Product liability under the CISG and Concurring tort law claims

Produktansvar efter CISG og Konkurrerende erstatningsretlige krav

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Dette speciale omhandler berøringsfladerne mellem den Internationale Købelov (CISG) og national produktansvarslovgivning samt problemstillingen omkring konkurrerende krav.

Art 5 CISG undtager personskade fra konventionen anvendelsesområde. Bestemmelsen blev indsat i konventionen, fordi konventionen ikke er egnet til at håndtere personskadesager. Blandt andet af denne årsag bør alle personskadesager være undtaget fra konventionen anvendelsesområde, uanset om personskaden skyldtes en defekt ved den solgte vare, er forsaget af en serviceydelse eller skyldtes sælgerens uagtsomhed. Personskadesager overlades dermed til national produktansvarslovgivning. Vendes blikket derimod mod tingsskade, er der intet grundlag for at undtage dette område fra konventionens anvendelsesområde. Idet tingsskade ligeledes ofte er omfattet af national produktansvarslovgivning, er der et overlap mellem konventionen og national produktansvarslovgivning. Dette overlap medfører risiko for, at der opstår konkurrerende krav. Tillades konkurrerende krav gives erhvervslivet en mulighed for at omgå konventionens regler, herunder især reklamationsbestemmelsen i art 39 CISG, og derudover undermineres hele formålet med konventionen, nemlig at skabe ensartede regler for international handel. Heroverfor står hensynet til national produktansvarslovning, samt spørgsmålet, om medlemsstaterne overhovedet er forpligtet til at tilsidesætte national erstatningsret til fordel for håndhævelse af international kontraktret. På trods af, at medlemsstaterne formentligt ikke kan påtvinges at tildele konventionen forrang, må medlemsstaterne have en stor interesse i at sikre konventionens succes som et instrument i international handel, hvilket forudsætter ensartede regler. Dette sammenholdt med den omstændighed, at der vil være tale om en relativ beskeden omgåelse af produktansvarslovgivningen må medføre, at konkurrerende krav som absolut udgangspunkt bør afvises og kun undtagelsesvist tillades, hvis andet ville være krænkende for retsfølelsen.

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1. INTRODUCTION

In 1980 62 states unanimously approved "*the United Nations Convention on Contracts for the International Sale of Goods*".[1] Over 70 states have now adhered to the Convention.

The Convention regulates the rights and obligations of buyers and sellers and provides a strong protection for international sales contracts. To avoid overlap between special protection rules in domestic law and the Convention, it was necessary to limit the scope of the Convention.
For this reason, liability for death and personal injury caused by goods sold in an international transaction has been excluded from the scope of the Convention, according to art 5 herein. The law applicable to such claims has to be determined by national courts via the conflict of law rules of the forum state. The applicable law will in some contracting states be contract law and in other states tort law.

Even though the scope of the Convention has been limited in some situations, liability based on a breach of an international sales contract, falling under the CISG, may still collide with liability according to domestic tort law. This has the unfortunate result that concurring claims can arise and domestic courts are thus faced with the difficult situation of having to decide whether to apply domestic tort law or international contract law, namely the CISG.

1.1. The aim of the thesis

When defective goods cause damage to a buyer´s property, it qualifies as a breach of contract according to the Convention. However, it may at the same time constitute a tort under domestic law. Liability, in these situations, is in many contracting states regulated by both the Convention and by domestic product liability laws, giving rise to the issue of concurring claims.

The questions, which will be explored in this thesis, are: will the fact that a claim falls within the CISG preempt domestic remedies otherwise available, or is it possible to assert domestic remedies and Convention remedies concurrently leaving an alternative, if access to CISG remedies is denied?

The extent of previous exploration into the questions raised above is limited, in doctrine as well as in case law. However, art 5 CISG provides a partial solution to the puzzle of concurring claims by limiting the scope of the Convention in a situation where a problem of concurrence might otherwise arise. When an issue has been excluded from the CISG, as the case is in art 5 CISG, it is only governed by domestic law and consequently the problems with concurring claims will not arise.

The issue of concurring claims has a special significance in relation to the notice requirement in art 39 CISG. This is due to the fact that domestic product liability laws often either has a prolonged time period for giving notice or simply do not include a similar notice requirement, which limits liability. If concurring claims are regarded as admissible, it would be possible for a buyer to make a claim against a seller, according to domestic product liability rules, even if such a claim has been barred by art 39 CISG, leaving art 39 CISG ineffective.

In practice, it is highly relevant to determine whether the Convention preempts domestic tort law, not only because of the differences regarding notice requirements, but also because domestic tort law may allow

[1] Hereinafter referred to as the CISG or the Convention

recovery of punitive or unforeseeable damages. This could shift the balance which has been established between the buyer and the seller in the Convention and create loopholes which will effect the success of the Convention as an instrument in international trade.
The fact that a uniform solution to the issue of concurring claims does not exist, is damaging both to the Convention itself, since the success of the Convention is based largely on uniform application, and for international trade in general, because it creates uncertainties, which companies have to take into account when they enter into a contract for the international sale of goods, e.g. by opting out of the Convention cf. art 6 CISG.

Whereas contract law protects what a party is entitled to expect under a contract, tort law protects a wider and more fundamental range of interests, which exist independently from any contractual relationship. The general consideration underlying domestic product liability laws is based on the notion that buyers should be compensated, when dangerous or defective goods cause injury or damage to them or their property.
Regardless of whether concurring claims are allowed or not, it will end up either circumventing domestic product liability laws or the Convention – at least to some extend. Therefore, it is important to look into the considerations behind this legislation to get the information which is necessary to determine whether domestic product liability laws or the Convention should take priority

This thesis will evaluate the different views on how to deal with concurring claims and propose a solution.

When analyzing the issue in relation to product liability, the first step is to determine the scope of art 5 CISG by performing an interpretation of it, thereby determining the areas of possible overlap between the Convention and domestic tort law and the areas relevant in the discussion of concurring claims. The interpretation will be followed by an in-depth discussion of the different opinions presented in doctrine and the solutions which national courts have chosen to take, when presented with the issue of concurring claims. Lastly, and based on the findings during the analyses, a solution to the problem will be proposed.

Contractual claims based on a contract for the international sale of goods have to be determined exclusively by the Convention. If the *lex fori* classifies product liability claims as contractual claims, domestic rules cannot be applied concurrently with the Convention rules, unless the situation falls within art 5 CISG. The possibility of having concurring claims based on both the CISG and domestic law therefore mainly exist where the *lex fori* classifies product liability as part of tort law. Domestic contract law is therefore not discussed any further in this thesis. Furthermore the different types of domestic product liability law will not be analyzed in this thesis.

2. INTERPRETATION OF ART 5 CISG

2.1. Introduction

When interpreting CISG provisions it is important to first review art 7 CISG. This provision establishes how to interpret the Convention in general, though the Convention does not prepose the particular method of interpretation.

According to art 7(1), regard is to be had to the Conventions international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

Domestic conceptions should not be allowed to subvert the uniform application of the CISG and this principle is stated directly in art 7(1). However, when there is a gap in the Convention – a matter which is governed but not settled by the Convention - art 7(2) states that such issues are firstly to be settled by resorting to the general principles on which the Convention is based and only if such principles do not exist, by resorting to the domestic law applicable according to the rules of private international law.

Another important consideration to bear in mind, when interpreting the Convention, is the Preamble of the Convention, because it provides key information concerning the very purpose of the Convention. The Preamble shows that the Convention is designed as a strictly neutral set of rules, which do not grant preferred treatment to any party to a contract. This has to be taken into consideration when dealing with product liability, since domestic tort law often favors the injured party and consequently does not have the same principle of strict equality.
Furthermore, the Preamble stresses that the provisions in the Convention represents a compromise between the various legal and economic systems. This provides difficulties in regards to product liability laws since domestic product liability laws varies to such an extent that even the drafters of the Convention failed to find common ground - at least in regards to damage to property.[2]

Even though the importance of the Preamble has not yet been clarified[3], it is this author's opinion that it cannot be disregarded when interpreting provisions in the Convention, since it contains the essence of the considerations underlying the Convention. This is supported by Professor Hachem, according to whom an interpretation of a Convention rule under art 7 must ultimately lead to a result, which is in conformity with the intentions of their drafters and the spirit of the Convention as embodied in the Preamble.[4]

It is within these boundaries that art 5 CISG will be interpreted and the same boundaries apply when interpreting other provisions in the Convention throughout this thesis.

2.2. Literal interpretation

The first step when interpreting any provision is to examine the wording of the provision and the ordinary meaning from the *black letter of the law* of one of the original language versions of the Convention.

The wording of art 5 CISG states the following: "*This Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person*".

The core of art 5 is clear. Liability for death or personal injury has been completely excluded from the scope of the Convention and consequently domestic product liability rules remain unaffected in this area.[5]

Although the provision is relatively short, many complex issues are attached to the wording of it.

[2] Cf. section 2.3.1. and section 3 of this thesis where the legislative history is presented.
[3] See Hachem in Schwenzer page 14 para 2 and 3, where it is stated that the correct view under the CISG holds that the Preamble has interpretative value. However see Honnold, Fourth edition, page 704 para 475, where a different view is put forth which does not favor the Preamble when construing the Conventions provisions since the Preamble was adopted without discussion amongst the delegates of the contracting states to the Convention. See also Schlechtriem/Thomas page 9 para 2.
[4] Hachem in Schwenzer page 14 para 3.
[5] Hachem in Schwenzer page 97 para 4, Schlechtriem second edition page 77 para 4, Schlechtriem/Butler page 38 para 39, Honnold fourth edition page 93 para 71, Herber in Schlechtriem/Thomas page 50 para 4, Stoll in Schlechtriem/Thomas page 570 para 26 and Ferrari 71-72 section VI.

Firstly, the wording of the provision seems to make it a prerequisite that the injury or death has been "*caused by the goods*". Interpreting the provision in this light has the unfortunate consequence that injury caused by lack of due care, or caused by a service provided by the seller, has not been excluded from the scope of the Convention. Whether such an interpretation is in line with the reasoning behind the inclusion of art 5 in the Convention and the Convention in general, will have to be examined closer.
Secondly, there is the issue of consequential damages caused by an injury such as liability for pain and suffering. Whether these types of claims have also been excluded from the CISG is not clear from the wording of the provision and it is therefore necessary to look elsewhere to find a possible answer to this question.
Lastly, the words "*to any person*" have caused some confusion regarding both indemnification claims and third party claims. Thus the extent of art 5 CISG has to be clarified.

Damage to property is not encompassed in the wording of art 5 CISG. The question is whether the provision has to be interpreted *e contrario* or not. If the provision is to be interpreted *e contrario* the next issue to investigate is whether domestic rules of product liability can be relied on by the injured party as well as the remedial rules in the Convention, giving rise to the issue of concurring claims.

When there are doubts about the application of the Convention, it is often best resolved by interpreting in favor of the Convention. However, there are those who are of the opinion that some doubts are best resolved by or in conjunction with domestic law, at least when dealing with complex issues in the Convention.[6]
The issues regarding product liability are not easily accessible. There are many complex issues and policy considerations to take into account. Therefore, the problem cannot be solved by merely interpreting in favor of the Convention. It is necessary to also examine domestic law and the general considerations behind domestic legislation concerning product liability in order to achieve a solution, which is satisfactory both to buyers and sellers as well as sufferers and wrongdoers.
Thus it is not sufficient only to interpret the wording of art 5. Both the legislative history, case law and the opinions in doctrine provide further guidance into the interpretation of the provision. These elements will be drawn into the interpretation in the following sections.

2.3. LEGISLATIVE HISTORY

The legislative history of the CISG can provide evidence of the legislative intent and thereby aid the interpretation of the provisions in the CISG, as a secondary source of information. However, the legislative history does not provide a binding authority regarding how the provisions in the Convention should be interpreted. In fact the *travaux préparatoires* have been interpreted in very different ways by different authors and contracting states and it is often possible to find arguments in favor of both sides of a case in the legislative history.

The proposal to exclude claims from the Convention, based on death or personal injury caused by the goods came from Finland, France and the United States. Their proposal was eventually accepted in Vienna and embodied in art 5.[7] However, the delegates at the Vienna Conferences struggled with the scope of the provision during the drafting period of Convention, which the following section will show.

[6] Lookofsky, In dubio, page 265.
[7] (A/CONF.97/C.1/SR.3) para 11.

2.3.1. Discussions during the Vienna Conferences

The reasoning behind the exclusion of claims, based on death or personal injury, was the fact that domestic legislation concerning death and personal injury offered a greater protection than the Convention, since the Convention was not designed for this purpose, but only concerned the commercial loss in an international sale of goods.[8]

The purpose of the law of contract is to ensure that promises are performed, whereas the law of torts provides redress for various injuries. In tort cases, the purposes of the law is to compensate the plaintiff for the injury inflicted even though it may have been unexpected, but in contract cases the damages must have been foreseeable to the parties, when the agreement was made.
Liability for death or personal injury is the most important field of product liability legislation, in this author´s opinion, because of the detrimental consequences which the defective goods have had. In these cases, there is a general interest in society in protecting the injured party. Therefore, it would likely have resulted in inappropriate solutions, if this area had been governed by notions underlying contract law, due to an applicability of the Convention.

The legislative history suggest that it is not only a buyer´s claim based on death or personal injury suffered by the buyer himself which is excluded from the Convention, but also includes the buyers own liability for damages due to death or personal injuries to the ultimate buyer,[9] because of the insertion of the fraise "*to any person*" in art 5 CISG.[10] It was proposed by the delegates to distinguish between cases where the relation was simply between buyer and seller and cases where action was taken by an injured ultimate buyer against the previous seller.[11] This suggestion was, however, rejected by the Chairman because *"it was clear that the Convention did not cover relations between the buyer and a previous seller; it was concerned with contracts of sale".*[12] The legislative history thereby provides valuable guidance as to the interpretation of the wording "*to any person*" in art 5 CISG.

The legislative history also provides information concerning the expression "*personal injury*" in art 5 CISG. According to legislative history "*person injury*" includes both bodily and mental injury, leaving these issues outside the scope of the Convention.[13]

Several of the delegates, including Denmark, Austria, the United Kingdom and Egypt, wished to extend the exclusion in art 5 CISG to all cases of product liability, including damage to property.[14] The main drawback with the Convention rules was the absolute time limit of two years, which follows from art 39(2) CISG. Since many complicated issues arose with the topic of product liability, the Danish delegate preferred to exclude all cases of product liability from the scope of the Convention.[15]

The delegates were faced with the difficult situation that in some states product liability was a part of contract law, in others a part of tort law and in others still partially a part of contract law and partially a part of tort law.

[8] (A/CONF.97/C.1/SR.3) para 12.
[9] For the purpose of this thesis the term "*ultimate buyer*" represents the third or later link in a contractual chain.
[10] 35th Commission meeting, para 42.
[11] (A/CONF.97/C.1/SR.3) para 27.
[12] (A/CONF.97/C.1/SR.3) para 28.
[13] (A/CONF/97/SR.6), para 24.
[14] (A/CONF.97/C.1/SR.3) para 13, 14, 18 and 24.
[15] (A/CONF.97/C.1/SR.3), para 14.

The consequence of these differences could result in having concurring claims if damage to property remained within the scope of the Convention. At the other end of the scale, a complete exclusion of product liability would also exclude some damages for commercial or economic losses. Claims based on commercial losses are part of the main scope of the Convention and therefore should not be excluded from it. Secondly, exclusion of these types of damages would be a setback for efforts of legal unification. It would not be clear which domestic law rules prevailed in these cases, because it would depend on the choice of law rules in the particular state.[16]

In the end it was impossible for the delegates to agree on a definition of product liability and consequently it became impossible for the delegates to agree on an exclusion of property damages arising out of product liability. Concurring claims based on the Convention and domestic tort law therefore became a possibility, leaving it up to the individual contracting states to decide whether or not to allow such claims. The issues which this introduces are discussed in section 4 of this thesis.

2.4. Injury "*caused by the goods*"

As mentioned the wording of art 5 CISG could indicate that it is a precondition for the application of the provision that the death or personal injury has to be "*caused by the goods*". A definition of what this fraise entails does not exist and it is unclear, when an incident can be categorized as having been "*caused by the goods*".
Therefore, it is possible that situations where an injury to the buyer is not a result of defective goods, but a result of lack of due care on the seller´s part, are subject to the Convention.[17] Situations such as these are at the core of domestic product liability laws and if art 5 CISG has to be interpreted in this manner, then the issue of concurring claims will be established here.

Whether or not it is a precondition for the application of art 5 CISG that the injury has been "*caused by the goods*", is not mentioned in the legislative history. Therefore the legislative history cannot aid in solving the puzzle of when an incident can be categorized as having been "*caused by the goods*" or whether this in fact is a precondition for the application of art 5 CISG.

In this author´s opinion the question is whether such claims are contractual in nature or whether they fall under the policy considerations, which led to the inclusion of art 5 in the Convention and therefore would be better dealt with by domestic law.

Professor Hachem has taken the position that it is only where the interpretation of the parties' agreement lead to the incorporation of such additional obligations of duty of care that claims for breach of these obligations can be based on the Convention. The reason for this is that no international standard exist according to which such additional obligations could be held to be contractual in nature.[18] Additional duties of care should therefore not lightly be implied in international sales contracts.

There are, however, also scholars who are of the opinion that in situations where personal injury or death has not been caused by the goods, the issue falls within the scope of the CISG.[19] According to this view a duty of care is an *ancillary duty* that is subject to the Convention.

[16] Mr. Hjerner (Sweden), (A/CONF.97/C.1/SR.3), para 20.
[17] Huber page 25 § 2 c, Schlechtriem Second edition page 77 para 5 and Hachem in Schewenzer page 98 para 6.
[18] Hachem in Schwenzer page 98 para 6 and Stoll in Schlechtriem/Thomas page 557 para 9.
[19] Hachem in Schwenzer page 98 n. 13 and Herber in Schlechtriem/Thomas page 50 para 5.

There are no specific provisions in the CISG obligating the parties to a contract to act in accordance with due care – in fact the Convention is generally not concerned with lack of due care.[20] Such a duty of care would therefore have to be derived from the general principle of good faith cf. art 7(1) CISG - assuming of course that such a general principle exist within the Convention.[21]
The principle of good faith, as expressed in art 7(1) CISG, is a supplement to the provisions in the Convention and extending the principle to be an *ancillary duty* in itself seems farfetched in this author´s opinion. The wording in art 7(1) represents a compromise between common law and civil law systems. The delegates at the Vienna Conferences decided that the obligation of good faith should not be imposed loosely and at large, but should be restricted to a principle for interpreting the provisions in the Convention.[22] Allowing the principle of good faith to represent an *ancillary duty* would mean ignoring this compromise and ignoring the delegates who believed that the principle would only create uncertainty, since the notion has no fixed meaning. Therefore, in this author´s opinion, the principle of good faith cannot represent an *ancillary duty* in itself.[23]
The obligation to act in accordance with duty of care is something, which is generally encountered, when dealing with tort law. It is this author´s opinion that such a consideration should not be forced into international sales law and into the Convention. This is due to the fact that the principle of good faith has no fixed meaning. It would only create confusion, destroy uniformity and make it impossible for international trade to predict how a particular legal predicament would turn out in case of a trial, if the principle of good faith was given status as an ancillary duty. Thus, it would go against the primary and most important aims of the Convention.

According to the legislative history of art 5 CISG, the reasoning behind the exclusion of claims due to death or personal injury was that domestic legislation offered a greater protection than the Convention in these situations, since the Convention was not designed for that purpose.[24] The Convention is simply not equipped to deal with such claims, regardless of whether the damage is due to defective goods or lack of due care, because the aim of the Convention is something completely different, namely to provide uniform rules in international trade. Whether a personal injury or death has been "*caused by the goods*" or by the seller´s lack of due care does not change this fact.
This is further supported by the fact that the Convention generally is not concerned with lack of due care. It would seem strange and out of tune with the rest of the Convention if lack of due care was left to be the decisive factor in determining the scope of art 5 CISG.
Judging by the purpose behind the incorporation of art 5 in the Convention, both situations, i.e. where damage has been caused by the goods and where damage has been caused by lack of due care, should in this author's opinion be regarded as falling outside the scope of the CISG.

[20] This follows from art 45(1)(b) CISG, which is discussed in detail in section 4.6.1 of this thesis.
[21] See Honnold page 135 para 95 where it is stated that the Convention rejects good faith as a general requirement and solely uses it as a principle for interpreting the provisions of the Convention. However, see also Herber in Schlechtriem/Thomas page 63 para 16, who is of the opinion that despite of the narrow wording of art 7(1), the principle of good faith cannot be confined to the interpretation of provisions in the Convention, but also constitutes a supplement to the provisions in the Convention.
[22] *(A/CN.9/142) para 70-87 and (A/CONF.97/C.1/SR.5) para 39-63.*
[23] See Stoll in Schlechtriem/Thomas page 557 para 9, who agrees with this author´s opinion and states that obligations to protect the other party to a contract from harm to other goods or protected interests should not be derived from the principle of good faith.
[24] (A/CONF.97/C.1/SR.3) para 12.

2.4.1. SERVICES PROVIDED BY THE SELLER

A RELATED ISSUE IS WHETHER SERVICES PROVIDED BY A SELLER THAT CAUSES INJURY OR DEATH TO A PERSON IS COVERED BY ART 5 CISG OR NOT, SINCE THE WORDING OF ART 5 CISG ONLY MENTIONS INJURY OR DEATH CAUSED BY GOODS.

THIS AUTHOR IS OF THE OPINION THAT CLAIMS FOR DAMAGES DUE TO DEATH OR PERSONAL INJURIES CAUSED BY SERVICES PROVIDED BY A SELLER, IS COVERED BY ART 5 CISG.

ACCORDING TO ART 3(2) CISG, THE CONVENTION DOES NOT APPLY TO CONTRACTS IN WHICH THE PREPONDERANT PART OF THE OBLIGATIONS CONSISTS IN THE SUPPLY OF LABOR OR OTHER SERVICES. CONSEQUENTLY, THE CISG ONLY APPLIES TO CONTRACTS WHERE THE PREPONDERANT PART OF THE OBLIGATIONS CONSISTS OF DELIVERING GOODS AND THE SERVICES PROVIDED ARE ONLY A SMALLER ADDITIONAL OBLIGATION.
THE DRAFTERS OF ART 3(2) DID NOT CONSIDER ALL OF THE CONSEQUENCES OF INSERTING SUCH A PROVISION IN THE CONVENTION IN THIS AUTHOR´S OPINION. THE POSSIBILITY OF A BUYER GETTING INJURED BY SERVICES PROVIDED BY A SELLER WAS MOST LIKELY OVERLOOKED, THEREBY CREATING A GAP IN THE CONVENTION.
THIS GAP SHOULD, IN ACCORDANCE WITH ART 7(2) CISG, BE FILLED BY APPLYING THE UNDERLYING PRINCIPLES OF ART 5 CISG,[25] NAMELY THAT PERSONAL INJURY OR DEATH ARE ISSUES BEST RESOLVED IN DOMESTIC LAW, MEANING THAT IF THE SERVICES RENDERED RESULT IN DEATH OR PERSONAL INJURY TO ANY PERSON, THEN THE CONVENTION IS NOT APPLICABLE TO THESE ISSUES AND DOMESTIC PRODUCT LIABILITY RULES WILL REMAIN APPLICABLE.
FURTHERMORE THE CONVENTION DOES GENERALLY NOT INCLUDE SPECIAL PROVISIONS TO BE APPLIED, WHEN DEALING WITH SERVICES PROVIDED BY A SELLER IN SITUATIONS, WHERE THE CISG GOVERNS THE CONTRACT. IT IS THEREFORE REASONABLE TO CONCLUDE THAT SERVICES ARE TO BE TREATED IN THE SAME WAY AS GOODS IN A PARTICULAR CONTRACT AND THAT ART 5 CISG THEREFORE ALSO IS APPLICABLE WHEN A PROVIDED SERVICE RESULTS IN INJURY OR DEATH.[26] IF, HOWEVER, THE SELLER HAS UNDERTAKEN TO BE BOUND BY CONTRACT TO PAY FOR INJURIES TO THE BUYER CAUSED BY A FAILURE TO PERFORM THE OBLIGATED SERVICES, ART 5 CISG WILL NOT EXCLUDE APPLICATION OF THE CONVENTION.[27]

THUS, CLAIMS FOR DAMAGES DUE TO DEATH OR PERSONAL INJURIES CAUSED BY SERVICES PROVIDED BY A SELLER, IS COVERED BY ART 5 CISG AND EXCLUDED FROM THE SCOPE OF THE CONVENTION.

2.4.2. Consequential damages as a result of personal injury

Loss of amenities, mental distress, pain and suffering and similar conditions can be considered as consequential damages resulting from the personal injury.

The Convention does not expressly exclude liability for these types of non-pecuniary losses, however it is the general opinion that these damages are encompassed by the exclusion in art 5 CISG.[28] *According to professor Hachem "parties to international sales contracts do not contract and pay for undisturbed enjoyment of life".*[29]
Furthermore, this solution is in line with the legislative history of art 5 CISG, since the delegates at the Vienna Conferences specifically stated that the fraise "personal injury" encompassed both bodily and mental

[25] Hachem in Schwenzer page 98 para 7 and Stoll in Schlechtriem/Thomas page 557 para 9.
[26] See Honnold, fourth edition page 67 para 60.1, where it is stated that when a contract falls within art 3(2) the Convention applies not only to the part of the contract dealing with the supply of goods, but also to the part dealing with the supply of services. The same principle applies here in this author´s opinion.
[27] Hachem in Schwenzer page 98 para 7.
[28] Hachem in Schwenzer page 97 para 4.
[29] Schwenzer page 1015 para 39.

injury.[30] *Consequential damages, which are the result of a personal injury, are therefore, in this author´s opinion, encompassed in the exclusion provided in art 5 CISG and therefore not governed by the Convention.*

2.5. Injury to any person

It is widely recognized, that art 5 CISG excludes claims for death or personal injury to not only the buyer but also to other people either participating indirectly in the contract or non-participating third parties.[31]

The legislative history and the wording of art 5 CISG suggest that excluded from the Convention is not only a buyer´s claim based on death or personal injury suffered by the buyer himself, but also includes the buyers own liability for damages due to death or personal injuries of the ultimate buyers because of the insertion of the fraise "*to any person*" in art 5.[32]

As mentioned previously in section 2.3.1, it was suggested by the delegates at the Vienna Conferences to distinguish between cases where the relation was simply between buyer and seller and cases where action was taken by an injured third party against a previous seller.[33] This suggestion was, however, rejected because it was clear that the Convention did not cover the relationship between the buyer and a previous seller but was only concerned with contracts of sale.[34]

It is therefore reasonable to conclude that third party claims regarding damages for death or personal injury is included by the scope of art 5 CISG and is governed by domestic law. However, the issue of recourse claims for death or personal injury demands further examination.

2.5.1. Recourse claims for death or personal injury

An interesting issue is whether art 5 CISG excludes from the scope of the Convention a buyer´s claim for financial losses incurred under domestic product liability laws, when the ultimate buyer to whom the goods were resold makes a claim against the buyer in connection with personal injury or death caused by the goods.

This issue was dealt with in a case brought before the *Court of Appeal in Düsseldorf* in 1993.[35]The case primarily concerns jurisdiction but is still interesting because of the issues addressed.
In this case a German buyer purchased a cutting machine, from a seller from Indiana, U.S., which had to be installed in the veneer processing unit of a Russian furniture combine. An accident occurred which led to the death of a worker, caused injuries to another worker and damaged the machine. The Russian ultimate buyer demanded repair of the machine from the buyer and the buyer in tern sued the seller to recover the cost of the repair and to establish if the seller was required to indemnify the buyer against damage claims from the Russian sub-purchaser with respect to the accident. The seller contested the jurisdiction of the court.

[30] (A/CONF/97/SR.6), para 24.
[31] Honnold fourth edition page 93 para 71, Herber in Schlechtriem/Thomas page 50 para 4 and Ferrari page 72 section VI.
[32] 35th commission meeting para 42.
[33] (A/CONF.97/C.1/SR.3) para 27.
[34] (A/CONF.97/C.1/SR.3) para 28.
[35] Court of Appeal Düsseldorf, 02.07.1993.

Before seizing jurisdiction the court firstly concluded that the CISG was applicable. Secondly, the court found that both the cost to repair the goods and indemnification of the buyer from claims from the ultimate buyer were elements of damages under the CISG pursuant to art 45(1) and 74 CISG.

This judgement is not convincing, both because the court did not provide much reasoning behind its decision and because the court did not consider neither art 4 CISG, in regards to third party claims, nor art 5 CISG, in regards to claims due to death or personal injury to any person.

The judgement has been criticized by Professor Schlechtriem.[36] According to Professor Schlechtriem, domestic rules on product liability are not supposed to be disturbed by the Convention according to art 5 CISG, and the buyer´s claim for damages due to death or injury to a sub-purchaser should be excluded from the Conventions scope according to art 5 CISG. "*If the buyer was allowed to claim his sub-purchaser´s injuries as damages of his own, product liability would indeed collide with sales law remedies under the Convention*".[37]

In cases like this, it would have been beneficial if an international court had been placed on the top of the CISG pyramid in order to clarify the confusion, which the judgement has left behind.

Whether recourse claims due to death or personal injury is governed by the Convention has to revolve around the scope and meaning of the fraise "*to any person*" in art 5 CISG.

The prevailing view is that the wording of art 5 CISG also includes the ultimate buyers and therefore recourse claims cannot be based on the CISG.[38] This conclusion is further based on the view that if recourse claims are regarded as governed by the Convention, there is a risk that the Convention could be regarded as *lex specialis* in this area, thereby excluding concurring domestic claims. This could potentially lead to inappropriate results because the notice requirements in art 39 CISG could bar recourse actions.[39] Only by extending the scope of art 5 CISG to include recourse claims, will it be possible to ensure that the damage claim can be passed back to the seller through the contractual chain.

There are, however, also scholars who view recourse claims as claims based on the economical loss consisting of the sum of money, which the buyer has to pay to compensate the ultimate buyer and not a loss triggered by death or personal injury. A recourse claim should therefore be understood as a claim based on consequential loss covered by art 74 CISG.[40]
Following this view makes it unnecessary to distinguish between separate heads of the buyer´s liability. However, it also has the consequence that the buyer looses his right to claim the loss in cases of lack of notice according to art 39(1) CISG or after the 2-year limit according to art 39(2) CISG, even in situations where the death or personal injury has occurred at a much later stage. This has the potential to create inappropriate results and the general sense of justice would suffer if the responsible parties to an accident, which cause death or personal injury, are not punished accordingly.

[36] Commentary on Court of Appeal Düsseldorft 2 July 1993.
[37] Commentary on Court of Appeal Düsseldorft 2 July 1993.
[38] Hachem in Schwenzer page 98 para 8, Magnus in Staudingers page 143 para 7, Honnold fourth edition page 94 para 71, Herber in Schlechtriem/Thomas page 50 para 7 and Ferrari page 72 section VI.
[39] Hachem in Schwenzer page 99 para 9, Herber in Schlechtriem/Thomas page 50 para 7 and Ferrari page 72-73 section 72-73.
[40] Schwenzer page 1004 para 14 and page 1012 para 32.

Professor Schlechtriem has advocated a solution, which allows the buyer´s recourse claims both according to the CISG and domestic law. According to the professor, the question of whether art 5 CISG excludes recourse claims from the scope of the Convention would then loose its practical effect.[41]

A similar solution has been proposed by Professor Hachem, who has proposed to leave it up to domestic courts to make the decision of whether to apply the CISG or domestic product liability law in a particular case.[42] Inappropriate solutions do not have to occur, for example when the 2-year limit in art 39(2) CISG has passed, because the death or personal injury has occurred after this time, since domestic courts have the possibility of choosing to apply domestic product liability rules instead.

An important factor that none of theses two solutions take into account is the fact that they do not provide companies in international trade with any certainty, which was part of the aim with the Convention. If anything the solutions increases uncertainties, because both make it impossible to predict which route the domestic courts will chose in a given situation.

It is therefore this author´s opinion that a choice should be made between domestic law or Convention regime. Since death and personal injury has been excluded from the Convention, by the insertion of art 5 CISG, because the Convention was not equipped to deal with these situations, it is furthermore this author´s opinion that it would be in line with the underlying principles of art 5 CISG to also exclude buyers redress claims from the scope of the Convention. These redress claims should therefore only be governed by domestic law.

2.6. Summary

This section has provided an interpretation of art 5 CISG in order to determine the possible areas of overlap between the Convention and domestic product liability laws and the area where concurring claims might occur.

Based on the findings above, art 5 CISG excludes the liability of the seller for death and personal injury to buyers and third parties from the scope of the Convention, regardless of whether the damage was caused by the goods, by services provided by the seller or by lack of due care. Furthermore, recourse claims due to liability for death or personal injury should be excluded from the scope of the Convention.
The main reason for the exclusion is the fact that domestic legislation offers a greater protection of injured parties than the Convention because the Convention was simply not designed for to handle these types of claims. It would be inappropriate and against a general sense of justice to let this area of the law be governed by a Convention, since it is only designed to protect commercial interest.

Consequently, there is no overlap between the Convention and domestic tort law in regards to damage claims due to death or personal injury. This area of the law is governed only by domestic law and domestic product liability rules therefore remain unaffected. Thus no issue of concurring claims arises in these cases.

The remaining question, which will be treated in section 3 of this thesis, is whether liability for damage to property is governed by the Convention or not. This area is also often dealt with in domestic product liability laws and the possibility of having concurring claims therefore also arises in these cases.

[41] Schlechtriem/Butler page 39 para 39.
[42] Hachem in Schwenzer page 99 para 10 and Schwenzer page 1004 para 14.

3. DAMAGE TO PROPERTY

3.1. Introduction

By clear implication art 5 CISG permits a buyer to make a claim for compensation under the Convention regime in situations, where non-conforming goods cause damages to the buyer´s property. Thus, damage to property is regarded as within the scope of the Convention.[43]

This is supported by the wording of art 5 of the Convention, which excludes only damages due to death or "*personal*" injury. The word "*personal*" was specifically inserted in the provision in an attempt to eliminate any possibility of doubt, as to whether the provision also covered damages to property.[44] Consequently, the legislative history of art 5 demonstrates that there is no gap which needs to be filled by an analogy of art 5.[45]

Consequently, in cases of damage to property due to a breach of contract, the buyer can claim damages for the loss incurred according to art 45(1)(b) CISG if the buyer has fulfilled the notice requirements in art 39 CISG and if the preconditions in art 74 CISG have been fulfilled.

Art 74 governs the scope of a buyers claim to compensation for the breach of a contractual obligation. It contains two essential notions: the principle of full compensation and the limitation of liability by the foreseeability rule.
Art 74 CISG requires the existence of a claim for damage pursuant to art 45(1)(b) CISG, which requires a breach of a contractual obligation. The Convention does not define in greater detail, which losses are recoverable and therefore recoverability has to be determined in accordance with the overall objective to achieve full compensation in view of the particular purpose of the contract.[46] *The type of loss relevant here is consequential loss resulting from a breach of contract. Consequential loss is a recoverable loss under the Convention.*[47] *It includes claims for recourse, damage to property and non-pecuniary losses.*
According to Professor Stoll, the foreseeability rule in art 74 CISG is ill-suited to deal with the loss, which defective goods cause to property. The reason for this is that it is always foreseeable that delivering dangerously defective goods may cause a loss.[48] *Damage to property is consequently always foreseeable.*[49] *The only effect of the foreseeability rule in these situations is therefore as a rule to determine, whether the occurred loss lies within the typical risk created by the seller when delivering defective goods. This does, however, not in this author´s opinion present an obstacle in relation to claiming damages due to damage to property, but merely represents common sense regarding the extent of liability.*

Claims for losses due to damage to property may also be subject to domestic product liability laws. This raises the questions: how should the relationship between the Convention and domestic tort law be, and should concurring domestic tort law claims be allowed or dismissed. These issues, which have been fiercely disputed, will be analyzed in detail in section 4 of this thesis.

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[43] Lookofsky, In dubio, page 287, Hachem in Schwenzer page 96 para 2 and page 99 para 11, Magnus in Staudingers page 144 para 9 and Schlechtriem/Butler page 40 para 40.
[44] (A/CONF.97/C.1/SR.35) para 37 and (A/CONF/97/SR.6), para 24.
[45] Hachem in Schwenzer page 96 para 2.
[46] Schwenzer page 1005 para 18. The main objective of the performance principle is to protect the promise in obtaining performance as required by the contract.
[47] Schwenzer page 1006 para 20 and page 1012 para 32.
[48] Stoll in Schlechtriem/Thomas page 571 para 44.
[49] Schwenzer page 1022 para 57.

3.1. Third party claims

The CISG generally follows the principle of privity, meaning that the Convention only holds the parties involved in a contract subject to its provisions, unless the parties have agreed otherwise cf. art 6 CISG. This principle of privity was incorporated in the Convention in art 4, which states that "*this Convention governs only the formation of the contract of sale and the rights and obligations of seller and the buyer arising from such a contract*".

The possibility of directing a claim due to damage to property directly against the manufacturer of the goods is a reality in many domestic product liability laws.[50] It is therefore relevant to examine how the Convention regulates direct claims against manufacturers and which effect an implied or express warranty from a manufacturer has on third party claims in regards to the application of the Convention.

This topic is much debated amongst scholars and it presents many issues. A complete description and analysis of it is outside the scope of this thesis. However, the topic is an important part of many domestic product liability laws, which will be shown the following sections, and therefore it would be inexpedient to completely omit it.

3.1.1. Direct claims against manufacturers and art 4 CISG

Chains of contracts have become an important focus point in recent years especially due to the globalization in trade. In many countries, including Denmark, an important part of product liability is the opportunity for ultimate buyers to sue manufacturers for damage or loss caused by defects in the sold goods, which the ultimate buyers have purchased from distributors.[51]

Personal injury to consumers and damage to a consumer´s property due to a dangerous product, leading to a direct claim against the manufacturer, does not present a problem in regards to the Convention. This is due to the fact that the area of consumer purchases lies outside the scope of the Convention both according to art 2(a) CISG, which generally excludes consumer purchases from the scope of the Convention, and according to art 5 CISG, which as discussed above excludes the liability of the seller for death or personal injury caused by the goods. The only applicable law in these situations is therefore domestic law.

A problem can however arise, when domestic legal systems also give ultimate buyers, who cannot be categorized as consumers, the possibility to claim damages directly from the manufacturer, with whom there is no contractual relationship, when defect products cause damage to property.

The Convention itself is silent on the admissibility of direct contractual claims from third parties. However, according to art 4 CISG the 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.
According to the Professors Schwenzer and Schmidt, no positive answer concerning the general question of admissibility of contractual claims without privity can be derived from the Convention because of the wording of art 4 CISG. "*On the other hand, however, a negative answer excluding any possibility of contractual third party claims cannot be deduced from this provision either. Rather, this question is entirely outside the*

[50] See e.g. the Danish product liability act § 6.
[51] For the purpose of this thesis the term "*distributor*" represents the buyer in relation to the manufacturer and the seller in relation to the ultimate buyer.

scope of the Convention".[52] This conclusion is supported by Professor Honnold, who finds that "*except for unusual circumstances, the Convention would not govern actions by a buyer against persons other than the seller and consequently would not interfere with domestic rules, such as product liability, that permit such actions*".[53]

Thus the prevailing view is that the Convention does not govern third party claims and that such should be dealt with according to the domestic law applicable, based on the rules of private international law. However, according to the Professors Schwenzer and Schmidt the determining factor is that the manufacturer´s financial outcome remains the same. Whether the claim is raised due to recourse within the respective contract relationship, ultimately attributing the loss to the manufacturer or through a direct claim is unimportant.[54] Although the learned professors do have a point in their statement, it is this author´s opinion that it is rash to refer to the method, which is use to climb down the contractual chain, as unimportant. Leaving such a topic unresolved creates unnecessary uncertainties regarding the applicable law and such uncertainties can easily lead to an increase in litigation costs and an increase in the general cost for goods sold in international trade as a result of this. This contradicts the very aim of the Convention, which was to create certainty and uniform rules in international trade.

Even though the prevailing view is that the Convention does not govern third party claims, it is possible that in situations where the manufacturer has participated substantially in a sale to an ultimate buyer, the domestic courts will come to the conclusion that the manufacturer is a "*seller*" according to art 4 CISG.
This was the case in a dispute brought before the *District Court in California, U.S.* in 2001.[55] The court applied the Convention to determine a U.S. buyer´s rights against a Canadian manufacturer of computer chips, which the buyer had purchased from a U.S. distributor. The buyer claimed that the computer chips did not conform to representations made by the manufacturer to the buyer.
It would appear that the court did not consider the issue of direct claims against third parties and the wording of art 4 CISG and as a result the judgement has been criticized and deemed as unconvincing precedence.[56]
In any event, the case illustrates that if there is a direct connection between the manufacturer and the ultimate buyer, it is possible that domestic courts will view this as a contractual relationship in itself. This must be taken into account by international traders, regardless of whether the approach is viewed as erroneous and out of tune with the provisions in the Convention.

3.1.2. Manufacturer´s implied or express warranty

Some manufacturers provide dealers and distributors with a guarantee or warranty in connection with a sale of the goods to pass on to potential buyers. Providing such a warranty can have many purposes, e.g. to encourage sales via the confidence that potential buyers have in a well-known manufacturer. The question is whether such a warranty makes the manufacturer a "*seller*" within the language of art 4 CISG in relation to the ultimate buyer, even though the distributor executed the actual contract with the ultimate buyer.

[52] Schwenzer/Schmidt Parties page 114 section 3.1, Hachem in Schwenzer page 84 para 23 and Stoll in Schlechtriem/Thomas page 564 para 26.
[53] Honnold, Fourth edition page 94 para 71 and page 77 para 63 cf. n. 10. See also Huber in Schlechtriem/Thomas page 368 para 37.
[54] Schwenzer/Schmidt page 115 section 3.1.
[55] Asante Technologies, Inc. v. PMC-Sierra, Inc.
[56] Honnold, Fourth edition page 78 para 63.

Art 6 CISG provides the general principle of freedom of contract and contracting parties have the possibility of implementing a contractual provision allowing direct claims from third parties. This has, in some instances, been said to be the case when a manufacturer warrants or guaranties certain qualities in the goods, thereby creating a true contract between the manufacturer and the ultimate buyer. Claims based on a manufacturers warranty are not derived from the first contract between the manufacturer and the original buyer, but on a contract directly between the manufacturer and the ultimate buyer.[57]

The view in these situations is that the offer either stems from the manufacturer and is delivered by the seller to the ultimate buyer or that the seller acts as an agent for the manufacturer. Lastly, the contract between the manufacturer and the seller is sometimes interpreted as a third party beneficiary contract making the ultimate buyer the beneficiary.[58]

This issue was treated in the case *Thermo King v. Cisgna Insurance*, brought before the Court of Appeal of Grenoble in 1996[59] and the Supreme Court in France in 1999[60]. In this case a French buyer purchased a thermostatic truck trailer from a French seller. The truck was equipped with a freezer, which was manufactured by a U.S. company and sold to the French seller through a French distributor. The freezer broke down during a transport of nuts and fish causing damage to the ultimate French buyer. The ultimate French buyer then sued the U.S. manufacturer directly based on the manufacture´s express warranty.
The Court of Appeal stated that since the manufacturer had granted, directly to the ultimate buyer, a document of guarantee, the ultimate buyer and the manufacturer were bound by a contractual relationship, which the Court considered as a sales contract governed by CISG. The manufacturer was held liable under arts. 35(2)(a) and 36 CISG for the damage suffered by the ultimate buyer.
The Supreme Court rejected the ultimate buyer´s direct claim according to art 1 and 4 CISG. It stated that "*the Convention applies to international contracts for the sale of goods and governs exclusively the rights and obligations, which such a contract gives rise to between the seller and the buyer*". Thus the Convention could only apply if the ultimate buyer had concluded a sales contract directly with the U.S. manufacturer. No such sales contract had been entered into between these parties and therefore the ultimate buyer could not rely on the manufacturer´s express warranty.

What this decision entails has been debated amongst scholars. Some argue that the decision only concerns situations, where the ultimate buyer relies on a contractual guarantee by the manufacturer, since the Convention only applies to sales contracts but not contractual guarantees by manufacturers. Others argue that if the initial sales contract between the manufacturer and the distributor is governed by the Convention, direct claims are not admissible.[61]

Parties to an international sales contract governed by the Convention always have the possibility of agreeing to extend a warranty in their contract to also include third parties, because of the principle of freedom of contract cemented in the Conventions art 6. However, even if such an express warranty has been included in the contract, the legitimacy of such an expansion has to be acknowledged by domestic law for it to have any legal effect. In this author´s opinion, it is only in situations, where direct claims are admissible according to domestic law, that a third party will have the possibility of making a claim based on a warranty in a CISG-contract, directly against the manufacturer. Consequently, it is always necessary to turn to the applicable domestic law to determine if third party claims are admissible, even if an implied or express war-

[57] Hachem in Schwenzer page 85 para 24.
[58] Schwenzer/Schmidt page 110-111 section 2.2.
[59] Thermo King v. CIGNA Insurance.
[60] Thermo King v. Cigna Insurance 2.
[61] Schwenzer/Schmidt page 113 section 3.1. n. 25 and 26.

ranty has been given from a manufacturer. The reason for this is that the Convention does not govern third party claims cf. art 4 and thus can not provide the legitimacy of such claims.
In any event it will usually be much easier and less expensive for the ultimate buyer to sue his seller since the ultimate buyer and his seller are usually located in the same State. The consequence of this is that the Convention does not apply cf. art 1(1) and instead domestic law will be applicable, which is both more convenient and possibly more favorable for the ultimate buyer then applying the Convention. It is therefore unlikely that the Convention will play a large role in regards to ultimate buyer´s claims against manufacturers and the Conventions role will likely be confined to situations, where the distributor in question has experienced a financial difficulty, thereby forcing the ultimate buyer to claim damages elsewhere.[62]

3.2. Summary

In this section it has been concluded that claims based on damage to property as a result of defective goods sold in an international transaction, is governed by the Convention. This is stated directly in the legislative history and also follows from the wording of art 5 CISG. Thus the buyer can claim damages for the loss incurred according to art 45(1)(b) CISG, if the notice requirements in art 39 CISG and the preconditions in art 74 CISG have been fulfilled.

DAMAGE TO PROPERTY CAUSED BY FAULTY GOODS IS TRADITIONALLY GOVERNED BY DOMESTIC PRODUCT LIABILITY LAWS. CONSEQUENTLY, THERE IS AN OVERLAP BETWEEN DOMESTIC LAW AND THE CONVENTION AND THIS OVERLAP CREATES ISSUES WITH concurring CLAIMS. HOW TO RESOLVE THESE ISSUES IS DISCUSSED IN SECTION 4 OF THIS THESIS.

In conjunction with the increasing globalization in trade, chains of contracts have become an important focus point in domestic product liability laws. This does not impact the use of the Convention, because the Convention is only concerned with the contract of sales between a seller and a buyer cf. art 1 and 4 CISG. Whether or not a third party claim can legitimately be raised depends entirely on domestic law.

4. CONCURRING CLAIMS

4.1. Introduction

Contracting states of the Convention are bound by public international law to apply the Conventions provisions within the anticipated sphere.

The general principle is that exclusivity of uniform law is to be assumed, which protects the balance between the buyer and the seller. Domestic law should therefore not be permitted to interfere with the balance created in the Convention. If a matter is governed by the Convention, the Convention takes priority and preempts the use of concurrent remedies under domestic contract law.

Thus contractual claims, based on an international sale of goods, have to be determined exclusively by the Convention. If the *lex fori* classifies product liability claims as contractual claims, domestic rules cannot be applied concurrently with the Convention. The possibility of having concurring claims based on both the

[62] Honnold, Fourth edition page 77 para 63 who agrees with this conclusion.

Convention and domestic law therefore only exist, where the *lex fori* classifies product liability as part of domestic tort law.
Even where liability according to domestic law does not fall within the scope of the Convention, a domestic remedy cannot produce a result, which is incompatible with the protective purpose of the Convention.

Therefore, three general conditions have to be fulfilled before a buyer´s concurring remedy, based on domestic law, can be regarded as admissible. Firstly, the grounds upon which the remedy is based must not fall within the proper scope of the Convention. Secondly, the remedy cannot be in conflict with the regulatory goals of the Convention and thirdly, the domestic law itself must permit concurring remedies.[63]

The puzzle of concurring domestic remedies has been subject to many discussions in doctrine and there is no simple solution to the problem. However, based on findings in the legislative history, doctrine and case law a solution to the problem will be proposed in this section.

4.2. Legislative history

The legislative history of art 5 does not provide the conclusion that with the inclusion of art 5, the discussions concerning concurring domestic remedies have been resolved.[64]

According to Professor Lookofsky it is difficult to imagine, in the light of the drafting history of art 5, which shows that the drafters unsuccessfully tried to exclude product liability altogether, that the contracting states´ legislators intended to reverse the principles underlying tort law by preempting important sectors of this area of law and elevating the Convention to *lex specialis* for these types of property damages.

Professor Honnold has a different view. According to Honnold, the drafting history of the Convention as an entity shows that the delegates at the Vienna Conferences and the states, which they represented, carved out exceptions in the Convention in areas, where appeals to domestic law were persuasive e.g. claims based on death or personal injury cf. art 5. Adding exceptions would be inconsistent with the compromises on scope and substance that led to the international agreement between the contracting states. Allowing concurring claims in cases of product liability would be adding such an exception.[65] "*If the Convention´s coverage of claims for property damage caused by the goods does not displace domestic product liability laws on the question, then property damage claims are actually favored over claims for death or personal injury: property damage claimants would have their choice to proceed either under the Convention or under domestic product liability law, whichever was more favorable, whereas personal injury claimants would be relegated exclusively to domestic law because of art 5. Such a strange set of priorities would presumably be evidenced somewhere in the drafting recor*d".[66]

During the drafting period of the Convention there were many proposals, counter-proposals and comments made by the different national delegates. It is this author´s opinion that it would be stretching the legislative intent very far to state that in the event that a discussion of an exclusion of an area from the Convention did not lead to a result, as was the case regarding product liability and damage to property, then the Convention should govern that area exclusively and effect even domestic tort law, as proposed by Professor Honnold. Furthermore, it may not be evident from the drafting record whether the Convention displaces product liability law, but it is evident that a Convention dealing with contract law cannot automatically

[63] Müller-Chen in Schwenzer page 702 para 32 and Huber in Schlechtriem/Thomas page 370-372 para 50-52.
[64] This statement is supported by Magnus in Staudingers page 145, para 14 and Lookofsky page 26 n. 106.
[65] Honnold, fourth edition, page 99 para 73.
[66] Honnold fourth edition page 100 para 73.

have effect on domestic tort law, especially when such a solution is not mentioned in either the Convention or the legislative history.

The fact that the drafters of the Convention rejected a proposal to limit recourse to concurring domestic rules, regarding actions concerning non-conforming goods,[67] could be viewed as an indication of the intention to generally allow concurring claims.[68] To consider the justification of such a position it is necessary to go further back in the legislative history of the Convention.
The Convention is rooted in two earlier Conventions, one dealing with formation of contracts (ULF) and the other dealing with the obligations of the parties (ULIS). Art 34 ULIS preempted the use of all other remedies based on lack of conformity of the goods in an attempt to protect the uniformity of the rules.[69] Consequently, ULIS took a deliberate stand on the issue of concurring claims.
Such a provision does deliberately not exist in the CISG. This does not reflect a support for concurring claims in general but only that the formulation of art 34 ULIS had the unfortunate result of preempting too much of domestic law, since it also meant excluding remedies, which the parties had agreed to in the contract.[70]
Furthermore, the Vienna drafters had the hope that a provision preempting concurring claims would not be necessary. This was especially due to the fact that art 7 of the Convention commands the attention to the international character of the Convention and the need to promote uniformity.[71] Since allowing concurring claims poses a direct threat to uniformity, the drafters were optimistic that a provision preempting the use of such was unnecessary.
Based on this it is difficult to conclude that since an article preempting recourse to domestic law regarding actions concerning non-conforming goods does not exist, the drafters supported concurring claims in general. On the other hand there is no clear indication in the legislative history of an intention to preempt recourse to domestic tort laws on product liability.

The only definite thing which can be concluded from the legislative history is that the Convention does not apply to the liability of the seller for death or personal injury to the buyer caused by the goods.
Whether damage to property is governed exclusively by the CISG or whether concurring claims based on domestic tort law are permitted was not clarified by the delegates at the Vienna conferences.
Thus it is necessary to examine other sources to determine the appropriate solution to the puzzle of concurring claims.

4.3. Doctrine

There are three main positions which have been advocated in doctrine regarding concurring claims based on domestic tort law.
According to the first position, the Convention exclusively governs cases of property damage and the admissibility of domestic product liability claims is thus denied.[72] The second position states that domestic remedies are generally available and leaves it up to domestic law to determine whether and to what extend a buyer can claim damages based on tort law.[73] The last position distinguishes between cases in which the property damage is the typical result of the breach of contract from cases in which the property dam-

[67] (A/CN.9/WG.2/WP.16) para 62.
[68] Lookofsky: page 26 § 2.6 n. 106.
[69] (A/CN.9/62) para 57.
[70] (A/CN.9/WG.2/WP.16) para 63.
[71] (A/CN.9/WG.2/WP.16) para 64.
[72] Honnold, Fourth edition, page 95-102 para 73 and Ramberg & Herre page 107-108 para 2.5.3.
[73] Magnus page 144-146 pap 9-16, Lookofsky, In dubio, page 287 and Ferrari page 73-75 section VI.

age is the result of a breach of standard safety expectations. In the first scenario the CISG is considered to be exclusive and in the second scenario concurring claims are admissible.[74]

In the following three sections the three positions and the individual arguments supporting them will be presented. A detailed analysis of the different arguments will follow in section 4.4. of this thesis.

4.3.1. The CISG preempts recourse to domestic tort law

The reasoning behind the view that the CISG exclusively governs cases of property damage, thereby denying access to domestic law and the admissibility of concurring claims, is that the facts that invoke domestic rules of product liability are the same facts that invoke the Convention.

Liability under the Convention is based on two elements: Firstly, a failure of the goods to conform to the contract according to art 35 CISG and secondly, damage as a result of this failure. If the seller fails to perform any of his obligations under the contract or the Convention, the buyer may claim damages according to art 45(1)(b) CISG. This rule in the Convention is a no-fault rule, because the basis of liability is the breach itself and it is independent of any form of lack of due care.

Liability according to domestic tort law includes a third element; proof of lack of due care.

According to professor Honnold it does not automatically follow that this third element excludes the application of the Convention, because the Convention embodies a deliberate choice in art 45(1)(b) in regards to the relevance of lack of due care. The question of negligence is irrelevant to the buyer´s right to recover damages from the seller according to the stated provision. This means that a buyer does not have to prove lack of due care to receive damages.[75]
One of the reasons for this choice is, according to Professor Honnold, that "when a seller has produced defective goods it is likely that the defects resulted from a lack of due care in production methods. However, proof of the seller´s lack of due care does not change the essential character of the claim, and access to domestic law based on such proof would make it possible to circumvent the uniform international rules established by the Convention".[76] The decisive prerequisite for liability for damage to property is instead that the goods are non-conforming according to art 35 CISG.[77]

As mentioned above access to domestic law based on proof of lack of due care would make it possible to circumvent the uniform international rules established by the Convention.[78] This is particularly the case in regards to the notice requirement in art 39 CISG.

If a buyer is injured by goods bought in an international sale, due to a hidden defect or a breach of standard safety regulations, which the buyer should not have become aware of before the injury occurred, after the 2-year limitation according to art 39(2) CISG has expired, the buyer cannot make a claim against the seller. Allowing the buyer to pursue a claim based on domestic product liability law, after this time limit has been surpassed, would lead to a circumvention of the CISG and could be detrimental to the uniform application of the CISG.

[74] Hachem in Schwenzer p. 100-101 para 14.
[75] Honnold, fourth edition, page 97 para 73.
[76] Honnold fourth edition page 97 para 73.
[77] Ramberg & Herre page 108 para 2.5.3.
[78] Raqmberg & Herre page 108 para 2.5.3. and Honnold, third edition page 74 para 73 and fourth edition page 97 para 73.

Professor Honnold does not view circumvention of domestic product liability laws as a valid counter argument against the Convention´s preemption of domestic law. According to the Professor it is a mere description of the inevitable interaction between the Convention and domestic law, since the argument is not only applicable to property damage claims, but also to many other types of claims based on domestic law. In the end it is an argument against injecting uniform international law into the midst of non-uniform domestic law.[79]
The Convention provides a fair balance between buyers and sellers. Permitting a buyer to choose a more favorable domestic law would merely add to the buyer´s protection and disturb the balance created in the Convention.[80]

The argument that domestic product liability laws on property damage should not be displaced because they are a part of public order in a wider sense does, according to Professor Honnold, represent a decision on which domestic laws are too "*important*" to preempt. The drafters of the Convention have already made this decision in the Convention by inserting provisions concerning those particular topics, where it was thought best to preserve domestic law – for example in art 5 CISG regarding death and personal injury claims. "*Without such explicit guidance from the text of the Convention, having commentators or even judges decide what domestic law is to important to preempt is a recipe for non-uniformity and infringement of the legislative function*".[81]

Access to domestic law will also render it impossible to maintain legal certainty in international sales contracts[82] because it would be the applicable domestic law, which decides whether or not to allow tort claims to co-exist with contractual claims.

Furthermore, permitting recourse to domestic law can be unfair, because not all domestic systems permit a choice between contract and tort law.[83] This is the case under French law, where the rule of *non-cumul* generally excludes the application of tort law rules if there is a contractual relationship between the parties, thereby giving the contractual liability system legal priority over the tort liability system.[84] This has the consequence that tort rules are suppressed, even though the Convention does not mention a particular matter. So a French buyer, whose property suffered damage due to a defect in goods bought in an international sale, will not have the possibility to claim damages under domestic tort law, e.g. where the 2-year limit in art 39 CISG has been exceeded. However an American buyer in the same situation might still have that option, since American courts have been know to allow concurring claims, where the essence of the action raised is viewed as based on tort and not contract.[85]

Thus only in situations where the claim under domestic law depends on facts that differ from the facts necessary to establish a claim under the Convention, can domestic law be invoked. Proof of lack of due care is not a fact that differs sufficiently in this respect.[86]
Concluding that domestic product liability is preempted by the Convention is, according to Professor Honnold, not only the sensible solution, but it is also the solution most likely to capture the result intended by

[79] Honnold fourth edition page 100 para 73.
[80] Honnold fourth edition page 101 para 73.
[81] Honnold fourth edition page 101 para 73.
[82] Raqmberg & Herre page 108 para 2.5.3. and Honnold, fourth edition page 101 para 73.
[83] Honnold, fourth edition page 101 para 73.
[84] Schlechtriem, Borderland page 468 section I, A and page 470 section I, B.
[85] Schlechtriem, Borderland, page 470 section I, B.
[86] Honnold, Third edtition page 75 para 73.

the drafters of the Convention and the fundamental purpose of the Convention to bring uniformity to the law applicable to international sales.[87]

4.3.2. The CISG does not preempt recourse to domestic tort law

The reasoning behind the view that domestic remedies generally are available, thus making concurring claims a possibility, is primarily that the principles underlying contract law and domestic product liability law are too different to justify prevalence of the Convention over domestic law. Moreover, the Convention does not provide a solution that is functionally equivalent to the one provided by domestic product liability laws. Therefore, domestic tort law principally should apply, if its prerequisites are met.[88]

Product liability laws are based on the strong notion that one should not harm another person´s life, limb or property by neglecting certain standards of safe behavior. If these standards were superseded by the Convention, the conclusion of an international sales contract would in effect amount to a partial disclaimer of tort liability.[89]

Tort law protects a wider and more fundamental range of interest that exists independently from any contractual relationship. Protecting these fundamental interests is a necessity regardless of whether a commercial contract has been entered into or not. Moreover, contracting parties are entitled to expect the same degree of care in protecting each other´s fundamental interest, as could reasonably be expected if no contract between them has existed.[90]

There is no difficulty in regarding a duty of care in tort as independent of any contractual liability and therefore, the ratification of the Convention in a state does not necessarily mean that the state has indented to merge contract law and tort law, especially because the Convention has been designed only to apply to the contractual side of equation.[91]

According to Professor Lookofsky the Convention´s command to have some regard to uniformity does not compel domestic courts to preempt all domestic remedies, let alone dictate the conclusion that domestic remedies invariably are preempted, when the facts of a case are covered by a given CISG rule.[92] Concurring claims represent little threat to achieving uniform Convention interpretation. Furthermore, if courts in contracting states interpret the Convention remedies as non-exclusive in situations, where faced with the same facts, this will also represent a uniform interpretation of the remedial rules. Such an interpretation cannot be rendered less uniform merely because of the possibility that domestic laws in the involved states may differ.[93]

A tort action brought directly against the manufacturer is always allowed, assuming that third party claims are admissible according to domestic law, when the manufacturer did not sell the product directly to injured party, since the manufacturer does not have a contractual relationship with the injured party and

[87] Honnold fourth edition page 101 para 73.
[88] Lookofsky, In dubio, page 287, Ferrari page 73-75 section VI, See Magnus page 144-146 pap 9-16.
[89] Professor Huber, who previously has supported the total exclusion of the application of domestic tort law, has expressed his doubts as to whether the risk of circumvention of the CISG is so severe that the exclusion of domestic tort remedies is justified. See Huber: page 27-28 para d, aa.
[90] Ferrari page74-75 section VI.
[91] Lookofsky page 78 § 4.6.
[92] Lookofsky, Case Commentary.
[93] Lokoofsky, In dubio, page 288 and n 124.

consequently the Convention does not apply cf. art 4 CISG. The same result should also prevail, when the manufacturer is also the seller.[94] Otherwise a manufacturer would be put in a situation that is far less advantageous than the distributor, even in situations where the manufacturer was unaware of the fact that his buyer intended to resell the sold goods. To achieve equal treatment of both the manufacturer and the distributor it is a necessity to allow concurring claims.

Whether and to what extent domestic tort law applies depends on the applicable domestic law.[95] Consequently, the fact that the Convention governs the contractual obligations to deliver conforming goods does not necessarily preempt domestic remedies based on product liability rules.

Thus concurring claims based on damage to property are generally allowed.

4.3.3. The CISG only preempts recourse to domestic tort law, when the damage to property is a typical result of a breach of contract

The reasoning behind this last view, which distinguishes between cases, where property damage is the typical result of the breach of contract from cases, where property damage is the result of the breach of standard safety expectations, is that the Convention is not concerned with general duties of safety and therefore does not exclusively govern liability in these situations.[96] In the first scenario where a claim for damages is due to a typical breach of contract, the Convention is considered to govern exclusively. In the second scenario where a claim for damages is due to a breach of safety expectations, concurring claims are admissible.

In the words of Professor Herber "*claims in tort or delict are basically not governed by the CISG and are therefore applicable concurrently with it, in accordance with domestic law. They are, however, restricted where they are used to extend the seller´s liability*".[97]

The CISG intends to protect the buyer from damages resulting from a breach of the contractual obligation to deliver conforming goods, and the Convention establishes the extent of protection of the buyer. The interests of the seller and buyer have been brought into a certain balance by the CISG which should not be altered by invoking domestic remedies. However, since the CISG is not concerned with general duties of safety, which not only protect the buyer, but also third parties not involved in the contract, it is left for the applicable domestic law to decide whether a concurring claim is admissible or not in these situations.[98]

Furthermore, a defect which triggers domestic product liability is not necessarily the same as "*non-conformity*" according to art 35 CISG and the extent of a possible preemptive scope of the Convention would therefore have to be based on a very subtle distinction.[99]

According to Professor Schlechtriem the economic interests which are created by a contract, e.g. the buyer´s interest in receiving conforming goods in time, differ from the "*property*" interests which exist independently from contractual obligations. In cases of property damages concurring claims is a possibility,

[94] Lookofsky, In dubio, page 287 n 122.
[95] Lookofsky page 78 § 4.6, Magnus in Staudingers page 145 para 14 and Ferrari page 75 section VI.
[96] Hachem in Schwenzer p. 100 para 14, Schwenzer page 1004 para 14, Schlechtriem/Butler page 40-42 para 40, Herber in Schlechtriem/Thomas page 47 para 23 and Schwenzer/Hachem page 471 section 2.
[97] Herber in Schlechtriem/Thomas page 47 para 23.
[98] Hachem in Schwenzer p. 100 para 14.
[99] Schlechtriem second edition page 79 para 10.

because these kinds of damages lie outside the principal domain of interests created by contracts and protected by the contractual remedies in the Convention.
Consequently, one has to determine whether an interest is genuinely created by the sales contract, in which case the Convention governs exclusively, or whether it is a property interest that lies outside the scope of the Convention, in which case concurring claims should be allowed. Actions may be based on domestic law, when defective goods cause property damage, irrespective of whether the goods are non-conforming to the contract or not, because the interest of receiving damage for the property damage lies outside the principal domain of the interest created by contracts.
The solution is to classify the rules by reference to their function. Not to categorize them according to domestic law. If the classification shows that the issue concerns contract law and the Convention contains a solution, either explicitly or by application of general principles, then the issue should be regarded as governed by the Convention exclusively and thereby not leave a door open for domestic rules.[100]
Another possible solution is to adjust concurring tort actions to the rules of the Convention e.g. the notice requirements in art 39 CISG, if a matter can be characterized as being genuinely governed by the CISG.[101]

In any event allowing concurring claims is the necessity that comes with preserving tort laws and preserving the public order in a wider sense, in order to avoid the Convention being a partial disclaimer of tort liability.[102]
Thus the Convention does not and should not preempt recourse to domestic tort law as a general rule.

4.3.4. Summary

The three approaches presented above all have different a reasoning underlying their conclusions and all raise valid points of concern. The sustainability of the arguments will be dealt with in detail in the following sections of this thesis.

At this point it can be concluded that domestic courts should show considerable restraint before granting remedies founded in tort, if regulations in the Convention are in effect disregarded.[103] "*For the CISG is created by a Convention binding the states, which have acceded to it by the proper acts and leaves no room for national legislators or courts to deviate from the Convention, unless use was made of one of the few reservations."*[104]
Even scholars who prefer an approach which allows concurring claims recognizes - at least to some extend - that caution is a necessity when dealing with these complex issues and it would seem that a good solution to the problem, which encompasses all the different concerns, is not ready in the near future.

In the following sections the different issues raised in doctrine will be explored further in an attempt to clarify the validation of them and to find a possible solution to the puzzle of concurring claims.

[100] Schlechtriem/Thomas page 6. See also Schlechtriem/Butler page 41 para 40, where the author proposes to differentiate between a defect in contract and in tort. It is stated that contract law rules apply, where there has been a failure of the delivered goods to conform to the contract and tort law rules apply, where the buyer property is damaged as a consequence of putting a defective good into circulation, unless the claim is based on non-conformity with the contract; then the CISG applies ahead of tort law.
[101] Schlechtriem, Borderland. Page 473-475.
[102] Schlechtriem second edition page 79 para 10.
[103] Lookofsky page 25, § 2.6, and Schlechtriem, Borderland, page 468-469 section I A.
[104] Schlechtriem, Borderland, page 468-469 section I A.

4.4. The Convention and product liability laws

Regardless of which of the paths in doctrine is chosen, it will end up either circumventing domestic product liability laws or the Convention – at least to some extend. Therefore, it is important to look into the considerations behind this legislation to get the information which is necessary to determine whether product liability laws or the Convention should take priority.

The findings in this section describe a solution, which is reasonable and should be acceptable to the contracting states of the Convention; a solution, where justice is being served in a wider sense and a solution that the contracting states are likely to adopt, even if they are not bound to do so by public international law.

The considerations underlying the Convention and underlying product liability laws are thus not just important when finding a solution to the problems, which the letter of law brings fourth, but also in order to find a diplomatic solution that every state can oblige by, just as was done during the Vienna Conferences during the drafting period of the Convention.

4.4.1. The CISG

The Convention has the function to replace diverse domestic rules with one uniform international law.

The delegates at the Vienna Conferences attempted to achieve a balance in the relationship between the rights and obligations of the seller and the buyer. Only a balanced sales law based largely on neutral terms can promote international trade and legal certainty.[105] *This assertion is very important and was therefore incorporated in the Preamble of the Convention.*[106]
The Convention should be regarded as "a building constructed by way of compromise from different and not always well-fitting bricks, which needs to be developed further through interpretation so as to form a uniform, complete construction. Only in that way can the objectives laid down in the Preamble be achieved".[107]

The following sections will firstly examine the implications which ratification of the Convention brings with it, in order to establish the extent of the binding effect on the contracting states and secondly, and most importantly, examine the uniform interpretation and application of the Convention and what the effect this has on the entire success of the Convention as a tool in international trade.

4.4.1.1. The implications of ratification of the CISG – preemption of domestic contract law

Contracting states of the CISG are bound by public international law to apply the Conventions provisions, within the anticipated sphere of contractual obligations, arising in an international sales contract, thereby displacing domestic sales law.

The question is whether the fact that the contracting states have ratified the Convention, also means that the states have agreed to merge the Conventions contractual rules with their domestic tort regime, when the two collide?

[105] Schlechtriem/Thomas page 10 para 5.
[106] Cf. the Preamble of the Convention.
[107] Schlechtriem/Thomas page 11 para 8.

It is difficult to imagine that public international law can force the contracting states to the Convention to actually merge contract and tort law[108]. However, if the Convention is not given priority, in situations where the Convention and domestic tort law overlap, it will not be effective and it would be very easy to overrule the Convention by resorting to domestic tort law.

The contracting states ratified the Convention and the effect of the Convention on domestic legislation, including domestic tort law, cannot be a surprise. One could argue that the Contracting states should be bound to "*merge*" contract and tort law in situations where the two collide, because they should have realized the effect of ratification of the Convention. However, the contracting states are only bound by public international law to apply the Conventions provisions on contractual obligations arising under an international sales contract and even though the above mentioned coalition was certainly foreseeable at the time of ratification, this foreseeability does not have a legally binding effect.

The inevitable interaction between the Convention and domestic law only concerns domestic contract law and *contract law still remains separate from tort law in many contracting states. Ratification of the Convention did not change this fact.*

It is this author´s opinion that in order to truly fulfill the obligation to enforce the Convention, according to public international law, without setting aside domestic tort law in the process, it is necessary to examine the facts of a given case and determining whether these facts are typically regarded as contractual or delictual. When the later is the case, the contracting states are not obligated to apply the Convention ahead of domestic tort law, although they may chose to do so. However, when the facts of a case are typically regarded as part of contractual law, the Convention has to be applied, regardless of whether domestic tort law could also apply. In these cases it is reasonable to expect that the courts of the contracting states will apply the Convention and honor the commitment to enforce the Convention, in order to achieve the goals put forward in the Preamble. After all, it has to be in the interest of both international trade and the individual contracting states that the Convention fulfills its purpose as an international uniform instrument.

4.4.1.2. Uniform interpretation and application of the CISG

The fundamental purpose of the Convention is bringing uniformity to the law applicable to international sale contracts, in order to reduce the legal uncertainty, which the interaction between different domestic legal systems had created. To achieve this certainty, it is a necessity that the Conventions rules are applied as uniformly as possible in all contracting states. Therefore art 7 CISG provides a series of principles for interpreting the Convention in an effort to handle the problems which follows with interpreting an international text.[109]

That a uniform interpretation is a necessity has been depicted in many cases for example the case *RJ & AM Smallmon v. Transport Sales Limited and Grant Alan Miller* where the court stated that: "*the Convention is to be given an autonomous interpretation requiring the Convention to be interpreted exclusively on its own terms and applying Convention-related decisions in overseas jurisdictions*". [110]

[108] Lookofsky page 78 § 4.6.

[109] Cf. section 2.1. of this thesis where art 7 CISG is discussed.

[110] RJ & AM Smallmon v. Transport Sales Limited and Grant Alan Miller. See also Scafom International BV v. Lorraine Tubes S.A.S; Forestal Guarani S.A. v. Daros International, Inc.; Officine Maraldi S.p.A. vs. Intesa BCI S.p.A., National Bank of Egypt, H.U. Gas Filling Plant Aswan USAMA and Appellate Court Celle Germany 24.07.09, which all emphasis the importance of uniform interpretation.

Allowing concurrent domestic remedies would have the consequence that the seller´s liability would vary depending on which domestic law was applicable pursuant to the private international law rules. This would jeopardize uniform application of the Convention, the success of which must be categorized as one of the most important aims of the Convention.[111]

The argument presented by Professor Lookofsky that if Courts in contracting states interpret the Convention remedies as non-exclusive in situations, where faced with the same facts, this will represent a uniform interpretation of the remedial rules in the Convention, even though domestic laws in the involved states may differ,[112] does not take into account the certainty aspect.
The need to promote uniformity is inevitably linked with being able to provide international trade with some degree of certainty. If the Convention cannot provide this certainty, companies will opt out of the Convention cf. art 6 CISG and the Convention will not have the success hoped for.
If the Convention remedies are interpreted as non-exclusive, and in that sense interpreted uniformly, it still leaves international trade with the very difficult situation of predicting which stand a particular domestic court might take - whether to apply the Conventions remedies or domestic tort remedies - in an attempt to prepare for future events. Therefore, in this author´s opinion, the solution provided by Professor Lookofsky does not fulfill the important aim of providing certainty in the Convention.

If you look up "uniform" in the dictionary, the definition is "*the same in all parts and at all times*"[113] and it is this form of uniformity, which is necessary for the Convention to achieve success as an instrument in international trade.
Allowing concurring claims will result in the opposite of a uniform solution and could potentially jeopardize the success of the Convention. It will not only result in a circumvention of some of the provisions in the Convention, but indeed circumvent the entire aim of the Convention as expressed in the Preamble. When finding a possible solution to the puzzle of concurring claims this is a very important consideration to bear in mind.

4.4.2. Product liability laws

Whereas contract law protects what a party is entitled to expect under a contract, tort law protects a wider and more fundamental range of interests, which exist independently from any contractual relationship. The general consideration underlying domestic product liability laws is based on the notion that buyers should be compensated, when dangerous or defective goods cause injury or damage to them or their property.

The considerations underlying product liability laws are in general similar. This section will be based on Danish product liability law but it is similar notions which will be circumvented on a global scale if the Convention is given a preemptive effect.

There are two different systems of product liability in Denmark. Firstly act no. 261 of 20th March 2007 concerning product liability, which is based on the *EC Product Liability Directive of 25. July 1985,*[114] and secondly a set of product liability rules developed in case law, which have not been codified. The two systems are very similar however there is one important difference to note in this context. The product liability act governs only damage to consumer property cf. § 2 herein. Companies that wish to claim damages based on product liability, when defective goods have caused damage to their property, will have to do so via the

[111] Huber in Schlechtriem/Thomas page 370 para 47 and Schwenzer/Hachem page 470 section 2.
[112] Lokoofsky, In dubio, page 288 and n 124.
[113] See Oxford Dictionary, section U, page 1673, the definition of the word "*uniform*".
[114] EC Council Directive 85/374.

liability developed in case law.[115] If a company choses to do so in a case which is governed by the Convention, then the issue of concurring claims arises.

ACCIDENTS CAN HAPPEN AND DAMAGE OCCURS AS A CONSEQUENCE EVEN THOUGH DIFFERENT MEASURES OF PRECAUTION HAVE BEEN TAKEN. BECAUSE THIS RISK CANNOT BE COMPLETELY ELIMINATED, MANY COUNTRIES HAVE ADOPTED LEGISLATION ON PRODUCT LIABILITY, WHICH EFFECTIVELY REGULATES THE LIABILITY IN THESE SITUATIONS IN ORDER TO SECURE COMPENSATION TO THE INJURED PARTIES.
BUYERS OF PRODUCTS PRESENT ON THE MARKET, BE IS CONSUMERS OR COMPANIES, SELDOM HAVE THE OPPORTUNITY TO EVALUATE WHETHER THE PRODUCT CARRIES WITH IT DANGEROUS ELEMENTS OR EVALUATE HOW TO AVOID A POSSIBLE ACCIDENT. IT WOULD NOT BE REASONABLE TO PUT THE FINANCIAL BURDEN FOR DEFECTIVE GOODS ON RANDOM BUYERS.[116] THEREFORE THE ULTIMATE LIABILITY IN THESE SITUATIONS HAS BEEN PUT ON THE MANUFACTURERS OF THE PRODUCTS.[117] HOWEVER, IN MANY COUNTRIES A BUYER WILL HAVE THE POSSIBILITY OF CLAIMING DAMAGES FROM EITHER THE MANUFACTURER OR THE PARTICULAR SELLER/DISTRIBUTOR.[118] IN MOST SITUATIONS, IT WILL BE MUCH MORE CONVENIENT FOR A BUYER TO SUE HIS SELLER INSTEAD OF THE MANUFACTURER, BECAUSE THE BUYER ALREADY KNOWS THE SELLER AND BECAUSE THE BUYER AND THE SELLER WILL MOST OFTEN BE PART OF THE SAME JURISDICTION. IF, HOWEVER, THE SELLER SUFFERS FROM FINANCIAL HARDSHIP OR HAS GONE BANKRUPT, THE POSSIBILITY OF SUING THE MANUFACTURER DIRECTLY REMAINS, THEREBY PROVIDING FURTHER SECURITY THAT THE BUYER WILL RECEIVE PROPER COMPENSATION.
HAVING STRICT AND EFFECTIVE PRODUCT LIABILITY RULES CAN ALSO HAVE THE EFFECT OF FURTHERING PRODUCT SECURITY IN GENERAL, BECAUSE MANUFACTURERS DO NOT WISH TO RISK BEING HELD LIABLE FOR DAMAGES,[119] ESPECIALLY IN JURISDICTIONS WHERE PUNITIVE DAMAGES CAN BE AWARDED.

The fact that there are two different systems of product liability in Denmark, one codified and one not, could be seen as evidence of where the greatest protective interests are. Liability for damage to property owned by companies was not included in the product liability act. It seems reasonable to presume that protecting consumer property and the life and limbs of buyers in general, deserves greater protection then the property of the companies, who in many cases will have the possibility of claiming damages according to contract law or cover their loses via insurances and who generally are more experienced with the law and justice system, than consumers are.

THE MAIN OBJECTIVE OF DOMESTIC PRODUCT LIABILITY LAWS IS TO ENSURE COMPENSATION OF INJURED BUYERS, IF THE PRODUCT PURCHASED WAS NOT SUFFICIENTLY SAFE TO BE PUT ON THE MARKET. THIS IS ESPECIALLY THE CASE, IF THE BUYER HAS SUFFERED PERSONAL INJURIES SINCE THESE CASES ARE THE MOST SEVERE ONES.

IT IS THIS AUTHORS OPINION THAT THE PROTECTIVE INTERESTS ARE GREATEST WHEN DEALING WITH DEATH AND PERSONAL INJURY AND WHEN DEALING WITH CONSUMER RELATIONS. THESE PROTECTIVE INTERESTS HAVE FORMED THE BASIS OF PRODUCT LIABILITY LAWS AND IT IS THESE INTERESTS, WHICH NEED TO BE PROTECTED WHEN DEALING WITH PRODUCT LIABILITY ISSUES.

THE RELATIONS BETWEEN COMPANIES HAVE BEEN SET ASIDE AND EVEN THOUGH DOMESTIC LEGISLATION STILL TO SOME DEGREE REGULATES THESE RELATIONS IN TORT LAW, IT IS NOT THE PRIMARY AIM OF PRODUCT LIABILITY LAWS. THIS IS PRIMARILY REGULATED BY CONTRACT LAW. THUS DENYING concurring CLAIMS WILL ONLY AMOUNT TO A RELATIVELY SMALL CIRCUMVENTION OF AN AREA OF PRODUCT LIABILITY LAW, WHICH SHARES ITS BORDERS WITH CONTRACT LAW.

[115] Gomard page 208-209 and Anne-Dorte Bruun Nielsen page 13.
[116] Remarks on the first draft of the product liability law no. 54, 12th of October 1988.
[117] The Danish product liability law no. 261 of 20th of March 2007 § 6.
[118] The Danish product liability law no. 261 of 20th March 2007 § 10.
[119] Gomard page 203-204 and Mads Bryde Andersen & Joseph Lookofsky page 454, section 10.1.a.

4.4.2.1. The effect of the EC Directive on Product Liability

The growing body of European private law results in more and more overlaps with the Convention. This raises the question of whether European legislation takes priority over the Convention or not?

This question has been much debated, because allowing EC directives or regulations to take priority over the Convention will interfere with the well-balanced rules in the Convention and the main goal of achieving uniformity in international trade. It could lead to a split in the application of the Convention, depending on the court in which the suit has been filed. This in effect could have a devastating impact on the success of the Convention as an instrument in international trade.
However, precedence must presumably be given to product liability laws based on the EC directive by virtue of art 90 CISG. Although a directive is not an international agreement as such, which is the requirement to enjoy priority according to art 90 CISG, it has its basis in the EC Treaties, which are international agreements. Because of this connection some scholars are of the opinion that directives are to be regarded as international agreements under art 90 CISG and consequently enjoy priority.[120]

It is this authors opinion that art 90 CISG should be construed narrowly because it represents an exception to the main rule in art 1 CISG, i.e. that the Convention governs contracts for the international sale of goods. This, coupled with the dangers of destroying the uniformity which the Convention represents, leads this author to the conclusion that caution should be taken before allowing directives and regulations to constitute international agreements.

The *EC Product Liability Directive of 25th of July 1985*[121] has been adopted by the member states of the European Union *and product liability laws in these states will, to a certain degree, be based on this directive. However, because the directive governs only death or personal injury to buyers and damage to consumer property,*[122] *the directive barely overlaps with the Convention which, as has been stated previously, does not govern death or personal injury cf. art 5 CISG nor consumer relations cf. art 2(a) CISG.*[123]

Thus the question of whether EC law takes priority over the Convention does not merit much consideration in this thesis, since it does not have much practical relevance. Therefore, and after establishing that the topic has a relatively small place in the product liability scheme, the issue will not be treated any further.

[120] See Herber in Schlechtriem/Thomas page 51 para 14 and page 689 para 12, who is of the opinion that EC Directives are to be regarded as international agreements according to art 90 CISG, and Huber page 28 section bb) and Ferrari page 76-77 section VI, who arrive at the opposite conclusion because directives have to be transformed into national law to have effect. See also Schlechtriem, second edition page 922 para 12b and 13 who regards it as the most desirable solution to not view EC Directives as international agreements in order to protect the well-balanced regime of the CISG, though admitting that it is difficult to find watertight reasons that will convince the European Court of Justice of this solution.
[121] EC Council Directive 85/374.
[122] Cf. art 9 of the Directive. Consequently, the directive does not govern damage to property owned by companies which is the relevant part governed by the Convention.
[123] Schlechtriem, second edition page 922 para 12a and Huber page 28 section bb) who both concurs with this authors conclusion.

4.4.3. Punitive damages

Punitive damages are a controversial issue in tort law and in product liability law, because punitive damages often put large financial burdens on businesses world wide. Therefore, it is relevant to shortly present this topic in general and in regards to concurring claims specifically.

In some contracting states punitive damages can be awarded in addition to actual damages, which (over-)compensates a buyer for the losses suffered due to the harm caused by the seller. Punitive damages are a way of punishing the seller, and the legitimacy of imposing them is based on the theory that the interests of society and the individual harmed can only be met by imposing additional damages on the defendant.
Injured buyers may seek punitive damages from sellers that have sold defective or unsafe products. This can be seen as a way of sending the message to the manufacturer and to companies in general, that it is financially unwise to cut corners and ignore safety concerns. On the other hand, the sellers and manufacturers in these cases view punitive damages as unfair, unpredictable, and often excessive since the buyers receive a financial windfall unrelated to the actual damages.[124]

Punitive damages are not recognized and enforceable in many countries, especially civil law countries, on the grounds that they violate international public policy[125] and the basic notions of morality and justice accepted by civilized countries. Rendering awards, which are unenforceable, will result in a waste of resources, time and money for already financially distressed claimants. Therefore, enforceability is something which should be kept in mind when dealing with international relations.

The Convention is based on the principle of full compensation. This follows from art 74 CISG in which it is stated that "*damages for breach of contract by one party consists of a sum equal to the loss […] suffered by the other party as a consequence of the breach*". This means that the buyer has the right to be fully compensated for all disadvantages suffered as a result of a breach of contract. However, the buyer must not be overcompensated and the loss has to, as a rule, be calculated concretely.[126] Consequently, the Convention does not permit punitive damages.[127]

This difference between domestic law and the Convention is important to keep in mind when examining the issue of concurring claims. If concurring claims are allowed in cases where a defective product has caused damage on a buyer´s property, punitive damages are in effect allowed. This further compromises uniformity and increases uncertainty in international trade. Firstly, since it would make if very difficult to estimate the financial risk of a contractual relationship. Secondly, since the monetary amount awarded will differ depending on which court and which specific judge is rendering the award and lastly, since punitive damages only exist as a means of compensation in some contracting states.

The fact that some contracting states, primarily common law states, award punitive damages in cases of product liability and some contracting states, primarily civil law states, do not, is something which has to be

[124] Gotanda page 4 Section II.
[125] Cf. Hague Convention on the law applicable to contracts for the international sales of goods art 6, which contains a public policy provision. See also Gotanda Page 7-8 Section II, with reference to case law world wide. The position stated in this thesis is supported by the author although he predicts a "*change in the wind*" leading to a greater enforcement of punitive damages awards in future – at least in cases where such awards serves a greater purpose.
[126] Secretariat Commentary on the 1978 draft page59 para3-7, Schwenzer page 1000 para 2 and 3 and Stoll in Schlechtriem/Thomas page 553 para 2 and page 565 para 28.
[127] CISG Advisory Council Opinion No. 6 para 9.5 , Schwenzer page 1002 para 8 and Stoll in Schlechtriem/Thomas page 566 para 31.

taken into account when discussing the issue of concurring claims, since it adds to the advantages of applying the Convention and the uniform system provided therein.

4.4.4. Summary

There are some protective interests underlying domestic product liability laws that would simply not be appropriate to dismiss and there are some interest underlying the Convention that it would be ill-advised to allow circumvention of through domestic tort law.

This complex issue requires courts and arbitrators to perform a balancing act, which is not easy, and agreeing on a uniform balancing act is even more difficult. It is, however, necessary in order to provide certainty in international trade and therefore it is very important to shed some light on the topic.

In the following sections a proposal will be presented to determine where the line between contract and tort should be drawn and which interests should be protected in this context, in order to find a solution to the issue of concurring claims.

4.5. Circumvention of the CISG or domestic product liability laws

When dealing with concurring *claims, one of the most disputed topics in doctrine is whether to allow a partial circumvention of the Convention or of domestic product liability laws.* Will placing the word 'tort' at the top of a claim release the buyer from the notice obligation in art 39 CISG and does it deprive the seller of the defenses that the Convention provides?

As has been shown previously the considerations underlying the Convention are very different from the considerations underlying product liability laws. In this section the considerations underlying the notice-requirements in the Convention will be explored further, in conjunction with the issue of circumvention of domestic product liability rules, in an effort to clarify what is at risk of being circumvented and in which situation circumvention will have the most detrimental effect.

4.5.1. Considerations underlying art 39 CISG

According to art 39 CISG "*the buyer loses the right to rely in a lack of conformity of the goods, if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it*. *In any event, the buyer loses the right to rely on a lack of conformity of the goods, if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee*".

Art 39 acts as the seller´s protection against a buyer, who calls into question a contract that has already been completed, by placing the seller in a position in which he is given the possibility to remedy a lack of

conformity or reduce the buyer´s loss in other ways.[128] It provides the general rules on time for notification and the consequences of failure to comply with this requirement.
The purpose of the provision is also to give the seller an opportunity to prepare for a dispute with the buyer concerning lack of conformity and to take the necessary steps in this regard, e.g. preparing claims against the seller´s own supplier.[129]
Lastly, the provision establishes a degree of certainty for the seller regarding future claims from buyers, since the liability has been limited to a two year period. This is a very important aspect in international trade, since it allows companies to administer their economic situation in a more predictable way.

Access to domestic law, based on product liability rules, would make it possible to circumvent the uniform international rules established by the Convention,[130] in particular the notice requirements in art 39 CISG, since domestic product liability laws generally are more lenient regarding notice requirements.

This issue was confronted by the *High Court in Thüringen*[131] in a case from 1998. In this case a Czech seller claimed payment for living fish delivered to a German buyer. The buyer refused payment, arguing that the delivered fish were infected with a virus. The buyer also claimed damages by way of set-off, as his own fish stock had been fatally infected by the virus.
The court found that the CISG was applicable and further held that *"lack of sufficient notice within the scope of the CISG also extends to exclude other concurrent remedies, such as a claim for tortuous liability*".[132] The buyer who did not give notice within reasonable time according to art 39 CISG, was therefore unable to claim damages for the infection of other fish.
Thereby, the court extended the scope of the CISG´s rules regarding notice requirements to also have effect on domestic tort law. By doing this the court eliminated the possibility to circumvent the CISG, but it also extended the scope of the Convention even further by allowing it to influence domestic law on a more general scale, including domestic tort law.

The judgement does not reveal the argumentation underlying the courts decision. A possible reasoning could be that if the court had allowed recourse to domestic law, then this would have produced a result, which was incompatible with the protective purposes of a fundamental rule in the Convention, namely art 39 CISG.

Based on the courts statement, it seems reasonable to assume that if the notice requirements in art 39 CISG had been complied with, the court would have allowed concurring claims based on domestic tort law. However, allowing the notice requirement in art 39 CISG to be the only barrier between the Convention and domestic tort law would have the consequence that it would be left entirely up to the courts in the contracting states to decide whether or not to allow or dismiss a concurring claim in a particular case. This would have a devastating impact on the uniform application of Convention.
Even though the courts solution might eliminate the possibility of circumvention of art 39 CISG, it does not eliminate circumvention of other provisions in the Convention, e.g. art 74 CISG which acts as a defense against punitive damage claims based on domestic tort law.
Furthermore, the court´s solution puts commitments on the contracting states of the Convention, which goes beyond what the states have agreed to, when they ratified the CISG, since it also has an influence on tort law. The contracting states are, therefore, not bound by public international law to apply the Conven-

[128] Huber in Schlechtriem/Thomas page 370 para 47.
[129] Schwenzer in Schlechtriem/Thomas page 301 para 4.
[130] Raqmberg & Herre page 108 para 2.5.3. and Honnold, third edition page 74 para 73 and fourth edition page 97 para 73.
[131] Court of Appeal Thüringen, 26.05.1998.
[132] Court of Appeal Thüringen, 26.05.1998 last para in UNCITRALs translation.

tion in this manner. This case does consequently not provide the type of uniform solution, which will solve the product liability issue.
That the solution in the case is not sustainable is already evident in case law. As an example the Supreme Court of Israel arrived at the opposite conclusion than the High Court in Thüringen, namely that the notice requirement in art 39 CISG cannot be extended to have effect on domestic tort law.[133] This conclusion was based on the simple fact that the Convention only governs rights and obligations arising from a contract cf. art 4 CISG. Since a tort claim does not arise from a contract, it is not governed by the Convention and the notice requirements included herein.[134]

According to Professor Schlechtriem a tort action for property damages, caused by defective and non-conforming goods, should not be barred by an omission to give notice within reasonable time under art 39 CISG.[135] The reason for this is that when dealing with property damages, which are recoverable under art 74 CISG as consequential damages, it is outside the principle domain of interest created by contracts and has therefore entered the field of genuinely extra-contractual remedies. Allowing tort actions for property damages, when the notice requirements in art 39 have not been fulfilled, prevents the loss of remedies granted by art 45 CISG.
However, allowing the buyer to circumvent art 39 CISG by recourse to domestic law disturbs the balance between the seller and the buyer established by the Convention. The buyer gets the advantage and thereby it goes against the aim of the Convention,[136] regardless of whether genuinely extra-contractual remedies have been granted by art 45 CISG. Furthermore, there is no actual loss of remedies under the Convention, which the use of domestic tort law would prevent. The reason for this is that art 45 CISG should not be construed as granting remedies, when the notice requirements in art 39 CISG have not been fulfilled. Surely art 45 CISG should not be construed in a manner which would undermine the entire aim and purpose of the Convention by way of shifting the balance between buyers and sellers. In this authors opinion this is the decisive factor.

A buyer who lost his right to rely on a lack of conformity in the goods and recover damages because he did not give notice to the seller within reasonable time according to art 39(1)CISG, does not appear to be worthy of much protection. Letting such buyers pursue concurring claims according to domestic tort law, gives the buyer a very large advantage at the seller´s expense, which in this author´s opinion is not reasonable.

The situation is different when examining art 39(2) CISG. After the absolute time-limit of 2 years has surpassed, the buyer has lost the right to rely on a lack of conformity in the goods even if the non-conformity, which has resulted in damage to property, occurred at a much later stage. Here it is not the buyer´s lack of good business management, which results in the loss of rights, but an ultimate time-limit provision. In these situations it is more reasonable to allow buyers to pursue concurring claims, especially when the seller has exhibited lack of due care or negligence. However, the Convention also has a solution - at least partially - to this problem, provided in art 40 CISG. This provision and the solution it provides will be presented in the following section.

[133] Pamesa Ceramica v. Yisrael Mendelson Engineering Technical Supply Ltd. The case concerns ULIS art 39, which is almost identical to art 39 CISG and the court referred to CISG case law and provisions in its conclusion, thereby making the case relevant also in this setting.
[134] Pamesa Ceramica v. Yisrael Mendelson Engineering Technical Supply Ltd, para 53.
[135] Schlechtriem, Borderland page 473-474 section A.
[136] Huber in Schlechtriem/Thomas page 370 para 47.

4.5.2. Art 40 CISG

According to art 40 CISG "the seller is not entitled to rely on the provisions of art 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer".

Art 40 relives the buyer of the consequence of a failure to comply with both art 39(1) CISG and art 39(2) CISG. The provision expresses the fundamental principle of good faith and fair dealings and is designed to prevent unnecessary punishment of a buyer for failing to meet the obligations in art 39 in situations where the seller, due to his knowledge of the non-conformity, is not worthy of protection.[137]

Art 40 CISG is triggered, if the seller knew or could not have been unaware of a lack of conformity by the end of the period for timely notice.[138] *Since* the buyer's duties to examine the goods and give notice of any non-conformity are basic and fundamental principles in the Convention, *the seller must have displaced more than gross negligence. Thus, the lack of conformity must be some what obvious before the exception in art 40 CISG will be brought into force.*[139] *However, there is not a set formula regarding which lack of conformity a seller could not have been aware of. This depends on the specific circumstances of the case.*

One of the greatest aversions against the Convention having a preempting effect regarding claims for damage to property was that it would be possible to circumvent domestic product liability rules, if the time limits in art 39 CISG had been surpassed, since domestic product liability rules do not contain the same limitations. However, in the most severe cases of damage to property, where the seller has acted gross negligently, domestic product liability rules are not circumvented, since art 40 CISG permits the buyer to claim damages even if the time limits have been surpassed.
Circumvention of domestic product liability laws is only an issue in situations where damage to a buyer´s property is caused by non-conforming goods, where the buyer is not a consumer cf. art 2 CISG, where the seller has not acted gross negligently cf. art 40 CISG and where the notice-requirements in art 39 CISG have not been fulfilled.
Adding to the equation that it, at least in the majority of cases, is not reasonable to allow the buyer to circumvent art 39(1) CISG, since the loss of the right to rely on a non-conformity is due to the buyers own lack of time-management, it is only in cases where the 2 year time-limit in art 39(2) has expired that an actual issue of circumvention of domestic product liability rules could present a problem. Thus the area where circumvention of domestic product liability rules could be view as an issue is, in this author´s opinion, very limited.

4.5.3. Summary

Circumvention of the Convention could have a devastating effect on the Convention as an effective instrument in international trade and on the uniform solution provided therein. The effect would also be devastating to sellers in general, since lack of certainty presents great risks for companies, if struck with a punitive damage claim. On the other hand there will only be a limited number of cases, where circumvention of domestic product liability law effects a buyer worthy of protection, since art 40 CISG acts as a safeguard against gross negligent sellers.

[137] Garro page 253 and Honnold fourth edition page 376 para 260.
[138] Schlechtriem second edition page 480 para 8 and Honnold fourth edition page 376 para 260.
[139] Schwenzer in Schlechtriem/Thomas page 321 para 4, Schlechtriem second edition page 478 para 4 and Garro page 255-257.

Allowing concurring *claims will have a detrimental effect on the Convention. Dismissing* concurring *claims on the other hand, will only have a minimum effect on product liability laws and only in situations where a company suffers damage to property, where the notice requirements in art 39 CISG have not been fulfilled and where the seller has not acted gross negligently. Thus, the sacrifices which the contracting states have to make in tort law, in order to obtain a successful international contract law, are limited in this author´s opinion.*

4.6. The effect of negligence

One of the greatest differences between the Convention and domestic tort law is the effect that negligence is given. While negligence does not influence liability according to the Convention it is often the triggering effect in domestic law which gives rise to a tort claim. Whether the very fact that a seller has acted negligently should automatically make it possible to file a domestic tort claim or not, and which effect negligence should be given in Convention regime, will be the focus of this section.

Key issues regarding negligence and product liability were identified by the Superior Court of Justice in Ontorio, Canada in a case from 2003.[140] In this case the family Shane, who owned a farm in Ottowa, Canada, bought a tractor directly from JCB Belgium N.V located in Belgium. The tractor was manufactured in England, where the owners of the company also resided. After the contract had been entered into, the Shanes made agreement to transport the tractor to Canada. While being used, the tractor caught fire and burned down. The Shanes claimed damages for negligent manufacture and design of the tractor and made their claim in Ontario, where the damage was suffered. JCB Belgium N.V. disputed jurisdiction.
The parties' contract was deemed to have been entered into in Belgium, and it was not disputed that the CISG was the applicable contract law. The essence of the claim was, according to the Court, determining what caused the tractor to catch fire. However, it was not clear whether the tractor was negligently manufactured or suffered a defect. Nevertheless, the court considered two possibilities as to where the tort occurred; in England, where the tractor was manufactured and designed, or in Ontario, where the damage occurred when the tractor caught fire and burned down.
The court found that "*in this case the consequences, namely the fire destroying the tractor occurred in Ontario and the law of Ontario may well apply to the issue of negligent design and manufacture of the tractor".*[141] Since the claim from the Shanes was based on negligence and not non-conformity the claim had the closest relation to tort law, according to the court, and the law of the place, where the damages had occurred (Ontario law), had to be applied. Thus the court seized jurisdiction.

The court treated this issue as a breach of a standard safety expectation rather than a breach of contract and found the interest of the injured party more worthy of protection than the commercial interests underlying the contract. This choice was not based on the specific defect the tractor suffered or whether or not it was manufactured negligently, since such information did not exist, but in stead the court viewed it as part of its discretion to make the decision on whether this was a tort claim or a contract claim.

The extent to which the CISG applies according to art 4 and 5, to the substantive and procedural aspects of this case, was not discussed by the court. The fact that liability for damage caused to property is not excluded by art 5 CISG may not have occurred to the court, which is an unfortunate omission, since it could have provided guidance regarding the puzzle of concurring claims.

[140] Shane v. JCB Belgium N.V.
[141] Shane v. JCB Belgium N.V. para 42.

Another interesting issue, which was not addressed by the Superior Court of Justice, was the extent to which the claim might have been excluded under the two year limitations period according to Article 39(2) CISG, since the Shanes did not give notice of its claim to JCB Belgium N.V until after the two year period had expired.
However, it would seem that the court viewed claims based on negligence as matters best dealt with in domestic tort law, regardless of whether a contractual relationship exists between the parties, and thus did not to give priority to the Convention. [142] Domestic law has a long history of dealing with negligence and lack of due care and it could therefore be argued that domestic courts are generally better equipped to handle such cases. However, in regards to product liability many domestic product liability laws are based on strict liability and not the fault principle.[143] Negligence is thus often not relevant in these situations and the reasoning behind giving priority to domestic courts, because of their experience with the fault principle, is therefor not convincing.

The Superior Court of Justice of Ontorio stated that its decision "*will affect many consumers and businesses who purchase manufactured goods from a foreign jurisdiction and subsequently, suffer damages caused by a defect in the manufacture or design of the goods where they live or carry on business*".[144] Since the court left many gaps in its decision, it seems impossible for the judgement to get this effect.

The position that the Convention should not be given priority over domestic tort law is also supported by the case *Stawski Distributing Co. Inc. v. Zywiec Breweries PLC*, brought before the District court of Illinois.[145] In this case the court stated that the CISG is considered equal in stature and force as any other domestic federal law and because the relevant domestic state law rules (The Illinois Beer Industry Fair Dealing Act) implicated issues related to core concerns reserved to states, its provisions were not preempted from conflicting portions of federal law. There was no persuasive reason to suggest that the CISG should be treated any differently than federal law, according to the court, particularly when the Convention has to be given the same weight as any other federal statute.[146]

In this author´s opinion there are very persuasive reasons for treating the Convention differently than federal law, the main reason being that the Convention is part of international law and federal law is not. There are different elements to consider when dealing with international law than when dealing with *domestic* federal law. The Convention will not be applied uniformly if its application depends on whether or not there exist domestic laws, which can block application in certain situations.[147] Therefore, the sphere of application of the Convention has been pinpointed in art 1-6 of the Convention. If the Convention is given the same weight as federal law, it cannot be expected that the Convention will succeed as a uniform instrument in international trade. The relationship between federal law and state law is therefore not relevant when dealing with the scope of the Convention.

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[142] This approach was taken in a case before the District Court in Ohio in Miamy Valley Paper LLC v. Lebbing Engineering & Consulting GmbH where the court found that since the CISG does not deal with the legal effects of a seller´s negligent or fraudulent misrepresentation cf. art 4 CISG, the buyer was not preempted from pleading such claims according to domestic tort law. See also Viva Vino Import Corp. v. Farnese Vini S.r.l. which came to the same conclusion.
[143] See the Danish Product Liability act § 6 and EC Product Liability Directive art 1 regarding the manufacturers liability.
[144] Shane v. JCB Belgium N.V. para 2.
[145] Stawski Distributing Co. Inc. v. Zywiec Breweries PLC. See however District Court Aachen, 14.05.1993, were the court found that the application of CISG precluded recourse to domestic law regarding both rules of frustration or economic hardship and challenges having to do with mistake as to the quality of the goods, because these matters were exhaustively covered by the CISG cf. section 2 para d.
[146] Stawski Distributing Co. Inc. v. Zywiec Breweries PLC, Section A para 4.
[147] See Schwenzer/Hachem page 471 section 2 where it is stated that to achieve the greatest level of uniformity, it cannot be left to individual states to apply their own domestic laws, whether contractual or tort.

When deciding whether or not to allow concurring claims, domestic courts often seem to rely on whether the claimant has filed a tort claim or not, because this is taken as an indicator of negligence and negligence *only* has a place in the tort law regime. To establish the accuracy of this view, it is necessary to determine which effect proof of lack of due care should have – if any - in Convention regime, and whether negligence is in fact something best dealt with in domestic tort law. This will be explored further in the following section.

4.6.1. The no-fault principle in article 45(1)(b) CISG

According to art 45(1) CISG a single set of remedies applies, when the seller fails to perform any of his obligations. The provision states that: "If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may: (a) exercise the rights provided in articles 46 to 52; (b)claim damages as provided in art 74 to 77".

It follows from art 45(1)(b) CISG that the sellers liability for damages is independent of fault or contractual warranty of performance. The seller is subject to a general guarantee liability with regard to performance of the contractual obligations.[148]

Some legal systems have traditionally restricted the seller´s liability for defective goods to cases where the defect resulted from the seller´s fault and other legal systems based damages merely on breach of contract. Art 45(1)(b) CISG represent a compromise between different legal systems.[149] *This compromise was essential for the success of the Convention, since straight-lined rules are necessary to achieve uniformity in international sale and the fault-principle inevitably bears with it confusions and exceptions.*[150]

That lack of due care and negligence generally does not have a place in the Convention can also be seen in the discussions between the delegates during the drafting period of the Convention. Concepts such as gross negligence have varying definitions in the contracting states and incorporating such a concept into the Convention would lead to uncertainty in its application, which in effect could lessen the chances of widespread ratification of the Convention. Therefore, concerns regarding negligence are best regulated by domestic law.[151]

Negligence in itself does however not automatically result in the exclusion of the application of the Convention. Negligence is irrelevant to the buyer´s right to recover damages from the seller, because the Convention embodies a deliberate choice in art 45(1)(b) in regards to the relevance of lack of due care. *According to Professor Honnold, one of the reasons for this choice is that defective goods often are a result of lack of due care in production methods, however, this does not change the essential character of the claim. Furthermore access to domestic law based on proof negligence would make it possible to circumvent the uniform international rules established by the Convention.*[152] The decisive prerequisite for liability for damage to property is instead that the goods are non-conforming according to art 35 CISG.[153]

[148] Müller-Chen in Schwenzer page 698 para 23, Honnold fourth edition page 405 para 276, Huber in Schlechtriem/Thomas page 359 para 10 and Lookofsky, Fault and No-Fault page 129 para 3.1.
[149] Lookofsky page 127 § 6.14.
[150] Honnold, fourth edition page 405 with n. 4.
[151] (A/CN.9/142) para 80 concerning the scope of the principle of good faith in the Convention.
[152] Honnold fourth edition, page 97 para 73.
[153] Ramberg & Herre page 108 para 2.5.3.

In a newer case brought before the District Court in Arkansas, U.S. in 2009[154] the relationship between the fault-principle in domestic tort law and the Convention was considered by the court, specifically in regards to the effect of negligence. In the case a U.S. buyer, Electrocraft Arkansas, Inc., brought an action against a Chinese seller, Super Electric Motors, LTD, asserting, amongst other things, a strict liability claim based on the seller´s negligence in connection with allegedly defective refrigerator motors, which Electrocraft purchased from Super Electric Motors. The seller argued that the CISG preempts and subsumes the negligence/strict liability and the claim was in fact a breach-of-contract claim in masquerade.
The court stated that "*despite differing viewpoints concerning the preemptive effect of the CISG on tort remedies, there is agreement that concurring state contractual claims are preempted by the CISG. Thus, a tort that is in essence a contract claim and does not involve interests existing independently of contractual obligations (such as goods that cause bodily injury) will fall within the scope of the CISG regardless of the label given to the claim, and therefore not require a determination concerning the preemptive effect of the CISG on tort remedies*".[155]
The court then went on to conclude whether the claim in this particular case was a tort claim or actually a breach of contract claim in masquerade. A claim based on breach of promise is contractual and a claim based on breach of a non-contractual duty is tortious.
The Court determined that Electrocraft's claim was based on contract, because the allegations did not amount to a breach of a duty distinct from a breach of contract claim. The court found that "*the obligation of the seller to deliver goods conforming to the contract and the interests of the buyer to use, consume, or to resell the goods purchased, and therefore to receive them conforming to the contract, as alleged by Electrocraft, are economic interests that are basically contractual and regulated by the CISG and its rules and remedies for international sales"*.[156]

Thus, since Electrocraft's negligence/strict liability claim was based on breach of contract, not breach of a non-contractual duty, the CISG preempted recourse to domestic tort law.[157]

This case, although preempting the use of domestic tort law, distinguishes between cases in which the damage is a typical result of a breach of contract or a breach of the promise underlying the contract from cases, in which the damage is a result of a breach of a general duty of care independent from the contract. This is similar to the the method proposed by Professor Schlechtriem.[158] The court looked deeper into the policy considerations behind both the Convention and tort law and determined the right setting for the claim, thereby taking into account the possibility of circumvention.

Furthermore, the case shows that negligence or fault is not the determining factor in itself, when establishing whether the Convention or domestic tort law should be applied in a given situation, even though the Convention is generally not concerned with fault or negligence. This has to depend on the specific circumstances in order to ensure proper use of the legal system.

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[154] Electrocraft Arkansas Inc. v. Super Electric Motors Ltd. Although the case does not revolve around the issue of product liability it none the less effectively deals with the difficulties between tort and contract law. Since these difficulties are the same when dealing with product liability the case is highly relevant also in these settings.
[155] Electrocraft Arkansas Inc. v. Super Electric Motors Ltd, Section B, 2 ii) para b.
[156] Electrocraft Arkansas Inc. v. Super Electric Motors Ltd, Section B, 2 ii) para b.
[157] The case Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories Inc, follows the same reasoning. In this case the court found that the CISG preempted recourse to domestic contract law, however, it stated that tort claims are in general not preempted by CISG, but a tort claim, which is actually a contract claim, or that bridges the gap between contract and tort law, may be preempted. See also Pamesa Ceramica v. Yisrael Mendelson Engineering Technical Supply Ltd, para 73 cf. section 4.5.1. of this thesis, where the court distinguished between different types of negligence in order to find a solution that was appropriate under the circumstances.
[158] Cf. section 4.3.3. and compare with Commercial Court Zürich, 24.04.1995 which provide the same line of argumentation.

Whether or not the courts solution to the puzzle of concurring claims and the effect of fault or negligence, is the best way of dealing with it, remains to be seen. However, in this author´s opinion this approach has the possibility of gaining success, since it represents the middle ground of the different views in doctrine. Considering the fact that the Convention was founded by finding the middle ground by way of compromise between different nations, the solution is at least in line with the spirit of the Convention, in this regard, although it might be a difficult balancing act to perform in practice.

4.6.2. Summary

Considerations based on fault, negligence and lack of due care generally do not have a place in Convention regime. It is simply irrelevant. This does however not mean that if a claim to some extend is based on fault, it is automatically outside the scope of the Convention. A tort claim based on fault has to be examined closely, in an attempt to avoid allowing contract claims in masquerade to circumvent the provisions in the Convention.
If, on the other hand, the claim is a genuine tort claim, which is based on different circumstances than those governed by the Convention, then concurring claims could be admissible. This is due to the fact that the Convention is not equipped to deal with such matters and because the contracting states of the Convention have only agreed to apply the Convention on international contract claims and not on tort claims.

Thus, negligence alone should not be the determining factor, when deciding whether the Convention or domestic tort law should govern a case concerning damage to property caused by non-conforming goods.

5. CONCLUSION

Art 5 CISG excludes the liability of the seller for death and personal injury to buyers and third parties from the scope of the Convention, regardless of whether the damage was caused by the goods, by services provided by the seller or by the sellers lack of due care. The main reason for the exclusion is the fact that domestic legislation offers a greater protection of physically injured parties than the Convention and it would be inappropriate and against a general sense of justice to let this area of the law be governed by a Convention that is designed to protect commercial interest.

However, claims based on damage to property, as a result of defective goods sold in an international transaction, is governed by both the Convention and TRADITIONALLY ALSO GOVERNED BY DOMESTIC PRODUCT LIABILITY LAWS. THIS CREATES AN OVERLAP BETWEEN DOMESTIC LAW AND THE CONVENTION AND ISSUES WITH concurring CLAIMS ARISES.

Allowing concurring claims will result in the opposite of a uniform solution and could potentially jeopardize the success of the Convention. It will not only result in a circumvention of some of the provisions in the Convention, but circumvent the entire aim of the Convention as expressed in the Preamble.

THE RELATION BETWEEN BUSINESSES IS NOT THE PRIMARY AIM OF PRODUCT LIABILITY LAWS AND HAS IN FACT BEEN SET ASIDE IN MANY CONTRACTING STATES. EVEN THOUGH DOMESTIC LEGISLATION STILL TO SOME DEGREE REGULATES BUSINESS RELATIONS IN PRODUCT LIABILITY LAW, REJECTING concurring CLAIMS WILL ONLY AMOUNT TO A RELATIVELY SMALL CIRCUMVENTION OF AN AREA OF PRODUCT LIABILITY LAW, WHICH SHARES ITS BORDERS WITH CONTRACT LAW.

FURTHERMORE, CONTRACTING PARTIES ARE NOT LEFT WITHOUT POSSIBILITIES TO PROTECT THE INJURED PARTY IN SITUATIONS, WHERE DEFECTIVE OR DANGEROUS PRODUCTS CAUSE DAMAGE TO PROPERTY. THE SELLER, IN A CONTRACT FOR AN INTERNATIONAL SALE OF GOODS, IS LIABLE ACCORDING TO ART 45 CISG AND EVEN IF THE NOTICE REQUIREMENTS IN ART 39 CISG HAVE NOT BEEN ADHERED TO, THE SELLER DOES NOT GET A FREE PASS TO RECKLESSNESS BECAUSE OF THE SAFETY VALVE IN ART 40 CISG. THUS IT IS A VERY LIMITED AREA, WHERE THERE IS AN ACTUAL RISK THAT AN INJURED PARTY WILL NOT BE COMPENSATED AND JUSTICE NOT SERVED AS A CONSEQUENCE.

The CISG is becoming increasingly predictable. However, domestic tort law is neither easily accessible nor predictable. Allowing buyers a choice has the inevitable consequence that predictability in international trade to some extend is lost. Thus, it is in the best interest of both international traders and the contracting states of the Convention that a solution to the puzzle of concurring claims is found, even if this means nearing the boarders of domestic product liability laws and making compromises.

In this authors opinion the Convention should ideally preempt the use of domestic product liability laws, since the prospective consequences for the success of the Convention in the long run are put a risk, if concurring claims are allowed. However, since the contracting states to the Convention are not bound by public international law to extend the scope of the Convention to have effect on domestic tort law, it is unlikely that the contracting states will adopt such a solution. Thus finding a compromise becomes a necessity for achieving a uniform solution. The solution suggested by the District Court in Arkansas, U.S.[159] is, in this authors opinion, a compromise which encompasses both the concerns of circumvention of the Convention and of domestic product liability laws, because it requires a closer examination of the claim to determine whether it in fact is a tort claim or actually a breach of contract claim in masquerade.

This solution is also in line with the solution proposed by Professor Schlechtriem, which requires a determination of whether the compensation-interest is genuinely created by the sales contract, in which case the Convention governs exclusively, or whether it is created by a property interest, which lies outside the scope of the Convention, in which case concurring claims should be allowed.[160]

As Judge Justice E. Rubinstein accurately stated, after concluding that concurring claims to some extend should be allowed: "*I will confess that I have not reached this conclusion lightly. This is because it can be argued that the Convention and the uniform law are intended to regulate the relationship between the parties in its entirety. But life creates complex situations that cannot easily be fitted into a predefined framework, and this leads to the aforesaid attempt to distinguish between the different types of negligence. This distinction is not an easy one, and there is a concern that it will lead to a slippery slope. Notwithstanding, it should be adopted, so that justice may be done in appropriate cases.*"[161]

Regardless of which solution is chosen, domestic courts should show considerable restraint before granting remedies founded in tort law, when regulations in the Convention are in effect pushed aside. It is in everybody's interest to safeguard the uniform rules provided in the Convention and for the courts in the contracting states to form a united front against unintended loopholes in the Convention, in order to avoid the damaging effects to the Convention of concurring claims.

[159] Electrocraft Arkansas Inc. v. Super Electric Motors Ltd. cf. page 55.
[160] Cf. page 34, where Professor Schlechtriems solution is presented in detail.
[161] Pamesa Ceramica v. Yisrael Mendelson Engineering Technical Supply Ltd, para 73 cf. section 4.5.1. of this thesis.

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CISG/Convention	United Nations Convention on Contracts for the International Sale of Goods (1980)
Danish Product Liability Law	Act no. 261 of 20th March 2007 concerning product liability
EC Product Liability Directive	EC Council Directive 85/374 *of 25. July 1985.*
Hague Convention	Hague Convention (1955) – Convention on the Law Applicable to Contracts for the International Sale of Goods.
ULF	Hague Formation Convention (1964) - Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, Annex of the Hague Convention
ULIS	Hague Sales Convention(1964) – Convention Relating to a Uniform Law on the International Sales of Good, Annex of the Hague Convention