

Electronic goods in the light of the United Nations Convention on the Contracts for the International Sale of Goods (CISG) in relation to software

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This article aims to analyze the issue of applicability of software sales, especially as an electronic good in the light of the United Nations Convention on Contracts for the International Sale of Goods (CISG). The Convention was drafted in Vienna in 1980 and after being applied in 92 countries² it became counted for more than 80% of international trade when it comes to goods³. Although being in force over three decades⁴, it is one of the most effective instruments for unification and harmonization that international trade has ever created⁵. In my opinion the issue whether to apply the CISG to software transactions, especially when software is downloaded via the internet, without material character of 'goods', deserves special attention. Nowadays there is a conflict of interpretation of the Convention, which has risen due to an unexpected development of modern society with new technologies not taken into account when adopting⁶. This problem had caught my attention during volunteering for the Polish Permanent Mission of the Republic of Poland to the United Nations Office and International Organizations in Vienna and led to writing this article. I realized that the progressive increase in economic trading and e-commerce brings the importance of transactions such as international sales of software. Having in mind applying the CISG to software not delivered in a tangible form I would also like to refer to the definition of 'goods' under the CISG and look into various types of software.

Introduction

The CISG was drafted by UNCITRAL – The United Nations Commission on International Trade Law, a legal body specializing in commercial law legislation worldwide for more than 50 years⁷. Moreover, the Convention is ratified by states from different legal traditions with different level of economic development⁸. Noteworthy is the fact that in 92 jurisdictions the Convention is fully incorporated into the legal system, meaning that national courts should apply the CISG ex officio, instead of using their domestic law⁹. Such a large number of countries testify to the huge role and recognition of the CISG¹⁰.

Definition of 'goods' under the meaning of the CISG

The key aspect is to understand what are 'goods' under the meaning of the Convention. The most common definitions say that movable and physical objects (physical at the time of delivery) are recognized as goods under the CISG¹¹ and that 'sale of goods' means the transfer of right in a movable (*a contrario* immovable) thing¹². For comparison, from the scope of application of the CISG intangible things: rights such as value rights or claims¹³, know-how and the sale of an entire business undertaking, also sale of partnership interest and shares since it means rights¹⁴, 'scholarly market analysis'¹⁵ are excluded. Regardless, we should not jump to the unjustified conclusion that Vienna Convention only applies to the sale of tangible things¹⁶.

¹ Author is a law student at the University of Wrocław.

² See: https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status (access 22.10.2019).

³ F.R. Villamizar, Foreword, [in:] I. Schwenzer, L. Spagnolo (eds.), *The Electronic CISG: 7th MAA Schlechtriem CISG Conference (International Commerce and Arbitration)*, Vol. 24, Eleven International Publishing, The Hague, The Netherlands 2017, p. ix

⁴ The CISG came into force in 1988.

⁵ F.R. Villamizar, Foreword, [in:] I. Schwenzer, L. Spagnolo (eds.), *The Electronic...*, p.ix.

⁶ H. Sono, *The Applicability and Non-Applicability of the CISG to Software Transactions*, [in:] C.B. Andersen, U.G. Schroeter (eds.) *Sharing International Commercial Law across National Boundaries*, Wildy, Simmons & Hill Publishing (2008), p. 512, <https://www.cisg.law.pace.edu/cisg/biblio/sono06.html> (access 27.9.2019).

⁷ See: <https://uncitral.un.org/en/about> (access 7.9.2019).

⁸ UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, United Nations, New York 2016, p. ix, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/cisg_digest_2016.pdf (access 17.10.2019).

⁹ M. Pohl, *Party Autonomy in the Light of the United Nations Convention on Contract for the International Sale of Goods*, Katowice–Osnabruck 2018, p. 13.

¹⁰ S. Gali, *Wprowadzenie, UNCITRAL i jej historia*, [in:] J. Gołaczyński (ed.), *Sporządzanie umów elektronicznych, Komentarz praktyczny, wzory umów, orzecznictwo*, Warszawa 2017, p. 316.

¹¹ C. Brunner, F. Meier, M. Stacher, Article 2, [in:] C. Brunner, B. Gottlieb (eds.), *Commentary on the UN Sales Law (CISG)*, Kluwer Law International BV, Alphen aan den Rijn, The Netherlands 2019, p. 29.

¹² J. Lookofsky, *Understanding the CISG, A Compact Guide to the 1980 United Nations Convention on Contracts for the International Sale of Goods, Third (Worldwide) Edition*, Kluwer Law International, Alphen aan den Rijn, The Netherlands 2008, p. 17.

¹³ C. Brunner, F. Meier, M. Stacher, Article 2, [in:] C. Brunner, B. Gottlieb, *Commentary...*, p. 29.

¹⁴ I. Schwenzer, P. Hachem, Chapter I: Sphere of Application, [in:] I. Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, Fourth Edition, Croydon, United Kingdom 2016, p. 35.

¹⁵ J. Lookofsky, *Understanding the CISG...*, p. 17.

¹⁶ *Ibidem*, p. 19.

E-commerce and the CISG

The development of information society and global progress in the field of computerization brought e-commerce to the forefront¹⁷. There is rather no doubt about material goods. Non-uniformity in the doctrine concerns intangible goods whether direct e-commerce (by electronic means of communication) should be treated as commerce or provision of services. Furthermore, the CISG often applies to indirect e-commerce (only if the contract conclusion or order takes place by electronic means while delivery of goods is accomplished in a traditional way e.g. by post) with regard to direct e-commerce, the possibility of using it is no longer so obvious¹⁸.

Sale of computer software

The main controversial issue in applying the CISG to selling computer software is its form. Considering the determination that the CISG governs sales of software it is necessary to stress that the parties do not use opt-out option but also classify a transaction as a 'sale of goods'¹⁹. The term 'goods' means a movable item²⁰ and the CISG clearly applies when the computer program is transferred on a portable medium, e.g. hard disk, microchip or CD because the software then meets the requirement of a material form²¹, wherefore the sale of computer hardware is governed by the CISG with no doubts²², what is also confirmed by the German courts: Landgericht München from 29 May 1995²³, and Landgericht Heidelberg from 3 July 1992²⁴. Some authors add that it can only be used regarding programs embodied in a material form, excluding programs made available electronically and regarding standard programs, excluding individual ones²⁵.

Sale of software – scholars' point of view

The vast majority of scholars and jurisprudence confirm the inclusion of software under the meaning of 'goods'²⁶. Among some academic scholars²⁷ the acceptance of the standard computer software embodied on a physical medium under the CISG is a common view. However, in their opinion software without a physical medium is not a subject of the Convention. On another note, they consider it as a serious problem especially when different regulations may apply depending on the application of the same software provided. This situation is complicated by modern devices (e.g. iPad, iPhone) and other programs that are only partially delivered on a tangible medium as well as when the program is loaded using online electronic communication. In their opinion, it seems that in such a case a liberal approach of the concept of 'goods' should be used and treat the program downloaded

online to the device as the element of this device and treat it collectively as a 'good'²⁸.

C. Brunner and *B. Gottlieb* are also supporters of treating programs which can be downloaded via the Internet directly and for a fee as 'goods'. They underlined that Convention does not differentiate, when it comes to the definition of goods, the way of reaching the buyer. Additionally, software in any case can be considered 'goods' under the CISG if it is saved in a tangible form (e.g. CDs, DVDs, chips, hard drives and diskettes)²⁹.

Some scholars find that the Convention refers to an online software³⁰. Such a step forward is presented by *J. Lookofsky*, who says that the Vienna Convention should be applied to the sales of computer software, not only to software which is on a disk but also „purely intangible software sold and delivered/downloaded via the Internet³¹.” Moreover *I. Schwenzer* claims that the mode (e.g. via the internet or a disc) in which software is delivered is irrelevant³². The mode of delivery should not matter since the aim of the sale of standard software in a tangible form and online software is the same. One commentator went further in equal treatment and compared the sales of standard and online software to the „beer sold in a bottle and beer sold from the tap” and holds that the medium in which goods are transferred is irrelevant, regardless

¹⁷ *D. Lubasz*, *Handel elektroniczny, Bariery prawne*, wyd. 1, Warszawa 2013, p. 23.

¹⁸ *J. Gołaczynski, D. Szostek*, *Międzynarodowy handel elektroniczny*, [in:] *W. Popiołek* (ed.), *Międzynarodowe prawo handlowe*, T. 9, Warszawa 2013, p. 373.

¹⁹ *J. Lookofsky*, In Dubio Pro Conventione? Some Thoughts About Opt-Outs, Computer Programs and Preemption Under the 1980 Vienna Sales Convention (CISG), *Duke Journal of Comparative & International Law*, Vol. 13, No. 3, Summer 2003, p. 273.

²⁰ *M. Pazdan* (ed.), *Konwencja wiedeńska o umowach międzynarodowej sprzedaży towarów, Komentarz*, Kraków 2001, p. 44.

²¹ *M. Kacprzyk*, *Zgodność towarów z umową, jako przesłanka należytego wykonania zobowiązania w świetle przepisów Konwencji Wiedeńskiej o umowach międzynarodowej sprzedaży towarów*, Warszawa 2018, p. 63.

²² *L. Mistelis*, Chapter I. Sphere of Application, [in:] *S. Kröll, L. Mistelis, P. Viscasillas*, *UN Convention on Contracts for the International Sale of Goods (CISG) A Commentary*, Second Edition, Munchen, Germany 2018, p. 32.

²³ Landgericht München (Germany) 29.5.1995, 21 O 23363/94, <http://cisgw3.law.pace.edu/cases/950529g1.html> (access 28.10.2019).

²⁴ Landgericht Heidelberg (Germany), 3.7.1992, O 42/92 KfH I, <http://cisgw3.law.pace.edu/cases/920703g1.html> (access 28.10.2019).

²⁵ *M. Pazdan* (ed.), *Konwencja wiedeńska...*, p. 44 and 46.

²⁶ *C. Pereira, A. Moniz de Aragao*, *Electronic Communications: Should CISG Advisory Council Opinion No.1 (2003) Be Updated?*, [in:] *I. Schwenzer, L. Spagnolo* (ed.), *The Electronic...*, p. 92.

²⁷ *J. Gołaczynski, D. Szostek*, *Międzynarodowy handel elektroniczny*, [in:] *W. Popiołek* (ed.), *Międzynarodowe...*, p. 376.

²⁸ *Ibidem*, p. 376–377.

²⁹ *C. Brunner, F. Meier, M. Stacher*, Article 2, [in:] *C. Brunner, B. Gottlieb*, *Commentary...*, p. 29.

³⁰ *H. Sono*, *The Applicability and Non-Applicability...*, p. 2, <https://www.cisg.law.pace.edu/cisg/biblio/sono6.html> p. 520 (access 27.9.2019).

³¹ *J. Lookofsky*, In Dubio Pro Conventione..., p. 277–278.

³² *I. Schwenzer, P. Hachem*, Chapter I: Sphere of Application, [in:] *I. Schwenzer*, *Commentary on...*, p. 35.

of falsehood of this analogy since beer is clearly tangible³³, it is an extraordinary example to imagine the issue.

The opinion of UNCITRAL and jurisprudence

Due to discrepancies in treating software as a thing, despite its material form, I asked Luca Castellani, a legal officer in the secretariat of the UNCITRAL, who works as a secretary of Working Group on Electronic Commerce, with the function of secretary of Working Group IV, whose role is promoting the uniform interpretation of UNCITRAL acquis concerning the sale of goods and e-commerce, about ongoing confusing issues regarding software³⁴. *L. Castellani* answered that „different views have been expressed with respect to the application of the CISG to software” and added that „the UNCITRAL Secretariat is not in a position to favor any particular interpretation”. He drew my attention to UNCITRAL Digest of Case Law on the CISG³⁵, which refers to the application of the CISG to software. In the Digest it says that „according to Koblenz Higher Regional Court in Germany, 17.10.1993, the concept of ‘goods’ is to be interpreted ‘extensively’, perhaps suggesting that the Convention might apply to goods that are not tangible³⁶”.

L. Castellani points out the case from the Netherlands: Rechtbank Midden, 25 March 2015³⁷, which concerned a downloaded software program. The court noted that Article 1(1) does not define ‘sale of goods’. Moreover, it was pointed out that under Article 7, the CISG should be understood in the light of its international character, the need to foster uniformity in application of the Convention and respect of good faith in international commerce, and the general principles of the CISG. Taking it into consideration, the court reasoned that based on the purpose of the Convention for removing legal barriers to trade by unification „a broad definition of goods must be assumed, one that includes intangible property. Thus, the Court found that the CISG applies to computer software even if it is not recorded on a physical medium such as DVD, CD or USB stick³⁸”.

CISG Conference – software issues

On 26 May 2015, the 7th MAA CISG Conference took place in Vienna. The theme was ‘The Electronic CISG – The Future of the CISG in the light of Technological Progress’³⁹. The Conference was an opportunity to reconsider the UN Convention on the Contract for the International Sale of Goods in accordance with advances in technology that have changed the modern world since drafting the CISG⁴⁰. In recent years, the internet has simplified international trade by reducing cross-border transactions costs. One of the Conference presenters *M. Zachariasiewicz* focused on the issue of

sale software under the CISG. He stressed that there are different points of view presented by the commentators. Moreover, he answered whether the CISG application depends on a tangible medium and a type of software. Hardware with software taken together are treated as ‘goods’. On the other hand it is not obvious whether the Convention applies to the software delivered online, since there is no material element which can be qualified as ‘goods’⁴¹. Regardless, some argue that „there is no reason to limit the CISG’s sphere of application to a tangible thing”⁴² since the essence is the same, the computer program, even if not in a tangible form⁴³.

Types of software

As pointed out by Schlechtriem/Schwenzer regardless of the type of software which is: typical software, software adapted to the customer’s needs or software fully customized, art. 3(1) draws attention to describe those different types and does not differentiate in determining the application of the CISG⁴⁴. Similarly, Brunner and Gottlieb claim that the CISG applies to sales of standard software as well as to sales of customized software. They justify the view by the fact that pursuant to Article 3(1) in principle, contracts for the supply of goods, yet to be made (contracts for materials and labor), applies to the CISG and does not matter between standard goods and goods produced individually for the buy-

³³ *H. Sono*, The Applicability and Non-Applicability..., p. 521, <https://www.cisg.law.pace.edu/cisg/biblio/sono6.html> (access 27.9.2019).

³⁴ See: <https://www.unece.org/tradewelcome/outreach-and-support-for-trade-facilitation/global-trade-facilitation-conference/speakers-bios/mr-luca-castellani.html> (access 15.10.2019).

³⁵ UNCITRAL Digest of Case Law..., https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/cisg_digest_2016.pdf (access 17.10.2019).

³⁶ UNCITRAL Digest of Case Law..., p. 27, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/cisg_digest_2016.pdf (access 17.10.2019).

³⁷ Rechtbank Midden (The Netherlands), 25.4.2015, No. C/16/364668 / HA ZA 14-217, CLOUT Case 1586, A/CN.9/SER.C/ABSTRACTS/170, p. 11–12, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V16/039/20/PDF/V1603920.pdf?OpenElement> (access 18.10.2019).

³⁸ Rechtbank Midden (The Netherlands), 25.4.2015, No. C/16/364668 / HA ZA 14-217, CLOUT Case 1586, A/CN.9/SER.C/ABSTRACTS/170, p. 12, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V16/039/20/PDF/V1603920.pdf?OpenElement> (access 18.10.2019).

³⁹ Current trends in the field of international sale of goods law, UNICITRAL, A/CN.9/849, Vienna 29.6–10.7.2015, <https://undocs.org/pdf?symbol=en/A/CN.9/849> (access 17.10.2019).

⁴⁰ *I. Schwenzer, L. Spagnolo* (eds.), The Electronic..., p. vii.

⁴¹ *M. Zachariasiewicz*, Inclusion of Standard Terms in Electronic Form under the CISG, [in:] *I. Schwenzer, L. Spagnolo* (ed.), The Electronic..., p. 98.

⁴² *F. Diedrich*, The CISG and Computer Software Revisited, *Vindobona Journal of International Commercial Law and Arbitration*, Supplement, vol. 6, 2002, p. 63.

⁴³ *M. Zachariasiewicz*, Inclusion of Standard Terms in Electronic Form under the CISG, [in:] *I. Schwenzer, L. Spagnolo* (ed.), The Electronic..., p. 98.

⁴⁴ *I. Schwenzer, P. Hachem*, Chapter I: Sphere of Application, [in:] *I. Schwenzer*, *Commentary on...*, p. 34.

er. It should also be pointed out that the exclusion rule in Article 3(2), which states that the Convention does not apply if service or labor obligations are preponderant, only relate to service whose purpose is not the manufacturing of goods under Article 3(1). On the other hand, based on Article 3(2), excluded contracts are those in which the software is transferred for use for a certain time (license for use for a specific period instead of giving a temporally unlimited right) or in which obligations to update or upkeep the software are preponderant⁴⁵. Furthermore, J. Lookofsky emphasizes that less popular transactions of developing and selling of specialized programs also fall within the CISG concept of 'goods'⁴⁶.

Even if there is a kind of support for applying the CISG for customized software, some courts consider 'goods' only as standard software while other courts recognize any kind of software, also tailor-made software⁴⁷. On 17 September 1993, the case of a French seller and a German buyer, who entered into a contract which allowed the buyer exclusive rights to sell computer printers and a chip, was brought before the Koblenz Higher Regional Court in Germany. The court held that the sale of the computer chip falls within the CISG's ambit, since it includes tangibles and intangibles, which also includes computer software⁴⁸. Furthermore, the Austrian Oberster Gerichtshof court on 21 June 2005, in the case of the sale of software, while CD-ROM did not contain all the modules required to use the software, applied the CISG⁴⁹. In both cases courts applied the Convention also for a tailor-made software.

By contrast, the court judgements that consider only standard software as 'goods' is one from Köln Higher Regional Court in Germany, passed on 26 August 1994, held that market analysis is not a 'good' under the CISG. In this case the Swiss Institute for Market Research, the plaintiff, developed and provided the market analysis, which the defendant, a German company, ordered. According to the court the CISG does not apply because the contract was not a contract under Art. 1(1) for the sale of goods or for producing goods under Art. 3(1). Nevertheless, the report is written on a piece of paper and the court concluded that the main purpose of the parties was the delivery of the right to make use of the ideas written in the document⁵⁰. Such a contract was therefore recognized by the court as a service contract. Accordingly, the court held that it does not fall within the CISG's understanding of 'goods'⁵¹. However, the refusal by the court of qualification 'market analysis' as a CISG sale of goods is not a reason to consider only standard software as a 'good' since in fact a computer program and market analysis are different things⁵².

According to the opinion of the Landgericht District Court in Munich, Germany, from 8 February 1995, about the computer program from the French seller, which was delivered and installed since the sale is about standard software,

the CISG applies⁵³. The court also found that only standard software is a 'good' under the Convention.

Interestingly, in the Schlechtriem/Schwenzer German edition of the Commentary B., Ferrari stressed that individual software can be excluded from the application of the CISG under Art.3(2) when labor or other services are the 'preponderant part' of the seller's obligation. However, if we consider standard software, Art.3(2) is generally not applicable and the CISG applies⁵⁴. Authors point out that this opinion was represented by the jurisprudence⁵⁵.

Conclusion

In conclusion, the Convention is without a doubt the most important regulation of international commercial law, playing a role internationally for over 30 years and covering over 80% of international sales of goods, being applied in 92 countries. Representatives of different systems and legal traditions such as common and continental law, no matter the economy, highly developed countries and countries of which GDP is lower, took part in its legislation⁵⁶. On the other hand, while considering the CISG as an advanced tool for a modern international trade, its legislation work before the huge development of information society and e-commerce should be emphasized. Consequently, there are differences in treating tangible software and intangible electronic goods by the scholars in jurisprudence since it is not clearly defined in the CISG. The development of internet in cross-border trade raises questions about the propriety of the Convention

⁴⁵ C. Brunner, F. Meier, M. Stacher, Article 2, [in:] C. Brunner, B. Gottlieb, Commentary..., p. 30.

⁴⁶ J. Lookofsky, Understanding the CISG..., p. 17.

⁴⁷ L. Mistelis, Chapter I. Sphere of Application, [in:] S. Kröll, L. Mistelis, P. Viscasillas, UN Convention..., p. 32.

⁴⁸ Oberlandesgericht Koblenz (Germany) 17 September 2019, 2 U 1230/91, CLOUT Case 281, A/CN.9/SER.C/ABSTRACTS/26, p. 12, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V99/903/75/PDF/V990375.pdf?OpenElement> (access 9.10.2019).

⁴⁹ Oberster Gerichtshof (Austria) 21 June 2005, 5 Ob 45/05m, CLOUT Case 749, A/CN.9/SER.C/ABSTRACTS/71, p. 4, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V07/890/92/PDF/V0789092.pdf?OpenElement> (access 9.10.2019).

⁵⁰ Oberlandesgericht Köln (Germany), 26.8.1994, 19 U 282/93, CLOUT Case 122, A/CN.9/SER.C/ABSTRACTS/9, p. 3, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V96/842/23/IMG/V9684223.pdf?OpenElement> (access 12.10.2019).

⁵¹ J. Lookofsky, Understanding the CISG..., p. 21.

⁵² J. Lookofsky, In Dubio Pro Conventione..., p. 274.

⁵³ Landgericht München (Germany), 8.2.1995, 8 HKO 24667/93, CLOUT Case 131, A/CN.9/SER.C/ABSTRACTS/10, p. 3, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V96/853/30/IMG/V9685330.pdf?OpenElement> (access 12.10.2019).

⁵⁴ F. Ferrari, Kapitel I. Anwendungsbereich, [in:] I. Schwenzer (ed.), Kommentar zum Einheitlichen UN- Kaufrecht, CISG, 6.Auflage, München, Germany 2013, p. 50.

⁵⁵ Landgericht München (Germany), 8.2.1995, 8 HKO 24667/93, Oberlandesgericht Köln (Germany), 26.8.1994, 19 U 282/93.

⁵⁶ J. Golaczyński (ed.), Sporządzenie umów..., p. 318.

to e-commerce. According to what was presented, the CISG applies to the online sale of computer software provided in a tangible form. In my opinion the term 'goods' should be interpreted widely and also be applied to the sale of computer software without material form since the contemporary legal situation did not take into account the reality of online sales and progressive globalization. Accordingly, the latest views of the scholars⁵⁷, which take a step forward, do not differentiate the 'goods' downloaded via the internet and consequently value them as 'goods' in the light of the CISG. Moreover, in my opinion the Convention should be applied to the sale of software, including customized software, as long as it is not treated as a service. The software can then be transferred in

a different way, via hard disc, CD, DVD, chip and online via the internet⁵⁸. I believe that in the coming years the issue of applying the Convention to the electronic goods such as software will clarify and there will be no doubt in applying the CISG to it.

⁵⁷ C. Brunner, F. Meier, M. Stacher, Article 2, [in:] C. Brunner, B. Gottlieb, Commentary..., p. 29.

⁵⁸ A. Apolidorio, CISG and its applicability to Software Sales, Davis 2012, p. 41, <http://www.cisg-brasil.net/downloads/doutrina/Alan%20Apolidorio.pdf> (access 10.10.2019).

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