substantive scope of the CISG is not as clear-cut as indicated by the wording. As such, Art 4 poses several interpretational challenges.

2.1. The Positive Delimitation in Art 4 Sentence 1 CISG

The first sentence of the introductory wording of Art 4 CISG positively defines the scope of the CISG as it lists the matters governed by the Convention: the '*formation of the contract*' and '*the rights and obligations of the seller and the buyer*'. The substantive rules concerning these matters are set out in Part II (Arts 14 *et seq*) and Part III (Arts 25 *et seq*) of the CISG respectively.

At first sight, since the Convention '*governs only*' the matters listed in the first sentence, the list seems to be exhaustive – and validity is notably not one of the matters listed.[18] However, despite the hard wording, the first sentence of Art 4 does not exhaustively identify the matters governed by the CISG. The phrasing "*governs only*" is strictly speaking incorrect as it is clear from the Convention itself that the CISG governs other matters than those listed.[19] And more importantly, at least for the purpose of this thesis, the CISG also governs issues of validity to some extent although there is no mentioning of validity in the first sentence of Art 4.[20] Accordingly, the first sentence of Art 4 can merely be understood as expressing matters which are undoubtedly governed by the CISG.[21]

Moreover, with respect to the formation of contract, the CISG only deals with the 'external consensus', meaning the mechanics and objective requirements for conclusion of a contract, e.g., offer and acceptance.[22] Conversely, the 'internal consensus' relating to the formation of the contract

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[16] Arts 1-3 is said to address the CISG's '*sphere of application*' whereas Arts 4-5 addresses its '*scope of application*', Ferrari, *Scope of Application* (2004) p 96; Honnold/Flechtner, *Uniform Law* (2021) para 86 n 1.

[17] See Ferrari, *Scope of Application* (2004) p 96; Djordjevic in Kröll/Mistelis/Perales Viscasillas, *Commentary* (2018) Art 4 para 2; Lookofsky, *Understanding the CISG* (2022) p 24.

[18] See Schroeter, *Irrelevance of the Validity Exception* (2015) p 98; Ferrari in Schlechtriem/Schwenzer/Schroeter, *Kommentar* (2019) Art 4 para 8.

[19] See e.g., Arts 8, 29, and 89-101 CISG; Ferrari/Torsello, *CISG in a Nutshell* (2018) pp 133-134; Hachem in Schwenzer/Schroeter, *Commentary* (2022) Art 4 para 2; Schroeter, *UN-Kaufrecht* (2022) para 151.

[20] Infra *sec 2.2*.

[21] Djordjevic in Kröll/Mistelis/Perales Viscasillas, *Commentary* (2018) Art 4 para 6; Ferrari in Schlechtriem/Schwenzer/Schroeter, *Kommentar* (2019) Art 4 para 8; Hachem in Schwenzer/Schroeter, *Commentary* (2022) Art 4 para 2; Schroeter, *UN-Kaufrecht* (2022) para 151.

[22] Arts 14-24 CISG; *Weapons Case*; *Fruits and Vegetables Case*; Huber/Mullis, *CISG* (2007) pp 21-22; Ferrari/Torsello, *CISG in a Nutshell* (2018) p 134 and 173; Djordjevic in Kröll/Mistelis/Perales Viscasillas, *Commentary* (2018) Art 4 para 7.

– i.e., issues of whether the contract was validly formed as a subjective requirement – is not governed, as such issues are excluded by virtue of Art 4(a).[23]

In sum, the matters governed by the CISG cannot be identified merely by looking at the first sentence of Art 4, as the provision does not exhaustively define the matters within the Convention's scope. The matters governed by the CISG include but are not limited to the formation of the contract and the rights and obligations of the parties.

2.2. The Validity Exception in Art 4(a) CISG

Subparagraphs (a) and (b) of Art 4 CISG negatively define the substantive scope of the CISG as they provide a list of the matters not governed. The list is - just like the list of matters governed – not exhaustive, which is evidenced by the phrasing '*in particular*' in the second sentence of Art 4.[24] The focal point of this thesis is Art 4(a) – the so-called validity exception[25] – according to which the Convention '*is not concerned with the validity of the contract*'. Art 4(b) falls outside the purpose of this thesis and will not be further addressed.

According to the validity exception in Art 4(a), issues concerning the validity of the contract are generally excluded from the scope of the CISG. Such issues are thus left to be solved by the applicable domestic law to be identified by virtue of private international law (*PIL*).[26]

The validity exception is, however, merely the general rule.[27] The second sentence of the introductory wording of Art 4 provides an important counter exception to the validity exception. It states that issues of validity are only left to domestic law '*except as otherwise expressly provided in this Convention*'.[28] Thus, according to the so-called except clause, not all issues of validity are excluded from the scope of the Convention as the CISG governs validity issues to some extent.[29]

As such, Art 4 provides a general rule in the validity exception as well as an exception to the validity exception in the except clause. Hence, the interpretation of Art 4(a) must be done in two parts.[30] An adjudicator must first decide whether a matter is classified as a validity issue, and if so, it must be decided whether the matter is nevertheless governed by the CISG.[31]

In sum, the mere wording of Art 4 CISG is not in itself sufficient to define the scope of the CISG in relation to issues of validity, as the provision does not exhaustively exclude all matters of validity. Therefore, a closer analysis is required to define the borders between the CISG and domestic law in relation to issues of the validity of the contract.

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[23] Art 4(a) CISG; Huber/Mullis, *CISG* (2007) pp 21-22; Ferrari/Torsello, *CISG in a Nutshell* (2018) pp 134 and 173.
[24] Art 4 CISG; Djordjevic in Kröll/Mistelis/Perales Viscasillas, *Commentary* (2018) Art 4 para 12; Ferrari/Torsello, *CISG in a Nutshell* (2018) p 136; Hachem in Schwenzer/Schroeter, *Commentary* (2022) Art 4 para 3.
[25] See Hartnell, *Rousing the Sleeping Dog* (1993) p 1; Schroeter, *Irrelevance of the Validity Exception* (2015) p 96.
[26] Ferrari in Schlechtriem/Schwenzer/Schroeter, *Kommentar* (2019) Art 4 para 6; Honnold/Flechtner, *Uniform Law* (2021) paras 89 and 126; Hachem in Schwenzer/Schroeter, *Commentary* (2022) Art 4 para 6.
[27] Lookofsky, *In Dubio* (2003) p 280.
[28] Art 4 CISG.
[29] Ferrari/Torsello, *CISG in a Nutshell* (2018) p 143; Djordjevic in Kröll/Mistelis/Perales Viscasillas, *Commentary* (2018) Art 4 para 12; Hachem in Schwenzer/Schroeter, *Commentary* (2022) Art 4 para 29.
[30] Leyens, *CISG and Mistake* (2005) p 14.
[31] Leyens, *CISG and Mistake* (2005) p 14; Ferrari/Torsello, *CISG in a Nutshell* (2018) p 145.

In this thesis, an interpretation of the general rule in the validity exception is set out in *section 3* in which it is examined what constitutes an issue of the validity of the contract in the sense of the CISG.

The exception to the validity exception is further examined in *section 4* of this thesis, which contains an analysis of the applicability of the CISG to specific issues of validity in light of the except clause.

2.3. The Intention Behind the Adoption of Art 4(a) CISG

Initially, it is relevant to outline some main points relating to the drafters' intention behind the exclusion of validity issues from the CISG's scope.

The exclusion of validity issues from the scope of the uniform sales law originates from the predecessor to the CISG, the 1964 Uniform Law on the International Sale of Goods (hereinafter the *ULIS*). Art 8 ULIS essentially corresponded to Art 4 CISG, as the provision by the same structure and content also excluded issues of validity from the ULIS.[32] Because of the nexus between these provisions and the scopes of the ULIS and CISG in relation to the exclusion of matters of validity, the legislative history of the ULIS is also relevant when analysing Art 4(a) CISG.[33]

During the drafting of the ULIS, the exclusion of validity issues was subject to discussions.[34] The Special Commission noted in its report that matters of validity were

> *very delicate matters where the traditions of different States would have rendered difficult either the adoption of a uniform law, or, at the least, its uniform interpretation.*[35]

According to one government, the ULIS failed to live up to its name of a uniform law as it did not '*achieve complete unification of the law in force for international contracts of sale*' by referring '*questions of great importance, such as the validity of the contract of sale*' to domestic law.[36] Still, the government accepted the limitation as it believed it to be necessary and inevitable '*because of the difficulty of unification of law*'.[37]

The concerns about the difficulties of unifying matters of validity expressed during the drafting of the ULIS were recurring during the drafting of the CISG. Although the inclusion of rules of validity in the CISG was considered for several years,[38] the wording of Art 4 CISG remained to a large degree the same as Art 8 ULIS.

Specifically, the drafters considered including the rules of the 1972 UNIDROIT Draft Law for the Unification of Certain Rules relating to the Validity of Contracts of International Sale of Goods (the

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[32] Art 8 ULIS in part: '*The present Law shall govern only the obligations of the seller and the buyer arising from a contract of sale. In particular, the present Law shall not, except as otherwise expressly provided therein, be concerned with […] the validity of the contract or of any of its provisions or of any usage*'; see also Hartnell, *Rousing the Sleeping Dog* (1993) p 27; Hachem in Schwenzer/Schroeter, *Commentary* (2022) Art 4 para 1.
[33] See Hartnell, *Rousing the Sleeping Dog* (1993) p 27.
[34] Ibid pp 25-31.
[35] *Hague Conference Documents II* p 30.
[36] *Hague Conference Documents II* p 82.
[37] Ibid. See also Hartnell, *Rousing the Sleeping Dog* (1993) p 28.
[38] See *WG Session 1* in *UNCITRAL YB* I (1968-70) pp 195-196 no 50-54; *WG Session 6* in *UNCITRAL YB* VI (1975) p 62 no 118; *WG Session 7* in *UNCITRAL YB* VII (1976) pp 88-89 nos 12-14; *WG Session 8* in *UNCITRAL YB* VIII (1977) pp 87-88 nos 169-174; see also Schroeter, *Contract Validity* (2017) p 48 n 5.

LUV), which contained a comprehensive set of validity rules, namely on mistake, fraud, and duress.[39] However, the UNCITRAL Working Group ultimately decided not to include any rules of validity in the CISG.[40]

Firstly, the unification of validity issues was found unnecessary for the intended goal of the CISG as validity issues were considered of only minor practical importance.[41] The drafters found that '*all available evidence suggests that [...] problems of validity are relatively rare events in respect of contracts for the international sale of goods.*'[42] And when they do arise, '*they can usually be handled as well under non-uniform national law as under any proposed text of uniform law*.'[43]

Secondly, the drafters believed that issues of validity could not be successfully unified in view of the different traditions at domestic level.[44] As such, a uniform interpretation would be difficult since validity issues are vague and require an extensive interpretation by the adjudicator.[45] Furthermore, domestic laws governing the validity of contracts was considered

> *an important vehicle by which the political, social and economic philosophy of the particular society is made effective in respect of contracts. [...] Statutory prohibitions and public policy vary to such an extent from country to country that it is impossible to achieve the goal of unification, namely the development of a uniform body of case law.*[46]

Finally, even if the adoption of uniform rules was possible, the drafting of the relevant rules would have been excessively difficult and time-consuming, which would have unreasonably delayed the conclusion of the Convention.[47] Hence, it was concluded that

> *the consideration of these matters would appear to be so complex that it would not be feasible for the Working Group to complete its work on the formation of contracts for the international sale of goods 'in the shortest possible time' as requested by the Commission.*[48]

Thus, matters of validity were purposefully omitted from CISG's scope because the unification on the subject was considered unnecessary but also too complex and controversial considering the differences in domestic law and the sensitivity of the subject.[49]

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[39] Arts 6-15 LUV; *SG Report* in *UNCITRAL YB* VIII (1977) pp 91-93 nos 8-27, pp 104-109; *WG Session 9* in *UNCITRAL YB* IX (1978) pp 65-66 nos 48-69; see also Leyens, *CISG and Mistake* (2005) p 24.
[40] *SG Report* in *UNCITRAL YB* VIII (1977) pp 91-93 nos 8-27; *WG Session 9* in *UNCITRAL YB* IX (1978) pp 65-66 nos 48-69; see also Hartnell, *Rousing the Sleeping Dog* (1993) pp 38-40.
[41] *SG Report* in *UNCITRAL YB* VIII (1977) p 92-93 nos 16-21.
[42] Ibid p 92 no 18.
[43] Ibid p 93 no 22.
[44] Ibid p 93 nos 23-26.
[45] Ibid p 93 no 24.
[46] Ibid p 93 no 25.
[47] Ibid pp 92-93 nos 23-27.
[48] Ibid p 93 no 27.
[49] See Hartnell, *Rousing the Sleeping Dog* (1993) p 39; Schroeter, *Contract Validity* (2017) p 48; Djordjevic in Kröll/Mistelis/Perales Viscasillas, *Commentary* (2018) Art 4 paras 5 and 12; Hachem in Schwenzer/Schroeter, *Commentary* (2022) Art 4 para 3.

In sum, the drafters deliberately decided to only unify the matters which it found feasible and necessary for the uniform sales law. On the contrary, the unification of validity issues was found unnecessary, practically impossible, and too time-consuming in light of the goals of the Convention.

3. Defining the Concept of the Validity of the Contract

When interpreting Art 4(a) CISG it must first be determined what is understood by '*the validity of the contract*', i.e., which matters constitute issues of validity in the sense of the CISG. This requires an interpretation of the term '*validity*' in Art 4(a).

The text of the Convention does not provide much guidance in understanding the concept of validity in relation to the CISG. Art 4(a) merely states that the CISG is not concerned with the validity of the contract and the term is not otherwise defined in the Convention.

The term is neither universally defined, as domestic definitions of validity vary among jurisdictions, since each legal system contains different rules concerning the validity of contracts.[50] As Djordjevic accurately expressed it, '*there can be as many definitions of validity as the number of Contracting States to the CISG.*'[51]

The preparatory works does not provide much guidance in understanding the concept of validity either since the term '*validity*' was never defined or discussed by the drafters of the CISG.[52]

The lack of a definition in the Convention, the lack of a universal definition, and the lack of an express definition in the preparatory works has led to uncertainty about how validity for contracts governed by the CISG is to be understood.
Under the autonomous interpretation required by Art 7(1) CISG, the provisions in the Convention should generally not be understood against the background of domestic law, as such an interpretation could lead to a non-uniform application of the CISG.[53] Accordingly, there is a tendency in today's scholarly writings to interpret '*validity*' autonomously in accordance with Art 7(1) CISG.[54] But how can validity be defined by the CISG when the Convention is not at all concerned with issues of validity?

Hence, although Art 7(1) generally requires an autonomous interpretation, it has been widely discussed whether this requirement applies to the term '*validity*' since matters of validity are excluded from the scope of the CISG.[55] The question is: Should validity be interpreted true to the requirement of autonomous interpretation in Art 7(1) or should the interpretation of validity be deferred to the

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[50] See Hartnell, *Rousing the Sleeping Dog* (1993) p 20; Bridge, *Commentary on Arts 1-13 and 78* (2004) p 243; Djordjevic in Kröll/Mistelis/Perales Viscasillas, *Commentary* (2018) Art 4 para 13; for a comparative overview see Schwenzer/Muñoz, *Global Law* (2022) paras 15.01-15.21.
[51] Djordjevic in Kröll/Mistelis/Perales Viscasillas, *Commentary* (2018) Art 4 para 13.
[52] Cf *Official Records*; *Secretariat Commentary* Art 4; see also Hartnell, *Rousing the Sleeping Dog* (1993) pp 20-21; Schroeter, *Contract Validity* (2017) p 50.
[53] See *Smallmon Case* para 88; Ferrari, *Interpretation Article 7* (2004) pp 140-143; Perales Viscasillas in Kröll/Mistelis/Perales Viscasillas, *Commentary* (2018) Art 7 paras 7-20; Honnold/Flechtner, *Uniform Law* (2021) para 111; Hachem in Schwenzer/Schroeter, *Commentary* (2022) Art 7 paras 7-15 and 20.
[54] Infra *sec 3.2.1*.
[55] See Schroeter, *Contract Validity* (2017) pp 50-51 with references; Ferrari in Schlechtriem/Schwenzer/Schroeter, *Kommentar* (2019) Art 4 para 16 with references.

applicable domestic law and decided on a case-by-case basis?[56] Multiple – albeit diametrically opposed – answers to this question have developed.[57]

3.1. Is It Necessary to Define Validity?

Initially, one methodical consideration must be addressed. The approach taken by many legal scholars when interpreting Art 4(a) CISG is to begin by interpreting the concept of validity.[58] However, as briefly introduced above, Art 4 CISG does not exhaustively exclude all issues of validity from the CISG's scope. The counter exception to the validity exception entails that some matters of validity might still be governed by the Convention.[59]

Accordingly, Schroeter has frequently argued that an interpretation of the term '*validity*', including whether it should be interpreted in accordance with domestic law or autonomously, is irrelevant.[60] According to Schroeter, the combination of the two opposed exceptions in the wording '*in particular*' and the except clause deprives Art 4(a) from any regulatory meaning and delimiting utility.[61] Consequently, Schroeter argues that

> *the interpretation of the term 'validity' alone in essence says nothing about the CISG's substantive scope in validity-related matters, because it is neither exclusive nor inclusive in nature.*[62]

In light of the wording of Art 4, Schroeter's argument is correct insomuch as defining the concept of validity will not in itself provide the final answer to the question of whether a matter is governed by the CISG. But this is not to say that a definition of validity is entirely irrelevant, namely for the purpose of this thesis.

The wording of Art 4 entails that – as a clear starting point – issues of validity are excluded from the scope of the CISG. In this author's opinion, it is therefore – irrespective of the significance of the except clause – still relevant to define the concept of validity to establish a starting point for which matters fall outside the Convention's scope. One cannot ignore the unambiguous wording of Art 4, which explicitly excludes issues of validity from the scope of the CISG merely because the provision also contains an exception to this exclusion.

For the present analysis and discussion, another important point can be made from the suggested irrelevance of defining the concept of validity: When assessing the approaches presented below it should be kept in mind that the borders between the CISG and domestic law is not ultimately defined by the definition of validity. Therefore, an autonomous definition of validity is not strictly necessary to achieve a uniform application of the CISG. The CISG's goal of uniformity can be achieved by other means, namely by interpretation of the except clause, which ensures that the borders of the

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[56] See Murray, *Neglect of the CISG* (1998) p 372, Leyens, *CISG and Mistake* (2005) pp 15-17; Ferrari, *CISG and Domestic Remedies* (2007) p 62.

[57] Infra *sec 3.2*. See Leyens, *CISG and Mistake* (2005) p 17.

[58] See Hartnell, *Rousing the Sleeping Dog* (1993) pp 19-22; Ferrari, *Scope of Application* (2004) p 100; Schroeter, *Contract Validity* (2017) pp 54-57; Djordjevic in Kröll/Mistelis/Perales Viscasillas, *Commentary* (2018) Art 4 para 13; Hachem in Schwenzer/Schroeter, *Commentary* (2022) Art 4 para 31.

[59] Supra *sec 2.2*.

[60] Schroeter, *Irrelevance of the Validity Exception* (2015) pp 101-103; Schroeter, *Contract Validity* (2017) pp 51-52; Schroeter, *UN-Kaufrecht* (2022) para 152; see also Ferrari/Torsello, *CISG in a Nutshell* (2018) p 143.

[61] Schroeter, *Irrelevance of the Validity Exception* (2015) pp 101-103.

[62] Schroeter, *Contract Validity* (2017) p 52.

CISG is defined from within. The further analysis of this part of the provision is referred to *section 4* of this thesis.

Consequently, the definition of validity is relevant and necessary to establish which matters are generally excluded from the Convention, but the definition cannot stand alone. Art 4 CISG – like any other provision – must be interpreted in its entirety. Although the definition does not conclude the analysis under Art 4, it is a necessary step in the interpretation of the provision.

3.2. Methodical Approaches for Defining the Concept of Validity

In the following, three different methodical approaches for defining the concept of validity will be presented, analysed, and discussed. The first approach defines validity autonomously, the second approach look to other international uniform instruments, and the third approach defers the definition of validity to domestic law. This subsection focuses mainly on the different approaches suggested in scholarly writings, while definitions in case law will be examined in *section 3.3*.

3.2.1. Defining Validity Autonomously in Accordance with Art 7(1) CISG

The prevailing opinion among legal scholars today is that the concept of validity should, in accordance with Art 7(1) CISG, be interpreted autonomously.[63] This entails that '*validity*' in Art 4(a) must be given a uniform meaning under the CISG itself detached from domestic definitions and perceptions of validity.[64]

One method of achieving an autonomous interpretation of '*validity*' is by compiling a comprehensive list of validity issues developed through comparative law analysis.[65] By this method, Art 4(a) would be confined only to those issues of validity which are recognised in all or at least in the majority of the Contracting States' legal systems.[66] This method would, taken by itself, serve the CISG's uniformity goals.[67] A variant of this method is discussed in *section 3.2.2*.

Another method of achieving an autonomous interpretation of '*validity*' is through an abstract autonomous definition of the term, which is the approach taken in most scholarly writings today. Although legal scholars on the CISG widely agree, that an autonomous interpretation of validity is the theoretically correct approach when defining the concept of validity, they do not agree on how to define the term.

Several scholars, who advocate for an autonomous definition, cite a definition of validity used by Hartnell, according to which issues of validity are '*any issue by which the domestic law would render*

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[63] See Huber/Mullis, *CISG* (2007) p 21; Bridge, *International Sale of Goods* (2013) para 10.31; Djordjevic in Kröll/Mistelis/Perales Viscasillas, *Commentary* (2018) Art 4 para 14; Ferrari/Torsello, *CISG in a Nutshell* (2018) p 142; Ferrari in Schlechtriem/Schwenzer/Schroeter, *Kommentar* (2019) Art 4 para 16; Honnold/Flechtner, *Uniform Law* (2021) para 89; Hachem in Schwenzer/Schroeter, *Commentary* (2022) Art 4 para 31.
[64] See Huber/Mullis, *CISG* (2007) p 21; Djordjevic in Kröll/Mistelis/Perales Viscasillas, *Commentary* (2018) Art 4 para 14; Honnold/Flechtner, *Uniform Law* (2021) para 89.
[65] See Hartnell, *Rousing the Sleeping Dog* (1993) p 48.
[66] Ibid p 48 n 198-199 with references.
[67] Ibid pp 49 and 60.

the contract void, voidable or unenforceable.'[68] This is despite the fact that Hartnell in the very same article criticises an autonomous interpretation of Art 4(a) CISG.[69]

Schlechtriem has suggested a different and more elaborate definition, which too have been referenced by other legal scholars, according to which

> *matters of validity are those where a contract is void ab initio by operation of law or rendered so either retroactively by a legal act of the State or of the parties such as rescission for mistake, 'withdrawal' or 'revocation' of consent under special provisions protecting certain persons such as consumers, or by a 'resolutive' condition (i.e. a condition subsequent) or a denial of approval of relevant authorities.*[70]

Finally, Schroeter has proposed another definition: '*by provisions concerned with 'the validity of the contract', Article 4(a) of the CISG refers to legal limits to party autonomy.*'[71]

All three of the suggested abstract definition of validity entails that under an autonomous interpretation of validity, the domestic *label* of a rule is not decisive. Rather, the concept of validity in relation to the CISG is dependent on the effect of the domestic rule. This essentially broadens the validity exception to include anything, which under domestic law might affect the legal force of the contract.

Nevertheless, the common denominator of the abovementioned definitions is that they are, taken by themselves, inadequate to get us all the way across the finish line when identifying matters of validity. As such, these 'autonomous' definitions are still somewhat dependent on the applicable domestic law as the definition of individual validity issues is essentially deferred to domestic law. The reliance on domestic law is most evident in Hartnell's definition, which is entirely and solely focused on the effects of domestic law. Likewise, the relevant '*operation of law*', '*legal act of the state*', '*special provisions protecting certain persons*', '*a denial of approval of relevant authorities*', or '*legal limits to party autonomy*' refers to the legal framework of the background domestic law of the contract.

This inevitable shortcoming of the definitions seems not to be recognised by the scholars advocating for an autonomous interpretation of validity. Ferrari simply states that '*[t]here is no reason [...] that the term "validity" is not to be interpreted "autonomously."*'[72]

However, it seems that the challenge of defining the concept of validity autonomously lies in the very exclusion of validity and is one of practical nature. As noted by Bridge, the exclusion itself '*deprives courts and tribunals of material from which to infer the meaning of validity.*'[73] Accordingly, the

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[68] Hartnell, *Rousing the Sleeping Dog* (1993) p 45; see Ferrari/Torsello, *CISG in a Nutshell* (2018) pp 142-143; Djordjevic in Kröll/Mistelis/Perales Viscasillas, *Commentary* (2018) Art 4 para 13 n 39; Ferrari in Schlechtriem/Schwenzer/Schroeter, *Kommentar* (2019) Art 4 para 16; Honnold/Flechtner, *Uniform Law* (2021) Art 4 para 89; but see Hachem in Schwenzer/Schroeter, *Commentary* (2022) Art 4 para 31 n 115 criticising Hartnell's definition.
[69] See Hartnell, *Rousing the Sleeping Dog* (1993) p 49.
[70] Schlechtriem in Schlechtriem/Schwenzer, *Commentary* (2005) Art 4 para 7; followed by Hachem in Schwenzer/Schroeter, *Commentary* (2022) Art 4 para 3; referenced by Schroeter, *Contract Validity* (2017) p 55; Djordjevic in Kröll/Mistelis/Perales Viscasillas, *Commentary* (2018) Art 4 para 13 n 39; Honnold/Flechtner, *Uniform Law* (2021) Art 4 para 89.
[71] Schroeter, *Contract Validity* (2017) p 56.
[72] Ferrari/Torsello, *CISG in a Nutshell* (2018) p 142
[73] Bridge, *International Sale of Goods* (2013) para 10.31.

autonomous interpretation of validity is based on nothing more than definitions suggested by legal scholars and they do not autonomously define which specific matters constitute issues of validity.

3.2.2. Defining Validity in Accordance with the UNIDROIT Principles

As a solution to the challenges outlined above, another approach has been suggested to define the concept of validity in relation to the CISG. Some scholars argue that guidance might be sought in the UNIDROIT Principles of International Commercial Contracts (hereinafter the *PICC*) when identifying matters of validity.[74]

The PICC is an international uniform soft law instrument, which is developed by the international organisation, UNIDROIT, and which set forth general rules for international commercial contracts based on comparative legal research.[75]

It is expressly stated in the Preamble, that the PICC '*may be used to interpret or supplement international uniform law instruments*' – like the CISG.[76] Accordingly, some courts have applied the PICC to interpret or supplement the CISG.[77]

A confined set of rules on validity can be found in the topics of 'Validity' in Chapter 3 of the PICC.[78] Specifically, the PICC identifies and defines, inter alia, the following grounds for avoidance: mistake, fraud, threat, and gross disparity.[79]

Some support for the use of the PICC in defining the concept of validity for the purpose of the CISG might be found in the preparatory works. The rules on validity in the PICC is inspired by and based on the rules of validity in the LUV, which the drafters considered including in the CISG.[80] Although these validity rules were ultimately not included in the CISG, the drafters recognized the attempt of a unification on the subject as it was stated:

> *the consideration which is currently being given in other bodies of the United Nations system to such issues as the new international economic order and transnational corporations may eventually result in a general consensus on principles which may affect the validity of international contracts. If so and if such principles should bear on the validity of contracts for the international sale of goods the Commission may wish to consider these matters.*[81]

As such, the drafters of the CISG considered the possibility in the future of a consensus on principles of the validity of international contracts. If the PICC as of today can be viewed as general principles of contractual validity – a modern day *lex mercatoria* – the preparatory works of the CISG indeed support using the rules of validity in the PICC for the purpose of the CISG. Hence, the PICC could

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[74] Perales Viscasillas, *Role of the PICC* (2009) pp 301-307; Bridge, *International Sale of Goods* (2013) para 10.34; Perales Viscasillas in Kröll/Mistelis/Perales Viscasillas, *Commentary* (2018) Art 7 para 67; see also Lookofsky, *Understanding the CISG* (2022); but see Schroeter, *Contract Validity* (2017) pp 54-55; Ferrari/Torsello, *CISG in a Nutshell* (2018) pp 66-67.

[75] PICC Preamble; Brödermann, *PICC Commentary* (2018) para 10.

[76] PICC Preamble; see Perales Viscasillas, *Role of the PICC* (2009) pp 288-289; but see Ferrari/Torsello, *CISG in a Nutshell* (2018) pp 66-67 arguing against the Preamble.

[77] See e.g., *Scafom International Case*; *Dupiré Invicta Case*.

[78] Arts 3.1.1-3.3.2 PICC; see Bridge, *International Sale of Goods* (2013) para 10.34; Perales Viscasillas in Kröll/Mistelis/Perales Viscasillas, *Commentary* (2018) Art 7 para 67.

[79] Arts 3.2.1-3.2.7 PICC.

[80] Supra *sec 2.3.*; see Schroeter, *Contract Validity* (2017) pp 54-55.

[81] *SG Report* in *UNCITRAL YB* VIII (1977) p 93 no 27.

provide a uniform supplement to the CISG, which the drafters did not see itself capable of providing at the time of the drafting of the Convention.

Furthermore, as opposed to the other approaches, the approach of using the PICC fulfils the requirements of internationality and uniformity in Art 7(1) CISG, at least to the extent that the interpretation of validity does not vary depending on the applicable domestic law. Instead, it is based on an international uniform instrument and the rules can be applied consistently to achieve a uniform interpretation on validity.

However, some scholars argue that to interpret '*validity*' in the CISG by looking to the PICC is incompatible with Art 7(1) CISG because the approach involves an orientation towards external solutions that cannot be found within the CISG itself.[82] This argument finds support in at least one case according to which an autonomous interpretation requires that material for interpretation must be taken from the CISG itself.[83]

Another challenge of the approach is that Art 4(a) would be confined only to the issues of validity included in the PICC. Thus, the approach falls short as it is insufficient to resolve cases, which involves an issue not included in the PICC, but which raises a question of validity in one or more of the Contracting States. Consequently, the approach of relying on this compiled list of validity issues cannot be applied restrictively and without exceptions.[84]

What is more, the drafters of the CISG deliberately refrained from including a comprehensive set of rules on validity in the Convention.[85] As such, the PICC would – without any authority in relation to the CISG – unify a subject which the drafters arguably intentionally left to domestic law by a method which was explicitly rejected by the drafters.

In sum, the PICC approach neither satisfy Art 7(1), nor does it take domestic interests into consideration.

3.2.3. Defining Validity by Deferring the Definition to Domestic Law

Finally, it must be considered whether the concept of validity in the sense of Art 4(a) CISG – despite Art 7(1) CISG – should be deferred to be defined by domestic law on contract validity.

This approach entails that it is left entirely to the applicable domestic law of the contract in dispute to define what constitutes issues of validity on a case-by-case basis.[86] Such an approach would lead to differing definitions of validity for contracts governed by the CISG dependent on the different domestic understandings and rules of contract validity.

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[82] See Schroeter, *Contract Validity* (2017) p 55; Ferrari/Torsello, *CISG in a Nutshell* (2018) pp 66-67; Schroeter, *UN-Kaufrecht* (2022) para 131; Hachem in Schwenzer/Schroeter, *Commentary* (2022) Art 7 para 26; see also Lookofsky, *Understanding the CISG* (2022) p 34.

[83] *Macromex Case* p 7.

[84] See Hartnell, *Rousing the Sleeping Dog* (1993) pp 49 and 60; Leyens, *CISG and Mistake* (2005) p 31.

[85] Supra *sec 2.3*.

[86] Leyens, *CISG and Mistake* (2005) p 28.

The approach of looking to domestic law to define issues of validity has found some support amongst legal scholars – albeit mainly in elder scholarly writings from the 1980s and 1990s.[87] Other scholars argue to the contrary that the approach jeopardises the CISG's goal of uniformity due to the different definitions in domestic law.[88]

It can be argued, that deferring the definition of validity to domestic law is merely a symptom of the 'homeward trend' – an approach that does not have regard to the '*international character*' of the CISG.[89] However, upon closer scrutiny, some support for the domestic approach can be found in both case law and the preparatory works.

Case law supports that Art 7(1) does not strictly require that all expressions in the Convention must be interpreted autonomously. According to a decision by an Italian court, the expression '*private international law*' in Arts 1(1)(b) and 7(2) CISG is not required to be interpreted autonomously but is to be understood as referring to the forum's understanding.[90] As such, a distinction must be made between the homeward trend and recourse to domestic law, which may be required by the CISG itself.[91] The latter is arguably the case with the concept of validity, since the CISG explicitly states that '*it is not concerned with*' validity.

In this regard, it should also be noted that the CISG generally respects the principle of party autonomy, which allows the parties to derogate from the provisions of the CISG and determine the applicable background law.[92] Hence, it would arguably not be contrary to the Convention, but rather in line with this principle, for validity to be defined by the law chosen by the parties.

The domestic approach is also somewhat supported by the preparatory works. The drafters' choice of the term validity and the lack of debate as to the meaning of the term could indicate that the drafters left the term ambiguous and open for interpretation.[93] One scholar argues that '*Since CISG does not define and thereby limit the term "validity", it is left to the various domestic legal systems to determine when a cause of invalidity exists and which consequences it has.*'[94] In the same line, Hartnell argues that

> *The choice of the term 'validity' as a parameter of the CISG reflects the drafters' effort to employ terminology that was not laden with legal meaning in any one state. [...] it is an elastic term that permits some national differences.*[95]

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[87] See Longobardi, *Disclaimers of Implied Warranties* (1985) pp 867-868; Tallon in Bianca/Bonell, *Commentary* (1987) Art 79 para 2.4.3; Drobnig, *Substantive Validity* (1992) p 636; for a comprehensive list of this view see Schroeter, *Contract Validity* (2017) p 50 n 27 with references.
[88] Ferrari in Schlechtriem/Schwenzer/Schroeter, *Kommentar* (2019) Art 4 para 16.
[89] Art 7(1) CISG. The 'homeward trend' refers to the tendency of interpreting the CISG in light of the domestic law in which the interpreter was trained and is most familiar with; see Ferrari, *Homeward Trend* (2009) pp 181-182; Honnold/Flechtner, *Uniform Law* (2021) para 111; Lookofsky, *Understanding the CISG* (2022) p 33.
[90] *Potatoes Case*.
[91] Ferrari, *Homeward Trend* (2009) pp 182-184.
[92] Art 6 CISG; see UNCITRAL Digest Art 1-6 no 2.
[93] Hartnell, *Rousing the Sleeping Dog* (1993) pp 20-21 and 47.
[94] Drobnig, *Substantive Validity* (1992) p 636.
[95] Hartnell, *Rousing the Sleeping Dog* (1993) p 47.

Furthermore, the drafters of the predecessor to the CISG, the ULIS, intentionally left the definition of specific validity issues such as fraud and misrepresentation to domestic law precisely due to definitional problems:

> *It is well known that the concepts of fraud and misrepresentation vary greatly from one law to another [...]. The unification of law by reference to these notions would therefore be only apparent, and the Commission has thought it preferable openly to admit recourse to municipal laws.*[96]

As such, the drafters of the ULIS took into consideration the different definitions of validity issues on domestic level – and accepted these differences.

These considerations were recuring during the drafting of the CISG. The drafters considered including rules and definitions of validity issues, such as mistake and fraud in the CISG.[97] In this regard it must be emphasised that the unification of such issues was rejected partly due to a respect of the differences in domestic law as well the complexity and sensitivity on the subject.[98] As such, the drafters of the CISG with Art 4(a) made a deliberate choice to exclude issues of validity from the scope of the uniform sales law and thus avoid a unification of the concept of validity.

The preparatory works thus demonstrates a clear concern for retaining domestic definitions on issues of validity alongside the application of the CISG, which supports that the purpose of Art 4(a) was precisely to allow domestic differences on sensitive matters of validity.[99]

3.3. Definitions of Validity in Case Law

Although the courts' interpretation of the term is not binding, case law serves to illustrate a practical – as opposed to a merely theoretical – approach for determining, which matters constitute issues of validity in the sense of Art 4(a) CISG. This section is separated from the methodical approaches because the definitions in case law call for other remarks, which hardly fits into just one of the categories above.

In the *Geneva Pharmaceuticals Case* a U.S. District Court defined the concept of validity in Art 4(a) CISG by referencing the definition proposed by Hartnell as it stated:

> *Under the CISG, the validity of an alleged contract is decided under domestic law. By validity, CISG refers to 'any issue by which the domestic law would render the contract void, voidable, or unenforceable.'*[100]

This definition was repeated in the *Barbara Berry Case* in which another U.S. District Court also cited Hartnell's definition and the *Geneva Pharmaceuticals Case* when it defined issues of validity.[101]

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[96] *Hague Conference Documents II* p 204.
[97] Arts 6-8 and 10 LUV; *SG Report* in *UNCITRAL YB* VIII (1977) pp 91-93 nos 8-27 and pp 104-107; *WG Session 9* in *UNCITRAL YB* IX pp 65-66 nos 49-69.
[98] Supra *sec 2.3.*
[99] See Hartnell, *Rousing the Sleeping Dog* (1993) p 49; Murray, *Neglect of the CISG* (1998) p 372.
[100] *Geneva Pharmaceuticals Case* (2002) para 206.
[101] *Barbara Berry Case* (2006) para 7.

It must be noted that these two U.S. courts have applied a definition of validity proposed by a U.S. professor, which according to Hartnell herself stems from a U.S. understanding of validity.[102] Thus, it appears as though the courts might have been influenced by the homeward trend.[103]

Nonetheless, Ferrari has subsequently construed this definition as an attempt by the courts of an autonomous definition of validity.[104] Furthermore, although the definition was originally inspired by a common law understanding of validity, the definition appears to be in line with what can be derived from comparative law about the concept of validity. Although the exact terms differ in different jurisdictions, the commonly understood effect of invalidity is that the contract is void *ab initio* (absolute nullity), voidable (relative nullity), or unenforceable.[105] Therefore, the definition proposed in case law is not merely a symptom of the homeward trend, but an expression of what is ordinarily understood as issues of validity.

Aside from the cases just cited, case law on the definition and interpretation of the term '*validity*' is sparse. In many cases, validity issues are identified intuitively, as courts without further explanation resort to domestic law to determine the requirements for a claim relating to validity.[106] What can be inferred from the lack of definitions in case law, is that adjudicators find themselves at a loss when interpreting the concept of validity in relation to contracts governed by the CISG. Since no guidance can be found within the CISG itself, courts intuitively resort to the understanding of validity derived from domestic law.

3.4. Discussion and Conclusion

The analysis and discussion set out above illustrates the balancing of domestic interests and international interests, which in the first place resulted in the adoption of Art 4(a) CISG.

One the one hand, an autonomous approach is (at least to a certain extent) required by the CISG's own wording, namely Art 7(1). On the other hand, Art 4(a)'s very exclusion of validity issues and the preparatory works support that the purpose of the provision was precisely to allow some differences on domestic level. Amongst legal scholars the domestic approach found support in the early days of the CISG, but today preference is clearly given to the autonomous approach. Meanwhile, the PICC confers on itself a power to aid in the interpretation of the CISG.

Initially, the approach of using the PICC to define issues of validity in the sense of Art 4(a) CISG must be rejected. The approach solves some of the practical challenges of defining the concept of validity under the CISG, and taken by itself, the approach would serve the CISG's uniformity goals. However, despite the Preamble of the PICC, the application of PICC should be restrained to cases in which the parties of the contract have chosen the PICC as the applicable law. A soft law instrument like the PICC cannot take precedence over binding law, which includes both the applicable domestic law as well as the CISG. Simply put, there is no legal basis for interpreting the CISG by using the PICC. Nonetheless, since the PICC is built on comparative studies, guidance might be sought in the PICC for a general understanding of validity issues such as mistake, fraud, etc.[107]

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[102] Hartnell, *Rousing the Sleeping Dog* (1993) pp 19-20 n 76 referencing Corbin, *Corbin on Contracts* (1952).
[103] Supra n 89.
[104] Ferrari, *Scope of Application* (2004) p 100; Ferrari/Torsello, *CISG in a Nutshell* (2018) p 142.
[105] Schwenzer/Muñoz, *Global Law* (2022) paras 15.01-15.15.
[106] Kröll, *Selected Problems* (2005) p 40, see e.g., *Miami Valley Paper Case* paras 46-49 and 57-59, *Sky Cast Case* p 11.
[107] See Hachem in Schwenzer/Schroeter, *Commentary* (2022) Art 7 para 26.

In this author's opinion, the proper interpretation of validity in the sense of Art 4(a) CISG requires a balanced approach that combines the two remaining approaches. The interpretation must take into consideration both the domestic interests inherent in the very exclusion of validity, and the internationalists interests of the CISG embodied in Art 7(1).[108]

Despite the advocacy for an autonomous interpretation of validity in most scholarly writings today, a complete autonomous understanding of validity seems to be practically impossible. Even under the proposed 'autonomous' definitions, the concept of validity cannot be completely severed from domestic law. This is simply because the CISG does not contain any rules, provisions, or authority relating to validity – a natural consequence of Art 4(a)'s general rule that the CISG '*is not concerned with the validity of the contract*'.

A complete autonomous interpretation might be desirable for the sake of uniformity. However, it seems that legal scholars on the CISG in their support for the uniform sales law do not dare to suggest that the content of some terms in the CISG must be defined by deference to domestic law. As such, an approach which leaves some room for domestic understandings of validity is the only feasible approach in practice.

To conclude, the term '*validity*' can be defined by using the definition proposed by Hartnell. This definition is autonomous insofar that it is not decisive whether domestic rules are labelled as rules of validity. What is decisive is the *effect* of the domestic rules.

In this regard, Hartnell's definition is to be preferred over the other autonomous definitions since it is the only definition that is supported by case law. Moreover, considering that the *Geneva Pharmaceuticals Case*'s definition is cited in the UNCITRAL Digest of Case Law on the CISG,[109] it must be expected that this definition (if any) will be applied by other courts and tribunals.

However, this 'autonomous' definition is not strictly speaking an autonomous interpretation of validity as it is not in itself sufficient to determine which concrete matters constitute issues of validity. In essence, the definition defers the definition of individual validity issues to the applicable domestic law to be decided on a case-by-case basis.

Taken together, the combination of the two approaches favours both domestic interests as well as the international interests. The proposed effect-approach ensures that validity is not defined by domestic labels as required by Art 7(1), but it still allows domestic differences in relation to specific issues of validity as was intended by the drafters.

In sum, validity in the sense of Art 4(a) CISG can be autonomously defined as *any issue by which the domestic law would render the contract void, voidable, or unenforceable*. However, it is left to the applicable domestic law *in concreto* to determine which specific matters concern contractual validity and under what circumstances the contract is rendered void, voidable, or unenforceable. The result is

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[108] See Hartnell, *Rousing the Sleeping Dog* (1993) pp 22, 46 and 49.

[109] UNCITRAL Digest Art 4 no 9. The Digest is published by the UNCITRAL as a tool designed to provide information on the interpretation of the CISG by giving an overview of the relevant case law on each provision, UNCITRAL Digest pp xi-xii. The Digest has been acknowledged and referenced by courts in the interpretation of CISG, see e.g., *ThyssenKrupp Case* para 43, in which the court stated that the Digest may serve as an appropriate reference for how to accurately interpret the relevant articles of CISG.

that the matters of contractual validity in the sense of Art 4(a) CISG will differ on a case-by case basis depending on applicable domestic law.

Nonetheless, this result is acceptable because the term validity does not define the borders of the CISG. Identifying a matter of being an issue of validity under domestic law only works to identify issues which are potentially excluded from the scope of the Convention. An autonomous interpretation of the validity exception can be achieved – not by forcing a practically impossible autonomous understanding of validity – but by interpreting Art 4(a) CISG in its entirety. As such, the decisive test that determines whether a certain matter is governed by domestic law is the not the term '*validity*' but the exception to the validity exception.[110]

4. The Applicability of the CISG To Specific Issues of Validity

Defining the concept of validity does not conclude the analysis of the scope of the CISG. Having established that the concept of validity hardly lends itself to complete autonomous interpretation, we must turn our attention to the counter exception to the validity exception – the except clause.

In this section, the Convention's scope in light of the except clause will be analysed. The analysis will be limited to two specific issues of validity: mistake and fraud.

Issues of mistake and fraud are frequently listed as validity issues, which – at least as a clear starting point – fall outside the scope of the CISG.[111] As will be demonstrated below, both issues were also frequently discussed during the drafting of the CISG,[112] which makes it all the more interesting to examine how such issues are dealt with today. What is more, since both mistake and fraud concern the consent of the parties to contract,[113] parallels can be drawn between the individual solutions. Thus, the examination of the chosen validity issues ought to provide an illustrative picture of the borders between the CISG and domestic law rules on validity.

In the following, the except clause will first be introduced and analysed in general terms. Then, it will be analysed whether and to what extent the CISG preempts concurrent domestic remedies for mistake and fraud.

4.1. The Counter Exception to the Validity Exception

According to the except clause in the introductory wording of Art 4 CISG, issues of validity are only excluded from the scope of the Convention '*except as otherwise expressly provided*'.[114] This important counter exception entails that once an adjudicator has identified an issue of being one of validity under domestic law, the adjudicator must also consider the except clause and determine whether the issue is nevertheless governed by the CISG.[115]

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[110] See Schroeter, *Contract Validity* (2017) p 52.
[111] *Aluminium Case* para 149; Djordjevic in Kröll/Mistelis/Perales Viscasillas, *Commentary* (2018) Art 4 para 16; Ferrari/Torsello (2018) p 135; Schroeter in Schwenzer/Schroeter, *Commentary* (2022) Arts 14-24 para 33.
[112] Infra *secs 4.2.3.1.* and *4.3.2.1.*
[113] Posch, *Defenses* (2016) paras 18-25.
[114] Art 4 CISG.
[115] Leyens, *CISG and Mistake* (2005) p 14; Ferrari/Torsello, *CISG in a Nutshell* (2018) p 143; Hachem in Schwenzer/Schroeter, *Commentary* (2022) Art 4 para 29.

Although it is apparent from the except clause, that the CISG might govern some issues of validity, it is not apparent to what extent it does so. The wording of the counter exception provides little, if any, guidance for an adjudicator in making this determination.

At first sight, the phrasing '*expressly*' indicates that the CISG is never concerned with issues of mistake or fraud, since the Convention does not contain any rules that expressly address such issues. However, the phrasing '*expressly*' does not require that a provision expressly states that it addresses a matter of validity.[116] This is explicitly recognised in the Secretariat Commentary, in which it is stated that '*there are no provisions in this Convention which expressly govern the validity of the contract'*.[117]

The reason as to why the Art 4 CISG even uses the phrase '*expressly*' can be found in its drafting history, as the wording stems from Art 8 ULIS.[118] As opposed to the CISG, the ULIS indeed contained provisions that expressly addressed the relationship between the ULIS and domestic rules on validity.[119] Although these provisions were deleted with the CISG, the wording of Art 4 CISG – in what appears to be a historical oversight – remained virtually the same as Art 8 ULIS.[120]

However, this does not mean that the except clause in Art 4 should be completely disregarded. The Secretariat Commentary further provides that

> *Although there are no provisions in this Convention which expressly govern the validity of the contract or of any usage, some provisions may provide a rule which would contradict the rules on validity of contracts in a national legal system. In case of conflict the rule in this Convention would apply.*[121]

Hence, Art 4's except clause requires an examination of the rules in the applicable domestic law and the Convention to determine whether the rules are conflicting. If the answer is affirmative, the CISG *preempts* or *displaces* the application of domestic law.[122] If the answer is in the negative, the party can rely on domestic remedies and defences provided for under the applicable law in concurrence with the CISG.[123]

According to the Secretariat Commentary, '*[t]he only article in which the possibility of such a conflict is apparent is [Art 11]*'.[124] This provision governs an issue of formal validity as it provides for freedom from form requirements.[125] Although Art 11 CISG does not expressly provide that it

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[116] Schroeter, *Contract Validity* (2017) p 52; Ferrari/Torsello, *CISG in a Nutshell* (2018) pp 143-144; Hachem in Schwenzer/Schroeter, *Commentary* (2022) Art 4 para 29.
[117] *Secretariat Commentary* Art 4 no 2.
[118] Supra n 32.
[119] Arts 34 and 53 ULIS.
[120] See Hartnell, *Rousing the Sleeping Dog* (1993) p 52; Schroeter, *Contract Validity* (2017) p 54.
[121] *Secretariat Commentary* Art 4 no 2.
[122] See Schroeter, *Defining the Borders* (2013) p 557-558; Djordjevic in Kröll/Mistelis/Perales Viscasillas, *Commentary* (2018) Art 4 para 15; Hachem in Schwenzer/Schroeter, *Commentary* (2022) Art 4 para 29.
[123] Hachem in Schwenzer/Schroeter, *Commentary* (2022) Art 4 para 19.
[124] *Secretariat Commentary* Art 4 no 3.
[125] Art 11 CISG.

addresses a matter of validity, the provision preempts domestic law rules, which require that a contract must be in writing for it to be valid.[126]

The question then is, aside from Art 11, how does an adjudicator determine whether there is a conflict between the rules in the CISG and the rules in domestic law? At first sight, the rules of substantive sales law and rules on contractual validity concern two entirely different areas of a sales transaction.

When determining whether the CISG preempts concurrent domestic remedies on issues of validity, several approaches have been suggested by various legal scholars.

According to Honnold, the CISG preempts domestic law if '*the domestic rule is invoked by the same operative facts that invoke a rule of the Convention*.'[127] Consequently, '*domestic rules that turn on substantially the same facts as the rules of the Convention must be displaced by the Convention*.'[128]

In dealing with preemption or coexistence of the CISG and domestic law, Ferrari suggests a functional equivalence test:

> *where, in relation to a specific set of facts, the CISG provides solutions that are exhaustive and functionally equivalent to the otherwise applicable domestic remedies, the CISG preempts recourse to those domestic remedies.*[129]

Whereas Honnold and Ferrari's approaches focus on the facts, Schroeter has developed and proposed the following two-step approach, which adds a second step:

> *A domestic law rule is displaced by the CISG if (1) it is triggered by a factual situation which the CISG also applies to (the 'factual' criterion), and (2) it pertains to a matter that is also regulated by the CISG (the 'legal' criterion).*[130]

Only if both criteria are cumulatively fulfilled there will be an overlap between the domestic law rules and the CISG in a way that will generally result in preemption of domestic law.[131] *The factual criterion* entails that dogmatic categories and labels of domestic law like 'contract' or 'torts' are not decisive, but rather the substance of the rules, which is identified by the facts of the case, is decisive.[132] *The legal criterion* takes into account the regulatory purpose and focus of the concurring legal rules.[133]

Ultimately, all three approaches focus on whether a solution to a specific problem can be found within the CISG regime. If so, the CISG preempts domestic law – even on issues, which undisputedly from a domestic perspective concerns the validity of the contract

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[126] *Secretariat Commentary* Art 4 no 3; Ferrari/Torsello, *CISG in a Nutshell* (2018) p 134 and 140; Honnold/Flechtner, *Uniform Law* (2021) para 89; Hachem in Schwenzer/Schroeter, *Commentary* (2022) Art 4 para 29.
[127] Honnold/Flechtner, *Uniform Law* (2021) para 87.
[128] Ibid para 102; see also Hachem in Schwenzer/Schroeter, *Commentary* (2022) Art 4 para 19.
[129] Ferrari/Torsello, *CISG in a Nutshell* (2018) p 144.
[130] Schroeter, *Defining the Borders* (2013) p 563.
[131] Ibid p 563.
[132] Ibid.
[133] Ibid p 566.

In the following it will be examined which (if any) methodical approach is employed by the courts in relation to matters of mistake and fraud.

4.2. Mistake

4.2.1. Common Characteristics of Mistake as an Issue of Contractual Validity

The concept of mistake varies in each jurisdiction. Nonetheless, for the purpose of this thesis, some general points can be derived from comparative law to provide an overall understanding of matters of mistake in relation to contractual validity.

Mistake or error as a legal issue is generally understood to refer to an erroneous assumption or belief relating to the facts or law at the time of contract conclusion.[134] Common law typically labels the mistake by focusing on who is mistaken, whereas civil law focuses on the type of mistake.[135] Notwithstanding significant differences between jurisdictions on rules on mistake, there is one common characteristic for a mistake to be legally relevant: The mistake must be essential and make the contract fundamentally different meaning that the mistaken party would not have concluded the contract or would have concluded the contract on different terms if it had not been mistaken.[136]

Mistakes involve a *defect in consent* for the mistaken party to enter the contract, which may make the contract void or voidable depending on the jurisdiction and the circumstances.[137]

It should be noted that there is an overlap between issues of mistake and other doctrines, such as issues of good faith and duties of disclosure in civil law systems and misrepresentation in common law systems.[138] Nonetheless, the analysis in this thesis will be delimited to sources which specifically addresses issues of mistake.

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[134] See e.g., Art. 3.2.1 PICC; Art 4:103(1) PECL; Art 48(1) CESL; US Restatement 2nd of Contracts § 151; Schroeter, *Contract Validity* (2017) p 65; Honnold/Flechtner, *Uniform Law* (2021) para 90; Schwenzer/Muñoz, *Global Law* (2022) para 17.03. In both civil law and common law jurisdictions, mistakes of law have traditionally not been recognised as a relevant mistake. However, some jurisdictions and international uniform law instruments recognises mistakes of law. In relation to international sales contracts, mistakes of law can be significant in cases where the applicable law is foreign to the mistaken party, e.g., in relation to import/export bans, see Posch, *Defenses* (2016) paras 27-28; Schwenzer/Muñoz, *Global Law* (2022) paras 17.18-17.20.

[135] Common law describes mistakes as either common, mutual, or unilateral mistake, whereas civil law identifies the type of mistake, e.g., errors of expression or mistake as to identity or subject matter, see Schwenzer/Muñoz, *Global Law* (2022) para 17.11-17.13 with references.

[136] See e.g., Art. 3.2.2 PICC; Art 4:103 PECL; Art 48 CESL; US Restatement 2nd of Contracts §§ 152-153; BGB § 119; Art 1130 French Civil Code; see Posch, *Defenses* (2016) para 26-48; Schwenzer/Muñoz, *Global Law* (2022) para 17.23; Hachem in Schwenzer/Schroeter, *Commentary* (2022) Art 4 para 36.

[137] See e.g., Art. 3.2.2 PICC; Art 4:103 PECL; Art 48 CESL; US Restatement 2nd of Contracts §§ 152-153; BGB § 119; Arts 1130-1131 French Code Civil; Posch, *Defenses* (2016) paras 18-48; Schwenzer/Muñoz, *Global Law* (2022) paras 19.01 and 19.06.

[138] Schwenzer/Muñoz, *Global Law* (2022) para 17.02. Misrepresentation can from a functional perspective be described as an induced mistake, Schwenzer/Muñoz, *Global Law* (2022) para 17.07.

4.2.2. The CISG and Domestic Remedies for Mistake – Preemption or Concurrence
In accordance with the definition of validity adopted in this thesis, issues of mistake can generally be categorised as an issue of the validity of the contract.[139] Accordingly, issues of mistake are generally not governed by the CISG pursuant to the validity exception in Art 4(a) CISG.[140]

However, an adjudicator must also take the exception to the validity exception into consideration and examine whether there is a conflict between the domestic rules and the rules in the CISG.[141] This analysis depends on what the mistake is about.[142]

Given the scope of this thesis, an exhaustive analysis of the many types of mistakes will not be provided here. Nonetheless, one particular type of mistake has especially given rise to discussion about the issue of preemption and concurrent domestic remedies. For illustrative purposes, the analysis below will focus primarily on this one type of mistake.

4.2.3. Mistakes About the Quality of the Goods
Mistakes relating to the quality of the goods has been the centre of discussions in case law, the preparatory works and amongst legal scholars.

The CISG's rules on the rights and obligations of the parties include the seller's obligation to deliver the goods in conformity with the contract. Art 35 CISG provides that '*the seller must deliver goods which are of the quantity, quality, and description required by the contract*'.[143] In case of non-conformity, the CISG provides remedies for breach of contract in Arts 45 *et seq* CISG.

As such, if the mistake relates to the quality and characteristics of the goods, the issue can simultaneously be viewed as of one of validity under domestic law and one of non-conformity under the CISG. The pivotal question is whether the mistaken party can rely on the rules and remedies available under domestic law to avoid the contract or whether Arts 35 *et seq* CISG preempts recourse to domestic law.

According to most legal scholars, the CISG preempts domestic law for issues of mistake relating to the quality and characteristics of the goods.[144]

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[139] Supra *secs 3.4.* and *4.2.1.* n 137.
[140] See *Window Shades Case*; *Roland Schmidt Case*; *Used Woodworking Machine Case*; *Air Filters Case*; Djordjevic in Kröll/Mistelis/Perales Viscasillas, *Commentary* (2018) Art 4 para 21; Ferrari/Torsello, *CISG in a Nutshell* (2018) p 135; Schroeter in Schwenzer/Schroeter, *Commentary* (2022) Arts 14-24 para 33.
[141] Ferrari/Torsello, *CISG in a Nutshell* (2018) pp 140-142.
[142] Leyens, *CISG and Mistake* (2005) p 28; Ferrari, *CISG and Domestic Remedies* (2007) p 68; Honnold/Flechtner, *Uniform Law* (2021) para 93; Schroeter, *Contract Validity* (2017) p 65; see also Hachem in Schwenzer/Schroeter, *Commentary* (2022) Art 4 para 36.
[143] Art 35(1) CISG in part (emphasis added).
[144] Leyens, *CISG and Mistake* (2005) p 48; Huber/Mullis, *CISG* (2007) pp 22-23; Ferrari, *CISG and Domestic Remedies* (2007) p 68; Schroeter, *Contract Validity* (2017) pp 65-66; Djordjevic in Kröll/Mistelis/Perales Viscasillas, *Commentary* (2018) Art 4 para 21; Kröll in Kröll/Mistelis/Perales Viscasillas, *Commentary* (2018) Art 35 para 211; Ferrari/Torsello, *CISG in a Nutshell* (2018) p 146; Honnold/Flechtner, *Uniform Law* (2021) para 313; Schroeter, *UN-Kaufrecht* (2022) paras 210-215; Schwenzer in Schwenzer/Schroeter, *Commentary* (2022) Art 35 paras 48-49; but see Hartnell, *Rousing the Sleeping Dog* (1993) pp 72-77.

4.2.3.1. The Travaux Préparatoires

During the drafting of the CISG, the drafters specifically discussed the relationship between domestic remedies for mistake and the remedies for non-conformity in the uniform sales law.

Initially, Art 41 of the 1956 Draft ULIS expressly prohibited the buyer from recourse to domestic remedies for non-conforming goods upon which the buyer '*might otherwise have relied, and in particular those based on mistak*e.'[145]

Art 34 ULIS in the final adoption of the ULIS was more vague as it provided that '*the rights conferred on the buyer by the [ULIS] exclude all other remedies based on lack of conformity of the goods.*'[146] This provision was deleted during the drafting of the CISG,[147] which might suggest that issues of mistake are entirely left to domestic law.[148]

However, upon closer scrutiny, this is not the case.[149] It was noted by the drafters of the CISG that the deletion of Art 34 ULIS

> *did not indicate disagreement with the objective of [Art 34 ULIS] ... to protect the uniformity of the [law] by prohibiting recourse to other remedies provided under some national rules*.[150]

However, the drafters found that Art 34 ULIS was too broad and that it was doubtful whether the provision was even needed:

> *There will be varying national rules on most of the provisions covered by the Uniform Law; these of course, are displaced by virtue of the general obligation to give effect to the uniform law. In addition, this obligation has been reinforced by [Art 7(1) CISG] which specifically directs attention to the international character of the law and the need to promote uniformity in its interpretation and application. It is, of course, impractical to repeat that inconsistent national laws are displaced in connexion with each of the rules of the Uniform Law.*[151]

Hence, the drafters emphasised Art 7(1)'s requirement of an autonomous interpretation and application and explicitly stated that the CISG displaces application of concurrent domestic remedies – even without the express provision in Art 34 ULIS. Accordingly, although the drafters left the definition of and remedies for mistake to domestic law, the drafters did not intend to allow the parties unlimited access to rely on domestic rules on mistake.[152] Rather, they assumed that insofar the mistake concerns a matter regulated by the Convention, the CISG preempts domestic rules on mistake from being applied. This part of the preparatory weighs heavily in favour of the argument that the CISG preempts domestic rules on mistake for non-confirming goods.[153]

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[145] See Hartnell, *Rousing the Sleeping Dog* (1993) p 73; Schroeter, *Irrelevance of the Validity Exception* (2015) p 108.
[146] Art 34 ULIS; see Hartnell, *Rousing the Sleeping Dog* (1993) pp 73-74; Schroeter, *Irrelevance of the Validity Exception* (2015) p 108.
[147] *SG Report* in *UNCITRAL YB* IV (1973) p 44 no 62.
[148] See Ferrari, *CISG and Domestic Remedies* (2007) p 63 with references.
[149] Kröll in Kröll/Mistelis/Perales Viscasillas, *Commentary* (2018) Art 35 para 208.
[150] *SG Report* in *UNCITRAL YB* IV (1973) p 44 nos 63-64; see Hartnell, *Rousing the Sleeping Dog* (1993) p 74.
[151] *SG Report* in *UNCITRAL YB* IV (1973) p 44 no 64 (emphasis added).
[152] See Ferrari, *CISG and Domestic Remedies* (2007) p 63.
[153] See Hartnell, *Rousing the Sleeping Dog* (1993) p 74.

However, this was not the last to be said on the subject. Later in the drafting process of the CISG, the drafters considered including a provision similar to Art 34 ULIS based on Art 9 LUV, which provided in part:

> *The buyer shall not be entitled to avoid the contract on the ground of mistake if the circumstances on which he relies afford him a remedy based on the non-conformity of the goods with the contract.*[154]

However, it was ultimately rejected to include such a rule because it was '*considered inappropriate*'.[155] Some found it undesirable to limit the rights given in domestic law for mistake because it might '*unjustifiably deprive the buyer of the right to avoid the contract*'.[156] Others found that an express article was unnecessary because in case of non-conformity of the goods, '*it was clear that any remedy must be based on non-conformity*'.[157]

In sum, the travaux preparatoires lend support both to arguments in favour of applicability of domestic rules on mistake and arguments in favour of the CISG's preemption of domestic rules on mistake.[158]

4.2.3.2. Case Law

The applicability of the CISG to mistakes relating to the quality and characteristics of the goods have since been addressed in a few cases.

In an Austrian decision from 1997, it was held - without any detailed discussion of Art 35 CISG – that the issue of mistake must be decided in accordance with Austrian domestic law.[159] However, in four other cases, a German District Court, the Austrian Supreme Court, a Belgian Court, and the Swiss Supreme Court all concluded, that the CISG preempted domestic rules on validity for issues of mistake about the quality of the goods.[160]

The recent decision by the Swiss Federal Supreme Court in 2019 thoroughly addressed the dilemma of preemption of domestic rules on mistake. In the *Electronic Electricity Meters Case* a Swiss buyer had purchased electricity meters from a Slovenian manufacturer.[161] After delivering approximately 35,000 electricity meters between 2004 and 2009, it was discovered that the electricity meters suffered from a design defect, which could lead to measuring errors.[162] The issue in the case thus related to the quality of the goods.

In 2012, the seller informed the buyer hereof, in 2013 the buyer declared to the seller that it considered all the contracts '*unverbindlich'*, and in 2015 the buyer-initiated court proceedings against the seller.[163] Since the buyer had not given notice to the seller within two years after delivery, the buyer had lost its right to rely on the CISG's remedies for non-conformity pursuant to Art 39(2) CISG.

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[154] Art 9 LUV; see *SG Report* in *UNCITRAL YB* VIII (1977) pp 91-93 nos 10-27, pp 106-107.
[155] *WG Session 9* in *UNCITRAL YB* IX (1978) p 66 nos 64-66.
[156] Ibid p 66 no 65.
[157] Ibid.
[158] See Hartnell, *Rousing the Sleeping Dog* (1993) pp 73-77; *Electronic Electricity Meters Case* para 51.
[159] *Monoammonium Phosphate Case* para 27; see Leyens, *CISG and Mistake* (2005) p 45.
[160] *Hearing Implants Case*; *Used Component Placement Machine Case*; *Bruggen Deuren Case*; *Electronic Electricity Meters Case*.
[161] *Electronic Electricity Meters Case* para 1.
[162] Ibid para 2.
[163] Ibid para 2.

Instead, the buyer relied on a domestic rule on '*Grundlagenirrtum*' in Art 24(1) no 4 of the Swiss Code of Obligations (*CO*).[164]

The Court of First Instance rejected the applicability of the CISG because it would lead to an '*unbefriedigenden Ergebnis*'.[165] It then concluded that the contract was invalid under domestic law because the buyer had been in fundamental error about the quality of the electricity meters when it concluded the contract.[166] The Court of Appeal reversed the judgment as it held that the CISG applied to the contract and preempted the application of the Swiss CO.[167]

After careful reasoning the Swiss Federal Supreme Court affirmed the Court of Appeal's decision. The Supreme Court first stressed the importance of an internationally uniform interpretation of the CISG in accordance with Art 7(1).[168] The court then held that the buyer was precluded from relying on Art 24(1) no 4 CO to avoid the contract, because whenever the buyer's mistake relates to the quality of the goods, domestic law rules are preempted by Art 35 *et seq* CISG.[169]

The Supreme Court reached its conclusion by first interpreting the except clause in Art 4. The court stated that issues of validity are only governed by domestic law if the CISG itself does not expressly regulate the matter.[170] The court then referenced Ferrari as it stated that the decisive factor is whether a factual question was regulated with at least a '*"funktional äquivalenten" Lösung'*.[171]

The court found that defects of intent are in principle not governed by the CISG, but only to the extent that the CISG does not provide a functionally equivalent solution.[172] As the court applied the functional equivalence test to the case at hand, it found that the CISG provided a solution functionally equivalent to Art 24(1) no 4 CO.[173] As such, Arts 35 *et seq* together with 45 *et seq* on the buyer's remedies provided an exhaustive regulation of the issue of fundamental error about the characteristics goods. It was emphasised that Art 35(3) CISG takes into account the buyer's knowledge about the non-conformity of the electricity meters at the time of contract conclusion.[174] Furthermore, Art 51(2) CISG provides the buyer with a right to avoid the contract in its entirety in case of a fundamental breach of contract.[175]

The court then concluded that although the buyer was entitled to invoke fundamental error under Swiss domestic law, the CISG applied exclusively to the case and preempted Art 24(1) no 4 CO.[176] According to the court's reasoning, if recourse to domestic law was allowed to challenge the validity of the contract based on a mistake concerning the characteristics of the goods, it would disturb the CISG's balance of interests and undermine the international uniformity of the CISG.[177] In this regard the court emphasised an important point in relation to the buyer's rights in an international sale of

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[164] Ibid paras 6, 8, and 48.
[165] Ibid para 6.
[166] Ibid paras 5-6.
[167] Ibid para 6.
[168] Ibid para 13.
[169] Ibid paras 48-62.
[170] Ibid para 52.
[171] Ibid.
[172] Ibid para 53.
[173] Ibid para 54-56.
[174] Ibid para 54.
[175] Ibid para 55.
[176] Ibid paras 57-59.
[177] Ibid para 58.

goods: That the CISG only provides for termination of the contract as a last resort because the cancellation of the contract is extraordinarily burdensome for the seller in international trade.[178]

Ultimately, the Swiss Supreme Court concluded that the buyer's reliance on Swiss domestic law to avoid the contract was precluded because the CISG's remedies exhaustively regulated the facts of the case.[179]

The persuasiveness of the court's reasoning is striking. The *Electronic Electricity Meters Case* is an example of a case, which to a great extent had regard to the autonomous interpretation required by Art 7(1) CISG. As such, the court made a total of 31 cross-citations to other CISG decisions, out of which 21 was international citations. This makes the case one of the CISG decisions containing the most cross-citations to other CISG decisions.[180] The court also made more than 100 citations to scholarly writings on the CISG.

Moreover, the court's reasoning persuasively demonstrates the issue with allowing concurrent application of domestic law remedies. As such, the court took into consideration the CISG's limitations to the buyer's right in Arts 35 *et seq*, which represent a careful balance of the interests of the parties. This balance is expressed in e.g., the notice requirement and cut-off period in Art 39 CISG and the fundamental breach threshold, which were both considered by the court. The balance of these provisions could be circumvented, if the CISG did not exclusively govern the issue.[181]

As such, the Swiss Supreme Court reached a highly persuasive conclusion, which took into consideration the interests of both parties as well as the CISG's goals of uniformity.

Furthermore, the case shows that Ferrari's functional equivalence test has been employed by at least one court in practise. The result of the case might also be explained by Schroeter's two-step approach,[182] but it seems that this approach is more theoretical than practically applied. As such, the Swiss Supreme Court focused mainly on the facts of the case and not on the regulatory purpose of the Swiss provision.

In conclusion, case law supports that the CISG preempts domestic law on issues of mistakes relating to the quality and characteristics of the goods. It can also be concluded on a general note, that the CISG preempts domestic law remedies if the CISG provides an exhaustive and functionally equivalent solution in accordance with Ferrari's test.

4.2.4. Should the CISG Preempt Domestic Law on Issues of Mistake?

Contrary to the decision in the *Electronic Electricity Meters Case* and the prevailing opinion in current scholarly writings, it has been argued in earlier scholarly writings that since the CISG is not concerned with validity, all domestic remedies for mistake remain applicable alongside the CISG.[183] Therefore, one might consider whether the current interpretation in case law and scholarly writings,

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[178] Ibid para 58.
[179] Ibid para 62.
[180] See CISG-online, *All Cross-citations*; CISG-online, *International Cross-citations*.
[181] See also *Bruggen Deuren Case* para 16; Leyens, *CISG and Mistake* (2005) pp 46-48; Hachem in Schwenzer/Schroeter, *Commentary* (2022) Art 4 para 19.
[182] Schroeter, *Irrelevance of the Validity Exception* (2015) pp 109-110.
[183] See Eörsi in Bianca/Bonell, *Commentary* (1987) Art 14 para 2.2.3.; see Hartnell, *Rousing the Sleeping Dog* (1993) pp 50-53 criticising the 'displacement method';.see also Schroeter, *Irrelevance of the Validity Exception* (2015) p 108 with references in n 83.

according to which the CISG preempts some domestic rules of validity, is the proper approach. After all, the preparatory works show that the drafters of the CISG were divided on the subject.

The decision in the *Electronic Electricity Meters Case* was largely based on references to legal scholars meaning that the decision was heavily influenced by scholarly interpretations of the CISG. In this regard, it should be noted that scholarly interpretations of the CISG have occasionally been criticised for being too expansive.[184] Accordingly, the interpretation in case law might be nothing more than a symptom of a CISG enthusiastic trend amongst today's legal scholars. But what is the downside of interpreting the CISG expansively so that it applies to as many issues as possible?

In this regard it must be emphasised that Art 4(a) CISG, like the rest of the Convention, represents a political compromise between the Contracting States to the CISG.[185] The Contracting States did not consent to an exhaustive body of rules in international sales but for a limited regime, which governs substantive sales law and leaves the validity of the contract to domestic law. The limits of this consent should generally be respected for the sake of a proper interpretation and success of the Convention.[186]

As such, if the borders of the CISG are stretched to solve problems, which the CISG was not designed to solve, this could lead to a lack of certainty with the result that parties choose to opt out of the CISG regime.[187] In fact, there already is a tendency in practice to recommend the exclusion of the CISG.[188] Accordingly, uniformity is not necessarily achieved by interpreting the CISG as widely as possible if this interpretation lead to parties opting out of the CISG. Rather, uniformity can be achieved by limiting the application of the CISG to matters that fall within its scope.

However, issues of mistake about facts which are addressed by the CISG does not necessarily fall outside the scope of the CISG merely because they are from a domestic perspective concern an issue of validity. Although the drafters agreed to exclude issues of validity from the CISG's scope, the drafters also agreed to include an exception to the validity exception in the wording of Art 4. The except clause should therefore not be completely disregarded. Moreover, the drafters were aware of – and some even advocated for – the legal effect that the CISG preempted domestic law on issues of validity, specifically issue of mistake. Against this backdrop, the CISG's preemption of issues of mistake is not merely a symptom scholars' CISG enthusiasm.

In this author's opinion, the decisive factor must ultimately be a weighing of the interests of the parties. On the one hand, preemption of domestic rules can lead to an unsatisfactory result for the buyer which might be unjustifiably deprived of the right to avoid the contract as noted by the lower court in the *Electronic Electricity Meters Case*[189] and the drafters of the CISG.[190] But the opposite solution can also lead to an unsatisfactory result for the seller, which would have to endure the more extensive rights for the buyer provided for under domestic law.

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[184] Steensgaard, *Boundaries for Expansive Interpretation* (2017) pp 44-54; Lookofsky, *Not Running Wild* (2011) p 143.
[185] See Hartnell, *Rousing the Sleeping Dog* (1993) p 49.
[186] See Steensgaard, *Boundaries for Expansive Interpretation* (2017) p 43; Honnold/Flechtner, *Uniform Law* (2021) para 97.
[187] Lookofsky, *Not Running Wild* (2011) p 144.
[188] Schwenzer/Hachem, *Successes and Pitfalls* (2009) p 463; Steensgaard, *Boundaries for Expansive Interpretation* (2017) p 40.
[189] *Electronic Electricity Meters Case* para 6.
[190] *WG Session 9* in *UNCITRAL YB* IX (1978) p 66 no 65.

In the weighing of these interests in relation to issues of mistake, it must be decisive that the contract in dispute is in fact governed by the CISG. When the CISG applies, the remedies in the CISG should be given preference to ensure the uniformity and internationality of the Convention as required by Art 7(1) CISG. This solution provides parties to a contract governed by the CISG with certainty and foreseeability within the CISG-regime. And parties to an international contract who do not wish to adhere to the solutions provided for in the CISG can simply exclude or derogate from the it.[191]

4.2.5. Conclusion to Mistake

In conclusion, issues of mistake generally represent a matter of the validity of the contract, which as a clear starting point fall outside the scope of the CISG according to Art 4(a) CISG.

However, according to the except clause in the introductory wording of Art 4, it must also be examined whether the specific type of mistake is governed by conflicting rules in the CISG. This is the case, for instance, with mistakes relating to the qualities and characteristics of the goods, which are governed by the rules and remedies for non-conformity in Arts 35 *et seq* CISG. Accordingly, the CISG preempts domestic law rules for mistakes relating to the quality and characteristics of the goods – although the issue from a domestic perspective undisputedly concerns the validity of the contract.

This conclusion has been reached by the majority of the few cases on the subject, including the highly persuasive decision in the *Electronic Electricity Meters Case*. The conclusion is also in line with the prevailing view amongst legal scholars today. Furthermore, the conclusion is partly supported by the preparatory works, which evidences that the drafters at least considered the possibility of the CISG's preemption of domestic rules on mistake.

Moreover, this conclusion is submitted to be satisfactory because it takes into consideration CISG's goals of uniformity as well as the interests of the parties to a contract governed by the CISG.

The conclusion to mistakes about the quality of the goods also support the more general conclusion that Ferrari's functional equivalence test can be used to determine the scope of the CISG in relation to issues of validity. Consequently, if the facts of a case simultaneously invoke domestic rules on mistake and rules in the CISG, and the CISG provides an exhaustive and functionally equivalent solution, the CISG exclusively governs the matter and recourse to domestic law is precluded.[192]

In sum, the CISG preempts domestic law remedies for issues of mistake insofar as the provisions in the CISG provides a functionally equivalent solution to the specific type of mistake.

4.3. Fraud

4.3.1. Common Characteristics of Fraud as an Issue of Contractual Validity

Although the precise definition of fraud varies slightly in different jurisdictions, there is a broad agreement on the meaning of fraud in the context of contract validity, which will be adopted for the purpose of this thesis.

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[191] Art 6 CISG.

[192] Ferrari/Torsello, *CISG in a Nutshell* (2018) pp 144-145.

It can be derived from comparative law that fraud or deceit is generally understood as a statement, act, or omission, which deceives the other party for the purpose of inducing that party to enter the contract.[193] Mistake is a necessary element of fraud.[194]

Fraud in relation to contractual validity can be categorised as another type of *defect in consent* for the defrauded party to enter the contract.[195] The principal effect of and remedy for fraud is that it renders the contract void or voidable.[196]

4.3.2. The CISG and Domestic Remedies for Fraud – Preemption or Concurrence

Under the definition of validity adopted in this thesis, issues of fraud can generally be categorised as an issue of the validity of the contract.[197] Accordingly, issues of fraud are generally governed by domestic law pursuant to the general rule in Art 4(a) CISG.

Contrary to what was concluded for issues of mistake, it has been commonly agreed in scholarly writings that the CISG is never concerned with issues of fraud as the CISG does not preempt domestic remedies for fraudulent conduct – even if the fraud relates to the quality of the goods.[198]

4.3.2.1. The Travaux Préparatoires

The issue of fraud was frequently discussed during the drafting of the CISG.

The ULIS included a provision, which addressed the result of fraud by explicitly deferring damages to domestic law. Hence, Art 89 ULIS provided that *'[i]n case of fraud, damages shall be determined by the rules applicable in respect of contracts of sale not governed by the present Law.'* Although the rule in Art 89 ULIS was not expressly included in the CISG, the drafters agreed that issues of fraud would be governed by domestic law in any event.[199] Consequently, the rule in Art 89 ULIS still applies under the CISG.[200]

During the drafting of the CISG, the drafters considered including a provision which expressly preserved domestic remedies for fraud.[201] The drafters also considered a proposal according to which the CISG limited the buyer's domestic law rights so that '*except in cases of fraud, remedies based upon national law are excluded*.'[202] The drafters disagreed as to whether it was necessary to include

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[193] See e.g., Art 3.2.5 PICC; Art 4:107(2) PECL; Art 49(2) CESL; US Restatement 2nd of Contracts § 162(1); BGB § 123; Art 1137 French Civil Code; Danish Contracts Act § 30; see also Posch, *Defenses* (2016) paras 49-62; Schwenzer/Muñoz, *Global Law* (2022) 18.03 for a full comparative view.

[194] Schwenzer/Muñoz, *Global Law* (2022) 18.25.

[195] See Posch, *Defenses* (2016) para 49; Schwenzer/Muñoz, *Global Law* (2022) 18.03.

[196] See Posch, *Defenses* (2016) para 49-51; Schwenzer/Muñoz, *Global Law* (2022) para 19.01 and 19.06; see e.g., Art 3.2.5 PICC; Art 4:107(1) PECL; Art 49(1) CESL; US Restatement 2nd of Contracts § 164; Arts 1130-1131 French Civil Code.

[197] Supra *secs 3.4.* and *4.3.1.* n 196.

[198] Hartnell, *Rousing the Sleeping Dog* (1993) p 70; Huber/Mullis, *CISG* (2007) p 23; Djordjevic in Kröll/Mistelis/Perales Viscasillas, *Commentary* (2018) Art 4 para 23; Kröll in Kröll/Mistelis/Perales Viscasillas, *Commentary* (2018) Art 35 para 211, Ferrari/Torsello, *CISG in a Nutshell* pp 145-146; Honnold/Flechtner, *Uniform Law* (2021) para 90; Hachem in Schwenzer/Schroeter, *Commentary* (2022) Art 4 para 37; Schroeter, *UN-Kaufrecht* (2022) para 238.

[199] '*Those who preferred its deletion noted that national law would apply even in the absence of this article*', *WG Session 5* in *UNCITRAL YB* V (1974) p 46 nos 195-196; see also Hartnell, *Rousing the Sleeping Dog* (1993) pp 71-72.

[200] Schroeter in Schwenzer/Schroeter, *Commentary* (2022) Arts 14-24 para 126; Schroeter, *UN-Kaufrecht* (2022) para 238.

[201] Art 10 LUV; *SG Report* in *UNCITRAL YB* VIII (1977) pp 91-93 nos 8-27, p 107; see also Hartnell, *Rousing the Sleeping Dog* (1993) pp 71-72.

[202] *Committee Report* in *UNCITRAL YB* VIII (1977) p 42 no 233 (emphasis added).

any provision which explicitly addressed the issue of fraud and deferred remedies to domestic law. But both the delegates who supported including an express provision and the delegates who opposed agreed that issues of fraud should be governed by domestic law.[203]

The drafters eventually found an explicit exclusion of fraud unnecessary because Art 4(a) CISG already excluded fraud from the scope of the Convention.[204]

These considerations demonstrate that the drafters of the CISG agreed that issues of fraud should be left entirely to the applicable domestic law. By contrast, the drafters of the Convention did consider the possibility of preemption of domestic rules on issues of mistake.[205] Thus, it can be inferred from the preparatory works that while the CISG to a certain extent was intended to govern issues of mistake, the CISG was by design never intended to govern fraud.

4.3.2.2. Case Law

It has since been firmly established in case law that matters relating to fraudulent conduct are not preempted by the CISG. As such, numerous domestic courts have held that for issues of fraud,[206] fraudulent inducement,[207] fraudulent misrepresentation,[208] common law fraud,[209] and intentional deception (*arglistiger/absichtliche Täuschung*)[210] domestic law rules remain applicable alongside the CISG.[211]

Notwithstanding that the contracts in dispute were governed by the CISG, most of the courts simply applied domestic law to establish the requirements for a successful claim of fraud.[212] The decisions were thus reached without even addressing the scope of the CISG or Art 4 and without further analysis of the applicable law.[213] In at least one case, the court cited Art 4, as it stated that fraud is not governed by the CISG.[214] However, none of the cases give any explanation as to why the CISG is not concerned with issues of fraud.

In other cases, which did not even concern fraud claims, courts have noted that the CISG does not preempt domestic law on issues of fraud, even though the courts found that the CISG preempted other domestic law claims.[215]

In the *Chinese Circuit Boards Case* the court applied German domestic law to an issue of fraud even though the facts of the case involved an issue addressed by the CISG. The case concerned a buyer's deceitful conduct about alleged defects of the delivered goods.[216] The buyer had claimed that the

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[203] Ibid p 42 nos 234-235.
[204] Ibid p 42 nos 234-236; see also Hartnell, *Rousing the Sleeping Dog* (1993) pp 71-72.
[205] Supra *sec 4.2.3.1*.
[206] *Semi-Materials Case* (Missouri law); *Window Shades Case* (South Korean Law); *Sky Cast Case* (Kentucky law).
[207] *Beijing Metals Case* (Texas law); *Miami Valley Paper Case* (Ohio law).
[208] *Dingxi Longhai Dairy Case* (Minnesota Law).
[209] *TeeVee Toons Case* (New York Law).
[210] *Chinese Circuit Boards Case* (German law); *Snowchains Case* (Swiss law); *Used Car Case II* (German Law).
[211] See Schroeter, *Defining the Borders* (2013) p 583; Schroeter in Schwenzer/Schroeter, *Commentary* (2022) Arts 14-24 para 126.
[212] *Beijing Metals Case* pp 8-9; *TeeVee Toons Case* paras 48-50; *Sky Cast Case* p 11; *Snowchains Case* para 24; *Dingxi Longhai Dairy Case* paras 9-11; *Miami Valley Paper Case* paras 46 and 57; *Semi-Materials Case* paras 3-7.
[213] Ibid.
[214] *Used Car Case II* para 39.
[215] *Electrocraft Arkansas Case* para 26; *B.R. Cohn Winery Case* paras 15-16; *Electronic Electricity Meters Case* para 53.
[216] *Chinese Circuit Boards Case* p 2.

delivered goods were worthless, so the parties agreed that the buyer would accept delivery for a price reduction. Subsequently, it turned out that the goods were not worthless.[217]

The seller sought to annul the price reduction agreement that had been concluded between the parties, because there was a defect in the seller's consent to the price reduction due to the buyer's misleading statement. The court stated that the modification of a contract is governed by Art 29(1) CISG, but that the validity of a contract and any modification thereof is governed by domestic law pursuant to Art 4(a) CISG.[218] The court then held that the buyer had deceived the seller about the non-conformity of the goods and that German domestic law governed the issue.[219]

Thus, case law shows that issues of fraud are not governed by the CISG – even when the facts of the case are addressed by the CISG. The courts did not, however, apply any of the suggested methodical approaches but simply concluded that fraud is not governed by the CISG without further explanation. Although not explicitly applied, the solution can still be explained by Ferrari's functional equivalence test: The CISG is not concerned with cases of aggravated defect of intention such as fraud because the CISG does not provide rules that from a functional perspective are comparable to those that in domestic law fall under the heading of fraud.[220]

The result of fraud not being governed by the CISG, is concurrent application of the CISG and domestic law remedies, meaning that both set of rules apply alongside each other, so the defrauded party is left with the choice of which rules to base their claim upon.[221]

In sum, it has been firmly established by the case law that the CISG does not govern issues of fraud. Consequently, concurrent domestic law remedies for fraud remain applicable alongside the remedies in the CISG.

4.3.2.3. Odd Case Out – The *Perkins Case*

Despite the conclusion that issues of fraud are never governed by the CISG, at least one case goes in another direction. In the *Perkins Case*, a U.S. District Court held that the CISG preempted domestic law for a claim of fraud and misrepresentation.

The facts of the case were as follows: In 2014, Haul-All purchased automated 'sideloaders', a type of mechanical arm used on waste-management trucks, from Perkins.[222] Haul-All intended to use the sideloaders on waste-management trucks that Haul-All had contracted to sell to the City of Toronto and the Town of Taber.[223]

During the negotiations, Haul-All informed Perkins, that the sideloaders needed to comply with certain requirements, including that the sideloaders had undergone FEA testing, that the manufacturing company had many years of experience making these sideloaders, and that certain factory jigs would be used. Perkins informed Haul-All that all the requirements were fulfilled since Perkins used FEA on its products, had been manufacturing sideloaders for 11 years, and used jigs.

[217] Ibid p 6.
[218] Ibid.
[219] Ibid.
[220] Ferrari/Torsello, *CISG in a Nutshell* (2018) pp 145-146.
[221] Schroeter, *Defining the Borders* (2013) pp 585-586; Hachem in Schwenzer/Schroeter, *Commentary* (2022) Art 4 para 37.
[222] *Perkins Case* para 2.
[223] Ibid para 3.

Haul-All entered the contract with Perkins based on these representations, which were made both orally and in writing.[224]

After the conclusion of the contract several problems arose, including delayed deliveries and repeated failures of the sideloaders.[225] It was later revealed that the representations made by Perkins were false. Perkins had not performed the required FEA testing, had not been manufacturing the sideloaders for 11 years, and was not using jigs in manufacturing the sideloaders.[226]

When Perkins sued Haul-All for breach of contract under the CISG, Haul-All brought several counterclaims, including a claim for fraud and misrepresentation under Illinois state law.[227]

First, the U.S. District Court correctly concluded that the contract was governed by the CISG,[228] and that the CISG is federal law, which preempts state contract law.[229]

The court found that the question before the court was '*whether Haul-All's claim for "fraud/misrepresentation" is "actually a breach-of-contract claim in masquerade."*'[230] According to the court, the essence of the claim was that Perkins' misrepresentations induced Haul-All to enter the contract, and that Perkins breached its promises by delivering non-conforming goods. The court then found that the claim was supported by the same factual allegations as a breach of contract claim, and that the claim was not otherwise distinct from contractual issues.[231] Thus, the Illinois court held that the fraud and misrepresentation claim was preempted by the CISG because it was in essence a contract claim concerning the conformity of the sideloaders.[232]

The court's conclusion is correct insofar as the issue in the case related to the quality of the sideloaders and that the CISG to a certain extent preempts domestic law on issues of validity relating to the quality of the goods.[233] However, the *Perkins Case* goes even further in finding that the CISG preempts domestic law in a case where a party was fraudulently induced to enter the contract. This expansive interpretation is not in line with the preparatory works, case law, or scholarly writings on the subject.[234]

It should be noted that Haul-All's fraud and misrepresentation claim was seemingly based on tort.[235] Thus, the claim did not concern the validity of the contract as such. However, the requirement for fraud claims in tort and contract are the same,[236] and the court treated the claim as a contract claim.

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[224] Ibid para 4.
[225] Ibid paras 5-8
[226] Ibid para 6.
[227] Ibid paras 1 and 12.
[228] *Perkins Case* paras 13-16; see Arts 1-3 CISG.
[229] *Perkins Case* paras 13-16; see also *Asante Technologies Case* paras 28-35; *Electrocraft Arkansas Case* para 14.
[230] *Perkins Case* para 17; *Electrocraft Arkansas Case* para 20.
[231] *Perkins Case* para 19.
[232] Ibid.
[233] Supra *sec 4.2.5*.
[234] Supra *secs 4.3.2.1-4.3.2.2*.
[235] In the US, claims of fraudulent misrepresentation can be based on contract law or tort law, see US Restatement 2nd of Contracts §§ 162 and 164, Restatement 2nd of Torts §§ 525-526. Based on the facts of the case, the claim might as well have been brought as a claim of fraudulent misrepresentation in contract, which could have rendered the contract void. Presumably, a claim based on tort was procedurally preferred over a claim in contract to obtain damages for Haul-All's lost contracts with its business partners.
[236] DiMatteo, *Pre-contractual Liability* (2016) para 3.

Therefore, the case is still relevant for the purpose of this thesis to examine whether the decision should have any bearing on the otherwise settled legal position that the CISG is never concerned with fraud.

However, when analysing the persuasive authority of the decision, the court's analysis appears to be flawed in multiple respects.

Firstly, the court's analysis was based on a mere positive definition of the scope of the CISG, as the court simply stated that the CISG governs the formulations of international sales contracts and the rights and obligations of the parties.[237] The lack of references to the CISG, namely Art 4, suggest that the court might not even have been aware of Art 4(a). As such, the court failed to identify that the CISG is generally not concerned with issues of validity or fraud. Accordingly, the fraud claim was construed as a claim concerning the rights and obligations of the parties.[238]

Secondly, the Illinois court's analysis is exclusively based on citations to other U.S. courts. The court thus completely disregarded that it is required to take foreign case law into consideration when interpreting the CISG.[239] In fact, the decision does not even contain any references to the text of the CISG. When the court concluded that the contract fell within the sphere of the Convention and when it established the substantive scope of the CISG, it did so with reference to U.S. case law.[240] Moreover, the decision contains no references to the preparatory works or scholarly writings. The Illinois court did therefore not interpret the Convention with regard to its international character as required by Art 7(1) CISG.

Thirdly, the cited cases did not concern fraud claims but claims of negligent misrepresentation.[241] The much-discussed relationship between the CISG and domestic tort claims for negligent misrepresentation falls outside the purpose of this thesis.[242] However, assuming that the CISG preempts tort claims to some extent, Haul-All's fraud claim is entirely different from the claims in the cited cases, as there are fundamental differences between fraudulent and negligent conduct. The very nature of fraud differs from that of negligence in that fraud requires an intent to deceive.[243] The cases cited in the Perkins Case, which held that the CISG preempted tort claims for negligent misrepresentation, even explicitly stated that the CISG does not preempt claims for fraud.[244]

To conclude, the court's reasoning is unpersuasive and therefore the court's conclusion that the CISG preempts fraud claims relating to the quality of the goods is unconvincing. Consequently, the *Perkins*

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[237] *Perkins Case* para 12; see Art 4 CISG.
[238] *Perkins Case* para 19.
[239] See *Medicaments Case*; *Electronic Electricity Meters Case* para 13; Lookofsky *U.2005B.45*.
[240] *Perkins Case* paras 12-13.
[241] *Perkins Case* paras 17-18; *Geneva Pharmaceuticals Case* para 223 n 30; *Weihai Textile Group Case* para 60; *Electrocraft Arkansas Case* para 20. Negligent misrepresentation is one of three degrees of misrepresentation that are recognized in common law jurisdictions (innocent, negligent, and fraudulent misrepresentation), see Schwenzer/Muñoz, *Global Law* (2022) para 17.08.
[242] Some scholars argue that Art 35 CISG preempts domestic law on tort claims of negligent misrepresentation relating to the features of the goods, see Schroeter, *Defining the Borders* (2013) p 582; Schwenzer in Schwenzer/Schroeter, *Commentary* (2022) Art 35 para 50; but see Lookofsky, *In Dubio* (2003) pp 283-286; *Sky Cast Case* p 7; *Miami Valley Paper Case* para 57.
[243] See Schwenzer/Muñoz, *Global Law* (2022) para 17.08 and 18.18.
[244] *Electrocraft Arkansas Case* paras 16 and 26; *Geneva Pharmaceuticals Case* paras 222 and 228.

Case should not be interpreted as a conclusive jurisprudence that fraud claims relating to the quality of the goods are generally preempted by the CISG.

4.3.3. Should the CISG Preempt Domestic Law on Issues of Fraud?

Notwithstanding the *Perkins Case*'s lack of persuasive authority, one might consider whether the result in the case was correct. Compared to the previously cited cases, which concluded that the CISG was not concerned with fraud without further explanation, the court in the *Perkins Case* at least attempted to analyse the issue more thoroughly. Accordingly, it is worth considering whether the CISG *should* preempt domestic law for issues of fraud cases in the same way that it preempts domestic law for issues of mistake, e.g., when the issue relates to the quality of the goods.

The previously cited decisions did not even address the except clause or possible preemption of domestic law remedies when they found that the CISG did not apply to issues of fraud. Does this mean that the interpretation in case law is wrong in that the courts erred in only considered the validity exception and not considering the exception to the validity exception? That is hardly the case.

When assessing the most satisfactory solution for issues of validity in relation to contracts governed by the CISG, a distinction must be made between the different levels of defective intention. Domestic rules of fraud differ from those of mistake in that fraud involves an aggravated defect of consent.[245] While rules on mistake look to the incorrect understanding of one party, rules on fraud look to an additional element, namely the other party's intentional creation or maintenance of the incorrect understanding.[246] As such, the focus of domestic rules on fraud is not only the buyer's mistaken knowledge about the goods, but to protect the buyer from the seller's fraudulent conduct.

Due to these protection considerations, domestic rules of fraud, more so than rules of mistake, touch upon a matter of public policy.[247] Precisely public policy concerns were one of the reasons that the drafters refrained from unifying issues of validity.[248] Such a distinction between rules of mistake and fraud is also expressed in Art 3.1.4 PICC according to which the rules of fraud, but not the rules of mistake, are mandatory.

Accordingly, for policy reasons, recourse to domestic law remedies for fraud should be allowed although the balance of the parties' interests in the CISG regime is not strictly preserved. The CISG's goals of uniformity should not take precedence over the interests of a defrauded party, and a fraudulent seller does not deserve the protection that the remedies in the CISG may grant.[249] Conversely, the defrauded party, who also suffered a breach of contract, should not be deprived of their remedies under the CISG. Therefore, the CISG should apply concurrently with domestic law for issues of fraud – a solution which is also in accordance with the promotion of good faith in Art 7(1) CISG.[250]

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[245] See Leyens, *CISG and Mistake* (2005) pp 22 and 45; Ferrari/Torsello, *CISG in a Nutshell* (2018) p 145.

[246] See Schwenzer/Muñoz, *Global Law* (2022) 18.25.

[247] *WG Session 5* in *UNCITRAL YB* V (1974) p 46 no 197; Leyens (2005) p 22-24.

[248] Supra *sec 2.3*; *WG Session 5* in *UNCITRAL YB* V (1974) p 46 no 197; *SG Report* in *UNCITRAL YB* VIII (1977) p 93 no 25.

[249] Huber/Mullis, The CISG (2005) p 23.

[250] Schroeter, *Defining the Borders* (2013) pp 585-586.

4.3.4. Conclusion to Fraud

In conclusion, issues of fraud generally represent a matter of the validity of the contract, which fall outside the scope of the CISG according to Art 4(a) CISG.

Contrary to what was concluded for issues for mistake, it is firmly established by the preparatory works, case law, and scholarly writings that the CISG does not preempt domestic law remedies for fraud. Instead, issues of fraud are left to be governed by the applicable domestic law – even if the fraud relates to an issue addressed by the CISG. The unpersuasive *Perkins Case* should not change this otherwise settled interpretation.

Moreover, this conclusion submitted to be satisfactory because issues of fraud involve an aggravated defect of intention compared to issues of mistake. As such, domestic remedies for fraud involve an element of public policy, as the rules protect parties from deceit. Precisely therefore were issues of fraud never intended by the drafters to be governed by the CISG.

In sum, the CISG does not provide a functionally equivalent solution to protect defrauded parties from fraudulent conduct, and thus, domestic remedies for fraud remain applicable in concurrence with the CISG.

5. Conclusion

The substantive scope of the Convention is defined in Art 4 CISG, which non-exhaustively identifies matters that are governed and not governed by the CISG. Matters of validity were purposefully excluded from the scope of the CISG because a unification of validity issues was considered unnecessary and too complex considering the differences in domestic law.

According to Art 4(a) CISG, the Convention '*is not concerned with the validity of the contract*'. This validity exception provides the general rule according to which issues of validity are, as a clear starting point, excluded from the scope of the CISG. Validity in the sense of Art 4(a) can be autonomously defined as *any issue by which the domestic law would render the contract void, voidable, or unenforceable*. However, the definition of specific validity issues is deferred to be defined by the applicable domestic law. Thus, what is understood by issues of the validity of the contract in the sense of the CISG differ on a case-by case basis depending on the domestic background law of the contract in dispute.

This balanced effect-approach is inspired by a definition proposed by Hartnell, which has found support in case law, and it takes into consideration both domestic and internationalists interest. In accordance with this definition, issues of mistake and fraud generally represent matters of the validity of the contract, which as a clear starting point fall outside the scope of the CISG.

However, the borders between the CISG and domestic law is not ultimately defined by the concept of validity. To determine the substantive scope of the CISG, it is necessary to interpret Art 4 CISG in its entirety. Once an adjudicator has identified a matter as one of validity, it must also be considered whether the CISG nevertheless governs the issue.

According to the exception to the validity exception validity issues are only excluded from the CISG's scope '*except as otherwise expressly provided*'. Despite the wording, the except clause does not require that a provision in the CISG expressly states that it addresses a matter of validity. Rather, the CISG *preempts* or *displaces* domestic law remedies if there is a conflict between the rules in domestic

law and the rules in the Convention. Ferrari's functional equivalence test can be used to determine the applicability of the CISG. Accordingly, the CISG preempts recourse to domestic law remedies for issues of validity, if the CISG provide an exhaustive and functionally equivalent solution to the issue.

In relation to issues of mistake, the CISG preempts domestic law remedies insofar as the provisions in the CISG provides a functionally equivalent solution to the specific type of mistake. For instance, the CISG preempts domestic law remedies for mistakes relating to the quality and characteristics of the goods, because the CISG governs the conformity of the goods in Arts 35 *et seq* CISG.

In relation to issues of fraud, the CISG does not preempt domestic law remedies – even if the fraud relates to an issue addressed by the CISG. Instead, domestic law remedies for issues of fraud apply in concurrence with the remedies in the CISG. Thus, when determining the application of the CISG, public policy considerations require that a distinction must be made between different degrees of defective intention. The CISG does not provide a functionally equivalent solution to aggravated defects of consent.

Indeed, although the validity exception defers matters of validity to be defined by the applicable domestic law, the exception to the validity exception ensures that the CISG's provisions determine the substantive scope of the CISG. Thus, the borders between the CISG and domestic law in relation to issues of the validity of the contract are ultimately defined autonomously by the CISG itself.

List of Abbreviations

ABBREVIATION	FULL REFERENCE
Art / Arts	Article / Articles
BGB	Bürgerliches Gesetzbuch (German Civil Code)
CESL	Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law (2011)
cf	confer
CISG	The United Nations Convention on Contracts for the International Sale of Goods (Vienna 1980)
CO	Swiss Code of Obligations
et al	and others
et seq	and the following
Ibid	In the same place
LUV	UNIDROIT Draft Law for the Unification of Certain Rules relating to the Validity of Contracts of International Sale of Goods (1972)

ABBREVIATION	FULL REFERENCE
n	note
no/nos	number/numbers
p / pp	page / pages
para / paras	paragraph / paragraphs
PECL	Principles of European Contract Law
PICC	UNIDROIT Principles of International Commercial Contracts (2016)
PIL	Private International Law
sec / secs	section / sections
SG	Secretary-General
U.S. / US	United States
ULF	Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (The Hague 1964)
ULIS	Convention relating to a Uniform Law on the International Sale of Goods (The Hague 1964)
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	The International Institute for the Unification of Private Law
WG	Working Group
YB	Yearbook

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