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This paper is dedicated to the memory of my Father, Professor Slobodan Perović and his scientific work in the domain of the obligations law and the natural law

CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

A COMPARATIVE REVIEW OF THE SOLUTIONS OF THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS AND THE SERBIAN LAW OF OBLIGATIONS

The Vienna Convention (CISG) began its life forty years ago. Created to address a need for a uniform law of international sale, this Convention stands today as a beacon for the process of unification of contract law, a role model of numerous national laws and international documents and a pillar of development of common legal culture. The international significance of the CISG and its long presence in Serbia's positive law provided a basis and inspiration for a general scientific overview of the solutions offered by this international document, and their comparison with the relevant rules of the Serbian Law of Obligations. Guided by this idea,

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the author chose to devote this paper to an analysis of those rules of the CISG that seem most important in terms of comparison with the corresponding rules adopted in the Law of Obligations. Specifically, these are the solutions relating to the sphere of application of the Convention, interpretation of the Convention, as well as provisions of the Convention relevant to the remedies for breach of contract. The paper analyses these solutions in the light of numerous different standpoints in legal doctrine and a veritable plethora of relevant court decisions and arbitral awards. In each case, the analysis of the rules of the Convention is accompanied by a comparative review of the relevant solutions of the Law of Obligations.

Key words: *CISG, Law of Obligations, contract, unification, international sale*

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INTRODUCTORY REMARKS

POWER AND POWERLESSNESS OF UNIFICATION

We are all of us a work of nature. We are also a part of nature. We are made equal in our entries and our exits alike.[1] Is there any justification, then, that we should submit to different national laws?

The natural law gives a negative response to this question. Since human beings are born equal in dignity of life, the natural law is universal, autonomous and applicable to the whole of humankind.[2] Diversity of race, colour, gender, language, faith, political or other affiliation, ethnicity, social origin, property and other similar factors, can only be dealt with by the positive law, while the natural law builds from the unity in such diversity.[3] The natural law, in itself, knows no territorial boundaries[4] and "it is the same whether in Rome or in Athens, it will be the same today and tomorrow, constant and eternal, one and only, for all peoples and for all time".[5] Drawing from this, Professor Slobodan Perović regards the natural law, codified in the documents of the UN and other relevant international organisations, as a basis for foundation of the universal or worldwide law.[6] In this regard, Professor Perović would say: "Nature is the measure of all things, the natural law is the measure of all laws. The natural law is the common language of humankind. And therefore, may only that law be blessed which makes us brothers with all the peoples of the world".[7]

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[1] Slobodan Perović, *Prirodno pravo i sud,* Belgrade, 1996, 7.

[2] Extensive scientific studies and reports made by Professor Slobodan Perović about the natural law are contained in *Besede sa Kopaonika,* Belgrade, 2018.

[3] Slobodan Perović, "Prostorne dimenzije pozitivnog i prirodnog prava", *Besede sa Kopaonika,* op. cit., 824.

[4] In detail, S. Perović, "Prostorne dimenzije pozitivnog i prirodnog prava" op. cit., 811–850.

[5] "*Non erit alia lex Romae, alia Athenis, alia nunc, alia posthac, sed et apud omnes gentes, et omni tempore, una eademque lex obtinebit*" (Cicero), quoted from *International Encyclopedia of Comparative Law,* Volume XII, Law of Transport, (ch. ed. Rolf Herber), Chapter 4, Maritime Transportation, Mohr Siebeck, Tübingen, Martinus Nijhoff Publishers, Dordrecht, Boston, Lancaster, 2001, 8.

[6] Slobodan Perović, "Prirodno pravo kao mera svetskog poretka", *Besede sa Kopaonika,* op. cit., 333.

[7] S. Perović, "Prirodno pravo kao mera svetskog poretka", op. cit., 327.

When it comes to the positive law, in addressing this question, we need to consider first the concept of the unification of the law. In a very broad sense, the unification of the law is a process which allows for a creation of unique and unified legal rules.[8] It lends itself to different classifications, depending on the criteria: 1. in terms of the type of legal norms it deals with, we differentiate between the unification of the substantive law, addressing substantive rules, the unification of the procedural law, addressing procedural rules, and the unification of the rules of the choice of law in private international law; 2. in terms of the number of states it applies to, we distinguish between internal unification, relating to the unification of legal norms within one state, regional unification, relating to a region or a group of states, and international (universal) unification, embracing a large number of states worldwide; 3. in terms of its implementation – there is unification through practice of international trade – spontaneous unification and unification through organised action of states and international organisations – official, organised unification.[9]

The concept of the unification of the positive law, thus formulated, poses two fundamental questions: is the unification of law possible, and is it desirable? These questions will be addressed solely from the aspect of the international (universal) unification of law.

Whether or not unification is possible depends largely on the field of legal relations it deals with. Although, theoretically, all legal norms may be subject to unification, as a rule, it will occur only where there is no great or insurmountable diversity between national legal systems.[10] In that regard, the international stage has long displayed tendency towards unification of the substantive law in the area of civil law and commercial law, especially in the sphere of contractual relations. These tendencies have led to the adoption of a number of international documents by different

[8] Unification of the law is "setting uniform rules of substantive or procedural laws valid in the territory of one or more countries", *Pravna enciklopedija,* 2, Savremena Administracija, Belgrade, 1989, 1763.

[9] More about unification and different classifications in that respect, René David, "The Methods of Unification", *American Journal of Comparative Law,* Volume 16, No. 1–2, 1968, 13–27; René David, *L'arbitrage dans le commerce international*, Economica, Paris, 1982, 191–192; Mario Matteucci, "L'évolution en matière d'unification du droit", *Revue internationale de droit comparé,* No. 13–2, 1961, 285–291; Ronald Harry Graveson, "The International Unification of Law", *American Journal of Comparative Law,* Volume 16, No. 1–2, 1968, 4–12; Mladen Draškić, *Međunarodno privredno ugovorno pravo*, Belgrade, 1990, 13–28; Maja Stanivuković, "Instrumenti unifikacijie i harmonizacije prava i njihov odnos prema kolizionim normama s posebnim osvrtom na Načela evropskog ugovornog prava", Načela evropskog ugovornog prava i jugoslovensko pravo, Prilog harmonizaciji domaćeg zakonodavstva, Kragujevac, 2001, 29–57; Mladen Draškić, Maja Stanivuković, *Ugovorno pravo međunarodne* trgovine, Belgrade, 2005, 17–45; Radovan Vukadinović, *Međunarodno poslovno pravo Posebni deo,* Kragujevac, 2009, 7–25.

[10] See M. Matteucci, op. cit., 286–288.

international organisations (organised unification),[11] as well as to a process of spontaneous unification, ongoing under the auspices of international non-governmental organisations and professional associations.[12] [13] On the other hand, in the field of public law, the scope of unification has been limited. Beyond its reach are typically those areas which are of key interest to states in terms of public law, pertinent to the issue of socio-economic and political system, so states are unwilling to embrace the changes which the process of unification in that domain may bring.[14] It may therefore be concluded that universal unification may be achieved in the areas of law where no sharp differences between national legal systems are discernible, and to the extent the states may be interested in unifying rules in such areas.[15]

In addressing the issue of desirability of unification, it seems necessary to consider in the first place the purpose which unification seeks to achieve. Any successfully implemented international unifying instrument should attain two fundamental goals: expand horizons of domestic law with international uniform regulations and, at the same time, contribute, through quality of its solutions and their adequate implementation, to raising the level of legal certainty in the field it addresses.

With regard to the first goal, it seems indisputable that the need to overcome the differences peculiar to national legal systems, particularly in the sphere of civil and commercial law, is today an inevitability.[16] This inevitability, as pointed out, has found its concrete expression in a multitude of international documents whose common

[11] Mainly by means of international conventions.

[12] Mainly by means of uniform rules.

[13] International organizations that are particularly active in terms of the unification and harmonization of the contract law include most importantly: the UN Commission on International Trade Law – UNCITRAL (*http://www.uncitral.org*) based in New York and Secretariat in Vienna, UN Economic Commission for Europe (*http://www.unece.org*) based in Geneva, International Institute for the Unification of Private Law – UNIDROIT (*http://www.unidroit.org*) based in Rome, International Chamber of Commerce – ICC (*http://www.iccwbo.org*) based in Paris, and other international governmental and non-governmental organisations and professional associations, contributing directly or indirectly towards unification and harmonization of the rules of contract law at an international level, within the sphere of their activities.

[14] R. Vukadinović, op. cit., 12.

[15] At least speaking of the current stage of development of legal civilisation.

[16] This goal vas voiced by Professor Slobodan Perović in the opening words of his Preface to the Law of Obligations, written after the Law was adopted in 1978: "Our time, as time of highly developed civilization, makes an increasingly inevitable demand for overcoming, at least in some areas of law, the differences arising from the multitude of national laws, and for developing common rules of conduct, by means of international conventions, acting as common denominators" (Slobodan Perović, "Osnovna koncepcija Zakona o obligacionim odnosima", *Predgovor, Zakon o obligacionim odnosima*, Službeni glasnik, Belgrade, 2010, 9).

mission is the alignment of rules in the areas of law to which they pertain.[17] Developed under the auspices of the UN and other international organizations, these documents are widely accepted across the world and implemented with increasing success.[18] In this way, the facts of today have proved wrong those scholars of the past century, who under the veil of "legal nationalism", had long regarded international unification of the law with scepticism and pessimism. In their view, such unification was as an illusion, it did not exist nor would ever be achieved; only national laws existed, extant within the borders of state territories and it would never change.[19] Perceived from the standpoint of the present day, in circumstances when international relations are increasingly gaining in importance and in number, such attitudes lack objective grounds. Therefore, René David was fully justified in claiming that international unification of the law is not the illusion; on the contrary, the illusion is refusal to contemplate unification.[20]

However, the power wielded through unification of the law certainly must not be of such nature and degree as to jeopardize the exercise of legal certainty in the fields it bears upon. With regard to international conventions, as key instruments of international unification, the process of their adoption and the manner of their application and interpretation are here of major importance.

There are numerous aggravating factors in the process of adopting international conventions. These include, above all: affiliation of state representatives to different legal systems[21] exhibiting significant and often sharp differences;[22] different political,

[17] See Slobodan Perović, "Prirodno pravo i miroljubive integracije", *Besede sa Kopaonika,* op. cit., 693: "From history and prehistory, law has had an irresistible urge to expand, to multiply its capillaries, to conquer any spatial-temporal dimension, to "peer" beyond a river or a mountain, beyond a natural or state border. To reach out to some universe, some legal skies, spreading above us common differences, the synthesis of which produces those legal arches that we call conventions, declarations or unifications, or more precisely, the bridges connecting divided peoples, even entire civilizations".

[18] In more details on the need for unification and harmonisation in the international sales law, Jelena Perović, *Bitna povreda ugovora Međunarodna prodaja robe*, Belgrade, 2004, 15–19.

[19] See R. David, "The Methods of Unification", op. cit., 14.

[20] *Ibidem*.

[21] For a representative scientific study on large legal systems worldwide see René David-a, *Les grands systèmes de droit contemporains,* Dalloz, Paris, 1964. See also the 12th edition of the book, René David, Camille Jauffret-Spinosi, Marie Goré, *Les grands systèmes de droit contemporains,* Dalloz, Paris, 2016 (in entirety). English edition, René David, John E. C. Brierley, *Major Legal Systems in the World Today*, *An Introduction to Comparative Study of Law*, Stevens & Sons, London, 1985.

[22] Large legal systems differ from one another in both material and formal sources. The most conspicuous differences are between major legal systems themselves. However, there are also differences between states that, according to their general characteristics, belong to the same family of law. See S. Perović, "Prostorne dimenzije pozitivnog i prirodnog prava", op. cit., 840–843.

economic and other interests of the states;[23] different positions adopted by states in negotiations for drafting international conventions;[24] language barrier; different customs and religions; different geographic areas etc.[25] In this context, some solutions developed in international conventions as a result of a compromise, are sometimes insufficiently clear, imprecise, and allow for different interpretations[26], or sometimes the above differences allow for making reservations to certain provisions of the convention.[27] Finally, the process of approving and ratifying an international convention following its adoption is complex and time-consuming, and certain conventions never enter into force, not having been ratified by the required number of states.

On the other hand, the adoption of international conventions alone is not sufficient for a successful unification of law. A ratified international convention must be applied whenever the requirements for its application are met, always in accordance with the principle of constitutionality and legality in force in the member state of the convention. Conversely, if the application of international conventions depends on the arbitrary assessment of national courts, if one ratified international convention is sometimes the law and sometimes the anti-law[28], if courts are unacquainted with either concrete solutions of the convention, or the very fact of its existence, this spells serious jeopardy for the principle of legal security. Furthermore, any efforts to unify the law may be fundamentally frustrated if domestic law criteria are applied in interpreting the rules of international conventions; international conventions must be interpreted autonomously, in the spirit of their international character, regardless of the fact that, upon entry into force in a given state, they become an integral part of its domestic law. By the same token, if the courts of member states apply the same uniform rules in different ways, this will defeat the

[23] Unification is sometimes an expression of the needs of certain states that are specific only to such states (S. Perović, "Prostorne dimenzije pozitivnog i prirodnog prava", op. cit., 845.

[24] In that respect, it is claimed that representatives of certain states, especially those wielding great power and influence, come to negotiations with deep-rooted belief in the superiority of their own law; they are in favour of unification "so long as the uniform text to be adopted resembles their national law" (M. Stanivuković, "Instrumenti unifikacije i harmonizacije prava i njihov odnos prema kolizionim normama s posebnim osvrtom na Načela evropskog ugovornog prava", op. cit., 73.

[25] In that respect, S. Perović, "Prostorne dimenzije pozitivnog i prirodnog prava", *ibidem*, 845; M. Matteucci, op. cit., 287; M. Stanivuković, "Instrumenti unifikacijie i harmonizacije prava i njihov odnos prema kolizionim normama s posebnim osvrtom na Načela evropskog ugovornog prava", op. cit., 73; *Pravna enciklopedija*, op. cit., 1763.

[26] Special attention will be given to these solutions in the context of the CISG further below.

[27] M. Stanivuković, "Instrumenti unifikacijie i harmonizacije prava i njihov odnos prema kolizionim normama s posebnim osvrtom na Načela evropskog ugovornog prava", op. cit., 74.

[28] See Slobodan Perović, "Osnovna koncepcija Zakona o obligacionim odnosima", op. cit., 10.

efforts towards unification; real and effective unification is directly contingent on whether or not it is possible to apply uniform rules in different states in a uniform way.[29] The absence of legal certainty in the areas governed by international conventions is hence largely caused by their non-application or incorrect application, which in the nature of things results in a loss of confidence in the quality of their solutions. If such is the case, the question of the place, role, and further existence of international conventions in a given legal system may justly be raised.

It may therefore be inferred that the process of international unification of law is attended by numerous difficulties, and that the results achieved in this domain are far from satisfactory. Much more needs to be done towards overcoming the provincialisms of national legal systems and paving the way for further development of a universal uniform law as a common denominator of the rules of conduct in the relations addressed and governed by the uniform law. An important step forward in that direction would be the eradication of prejudices still alive against the adoption and application of uniform rules of international character, as well as raising awareness of the need for a universal and common legal culture. Because what fundamentally sets national legal systems apart are not merely differences in individual legal rules, but first and foremost differences in general conception and the way of thinking about the law, as well as different methods and approaches applied in that regard.

A general conclusion may be drawn from this. International unification of the law, determined by legitimacy of origin and legality of application, attended by respect of the need for autonomous and uniform interpretation of international conventions as the most important instruments of unification, is the best guarantor of legal certainty in legal relations of international character. It is therefore up to the contemporary legal civilisation to persevere on the path of continuous development and improvement of the universal unified law that knows no national borders, and up to court practice to properly apply such law.

IMPORTANCE OF THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS IN THE SPHERE OF UNIFICATION OF CONTRACT LAW

General. – The United Nations Convention on Contracts for the International Sale of Goods adopted in 1980[30] (hereinafter: CISG or Convention) is one

[29] The need for autonomous and uniform interpretation of the CISG will be addressed in detail further below.

[30] In French: *Convention des Nations-Unies sur les contrats de vente internationale de marchandises* (CVIM).

of the most important conventions in the field of contract law and the principal instrument of unification of the law in this area.[31] This Convention, drawn up as a result of years of work of UNCITRAL[32] member states representatives coming from different legal systems, is often described in literature as a universal codifying act in the international sale of goods, a central pillar of a unified legal order and *lingua franca* of international trade.[33] The vision of a global unified law on international sales, promoted by Ernst Rabel and his followers in the early 20th century, came true with its adoption.[34]

The CISG genesis. – The CISG was preceded by the Hague Uniform Laws, which presented the first significant step towards the unification of the international sales law. The work on the unification of the law in this area began in 1929

[31] For an introduction to the Convention, see: *Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG)*, Fourth Edition (ed. by Ingeborg Schwenzer), Oxford University Press, 2016, (hereinafter: *Schlechtriem & Schwenzer Commentary,* 2016); *UN Convention on Contracts for the International Sale of Goods (CISG) A Commentary,* (eds. Stefan Kröll, Loukas Mistelis, Pilar Perales Viscasillas), Second Edition, C. H. Beck Hart Nomos, 2018 (hereinafter: *Commentary,* Kröll/Mistelis/Perales Viscasillas, 2018); *Commentary on the International Sales Law The 1980 Vienna Sales Convention* by Cesare Massimo Bianca, Michael Joachim Bonell, Giuffrè, Milan, 1987 (hereinafter: *Commentary,* C. M. Bianca, M. J. Bonell, 1987); Karl H. Neumayer, Catherine Ming, *Convention de Vienne sur les contrats de vente internationale de marchandises Commentaire* (ed. F. Dessemontet), CEDIDAC, Lausanne, 1993; John O. Honnold, *Uniform Law on International Sales,* Third edition, Kluwer Law International, 1999; Vincent Heuzé, *La vente internationale de marchandises Droit uniforme, Traité des contrats sous la direction de Jacques Ghestin*, L.G.D.J, Paris, 2000. In domestic literature, for example: Mladen Draškić, *Međunarodno privredno ugovorno pravo*, op. cit; Mladen Draškić, Maja Stanivuković, *Ugovorno pravo međunarodne trgovine*, op. cit; Aleksandar Goldštajn, *Konvencija UN o ugovorima o međunarodnoj prodaji robe u strukturi prava međunarodne trgovine*, Zagreb, 1980; Jelena Vilus, *Komentar Konvencije UN o međunarodnoj prodaji robe*, Zagreb, 1981; Vitomir Popović, Radovan Vukadinović, *Međunarodno poslovno pravo – posebni deo: Ugovori međunarodne trgovine,* Banjaluka – Kragujevac, 2010; Milena Đorđević, *Obim naknade štete zbog povrede ugovora o međunarodnoj prodaji robe*, PhD thesis defended at Faculty of Law, Belgrade University in 2012 (available at: *http://doiserbia.nb.rs/phd/fulltext/BG20120622DJORDJEVIC.pdf*), in particular 1–30; Jelena Perović, *Bitna povreda ugovora Međunarodna prodaja robe,* op. cit., in particular 28–110.

[32] United Nations Commission on International Trade Law.

[33] See Peter Schlechtriem, "Introduction" in *Commentary on the UN Convention on the International Sale of Goods*, Second Edition, (ed. Peter Schlechtriem), Clarendon Press, Oxford, 1998, 5 - 7 hereinafter: *Commentary*, Schlechtriem, 1998); Peter Schlechtriem, "25 Years of the CISG: An International Lingua Franca for Drafting Uniform Laws, Legal Principles, Domestic Legislation and Transnational Contracts", in *Drafting Contracts Under the CISG*, (eds. Harry Flechtner, Ronald Brand, Mark Walter), Oxford University Press, New York, 2008; Ingeborg Schwenzer, "Introduction", in *Schlechtriem & Schwenzer Commentary,* 2016, 9 ff.

[34] See Jelena Perović, *Bitna povreda ugovora Međunarodna prodaja robe,* Belgrade, 2004, 20 - 23 & 30.

at the International Institute for the Unification of Private Law (UNIDROIT), at the initiative of German Law Professor Ernst Rabel, in an effort to create a worldwide uniform law on the sale of goods. In the same year, UNIDROIT decided to examine the possibility of unifying the international sales law.[35] After many years of work towards achieving this idea,[36] Diplomatic Conference held in The Hague in 1964[37] adopted two conventions: the Convention relating to a Uniform Law on the International Sale of Goods (ULIS)[38] and the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (ULFIS).[39]

The uniform rules of the Hague Conventions were an important step towards overcoming differences in domestic laws in the field of international sale. On a wider scale, those instruments presented the most important contribution lawyers could make in the field of private law towards the creation of a "more harmonious and fraternal world".[40] Time showed the truth of Tunc's visionary statement

[35] The report prepared by Ernst Rabel served as a basis for this undertaking, and in 1930 a committee of experts was set up, composed of eminent lawyers in the field of comparative law. The committee was tasked with drawing up a draft uniform law. The first draft was considered by the League of Nations in 1934 and submitted to member states for their comments. After the comments from member states were considered, another draft was made, called Rome Draft, which was adopted by UNIDROIT in 1939. Further plans for this project were thwarted by the outbreak of World War II. At the initiative of the Government of the Netherlands, the draft was presented at a Diplomatic Conference in The Hague in 1951. The Conference convened around 20 states and appointed a Commission to further elaborate the text. The Conference decided in favour of the unification of international sales law and approved the basic principles of the draft with proposals for amendments. In the aftermath of the Diplomatic Conference, two commissions were established, one for the drafting of the Uniform Law on the Formation of Contracts for the International Sale of Goods, and the other for the drafting of the Uniform Law on the International Sale of Goods. These commissions prepared drafts in 1956 and revised drafts in 1963, which were submitted to the governments of the UNIDROIT member states for consideration at the international conference convened at the invitation of the Netherlands Government. See *Actes de la conférence convonquée par le Gouvernement Royal des Pays Bas sur un projet de convention relatif à une loi uniforme sur la vente d'objets mobiliers corporals, La Haye 1er-10 novembre, 1951,* UNIDROIT, Rome, 1952.

[36] See André Tunc, 'Les conventions de La Haye du 1er juillet 1964 portant loi uniforme sur la vente internationale d'objets mobiliers corporels. Une étude de cas sur l'unification du droit', *Revue internationale de droit comparé*, No. 16 – 3, 1964, 547 – 558.

[37] Conference was attended by 28 states (Yugoslav delegation included Professor Mihailo Konstantinović, Professor Aleksandar Goldštajn and Professor Jelena Vilus) and six international organisations.

[38] In Serbian: *Konvencija o jednoobraznom zakonu o međunarodnoj prodaji robe*.

[39] In Serbian: *Konvencija o jednoobraznom zakonu o zaključenju ugovora o međunarodnoj prodaji robe*

[40] André Tunc, "Commentary of the Hague Conventions of the 1st of July 1964 on International Sale of Goods and the Formation of the Contract of Sale" in Ministry of Justice of the Netherlands

that the Uniform Law adopted at The Hague in 1964 can render significant service in all parts of the world in circumstances of rapid development of international commerce, and that an even more radical unification of the law of international sale might seem desirable. Along these lines, Tunc concluded: "One could wish that all the nations of the world would agree to unify their law of sale without distinguishing between municipal sale and international".[41]

In terms of the anticipated unification of the international sales law, the Hague Conventions did not prove a success. Although available for signing as early as 1 July 1964, the Conventions did not enter into force until 1972 and were ratified by a small number of countries.[42] On the other hand, the Hague rules have been relevant for the court practice of some countries, in particular Germany, Italy and Benelux, and have served as a model to numerous national legislators[43] in reforming domestic sale of goods laws.[44] Finally, these documents were used as a basis for further development of the uniform international sales law. All these circumstances pointed to the need for drafting a new document to achieve unification. That was how the CISG came into being.

The work around adopting the CISG evolved within UNCITRAL.[45] At the very outset, UNCITRAL member states were invited to comment on the solutions of the Hague Uniform Laws. Based on appraisal of their comments, it was decided to establish a Working Group to prepare a review of these documents. The Working Group completed the review of ULIS in 1976 and that of ULFIS in 1978.[46] The same year, UNCITRAL examined both drafts, at its eleventh session, and merged them into a single draft convention, known as the New York Draft, provided to the UN

(ed.), Diplomatic Conference on the Unification of Law Governing the International Sale of Goods (the Hague, 2–25 April 1964) – Records and Documents of the Conference, Vol. I – Records, The Hague, 1966.

[41] *Ibidem.*

[42] Belgium, Gambia, Italy, Israel (which ratified only ULIS), Luxembourg, Netherlands, Federal Republic of Germany, United Kingdom and San Marino.

[43] Thus, the Draft Code of Obligations and Contracts, which served as a basis for the Law of Obligations, had many solutions modelled after the Hague Uniform Laws. See Mihailo Konstantinović, "Prethodne napomene" to the Draft Code of Obligations and Contracts in *Klasici jugoslovenskog prava, Mihailo Konstantinović, Obligacije i ugovori, Skica za Zakonik o obligacijama i ugovorima,* Belgrade, 1996, 34.

[44] In detail, P. Schlechtriem, "Introduction" in *Commentary*, Schlechtriem, 1998, 1.

[45] In detail on the genesis of the Convention, J. O. Honnold, op. cit., 5 12.

[46] In details, Edward Allan Farnsworth, "The Vienna Convention: History and Scope", *International Lawyer*, No. 18, 1984, 17–20.

member states for further comments. Those comments formed a basis for adopting the CISG in 1980.[47] The New York Draft was considered at the United Nations Conference on Contract for the International Sale of Goods held in Vienna in March and April 1980.[48] A total of 62 states took part in the Conference, out of which 42 states voted in favour of the final text of the Convention, drawn up during the Conference. Accordingly, after eleven months of work, the Convention was adopted on 11 April 1980. Article 99 of the CISG provided that it would enter into force 12 months from depositing the tenth instrument of ratification, acceptance, approval or accession. Upon fulfilment of that requirement, the CISG entered into force on 1 January 1988.[49]

Forty years later. – The CISG began its life forty years ago. Today, this Convention bears the mark of acquired experience, a beacon in the process of unification of contract law, a role model of numerous national laws and international documents in the international sales law and a pillar of development of common legal culture.

Of all the international conventions governing substantive contract law, the CISG includes the largest number of Contracting States. Since its entry into force in January 1988, the number of Contracting States has been steadily growing,[50], and today[51] there are as many as 94 states from all over the world.[52] The Convention has been ratified by the largest exporting countries (China, USA, Germany, Japan, Netherlands, South Korea, France, Italy, Belgium), and over 80% world trade is governed by the CISG.[53] In Europe, almost all countries have ratified this

[47] See *United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March–11 April 1980: Official Records: Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committees*, United Nations, New York,1981.

[48] The composition of the Working Groups within UNCITRAL had a great impact on its work and the results achieved. Specifically, Africa received 9 seats, Asia 7, Eastern Europe 5, Latin America 6 and the Western states 9. Furthermore, the representatives of the member states were required to have experience in the field of international trade. Continuity with regard to the Hague laws was ensured by member states sending delegates who had already worked on these laws and were therefore well acquainted with the matter. Yugoslav delegation included Professor Borislav Blagojević, Professor Jelena Vilus, Professor Aleksandar Goldštajn and Professor Mladen Draškić.

[49] Text of the Convention in different languages is available at UNCITRAL official webpage (*http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html*). Text of the Convention in Serbian is contained in the Law on Ratification of the Convention, *Official Gazette of the SFRY*, No. 10-1/84.

[50] Yugoslavia ratified the Convention on 27 March 1985. Following the changes in terms of state law in the SFRY, the Convention remains in force in Serbia.

[51] As at October 2020.

[52] See *https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status.*

[53] See I. Schwenzer, "Introduction" op. cit., *1.*

document (exceptions are the United Kingdom, Ireland and Malta),[54] so the CISG is on the way to becoming the universal law of international sales in Europe.[55] It should be noted that major trading countries with Serbia have accepted the CISG (all EU countries except the three above-mentioned, Russia and China, all CEFTA Member States), and that trade between Serbia and these countries takes place within the CISG.[56]

The CISG rules have exerted considerable influence on modern national codifications governing contracts for the sale of goods (*e.g.* in Germany, Netherlands, Scandinavian states, China, Japan, South Korea, Russia, Estonia, Quebec),[57] as well as other international and regional documents and projects concerning uniform contract law (UNIDROIT Principles of International Commercial Contracts,[58] Principles of European Contract Law,[59] Draft Common Frame of Reference of European Private Law,[60] etc).[61] The importance of the CISG was also acknowledged by the Commission for Drafting the Civil Code of the Republic of Serbia, which explicitly stated in its 2007 Report that the CISG provided a starting point for drafting the section of the Civil Code addressing Obligations.[62]

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[54] The last European country to accede to the Convention at the time of writing this paper was Portugal, which ratified the Convention on 23 September 2020 and the Convention is to enter into force in this country on 1 October 2021.

[55] J. Perović, *Bitna povreda ugovora Međunarodna prodaja robe,* op. cit., 31.

[56] More details, M. Đorđević, *Obim naknade štete zbog povrede ugovora o međunarodnoj prodaji robe*, op. cit., 7 ff.

[57] For a summary of comparative legislation in this regard, see I. Schwenzer, "Introduction", op. cit., 10.

[58] *See UNIDROIT Principles of International Commercial Contracts 2016*, UNIDROIT, Rome, 2016.

[59] See *Principles of European Contract Law, Parts I and II,* prepared by the Commission of European Contract Law, (edts. Ole Lando and Hugh Beale), Kluwer Law International The Hague/London/Boston, 2000.

[60] See *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR)*, Outline Edition, Sellier European Law Publishers, Munich, 2009.

[61] The CISG also had a great influence on uniform rules of commercial contracts – *Acte uniforme relative au droit commercial général* from 1997, drawn up by the Organisation for the Harmonisation of Corporate Law in Africa (OHADA). In detail, Petar Šarčević, "The CISG and Regional Unification", *The 1980 Uniform Sales Law, Old Issues Revisited in the Light of Recent Experiences,* Verona Conference 2003, (ed. Franco Ferrari), Giuffrè Editore, Sellier European Law Publishers, Milan, 2003, 13–15. See also *Acte uniforme révisé sur le droit commercial général* from 2010 (available at: *http://www.ohada.com/actes-uniformes/940/acte-uniforme-revise-portant-sur-le-droit-commercial-general.html*).

[62] *Rad na izradi Građanskog zakonika Republike Srbije, Izveštaj Komisije sa otvorenim pitanjima,* Government of Serbia, Commission for Drafting the Civil Code, Belgrade, 2007, 149.

Accordingly, the Preliminary Draft Civil Code of the Republic of Serbia[63] (hereinafter: Preliminary Draft or Preliminary Draft Civil Code of Serbia), in the section related to obligation relations, proposes a number of changes in line with the relevant solutions of the CISG.[64]

The CISG rules are applied to a large number of cases decided by courts and arbitral tribunals worldwide,[65] and at the international level there have been several attempts to make the case law of different countries available to those who apply the Convention and thus contribute to its uniform interpretation.[66]

Finally, the CISG itself, as well as its specific solutions and rules, are subject to continuous scrutiny of legal theory, which has dedicated numerous scientific studies, commentaries and analyses to the Convention.[67]

And here is the general conclusion: the forty years of the Convention testify to the manifold importance of this international document – from the solutions adopted, the number of Signatory States, court and arbitration practice as a kind

[63] Chair of the Commission for Drafting the Civil Code of the Republic of Serbia was Academician Professor Dr. Slobodan Perović. Professor Perović emphasized that the Kopaonik School was "birthplace of the Preliminary Draft Civil Code", and that the first important steps towards making a proposal for drafting the Code were taken at the Kopaonik School of Natural Law. It was the School, acting within its scientific competence, and especially upon the reasoned initiative of its Department for Codification of Civil Law, that made this proposal alive. On that occasion, Professor Perović said: "As founder and Chair of the Kopaonik School of Natural Law, I was given the scientific honour to forward to the Government an official proposal to establish a Commission for Adoption of the Civil Code of the Republic of Serbia, complete with underlying reasons and needs for adopting the Code. The proposal contained nominations for potential members of the Commission, competent to work on such a Commission". The proposal was fully accepted by the Serbian Government, which decided, in 2006, to set up a Commission for Drafting the Civil Code of the Republic of Serbia. The Preliminary Draft Civil Code of the Republic of Serbia was written, published and submitted for public discussion during the lifetime of Professor Slobodan Perović. This work, made before the passing of Professor Perović, remains noted and documented and available as such to the general public. The publication of the work allowed for drawing a clear line between the Preliminary Draft Civil Code drawn up during the lifetime of Professor Slobodan Perović and everything that would transpire after his demise.

[64] Some of the more important changes will be discussed further below.

[65] Information on court decisions and arbitral awards involving the application of the CISG is available at: *www.uncitral.org/clout*.

[66] This will be discussed further below while addressing the need for a uniform interpretation of the Convention.

[67] List of published papers dealing with the CISG is available at: *https://iicl.law.pace.edu/iicl/selected-archives-cisg*. The list is just a part of the veritable treasure trove of various theoretical studies dedicated to the Convention.

of "test" of the criteria laid down by the Convention, abundance of standpoints in legal theory, all the way to the triumph of universal law of international sales over the particularism of myriads of national legal systems.

Legal instruments of unification and harmonisation of the contract law rules (general). – Speaking of international conventions which seek to achieve unification of substantive law in the sphere of contractual and commercial law relations, ratified by Serbia, which, directly or indirectly deal with the international sale of goods, the following are worth mentioning in addition to the CISG: the Convention on the Limitation Period in the International Sale of Goods from 1974, the Convention providing a Uniform Law for Bills of Exchange and Promissory Notes from 1930, the Convention on the Contract for the International Carriage of Passengers and Luggage by Road (CVR) from 1973, the Convention on the Contract for the International Carriage of Goods by Road (CMR) from 1955, the Convention concerning International Carriage by Rail (COTIF) from 1980, which contains Uniform Rules concerning the Contract of International Carriage of Passengers by Rail (CIV) and Uniform Rules concerning the Contract of International Carriage of Goods by Rail (CIM), the Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw Convention) from 1929, the Convention on International Civil Aviation (Chicago Convention) from 1944, the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading from 1924.[68]

In addition to international conventions and uniform laws, unification and harmonization of contract law rules at an international level is achieved by means of various legal instruments – model laws, boilerplate contracts and general terms of contract, uniform rules,[69], legal guides, model contracts and model clauses[70] etc.[71]

[68] With regard to the international sale of goods, the Convention on Agency in the International Sale of Goods from 1983 is also worth noting, although it has not been ratified by Serbia.

[69] Particularly important in this regard are the Incoterms Rules of the International Chamber of Commerce. In details on the latest version of the Incoterms Rules, Burghard Piltz, "INCOTERMS 2020", *Review of the Kopaonik School of Law,* No. 1, Belgrade, 2020, 9–28.

[70] In the last two decades, the International Chamber of Commerce has come up with a series of model contracts and model clauses, such as: *The ICC Model International Sale Contract*, *The ICC Model Distributorship Contract*, *The ICC Model Selective Distribution Contract, The ICC Model Commercial Agency Contract*, *The ICC Model Occasional Intermediary Contract*, *The ICC Model Confidentiality Agreement*, *The ICC Model International Transfer of Technology Contract*, *The ICC Model International Franchising Contract*, *The ICC Force Majeure Clause 2003*, *The ICC Hardship Clause 2003*, etc (see *https://iccwbo.org/*).

[71] In detail on instruments of unification and harmonisation of contract law, Jelena Perović, *Međunarodno privredno pravo*, Belgrade, 2020, 357–374.

Lately, a new kind of uniform law has emerged through development of principles of international contracts at an international level. These principles stem from the need to unify the rules of contract law and their purpose is to overcome difficulties in concluding international contracts, arising from the differences existing in national legislations. They are drawn up as documents containing broadly applicable, uniform rules for contractual relations, separate from national legal systems, and combining solutions of different national laws, international conventions and customs of trade. Best known documents of this kind are the UNIDROIT Principles of International Commercial Contracts[72] and the Principles of European Contract Law,[73] which have already been referred to, and will be considered further below as part of a comparative analysis of the solutions adopted in these documents and those provided in the CISG and the Law of Obligations.

SCOPE AND PURPOSE OF THIS STUDY

The significance of the forty-year presence of the CISG, in terms of its broad international acceptance, impact on further development of uniform law, application in court and arbitration practice and continuous development of legal science, compels familiarity with the Convention for any national legislator, judge, arbitrator and legal theorist dealing with the international sales law and contract law in general, as well as any businessman involved in international trade.

[72] UNIDROIT Principles were adopted under the auspices of the International Institute for the Unification of Private Law (UNIDROIT) from Rome, in 1994, and the latest version was published in 2016. The Preamble of UNIDROIT Principles provides that the Principles set forth general rules for international commercial contracts. The Principles must be applied when the parties have agreed that their contract be governed by them. They may be applied when the parties have agreed that their contract be governed by "general principles of law", the "*lex mercatoria*" or the like and when the parties have not chosen any law to govern their contract. They may be used to interpret or supplement international uniform law instruments, as well as to interpret or supplement domestic law. Finally, the Principles may serve as a model for national and international legislators.

[73] The Principles of European Contract Law were created by the Commission on European Contract Law (CECL). The Principles apply as general rules of contract law in the European Union. These Principles must apply when the parties have agreed to incorporate them into their contract or to have their contract governed by them. On the other hand, the Principles may be applied when the parties have agreed that their contract is to be governed by "general principles of law", the "*lex mercatoria*" or the like or have not chosen any system or rules of law to govern their contract. The Principles may also be applied when the system or rules of the governing law do not provide a solution to the issue raised. The Principles of European Contract Law are incorporated, with minor changes, into the so-called draft Common Frame of Reference for European Private Law, prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law – Acquis Group.

In Serbian law, this obligation acquires another dimension: with the adoption of the CISG, two different legal regimes for the contract of sale have been introduced into the Serbian legal system – one applicable to international sales (the CISG) and the other relating to the sales of exclusively domestic character (the Law of Obligations). Furthermore, the CISG itself provides for the test of international character of sale. This parallelism of rules relevant to the contract of sale requires good knowledge, primarily by judges and arbitrators, of the provisions of the Convention relating to the terms of its application (the sphere of application of the CISG). Moreover, the Convention needs to be analysed by comparing its rules with the corresponding provisions of the Law of Obligations. Such comparative analysis is needed for several reasons.

Fundamental similarity between certain solutions of the CISG and the Law of Obligations is obvious at first sight; it derives from the fact that the Draft Code of Obligations and Contracts, used as a basis of the Law of Obligations, in many instances followed the Hague Uniform Laws which preceded the CISG and as such wielded a strong influence on its solutions. On the other hand, the two sources exhibit significant differences, from the rules of formation of the contract, through the rules on fulfilling contractual obligations, to the rules concerning legal remedies for breach of contract. These differences will be addressed separately further bellow. However, it is the very similarity that exists between the CISG and the Law of Obligations that is used in some cases as justification for non-application or erroneous application of the Convention by Serbian courts.

Specifically, an analysis of the available court decisions shows that the domestic courts do not apply the CISG in a large number of cases although the requirements for its application are met, and instead apply the Law of Obligations, while claiming that the outcome of the dispute in a given case would have been the same had the CISG been applied.[74] What is more, even when finding the CISG to

[74] See for example Decision of the Commercial Appellate Court 3PŽ 6530/19 of 16 January 2020, where the Court, deciding on the appeal against the judgment of the Commercial Court in Belgrade in a dispute between a claimant from Serbia and a defendant from Bosnia and Herzegovina, upheld the judgment of the first instance court, even though it found that it had incorrectly applied the Law of Obligations instead of the CISG. In that respect, the Court held: "In this small claims dispute, the first instance court applied to the established state of facts the provisions of the Law of Obligations of the Republic of Serbia, as the applicable law for the substantive legal relationship of the parties, namely a contract of sale, although what should have been applied in that regard was the United Nations Convention on Contracts for the International Sale of Goods… ratified by Bosnia and Herzegovina, but the above said does not affect the correctness of the first instance judgement, because, given the established state of facts, even if the said Convention had been applied, the meritorious outcome would still have been the same".

be applicable, the courts tend to interpret the Convention not autonomously, but rather in the light of domestic law criteria, or invoke, in the reasoning of the decision, both the rules of the Convention and the Law of Obligations.[75] The reason for this, as already argued, should be sought in the similarities between the solutions of the CISG and the Law of Obligations, as well as the fact that judges are generally better acquainted with domestic law than with the CISG uniform rules.[76] Such approach is incorrect, whatever the reasons. The Convention must be applied in each case where the requirements for its application have been met; the Law of Obligations may not be applied instead of the CISG, regardless of the degree of similarity or likeness that may exist between these sources and without delving into whether or not the outcome of the dispute would have been the same had the CISG been applied to the dispute. The same applies to the issue of interpretation of the CISG: the Convention is to be interpreted autonomously, always keeping in mind its international character, and not in the light of domestic law criteria, even when the solutions provided by the CISG and the Law of Obligations are the same in a case in hand. It is imperative, therefore, for the judges to have sound knowledge of the sphere of application of the Convention, the rules of its interpretation and its specific solutions, and to be aware of the differences from the relevant solutions offered by the Law of Obligations.

In the context of application of the CISG by local courts, it is necessary to bear in mind Article 505 of the Preliminary Draft of the Civil Code of Serbia, providing that: "International trade shall be governed by the United Nations Convention on Contracts for the International Sale of Goods of 1980, when the requirements, as laid down in the Convention, of its application are met". The author of this paper strongly supports the above provision of the Preliminary Draft, convinced that explicit reference to the application of the CISG will contribute substantially to remedying the flaws observed in the application of the CISG in court practice.

Another argument for a comparative analysis of the respective solutions of the CISG and the Law of Obligations concerns the conditions of application of the

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[75] See M. Đorđević, *Obim naknade štete zbog povrede ugovora o međunarodnoj prodaji robe*, op, cit., 12 –13. On positions held in that regard in the practice of the Foreign Trade Court of Arbitration at the Serbian Chamber of Commerce, see Vladimir Pavić, Milena Đorđević, "Primena Bečke konvencije u arbitražnoj praksi Spoljnotrgovinske arbitraže pri Privrednoj komori Srbije", *Pravo i privreda,* No. 5–8, Belgrade, 2008, (in full, and particularly 24–25).

[76] In that respect see also M. Đorđević, *Obim naknade štete zbog povrede ugovora o međunarodnoj prodaji robe*, op. cit., 13, stating: "Such approach by the courts (arbitral tribunals) to the Convention can be attributed, on the one hand, to the need of human nature to cling to what it is more familiar with, but also to the fact that the provisions of the CISG, at first glance, closely resemble the provisions of the Law of Obligations".

Law to the international sale of goods, given that in Serbian system, the Law of Obligations applies to the international sale of goods in two cases.

Firstly, when the contract is governed by the Serbian law and requirements for the application of the CISG are met, the Law applies, as a supplemental source, to those issues of the contract in hand not regulated by the Convention. This situation requires knowledge of the rules of the Convention under Article 1, Paragraph 1 (determining the scope of *ratione materiae* application of the CISG by limiting it to the contracts for sale of goods), Article 2 (providing for the sales not governed by the Convention), Article 3 (setting the criteria for distinguishing contracts of sale on the one hand and the contracts for services and mixed contracts on the other), Article 4 (defining fundamentally the sphere of application of the CISG by outlining the matters covered by the Convention and those outside the Convention) and Article 5 (providing for the matters to which the Convention does not apply).

Secondly, the Law of Obligations applies to a contract of international sale of goods when the parties have agreed to its application. Drawing on the principle of the party autonomy, fully reflected in Article 6 of the Convention, parties may opt out of the Convention and stipulate the Law of Obligations as the applicable law. In such cases, the motif for any exclusion of the Convention by the parties should not boil down to the "fear of the unknown". Quite the opposite, in deciding whether their contract should be governed by the CISG or the Law of Obligations, parties should be acquainted with the solutions offered by both sources, and especially the differences between such solutions. This particularly applies to the mattes concerning formation of the contract, interpretation of the contract, rights and obligations of the parties, contract termination and liability for damages. It is therefore that a comparative study of similarities and differences between the CISG and the Law of Obligations may effectively aid parties in making an informed decision as to the applicability of the CISG or the Law of Obligation in each case in hand.

The importance of a comparative study addressing the solutions of the CISG and the Law of Obligations may also be viewed in terms of future reforms of Serbian legislation in this domain. Against this background, special attention should be given to the role of the Preliminary Draft Civil Code, which proposes a number of changes in line with the relevant solutions of the CISG, and the Report of the Commission, which explicitly states that the CISG provides a starting point for drafting the section of the Civil Code relating to obligations. Whatever its fate may be, the Preliminary Draft will remain noteworthy for science, not only in retrospect, but also as a basis for comparison of its solutions with the future reforms of Serbian legislation.

Legal theory, as already noted, has shown continuous interest in the solutions of the Convention, and it has been subject of numerous scientific studies,

monographs and commentaries in legal literature. The CISG is also an effective tool for studying comparative contract law, primarily because of the solutions it has developed as a compromise between the civil law and common law legal traditions.[77] It seems, however, that Serbian legal theory has not given this matter sufficient attention, particularly as the CISG has been part of the positive law in these areas for more than thirty years. The total number of scientific papers written by domestic authors about the CISG is relatively small and the prevailing body of this work consists of PhD thesis and monographs, which place the focus on a single matter within the purview of the CISG. Remaining literature, as a rule, consists of summary reviews of the key solutions of the CISG in textbook forms. What seems to be lacking here is a general overview that may contribute to establishing a full picture of the relations between the CISG and the Law of Obligations by comparing their respective solutions.

The scope and purpose of this paper may be inferred from the foregoing.

Faced with the full range of rules of the Convention, each in its own providing a basis and a stimulus for a scientific study, the author of this paper has chosen to analyse those rules that seem most important in terms of comparison with the corresponding solutions of the Law of Obligations. Specifically, they are the solutions pertaining to the sphere of application of the CISG, interpretation of the CISG, as well as the provisions of the CISG dealing with the remedies for breach of contract. The paper analyses these solutions in the light of many different standpoints in legal doctrine and a plethora of relevant court decisions and arbitral awards. In each case, the analysis of the rules of the Convention is accompanied by a comparative review of the relevant solutions of the Law of Obligations. The comparative review of the rules of the CISG and the Law of Obligations addressed in this paper concludes in a synthesis offering a general assessment of the solutions, recognition of their fundamental advantages and disadvantages and identification of potential issues in their application.

The specific goals this paper aims to achieve stem from the above. In the broadest possible sense, this paper attempts to contribute to: 1) correct application of the CISG in the practice of domestic courts and arbitration tribunals and removing the flaws observed in that respect; 2) adequate choice of law applicable to the contract for international sale of goods by the parties faced with the question of whether their contract should be governed by the CISG or the Law of Obligations; 3) presenting Serbian legislator with a full picture of the importance

[77] In this regard, Edgardo Muñoz, "Teaching Comparative Contract Law through the CISG", *The Indonesian Journal of International & Comparative Law*, Volume IV, No. 4, 2017, 726–757 (available at: *http://works.bepress.com/edgardo_munoz/28/*).

of the CISG at the international plane, which may aid in determining the general direction of any reforms in Serbian legislation in the area of contract law; and 4) kindling interest of domestic legal science in the unification of contract law and study of this issue in terms of comparative law. Each of these aspects in its own right and all of them jointly serve the same universal and common goal, namely to increase the level of legal certainty in the sphere of international trade and contractual relations in general.

PLAN OF PRESENTATION

The goals set by this paper have determined the presentation plan here applied. The paper examines the rules of the CISG relative to the sphere of application of the Convention, interpretation of the Convention and the remedies for breach of contract. Within this framework, the paper analyses in the first place the sphere of application of the Convention, in terms of requirements for its *ratione materiae* application (contract for sale of goods), territorial application (international character of the contract), direct application (parties located in the Contracting States) and indirect application (when the rules of private international law lead to the application of the law of a Contracting State), possibility of excluding the application of the Convention through party autonomy, as well as in terms of the rules determining the fundamental scope of the Convention (I). Special attention is given to the interpretation and the gap-filling in the CISG. Within this context, the paper analyses the principles of interpretation of the Convention – general rule, autonomous and uniform interpretation, principle of good faith in international trade, as well as the rules of gap-filling – general rule, the concept of gap under the CISG, general principles on which the Convention is based, with special emphasis on the analysis of the good faith principle (II). In view of the practical and theoretical implications of remedies for breach of contract, examination of these issues holds a prominent place in the paper. Following a general overview of the remedies available for breach of contract under the CISG, the paper offers a detailed analysis of contract avoidance for non-performance under the Convention, in terms of grounds for avoidance (fundamental breach of contract) and preconditions for avoidance (declaration of avoidance of the contract). Amongst the multitude of issues arising in relation to damages for breach of contract, the author chose to examine the rules of the CISG addressing the extent of damages, which seem particularly important in the light of comparative law analysis. In this context, the paper analyses the principle of full compensation adopted by the CISG and its limitations by the foreseeability rule, while making special reference to the solutions

of UNIDROIT Principles and Principles of Principles of European Contract Law relevant to this matter (III). In each case, the analysis of the rules of the Convention is accompanied by a comparative review of the relevant solutions of the Law of Obligations. The comparative analysis of the rules of the CISG and the Law of Obligations concludes in a synthesis which provides a general assessment of the solutions, outline of their fundamental advantages and disadvantages and identification of potential issues in their application. A general conclusion of the author completes the paper.

Chapter I

SPHERE OF APPLICATION OF THE CISG

I. GENERAL RULES

The sphere of application of the Convention is defined in Articles 1–6 CISG.[78] Under these rules, the application of the Convention is subject to fulfilment of certain requirements related to the contract for the sale of goods (*ratione materiae* application), which needs to be of international character, *i.e.* concluded between parties having their places of business in the territories of different States (territorial application) when the States are Contracting States (direct application) or when the rules of private international law lead to the application of the law of a Contracting State (indirect application).[79] On the other hand, the Convention

[78] In details on the sphere of application of the CISG, Franco Ferrari, *The Sphere of Application of the Vienna Sales Convention,* Deventer: Kluwer Law and Taxation, 1995; Peter Schlechtriem, "Requirements of Application and Sphere of Applicability of the CISG", *Victoria University Wellington Law Review,* No. 4, 2005, 781–794; Jacob Ziegel, "The Scope of the Convention: Reaching Out to Article One and Beyond", *Journal of Law and Commerce,* 2005–06, 59–73. In Serbian literature, Jelena Perović, "Selected Critical Issues Regarding the Sphere of Application of the CISG", *Annals of the Faculty of Law in Belgrade, Belgrade Law Review, Journal of Legal and Social Sciences University of Belgrade*, Year LIX, No. 3, 2011, 181–196; Jelena Perović, "Načelo autonomije volje u primeni Bečke konvencije na ugovor o međunarodnoj prodaji robe", *Pravni život,* No. 11, Belgrade, 2015, 179–192; Jelena Perović, *Standardne klauzule u međunarodnim privrednim ugovorima,* Belgrade, 2012, 160–185.

[79] Article 1 Para 1 CISG. Paragraph 2 of the same Article provides that the fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract. Under Paragraph 3 of this Article, neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention. With regard to the above rules, the Contracting States of the Convention may declare a reservation under Articles 94 and 95 CISG. Commentary to Article 1 of the Convention, Ingeborg Schwenzer, Pascal Hachem, "Article 1" in *Schlechtriem & Schwenzer Commentary,* 2016, 27–46; Loukas Mistelis, "Article 1" in *Commentary,* Kröll/Mistelis/Perales Viscasillas, 2018, 21–38; Erik Jayme "Article 1" in C. M. Bianca, M. J. Bonell, 1987, 27 – 33; K. H. Neumayer, C. Ming, op. cit., 37–51; J. O. Honnold, op. cit., 29–45; V. Heuzé, op. cit., 96–101 and 103–105.

does not apply to certain types of sale,[80] while special rules apply to contracts for the supply of goods to be manufactured or produced and to mixed contracts.[81] The Convention governs only the formation of the contract of sale and the rights and obligations of the parties arising from such a contract and is neither concerned with the validity of the contract, its provisions or usage, nor with the effect which the contract may have on the property in the goods sold.[82] The Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person.[83] Parties may exclude the application of the Convention or derogate from or vary the effect of any of its provisions. [84]

[80] This mater is determined in Article 2 CISG. The contracts beyond the scope of the Convention may be grouped round three categories, based on the grounds for their exclusion: sales excluded in light of the purpose for which they are undertaken, sales excluded in light of the manner of their execution, sales excluded in light of their subject matter. With regard to the purpose of sale, sales of goods bought for "personal, family or household use", *i.e.* goods bought for non-professional use, are excluded from the sphere of application of the Convention (Article 2 Item a CISG). With regard to the manner of sale, application of the CISG is excluded for sales by auction or on execution or otherwise by authority of law (Article 2 Items b and c CISG). The criterion concerning the subject matter of sale excludes from the sphere of the Convention the sale of stocks, shares, investment securities, negotiable instruments or money, ships, vessels, hovercraft or aircraft and electricity (Article 2 Items d, e and f CISG). Commentary to Article 2 CISG: Ingeborg Schwenzer, Pascal Hachem, "Article 2" in *Schlechtriem & Schwenzer Commentary,* 2016, 2016, 47–59; Frank Spohnheimer, "Article 2" in *Commentary,* Kröll/Mistelis/Perales Viscasillas, 2018, 39–53; K. H. Neumayer, C. Ming, op. cit., 52–60; J. O. Honnold, op. cit., 46–56; V. Heuzé, op. cit., 78–82.

[81] Article 3 CISG. Commentary to Article 3 CISG, Ingeborg Schwenzer, Pascal Hachem, "Article 3" in *Schlechtriem & Schwenzer Commentary,* 2016, 60–72; Loukas Mistelis, Anjanette Raymond, "Article 3" in *Commentary,* Kröll/Mistelis/Perales Viscasillas, 2018, 54–62; Rolf Herber, "Article 3" in *Commentary*, Schlechtriem, 1998, 38–41; K. H. Neumayer, C. Ming, op. cit., 61–66; J. O. Honnold, op. cit., 56–62; V. Heuzé, op. cit., 76–77.

[82] Article 4 CISG. Commentary to Article 4 CISG, Ingeborg Schwenzer, Pascal Hachem, "Article 4" in *Schlechtriem & Schwenzer Commentary,* 2016, 73–100; Milena Đorđević, "Article 4" in *Commentary,* Kröll/Mistelis/Perales Viscasillas, 2018, 63–90; Warren Khoo, "Article 4" in *Commentary,* C. M. Bianca, M. J. Bonell, 1987, 44–48; K. H. Neumayer, C. Ming, op. cit., 67–79; J. O. Honnold, op. cit., 63–70; V. Heuzé, op. cit., 82–86.

[83] Article 5 CISG. Commentary to Article 5 CISG, Ingeborg Schwenzer, Pascal Hachem, "Article 5" in *Schlechtriem & Schwenzer Commentary,* 2016, 95–100; John Ribeiro, "Article 5" in *Commentary,* Kröll/Mistelis/Perales Viscasillas, 2018, 91–100; K. H. Neumayer, C. Ming, op. cit., 80–82; J. O. Honnold, op. cit., 71–73; V. Heuzé, op. cit., 86–87.

[84] Article 6 CISG. Commentary to Article 6 CISG, Ingeborg Schwenzer, Pascal Hachem, "Article 6" in *Schlechtriem & Schwenzer Commentary,* 2016, 101–118; Loukas Mistelis, "Article 6" in *Commentary,* Kröll/Mistelis/Perales Viscasillas, 2018, 101–111; Michael Joachim Bonell, "Article 6" in *Commentary,* C. M. Bianca, M. J. Bonell, 1987, 51–64; K. H. Neumayer, C. Ming, op. cit., 83–95; J. O. Honnold, op. cit., 77–87; V. Heuzé, op. cit., 91–94.

II. CONTRACT OF SALE

1. Defining Contract of Sale

The Convention does not provide for an explicit definition of the contract of sale. However, a definition of such contract may be established indirectly from the provisions of the CISG regulating the obligations of the seller (Article 30)[85] and those of the buyer (Article 53)[86]. Accordingly, the contract of sale may be defined as a contract in which the seller undertakes to deliver the goods, hand over relevant documents and transfer the property in the goods to the buyer, while the buyer undertakes to pay the price and take delivery of the goods,[87] as provided in the contract.[88] This is a "classic" definition of a contract of sale[89] which generally corresponds to appropriate definitions in national laws.[90] This is valid for the definition

[85] Article 30 CISG outlines the main obligations of the seller. It provides that "The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention". In detail, Corinne Widmer Lüchinger, "Article 30" in *Schlechtriem & Schwenzer Commentary,* 2016, 514–519; Burghard Piltz, "Article 30" in *Commentary,* Kröll/Mistelis/Perales Viscasillas, 2018, 393–408; K. H. Neumayer, C. Ming, op. cit., 236–238; V. Heuzé, op. cit., 213 ff.

[86] Article 53 CISG outlines the main obligations of the buyer. It lays down that "The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention". In detail, Florian Mohs, "Article 53" in *Schlechtriem & Schwenzer Commentary,* 2016, 821–839; Petra Butler, Arjun Harindranath, "Article 53" in *Commentary,* Kröll/Mistelis/Perales Viscasillas, 2018, 771–777; V. Heuzé, op. cit., 293 ff.

[87] CISG commentators like to point out that this is essentially "exchange of goods for money" (see *e.g.* P. Schlechtriem, "Requirements of Application and Sphere of Applicability of the CISG", op. cit., 787; I. Schwenzer, P. Hachem, "Article 1", op. cit., 30; L. Mistelis, "Article 1", op. cit., 28.

[88] See I. Schwenzer, P. Hachem, "Article 1", *ibidem.*

[89] See Claude Witz, *Les premières applications jurisprudentielles du droit uniforme de la vente internationale Convention des Nations – Unies du 11 avril n1980*, L.G.D.J, Paris, 1995, 32; K. H. Neumayer, C. Ming, op. cit., 38.

[90] It should be noted that legal systems which regulate commercial relations under a separate law distinguish between civil law and commercial sales. Serbian Law of Obligations adopts the principle of uniform regulation of obligations, whereby the rules of the Law apply equally to all contractual relations, unless otherwise expressly provided in respect of commercial contracts. The Law defines commercial contracts as contracts between companies and other legal persons engaging in an economic activity, as well as natural persons engaging in an economic activity as their registered profession, concluded in the course of performing such activity or in relation to such activity (Article 25 Para 2). Concerning the definition of the contract of sale itself, the Law does not distinguish between commercial and civil law sales. However, in terms of other provisions governing the contract of sale, the Law provides for special rules for commercial contracts in a number of cases.

of a contract of sale from the Law of Obligations, which provides that: "Under a contract of sale a seller shall undertake to transfer to a buyer the right of ownership of the goods sold and to deliver such goods to him for that purpose, while the buyer shall undertake to pay the price in money and to take over the goods".[91]

In the light of this definition, the Convention applies to different types of sale, such as sale by instalments,[92] sale as a sample or model,[93] sale involving carriage of goods,[94] sale involving the retention of title,[95] sale providing for direct delivery of goods to the customer of the buyer,[96] etc.[97]

It is irrelevant for the application of the CISG whether the character of the parties or of the contract is of civil or commercial nature (Article 1 Para 3).[98] However, the Convention typically applies to commercial contracts, as its rules are tailored to this kind of contractual relations. The above solution of the CISG derives from the fact that the rules governing civil law contracts on the one hand and commercial contracts on the other are not uniformly defined in comparative law;[99] while commercial relations are governed by special rules in some legal systems,

In detail, S. Perović, "Osnovna koncepcija Zakona o obligacionim odnosima", op. cit., 19–22; Marko Perović, "Key distinctions between commercial and civil law contracts in Serbian legislation", *Ekonomika preduzeća,* No. 3–4, Belgrade, 2019, 248–260.

[91] Article 454 Para 1 Law of Obligations. In details on contract of sale in Serbian law, Slobodan Perović, *Obligaciono pravo*, Belgrade, 1990, 525–593.

[92] See Article 73 CISG.

[93] See Article 35 Para 2 Item c CISG.

[94] See Article 31 Item 2 a and Article 67 CISG.

[95] The fact that in this type of sale the seller retains the title to the goods sold and delivered to the buyer until the buyer has paid the price, is without prejudice to the application of the CISG (see. I. Schwenzer, P. Hachem, "Article 1", *ibidem*).

[96] I. Schwenzer, P. Hachem, "Article 1", *ibidem*; L. Mistelis, "Article 1", *ibidem*. See decision of Bundesgerichtshof (*Vine wax case*) of 24 March 1999 (available at: *https://iicl.law.pace.edu/cisg/case/germany-bger-bundesgerichtshof-federal-supreme-court-german-case-citations-do-not-ident-33)* where the CISG was applied to the case of direct delivery of goods by the producer to the buyer under the contract agreed.

[97] The issue of application of the CISG has recently been raised in the context of digital contracts and sale of digital contents (see L. Mistelis, "Article 1", *ibidem*).

[98] This rule was taken over from Article 1 Para 3 and Article 7 of the Hague Uniform Law on the International Sale of Goods. The grounds for the CISG solution declaring the nationality of the parties irrelevant lie in avoiding difficulties that may arise in the case of parties with dual nationality, as well as in obviating the need to identify the "nationality" of a legal entity such as a corporation (see I. Schwenzer, P. Hachem, "Article 1", op. cit., 45; K. H. Neumayer, C. Ming, op. cit., 51).

[99] I. Schwenzer, P. Hachem, *ibidem*; K. H. Neumayer, C. Ming, *ibidem.*

other legal systems adopt the concept of uniform regulation of obligation relations, with all sales, whether of non-commercial or commercial nature, being governed by the same rules, unless otherwise expressly provided for in the law in respect of the commercial contracts.[100] On the other hand, consumer sale is expressly excluded from the scope of the CISG,[101] which limits the scope of the Convention *de facto* to sales for business or professional uses.[102]

[100] As already pointed out, Serbian Law of Obligations adopts the principle of uniform regulation of obligations. With respect to the contracts of sale, the Law of Obligations provides in several places for special rules pertaining to commercial sale (the Law employs the term "contract of commercial sale"). Thus, under the Law, if a contract of commercial sale does not stipulate the price, and there is not sufficient information therein based on which it could be stipulated, the buyer must pay the price otherwise regularly charged by the seller at the time of entering into contract, or a reasonable price if there is no regular charge (Art 462 Para 2). Conversely, in case of non-commercial sale, the price must be stipulated in the contract of sale or the contract must contain sufficient information based on which it could be determined. A contract of non-commercial sale which lacks these elements has no legal effects (Art 462 Para 1). Another distinguishing feature of the commercial sale is the matter of time limits allowed to the buyer to notify the seller of any material defects. The Law provides that the buyer is obliged to inspect the thing received or have it inspected in the customary manner, as soon as this is possible in the usual course of things. In commercial sale, the buyer is obliged, under the pain of losing his rights, to notify the seller of any patent defects without delay, while in non-commercial sale, the buyer may give such notice to the seller within eight days of discovering such defect (Article 481 Para 1). The identical difference in time limits is provided for notices given to the seller about latent defects (Art 482 Para 1), and the seller will not be responsible for defects appearing six months after delivery of the goods, unless a longer time limit has been stipulated (Article 482 Para 2). The Law provides for other special rules for commercial sale. Thus, if the seller of goods of a specific type delivers to the buyer a larger quantity than that agreed, and the buyer fails to declare his refusal of the surplus within a reasonable time limit, the buyer is deemed to have also accepted the surplus and must pay the same price for it. If the buyer refuses to accept the surplus, the seller must reimburse the buyer for the damage (Art 493). In case of a sale by sample or model under a commercial contract, if the goods delivered by the seller to the buyer do not conform to the sample or model, the seller will be liable under the regulations governing the seller's liability for material defects, and in other cases under the regulations governing liability for non-performance (Art 538). If the seller has concluded a contract of sale in the course of carrying out his regular economic activity, the place of delivery, under the Law, will be the seller's head office, unless otherwise agreed (Art 471). In details on specific features of rules governing commercial contracts in Serbian law, S. Perović, "Osnovna koncepcija Zakona o obligacionim odnosima", op. cit., 19–22; M. Perović, op. cit., 248–260.

[101] Article 2 Item a CISG providing that the Convention does not apply to sales of "goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use".

[102] In detail, *Commentary of the Draft Convention on Contracts for the International Sale of Goods, Prepared by the Secretariat (A/CONF, 97/5),* OR, 14–66, (hereinafter: *Secretariat Commentary*), Art. 2, 15–16 (available at: *http://www.cisg-online.ch/index.cfm?pageID=644).* Ingeborg Schwenzer, Pascal Hachem, "Article 2", op. cit., 48; K. H. Neumayer, C. Ming, op. cit., 52–56; J. O. Honnold, op. cit., 46–48.

2. Distinction Between Similar Contracts

The application of the CISG may be doubtful in case of certain contracts similar to the contract for the sale of goods. Therefore, the CISG establishes additional requirements for its application to some of these contracts.[103]

Under these requirements, contracts for the supply of goods to be manufactured or produced are to be considered sale contracts unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.[104] It is to be inferred that the CISG in principle applies to contracts for supply of goods to be manufactured or produced[105] since such contracts are normally treated as contracts of sale,[106] regardless of whether the contracted goods are generic or customized.[107] Only the cases where the party ordering the goods undertakes to supply a "substantial part" (in French *une part essentielle*) of the materials are excluded from the sphere of the CISG.[108]

The exclusion from the scope of the CISG on the bases of this rule is not doubtful where the entire material necessary for manufacture or production is supplied by the party ordering the goods.[109] On the other hand, when both parties contribute

[103] Article 3 CISG. In detail on this matter in Serbian literature, J. Perović, "Selected Critical Issues Regarding the Sphere of Application of the CISG", op. cit., 183–187; J. Perović, *Standardne klauzule u međunarodnim privrednim ugovorima*, op. cit., 162–165.

[104] Article 3 Para 1 CISG. Compare with Article 6 ULIS.

[105] K. H. Neumayer, C. Ming, op. cit., 61; V. Heuzé, op. cit., 76; Bernard Audit, *La vente internationale de marchandises Convention des Nations-Unies du 11 avril 1980,* L.G.D.J, Paris, 1990, 25.

[106] L. Mistelis, A. Raymond, "Article 3", op. cit., 55–56.

[107] *CISG Advisory Council Opinion No. 4, Contracts for the Sale of Goods to Be Manufactured or Produced and Mixed Contracts*, Item 4 (available at: *https://www.cisgac.com/cisgac-opinion-no4-p2/*); I. Schwenzer, P. Hachem, "Article 3", op. cit., 62. In that regard, see decision of HG Zürich (*Art books case*) of 10 February 1999 (available at: *https://iicl.law.pace.edu/cisg/case/switzerland-handelsgericht-commercial-court-aargau-22)*; Decision of OLG Frankfurt (*Shoes case)* of 17 September 1991 (available at: *https://iicl.law.pace.edu/cisg/case/germany-oberlandesgericht-hamburg-oberlandesgericht-olg-provincial-court-appeal-german-168).*

[108] On issues arising, in the context of this rule, from the differences in wording in versions made in different languages, see Rolf Herber, "Article 3" in *Commentary*, Schlechtriem, 1998, 39; I. Schwenzer, P. Hachem, "Article 3", op. cit., 63; J. O. Honnold, op. cit., 59;

[109] This position was held by Austrian court which found the CISG to be inapplicable to a contract under which a party from the former Yugoslavia manufactured goods with raw materials provided by the other party in Austria. Decision of *Oberster Gerichtshof* (*Brushes and brooms case*) of 27 October 1994 (available at: *https://iicl.law.pace.edu/cisg/case/austria-october-27-1994-oberster-gerichtshof-supreme-court-fa-n-gmbh-v-fa-n-gesmbh-co*). Commentary of the decision, P. Schlechtriem, "Requirements of Application and Sphere of Applicability of the CISG", op. cit., 786; V. Heuzé,

materials required, the issue of applicability of the Convention may become thorny. In such cases, it is difficult to draw a line between sales and services using the test of "substantial part" wording, which is variously interpreted in the doctrine,[110] while courts often apply domestic law criteria in determining the distinction between these contracts.[111] In this regard, the prevailing test in the commentaries of the Convention seem to be the economic value of the contracted goods[112] at the time of formation of contract,[113] such value being determined from comparison of the respective contributions of the parties and not from the value of the end product.[114] Still, this rule of the CISG, as insufficiently precise, remains the bone of contention in the application of the CISG and as such much criticised in the doctrine.[115]

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op. cit., 76. With reservations in that regard, Jovan Nikčević, "Razgraničenje ugovora o delu i ugovora o prodaji", *Review of Kopaonik School of Natural Law,* No. 1, Belgrade, 2019, 102.

[110] See *CISG Advisory Council Opinion No. 4*, op. cit., Item 1.3. On different criteria of interpretation in the context of this issue, I. Schwenzer, P. Hachem, "Article 3", op. cit., 63–64; L. Mistelis, A. Raymond, "Article 3", op. cit., 57–58. In Serbian, J. Nikčević, op. cit., 101–104.

[111] That approach was adopted, for example, by a French court deciding a dispute in case of a French company which undertook to produce and deliver connectors to an Italian company on the basis of the designs and standards supplied by the Italian company. In this case, the Court found that the disputed contract was not a sale contract within the meaning of Article 3 Para 1 CISG, since the goods were manufactured based on the designs and standards supplied by the other party, and this was the decisive criterion for interpreting the term *"part essentielle"*. Decision of *Cour d'appel de Chambéry* (*A.M.D. Electronique v. Rosenberger*) of 25 May 1993 (available at: *https://iicl.law.pace.edu/cisg/case/france-ca-aix-en-provence-ca-cour-dappel-appeal-court-soci%C3%A9t%C3%A9-amd-electronique-v*). This decision was severely criticised in French doctrine as an example of misapplication of the CISG, since the Court was guided, in determining the concept of "substantial part" by domestic law criteria, and thus placed the case beyond the scope of the CISG without proper grounds. C. Witz, op. cit., 34. In contrast, a German Court decided that the CISG is applicable to a contract for delivery of shoes manufactured for a German buyer in accordance with the instructions provided by the buyer to the manufacturer. The Court held that the fact that the manufacturer, as provided in the contract, followed the technical instructions of the buyer for the manufacture of goods ordered by the buyer, cannot justify exclusion of that contract from the sphere of application of the CISG. Decision of *OLG Frankfu*rt (*Shoes case*) of 17 September 1991 (available at: *https://iicl.law.pace.edu/cisg/case/germany-oberlandesgericht-hamburg-oberlandesgericht-olg-provincial-court-appeal-german-168*). Commentary of the decision, C. Witz, op. cit., 35.

[112] See *CISG Advisory Council Opinion No. 4*, op. cit., Items 2.3–2.10; V. Heuzé, op. cit., 76; K. H. Neumayer, C. Ming, op. cit., 62; J. O. Honnold, op. cit., 57; B. Audit, op. cit., 26.

[113] I. Schwenzer, P. Hachem, "Article 3", op. cit., 64–65.

[114] See R. Herber, "Article 3", op. cit., 39; V. Heuzé, *ibidem*; I. Schwenzer, P. Hachem, "Article 3", op. cit., 65.

[115] See P. Schlechtriem, "Requirements of Application and Sphere of Applicability of the CISG", op. cit., 786–787, where the author, in this regard, acknowledges that there are many issues in interpreting this provision; I. Schwenzer, P. Hachem, "Article 3", op. cit., 63, describe the test for determining "substantial part" as controversial.

The Law of Obligations also adopts the term "substantial part" of the material as a test for distinguishing the contract of service from the contract of sale, however in a way that somewhat differs from the corresponding solution of the CISG. The Law provides that: "*(1) A contract by which one party undertakes to manufacture a specific object from his own material shall be considered, if in doubt, as a contract of sale. (2) However, it shall remain a contract for services if the buyer has undertaken to provide a substantial part of the material needed for the manufacture of the object. (3) Such a contract shall in any case be considered as a contract for services if the parties particularly had in view the supplier's work.*"[116] A key departure from the solution of the CISG can be seen in Para 3 which, giving due consideration to the intentions of the parties in a specific contract, provides for the contract to be deemed a contract for services if the parties particularly had in view the supplier's work.[117] It is suggested in the commentaries to the Law that there are two key elements for drawing a distinction between a contract for services and a contract of sale: intention of the parties and ownership of the material. Thus, if a party undertakes to manufacture the ordered goods, entirely or for the most part from his own material, providing that the parties had such material in view, this is deemed to be a sale. Conversely, if the parties for the most part or solely had the supplier's work in view, even when the material is his own (for example, when a painter, as a supplier, paints a picture from his own material and delivers it to the purchaser for appropriate consideration), this is deemed to be a contract for services. Furthermore, if the purchaser undertakes to provide entire or substantial part of the materials required for the manufacture of goods, this is considered to be a contract for services.[118]

On the other hand, the CISG does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services.[119] Such contracts, according to the nature of prestation, fall within the group of mixed contracts.[120] Specifically, this rule of the CISG applies when a party assumes the obligation to deliver the goods alongside the

[116] Article 601 Law of Obligations. On drawing a distinction between a sales contract and a service contract in Serbian law, see S. Perović, *Obligaciono pravo*, op. cit., 712; Slobodan Perović, "Član 601" in *Komentar Zakona o obligacionim odnosima,* II Knjiga, (Editor in Chief Prof. Dr. Slobodan Perović), Savremena administracija, Belgrade, 1995, 1085–1086 (hereinafter: *Komentar Zakona o obligacionim odnosima*, Slobodan Perović, 1995).

[117] Such provision is not contained in the Hague law either (see Art 6).

[118] S. Perović, "Član 601" in *Komentar Zakona o obligacionim odnosima*, Slobodan Perović, II Knjiga, 1995, 1085–1086; S. Perović, *Obligaciono pravo*, op. cit., 712.

[119] Article 3 Para 2 CISG.

[120] On classification of contracts based on this criterion in general, S. Perović, *Obligaciono pravo*, op. cit., 213–216.

obligation to supply labour or provide other services, under the same contract.[121] On the other hand, if the parties choose to conclude two separate contracts – one for sale and another for supply of labour or other services, the Convention will apply to the contract of sale, and the applicable domestic law to the other contract.[122]

In determining whether the transaction in hand is to be regarded as a single contract or two separate agreements, and whether it falls within the scope of the CISG, the answer is sought not in domestic laws, but rather in the CISG, the decisive criterion being that of the intention of the parties, provided in Article 8 CISG related to contract interpretation.[123]

The same principle applies in Serbian domestic law in the context of mixed contracts. In the course of general analysis of mixed contracts and examination of the rules that apply to them, Professor Slobodan Perović takes the approach that the intention of the parties presents the main criterion, underlining that: "The issue essentially seem to boil down to identifying, in a mixed contract, the actual will of the parties concerning the importance and effect of its individual elements. Therefore, in interpreting a mixed contract, the court would have to begin with the basic rule of interpretation, namely to identify the joint intention of the parties, what they wanted to achieve with the contract in the first place, and consequently to apply the appropriate rules".[124]

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[121] The main problem in this regard lies in the interpretation of the term "preponderant part of the obligation", *i.e.* assessment whether the obligation to perform service carries more weight than the obligation to perform delivery. The prevalent view in the doctrine and court practice is that the test should be a comparison of the economic value of the goods with the economic value of the services based on the prices that would have been applicable had the parties concluded two separate contracts (*CISG Advisory Council Opinion No. 4*, op. cit., Items 3.3 and 3.4; I. Schwenzer, P. Hachem, "Article 3", op. cit., 69). However, it is often emphasized in literature that this is a starting point that ought to be interpreted in the light of the importance each individual obligation carried for the parties themselves (see L. Mistelis, A. Raymond, "Article 3", op. cit., 59; I. Schwenzer, P. Hachem, "Article 3", op. cit., 70–71). The economic value test in the context of this rule of the Convention has been applied in a large number of decisions made by courts and arbitral tribunals (examples of decision L. Mistelis, A. Raymond, "Article 3", *ibidem*; I. Schwenzer, P. Hachem, "Article 3", op. cit., 70). Thus, for example, in a case of contract for delivery and installation of materials for construction of the hotel submitted before the ICC International Court of Arbitration in Paris, the seller challenged the application of the CISG claiming that his obligation consisted in installation of the material. The arbitrator, however, held that it was a contract of sale and applied the CISG, having found that the price of installation of the material carried less weight than the price of the material itself *ICC Arbitration Case* (*Hotel materials case),* No. 7153 from 1992 (available at: *http://cisgw3.law.pace.edu/cases/927153i1.html*).

[122] See I. Schwenzer, P. Hachem, "Article 3", op. cit., 68; R. Herber, "Article 3", op. cit., 40; K. H. Neumayer, C. Ming, op. cit., 64; J. O. Honnold, op. cit., 59.

[123] More on this issue, I. Schwenzer, P. Hachem, "Article 3", 67.

[124] S. Perović, *Obligaciono pravo*, op. cit., 216.

3. Application of the CISG to International Barter Contracts

The application of the CISG to barter contracts is a controversial issue. According to some opinions, barter contract is excluded from the Convention, because the CISG requires sales contracts to be an exchange of goods against payment of price.[125] There are, however, more flexible interpretations, suggesting that the CISG may apply to barter contracts since the term "price" used in the CISG is not restricted to money, and both parties may be treated as sellers in regard to the goods they deliver, or buyers in regard to the goods they receive.[126] In Serbian domestic legal system, the Law of Obligations devotes two provisions to barter contracts,[127] while expressly referring to the relevant provisions of the contract of sale.[128] With regard to drawing a line between sale contracts and barter contracts, Professor Slobodan Perović points out: "Hence, if the pecuniary means are set aside, barter and sale largely achieve the same legal effects. Consequently, the rules of sale apply to a barter contract in the sense that each contracting party may be considered as a seller in terms of the goods he delivers, and as a buyer in terms of the goods he receives. This should not go to equate barter with a double sale transaction, where goods are delivered and prices mutually compensated. The nature and purpose of such contract, regardless of price compensation, distinguish it from barter where money is never involved as consideration for performed prestation by the other party"[129].[130]

[125] This approach was taken by the International Commercial Arbitration Court at the Russian Federation Chamber of Commerce and Industry, deciding in case of a barter contract concluded by a party from Russia and a party from Lichtenstein. It held that barter contracts involving no pecuniary obligations were excluded from the scope of the CISG. Decision of 9 March 2004, 91/2003, CISG-online 1184. The same position is held by Rolf Herber, "Article 1" in *Commentary*, Schlechtriem, 1998, 22. With reservations, allowing for flexible interpretation, L. Mistelis, "Article 1" op. cit., 29.

[126] This approach is advocated by I. Schwenzer, P. Hachem, "Article 1", op. cit., 31–32; V. Heuzé, op. cit., 76; J. O. Honnold, op. cit., 53. Undecided in that regard, K. H. Neumayer, C. Ming, op. cit., 38; J. Ziegel, op. cit., 60. See decision of ICAC in a dispute over barter contract concluded between a party from Russia and a party from Cyprus which held that the CISG was applicable to the contract. Decision of 17 June 2004, CISG-online 1240.

[127] Article 552 and Article 553 Law of Obligations. In detail on barter contracts under the Law of Obligations, S. Perović, *Obligaciono pravo*, op. cit., 594–601; Slobodan Perović, "Član 552" and "Član 553" in *Komentar Zakona o obligacionim odnosima*, Slobodan Perović, II Knjiga, 1995, 1005–1012.

[128] With respect to barter contracts, references to application of sales contracts provisions are widely accepted in comparative law. Comparative law overview of this issue, I. Schwenzer, P. Hachem, "Article 1", op. cit., 31.

[129] S. Perović, *Obligaciono pravo*, op. cit., 595.

[130] *Si rem do, ut rem accipiam, id permutationis causa fit* – Paulus, D. 19.5.5.1 (If I give one thing, in order to receive another, this creates a contract of exchange). Cited from S. Perović, *Obligaciono pravo*, *ibidem*.

4. Application of the CISG to International Distributorship Contracts

On the international plane, there are no documents providing in a uniform way for the rights and obligations of parties to a distributorship contract. The parties, however, may provide for the application of UNDROIT Principles of International Commercial Contracts which establish general rules for international commercial contracts[131] or be guided by model distributorship contracts made by international organisations.[132]

In examining the applicability of the CISG to international distributorship contracts,[133] it is necessary to distinguish between framework distributorship contracts on the one hand, and the contracts of sale concluded between the supplier and the distributor based on the distributorship contract, on the other.[134] The applicability of the CISG to individual contracts of sale concluded between the supplier and the distributor is not doubtful if other requirements for its application are met.[135] On the

[131] Commentary to the UNIDROIT Principles states that they present system of principles and rules of contract law common to the existing national legal systems or best tailored to the special requirements of international commercial transactions, and therefore encourages contracting parties to opt for their application *(UNIDROIT Principles of International Commercial Contracts 2016*, op. cit., 2).

[132] For example, *The ICC Model Distributorship Contract* (see *https://iccwbo.org/resources-for-business/model-contracts-clauses/distributorship/*), as well as different model distributorship contracts made by the International Distribution Institute – IDI (see *https://www.idiproject.com/documents/contracts*).

[133] For general characteristics of distributorship contracts, see for example Richard Christou, *Drafting Commercial Agreements,* Sweet/Maxwell, 1998, 260; Clive M. Schmitthoff, Michael Thornton, Stephen Kenyon-Slade, *Schmitthoff's Agency and Distribution Agreements,* Sweet&Maxwell, 1992, 13 ff. On distributorship contracts from the aspect of dispute resolution by arbitration, Pilar Perales Viscasillas, "The Good, the Bad, and the Ugly in Distribution Contracts: Limitation of Party Autonomy in Arbitration?", *Penn State Journal of Law & International Affairs,* Volume 4, No. 1, Seventeenth Biennial Meeting of the International Academy of Commercial and Consumer Law, December 2015, 213–241. An overview of different kinds of distribution in international commercial transactions, Fabio Bortolotti, *Drafting and Negotiating International Commercial Contracts A practical guide,* ICC International Chamber of Commerce, 2013, 181–184.

[134] See Jelena Perović, "Applicability of the CISG to International Distribution Agreement", *Pravni život,* No. 12, Belgrade, 2007, 359–369; Jelena Perović, "Sporne odredbe ugovora o međunarodnoj distirbuciji", *Pravo i privreda,* No. 4–6/2010, Belgrade, 2010, 359–377; Jelena Perović, "How to Secure Contract Performance? Distribution, Franchise and Financial Leasing in Serbian Law", *Ekonomika preduzeća*, No. 3–4, March-April 2012, Belgrade, 2012, 155–156; R. Vukadinović, *Međunarodno poslovno pravo,* op. cit., 250; Aleksandar Ćirić, *Međunarodno trgovinsko pravo, Posebni deo,* Niš, 2018, 276; Ljubica Tomić, "Ključna pitanja ugovora o međunarodnoj distribuciji", *Revija Kopaoničke škole prirodnog prava,* No. 1, Belgrade, 2019, 125.

[135] See L. Mistelis, "Article 1" op. cit., 29–30; I. Schwenzer, P. Hachem, "Article 1", 33; J. O. Honnold, op. cit., 54. This approach was taken in a large number of decisions by courts and arbitral tribunals.

other hand, the distributorship contract itself, which regulates long-term relationship between the parties, their rights and obligations arising from the distribution relation (such as, for example, the obligation on part of the distributor to promote and advertise supplier's products, establish appropriate sales network, etc, or the obligation on part of the supplier to provide technical assistance, advertising materials, obligation to observe the exclusivity clause in exclusive distribution contracts etc.), is outside of the scope of the CISG in the prevailing opinion, as it does not constitute a contract of sale.[136] In some cases, however, it is difficult to draw a line between the framework

See for example Decision of Hamm *OLG Hamm* (*In-line skates case*) of 5 November 1997 (available at: *https://iicl.law.pace.edu/cisg/case/germany-oberlandesgericht-hamburg-oberlandesgericht-olg-provincial-court-appeal-german-13*) which held that each individual contract of sale should be distinguished from the framework distributorship agreement, and applied the CISG to the disputed contract of sale concluded under the distributorship agreement. Such approach was also adopted by the ICC International Court of Arbitration in Paris in a dispute between a seller from Germany and a buyer from Spain, who entered into an agreement whereby the buyer became the exclusive distributor of the other party's goods in Spain. Several individual sales contracts were concluded based on this agreement. In the course of contract performance, the seller informed the buyer that he would engage another distributor. Thereafter, upon the buyer's refusal to pay for some of deliveries, the seller started arbitral proceedings, and the buyer counterclaimed damages arising from breach of exclusivity obligation and lack of conformity of goods. It was held in the arbitration award in this case that the CISG was not applicable to the distributorship agreement as such, but to the individual sales contracts concluded pursuant to the distributorship contract [*ICC Arbitration Case* No. 8611 (*Industrial equipment case*) of 23 January 1997 (available at: *https://iicl.law.pace.edu/cisg/case/case-report-does-not-identify-parties-proceedings-3*)].

[136] See I. Schwenzer, P. Hachem, "Article 1", 32; V. Heuzé, op. cit., 75; C. Witz, op. cit., 32; Franco Ferrari, *La compraventa internacional Aplicabilidad y aplicaciones de la Convención de Viena de 1980,* Valencia, 1999, 129. This position was taken in a large number of court and arbitral decisions. See for example Decision of *OLG München* (*Leather goods case*) of 9 July 1997 (available at: *https://iicl.law.pace.edu/cisg/case/germany-oberlandesgericht-hamburg-oberlandesgericht-olg-provincial-court-appeal-german-107*); Decision of *Cour d'appel de Reims* (*Light chains case*) of 30 April 2013 (available at: *https://iicl.law.pace.edu/cisg/case/france-april-30-2013-cour-dappel-court-appeals-cast-v-festilight*), as well as Decision of U.S. District Court, Maryland (*Gruppo Essenziero Italiano, S.P.A. v. Aromi D'Italia, Inc.*) of 27 July 2011 (available at: *https://iicl.law.pace.edu/cisg/case/united-states-state-minnesota-county-hennepin-district-court-fourth-judicial-district-12*) stating: "*Although distribution agreements are considered contracts for the sale of goods under Maryland's Uniform Commercial Code ("UCC"), courts have held that such agreements are not considered contracts for the sale of goods under the CISG. Under the UCC, a contract for the sale of goods explicitly includes both contracts relating to the present sale of goods and contracts relating to the future sale of goods... Courts interpreting the CISG, however, have concluded that the law does not extend to agreements that create a framework for the future sale of goods but fail to establish specific terms for quantity and price*". This view was taken in the Award of the Foreign Trade Court of Arbitration at the Serbian Chamber of Commerce, which established that a contract between a Serbian and a Macedonian company was outside of the scope of the CISG because the contract, although designated as a contract of sale, was in fact a distributorship contract. The Award stated that in the practice of courts and arbitral tribunals the CISG

distributorship contract and individual sales contracts to be concluded under such framework contract. This is particularly true of cases when the distributorship contract itself already provides in precise details for the obligations of the parties, and making individual deliveries of goods and taking such deliveries in each case constitutes fulfilment of the obligations under the distributorship contract. It is for this reason that some authors do not entirely rule out the possibility of application of some general rules and principles of the CISG to the distributorship contract itself.[137]

The Law of Obligations does not provide for distributorship contracts,[138] and neither, for the most part, do the corresponding domestic rules in comparative law.[139] However, the Preliminary Draft Civil Code of the Republic of Serbia contains a proposal for codification of this kind of contract.[140] The provisions of the distributorship contract, as proposed in the Preliminary Draft are largely of dispositive nature, and aligned with the corresponding solutions of the Draft Common Frame of Reference for a European Private Law.[141]

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is not applicable to distributorship contracts, unless the dispute concerns individual deliveries within the framework of a distributorship agreement, which was not the case (Decision T-25/06 of 13 November 2007, cited after V. Pavić, M. Đorđević, op. cit., 578–579). Similarly, Award of Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce (*Medicaments case*) of 28 January 2009 (available at: *https://iicl.law.pace.edu/cisg/case/28-january-2009-foreign-trade-court-arbitration-attached-serbian-chamber-commerce*).

[137] This approach, advocated for example by L. Mistelis, "Article 1", op. cit., 30; I. Schwenzer, P. Hachem, "Article 1", 32–33, is also used in case law. For instance, in the case decided by *Corte di Cassazione*, a party from Italy and a party from UK entered into an agreement for the sale and distribution of goods. In the ensuing dispute, initiated by the party from Italy over contract avoidance, the Court held that the CISG was appliable not only to sales, but also to distributorship agreements, when these may be construed as accessory clauses of the sale contract [Decision of Corte di Cassazione (*Imperial v. Sanitari*) of 14 December 1999 (available at: *https://iicl.law.pace.edu/cisg/case/italy-december-14-1999-corte-suprema-di-cassazione-supreme-court-imperial-bathroom-company*)]. Similar view was expressed in the Decision of *Cour de Justice de Genève* of 20 May 2011 (Decision is available in French at: *https://iicl.law.pace.edu/cisg/case/switzerland-cj-gen%C3%A8ve-cj-cour-de-justice-appellate-court-1*).

[138] As an unnamed contract, a distributorship contract may be validly concluded within the scope of imperative rules, public order and good practices. On unnamed contracts in general, Perović, *Obligaciono pravo,* op. cit., 192–194; Jelena Perović, *Međunarodno privredno pravo,* Belgrade, 2020, 175–176.

[139] The laws or codes governing obligation relations.

[140] Articles 620–647 of the Preliminary Draft (see *Prednacrt Građanski zakonik Republike Srbije, Druga knjiga, Obligacioni odnosi*, Government of the Republic of Serbia and Commission for Drafting the Civil Code, Belgrade, 2009, 201–207).

[141] *Draft Common Frame of Reference for a European Private Law (*DCFR), Art IV.E. – 5:101–5:306. On the need for codifying modern contracts in business transactions in general, see Marcel Fontaine, *Codifying "Modern" Contracts*, in *Towards a European Civil Code,* Kluwer Law International – The Hague/London-Boston, 1998, 371–383.

5. Concept of Goods under the CISG

The CISG applies to the contracts for the sale of goods. Although the Convention does not define goods,[142] it is accepted beyond dispute in legal theory and case law that goods as a rule mean moveable tangible objects.[143] In this respect, commentators of the CISG suggest that the concept of goods needs to be interpreted autonomously and in the light of the CISG rules on non-conformity,[144] in order to allow for a broad understanding of the concept covering all moveable tangible objects[145] which may be the subject matter of commercial sales contracts, with the exception of the items excluded by Article 2 CISG and those objects which, within the meaning of the CISG, are not considered as moveable tangible objects, although not explicitly provided for in the CISG.[146] In any interpretation, the decisive criterion should be sought in Article 7 CISG, which enjoins regard to the international character of the CISG and to the need to promote uniformity in its application, rather than in the domestic law.[147]

The goods, within the meaning of the Convention, must be moveable at the time of delivery, regardless of whether or not they were immoveables or attached to immoveables prior to delivery;[148] the CISG applies to the sale of moveable objects intended to serve the immoveables and be attached to them, since they are nevertheless moveable at the time of delivery.[149] In interpreting the notion of moveable objects, scholars and courts have suggested that the CISG applies to the sale of plants,[150] livestock,[151] cultural

[142] While the official English versions of both the Hague Law and the CISG use the term "goods", the term employed in the official French text of the CISG is "*marchandises*", which differs from the term used in the French version of the Hague Law, namely "*objets mobiliers*".

[143] See I. Schwenzer, P. Hachem, "Article 1", 33; L. Mistelis, "Article 1" op. cit., 31; J. O. Honnold, op. cit., 51; K. H. Neumayer, C. Ming, op. cit., 39; P. Schlechtriem, "Requirements of Application and Sphere of Applicability of the CISG", op. cit., 785.

[144] See Article 35 CISG.

[145] Both new and used.

[146] I. Schwenzer, P. Hachem, "Article 1", *ibidem*.

[147] See L. Mistelis, "Article 1", *ibidem.*

[148] See I. Schwenzer, P. Hachem, "Article 1", op. cit., 34.

[149] See K. H. Neumayer, C. Ming, op. cit., 39–40.

[150] See for example Decision of the Swiss Federal Supreme Court (*Spinning Plant Case*) of 16 July 2012 (*available at: https://iicl.law.pace.edu/cisg/case/switzerland-bger-bundesgerichtshof-federal-supreme-court-6*).

[151] See for example Decision of *OLG Thüringen* (*Live fish case*) of 26 May 1998 (available at: *https://iicl.law.pace.edu/cisg/case/germany-oberlandesgericht-hamburg-oberlandesgericht-olg-provincial-court-appeal-german-211*).

items and art, pharmaceuticals, etc.[152] However, it is necessary to keep in mind the possibility of contract rescission under the applicable domestic law, in view of the type of goods involved in the sale in hand. The immoveable objects are excluded from the scope of the Convention,[153] which follows from numerous provisions of the CISG in their nature inapplicable to immoveables.[154]

The interpretation of the notion of tangible objects in the context of the CISG application requires some clarification.[155] Thus, for example, the sale of know-how,[156] complete business undertakings,[157] contracts relating to scientific research or intellectual services as such,[158] sale of share in a company,[159] transfer of debt agreements,[160] etc., are excluded from the scope of the CISG since the absence of tangible embodiment into a material object precludes fulfilment of the "physical" delivery requirement under the CISG.[161] On the other hand, the application of the CISG to software[162] is a controversial and frequently debated issue, with a range of different positions advocated both in the doctrine and the case

[152] More, I. Schwenzer, P. Hachem, "Article 1", *ibidem*; L. Mistelis, "Article 1", *ibidem.*

[153] See P. Schlechtriem, "Requirements of Application and Sphere of Applicability of the CISG", op. cit., 786; J. O. Honnold, op. cit., 52.

[154] For example, packing (Article 35 Para 2 Item d), shipment and damage during transit (Articles 67–69), delivery by instalments (Article 73), etc.

[155] More, P. Schlechtriem, "Requirements of Application and Sphere of Applicability of the CISG", *ibidem*; J. O. Honnold, op. cit., 51.

[156] In that regard, I. Schwenzer, P. Hachem, "Article 1", op. cit., 35; F. Ferrari, *La compraventa internacional Aplicabilidad y aplicaciones de la Convención de Vienna de 1980,* op. cit, 147; J. O. Honnold, op. cit., 52.

[157] I. Schwenzer, P. Hachem, "Article 1", *ibidem*; L. Mistelis, "Article 1" op. cit., 32; F. Ferrari, *La compraventa internacional Aplicabilidad y aplicaciones de la Convención de Vienna de 1980,* op. cit., 150; R. Herber, "Article 1", op. cit., 24.

[158] See for example Decision of *OLG Köln* (Market study case) of 26 August 1994, (available at: *https://iicl.law.pace.edu/cisg/case/germany-oberlandesgericht-hamburg-oberlandesgericht-olg-provincial-court-appeal-german-42*), commented in C. Witz, op. cit., 32–33.

[159] See for example Award of the Arbitration Court of the Chamber of Commerce and Industry of Budapest (Shares of stock case) of 20 December 1993 (available at: *https://iicl.law.pace.edu/cisg/case/hungary-december-20-1993*).

[160] See for example Decision of *Tribunale di Vigevano* (*Rheinland Versicherungen v. Atlarex*) of 12 July 2000 (*available at: https://iicl.law.pace.edu/cisg/case/italy-july-12-2000-tribunale-district-court-rheinland-versicherungen-v-atlarex-srl-and*).

[161] More, L. Mistelis, "Article 1" op. cit., 30.

[162] On the other hand, there is no doubt that hardware is considered as goods within the meaning of the CISG (see. L. Mistelis, "Article 1" op. cit., 32).

law.[163] Thus, certain court decisions accept that only standard software constitutes goods in the sense of the Convention,[164] while others take the position that any kind of software, including the tailor-made software, may be considered as goods,[165] and that the contracts for the sale of this software are subject to the CISG rules.[166] The application of the CISG to software sales raises other numerous concerns,[167] the most relevant of which address the transfer of intellectual property rights involved in the of sale of software, associating relevant contracts with mixed contracts in the sense of Article 3 CISG.[168]

III. INTERNATIONAL CHARACTER OF CONTRACTS

1. Test of International Character

The CISG applies only to the contracts of international character. The international character of sales contracts is affirmed from the requirement of the Convention that the contracting parties have their respective places of business[169] in different states.[170] In laying down this requirement, the CISG adopts a purely

[163] See J. Ziegel, op. cit., 61–62; F. Ferrari, *La compraventa internacional Aplicabilidad y aplicaciones de la Convención de Vienna de 1980,* op. cit., 147–149; Joseph 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*, Volume 13, No. 3, 2003, 273–279; P. Schlechtriem, "Requirements of Application and Sphere of Applicability of the CISG", op. cit., 786; J. O. Honnold, op. cit., 55.

[164] See for example Decision of *OLG Köln* (Market study case) of 26 August 1994 (available at: *https://iicl.law.pace.edu/cisg/case/germany-oberlandesgericht-hamburg-oberlandesgericht-olg-provincial-court-appeal-german-42*).

[165] See for example Decision of the Austrian Supreme Court *Oberster Gerichtshof* (Software case) of 21 June 2005 (available at: *https://iicl.law.pace.edu/cisg/case/austria-june-21-2005-oberster-gerichtshof-supreme-court-austrian-case-citations-do-not*).

[166] This position is strongly upheld in J. Lookofsky, op. cit., 278–279. The same approach is adopted in I. Schwenzer, P. Hachem, "Article 1", op. cit., 34–35. These authors suggest that the mode in which software is delivered – whether via disc or via the internet – is irrelevant.

[167] See P. Schlechtriem, "Requirements of Application and Sphere of Applicability of the CISG", op. cit., 785; F. Ferrari, *La compraventa internacional Aplicabilidad y aplicaciones de la Convención de Vienna de 1980, ibidem.*

[168] L. Mistelis, "Article 1" op. cit., 33; I. Schwenzer, P. Hachem, "Article 1", op. cit., 34–35.

[169] The official translation of the CISG into Serbian employs the term "seat", while the English text of the CISG uses the term "place of business". This distinction may be of interest in the context of Article 10 CISG which provides for cases where a party has more than one place of business (seats).

[170] Article 1 CISG.

subjective test of internationality of the contract.[171] Thus, the contract is not deemed to be of international character if the places of business of the parties are in the same state,[172] even when the goods which are the subject matter of the sale are situated in another state (objective test), or in the case of parties having their places of business in the same state, while contracting for performance in another state[173] (mixed test).[174] Therefore, the *conditio sine qua non* for the application of the CISG is for the parties to have their places of business in different states, while the nationality of the parties is to be disregarded in determining the internationality of the contract.[175] The moment relevant for deciding if the requirement of having the places of business in different states has been satisfied[176] is the time of conclusion of the contract.[177]

2. Place of Business

The CISG does not define the notion of place of business. Commentaries to the Convention suggest that this term is to be interpreted autonomously in the

[171] Compare with the solution of Article 1 ULIS and Article 1 ULFIS from 1964 (the Hague laws). The solution of the Hague Laws has been criticised in the doctrine as "complicated and confusing", which discouraged the CISG editors from adopting such solution. In more detail, J. Perović, *Bitna povreda ugovora Međunarodna prodaje robe*, op. cit., 2004, 41–43.

[172] The same is valid for the relevant place of business in the sense of Article 10 CISG when one party or both parties have more than one place of business.

[173] More, F. Ferrari, *La compraventa internacional Aplicabilidad y aplicaciones de la Convención de Vienna de 1980,* op. cit, 53–58; I. Schwenzer, P. Hachem, "Article 1", op. cit., 37; L. Mistelis, "Article 1", op. cit., 34.

[174] See for example Decision of *OLG Köln* (Ticket for soccer world championship case) of 27 November 1991 (available at*: https://iicl.law.pace.edu/cisg/case/germany-oberlandesgericht-hamburg-oberlandesgericht-olg-provincial-court-appeal-german-46*).

[175] Article 1 Para 3 CISG.

[176] Under the CISG, the fact that the parties have their places of business in different states is to be disregarded whenever this fact does not appear either from the contract or from any dealings between or from information disclosed by, the parties at any time before or at the conclusion of the contract (Article 1 Para 2). More, J. Perović, *Bitna povreda ugovora Međunarodna prodaja robe*, op. cit., 52–54.

[177] See I. Schwenzer, P. Hachem, "Article 1", op. cit., 37; L. Mistelis, "Article 1", op. cit., 33. See Decision of OLG Dresden (Chemical products case) of 27 December 1999 (available at: https://iicl.law.pace.edu/cisg/case/germany-december-27-1999-oberlandesgericht-court-appeal-german-case-citations-do-not) which held that the contract fell under the scope of the CISG as the parties had their places of business in different states *at the time of conclusion of the contract*. Similarly, Decision of *Tribunale di Forli* (*Mitias v. Solidea S.r.l.*) of 11 December 2008 (available at: *https://iicl.law.pace.edu/cisg/case/italy-december-11-2008-tribunale-district-court-mitias-v-solidea-srl-translation-available*).

light of Article 7 Para 1 CISG,[178] to the exclusion of recourse to domestic law.[179] In the general view of scholars and courts, the place of business (seat) is the place which the party uses openly to conduct his business activities, displaying a degree of duration, stability and independence.[180] If a party has several places of business, the CISG provides that the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract. On the other hand, if a party does not have a place of business, reference is to be made to his habitual residence.[181]

3. Agency

Where contract for international sale involves use of agents, this raises the issue of the decisive place of business in the light of requirements for the application of the CISG – whether that of the principal or that of the agent. The issue is to be resolved, with the aid of private international law, by consulting the applicable domestic law in determining who in the case in hand is party to the

[178] Which lays down that in the interpretation of the CISG, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

[179] See I. Schwenzer, P. Hachem, "Article 1", op. cit., 36.

[180] In detail on this issue, F. Ferrari, *La compraventa internacional Aplicabilidad y aplicaciones de la Convención de Vienna de 1980,* op. cit, 65–68; I. Schwenzer, P. Hachem, "Article 1", op. cit., 36; L. Mistelis, "Article 1" op. cit., 33–34; R. Herber, "Article 1", op. cit., 24; K. H. Neumayer, C. Ming, op. cit., 41. See for example Decision of *Tribunale di Rimini* (*Al Palazzo S.r.l. v. Bernardaud di Limoges S.A.*) of 26 November 2002 (available at: *https://iicl.law.pace.edu/cisg/case/italy-november-26-2002-tribunale-district-court-al-palazzo-srl-v-bernardaud-di-limoges-sa*), Decision of *OLG Stuttgart* (Floor tiles case) of 28 February 2000 (available at: *https://iicl.law.pace.edu/cisg/case/germany-oberlandesgericht-hamburg-oberlandesgericht-olg-provincial-court-appeal-german-126*) and OLG Hamm (Automobile case) of 02 April 2009 (available at: *https://iicl.law.pace.edu/cisg/case/germany-oberlandesgericht-hamburg-oberlandesgericht-olg-provincial-court-appeal-german-29*) and Decision of *Oberster Gerichtshof* (Chinchilla furs case) of 10 November 1994 (available at: *https://iicl.law.pace.edu/cisg/case/austria-ogh-oberster-gerichtshof-supreme-court-austrian-case-citations-do-not-generally-60*), stating in this regard that: "*Place of business" is every location from which [a party] participates in economic transactions in a somehow independent manner*".

[181] Article 10 CISG. Commentary to Article 10 CISG, Ingeborg Schwenzer, Pascal Hachem, "Article 10" in *Schlechtriem & Schwenzer Commentary,* 2016, 197–202; Stavros Brekoulakis, "Article 10" in *UN Convention on Contracts for the International Sale of Goods (CISG) A Commentary,* (eds. Kröll/Mistelis/Perales Viscasillas), Second Edition, C. H. Beck Hart Nomos, 2018, 182–190.

contract of sale,[182] *i.e.* whose place of business will be considered in establishing if the contract is international.[183]

If Serbian Law of Obligations were to be applied, the very first question to be addressed would be on whose behalf the agent is acting, *i.e.* whether the agency is commercial agency or that of commission.[184] If the agent is acting on behalf of the principal, with a direct legal relationship being constituted between the principal and the other party to the contract of sale from the moment of entry into contract, it is a case of commercial agency,[185] and the decisive place of business is that of the principal. Therefore, if the principal's place of business is situated in a state other than the state of the place of business of the other party to the contract of sale, such contract is considered as international. Conversely, if the principal has the place of business in the same state as the other party, the CISG may not apply, regardless of the location of the place of business of the agent. The situation is different if the contract of sale is concluded by the commission agent within the meaning of Article 771 of the Law of Obligations.[186] Under such contract, the commission agent undertakes to perform transactions on his own behalf, and for the account of the client. In other words, the commission agent is the holder of rights and obligations under the contract concluded with a third party, with whom he enters into direct legal relations.[187] In such a case, it is the commission agent who is bound to the contract, and consequently the place of business decisive for determining the internationality of the contract would be that of the commission agent, rather than that of the client for whose account the transaction is performed. Hence, the CISG is applicable solely to the contract of sale, while the legal relationship between the commission agent and the client falls beyond its scope.[188]

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[182] See F. Ferrari, *La compraventa internacional Aplicabilidad y aplicaciones de la Convención de Vienna de 1980,* op. cit, 63; I. Schwenzer, P. Hachem, "Article 1", op. cit., 38; L. Mistelis, "Article 1" op. cit., 34.

[183] While giving due regard to the limitations of Article 1 Para 2 CISG.

[184] On contract of commercial agency and contract of commission in Serbian law, see Mirko Vasiljević, *Trgovinsko pravo*, Belgrade, 2016, 131–155.

[185] See Article 790 Law of Obligations. Commentary to this rule, Jovan Slavnić. "Član 790" in *Komentar Zakona o obligacionim odnosima*, Slobodan Perović, II Knjiga, 1995, 1315–1321.

[186] Commentary to this rule, Ivica Jankovec. "Član 771" in *Komentar Zakona o obligacionim odnosima*, Slobodan Perović, II Knjiga, 1995, 1299 – 1302.

[187] The civil-law notion of commission relies on the assumption that no direct legal relations exist between a client and a third party, which excludes joint claims arising from a contract concluded through commission agent (M. Vasiljević, op. cit., 144).

[188] J. Perović, *Bitna povreda ugovora Međunarodna prodaja robe*, op. cit., 46; J. Perović, *Standardne klauzule u međunarodnim privrednim ugovorima*, op. cit., 176.

IV. DIRECT AND INDIRECT APPLICATION OF THE CISG

1. Alternative Requirements

As already pointed out, three requirements need to be satisfied for the application of the Convention: 1) the contract in hand must be for the sale of goods; 2) it must be of international character and 3) the states in which the parties have their places of business must be the Contracting States (direct application) or the rules of private international law must lead to the application of the law of a Contracting State (indirect application). For the CISG to be applicable, the first two requirements must be satisfied cumulatively, while the application criteria for the third requirement are set alternatively.

2. Direct Application

If requirements concerning the contract for the sale of goods of international character have been met, the CISG will apply when the places of business of the parties are in different Contracting States.[189] In such case, the Convention is applied directly (automatically, autonomously), without there being a need to invoke the rules of private international law.[190] However, the concept of Contracting States can be restricted by reservations provided under special rules of the CISG. Specifically, if a Contracting State should declare that it will not be bound by Part II or Part III of the CISG, it will not be considered to be a Contracting State in respect of the matters governed by the Part of the CISG to which such declaration applies.[191] If a Contracting State should declare that the CISG will apply to one or more but not to all of its territorial units, and if the place of business of a party should be located in that State, it will be considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends.[192] Another restriction on the sphere

[189] Article 1 Para 1(a) CISG.

[190] See Franco Ferrari, *The Sphere of Application of the Vienna Sales Convention*, Deventer: Kluwer Law and Taxation, 1995, 13; F. Ferrari, *La compraventa internacional Aplicabilidad y aplicaciones de la Convención de Vienna de 1980,* op. cit, 82–83; 35; K. H. Neumayer, C. Ming, op. cit., 41. A large number of court decisions held in favour of direct application of the CISG. Examples of such decisions are cited in L. Mistelis, "Article 1", op. cit., 35.

[191] Article 92 Para 2 CISG. Commentary to Article 92 CISG, Ingeborg Schwenzer, Pascal Hachem, "Article 92" in *Schlechtriem & Schwenzer Commentary,* 2016, 1253–1254; Johnny Herre, "Article 92" in *Commentary,* Kröll/Mistelis/Perales Viscasillas, 2018, 1174–1176.

[192] Article 93 Para 3 CISG. Commentary to Article 93 CISG, Ingeborg Schwenzer, Pascal Hachem, "Article 93" in *Schlechtriem & Schwenzer Commentary,* 2016, 1255–1257; Johnny Herre, "Article 93" in *Commentary,* Kröll/Mistelis/Perales Viscasillas, 2018, 1177–1180.

of the CISG is provided in the rule enabling the States with the same or related legal systems governing the sale of goods to refrain from applying the CISG to transactions between such States.[193]

3. Indirect Application

The CISG may also be applied where only one or even no party has his place of business in a Contracting State, if the rules of private international law lead to the application of the law of a Contracting State.[194] For the CISG to be applicable in this case, there must be a contract for the sale of goods with parties having their places of business in different states (international character), and the requirements concerning certain limitations on the CISG outlined in Article 1 Para 2, must be satisfied. If these requirements are met, this will lead to indirect application of the CISG when parties have their places of business in different states, of which either one or both states are non-Contracting States. In other words, the parties must have their places of business in different states, but these states need not be the Contracting States; so long as the relevant rules of private international law[195] lead to the application of the law of a Contracting State,[196]

[193] Article 94 CISG. Commentary to 94 CISG, Ingeborg Schwenzer, Pascal Hachem, "Article 94" in *Schlechtriem & Schwenzer Commentary,* 2016, 1258–1261; Johnny Herre, "Article 94" in *Commentary,* Kröll/Mistelis/Perales Viscasillas, 2018, 1181–1184.

[194] Article 1 Para 1(b) CISG. See F. Ferrari, *La compraventa internacional Aplicabilidad y aplicaciones de la Convención de Vienna de 1980,* op. cit, 90 ff; I. Schwenzer, P. Hachem, "Article 1", op. cit., 39–40; K. H. Neumayer, C. Ming, op. cit., 42–49. A large number of court decisions ruled in favour of direct application of the CISG under Art 1 Para 1(b). Examples of such decisions are cited in L. Mistelis, "Article 1", op. cit., 37. See for example Decision of the Supreme Court of Queensland (Scrap steel case) of 12 October 2001 (available at: *http://www.unilex.info/cisg/case/968*) in a case where a party from Australia and a party from Malaysia agreed that the law applying in Brisbane would be the applicable law.

[195] On whether parties whose places of business are outside Contracting States may agree to have the CISG directly applied in any dispute before the state courts, Ingeborg Schwenzer, Pascal Hachem, "Introduction to Articles 1–6" in *Schlechtriem & Schwenzer Commentary,* 2016, 22; L. Mistelis, "Article 1", op. cit., 38; J. Perović, "Načelo autonomije volje u primeni Bečke konvencije na ugovor o međunarodnoj prodaji robe", op. cit., 185.

[196] The requirement of Article 1 Para 1(a) CISG has not been satisfied in a large number of contracts concluded formerly, because only one party had his place of business situated in a Contracting State. Thus, any contracts concluded in 1988, 1989 and 1990 between a seller with a place of business in Italy (where the CISG came into force in 1988) and a buyer with a place of business in Germany where the CISG came into force in 1991), could be subjected to the CISG only based on the rules of private international law. The CISG was applied to these contracts when the parties provided for Italian law as applicable, or, in the absence of choice of law, as the law of the state in which the seller has his place of business (right of the party owing characteristic obligation). Similarly, courts applied the CISG to contracts with one party from Belgium (where the CISG came

the CISG may still be applicable.[197] Naturally, it is necessary that the Contracting State, to whose law the rules of private international law have led, has not declared reservations to indirect application of the CISG.[198]

V. EXCLUSION OF THE CISG THROUGH AGREEMENT OF WILLS OF THE PARTIES

The freedom of contract principle has achieved full expression in the CISG, which lays down that the parties may exclude its application of derogate from or vary the effect of any of its provisions.[199] This rule lends dispositive character to the CISG, which applies automatically when requirements for its application are satisfied, unless the parties have excluded or restricted its application, or varied the effect of its

into force in 1997), and the other from Italy, based on the rules of private international law before it came into force in Belgium. Indirect application of the CISG was also granted by the international commercial arbitral tribunals. In detail, J. Perović, *Bitna povreda ugovora Međunarodna prodaja robe,* op. cit., 56 ff; J. Perović, *Standardne klauzule u međunarodnim privrednim ugovorima*, op. cit., 177–178.

[197] The indirect application of the CISG also occurs, as a rule, when the parties agree that the applicable law will be the law of a third state which is a Contracting State (in detail, L. Mistelis, *ibidem*; F. Ferrari, *La compraventa internacional Aplicabilidad y aplicaciones de la Convención de Vienna de 1980,* op. cit, 92 ff). See in that regard *Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), Official Journal of the European Union 4.7.2008.* The CISG has been applied in this way in a large number of court decisions. See for example Decision of *Hof van Beroep* (Design of radio phone case) of 15 May 2002 (available at: *https://iicl.law.pace.edu/cisg/case/belgium-may-15-2002-hof-van-beroep-appellate-court-nv-ar-v-nv-i-translation-available*) and Decision of *LG Kassel* (Marble slab case) of 15 February 1996 (*available at: https://iicl.law.pace.edu/cisg/case/germany-lg-aachen-lg-landgericht-district-court-german-case-citations-do-not-identify-117*). In detail on this issue in Serbian: J. Perović, *Standardne klauzule u međunarodnim privrednim ugovorima,* op. cit., 178–179; J. Perović *Bitna povreda ugovora Međunarodna prodaja robe*, op. cit., 56–60; J. Perović, "Načelo autonomije volje u primeni Bečke konvencije na ugovor o međunarodnoj prodaji robe", op. cit., 182–186; Marko Jovanović, "Primena konvencije Ujedinjenih nacija o ugovorima o međunarodnoj prodaji robe kada pravila međunarodnog privatnog prava upute na primenu prava države-ugovornice", *Anali Pravnog fakulteta u Beogradu,* Volume 62, No. 1, Belgrade, 2014, 170–186; Tibor Varadi, Gašo Knežević, Bernadet Bordaš, Vladimir Pavić, *Međunarodno privatno pravo,* Belgrade, 2012, 417–421; A.Ćirić, op. cit., 95; R. Vukadinović, op. cit., 1–53. On positions taken in that regard in the practice of Serbian courts and arbitral tribunals see V. Pavić, M. Đorđević, op. cit., 569 ff.

[198] This reservation is enabled by Article 95, which provides that any State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph (1) (b) of Article 1 CISG. In detail, Ingeborg Schwenzer, Pascal Hachem, "Article 95" in *Schlechtriem & Schwenzer Commentary,* 2016, 1262–1263; Johnny Herre, "Article 95" in *Commentary,* Kröll/Mistelis/Perales Viscasillas, 2018, 1185–1190; J. Ziegel, op. cit., 64–67.

[199] Article 6 CISG.

provisions (opting out).[200] The exclusion of the CISG may be explicit[201] or implicit[202] and can relate to the entire CISG or to its individual provisions.[203]

[200] In detail on this issue, J. Perović, "Načelo autonomije volje u primeni Bečke konvencije na ugovor o međunarodnoj prodaji robe", op. cit., 186–189; J. Perović, *Standardne klauzule u međunarodnim privrednim ugovorima,* op. cit., 180–184; J. Perović, *Bitna povreda ugovora Međunarodna prodaja robe*, op. cit., 74–84; Andrea Nikolić, "Načini isključenja primene Konvencije UN o ugovorima o međunarodnoj prodaji robe", *Pravni život,* No. 9, Belgrade, 2017, 213–231.

[201] The explicit exclusion occurs when parties make explicit reference to the exclusion of the CISG in the choice of law clause. The wording of such clause may include: "*This contract is governed by the law of Swiss Federation to the exclusion of the United Nations Convention on Contracts for the International Sale of Goods*" or more precisely: "*This contract is governed by the Swiss Code of Obligations under the exclusion of the United Nations Convention on Contracts for the International Sale of Goods*". On the other hand, the parties may opt out of the entire CISG without designating the law applicable to the contract. The applicable law, in such case, is determined based on the rules of private international law. More in Loukas Mistelis, "Article 6" in *Commentary,* Kröll/Mistelis/Perales Viscasillas, 2018, 109. In detail on explicit exclusion of the CISG, J. Perović, "Načelo autonomije volje u primeni Bečke konvencije na ugovor o međunarodnoj prodaji robe", op. cit., 186; J. Perović, *Standardne klauzule u međunarodnim privrednim ugovorima,* op. cit., 181.

[202] The implicit exclusion of the CISG is achieved in several ways. Thus, an intention to exclude the CISG will normally be assumed when parties stipulate the law of a non-Contracting State. The choice of a specific domestic law relevant to internal sales transactions in a certain state is also considered as an implicit exclusion of the CISG. On the other hand, a choice of law clause designating a domestic law of any Contracting State without further specifications (*e.g.* "*This contract is governed by Swiss law*"), may be controversial with regard to the intention to exclude the CISG. Where the parties are from Contracting States, scholarly articles and case law overwhelmingly take the position that the choice of law of a Contracting State is not meant to exclude the CISG. Such position relies on the fact that the CISG is part of the legal system of any Contracting State; the choice of law of a Contracting State, without explicitly providing for the law of such state regulating sale in internal contractual relations, does not imply exclusion of the CISG in cases of contracts of international character, satisfying all requirements for *ratione materiae* application of the Convention. However, certain authors hold that a general choice of a domestic law of a Contracting State does not allow for the assumption that the parties intend to apply uniform law. According to them, where the parties from the Contracting States designate the law of a Contracting State as the applicable law, such choice points to the intention of the parties to exclude the Convention in favour of the domestic law, given that their contract, in the absence of the choice of law clause, would have been governed by the CISG. These views, however, are fairly isolated, in contrast to the overwhelmingly accepted position that the choice of law of a Contracting State should not be construed as an exclusion of the CISG. On the other hand, when one or both parties are located in non-Contracting States, the choice of law clause designating law of a Contracting State may lead to the applicability of the CISG, by virtue of party autonomy. More on these and other issues raised in the context of implicit exclusion of the CISG, with quotations of authors advocating such views and relevant court decisions, J. Perović, "Načelo autonomije volje u primeni Bečke konvencije na ugovor o međunarodnoj prodaji robe", op. cit., 186–189; J. Perović, *Standardne klauzule u međunarodnim privrednim ugovorima,* op. cit., 181–183.

[203] Detailed commentary of the rule under 6 CISG, Ingeborg Schwenzer, Pascal Hachem, "Article 6" in *Schlechtriem & Schwenzer Commentary,* 2016, 101–118; M. J. Bonell, "Article 6", op. cit., 51–64; L. Mistelis, "Article 6", op. cit., 101–111; K. H. Neumayer, C. Ming, op. cit., 83–95.

Exclusion of the entire CISG is regularly assumed when parties stipulate a national law regulating sales in internal contractual relationships. However, a general reference to a domestic law (for example Serbian law) is not considered sufficient for exclusion of the CISG, rather it is necessary to stipulate application of the specific domestic law governing sales contracts in internal relationships (for example "Serbian Law of Obligations"). Still, it must not be taken for granted that stipulating a domestic law amounts to an exclusion of the CISG. Thus, for example, an exclusion of the CISG will not occur in this way when the stipulated civil code provides only for civil contracts, but not for commercial,[204] or in other cases where the relevant domestic law, for different reasons, may not apply to the contract of international sale in hand.[205] Similarly, a reference to INCOTERMS[206] does not derogate from the CISG entirely, but only from certain aspects thereof dealt with by these rules.[207] Furthermore, exclusion of the CISG will not be assumed where the parties substitute certain rules of the CISG with appropriate rules of a domestic law, or where they use standard terms made in line with provisions of a domestic law.[208]

On the other hand, while generally accepting the CISG, the parties may modify certain provisions of the Convention by agreement of wills. Thus, for example, parties may make special provisions for avoidance due to non-performance (different from the CISG rules on fundamental breach of contract under Article 25), special provisions for exemptions from liability (different from the rules of Article 79 CISG) etc. In such cases, the Convention will not apply only to those issues arising from the contract that the parties have otherwise provided for by agreement of wills.[209]

VI. FUNDAMENTAL SCOPE OF THE CISG

1. General

The above addressed provisions of the Convention lay down the requirements that need to be satisfied for the CISG to be applicable (Articles 1 and 3) and

[204] See Decision of *Oberlandesgericht Linz* (Auto case) of 23 January 2006 (available at: *https://iicl.law.pace.edu/cisg/case/austria-oberlandesgericht-wien-appellate-court-austrian-case-citations-do-not-generally-5*).

[205] More, L. Mistelis, "Article 6", op. cit., 109.

[206] On INCOTERMS 2020 in general and in the context of the CISG, Burghard Piltz, "INCOTERMS 2020", op. cit., 9–28.

[207] I. Schwenzer, P. Hachem, "Article 6", op. cit., 114; K. H. Neumayer, C. Ming, op. cit., 87; B. Audit, op. cit., 38–39

[208] See I. Schwenzer, P. Hachem, "Article 6", op. cit., 114–115.

[209] J. Perović, "Načelo autonomije volje u primeni Bečke konvencije na ugovor o međunarodnoj prodaji robe", op. cit., 189.

also affirm its dispositive character, by allowing the parties to opt out of the CISG or derogate from or vary the effect of any of its provisions (Article 6).

On the other hand, the CISG sets down the rules defining the scope of its application *fundamentally*, by outlining the matters governed by the Convention (positive definition) and those beyond the sphere of its application (negative definition). According to these rules, the CISG governs only the formation of the contract of sale and the rights and obligations of the parties arising from such a contract. In particular, except as otherwise expressly provided in the CISG, it is not concerned with the validity of the contract or of any of its provisions or of any usage, or the effect which the contract may have on the property in the goods sold (Article 4).[210] The CISG furthermore does not apply to the liability of the seller for death or personal injury caused by the goods to any person (Article 5).[211] These provisions raise a whole series of issues proved to be controversial in court practice and consequently the source of much debate in scholarly articles.[212]

In determining the applicability of the CISG to a specific matter arising from the contractual relationship between the buyer and the seller, it is first of all necessary to establish if the matter is covered by the Convention. Where it is covered, it will be governed by the explicit provisions of the CISG, and in the absence of explicit provisions, dealt with by gap-filling under Article 7 Para 2 CISG. Conversely, the matters not covered by the CISG are dealt with by recourse to the domestic law[213] that would anyway have been applicable to the contract in hand.[214] A brief examination of Article 4 CISG will be given below, with the primary aim of identifying those matters which, being outside of the Convention, are to be dealt with by subsidiary application of the relevant provisions of the Serbian Law of Obligations, where Serbian law is applicable to the contract.

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[210] Commentary, Ingeborg Schwenzer, Pascal Hachem, "Article 4" in *Schlechtriem & Schwenzer Commentary,* 2016, 73–94; Milena Đorđević, "Article 4" in *Commentary,* Kröll/Mistelis/Perales Viscasillas, 2018, 63–90; K. H. Neumayer, C. Ming, op. cit., 67–79; J. O. Honnold, op. cit., 62–70.

[211] Commentary, Ingeborg Schwenzer, Pascal Hachem, "Article 5" in *Schlechtriem & Schwenzer Commentary,* 2016, 95–100; John Ribeiro, "Article 5" in *Commentary,* Kröll/Mistelis/Perales Viscasillas, 2018, 91–100; K. H. Neumayer, C. Ming, op. cit., 80–82; J. O. Honnold, op. cit., 71–76.

[212] On this issue, M. Đorđević, "Article 4", op. cit., 65; Franco Ferrari, "CISG and Private International Law", *The 1980 Uniform Sales Law Old Issues Revisited in the Light of Recent Experiences,* Verona Conference 2003, (ed. Franco Ferrari), Giuffrè Editore, Sellier European Law Publishers, Milano, 2003, 44 ff.

[213] Or other uniform rules addressing the matter in hand.

[214] See M. Đorđević, "Article 4", op. cit., 65; I. Schwenzer, P. Hachem, "Article 4", op. cit., 76.

2. Matters Explicitly Governed by the CISG

2.1. General Rule

Under the rule explicitly provided in the CISG, it governs only[215] the formation of the contract of sale and the rights and obligations of the buyer and the seller arising from such a contract.[216] Also relevant in this context are the provisions of the CISG relating to formation of the contract – offer and acceptance (Part II CISG)[217] and rights and obligations of the parties (Part III CISG). In addition to providing for these matters, the Convention also establishes rules for the interpretation of its own provisions and gap-filling (Article 7), interpretation of contract (Article 8), application of any practices and any usage established between the parties (Article 9), informal aspects of the contract (Article 11), as well as modification and termination of the contract by agreement (Article 29).

On the other hand, where the parties use agents in formation of the contract, the CISG does not provide for the legal relationship between the agent and the principal, or the legal relationship between the agent and the third party[218], the existence and aspects of which depend primarily on the type of agency. These matters are governed by the relevant set of rules of the applicable domestic law or other uniform rules addressing such matters (for example UNIDROIT Principles[219] or Principles of European Contract Law[220]) if their application is agreed. Where the case in hand is governed by Serbian law, the applicable rules are those of the Law of Obligations, providing for the contract of commercial agency[221] or

[215] The commentaries to the CISG often emphasise that the term "only" in the context of Article 4 CISG should not be interpreted as "exclusively", but "without doubt" (see for example I. Schwenzer, P. Hachem, "Article 4", op. cit., 74). However, the French text of the CISG employs the term "exclusively" (*exclusivement*).

[216] Article 4 CISG, first sentence.

[217] Articles 14–24 CISG.

[218] On this matter, K. H. Neumayer, C. Ming, op. cit., 75; I. Schwenzer, P. Hachem, "Article 4", op. cit., 77; B. Audit, op. cit., 31. See Decision of *Tribunal cantonal Valais* (*Oven case*) of 27 April 2007 (available at: https://iicl.law.pace.edu/cisg/case/switzerland-tribunal-cantonal-appellate-court-du-jura-16), stating: "*The representation of natural and legal persons and the capacity to contract are also excluded from the CISG's field of application... These questions remain subject to the national law designated by the rules on the conflict of laws*". For numerous other court decisions taking the same position, see M. Đorđević, "Article 4", op. cit., 71.

[219] UNIDROIT Principles of International Commercial Contracts 2016, Article 2.2.1 ff.

[220] Principles of European Contract Law, Article 3:101 ff.

[221] Articles 790–812 Law of Obligations. Commentary to these rules, Jovan Slavnić in *Komentar Zakona o obligacionim odnosima*, Slobodan Perović, II Knjiga, 1995, 1315–1344.

the contract of commission,[222] depending on whose behalf the agent is acting.[223] Similarly, the position prevalent in the doctrine and case law is that the issue of pre-contractual liability is not covered by the CISG,[224] except with regard to the revocability of the offer under Articles 15 and 16 CISG.[225] Accordingly, the legal consequences of breaking off negotiations are covered by the relevant provisions of the applicable domestic law or other uniform rules agreed upon.[226] Where Serbian Law of Obligations is applicable to this matter, the relevant provisions are laid down in Article 30 which governs negotiations preceding the entering into contract.[227]

2.2. Formation of the Contract

Regarding the set of rules governing formation of the contract, a comparative analysis of the solutions adopted in the CISG on the one hand, and the Law of Obligations on the other, suggests that in spite of there being a high degree

[222] Articles 771–789 Law of Obligations. Commentary to these rules, Ivica Jankovec in *Komentar Zakona o obligacionim odnosima*, Slobodan Perović, II Knjiga, 1995, 1299–1315.

[223] On contract of commercial agency and contract of commission in Serbian law, see M. Vasiljević, *Trgovinsko pravo*, op. cit., 131–155.

[224] See M. Đorđević, "Article 4", op. cit., 67; K. H. Neumayer, C. Ming, op. cit., 75–76; B. Audit, op. cit., 31–32. See Decision of *Polimeles Protodikio Athinon* (*Bullet-proof vest case*) of 01 January 2009 (available at: *https://iicl.law.pace.edu/cisg/case/greece-2009-polimeles-protodikio-multi-member-court-first-instance*), stating: "*The issue of pre-contractual (established during the negotiations) liability, according to the opinion that this Court adopts, is not regulated by the CISG, except for the cases in which the CISG regulates specifically an issue for the period before the conclusion of the contract (e.g., CISG Article 16(2)). Therefore, any remedy related to pre-contractual liability which derives from the provisions of domestic law to which the rules of the private international law of the forum refer to... may apply in parallel with the provisions of the CISG...*". Conversely, position advocating applicability of the CISG to pre-contractual liability under Article 7 Para 2, *G. Nikolaidis*, "The Importance of Good Faith and Pre-contractual Liability pursuant to the Vienna Convention for the International Sale of Goods", *Chronicles of Private Law,* 2002, 891, cited from Dionysios P. Flambouras, "Case Law of Greek Courts for the Vienna Convention (1980) for International Sale of Goods", *Nordic Journal of Commercial Law,* No. 2, 2009, 39.

[225] On limitations in application of domestic law to this matter, I. Schwenzer, P. Hachem, "Article 4", op. cit., 80–81.

[226] See UNIDROIT Principles of International Commercial Contracts 2016, Article 2.1.15 and Principles of European Contract Law, Article 2:301.

[227] Commentary to this rule, Mladen Draškić, "Član 30" in *Komentar Zakona o obligacionim odnosima*, Slobodan Perović, I Knjiga, 1995, 69–74. On negotiations, their legal effect and importance, S. Perović, *Obligaciono pravo*, op. cit., 264–266.

of similarity between these rules, they also show certain differences. Particularly significant in this context are the matters related to the offer (to whom the offer is addressed, contents of the offer and revocability of the offer), the moment when a contract is concluded between the absent parties, and the form of the contract.

In the first place it may be observed that the CISG, by requiring the proposal to be made to a *specific* person,[228] follows the solution adopted in a large number of domestic laws,[229] including Serbian Law of Obligations.[230]

Furthermore, the general requirement of the Law of Obligations for an offer to contain essential elements (*essentialia negotii*) of the contract being proposed for conclusion and to indicate offeror's intention to conclude contract in the event of acceptance,[231] is reflected in Article 14 Para 1 CISG dealing with the offer. Under this provision, a proposal for concluding a contract addressed to one or more specific persons constitutes offer if it is sufficiently definite and indicates the

[228] Under the CISG, a proposal for concluding a contract, other than the one addressed to one or more specified persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal (Article 14 Para 2). Commentary, Ulrich G. Schroeter, "Article 14" in *Schlechtriem & Schwenzer Commentary,* 2016, 286–287; Franco Ferrari, "Article 14" in *Commentary,* Kröll/Mistelis/Perales Viscasillas, 2018, 228–229; K. H. Neumayer, C. Ming, op. cit., 148–149.

[229] For example, in the Swiss Code of Obligations (Article 3), German Civil Code (Article 145), Austrian Civil Code (Article 861). On the other hand, in French domestic law, a proposal for concluding a contract is considered offer both when made to a particular person and when made to persons generally. Under this approach, the offer made to persons generally bounds the offeror to the first person to accept the offer under the same terms as if the offer was made to a particular person (see François Terré, Philippe Simler, Yves Lequette, *Droit civil Les obligations*, Dalloz, Paris, 1996, 92, stating, in this context "*Contrairement à la Convention de Vienne ainsi qu'à certains droits étrangers, qui voient dans l'offre à personne indéterminée une simple invitation à formuler une offre, le droit interne français annalyse celle-ci en une véritable pollicitation*". A comparative review of this issue, S. Perović, *Obligaciono pravo,* op. cit., 266. Speaking of other uniform laws, UNIDROIT Principles do not require the offer to be made to a specific person (see Article 2.1.2). On the other hand, the Principles of European Contract Law expressly provide that the offer may be made to one or more specific persons or to the public. Furthermore, the PECL stipulates that a proposal to supply goods or services at stated prices made by a professional supplier in a public advertisement or a catalogue, or by a display of goods, is presumed to be an offer to sell or supply at that price until the stock of goods, or the supplier's capacity to supply the service, is exhausted (Article 2:201).

[230] Under the Law, an offer is a proposal for concluding a contract made to a specific person (Article 32 Para 1). However, the Law also provides for a so-called general offer, *i.e.* an offer made to the public. Under this provision, a proposal to conclude a contract made to an unspecified number of persons and containing essential elements of contract envisaged by the proposal, shall be valid as an offer, unless otherwise may be inferred from circumstances of the case or usage (Article 33).

[231] More, S. Perović, *Obligaciono pravo,* op. cit., 270–271.

intention the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.[232] The Law of Obligations also requires that the offer is precise in terms of outlining the essential elements of the contract.[233]

On the other hand, with regard to revocability of an offer, while the Law of Obligations takes the position that the offer is irrevocable unless the offeree receives the revocation before or at the time of receiving the offer,[234] the CISG in principle embraces the revocability principle.[235] Under the CISG, until a contract is concluded, an offer may be revoked so long as the revocation reaches the offeree before he has dispatched an acceptance. The CISG however, allows for significant restrictions of this principle by providing that an offer cannot be revoked: a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable or b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.[236]

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[232] Article 14 Para 1 CISG. Commentary, U. Schroeter, "Article 14", op. cit., 270 ff; F. Ferrari, "Article 14", op. cit., 227 ff; K. H. Neumayer, C. Ming, op. cit., 139 ff, 48–149.

[233] Article 32 of the Law stating: "An offer shall be a proposal for entering into a contract made to a specific person and containing all essential elements of the contract, so that its acceptance would amount to the entering into contract (Para 1). Should the parties, after reaching agreement as to essential elements of contract, leave out some secondary points to be decided upon at a later time, the contract shall be considered concluded, while such secondary points – should the parties themselves fail to reach agreement thereon – shall be regulated by a court, taking into account preliminary negotiations, established practice between the parties and usage (Para 2). Commentary, Mladen Draškić, "Član 32" in *Komentar Zakona o obligacionim odnosima*, Slobodan Perović, I Knjiga, 1995, 77–81. The requirement for a definite offer is expressly laid down in both UNIDROIT Principles, providing that a proposal for concluding a contract constitutes an offer "if it is sufficiently definite" (Article 2.1.2), and the Principles of European Contract Law, stipulating that a proposal amounts to an offer if "it contains sufficiently definite terms to form a contract" (Article 2:201).

[234] See Article 36 of the Law providing that: "An offeror shall be bound by his offer unless his obligation to honour the offer is excluded, or unless such exclusion may be implied from the circumstances of the business transaction involved (Para 1). An offer may be revoked only if the offeree receives the revocation prior to receiving the offer, or simultaneously with it (Para 2). Commentary, Mladen Draškić, "Član 36" in *Komentar Zakona o obligacionim odnosima*, Slobodan Perović, I Knjiga, 1995, 85–87. On the effects of an offer in general, S. Perović, *Obligaciono pravo,* op. cit., 271–273.

[235] A comparative review of the solutions developed regarding revocability or irrevocability of an offer, *Principles of European Contract Law, Parts I and II*, op. cit., 166–168.

[236] Article 16 CISG. Commentary, Ulrich G. Schroeter, "Article 14" in *Schlechtriem & Schwenzer Commentary,* 2016, 318–327; Franco Ferrari, "Article 16" in *Commentary,* Kröll/Mistelis/Perales Viscasillas, 2018, 251–262; K. H. Neumayer, C. Ming, op. cit., 153–163. Identical provision is adopted in UNIDROIT Principles (Article 2.1.4), and the PECL adopts a similar solution (Article 2:202).

As to the moment when a contract is concluded between the absent parties, both the CISG[237] and the Law of Obligations[238] adopt the reception theory[239] according to which a contract is concluded at the moment when the offeror receives offeree's declaration of acceptance.[240] Finally, the principle of consensualism[241] affirmed by the Law of Obligations in stating that: "entering into contract shall not be subject to any form, unless otherwise specified by the law",[242] is duly reflected in the CISG which asserts that: "a contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form"[243].[244]

[237] Article 18 Para 2 CISG stipulating that an acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. See entire Article 18 which also provides for an oral offer ("an oral offer must be accepted immediately unless the circumstances indicate otherwise"). Commentary, Ulrich G. Schroeter, "Article 18" in *Schlechtriem & Schwenzer Commentary,* 2016, 341 ff; Franco Ferrari, "Article 18" in *Commentary,* Kröll/Mistelis/Perales Viscasillas, 2018, 275 ff; K. H. Neumayer, C. Ming, op. cit., 171 ff.

[238] Article 39 Para 1 of the Law which lays down that an offer is accepted when the offeror receives a statement from the offeree that he accepts the offer. Commentary, Mladen Draškić, "Član 39" in *Komentar Zakona o obligacionim odnosima*, Slobodan Perović, I Knjiga, 1995, 92–94. See also Article 40 of the Law relating to a direct offer ("an offer made to a person present shall be considered rejected if not accepted immediately, unless the circumstances of the case indicate that the offeree was entitled to a certain time for considering the offer". On importance of the moment of entering into contract, S. Perović, *Obligaciono pravo,* op. cit., 280–281; J. Perović, *Međunarodno privredno pravo,* op. cit., 243.

[239] On different theories in this regard (declaration theory, dispatch theory, knowledge theory and reception theory), S. Perović, *Obligaciono pravo,* op. cit., 280–285.

[240] The reception theory is adopted in both UNIDROIT Principles (Article 2.1.6 Para 2) and the PECL (Article 2:205). A comparative review of the solutions developed regarding the moment of entry into contract between the absent persons, *Principles of European Contract Law,* op. cit., 173–174.

[241] In detail on the principle of consensualism, S. Perović, *Obligaciono pravo,* op. cit., 182–190, S. Perović, "Osnovna koncepcija Zakona o obligacionim odnosima", op. cit., 40–45.

[242] Article 67 Para of the Law (see the entire provision, governing the form of any subsequent modifications and amendments of the contract, as well as Article 68 relating to rescission of formal contracts). Commentary, Slobodan Perović, "Član 67" and "Član 68" in *Komentar Zakona o obligacionim odnosima*, Slobodan Perović, I Knjiga, 1995, 147–155.

[243] Article 11, which further provides that a contract may be proved by any means, including witnesses. Commentary, Martin Schmidt-Kessel, "Article 11" in *Schlechtriem & Schwenzer Commentary,* 2016, 203–213; Pilar Perales Viscasillas, "Article 11" in *Commentary,* Kröll/Mistelis/Perales Viscasillas, 2018, 191–200; K. H. Neumayer, C. Ming, op. cit., 126–129. See also Article 29 Para 1 CISG whereby a contract may be modified or terminated by the mere agreement of the parties.

[244] UNIDROIT Principles (Article 1. 2) and the PECL (Article 2:101) adopt the same solution, and scholarly writings consider consensualism as general principle of *lex mercatoria* (See P. Perales Viscasillas, "Article 11", op. cit., 199).

2.3. Rights and Obligations of the Parties

The rights and obligations of the parties covered in Part III of the Convention constitute *sedes materiae*[245] of this document. The CISG provides first for the obligations of the seller, outlining the remedies available to the buyer in the event of a breach of contract by the seller, and subsequently, *vice versa*, stipulates the obligations of the buyer, together with the remedies available to the seller for a breach of contract by the buyer.[246] The rules of the CISG governing remedies for breach of contract[247] – contract performance, contract avoidance and damages – are of particular significance for the contractual relationship between the buyer and the seller and will be given special attention in this paper.

Given that an analysis of individual rights and obligations of the parties would go beyond the scope of this paper, we will here briefly address the CISG rules governing non-conformity of the goods, this matter being one of the key points of difference between the CISG and Serbian Law of Obligations.

2.4. Non-Conformity of the Goods – a Brief Overview

The concept of the lack of conformity, (French *défaut de conformité*) as defined under the CISG,[248] is wider than the concept of material defects known to civil law legal systems;[249] it includes not only differences in quality, but also differences in quantity, delivery of goods of different kind – *aliud* and defects in

[245] This is the "core" of the matter regulated by the Convention (see P. Schlechtriem, "Requirements of Application and Sphere of Applicability of the CISG", op. cit., 792).

[246] Drawing on the party autonomy principle established under Article 6 CISG, parties are free to create and regulate their contractual relationship on their own, though the agreement of wills, the validity of contractual clauses being governed by the applicable domestic law. In that regard, the rules of the CISG apply as far as not otherwise provided for by the parties.

[247] These rules are described as the "pillar" of the CISG (see P. Schlechtriem, *ibidem*).

[248] Article 35 CISG. Commentary, Ingeborg Schwenzer, "Article 35" in *Schlechtriem & Schwenzer Commentary,* 2016, 591–622; Commentary Stefan Kröll, "Article 35" in *Commentary,* Kröll/Mistelis/Perales Viscasillas, 2018, 487–538; Cesare Massimo Bianca, "Article 35" in *Commentary,* C. M. Bianca, M. J. Bonell, 1987, 268 – 283; K. H. Neumayer, C. Ming, op. cit., 270–285; J. O. Honnold, op. cit., 252–263; B. Audit, op. cit., 95–109. In Serbian language on the concept of non-conformity as adopted in the CISG, see for example, J. Perović, *Bitna povreda ugovora Međunarodna prodaja robe,* op. cit., 134–147, 195–200; Jelena Perović, "Nesaobraznost robe kao osnov neizvršenja ugovora o prodaji", *Pravo i privreda,* No. 5–8, Belgrade, 2003, 332–344; R. Vukadinović, op. cit., 123–143; A. Ćirić, op. cit., 119–134; M. Draškić, M. Stanivuković, op. cit., 318 ff.

[249] A summary comparative law analysis in that regard, I. Schwenzer, "Article 35", op. cit., 593.

packing.[250] On the other hand, Serbian Law of Obligations makes a distinction between the defects in the quality of goods, covered under the special rules of liability for material defects, and other cases of the breach of obligation to make delivery, governed by different rules of the Law,[251] separate from the rules concerning the liability for material defects.[252] The concept on non-conformity of the goods, as provided in the CISG, should be interpreted autonomously, in line with Article 7.1 CISG, rather than in the light of the applicable criteria of domestic legal systems.[253]

Under the CISG, the seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract (Article 35 Para 1). Except where the parties have agreed otherwise, the goods do not conform with the contract unless they: are fit for the purposes for which goods of the same description would ordinarily be used; are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement; possess the qualities of goods which the seller has held out to the buyer as a sample or model; are contained or packaged in the manner usual for such goods or, where there is no such manner,

[250] It is therefore that the concept of non-conformity adopted in the CISG is described in scholarly writings as "uniform", "unified" or "unique" concept (see for example I. Schwenzer, "Article 35", op. cit., 593; S. Kröll, "Article 35", op. cit., 487; J. O. Honnold, op. cit., 253).

[251] Comparative analysis of the solutions of the CISG concerning non-conformity of goods and the rules of the Law of Obligations relevant to the liability of the seller for material defects, J. Perović, *Bitna povreda ugovora Međunarodna prodaja robe, ibidem.*

[252] However, the concept of non-conformity is not alien to Serbian law. Professor Mihailo Konstantinović' Preliminary Remarks to the Draft Code of Obligations and Contracts provide, in addition to the rules of material defects (Article 407 Para 2), for special rules for the commercial contracts of sale. Under these rules, the liability of the seller for material defects exists even in case of delivery of only one part of individually defined goods, as well as in case of delivery of a smaller or larger quantity than agreed, in case of delivery to the buyer of other goods than that agreed, or delivery of goods of different kind, as well as in cases when the delivered goods do not conform to the sample or model (Article 407 Para 3). Furthermore, the Preliminary Draft Civil Code in that regard contains a proposal whereby the rules on material defects should also apply in case of delivery of only a part of goods or delivery of a smaller or larger quantity than agreed, in case of delivery of other goods than that agreed, or delivery of goods of different kind (*aliud*), as well as when goods are not packed or protected in a manner customary for such kind of goods or, in the absence of such manner, in the manner suitable to protect and preserve the goods (see Article 531 of Preliminary Draft, *Prednacrt Građanskog zakonika Republike Srbije, Druga knjiga, Obligacioni odnosi*, Belgrade, 2009, 176–177).

[253] See I. Schwenzer, "Article 35", op. cit., 593.

in a manner adequate to preserve and protect the goods (Article 35 Para 2). This definition of the non-conformity test shows marked similarities with, as well as departures from, the provisions of Article 479 of the Law of Obligations which deals with material defects.[254]

The CISG in the first place requires the seller to deliver the goods as defined in the *contract*, from which it may be inferred that the Convention adopts a subjective standard in determining the conformity of goods.[255] The provisions of Article 2 CISG dealing with lack of conformity will only be applied where the parties failed to provide otherwise *i.e.* provide for cases of non-conformity different than those identified in the CISG. On the other hand, the Law of Obligations lists four cases where material defect exists (Article 479), permitting the *prima facie* conclusion that the Law "inclines" towards objective determination of non-conformity. However, Article 479 Para 3 of the Law provides that a material defect exists where the goods do not have the properties and characteristics that were explicitly or implicitly agreed, thus placing the determination of a material defect within the context of the contractual provisions.[256] The solutions of the CISG and the Law of Obligations thus tend to show similarities when it comes to the criteria for determining non-conformity of goods or material defects, which rely on party autonomy.[257] In the general context of liability of the seller for material defects, Professor Slobodan Perović holds: "In principle, it may be argued that the transferor is liable for all those defects in the goods that diminish its value or usefulness in terms of the purpose agreed in the contract or arising from the circumstances or use of

[254] These provisions stipulate that a defect exists if the goods do not have the necessary properties for their regular use or for being marketable, if the goods do not have the properties necessary for their specific use being the buyer's reason for acquiring them, which use was known, or should have been known, to the seller, if the goods do not have the properties and characteristics which are explicitly or implicitly agreed, or prescribed and if the seller has delivered goods which are not in conformity with a sample or model, unless the sample or model was presented only for information. See commentary to Article 479 in *Komentar Zakona o obligacionim odnosima*, Slobodan Perović, II Knjiga, 1995, 907–910. On this issue in general, S. Perović, *Obligaciono pravo,* op. cit., 389–404.

[255] See S. Kröll, "Article 35", *ibidem*, I. Schwenzer, "Article 35", op. cit., 594.

[256] See General Usage of Trade (Article 146) providing that: "Where the quality of goods is not defined in the contract, and the intended purpose of the goods was known or had to be known to the seller at the time of the conclusion of the contract, the seller must deliver the goods of such quality as is fit for the purpose. Where the quality of goods is not defined in the contract, and the purpose was neither known nor had to be known to the seller, the goods cannot be of a quality below average".

[257] Any dissimilarities seem not to be particularly important given that the rules in both sources are of dispositive character.

the goods".[258] Another difference between the CISG and the Law of Obligations is found in the CISG rule on the fitness of goods for a particular purpose, providing that no lack of conformity occurs where "the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement".[259] The Law of Obligations, on the other hand, provides that a defect exists where "goods do not have the properties necessary for their specific use, being the buyer's reason for acquiring them, which use was known, or should have been known, to the seller". The wording of the Law of Obligations seems, in comparison to that of the CISG, to be simpler and more acceptable in terms of legal certainty.[260] Finally, the CISG considers defects in packing, or rather, protecting the goods as cases of non-conformity, while the Law of Obligations keeps silent on this matter.[261]

Under the CISG, the seller is liable for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time. The seller is also liable for any lack of conformity which occurs after the passing of risk and which is due to a breach of any of his obligations, including a breach of any guarantee that for a period of time the goods will remain fit for their ordinary purpose or for some particular purpose or will retain specified qualities or characteristics.[262] The Law of Obligations provides for a similar solution.[263]

The seller is not liable for any lack of conformity under the CISG if, at the time of the conclusion of the contract, the buyer knew or could not have been

[258] S. Perović, *Obligaciono pravo,* op. cit., 390.

[259] Article 35 Para 2 Item b CISG.

[260] More, J. Perović, *Bitna povreda ugovora Međunarodna prodaja robe*, op. cit., 138.

[261] More, J. Perović, *Bitna povreda ugovora Međunarodna prodaja robe*, op. cit., 137–138.

[262] Article 36 CISG. Commentary, Ingeborg Schwenzer, "Article 36" in *Schlechtriem & Schwenzer Commentary,* 2016, 623–628; Stefan Kröll, "Article 36" in *Commentary,* Kröll/Mistelis/Perales Viscasillas, 2018, 539–545; Cesare Massimo Bianca, "Article 36" in *Commentary,* C. M. Bianca, M. J. Bonell, 1987, 284–289; K. H. Neumayer, C. Ming, op. cit., 286–290; J. O. Honnold, op. cit., 264–266.

[263] Article 478 of the Law of Obligations, which lays down that the seller is responsible for material defects in the goods existing at the moment of passing of risk to the buyer, regardless of whether or not he was aware of the fact. The seller is also liable for material defects that arise after the passing of risk to the buyer, where they are due to a cause which existed before that. Unlike the CISG, the Law provides that insignificant material defect is not taken into consideration. See commentary to Article 478 in *Komentar Zakona o obligacionim odnosima*, Slobodan Perović, II Knjiga, 1995, 905–907. On this issue in general, S. Perović, *Obligaciono pravo,* op. cit., 393.

unaware of such a lack of conformity.[264] A similar rule is contained in the Law of Obligations.[265] It is worth noting, in this context, that the range of cases wherein the liability of the seller is excluded on account of the buyer's awareness of the lack of conformity is broader in the CISG than in the Law of Obligations, given that the CISG provides that the seller will not be held liable even where goods do not confirm to a sample or model, or in case of inadequate packing or protection of goods.

In view of the fact that the CISG is not concerned with the validity of the contract or of any of its provisions, it does not cover the issue of stipulated exclusion and limitation of liability of the seller for any lack of conformity, an issue that will be addressed further below. Under the Law of Obligations, the parties may limit or entirely exclude the seller's liability for material defects of goods. However, any clauses in the contract of sale limiting or excluding the seller's liability for material defects will be considered null and void if the seller was aware of the defect and failed to inform the buyer thereof, and when the seller imposed such clauses, using his monopoly position. The buyer forfeiting his right to repudiate the contract due to a defect in the goods shall keep the remaining rights arising from such a defect.[266]

Two requirements need to be satisfied under the CISG for there to be a claim for lack of conformity: that the buyer was unaware of such lack of conformity at the time of conclusion of the contract[267] and that the lack of conformity existed at

[264] Article 35 Para 3 CISG.

[265] Article 480 of the Law of Obligations, stipulating that the seller is not responsible for defects in terms of fitness for regular use or trade, specific use and agreed properties or characteristics of the goods, if at the moment of conclusion of the contract, they were known or could not have remained unknown to the buyer. The defects that could not have remained unknown to the buyer are considered to be those that could easily be noticed upon usual inspection by a diligent person having average knowledge and experience characteristic for a person of the same profession or trade as the buyer. The seller is also responsible for the defects which the buyer could easily have noticed, if the former declared that the goods were free of all defects or that they had specific properties or characteristics. See commentary to Article 480 in *Komentar Zakona o obligacionim odnosima*, Slobodan Perović, II Knjiga, 1995, 910–911. On this issue in general, S. Perović, *Obligaciono pravo,* op. cit., 391–393.

[266] Article 486 of the Law of Obligations. See commentary to Article 488 in *Komentar Zakona o obligacionim odnosima*, Slobodan Perović, II Knjiga, 1995, 924–925. On this issue in general, S. Perović, *Obligaciono pravo,* op. cit., 403–404. On exclusion and limitation of liability clauses in Serbian and comparative law, Jelena Perović, "Klauzule o isključenju odgovornosti u međunarodnim privrednim ugovorima", *Pravni život,* No. 11, Belgrade, 2013, 237–248.

[267] Article 35 Para 3 CISG. See I. Schwenzer, "Article 35", op. cit., 613–615; S. Kröll, "Article 35", op. cit., 525–526.

the time of the passing of risk to the buyer.[268] This implies the obligation on part of the buyer to examine the goods within as short a period as practicable under the circumstances[269] and, having established a lack of conformity, inform thereof the seller within a reasonable time after he has discovered it or ought to have discovered it, and not later than two years from the date on which the goods were actually handed over to the buyer.[270] However, even upon the expiry of this period, the buyer will not lose the right to rely on a lack of conformity if such lack of conformity relates to the facts of which the seller was aware or could not have been unaware and which he did not disclose to the buyer.[271] In this respect, the Law of Obligations provides for the solutions similar to those developed in the CISG.[272] The seller is not responsible for the material defects if they were known or could not have remained unknown to the buyer at the moment of conclusion of the contract. With regard to the examination of goods and notifying the seller of material defects, the Law draws a distinction between the patent defects on the one hand and latent defects on the other.[273] Although the Law provides separately for patent and latent defects, this solution does not differ substantially from the corresponding rules of the CISG, which explicitly provides for the seller's liability the due to a lack of conformity even where such lack becomes apparent after the time when the risk passes to the buyer".[274]

The solutions of the CISG and the Law of Obligations on giving notice of lack of conformity also share similarities. In this context, both sources require the

[268] Article 36 CISG.

[269] Article 38 Para 1 CISG. If the period for the examination of goods by the seller is not provided in the contract, in determining the duration of the period within the meaning of Article 38 Para 1 CISG, it is necessary to consider circumstances of each individual case, as well as "reasonable" opportunities for the seller's obligation to be fulfilled. In that regard, Ingeborg Schwenzer, "Article 38" in *Schlechtriem & Schwenzer Commentary,* 2016, 644; Stefan Kröll, "Article 38" in *Commentary,* Kröll/Mistelis/Perales Viscasillas, 2018, 569.

[270] Article 39 CISG. Commentary, Ingeborg Schwenzer, "Article 39" in *Schlechtriem & Schwenzer Commentary,* 2016, 652–673; Stefan Kröll, "Article 39" in *Commentary,* Kröll/Mistelis/Perales Viscasillas, 2018, 586–617; K. H. Neumayer, C. Ming, op. cit., 302–307; J. O. Honnold, op. cit., 277–286.

[271] Article 40 CISG. Commentary, Ingeborg Schwenzer, "Article 40" in *Schlechtriem & Schwenzer Commentary,* 2016, 674–679; Stefan Kröll, "Article 40" in *Commentary,* Kröll/Mistelis/Perales Viscasillas, 2018, 308–310.

[272] See Articles 480–482 of the Law of Obligations.

[273] See commentary to Articles 481 and 482 *Komentar Zakona o obligacionim odnosima*, Slobodan Perović, II Knjiga, 1995, 911–920.

[274] Article 36 Para 1 CISG.

notice to be specific,[275] made within reasonable time in a reliable way.[276] Unlike the CISG, however, the Law provides that the buyer is required to invite the seller to inspect the goods.[277] Under the Law, the buyer does not forfeit the right to claim a material defect even where he failed to fulfil the duty to inspect the goods, or the duty to give notice to the seller in due time, or where the defect appeared six months upon delivery of goods, if such defect was known or could not have remained unknown to the seller.[278] Such solution in principle corresponds to the CISG rules.[279]

Finally, the remedies available to the buyer in case of lack of conformity under the CISG, or material defects under the Law, bear strong similarities. Under the CISG, in case of lack of conformity of goods, the buyer may: require performance – delivery of substitute goods or remedying the lack of conformity;[280] reduce the price;[281] declare the contract avoided[282] and claim damages – alone[283] or in conjunction with other remedies.[284] The same rights are also available to the buyer under the Law of Obligations, where requirements for liability of the seller for material defects are met.[285] However, the claim for delivery of substitute goods and contract avoidance under the CISG requires a fundamental breach of contract to occur, within the meaning of Article 25, a concept unknown to the

[275] The buyer is required to give notice with a detailed description of the defect (Law of Obligations Article 484 Para 1) *i.e.* specifying the nature of the lack of conformity (Article 39 Para 1 CISG).

[276] Article 39 CISG, Article 484 Para 2 Law of Obligations. The Law is silent on the form of notice, and it is assumed that it may be given orally or in writing, directly or using any means of communication (see commentary to Article 484 of the Law of Obligations in *Komentar Zakona o obligacionim odnosima*, Slobodan Perović, II Knjiga, 1995, 921). At the same time, the Law lays down that the buyer is deemed to have fulfilled his duty to notify the seller if the notification about the defect, which had been sent to the seller by the buyer on time by registered mail, telegram or in some other reliable way, should be late or entirely fail to reach the seller (Article 484 Para 2).

[277] Article 484 Para 1 Law of Obligations.

[278] Article 485 Law of Obligations. Commentary to this Article in *Komentar Zakona o obligacionim odnosima*, Slobodan Perović, II Knjiga, 1995, 923–924.

[279] See Article 40 CISG.

[280] Article 46 CISG.

[281] Article 50 CISG.

[282] Article 49 CISG.

[283] Article 45 Para 1 Item b CISG.

[284] Article 45 Para 2 CISG.

[285] See Article 488 Law of Obligations.

Law of Obligations. Special attention will be given to these issues when addressing remedies for breach of contract further below.

3. Matters Explicitly Excluded from the CISG

3.1. Validity of the Contract and Effect of the Contract on Transfer of Property in the Goods Sold

The rule of the CISG which essentially defines the sphere of its application, also provides in explicit terms for the matters being excluded from the CISG. This rule stipulates that "In particular, except as otherwise expressly provided in this Convention, it is not concerned with: (a) the validity of the contract or of any of its provisions or of any usage; (b) the effect which the contract may have on the property in the goods sold" (Article 4). Although these rules may seem fairly simple[286] at first glance, serious problems may arise from their application.

The wording of this rule ("In particular, except as otherwise expressly provided in this Convention") requires some clarifying. In the first place, it may be inferred from such wording that the matters beyond the scope of the CISG are not *automatically* subject to the application of the domestic law, but only where such matters are not covered by the CISG itself. In other words, in determining the law to be applied to the matter at issue, it is necessary to begin by determining if such matter is covered by the CISG; and only where not covered, may recourse be sought in the applicable rules of the domestic law.[287] A typical example in this regard is the rule under Article 11 CISG which expressly provides that a contract of sale need not be concluded in writing nor is subject to any other requirements as to form[288] although under the general rules, the requirement as to form must be satisfied for

[286] In this regard, one author went so far as to claim they were superfluous as providing for what is "obvious": (cited from Franco Ferrari, "CISG and Private International Law", *The 1980 Uniform Sales Law Old Issues Revisited in the Light of Recent Experiences,* op. cit., 45).

[287] See F. Ferrari, "CISG and Private International Law", op. cit., 45; M. Đorđević, "Article 4", op. cit., 69; I. Schwenzer, P. Hachem "Article 4", op. cit., 86.

[288] See Decision of *Tribunale di Padova* (*Pizza boxes case*) of 31 March 2004 (available at: *https://iicl.law.pace.edu/cisg/case/italy-march-31-2004-tribunale-district-court-scatolificio-la-perla-snc-di-aldrigo-stefano*) stating, in the context of Article 4 CISG: "*In fact, even if affirming that Article 4 of the Convention "is not concerned with [(a)] the validity of the contract or of any of its provisions," the question of formal validity is however regulated by Article 11, affirming the general principle of informality... whereby the contract for which written proof does not exist is valid also*".

a formal contract to be valid.[289] Furthermore, the validity of the contract and the effect the contract may produce on the property of the goods sold are provided *exempli causa,*[290] as matters not governed by the CISG,[291] while a range of different questions that may be raised in the context of contracts in international sale remains beyond its sphere.

Exclusion of contract validity from the CISG presents a special problem, there being no uniform definition of the term contract validity[292] at an international level.[293] This is all the more evident in the light of numerous and mutually different definitions of the term in domestic legal systems[294] The need for autonomous and uniform interpretation of the CISG requires the notion of contract validity to be defined in the context of international character of contract and as such distinguished from the criteria accepted in that regard by domestic laws.[295] This leaves open the issue of what criteria the courts should use, in the application of the

[289] On formal contracts and contract form in general, S. Perović, *Obligaciono pravo,* op. cit., 194–197, 338–367; Slobodan Perović, *Formalni ugovori u građanskom pravu,* Belgrade, 1964 (in full).

[290] Which may be inferred from the wording of the rule "In particular, except...". More, Ulrich G. Schroeter, "Contract validity and the CISG", *Uniform Law Review*, Volume 22, No. 1, 2017, 51–52.

[291] See I. Schwenzer, P. Hachem, "Article 4", op. cit., 74, emphasising, in this context: "*This list is, however not exhaustive*"; F. Ferrari, *ibidem.*

[292] On reasons that caused the editors of the CISG to refrain from including a definition of contract validity into the CISG, U. G. Schroeter, "Contract validity and the CISG", op. cit., 48.

[293] See definition of contract validity in Decision of *U.S. District Court for the Southern District of New York* (*Geneva Pharmaceuticals Tech. Corp. v. Barr Labs. Inc.*) of 10 May 2002 (available at: *https://iicl.law.pace.edu/cisg/case/united-states-state-minnesota-county-hennepin-district-court-fourth-judicial-district-24*) stating: "*By validity, CISG refers to any issue by which the "domestic law would render the contract void, voidable, or unenforceable*". Such definition is taken over from Helen Elisabeth Hartnell, "Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods", *Yale Journal of International Law,* No. 18, 1993. On the other hand, Schlechtriem holds that: "*if a contract is rendered void ab initio, either retroactively by a legal act of the state or of the parties such as avoidance for mistake or revocation of one's consent under special provisions protecting certain persons such as consumers, or by a 'resolutive' condition (i.e., a condition subsequent) or a denial of approval of relevant authorities, the respective rule or provision is a rule that goes to validity and therefore is governed by domestic law and not by the CISG*" (see I. Schwenzer, "Article 38", op. cit., 87, H. Flechtner, op. cit., 94). Finally, Schroeter suggests that: "*by provisions concerned with 'the validity of the contract', Article 4(a) of the CISG refers to legal limits to party autonomy*" (U. G. Schroeter, "Contract validity and the CISG", op. cit., 56).

[294] In detail on this issue, H. E. Hartnell, op. cit., 1–93.

[295] M. Đorđević, "Article 4", op. cit., 70.

CISG, to determine the scope of the exceptions under Article 4 in a given case,[296] *i.e.* how may matters covered by the concept of validity[297] be determined by courts with complete certainty, and made subject to the relevant rules of the applicable domestic law.[298]

In any case, it seems beyond doubt that the CISG is not concerned with the legal capacity to conclude contracts and the related issues of concluding a contract through an agent, lack of consent (mistake, fraud, threat, duress), impermissibility of the subject matter of the contract from the standpoint of domestic mandatory regulations, or validity of the general terms of the contract;[299] these matters are governed by the provisions of the applicable domestic law determined in line with the rules of private international law. In that regard, where Serbian law is applicable to a case in dispute, the solution to these matters should be sought by recourse to the Law of Obligations.

On the other hand, the doctrine is divided as to whether the initial objective impossibility of performance[300] should be governed by the relevant rules of domestic law[301] or indeed by the relevant provisions of Articles 68 and 79 CISG which take

[296] See Harry M. Flechtner, "Selected Issues Relating to the CISG's Scope of Application", *The Vindobona Journal of International Commercial Law and Arbitration,* No. 1, 2009, 92, (available at: *https://iicl.law.pace.edu/cisg/bibliography/flechtner-harry-m-us-22*), stating, with respect to exclusion of validity from the sphere of the CISG: "*Thus, contrary to the general impression of its scope, the Convention in fact governs questions of validity – but only if a provision expressly addresses the question*".

[297] In that regard, Drobnig holds the issue of validity of international commercial contracts to be "the most sensitive crossroad of uniform law and domestic legal systems" (Ulrich Drobnig, "Substantive Validity" American Journal of Comparative Law, No. 40, 1992, 635, cited from U. G. Schroeter, "Contract validity and the CISG", op. cit., 47).

[298] See H. E. Hartnell, op. cit., 4.

[299] In detail on matters not governed by the CISG, *Die materielle Gültigkeit von Kaufverträgen: ein rechtsvergleichender Bericht. Erstattet im Auftrag der UNIDROIT vom Max-Planck-Institut für ausländisches und internationales Privatrecht im Hamburg,* Max-Planck-Institut für Ausländisches und Internationales Privatrecht, Hamburg, 1968. More, M. Đorđević, "Article 4", op. cit., 70–77; I. Schwenzer, P. Hachem, "Article 4", op. cit., 87–92; K. H. Neumayer, C. Ming, op. cit., 70–75; H. E. Hartnell, op. cit., 62–78; J. O. Honnold, op. cit., 66–69; U. G. Schroeter, "Contract validity and the CISG", op. cit., 57–62.

[300] On initial impossibility of performance and other classifications of impossibility of performance based on different criteria in general, S. Perović, *Obligaciono pravo,* op. cit., 312–314. On solutions developed in Serbian and comparative law, J. Perović, *Standardne klauzule u međunarodnim privrednim ugovorima,* op. cit., 60–76.

[301] This approach is adopted, for example, by K. H. Neumayer, C. Ming, op. cit., 73–75 and V. Heuzé, op. cit., 85–86.

precedence over the rules of the applicable domestic law.[302] This issue is important in view of the fact that in the legal systems following the tradition of Roman law, the impossibility existing at the moment of concluding a contract (initial impossibility) renders the contract void (*impossibilium nulla obligatio*).[303] In contrast, the prevailing view in commentaries to the Convention is that the provisions of Article 79 do not distinguish between initial and subsequent impossibility, and should therefore apply both where the impediment occurred after the conclusion of a contract and where it existed at the time of its conclusion. The initial impossibility, therefore, under this solution, does not render the contract void, and legal effects of such impossibility are determined under article 79 CISG, same as in case of a subsequent impossibility.[304] Specifically, although Article 4 CISG provides that the Convention is not concerned with the validity of the contract or of any of its provisions, the issues expressly addressed by the Convention are not covered by this exemption but rather subject to the relevant rules of the CISG.[305] In line with the uniform concept of the breach of contract adopted by the CISG, non-performance due to initial impossibility is covered by the CISG rules, just as any other non-performance.[306] The CISG does not provide for validity of individual provisions of the contract, such as, for example[307] retention of title clause (*pactum reservati dominii*),[308] exclusion and

[302] This position is advocated, for example, by I. Schwenzer, P. Hachem, "Article 4", op. cit., 87–88 and Pascal Hachem, "Article 68" in *Schlechtriem & Schwenzer Commentary,* 2016, 980.

[303] See for example Swiss Code of Obligations, Art 20 Para 1, French Civil Code, Arts 1108 and 1601 before the 2016 reform, Italian Civil Code, Arts 1346 and 1418 Para 2, Austrian Civil Code, Art 878 and German Civil Code, Art 306 before the 2002 reform. This distinction is also accepted in Serbian Law of Obligations. More, S. Perović, *Obligaciono pravo*, op. cit., 312–314, 519 ff.

[304] Ingeborg Schwenzer, "Article 79" in *Schlechtriem & Schwenzer Commentary,* 2016, 1134; Yesim M. Atamer, "Article 79" in *Commentary,* Kröll/Mistelis/Perales Viscasillas, 2018, 1057–1058; U. G. Schroeter, "Contract validity and the CISG", op. cit., 63–64.

[305] See I. Schwenzer, P. Hachem, "Article 4", op. cit., 87–88.

[306] The CISG commentaries expressly assert that the impediment may exist at the time of conclusion of the contract. More, J. Perović, *Standardne klauzule u međunarodnim privrednim ugovorima*, op. cit., 69 ff.

[307] More on contract provisions beyond the sphere of the CISG, I. Schwenzer, P. Hachem, "Article 4", op. cit., 90–92; M. Đorđević, "Article 4", op. cit., 74 ff.

[308] See Decision of *Federal Court, South Australian District, Adelaide* (*Roder v. Rosedown*) of 28 November 1995 (available at: *http://www.uncitral.org/docs/clout/AUS/AUS_280495_FTAdelaide.pdf*) where the Court held the CISG to be inapplicable to the validity of the retention of title clause. On this issue, Corinne Widmer Lüchinger, "Article 30" in *Schlechtriem & Schwenzer Commentary,* 2016, 518–519; M. Đorđević, "Article 4", op. cit., 77–78. See, however Burghard Piltz, "Article 30" in *Commentary,* Kröll/Mistelis/Perales Viscasillas, 2018, 397, stating in this regard: "*The parties are free to agree that regardless of the delivery of the goods, property in goods shall only be transferred after the*

limitation of liability clauses[309] and liquidated damages clauses.[310] If a contract is governed by Serbian law, the validity of such clauses is determined by applying the relevant provisions of the Law of Obligations.[311] By the same token, the validity of usage remains outside the sphere of the CISG, however, distinction must be drawn between validity itself and the terms under which the parties are bound by usage,[312] a matter provided under Article 9 CISG.[313] Finally, in addition to the validity of

price for the goods has been paid in full. It has to be judged by the rules of the CISG whether or not such an agreement regarding a reservation of title is concluded with a legally binding effect".

[309] However, in determining the validity of such clauses, courts ought to consider general principles of the CISG. In detail on this matter, Jelena Perović "Interplay between the CISG and other legal sources of contract law (or contract principles) – on the example of clauses excluding or limiting the liability", *International Conference 35 Years of CISG – Present Experiences and Future Challenges* – organized by UNCITRAL Secretariat and the Faculty of Law, University of Zagreb, December 1–2, Zagreb, 2015, 11–35.

[310] See CISG Advisory Council Opinion No. 10 (available at: https://www.cisgac.com/cisgac-opinion-no10/). In detail, Jack Graves, "Penalty Clauses and the CISG", *Journal of Law and Commerce,* Volume 30, No. 2, 2012, 153–172. In that regard, Schwenzer, "Article 4", op. cit., 91–92; M. Đorđević, "Article 4", op. cit., 76–77, citing abundance of court decisions relating to this issue.

[311] Sale with retention of title – Articles 540–541 of the Law (see S, Perović, *Obligaciono pravo*, op. cit., 562–568); limitation and exclusion of liability – Article 265 of the Law (see Ivica Jankovec, *Ugovorna odgovornost,* Belgrade, 1993, 363–383); liquidated damages – Articles 270–276 (see I. Jankovec *Ugovorna odgovornost,* op. cit., 297–317; Dragor Hiber, Miloš Živković, *Obezbeđenje i učvršćenje potraživanja,* Belgrade, 2015, 411–473).

[312] See Decision of Supreme Court of Austria Oberster Gerichtshof (*Wood case*) of 21 March 2000 (available at: *https://iicl.law.pace.edu/cisg/case/austria-ogh-oberster-gerichtshof-supreme-court-austrian-case-citations-do-not-generally-54*): *"According to Art. 4(a), the Convention, unless expressly provided otherwise, does not govern the validity of usages. The question of validity must be assessed under national law. In Art. 9 CISG, the Convention only governs the applicability of valid usages*".

[313] Under Article 9 CISG: "The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves (1). The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned (2)". Commentary, Martin Schmidt-Kessel, "Article 9" in *Schlechtriem & Schwenzer Commentary,* 2016, 181–196; Pilar Perales Viscasillas, "Article 9" in *Commentary,* Kröll/Mistelis/Perales Viscasillas, 2018, 162–181; Michael Joachim Bonell, "Article 9" in *Commentary,* C. M. Bianca, M. J. Bonell, 1987, 103–115; K. H. Neumayer, C. Ming, op. cit., 116–121; J. O. Honnold, op. cit., 124–131; Edward Allan Farnsworth, "Unification of Sales Law: Usage and Course of Dealing", *Unification and Comparative Law in Theory and Practice: Liber amicorum Jean Georges Sauveplanne*, Deventer: Kluwer Law and Taxation, 1984, 81–89; Aleksandar Goldštajn, "Usages and Trade and Other Autonomous Rules of International Trade According to the UN (1980) Sales Convention", *International Sale of Goods: Dubrovnik Lectures,* Oceana, 1986, 55–100.

contract, contractual provisions and usage, the effects which the contract may have on the property in the goods sold are explicitly excluded from the CISG,[314] in view of the many differences surrounding this matter in comparative law.[315]

3.2. Other Matters

In addition to the exemptions expressly provided in the Convention, a whole range of different matters that may be raised in the context of international sales contracts remains beyond its sphere. The number and diversity of areas covering these matters make it difficult not only to classify such matters based on certain criteria, but also to enumerate them exhaustively.[316] Furthermore, some of these matters, such as set-off,[317] change of circumstances (*rebus sic stantibus* clause),[318]

[314] Article 4 Item b CISG. Commentary, I. Schwenzer, "Article 4", op. cit., 92; M. Đorđević, "Article 4", op. cit., 77; K. H. Neumayer, C. Ming, op. cit., 75–76; J. O. Honnold, op. cit., 70. In that regard see for example Decision of *OLG München* (*Stolen car case*) of 5 March 2008 (available at: *https://iicl.law.pace.edu/cisg/case/germany-march-5-2008-oberlandesgericht-court-appeal-german-case-citations-do-not-identify*) and Decision of Bundesgerichtshof (*Key press machine*) of 15 February 1995 (available at: *https://iicl.law.pace.edu/cisg/case/germany-february-15-1995-bundesgerichtshof-federal-supreme-court-translation-available*).

[315] In Serbian law a contract produces only the obligation-law effects and is not sufficient for a transfer of title. On the effects of the contract between parties in Serbian and comparative law in general, S. Perović, *Obligaciono pravo*, op. cit., 373–376.

[316] On difficulties in that regard, U. G. Schroeter, "Contract validity and the CISG", op. cit., 52.

[317] The position widely accepted in court practice is that set-off is not covered by the CISG (see M. Đorđević, "Article 4", op. cit., 83–84, citing abundance of decisions to that effect). However, certain court decisions held that the CISG may still be applicable to set-off where the claims arose from a contract subject to the CISG. See Decision of *AG Duisburg* (*Pizza cartons case*) of 13 April 2000 (available at: *https://iicl.law.pace.edu/cisg/case/germany-ag-alsfeld-ag-amtsgericht-petty-district-court-german-case-citations-do-not-5*) and Decision of *OLG München* (*Leather goods case*) of 09 July 1997 (available at: *https://iicl.law.pace.edu/cisg/case/germany-oberlandesgericht-hamburg-oberlandesgericht-olg-provincial-court-appeal-german-107*). On positions adopted in the doctrine on this issue, M. Đorđević, *ibidem*; I. Schwenzer, P. Hachem, "Article 4", op. cit., 85–86; F. Ferrari, "CISG and Private International Law", op. cit., 51.

[318] This is one of the most controversial and frequently debated issues in the doctrine of the international sales law. For different positions on this matter see for example: K. H. Neumayer, C. Ming, op. cit., 535–538; B. Audit, op. cit., 174–175; Denis Tallon "Article 79" in *Commentary,* C. M. Bianca, M. J. Bonell, 1987, 591–595; V. Heuzé, op. cit., 425–426; C. Witz, op. cit., 109–110; I. Schwenzer, P. Hachem, "Article 4" and I. Schwenzer, "Article 79", op. cit., 90–91 and 1150–1151; Y. M. Atamer, "Article 79", op. cit., 1070–1075; J. O. Honnold, op. cit., 483 ff; Christoph Brunner, *Force Majeure and Hardship under General Contract Principles, Exemption for Non-performance in International Arbitration*, Wolters Kluwer Law & Business, 2009, 213–215 and 397–400; CISG-AC Opinion No. 7,

interest rate[319] etc, are highly disputed in so far as the CISG application is concerned. Although these matters are not expressly addressed by the CISG, court practice and doctrine voice different positions as to whether or not such matters are excluded from the CISG and "left" to the rules of applicable domestic law.[320]

On the other hand, commentaries to the CISG and case law in principle agree that the CISG is not concerned with the following matters: periods of limitation of actions,[321] assignment of contract,[322] assignment,[323] assumption of debt,[324] issue of the debtor's

Exemption of Liability for Damages under Article 79 of the CISG, 12 October 2007, rapporteur prof. A. M. Garro, New York, USA, (available at: *https://iicl.law.pace.edu/cisg/scholarly-writings/cisg-advisory-council-opinion-no-7-exemption-liability-damages-under-article*). Harry M. Flechtner, "The Exemption Provisions of the Sales Convention, including Comments on "Hardship" Doctrine and the 19 June 2009 Decision of the Belgian Cassation Court", *Annals of the Faculty of Law in Belgrade, Belgrade Law Review, Journal of Legal and Social Sciences University of Belgrade*, Year LIX. No. 3, 2011, 84–102. On change of circumstances in Serbian and uniform law in Serbian language, Jelena Perović "Promenjene okolnosti u srpskom ugovornom pravu i izvorima uniformnog ugovornog prava", *Anali Pravnog fakulteta u Beogradu,* No. 1, Belgrade, 2012, 185–202.

[319] In details, M. Đorđević, "Article 4", op. cit., 86–87 and the authors cited therein; Franco Ferrari, "Uniform Application and Interest Rates Under the 1980 Vienna Sales Convention" *Cornell Review of the Convention on Contracts for the International Sale of Goods*, 1995, 3–19 (available at: *https://iicl.law.pace.edu/cisg/scholarly-writings/uniform-application-and-interest-rates-under-1980-vienna-sales-convention*). Also see CISG-AC Opinion No. 9 (available at: *https://iicl.law.pace.edu/cisg/scholarly-writings/cisg-advisory-council-opinion-no-9-consequences-avoidance-contract*) and CISG–AC Opinion No. 14 (available at: *https://iicl.law.pace.edu/cisg/scholarly-writings/cisg-advisory-council-opinion-no-14-interest-under-article-78-cisg*).

[320] More on this, M. Đorđević, "Article 4", op. cit., 78–89; I. Schwenzer, I. Schwenzer, "Article 4", op. cit., 86 ff.

[321] This matter is governed by the rules of domestic law or the UN Convention on the Limitation Period in the International Sale of Goods from 1974 (more on this Convention: *https://uncitral.un.org/en/texts/salegoods/conventions/limitation_period_international_sale_of_goods*). See I. Schwenzer, P. Hachem, "Article 4", op. cit., 93: "*It is unanimously held that (periods of limitation of actions are not governed by the CISG but are governed by domestic law or the UN Limitation Convention*" and M. Đorđević, "Article 4", op. cit., 78–79, citing abundance of court decisions to this effect.

[322] See for example Decision of *Bundesgerichtshof* (*Key press machine*) of 15 February 1995 (available at: *https://iicl.law.pace.edu/cisg/case/germany-february-15-1995-bundesgerichtshof-federal-supreme-court-translation-available*). In that regard, F. Ferrari, "CISG and Private International Law", op. cit., 50.

[323] See for example Decision of *Oberster Gerichtshof* (*Tombstones case*) of 07 September 2000 (available at: *https://iicl.law.pace.edu/cisg/case/austria-ogh-oberster-gerichtshof-supreme-court-austrian-case-citations-do-not-generally-49*). In that regard, F. Ferrari, *ibidem*.

[324] See for example Decision of *Oberster Gerichtshof* (*Processing plant case*) of 24 April 1997 (available at: *https://iicl.law.pace.edu/cisg/case/austria-ogh-oberster-gerichtshof-supreme-court-austrian-case-citations-do-not-generally-50*): "*assumptions of obligations... do not fall within the material scope of application of the CISG*". In that regard, F. Ferrari, *ibidem*.

joint and several liability,[325] validity of settlement agreement,[326] excessive loss,[327] novation,[328] validity of forum selection clauses[329],[330] jurisdictional matters[331] and

[325] The fact that the CISG does not provide for obligations involving several parties, raises the question whether, in the absence of relevant provision in the contract, debtors should be held liable jointly and severally, or each debtor should be liable only for his part of the debt. Under Article 7 Para 2 CISG, questions concerning matters governed by the CISG which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the domestic law applicable by virtue of the rules of private international law. In this regard, the view advocated in scholarly writings is that, where not provided for in the agreement, the matter of joint and several liability of several debtors in a contract will be decided in line with the general principles of the CISG, and in their absence, in conformity with the rules of the applicable domestic law. If, however, the contract provides for joint and several liability of debtors, the validity of such clause will be determined by applying the rules of the applicable domestic law. See Marko Perović, *Solidarnost dužnika u obligacionim odnosima,* PhD thesis defended at the Faculty of Law of Belgrade University, Belgrade, 2018, 116–118 and the references cited therein (available at: *https://nardus.mpn.gov.rs/bitstream/handle/123456789/10596/Disertacija.pdf?sequence=6&isAllowed=y*). The issue has been addressed in court practice. See for example Decision of *LG München* (*Vodka case*) of 25 January 1996 (available at: *https://iicl.law.pace.edu/cisg/case/germany-lg-aachen-lg-landgericht-district-court-german-case-citations-do-not-identify-154*) and Decision of *Judicial Board of Szeged* (Wine case) of 05 December 2008 (available at: *https://iicl.law.pace.edu/cisg/case/hungary-december-5-2008-judicial-board-szeged-appellate-court-translation-available*).

[326] See for example Decision of *LG Aachen* (*Electronic hearing aid case*) of 14 May 1993 (available at: *https://iicl.law.pace.edu/cisg/case/germany-may-14-1993-landgericht-regional-court-german-case-citations-do-not-identify*). In that regard, F. Ferrari, *ibidem*; M. Đorđević, "Article 4", op. cit., 89.

[327] See I. Schwenzer, P. Hachem, "Article 4", op. cit., 90: "*With regard to cases in which the relationship between performance and counter-performance is grossly disproportionate it is also domestic law which has to decide upon the fate of the contract. This also holds true for the question, whether gross disparity is given. The CISG makes no provision for the relationship between performance and counter-performance*".

[328] See Arbitral Award of *ICC Arbitration, Case No. 7331* (*Cowhides case*) from 1994 (available at: *http://www.unilex.info/cisg/case/140*). In that regard, M. Đorđević, *ibidem.*

[329] These matters are addressed by other international documents, such as Brussels I Regulation 44/2001 at the regional level, and on the international plane – The Hague Convention on Choice of Court of 2005. Arbitration agreement, on the other hand, is covered, among others, by The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 and European Convention on International Commercial Arbitration of 1961.

[330] See Decision of *Cámara Nacional de Apelaciones en lo Comercial* (*Inta v. Officina Meccanica*) of 14 October 1993 (available at: *https://iicl.law.pace.edu/cisg/case/argentina-c%C3%A1mara-nacional-de-apelaciones-en-lo-comercial-appellate-court-inta-sa-v-mcs*). In that regard, M. Đorđević, "Article 4", op. cit., 79–80 and in that context, the exclusion of the validity of arbitration clause from the CISG.

[331] See M. Đorđević, "Article 4", *ibidem*; I. Schwenzer, P. Hachem, "Article 4", op. cit., 93; F. Ferrari, *ibidem.*

other matters procedural in nature.[332] [333] These matters are governed by the provisions of the domestic law applicable under the rules of private international law, unless other uniform rules addressing the matter at issue have been agreed.

VII. SYNTHESIS

In addressing the issues raised in the context of applicability of the CISG, attention should first and foremost be given to the set of rules under Articles 1–6 CISG in their entirety, and only then devoted to the analysis of each individual rule. This road is nowhere near straightforward, given that these rules seek to define the sphere of application of the CISG from different aspects, creating in totality a mosaic of solutions relevant for outlining the field covered by this international document. It may be inferred from the above analysis of these rules that the efforts to define the sphere of application of the CISG have sparked a number of controversies.

In defining a contract for the sale of goods (*ratione materiae* application), the applicability of the CISG may be doubtful in case of certain contracts similar to contracts of sale. In this context, it is sometimes difficult to distinguish between sales and services using the test of "substantial part" wording under Article 3 CISG. A similar problem arises with regard to the application of the CISG to the contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services (mixed contracts). The issue of *ratione materiae* application of the CISG to international barter contracts and international distributorship contracts has raised particular dilemmas. Finally, the interpretation of the notion of corporeal objects in the context of the CISG deserves special attention, particularly with regard to the application of the CISG to software. This is a controversial and frequently debated issue, variously interpreted in the doctrine and case law.

On the other hand, in determining the internationality of the contract of sale, (territorial application), the CISG applies the subjective test which considers the place of business of the parties; for the CISG to be applicable, the parties must have their places of business in territories of different States. The CISG, however, does not define the notion of the place of business, thus leaving room for different

[332] Scholarly articles underline that in interpretation of the CISG, care must be taken to avoid making a distinction between substantive and procedural matters, in view of the different criteria applied in that context in domestic legal systems; instead, it is important to establish whether or not the matter at issue is covered by the CISG. See M. Đorđević, "Article 4", op. cit., 79.

[333] On other matters that remain outside the scope of the CISG, consult I. Schwenzer, P. Hachem, "Article 4", op. cit., 86 ff; M. Đorđević, "Article 4", op. cit., 78 ff.

interpretations. The position held in that regard in the doctrine is that this notion must be interpreted autonomously in the light of Article 7 Para 1 CISG, with no recourse to the relevant criteria of the domestic law.

The CISG allowed the freedom of contract principle to achieve full expression, by providing that the parties may exclude its application of derogate from or vary the effect of any of its provisions. This rule reflects dispositive character of the CISG, which applies automatically once requirements for its application are met, unless the parties have excluded or restricted its application, or varied the effect of its provisions (opting out). In this context, special attention is to be given to what may be considered respectively as explicit and implicit exclusion of the CISG, and the fact that the exclusion may encompass the entire CISG as well as its individual provisions.

Finally, the provisions of Article 4 CISG, which essentially define the scope of its application, provide in explicit terms for the matters not governed by the CISG. In this context, the validity of the contract and the effect the contract may produce on the property of the goods sold are provided *exempli causa* as matters not governed by the CISG, while a range of different questions that may be raised in relation to the contracts in international sale remains beyond its sphere. Exclusion of the contract validity from the CISG presents a special problem, there being no uniform definition of the term contract validity at an international level. This leaves open the issue of the criteria the courts should use in the application of the CISG to determine the scope of the exceptions under Article 4, *i.e.* how may matters covered by the concept of validity be determined by courts with complete certainty, and made subject to the relevant rules of the applicable domestic law.

Chapter II

INTERPRETATION OF THE CISG

I. IMPORTANCE OF INTERPRETATION OF THE CISG

International conventions, by virtue of their unified rules, ought to contribute to raising the level of legal certainty in the fields they bear upon. One of the basic requirements in this regard is to ensure their uniform interpretation. In the context of the CISG, which covers a broad spectrum of contractual relations in the international sale of goods, the fulfilment of this requirement presents a complex and extremely delicate mission. As an international document enacted in more than 90 countries, applied by judges and arbitrators coming from different legal systems, the CISG faces the risk of being interpreted not in a way that is autonomous and uniform, but rather in the light of criteria and legal concepts accepted in different national legal cultures and traditions.[334] The scope for different interpretations is all the greater since there is no court at the international level vested with exclusive jurisdiction to interpret the Convention,[335] and the interpretation of uniform rules rests "in the hands" of national courts,[336] whose logic and legal reasoning may differ from country to country.[337] This is paving the way for the Convention to lose its uniform identity,[338] and for its rules to become subject to

[334] See Franco Ferrari "Gap-Filling and Interpretation of the CISG: Overview of International Case Law", *Vindobona Journal of International Commercial Law & Arbitration,* No. 7, 2003, 63, stating that, in practice, different countries almost inevitably come to put different interpretations upon the same enacted words.

[335] See J. Lookofsky, "In Dubio Pro Conventione? Some Thoughts About Opt-outs, Computer Programs and Preemption Under the 1980 Vienna Sales Convention (CISG)", op. cit., 268, stating in that respect: "*no international court sits atop the CISG "pyramid" with the authority to iron out differences in opinion among the national instances below*"

[336] More, Martin Gebauer, "Uniform Law, General Principles and Autonomous Interpretation", Uniform Law Review, Volume 5, No. 4, 2000, 683–704; Susanne Cook, "The Need for Uniform Interpretation of the 1980 UN Convention on Contracts for the International Sale of Goods", *University of Pittsburgh Law Review*, No. 50, 1988, 197.

[337] See B. Audit, op. cit., 47.

[338] Some authors describe this as "re-nationalisation" of unified law. See M. Gebauer, op. cit., 683.

different interpretations, which in itself opens the door to legal uncertainty in the area covered by the CISG.[339]

Aware of this problem, the drafters of the Convention established a special set of rules aimed to ensure uniform application of this international document.[340] These rules, concerned with the interpretation of the Convention and gap-filling, are laid down in Article 7 CISG providing that: "In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade (1). Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law (2)".[341] It is rightfully argued in literature that Article 7 presents one of the most important provisions of the CISG, given that a successful application of the Convention depends primarily on its uniform interpretation by courts and arbitral tribunals.[342]

II. PRINCIPLES OF INTERPRETATION

1. General Rule

Under Article 7 Para 1, the CISG provides for three principles to be applied in its interpretation, relating to: the international character of the Convention, its uniform application and the observance of good faith in international trade. Similar rules of interpretation are contained in some other documents of uniform law, such as UNIDROIT Convention on Agency in International Sale of Goods of 1983,[343]

[339] In this regard, it is held in the doctrine that unification of the law at international level is, understandably, impeded by political, social, economic and cultural differences among countries (see Kurt H. Nadelmann, "Uniform Interpretation of 'Uniform' Law, *1959 UNIDROIT Yearbook*, Rome, 1960, 383, cited from Leonardo Graffi, "Razlike u tumačenju Konvencije UN o ugovorima o međunarodnoj prodaji robe: koncept 'bitne povrede ugovora'", *Pravni život*, No. 11, Belgrade, 2003, 238).

[340] On history of these rules, Ingeborg Schwenzer, Pascal Hachem, "Article 7" in *Schlechtriem & Schwenzer Commentary,* 2016, 119–120; K. H. Neumayer, K. Ming, op. cit., 96 ff.

[341] Commentary, I. Schwenzer, P. Hachem, "Article 7", op. cit., 119–142; Pilar Perales Viscasillas, "Article 7" in *Commentary,* Kröll/Mistelis/Perales Viscasillas, 2018, 112–145; Michael Joachim Bonell, "Article 7" in *Commentary,* C. M. Bianca, M. J. Bonell, 1987, 65–94; K. H. Neumayer, K. Ming, op. cit., 96–110; J. O. Honnold, op. cit., 88–114.

[342] See P. Perales Viscasillas, "Article 7", op. cit., 113.

[343] Article 6 Para 1 of the Convention.

UNIDROIT Convention on International Factoring of 1988,[344] UNIDROIT Convention on International Financial Leasing of 1988,[345] UNIDROIT Principles of International Commercial Contracts[346] and Principles of European Contract Law.[347]

2. Autonomous Interpretation

The principle which prescribes giving regard to the international character of the Convention in its interpretation indicates that the CISG is to be interpreted autonomously.[348] Essentially, it imposes the requirement for the meaning of the CISG rules to be determined independently from any criteria applied in domestic law in that regard,[349] notwithstanding the fact that international conventions, by virtue of being enacted in a state, become part of its domestic law.[350]

In this regard, the wording used in the CISG should not be interpreted in the context of the corresponding wording of the domestic law, even in case of identical terminology,[351] *i.e.* even where the domestic law makes the identical choice of words as the CISG[352] (such as "good faith", "usage", "reasonably", "termination" etc).[353] Such terms should be considered as separate and different from the corresponding terms of the domestic law since the language of international conventions is presumed to be "neutral"[354] as a rule. The method of interpretation to be

[344] Article 4 of the Convention.

[345] Article 6 of the Convention.

[346] Article 1.6 UNIDROIT Principles.

[347] Article 1:106 PECL.

[348] Peter Huber, "Some introductory remarks on the CISG", *Internationales Handelsrecht*, Sellier, European Law Publishers, No. 6, 2006, 228–238 (available at: *https://iicl.law.pace.edu/cisg/scholarly-writings/some-introductory-remarks-cisg*); P. Schlechtriem, "Requirements of Application and Sphere of Applicability of the CISG", op. cit., 789; B. Audit, *ibidem*; I. Schwenzer, P. Hachem, "Article 7", op. cit., 122.

[349] In other words, the CISG is to be interpreted in the context of its international character, rather than the "optics" of the domestic law (Franco Ferrari, "The Relationship Between the UCC and the CISG and the Construction of Uniform Law" *Loyola of Los Angeles Law Review,* No. 29, 1996, 1025).

[350] In that regard, F. Ferrari, "Gap-Filling and Interpretation of the CISG: Overview of International Case Law", op. cit., 64.

[351] P. Huber, *ibidem,* underlining the importance of autonomous "*CISG - meaning*" interpretation.

[352] Franco Ferrari, "The Relationship Between the UCC and the CISG and the Construction of Uniform Law" op. cit., 1023.

[353] F. Ferrari, "Gap-Filling and Interpretation of the CISG: Overview of International Case Law", op. cit., 65.

[354] On neutrality of the language of the CISG, M. J. Bonell, "Article 7", op, cit., 74.

applied[355], in this regard, relies on the autonomous wording of the CISG,[356] positions taken in the course of its preparation at the Diplomatic Conference in Vienna (*travaux préparatoires*),[357] the place and role of the specific rule within the system of the CISG,[358] and the goals it aims to achieve.[359]

The need to take into account the international character of the CISG in its interpretation has also been affirmed in court practice. Thus, a decision of a US court warns that even when the language of the relevant CISG provisions and the UCC[360] is identical, the UCC caselaw should not be applicable to the interpretation of the CISG.[361] By the same token, Swiss courts hold that the requirement to have regard to the international character of the CISG enjoins the courts to interpret it autonomously, excluding recourse to any domestic laws.[362] Explicit position to that effect is also taken by the German Federal Supreme Court[363].[364]

[355] On specific methods of interpretation to be applied, P. Perales Viscasillas, "Article 7", op. cit., 115 and 127 ff; I. Schwenzer, P. Hachem, "Article 7", op. cit., 129.

[356] In particular the official languages of the CISG: Arabic, Chinese, English, French, Russian and Spanish, although regard should be given to the fact that these texts show certain terminological discrepancies. See I. Schwenzer, P. Hachem, "Article 7", op. cit., 122.

[357] See *https://uncitral.un.org/en/commission* and *https://iicl.law.pace.edu/cisg/page/legislative-history-1980-vienna-diplomatic-conference.*

[358] I. Schwenzer, P. Hachem, "Article 7", op. cit., 123.

[359] P. Huber, *ibidem.*

[360] Uniform Commercial Code (USA).

[361] *Delchi Carrier S.p.A. v. Rotorex Corp.*, 71 F.3d 1024, 1028 (2d Cir. 1995): "*UCC case law is not per se applicable*", cited from F. Ferrari, "Gap-Filling and Interpretation of the CISG: Overview of International Case Law", op. cit., 66.

[362] See for example Decision of *HG Kanton Aargau*, (*Granular plastic case*) of 11 June 1999 (available at: *https://iicl.law.pace.edu/cisg/case/switzerland-handelsgericht-commercial-court-aargau-11*). More on Swiss court practice in that regard, F. Ferrari, *ibidem*.

[363] *Bundesgerichtshof* (*Cobalt sulphate case*) of 03 April 1996 (available at: *https://iicl.law.pace.edu/cisg/case/germany-bger-bundesgerichtshof-federal-supreme-court-german-case-citations-do-not-identi-5*): "*The CISG is different from German domestic law, whose provisions and special principles are, as a matter of principle, inapplicable for the interpretation of the CISG (Art. 7 CISG)*". See also *Bundesgerichtshof* (*Vine wax case*) of 24 March 1999 (available at: *https://iicl.law.pace.edu/cisg/case/germany-bger-bundesgerichtshof-federal-supreme-court-german-case-citations-do-not-ident-33*).

[364] However, certain courts have taken the contrary position on this issue, allowing that analogous application of the domestic law criteria to the CISG rule under scrutiny, may assist the judge in the interpretation of the Convention. This approach has been sharply criticised in the doctrine as being contrary to the goals of the CISG. See F. Ferrari, "Gap-Filling and Interpretation of the CISG: Overview of International Case Law", op. cit., 67.

It is in this context that we need to understand some broad and general terms used by the CISG, such as "substantial part" of the materials and "preponderant part" of the obligation in Article 3, "fundamental breach of contract" in Article 25, "impediment" in Article 79, "place of business" or "seat" in Articles 1 and 10 CISG etc. These and similar terms in the CISG have their own special meaning, separate from the preconceptions of the domestic law in that regard, and this lends singular importance to the principles of autonomy and uniformity in their interpretation.[365]

3. Uniform Interpretation

The requirement for uniform interpretation laid down in Article 7 Para 1 CISG ("In the interpretation of this Convention, regard is to be had... to the need to promote uniformity in its application") is closely linked to the autonomous interpretation of the CISG.[366] The reference made in the CISG to the need for its uniform interpretation does not mean that the Convention is a document "frozen in time", "perfect" and self-sufficient.[367] To the contrary, the general flexibility of the solutions of the Convention, and above all its rules concerning the gap-filling[368] and the importance of usage,[369] leave room enough for the courts to find optimum solutions in line with the circumstances of each case at issue.[370] What the above reference seeks to achieve is for the uniform rules to be understood as general and common to the transactions involving the international sale of goods,[371]

[365] See P. Perales Viscasillas, "Article 7", op. cit., 116: "*In that sense, the Convention creates its own terminology displacing similar concepts under domestic law...The Convention, through its uniform and autonomous concepts and progressive awareness, tries to achieve an international, concrete, predictable, and uniform interpretation*".

[366] Although the principles of autonomous and uniform interpretation are interlinked, they should not be equated. Autonomous interpretation of the CISG is no guarantee of its uniform application, since in some cases different courts are likely to give different "autonomous" interpretations of the same rules. On the other hand, uniform application of the CISG is not invariably based on its autonomous interpretation (M. Gebauer, op. cit., 683).

[367] In that regard, P. Schlechtriem, "Requirements of Application and Sphere of Applicability of the CISG", op. cit., 788.

[368] Article 7 Para 2 CISG.

[369] Article 9 CISG.

[370] In that regard, P. Perales Viscasillas, "Article 7", *ibidem*; P. Schlechtriem, "Requirements of Application and Sphere of Applicability of the CISG", op. cit., 788.

[371] Uniform application of the CISG does not entail identical solutions; the rules of the CISG may be adapted to the relevant circumstances of each case in hand. See in that regard, Camilla Andersen, "Defining Uniformity in Law", *Uniform Law Review,* Volume 12, No. 1, 2007, 5, stating:

regardless of the nationality of the parties, place of performance, or the type of the goods in hand[372].[373]

The CISG, however, does not provide for guidance on how to achieve its uniform application, and there is no international court[374] with an exclusive authority in interpreting the CISG.[375] A uniform application of the CISG therefore requires the judges and arbitrators applying the CISG to have regard to the court decisions and arbitral awards in other states and thereby develop common rules for the interpretation of the CISG.[376] In this sense, judges and arbitrators, in the reasoning of their decisions relating to the CISG application, often quote the decisions of the courts in other countries rendered in similar cases.[377]

At the international plane, several efforts have been made to make the case law of different countries available to those applying the Convention and thus promote its uniform interpretation. Particularly important in this regard are the activities undertaken within UNCITRAL, above all the CLOUT system[378] and the Digest of

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"*We can define 'uniformity' as the varying degree of similar effects on a legal phenomenon across boundaries of different jurisdictions resulting from the application of deliberate efforts to create specific shared rules in some form*".

[372] See in this context Decision of *U.S. District Court for the Southern District of New York* (*St. Paul Guardian Insurance Company et al. v. Neuromed Medical Systems & Support et al.*) of 26 March 2002 (available at: *https://iicl.law.pace.edu/cisg/case/united-states-march-26-2002-district-court-st-paul-guardian-insurance-company-and*).

[373] See P. Perales Viscasillas, "Article 7", op. cit., 117.

[374] Schlechtriem suggests that this situation resembles "members of an orchestra without a conductor", cited from I. Schwenzer, P. Hachem, "Article 7", op. cit., 123.

[375] In this context some authors refer to "international supreme court that is competent to decide on the interpretation as a last instance" (I. Schwenzer, P. Hachem, "Article 7", *ibidem*), others speak of "supranational court having the power to decide with binding effect on the correct interpretation of the Convention" (P. Huber, "Some introductory remarks on the CISG", op. cit., 228), while yet others of "common court for the authoritative interpretation of the uniform law" (M. Gebauer, *ibidem*) etc.

[376] I. Schwenzer, P. Hachem, "Article 7", *ibidem.*

[377] Thus, for example, in the Award of Foreign Trade Court of Arbitration at the Serbian Chamber of Commerce T-25/06 of 13 November 2007, the sole arbitrator made reference to three foreign court decisions relating to the issue of applicability of the CISG to international distributorship contract, while in Award T-8/06 of 1 October 2007, arbitrators affirmed, without quoting the relevant decisions, that regard is to be had of the comparative practice and the preceding positions, in the interpretation of the CISG under Article 7 Para 1 CISG (cited from V. Pavić, M. Đorđević, op. cit., 580–581).

[378] *Case Law on UNCITRAL Text* – information system established within UNCITRAL whose aim is to collect, publish and exchange the information on court decisions and arbitral awards relating to UNCITRAL Conventions and Model Laws, in order to facilitate their uniform interpretation and application. The system is explained in the User Guide: A/CN.9/SER.C/GUIDE/1/Rev.3. Detailed information about CLOUT system is available at: *https://uncitral.un.org/en/case_law.*

Case Law,[379] as well as the opinions issued by the Advisory Council on the CISG,[380] *Pace* electronic database[381] on the CISG and international commercial law,[382] UNILEX collection of case law and international bibliography on the CISG[383] etc.[384]

4. Observance of Good Faith in International Trade

The third principle provided under Article 7 Para 1 CISG addresses the need to observe good faith[385] in international trade. This solution was adopted at the Diplomatic Conference in Vienna as a result of a compromise between two conflicting positions of the delegates present – those in favour of explicitly providing for the observance of good faith principle as a general obligation of the parties under the CISG and those believing that any explicit reference to this principle in the

[379] *UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods*. The Digest follows the evolution of the case law on the CISG. Published in 2004 for the first time, the Digest is committed to periodic releases of updates, the latest being published in 2016. Detailed information about the Digest is available at: *https://uncitral.un.org/en/case_law/digests.*

[380] *Advisory Council on the CISG (CISG – AC)*, established as a private initiative by a number of scholars aiming to promote a uniform interpretation and application of the CISG by critically analysing cases of CISG application and scholarly writings on these topics. In line with its objectives, this body issues opinions of advisory character (at the time of writing this paper, CISG-AC has issued 21 and published 20 Opinions). Detailed information is available at: *www.cisgac.com.*

[381] *Pace database on the CISG and International Commercial Law*, established at the Institute of International Commercial Law of Pace University in New York, bearing the name or its creator Professor Albert Critzer (*Albert H. Critzer CISG Database*). It is an eLibrary with about 10.000 bibliographic units, over 3000 cases and 1600 commentaries, monographs and books on the CISG and thereto related topics. Detailed information about this database is available at: *www.cisg.law.pace.edu.*

[382] There are similar data bases in Austria (*http://www.cisg.at/*), France (*http://www.cisg.fr*), Switzerland (*http://www.cisg-online.ch*), Portugal (*https://cisg-portugal.org*), Canada (*https://cisg.ca/index.html*), Brazil (*https://www.cisg-brasil.net/*), Turkey (*https://cisg.bilgi.edu.tr/tr/*), Japan (*https://lex.juris.hokudai.ac.jp/~sono/cisg/eng_index.html*) etc. For other data bases dedicated to the CISG, see *https://iicl.law.pace.edu/cisg/page/autonomous-network-cisg-websites.*

[383] Electronic database of case law and bibliography on the UNIDROIT Principles of International Commercial Contracts and on the CISG. Detailed information about this database: *www.unilex.info.*

[384] The *Willem C. Vis International Arbitration Moot*, an international competition for law students, traditionally organized in Vienna every year, also contributes significantly to the knowledge of the CISG, its problems always involving cases arising out of contracts of international sale governed by the CISG. Given that many students participating in the competition become judges or arbitrators on completing their studies, this competition undoubtedly promotes uniform interpretation and application of the CISG. Detailed information is available at: *https://vismoot.pace.edu/*.

[385] The official translation of the Convention in Serbian uses the term "*savesnost*" /good faith/. However, the author of this paper believes that the term "*savesnost i poštenje*" /good faith and fair dealing/ is better suited to Serbian legal terminology in this case.

CISG should be avoided.[386] The solution, as it is, has been a source of controversies in legal theory and case law ever since it was proposed.

These controversies boil down to two fundamental questions: 1) whether the good faith principle is applied only to the interpretation of the CISG or also to the contractual relationship in terms of a general obligation of the parties 2) whether the scope of this principle is narrowed down to the interpretation of Article 7 Para 1 CISG, or it constitutes a general principle on which the Convention is based in terms of Article 7 Para 2 CISG.[387] In search for answers to these questions, two sharply conflicting approaches have emerged in legal theory and case law.

According to one approach, the good faith principle is simply an additional instrument of CISG interpretation,[388] used by the judges to avoid reaching unfair solutions in specific cases of application of the Convention.[389] The main argument behind this approach, based on *travaux préparatoires* and strict linguistic interpretation of the CISG, suggests that the vagueness of the notion of good

[386] More on this issue, J. O. Honnold, op. cit., 99; Bruno Zeller, *Four-Corners – The Methodology for Interpretation and Application of the UN Convention on Contracts for the International Sale of Goods,* 2003, Chapter 4 (available at: *https://iicl.law.pace.edu/cisg/bibliography/zeller-bruno-australia-24*); Milena Milutinović, "Načelo savesnosti i poštenja – Univerzalni princip međunarodne trgovine", *Pravni život,* No. 10, 2004, 431 ff; F. Ferrari, "Gap-Filling and Interpretation of the CISG: Overview of International Case Law", op. cit., 74; I. Schwenzer, P. Hachem, "Article 7", op. cit., 126*;* Peter Schlechtriem*, Uniform Sales Law – The UN-Convention on Contracts for the International Sale of Goods,* Manz, Vienna, 1986, 38*;* Alejandro M. Garro, "Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods", *International Lawyer*, No. 23, 1989, 466–467.

[387] In that regard, M. Milutinović, "Načelo savesnosti i poštenja – Univerzalni princip međunarodne trgovine", op. cit., 431.

[388] This approach is advocated, for example, by, I. Schwenzer, P. Hachem, "Article 7", op. cit., 126–128; P. Schlechtriem, "Requirements of Application and Sphere of Applicability of the CISG", op. cit., 790; P. Schlechtriem, *Uniform Sales Law – The UN-Convention on Contracts for the International Sale of Goods,* op. cit., 38; J. O. Honnold, op. cit., 100: "*... the Convention rejects 'good faith' as a general principle and uses 'good faith' solely as a principle for interpreting the provisions of the Convention*"; B. Audit, op. cit., 47; Edward Allan Farnsworth, "Duties of Good Faith and Fair Dealing under the UNIDROIT Principles, Relevant International Conventions and National Laws", *Tulane Journal of International and Comparative Law*, 1995, 55–56 (available at: *https://www.trans-lex.org/122100/_/farnsworth-allan-duties-of-good-faith-and-fair-dealing-under-the-unidroit-principles-relevant-international-conventions-and-national-laws-tuljintcompl-1995-at-56-et-seq/*). Speaking of case law, see for example arbitral award of *ICC Arbitration Case No. 8611* (*Industrial equipment case*) of 23 January 1997 (available at: *https://iicl.law.pace.edu/cisg/case/case-report-does-not-identify-parties-proceedings-3*), stating: "*the provisions of Art. 7(1) CISG concern only the interpretation of the Convention*".

[389] More, Peter Winship, "Commentary on Professor Kastely's Rhetorical Analysis (Symposium Reflections)", *Northwestern Journal of International Law and Business*, Volume 8, No. 3, 1988, 631; F. Ferrari, "Gap-Filling and Interpretation of the CISG: Overview of International Case Law", *ibidem.*

faith[390] may undermine uniform application of the CISG, and consequently also legal certainty.[391] The same logic is evident in the positions suggesting that the good faith principle, even if understood as mere instrument of interpretation, may go contrary to the ultimate goal of the CISG, which is to promote uniformity of its application. It is suggested in this regard that there is a risk of courts being unable to develop a common definition of this principle,[392] which would lead to different interpretations of the CISG and get in the way of its uniform application.[393] Finally, it is argued in favour of this approach that the UNIDROIT Principles of International Commercial Contracts, whose solutions are largely inspired by the CISG, contain two separate rules – one addressing the interpretation of the Principles (Article 1.6) and the other directly obliging the parties to act in good faith in their contractual relationship (Article 1.7). The conclusion drawn from this is that Article 7 Para 1 CISG concerns the interpretation of the Convention only and cannot be applied directly to individual contracts for the international sale of goods.[394]

Several objections can be raised concerning this approach. In the first place, the good faith principle is not defined precisely even in those domestic laws[395] where it traditionally constitutes one of the fundamental principles of the contract law and the civil law[396] in general, this being no impediment to their interpretation and application by the courts.[397] In other words, the general clause on good faith

[390] A critical analysis of the vagueness of the notion of good faith, Arthur Rosett, "Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods", *Ohio State Law Journal*, No. 45, 1984, 289.

[391] More, J. O. Honnold, *ibidem*; F. Ferrari, "Gap-Filling and Interpretation of the CISG: Overview of International Case Law", *ibidem.*

[392] See Gyula Eörsi, "Problems of Unifying Law on the Formation of Contracts for the International Sale of Goods", *American Journal of Comparative Law*, No. 27, 1979, 314.

[393] See M. Milutinović, "Načelo savesnosti i poštenja – Univerzalni princip međunarodne trgovine", op. cit., 433; F. Ferrari, "Gap-Filling and Interpretation of the CISG: Overview of International Case Law", *ibidem*.

[394] This approach is advocated in I. Schwenzer, P. Hachem, "Article 7", op. cit., 127.

[395] In details on origin, evolution and importance of this principle, Slobodan Perović, "Prirodno pravo i načelo savesnosti i poštenja", *Pravni život,* No. 9, Belgrade, 2014, 7–163 (in full); examination of the good faith principle in comparative law, M. Milutinović, "Načelo savesnosti i poštenja – Univerzalni princip međunarodne trgovine", op. cit., 424–429.

[396] On place, role and importance of the good faith principle in Serbian law, S. Perović, "Prirodno pravo i načelo savesnosti i poštenja", op. cit., 145 ff and in particular in the Law of Obligations, S. Perović, "Osnovna koncepcija Zakona o obligacionim odnosima", op. cit., 22–30.

[397] In that regard, M. Milutinović, "Načelo savesnosti i poštenja – Univerzalni princip međunarodne trgovine", op. cit., 434.

that has been extant in these states since Roman law, through lasting and continuous application in court practice and analyses by legal doctrine, has gained the attribute of a developed legal standard, which can be said to cause no serious difficulties in its application.[398] Secondly, while it is true that differences in the interpretation of the good faith principle may undermine uniform application of the Convention, there is no reason to set this principle apart from other broad and vague terms adopted by the Convention, an issue addressed above. Thirdly, the concern that the application of a general clause may undermine legal certainty seems devoid of rational justification. The approach advocated here is that legal uncertainty in the field of contractual relations regulated by the Convention does not arise from general legal standards and general clauses such as a good faith clause, but appears primarily as a consequence of non-application or biased application of the Convention by the courts.[399] Finally, the reference made to the relevant provisions of the UNIDROIT Principles as an argument to support the claim that the good faith principle presents merely an "instrument" of interpretation of the Convention, actually points to the opposite conclusion. The provision of the UNIDROIT Principles governing the interpretation of the Principles (Article 1.6), makes reference to their international character and purpose, and particularly the need to promote uniformity in their application. On the other hand, the Principles explicitly provide in Article 1.7 for the principle of good faith and fair dealing as a general obligation of the parties. According to this rule: "Each party must act in accordance with good faith and fair dealing in international trade (1). The parties may not exclude or limit this duty (2)"[400].[401]

Another approach is that the reference made to good faith in Article 7 Para 1 CISG, concerns, in addition to the interpretation of the CISG, also the obligation of the parties to act in accordance with this principle, and that this requirement of the

[398] See S. Perović, "Prirodno pravo i načelo savesnosti i poštenja", op. cit., 124.

[399] In that regard but on a general plane, S. Perović, "Prirodno pravo i načelo savesnosti i poštenja", op. cit., 124 ff.

[400] See commentary in the *UNIDROIT Principles of International Commercial Contracts 2016*, op. cit., 18, stating: "*This means that good faith and fair dealing may be considered to be one of the fundamental ideas underlying the Principles. By stating in general terms that each party must act in accordance with good faith and fair dealing, paragraph (1) of this Article makes it clear that even in the absence of special provisions in the Principles the parties' behaviour throughout the life of the contract, including the negotiation process, must conform to good faith and fair dealing*".

[401] Furthermore, there is a significant difference between the sphere of application of the UNIDROIT Principles and that of the CISG – while the Principles address international commercial contracts in general, the application of the CISG is limited to the contract for the international sale of goods. Besides, the rule under Article 1.7 Principles also covers negotiations, while the CISG, as pointed out, is not concerned with matters of precontractual liability.

CISG is to be applied directly to the concrete contracts of sale[402]. Along these lines, some authors suggest that the good faith principle, even understood in the context of interpretation of the CISG, must be reflected in the contracts governed by the CISG. It is precisely due to the need for the parties to observe the good faith principle in a contractual relationship, that special importance must be accorded to this principle.[403] Following this logic, these authors reach the conclusion that the good faith principle "does not exist in a vacuum" nor will indeed exist if the parties themselves are not required to observe it.[404] A large number of court decisions and arbitral awards take this approach.[405].[406] It is on these grounds that a large number of authors criticized the solution under Article 7, Para 1, voicing their conviction that the "extended" effect of this principle will be accepted with time, so that it implies the obligation of the parties to act in accordance with the good faith imperative.[407]

In view of the arguments put forward in favour of one approach or the other, it can be generally observed that the good faith principle plays an important role in the interpretation of the CISG as it establishes a framework for the operations of the judges and arbitrators applying its rules. It may also be perceived as a kind of corrective principle of autonomous and uniform interpretation of the CISG, the application of which

[402] This approach is taken for example by M. J. Bonell, "Article 7", op. cit., 84–85. Analysis of this position, Gyula Eörsi, "General Provisions", *International Sales. The United Nations Convention on Contracts for the International Sale of Goods*, (eds. Galston N., Smit H.), New York, 1984, 2–9. This approach seems also to prevail in P. Perales Viscasillas, "Article 7", op. cit., 122 ff.

[403] In that regard, Fritz Enderlein, Dietrich Mascow, *International Sales Law,* Oceana Publications, 1992, 54.

[404] See M. Milutinović, "Načelo savesnosti i poštenja – Univerzalni princip međunarodne trgovine", op. cit., 435.

[405] Particularly in the countries of the civil law system, the decisions of German courts being especially prominent. Decisions and awards are cited for example in I. Schwenzer, P. Hachem, "Article 7", op. cit., 126–127, F. Ferrari, "Gap-Filling and Interpretation of the CISG: Overview of International Case Law", op. cit., 77; P. Perales Viscasillas, "Article 7", op. cit., 125. Thus, for example, in the practice of the Foreign Trade Court of Arbitration at the Serbian Chamber of Commerce, this approach was taken in Award T-9/07 of 23 January 2008 which held that the respondent "failed to act in accordance with the good faith principle which is the basis for all modern legislation, and in particular the principles and rules referred to by this Arbitral Tribunal as legal sources of substantive law according to which it decided on this dispute (the CISG, the Law of Obligations, the UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law)", cited from V. Pavić, M. Đorđević, op. cit., 581.

[406] See P. Perales Viscasillas, "Article 7", op. cit., 125, stating in this context: "*Case law recognized good faith not only plays a role within the Convention for interpretation, but also plays a seminal role throughout the Convention to modulate its content and be used as a standard of conduct for the parties...*".

[407] More on this, F. Enderlein, D. Mascow, *ibidem*.

should be devoid of automatism and at all times based on the good faith requirement, taking into account the circumstances of each case. On the other hand, this principle has a significant part in gap-filling under Article 7 Para 2 CISG. All of this allows for the conclusion that good faith is an underlying principle of the CISG, and its directives find their place both in the provisions governing the interpretation of the CISG, and numerous rules addressing particular rights and obligations of the parties.[408]

III. GAP-FILLING

1. General Rule

With regard to gap-filling, the Convention provides that "questions concerning matters governed by this Convention which are not expressly settled in it" are to be settled in conformity with "the general principles on which it is based".[409] In the absence of such principles, these questions are to be settled in conformity with the law applicable by virtue of the rules of private international law (Article 7 Para 2 CISG). The conclusion to be drawn from this rule seems simple at first glance: the primary role in filling the gaps in the CISG[410] is to be played by the general principles on which the CISG is based. However, a deeper analysis of this solution requires two fundamental questions to be answered. The first concerns the definition of the very notion of the legal gap which is to be filled by means of applying general principles, while the second seeks to establish which specific principles are to be considered as "the general principles on which [the CISG] is based".

2. Legal Gaps in the CISG

The rule under Article 7 Para 2 CISG invokes the general principles only with respect to the questions concerning the matters covered by the CISG, and not

[408] See F. Enderlein, D. Mascow, *International Sales Law,* op. cit., 55.

[409] The official translation of Article 7 Para 2 CISG into Serbian employs the wording "opšta načela na kojima Konvencija počiva" /general principles on which the Convention rests/. The author of this paper does not agree with the use of the term "rests", given that the term is neither a part of Serbian legal terminology nor matches the meaning of the above-mentioned rule. In the context of the terminology, it seems important to note the differences between the English text of the CISG which uses the wording "*general principles on which it is based*" and the French text which employs the wording "*principes généraux dont elle s'inspire*", which may be of relevance, not only in terms of language , but also in terms of substance.

[410] The existence of legal gaps in the CISG is understandable given the fact that no convention may "cover" entirely the field it addresses, the CISG being no exemption.

expressly settled in it ("internal gaps"), but not relating to the questions beyond the sphere of the CISG ("external gaps")[411].[412] Therefore, the first requirement for a legal gap to exist within the meaning of Article 7 Para 2 CISG is for the matter to be within the ambit of the CISG itself.[413]

Furthermore, the rules of the CISG concerning gap-filling provide for a "two-step" procedure;[414] to fill the gap, the general principles on which the Convention is based are to be applied first, and only if the requirements for their application are not satisfied, recourse is sought in the law applicable by virtue of private international law. Resorting to the applicable domestic law is thus considered as *ultima ratio* of gap-filling.[415]

Finally, there is the question of whether the rule under Article 7 Para 2 CISG should be interpreted broadly, allowing for other gap-filling methods, above all analogy, or it should rather be interpreted restrictively. The prevailing position in the doctrine admits of both methods (application of general principles and analogy)[416] while noting that in filling the gap, the recourse is to be sought first in the analogous application of the appropriate provisions of the CISG; only where no such degree of similarity exists between a matter explicitly settled by the CISG and that to which the gap refers, as to justify analogy, should the matter be resolved by

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[411] To describe internal and external gaps in this sense, certain authors use the terms "*praeter legem* gap" and "*intra legem* gap" (for example Franco Ferrari, "General Principles and International Uniform Commercial Law Conventions: A Study of the 1980 Vienna Sales Convention and the 1988 UNIDROIT Conventions", *Pravni život,* No. 11, Belgrade, 2003, 214 ff; B. Zeller, op. cit., Chapter 5).

[412] Such as the matters provided under Article 4 CISG – validity of the contract or usage, or the effect which the contract may have on the property in the goods sold (as discussed above), as well as the matters envisaged by Articles 2, 3 and 5 CISG.

[413] See F. Ferrari, "General Principles and International Uniform Commercial Law Conventions: A Study of the 1980 Vienna Sales Convention and the 1988 UNIDROIT Conventions", op. cit., 214–215; M. J. Bonell, "Article 7", op. cit., 75; B. Zeller, op. cit., Chapter 5; P. Perales Viscasillas, "Article 7", op. cit., 136 ff.

[414] I. Schwenzer, P. Hachem, "Article 7", op. cit., 132, describing the gap-filling by means of uniform rules as the first step, and the recourse to the applicable domestic law as the second step.

[415] See Rolf Herber, "Article 7" in *Commentary*, Schlechtriem, 1998, 66; P. Perales Viscasillas, "Article 7", op. cit., 135.

[416] See Gert Brandner, *Admissibility of Analogy in Gap-filling under the CISG*, University of Aberdeen, 1999, (available at: *https://iicl.law.pace.edu/cisg/bibliography/admissibility-analogy-gap-filling-under-cisg*); R. Herber, "Article 7", op. cit., 65; F. Ferrari, "General Principles and International Uniform Commercial Law Conventions: A Study of the 1980 Vienna Sales Convention and the 1988 UNIDROIT Conventions", op. cit., 220.

resorting to the general principles on which the CISG is based.[417] This position is voiced in a number of court decisions and arbitral awards.[418]

3. The General Principles on Which the Convention Is Based

Basic questions. – The rule providing that the gaps in the Convention are to be filled in conformity with the general principles on which the CISG is based, raises two basic questions – which exactly are those principles and how should their substance and scope be understood in the context of filling the gaps in the Convention. In light of the fact that the CISG offers no answers to these questions[419],[420] the doctrine has devoted much attention to this matter,[421] while the case law abounds in the decisions containing reference to the general principles, both in general terms and in terms of the specific rules of the CISG.[422] In this context, the place and role of the good faith principle in the Convention proves to be particularly controversial,

[417] See F. Enderlein, D. Mascow, op. cit., 58; M. J. Bonell, "Article 7", op. cit., 78; P. Perales Viscasillas, "Article 7", op. cit., 136.

[418] See for example Decision of the Supreme Court of Poland (Shoe leather case) of 11 May 1997 which held that the lower court failed to examine if Article 71 CSG may apply by analogy: "*the Appellate Court violated the Convention by not analysing whether Article 71 can be applied by analogy*", as well the Award by ICC Arbitration Case No. 8324 (Magnesium case) from 1995 (cited from P. Perales Viscasillas, "Article 7", op. cit., 136).

[419] See P. Schlechtriem, "Requirements of Application and Sphere of Applicability of the CISG", op. cit., 790: "*Therefore, they have to be derived from an analysis of concrete provision so to unearth the general principles underlying them*".

[420] Worthy of note in this regard is the position in the doctrine which holds the general principles on which the Convention is based to essentially represent the "pillars" of the CISG. These principles are so important that without them the Convention as a whole could not survive (see G. Brandner, *ibidem,* putting it picturesquely: "*the principle must be so important that without it the Convention as a whole might crumble*"). On distinction between specific legal provisions and general principles of law, Ulrich Drobnig, "General Principles of European Contract Law", *International Sale of Goods: Dubrovnik Lectures* (eds. P. Šarcevic, P. Volken), Oceana, 1986, 306.

[421] See for example F. Ferrari, "General Principles and International Uniform Commercial Law Conventions: A Study of the 1980 Vienna Sales Convention and the 1988 UNIDROIT Conventions", op. cit., 221–228; F. Ferrari, "Gap-Filling and Interpretation of the CISG: Overview of International Case Law", op. cit., 79–90; B. Zeller, op. cit., Chapter 5; I. Schwenzer, P. Hachem, "Article 7", op. cit., 134–138; P. Perales Viscasillas, "Article 7", op. cit., 139–143.

[422] The lack of guidance in the CISG poses a risk that in the interpretation of the CISG judges and arbitrators may take different positions on what principles are to be considered as "the general principles on which it is based", as well as on the substance of these principles and the legal effects they may produce. More, P. Perales Viscasillas, "Article 7", op. cit., 139.

which is why a summary of the attempts to define this principle in comparative law will be given further bellow, followed by an examination of the specific rules of the Convention underlain by good faith. Following a reflection on the good faith principle, other general principles on which the CISG is based will be considered and compared to the basic principles of the Serbian Law of Obligations.

A definition of good faith. – The good faith principle, with its distant roots in Roman Law, is one of the fundamental principles of the contract law and of the civil law in general in many countries[423] and is widely applied by courts and tribunals[424] as a "member of the general clauses family".[425] In comparative legal terminology, this principle is differently designated – *bona fides* in Latin, *bonne foi* in French, *good faith (and fair dealing)* in English, *Treu und Glauben* in German, *buona fede* in Italian. In the Serbian language, in the context of the term "*savesnost i poštenje*" / good faith and fair dealing, literally: conscientiousness and honesty/, there appears also the term "dobra vera" /good faith, literally/, as well as similar or related words: conscientious, respectable, polite, eager, dedicated, careful, diligent, loyal, considerate, orderly, accurate, infallible, exemplary, just, impartial.[426]

Defining the good faith principle has proved to be an exceedingly difficult and delicate task. Due to a generality of the categories implied by the good faith

[423] These are, above all, the countries of the civil law tradition, which have incorporated this principle into their civil codes. Although the good faith principle is almost universally accepted by these countries, they show significant differences in terms of its breadth and scope. A comparative review, *Principles of European Contract Law, Parts I and II,* op. cit., 116–119. Furthermore, the US Uniform Commercial Code, influenced by the civil law, proclaims the principle of good faith and lays down that every contract imposes an obligation of good faith in its performance and enforcement (Article 1-304). More on this, Harry Flechtner, "Comparing the General Good Faith Provisions of the PECL and the UCC: Appearance and Reality", *Pace International Law Review*, No. 13, 2001, 295–337.

[424] In detail on the origin and evolution of the principle, its importance in terms of Serbian and comparative law, S. Perović, "Prirodno pravo i načelo savesnosti i poštenja", op. cit., (in full); M. Milutinović, "Načelo savesnosti i poštenja – Univerzalni princip međunarodne trgovine", op. cit., 419–441.

[425] See Slobodan Perović, "Prirodno pravo i načelo savesnosti i poštenja", *Pravni život,* No. 9, Belgrade, 2014, 123–124, stating: "Good faith and fair dealing derive from established rules of conduct in a particular environment, in the manner of a "general clause" with the attributes of a "legal standard" ... Some of the legal standards have been frequently and long in use in court and business practice, and being thus established and habitual, these concepts are so common in practical life that they cause no considerable difficulties in their application. This is also the case of the "general clause" of good faith that has been in constant use since the days of Roman Law (*boni mores*) to this day, so it may well be said to have gained, by way of past and contemporary legal practice, legislation and legal doctrine, the attribute of a developed legal standard, obviously, giving due regard to the space and time of its application.

[426] S. Perović, "Prirodno pravo i načelo savesnosti i poštenja", op. cit., 112.

principle, various definitions tend to variously interpret this principle in terms of its purpose and external manifestations, but for the most part, not in terms of its nature and essence.[427]

Some of the views taken in the doctrine in this context suggest: that the good faith principle is a kind of moralisation of the law governing obligation relations,[428] that, being on a par with "inner moral code",[429] it can rather be felt than precisely defined,[430] that its purpose is to achieve the standard of decency, fairness and reasonableness,[431] that it represents a norm of conduct relying on the will to act in conformity with basic moral and ethical standards,[432], and that the fundamental principle of good faith in international law is a source of the *pacta sunt servanda* rule, as well as other rules relating to the achievement of honesty, fairness and reasonableness.[433] On the other hand, some definitions adopt a negative definition of this principle, whereby conduct in conformity with the good faith principle is such conduct that is not contrary to

[427] On different definitions of the good faith principle, see for example, Denis Tallon, "Le concept de bonne foi en droit français du contrat", Saggi, Conferenze e Seminari, Roma, 1994, (in full), available at: *https://iicl.law.pace.edu/cisg/scholarly-writings/le-concept-de-bonne-foi-en-droit-fran%C3%A7ais-du-contrat*; Roy Goode, "The Concept of 'Good Faith' in English Law", Saggi, Conferenze e Seminari, Roma, 1994, (in full), available at: *https://iicl.law.pace.edu/cisg/scholarly-writings/concept-good-faith-english-law*; H. Flechtner "Comparing the General Good Faith Provisions of the PECL and the UCC: Appearance and Reality", op. cit., 2001, 295–337.

[428] Ole Lando, "Principles of European Contract Law in the Third Millennium", *Transnational Law in Commercial Legal Practice,* 1999, 76, cited from M. Milutinović, "Načelo savesnosti i poštenja – Univerzalni princip međunarodne trgovine", op. cit., 420.

[429] Carl Crome, *System des deutschen bürgerlichen Rechts,* I, 1990, 68, cited from Dragoljub Stojanović, "Član 12" in *Komentar Zakona o obligacionim odnosima*, Slobodan Perović, I Knjiga, 1995, 13.

[430] D. Tallon, op. cit., stating: "*La bonne foi est quelque chose que l'on sent plutôt que quelque chose que l'on peut enfermer dans une définition rigide. Seule est possible une définition souple ou même plusieurs*".

[431] *Principles of European Contract Law, Parts I and II,* op. cit., 113 and 115–116. A commentary of the PECL rule providing for the principle of good faith and fair dealing (Article 1:201), draws a distinction between good faith and fair dealing, arguing that good faith is a subjective concept as it implies an inner sense of honesty and fairness, while fair dealing, as an objective criterion, refers to observance of fairness in the conduct of the parties. This distinction is also underlined by some commentators of Article 12 of the Serbian Law of Obligations providing for the principle of good faith and fair dealing. See for example, Boris Vizner, *Komentar Zakona o obveznim (obligacionim) odnosima,* 1. knjiga, Zagreb, 1978, 69.

[432] Claude Samson, "L'harmonisation du droit de la vente: l'influence de la Convention de Vienne sur l'évolution et l'harmonisation du droit des provinces canadiennes", *Les Cahiers de droit*, Volume 32, No. 4, 1991, 1017.

[433] John F. O'Connor, *Good Faith in International Law*, Dartmouth, Aldershot, 1991, Ch.8.

this principle.[434] The US Uniform Commercial Code defines the good faith principle as "honesty in fact in the conduct or transaction concerned".[435] Giving consideration to a diversity of definitions of good faith, some authors endeavoured to classify them around the elements they contain. Within this framework, it is suggested that this principle may be deemed to imply: 1) the duty of a fair and just relation towards the other party; 2) the obligation of mutual respect and trust of the parties; 3) a set of standards of reasonable conduct in contractual relations and 4) the obligation of the parties not to act in "bad faith".[436] In the context of the good faith principle, attention is also drawn to the differences between its subjective and objective aspects, suggesting that it implies a value judgement from which it is yet to be deduced what in a particular case may be considered as the conduct in accordance with the good faith standard. Such judgement is not a subjective assessment of a judge, but rather the judge appears as interlocutor and interpreter of all those who "think fairly and justly".[437]

Speaking of a definition of the concept of good faith principle, a definition noteworthy for its comprehensiveness and legal philosophy, is the one proposed by Professor Slobodan Perović at the Twenty-Seventh Meeting of the Kopaonik School of Natural Law held in December 2014, dedicated to the general annual theme of "the Law and the Principle of Good Faith and Fair Dealing".[438] Presenting this definition, Professor Perović said:

"Relying on a rational conception of the natural law, as well as a normative culture of the positive law, an attempt is being made to define the principle of good faith and fair dealing, which, it would seem, may contribute to a more precise definition of this principle in the entire mosaic of theoretical and legislative difficulties attending the efforts at devising a synthetic formula of this principle.

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[434] Robert S. Summers, "The General Duty of Good Faith – its Recognition and Conceptualization", *Cornell Law Review*, No. 67, 1982, 823 ff, in particular 837, giving examples of conduct contrary to this principle, *i.e.* the cases of so-called "*bad faith*"; see in that regard also M. Milutinović, "Načelo savesnosti i poštenja – Univerzalni princip međunarodne trgovine", op. cit., 421.

[435] Article 1–201 (19) of the US Uniform Commercial Code. The Code expands on this term in case of merchants. Under Article 2–103 (b) UCC, it means "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade".

[436] Cristiano Pettinelli, "Good Faith in contract law: Two paths, two systems, the need for harmonisation", *Diritto & Diritti – Rivista giuridica elettronica pubblicata su Internet*, No. 6, 2005 (available at: *https://www.diritto.it/archivio/1/20772.pdf).*

[437] Dragoljub Stojanović, "Član 12" in *Komentar Zakona o obligacionim odnosima*, Slobodan Perović, I Knjiga, 1995, 11–22.

[438] The opening address by Professor Slobodan Perović at the Twenty-Seventh Meeting of the Kopaonik School of Natural Law is published in full in: Slobodan Perović, "Prirodno pravo i načelo savesnosti i poštenja", *Besede sa Kopaonika*, op. cit., 961–1003.

Seized with this impression, Author of these lines makes one of possible proposals for defining the good faith and fair dealing, conveyed from the sphere of meta-legal disciplines into the ambit of the juridical world, where it enjoys proper application and protection of moral imperatives. Here, then, is this proposal:

Good faith and fair dealing is a human virtue which entails a subjective assessment of concrete Good or Bad conduct, based on the appropriate standards applicable in particular space and time, protected by the norms of natural and positive law.

The following elements are inferred from such definition: 1. good faith is a human virtue; 2. good faith entails a subjective assessment as key criterion for reasoning; 3. good faith distinguishes Good from Bad conduct; 4. good faith arises from the established rules of conduct – social standards; 5. good faith as a subjective assessment is anchored in the objective values in terms of space and time; 6. good faith enjoys absolute protection of the natural law and relative protection of the positive law".[439]

In the countries of the civil law tradition, the good faith principle has been incorporated into the codes (or laws) regulating the area of civil-law and in particular obligation relations. Although these legislations have widely embraced the good faith principle, there exist significant differences in terms of the coverage and scope of this principle.[440] Since an analysis of the above differences would go beyond the ambit of this paper, we will limit ourselves to the conclusion that the general good faith clause has a broad sphere of application in these countries and governs, as a rule, not just the contract performance, but also its formation and interpretation, as well as the negotiations for the contract formation[441].[442] On the other hand,

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[439] S. Perović, "Prirodno pravo i načelo savesnosti i poštenja", *Pravni život,* No. 9, Belgrade, 2014, 111.

[440] Comparative review, *Principles of European Contract Law, Parts I and II*, op. cit., 116–119; Paul J. Powers, "Defining the Undefinable: Good Faith and the United Nations Convention on Contracts for the International Sale of Goods", *Journal of Law and Commerce*, No. 18, 1999, 335 ff; M. Milutinović, "Načelo savesnosti i poštenja – Univerzalni princip međunarodne trgovine", op. cit., 424–429.

[441] This approach is also taken in the UNIDROIT Principles of International Commercial Contracts (see commentary to Article 1.7 *UNIDROIT Principles of International Commercial Contracts 2016*, op. cit., 18: "*By stating in general terms that each party must act in accordance with good faith and fair dealing, paragraph (1) of this Article makes it clear that even in the absence of special provisions in the Principles the parties' behaviour throughout the life of the contract, including the negotiation process, must conform to good faith and fair dealing*"), as well as in the PECL (see commentary to Article 1:201 in *Principles of European Contract Law, Parts I and II*, op. cit., 113–188.

[442] More on this, *Principles of European Contract Law, Parts I and II,* op. cit., 116–119; M. Milutinović, "Načelo savesnosti i poštenja Univerzalni princip međunarodne trgovine", op. cit., 428; D. Stojanović, "Član 12", op. cit., 14, stating in this context the position of German doctrine distinguishing six stages in the application of the good faith and fair dealing principle: precontractual

in the countries of the common law tradition which recognise the general principle of good faith,[443] its application is typically more restrictive, limited to contract performance.[444]

The Serbian Law of Obligations promulgates the principle of good faith and fair dealing as one of the fundamental principles of the Law, in a rule of imperative character[445] of the following wording: "In establishing obligation relations and exercising rights and duties arising out of these relations, the parties shall observe the principle of good faith and fair dealing".[446] In addition to the general provision, there are numerous rules in the Law of Obligations giving concrete expression to

obligations, preparation of contract performance, contract interpretation, performance, achievement of contract objectives, mutual considerations even at non-performance.

[443] The US Uniform Commercial Code, drawing on the civil law, promulgates the good faith principle by providing that every contract imposes an obligation of good faith in its performance and enforcement (Article 1–203). More on this issue, H. Flechtner, "Comparing the General Good Faith Provisions of the PECL and the UCC: Appearance and Reality", op. cit., 295–337; P. J. Powers, op. cit., 338–341; R. S. Summers, op. cit., 810, stating in regard to this rule: "*This section, together with its accompanying Comment and Reporter's Note, recognizes and conceptualizes a general duty of good faith and fair dealing in the performance and enforcement of contracts in American law*". The duty of good faith and fair dealing is also imposed by American *Restatement of Contracts* (§ 205). Speaking of other countries of the common law tradition, Australian court practice shows a tendency towards gradual recognition of the good faith principle in contract performance (in detail, P. J. Powers, op. cit., 340–341; see also M. Milutinović, op. cit., 427), and the need to recognise this principle is also affirmed in Canada (in detail on this issue in Canada, including the Civil Code of Quebec, and particularly on the reports of the Ontario Law Reform Commission, and relevant position taken in court practice, C. Samson, op. cit., 1019–1025). On the other hand, the English law does not recognise the general principle of good faith (see for example, R. Goode, op. cit., stating: "*English law does not have anything equivalent to the general concept of good faith found in the civil law; we require good faith in particular situations*".

[444] In that regard, for example, R. S. Summers, op. cit., (in full); H. Flechtner, "Comparing the General Good Faith Provisions of the PECL and the UCC: Appearance and Reality" op. cit., 307 ff; *Principles of European Contract Law, Parts I and II,* op. cit., 117–118.

[445] Particular emphasis on the imperative nature of this principle was laid in the General Usages of Sale of Goods, providing that: "Good faith and fair dealing is the fundamental principle to be observed by the parties in the transactions relating to the sale of goods. Parties are not permitted to invoke any of these usages, if their application in the particular case would produce effects contrary to this principle" (Usage No. 3).

[446] Article 12 Law of Obligations. See S. Perović, *Obligaciono pravo,* op. cit., 56–61; S. Perović, "Osnovna koncepcija Zakona o obligacionim odnosima", op. cit., 22–30; D. Stojanović, "Član 12", op. cit., 11–22; B. Vizner, *Komentar Zakona o obveznim (obligacionim) odnosima,* 1. knjiga, op. cit., 69–80; Milan Petrović, "Član 12" in *Komentar Zakona o obligacionim odnosima - I*, (ed. B. Blagojević, V. Krulj), Savremena administracija, Belgrade, 1980, 56–66; Stojan Cigoj, *Obligacijska razmerja, Zakon o obligacijskih razmerjih s komentarjem,* Ljubljana, 1978, 12–13.

the principle of good faith and fair dealing.[447] The principle of good faith and fair dealing is also provided in the Preliminary Draft Civil Code, which treats it as one of its fundamental principles. The imperative nature of this rule in the Preliminary Draft is clearly denoted in the wording that parties are not permitted to exclude or limit the duty to observe the principle of good faith and fair dealing.[448]

Good faith as a general principle of the CISG. – The widely prevailing position[449] finds the good faith principle to be a general principle of the Convention, applied in gap-filling within the meaning of Article 7 Para 2 CISG.[450]

Good faith, in the sense of a standard of conduct for the parties underlying essentially the entire Convention,[451] has found its concrete expression in several rules. The CISG provisions that directly manifest this principle include: Article 8 which relates to contract interpretation; Article 16 Para 2 Item b which makes offer irrevocable if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer; Article 21 Para 2 which grants the effect of an acceptance to a late acceptance, where a letter or other writing containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time;

[447] In detail, S. Perović, *Obligaciono pravo,* op. cit., 59–61; S. Perović, "Osnovna koncepcija Zakona o obligacionim odnosima", op. cit., 27–28; S. Perović, "Prirodno pravo i načelo savesnosti i poštenja", op. cit., 149 ff.

[448] Article 5 Preliminary Draft (see *Prednacrt Građanskog zakonika Republike Srbije, Druga knjiga, Obligacioni odnosi*, op. cit., 12). Professor Slobodan Perović reflected on the principle of good faith and fair dealing in the context of the Preliminary Draft, stating: "Good faith and fair dealing, that noble voice of Universe and its echo in the determined Individuality, renders the law and order of every organised community richer by yet another dimension of humanity, more humane by yet another degree of moral disposition, by yet another sphere of the culture of peace and the virtue of justice" (see in entirety, Slobodan Perović, "Prednacrt Građanskog zakonika Republike Srbije", *Pravna riječ,* No. 47, Banja Luka, 2016, 11–30).

[449] According to certain positions discussed while addressing Article 7 Para 1 CISG, the good faith principle is understood as mere "instrument" of interpretation of the CISG, given that it is expressly provided for only within the rules of interpretation of the CISG. Detailed discussion on this issue, Franco Ferrari, "Uniform Interpretation of The 1980 Uniform Sales Law", *Georgia Journal of International and Comparative Law*, No. 24, 1994–95, 210–212.

[450] In that context, for example, I. Schwenzer, P. Hachem, "Article 7", op. cit., 126 and 135; P. Perales Viscasillas, "Article 7", op. cit., 140; F. Ferrari, "General Principles and International Uniform Commercial Law Conventions: A Study of the 1980 Vienna Sales Convention and the 1988 UNIDROIT Conventions", op. cit., 223; G. Brandner, *ibidem*; R. Herber, "Article 7", op. cit., 65; B. Audit, op. cit., 51; V. Heuzé, op. cit., 89; F. Enderlein, D. Mascow, *ibidem*.

[451] See F. Enderlein, D. Mascow, *International Sales Law,* op. cit., 55: "*the provisions of the Convention are themselves an expression of good faith*".

Article 29 Para 2 which precludes a party from invoking a contractual provision requiring modifications or termination of the contract to be in writing if he has conducted himself otherwise, and the other party has relied on such conduct; Article 37 which in case of non-conforming deliveries gives the right to the seller to deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered, or remedy any lack of conformity in the goods delivered, if he has delivered goods before the date for delivery, providing that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense;[452] Article 40 which stipulates that the seller is not entitled to rely on the provisions of Articles 38 and 39 CISG if the lack of conformity relates to the facts of which he knew or could not have been unaware and which he did not disclose to the buyer; Articles 49 Para 2, 64 Para 2 and 82 which deal with loss of right to contract avoidance and Articles 85 and 88 which impose on the parties the obligation to preserve the goods,[453] Article 77 which enjoins the obligation to mitigate losses, Article 80 which lays down that a party may not rely on a failure of the other party to perform to the extent such failure was caused by the first party's act or omission (*venire contra factum proprium* principle, estoppel), etc.[454] The good faith principle has also inspired, among other, the duty of the parties to cooperate with each other and to exchange information.[455]

The position identifying the good faith principle as one of general principles on which the CISG is based, has been widely accepted by courts and arbitral tribunals, which have had the occasion to apply it in a large number of decisions.[456] It is pointed out in the commentaries to the CISG that the case law has recognized good faith not only plays a role within the Convention for interpretation; it plays a seminal role throughout the Convention to "modulate" its content and be used as a standard of conduct for the parties.[457]

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[452] In this regard also Article 48 CISG.

[453] The systematisation followed in listing the above rules is taken over from M. Milutinović, "Načelo savesnosti i poštenja – Univerzalni princip međunarodne trgovine", op. cit., 437–438.

[454] For other examples of rules and principles of the CISG directly or indirectly inspired by the good faith principle, see for example P. Perales Viscasillas, "Article 7", op. cit., 122–125.

[455] This obligation is foreseen in a number of CISG provisions (Article 19 Para 2, Article 21 Para 2, Article 26, Article 39 Para 1, Article 65. See in that respect Award of the Foreign Trade Court of Arbitration at the Yugoslav Chamber of Commerce (*Aluminium Case*) of 09 December 2002 (available at: *https://iicl.law.pace.edu/cisg/case/9-december-2002-foreign-trade-court-arbitration-attached-yugoslav-chamber-commerce*).

[456] Examples of decisions in that regard, P. Perales Viscasillas, *ibidem*; M. Milutinović, "Načelo savesnosti i poštenja – Univerzalni princip međunarodne trgovine", op. cit., 435.

[457] P. Perales Viscasillas, "Article 7", op. cit., 125.

Other general principles of the CISG. – An attempt at precisely defining the general principles "on which [the CISG] is based or "which the CISG is inspired by" is a veritable ordeal. In the first place, there are different positions in legal theory as to which specific principles are to be considered as the general principles within the meaning of Article 7 Para 2 CISG.[458] Furthermore, classification criteria are typically not applied in determining these principles, rather they are simply being listed (mostly *exempli causa*), and if any criteria have been applied, they differ from author to author.[459]

With regard to the methods of establishing the general principles of the CISG, the doctrine rightly emphasizes that those principles which are not expressly provided for in the Convention must be derived from the specific rules of the Convention, through an analysis of their contents. Application of this method is necessary in determining whether a specific rule of the CISG is an expression of a general principle and whether it may, as such, be applied to the cases that are not explicitly settled by the CISG.[460] However, an examination of the positions taken in the doctrine on this matter suggests that no clear distinction in this context is drawn between the notion of the general principle and the notion of the rule of the CISG which is the embodiment of a particular general principle. A reason for this may lie in the fact that legal theory tends to follow the positions of court practice summed up in the UNCITRAL Digest, which lists a series of different principles and rules in the context of Article 7 Para 2 CISG.[461] Such positions (all or some of

[458] These differences are easily discernible already from a general review of literature dealing with this matter. See for example, I. Schwenzer, P. Hachem, "Article 7", op. cit., 135 ff; P. Perales Viscasillas, "Article 7", op. cit., 140 ff; M. J. Bonell, "Article 7", op. cit., 80 ff; F. Ferrari, "General Principles and International Uniform Commercial Law Conventions: A Study of the 1980 Vienna Sales Convention and the 1988 UNIDROIT Conventions" op. cit., 222–228; K. H. Neumayer, C. Ming, op. cit., 103–104; J. O. Honnold, op. cit., 102–111; B. Audit, op. cit., 51; V. Heuzé, op. cit., 89–90.

[459] Thus, certain authors rely on the contents and structure of the CISG, classifying these principles according to the parts of the CISG wherein they are contained (this system is adopted for example in P. Perales Viscasillas, "Article 7", op. cit., 140 ff, where in addition to these, the principles relating to the entire Convention are outlined; I. Schwenzer, P. Hachem, "Article 7", op. cit., 135 ff), while others in that regard distinguish between the principles that are expressly provided in the CISG and those that are not (for example F. Ferrari, "General Principles and International Uniform Commercial Law Conventions: A Study of the 1980 Vienna Sales Convention and the 1988 UNIDROIT Conventions" op. cit., 222–228; B. Audit, *ibidem*).

[460] M. J. Bonell, "Article 7", op. cit., 80.

[461] Thus, in the context of principles under Article 7 Para 2 CISG, the Digest presents positions taken in court practice with regard to: party autonomy, good faith, estoppel, place of payment of monetary obligations, currency of payment, burden of proof, full compensation principle, informality principle, dispatch theory, duty to mitigate losses, binding usages, set-off, plea of

those) are typically only cited by authors, without making an attempt at their synthesis or their proper classification.

It seems, nevertheless, that certain principles may be identified in the abundance of different positions as those widely accepted in case law and doctrine as the general principles on which the CISG is based. These principles include, for example: party autonomy,[462] proclaimed under Article 6 CISG,[463] considered by some commentators as the most important principle of the CISG;[464] the consensualism principle established in Article 11 CISG[465],[466] application of usage and practices established between the parties under Article 9 CISG,[467] full compensation principle[468] and the

non-performance, right to interest, costs of one's own obligations, right to claim renegotiation of the contract in case of changed circumstances and the *favor contractus* principle. See *UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods,* 2016 Edition, UNCITRAL United Nations Commission on International Trade Law, United Nations New York, 2016, 43–46.

[462] In that regard, for example, Schwenzer, P. Hachem, "Article 7", op. cit., 135; P. Perales Viscasillas, "Article 7", op. cit., 140; F. Ferrari, "General Principles and International Uniform Commercial Law Conventions: A Study of the 1980 Vienna Sales Convention and the 1988 UNIDROIT Conventions", op. cit., 224; Enderlein, D. Mascow, *ibidem*.

[463] Discussed in this paper while addressing the sphere of application of the CISG.

[464] On this position, F. Ferrari, "General Principles and International Uniform Commercial Law Conventions: A Study of the 1980 Vienna Sales Convention and the 1988 UNIDROIT Conventions", *ibidem*.

[465] Excepting as foreseen under Article 12 CISG.

[466] In that regard for example, I. Schwenzer, P. Hachem, "Article 7", *ibidem*; P. Perales Viscasillas, "Article 7", *ibidem*; F. Ferrari, "General Principles and International Uniform Commercial Law Conventions: A Study of the 1980 Vienna Sales Convention and the 1988 UNIDROIT Conventions", op. cit., 225. Several court decisions have explicitly held that the consensualism principle is a general principle on which the CISG is based (see *UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods,* op. cit., 52).

[467] In that regard for example, P. Perales Viscasillas, "Article 7", *ibidem*; F. Ferrari, "General Principles and International Uniform Commercial Law Conventions: A Study of the 1980 Vienna Sales Convention and the 1988 UNIDROIT Conventions", *ibidem*. See decisions of *Tribunale di Rimini* (*Al Palazzo S.r.l. v. Bernardaud di Limoges S.A.*) of 26 November 2002 (available at: *https://iicl.law.pace.edu/cisg/case/italy-november-26-2002-tribunale-district-court-al-palazzo-srl-v-bernardaud-di-limoges-sa*) and *Tribunale di Padova* (*Agricultural products case*) of 25 February 2004 (available at: *https://iicl.law.pace.edu/cisg/case/italy-february-25-2004-tribunale-district-court-so-m-agri-sas-di-ardina-alessandro-c-v*).

[468] In that regard for example, P. Perales Viscasillas, "Article 7", *ibidem*; F. Ferrari, "Gap-Filling and Interpretation of the CISG: Overview of International Case Law", op. cit., 85. See for example Decision of *Oberster Gerichtshof* (*Wood case*) of 21 March 2000 (available at: *https://iicl.law.pace.edu/cisg/case/austria-ogh-oberster-gerichtshof-supreme-court-austrian-case-citations-do-not-generally-54*).

principle of limitation of liability by the foreseeability rule under Article 74 CISG;[469] the estoppel principle[470] (*venire contra factum proprium)*[471] laid down in Article 80 CISG, which is essentially inspired by the good faith principle, the *favor contractus* principle which requires the contract to be maintained in force whenever possible.[472]

There are authors who have directed special attention in the analysis of Article 7 Para 2 CISG to the "principle of reasonableness" which enjoins parties to conduct themselves according to the standard of a "reasonable person", with some of them considering this standard to be a "fundamental" principle of the CISG.[473] In this respect, *Schlechtriem* goes a step further, suggesting that good faith in international sale ought to be interpreted in the light of many references made in the CISG to "reasonableness". According to this view, it is a standard permeating the CISG to such an extent that it may be considered as one of the general principles on which the CISG is based.[474] In this context, it is the opinion of the author of this paper that the understanding of good faith principle may not be narrowed down to the standard of a "reasonable person" because this would ignore a number of important elements entailed in the notion of good faith, discussed at the time of addressing a definition of good faith. In other words, the principle of good faith should be viewed in the light of a totality of facts determining it, rather than through the isolated prism of merely one of its attributes. In this sense, the good faith principle

[469] F. Ferrari, "General Principles and International Uniform Commercial Law Conventions: A Study of the 1980 Vienna Sales Convention and the 1988 UNIDROIT Conventions", *ibidem.* See for example Award of the Foreign Trade Court of Arbitration at the Yugoslav Chamber of Commerce (*Aluminium Case*) of 09 December 2002 (available at: *https://iicl.law.pace.edu/cisg/case/9-december-2002-foreign-trade-court-arbitration-attached-yugoslav-chamber-commerce*).

[470] On this notion in English law, J. O. Honnold, op. cit., 105–107; Michael Bridge, *The Sale of Goods,* Oxford University Press, 1997, 419–427; *Anson's Law of Contract* (ed.by A. G. Guest), 25th (Century) Edition, Clarendon Press Oxford, 1979, 659 ff.

[471] In that regard for example F. Ferrari, "General Principles and International Uniform Commercial Law Conventions: A Study of the 1980 Vienna Sales Convention and the 1988 UNIDROIT Conventions", op. cit., 227; I. Schwenzer, P. Hachem, "Article 7", *ibidem*; P. Perales Viscasillas, "Article 7", op. cit., 140; K. H. Neumayer, C. Ming, op. cit., 104; P. Schlechtriem, "Requirements of Application and Sphere of Applicability of the CISG", op. cit., 790.

[472] In that regard for example, F. Ferrari, "General Principles and International Uniform Commercial Law Conventions: A Study of the 1980 Vienna Sales Convention and the 1988 UNIDROIT Conventions", *ibidem*; P. Perales Viscasillas, "Article 7"; M. J. Bonell, "Article 7" op. cit., 81.

[473] More on this issue, F. Ferrari, "General Principles and International Uniform Commercial Law Conventions: A Study of the 1980 Vienna Sales Convention and the 1988 UNIDROIT Conventions", op. cit., 226.

[474] P. Schlechtriem, *Uniform Sales Law – The UN Convention for the International Sale of Goods*, op. cit., 39.

cannot be equated to the "principle of reasonableness", rather, the "principle of reasonableness" ought to be understood and applied only as a standard derived from the general principle of good faith.

It is therefore that, in addressing the general principles on which the CISG is based, we shall not go beyond acknowledging that the standard of a "reasonable person" certainly holds an important role in the CISG, above all by virtue of its strong presence in this document. Thus, for example, this standard is contained in Articles 8 Para 2 and 16 Para 2 Item b (reasonable reliance), Articles 18 Para 2, 39 Para 1, 48 Para 2, 49 Para 2, 63 Para 1 and 79 Para 4 (reasonable time), Articles 34, 86 Para 2 and 88 Para 2 (unreasonable inconvenience and unreasonable expense), Article 38 Para 3 (reasonable opportunity for examination of goods), Article 48 Para 1 (unreasonable delay and unreasonable inconvenience), Article 60 Item a (reasonable expectations), Article 72 Para 2 (reasonable notice), Article 75 (reasonable manner and reasonable time), Article 76 Para 2 (reasonable substitute), Article 79 Para 1 (reasonable expectations), Articles 85 and 86 Para 1 (reasonable steps), Article 88 Para 1 (unreasonable delay, reasonable notice). In applying this standard, courts are faced with responsible task of assessing what in a particular case may be considered "reasonable" (normal, acceptable),[475] taking into account all relevant circumstances of the transaction in hand.

A comparison with the Law of Obligations. – Even a cursory glance at the positions taken by courts and scholars on the principles considered as "general principles on which [the CISG] is based" allows for the conclusion that most of these principles are in line with those accepted by the Law of Obligations, where they find their expression in the provisions on fundamental principles, as well as numerous other specific rules.

In that regard, the fundamental principles of the Law include, first and foremost: party autonomy, equality of parties, principle of good faith and fair dealing, prohibition of abuse of rights, prohibition of creation and exploitation of monopoly position, principle of equal consideration in bilateral contracts, prohibition of causing damage, duty to perform obligations, dispositive character of the provisions of the Law, application of fair trade custom and usage.[476] The Law explicitly accepts the principle of consensualism, providing that entering into contract shall not be subject to any form, unless otherwise specified by the law.[477] With regard to the scope of damages, the solution developed in the Law is based on the principle of

[475] J. O. Honnold, op. cit., 101: "*What is 'reasonable' can appropriately be determined by ascertaining what is normal and acceptable in the relevant trade*".

[476] Fundamental principles of the Law of Obligations are established under Articles 1–25 of the Law.

[477] Article 67 Para 1 Law of Obligations.

full compensation and limitation of liability by the foreseeability rule,[478] which basically corresponds to the relevant principles of the CISG.[479]

On the other hand, the Law in principle does not recognise the standard of a "reasonable person", widely accepted in the CISG. With regard to the conduct of the parties in the performance of obligations and exercise of rights, the Law stipulates that parties are bound to act with the care required in legal transactions of the kind of obligation relations involved (care of a prudent businessman or care of a prudent owner). Speaking of performing obligations which fall within professional activities, a greater degree of care is required, in line with professional rules and usage (care of a prudent professional). In this context, the Law provides in particular that in exercising one's rights, a party to obligation relations must refrain from acts which may hamper the performance of obligations of the other party.[480]

A comparative examination of the general principles of the CISG and those of the Law of Obligations seems to suggest, in general terms, that a consistent comparison of these principles is a challenging or well-nigh impossible task, primarily because the CISG, as already pointed out, does not define "the general principles on which it is based", and also due to the differences in their respective spheres of application – while the CISG governs only the contracts for the international sale of goods, the Law of Obligations covers and regulates a broad area of obligation relations in general. In any case, the important thing is for the judges from Serbia applying the CISG not to interpret its principles in the light of the similarities with and differences from the corresponding principles of the Law of Obligations, but rather to be guided by the requirement for autonomous and uniform interpretation of the CISG, already addressed in this paper.

IV. SYNTHESIS

An analysis of the rules under Article 7 CISG leads to the conclusion that the solution adopted by the CISG in the context of its interpretation and gap-filling is far from optimal in terms of legal certainty. In the first place, the rule under Article 7 Para 1 CISG, being a result of a compromise, seems to be more of a "diplomatic concession" than an expression of clear legal thought and particular design of the CISG drafters. As such, it paves the way to confusion and ambiguities in interpretation of the CISG, which in turn may have a negative impact on legal certainty in

[478] Article 266 Law of Obligations.

[479] This issue will be specially addressed when discussing damages.

[480] Article 18 Law of Obligations.

the course of its application. It seems therefore that the vague wording on the need for "observance of good faith in international trade" ought to be removed from the rules on the interpretation of the CISG, and the good faith principle be explicitly provided as one of the general principles on which the CISG is based in the sense of Article 7 Para 2. On the other hand, if the intention of the CISG drafters was to avoid "at all costs" making explicit provision for the good faith principle as a general principle of the CISG, the wording concerning its application and scope in the context of interpretation of the CISG should have been clearer, so as not to allow room for different interpretations. Furthermore, in terms of gap-filling in the sense of Article 7 Para 2 CISG, while giving regard to all the difficulties attending a choice and determination of these principles in a document of international character, it remains unclear why no provisions were made here, using the *exempli causa* method, at least for those principles universally accepted as "the general principles on which [the CISG] is based", which, as such, unambiguously derive from the contents of the specific rules of the CISG. Given that the judges of domestic courts are not always fully acquainted with the principles of uniform law, and tend to interpret them in the light of the criteria of the domestic law, it would seem that identifying these principles, particularly in the context of the requirement for autonomous and uniform interpretation under Article 7 Para 1 CISG, would provide the judges with important guidance in seeking the most adequate solution for applying the Convention.

Chapter III

REMEDIES FOR BREACH OF CONTRACT

I. GENERAL

The binding force of a contract between parties operates as a law. The parties are bound to perform the obligations they assumed under a contract as if those obligations were provided under the law, and failing to perform such obligations as stipulated under the contract, they will suffer legal consequences as provided under the law or the will of the parties. The rule whereby contractual obligations must be kept as agreed (*pacta sunt servanda*) is an expression of the age-old evolution of contract law and fundamental rule in the contract matter.[481]

Should a party fail to perform any of his obligations, which is nonetheless capable of being performed, or still perform it, but otherwise than as laid down in the contract, this raises the issue of what right may be available to the other party that stands ready to fulfil his obligations or has already fulfilled them. The answer offered in that respect by the CISG and the Law of Obligations is pretty much the same: this is the right to performance, right to damages, as well as contract termination when the requirements for this have been met. There are, however, important differences between these two sources, above all in respect of: contract termination (I) and damages (II).

These rights will be analysed further below. Their understanding and analysis of the differences between the Convention and the Law of Obligations, require that an examination be made first of the general system of the CISG rules concerning remedies for breach of contract.

[481] S. Perović, *Obligaciono pravo*, op. cit., 374.

II. THE CISG SYSTEM

1. Breach of Contract

Under Articles 45 and 61 CISG, if a party fails to perform any of his obligations under the contract or the CISG, the other party may resort to a remedy provided under the CISG. These rules serve as a basis for the application of any remedies provided under the Convention for breach of contract.[482]

In this context, note should be taken at the outset that the CISG adopts a unique notion of the breach of contract that covers all cases of non-performance[483] – total non-performance, partial non-performance and cases of performance different from that for which the parties contracted.[484] Under the CISG, the debtor is liable for any loss which is due to a breach of contract, regardless of fault (strict liability system),[485] except in cases of exemption of liability under Articles 79 and 80 CISG and where the parties have agreed otherwise.[486] A breach of contract exists regardless of whether it concerns the primary or secondary obligation, and whether it arises from the rules of the CISG or the contract

[482] Commentary to Article 46 CISG, Markus Müller-Chen, "Article 46" in *Schlechtriem & Schwenzer Commentary,* 2016, 736–754; Peter Huber, "Article 46" in *Commentary,* Kröll/Mistelis/Perales Viscasillas, 2018, 673–687; K. H. Neumayer, C. Ming, op. cit., 329–335; J. O. Honnold, op. cit., 304–312. Commentary to Article 61 CISG, Florian Mohs, "Article 61" in *Schlechtriem & Schwenzer Commentary,* 2016, 899–905; Gary F. Bell, "Article 61" in *UN Convention on Contracts for the International Sale of Goods (CISG) Commentary,* (eds. Kröll/Mistelis/Perales Viscasillas), C. H. Beck Hart Nomos, 2011, 827–830; K. H. Neumayer, C. Ming, op. cit., 391–394; J. O. Honnold, op. cit., 377.

[483] See Jürgen Basedow "Towards a Universal Doctrine of Breach of Contract: The Impact of the CISG", *International Review of Law and Economics*, No. 25, 2005, 490; Milena Đorđević, "Article 74" in *Commentary,* Kröll/Mistelis/Perales Viscasillas, 2018, 960–961.

[484] See J. Perović, *Standardne klauzule u međunarodnim privrednim ugovorima,* op. cit., 97.

[485] Unlike a large number of civil law systems, the CISG does not require there to be a fault for debtor's liability to established. More on this issue, Markus Müller-Chen, "Article 45" in *Schlechtriem & Schwenzer Commentary,* 2016, 723; Ingeborg Schwenzer, "Article 74" in *Schlechtriem & Schwenzer Commentary,* 2016, 1058; M. Đorđević, "Article 74", op. cit., 961–962; M. Đorđević, *Obim naknade štete zbog povrede ugovora o međunarodnoj prodaji robe,* op. cit., 134 ff; K. H. Neumayer, C. Ming, op. cit., 483: "*L'indemnisation est indépendente de toute faute du débiteur qui, par definition, garantit l'exécution de ses obligations contractuelles*"; Victor Knapp, "Article 74" in *Commentary,* C. M. Bianca, M. J. Bonell, 1987, 540; B. Audit, op. cit., 162; V. Heuzé, op. cit., 400 ff; Djakhongir Saidov, "Methods of Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods", *Pace International Law Review,* Volume 14, No. 2, 2002.

[486] See J. Perović, *Standardne klauzule u međunarodnim privrednim ugovorima,* op. cit., 99.

itself.[487] It may therefore be concluded in general terms that any kind of "objective non-performance of the obligations under the contract" is considered as breach of contract under the CISG.[488]

Should a breach of contract occur, the CISG leaves it to the creditor to decide what remedy (or remedies) he will resort to. It is worth noting, in this context, that the creditor may claim damages, regardless of whether or not the requirements have been met for recourse to any other remedies. On the other hand, the right to performance and the right to avoidance may not be aggregately claimed, both due to their nature and on account of the legal effects they produce. Finally, contract avoidance, as well as the right to require delivery of substitute goods, are contingent on there being a fundamental breach of contract within the meaning of Article 25 CISG.

2. Claim for Performance

The claim for performance, with its roots in the *pacta sunt servanda* rule, constitutes, as a matter of principle, the primary right of the creditor in case of breach of contract in the civil law systems. It is assumed in these systems that parties enter into a contract in order to perform it, rather than acquire the right to claim damages for non-performance.[489] Accordingly, when a party fails to perform his obligations under a contract, the other party has two options at disposal: the right to performance and the right to contract termination; whatever his choice, he may also exercise the right to claim damages.[490] This approach is reflected in the Law of Obligations in a general rule on contract termination for failure to perform obligations, providing that in bilateral contracts, when a party fails to perform his obligation, the other party may, unless otherwise agreed, require performance of the obligation, or, under the terms specified in the law, terminate the

[487] See Ulrich Magnus, "Remedies: Damages, Price Reduction, Avoidance, Mitigation and Preservation", in *International Sales Law: A Global Challenge* (ed. L. DiMatteo), Cambridge University Press, 2014, 258.

[488] See Herbert Bernstein, Joseph Lookofsky, *Understanding the CISG in Europe*, 1997, Springer Netherlands, 1997, 96; *Dj. Saidov, Methods of Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods*, op. cit.

[489] In this sense, see S. Perović, *Obligaciono pravo*, op. cit., 508, stating: "It seems that damages due to non-performance may not be understood as 'contract performance in another form'... The damages due to non-performance of obligations do not provide the creditor with the full satisfaction he would have enjoyed had the contract been performed as intended".

[490] More on this, S. Perović, *Obligaciono pravo, ibidem.*

agreement.[491] In common law countries, on the other hand, the claim for damages counts as the primary remedy available to the creditor in case of breach of contract, with the request for specific performance being asserted very seldom or in cases where damages would not constitute adequate compensation[492] or where so agreed by the parties[493].[494]

The CISG, when it comes to the performance claim, takes into account both approaches.[495] On the one hand, it follows in the tradition of the civil law countries by providing for performance as the primary remedy available to the creditor. This is indubitably inferred from the wording of Article 46 which lays down that the buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement. Specifically, in case of non-conforming goods, the buyer may require delivery of substitute goods where the lack of conformity constitutes a fundamental breach of contract and may require that the lack of conformity be remedied by repair. The rule under Article 62 CISG deals with the seller's right to require performance for breach of contract by the buyer and "mirrors" the rule laid down in Article 46 CISG. Thus, under Article 62, the seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement. In addition to the claim for performance, the creditor, as a rule, may also resort to the claim for damages. On the other hand, the common law approach has found its expression in Article 28 CISG which stipulates:

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[491] Article 124 Law of Obligations. Commentary, Slobodan Perović, "Član 124" in *Komentar Zakona o obligacionim odnosima*, Slobodan Perović, I Knjiga, 1995, 243–249; B. Vizner, *Komentar Zakona o obveznim (obligacionim) odnosima,* 1. knjiga, op. cit., 508: "there is no doubt that, in case a party refuses to perform the obligations under a contract, the other party may successfully *request performance* of the contract in hand".

[492] See US Uniform Commercial Code, Article 2–716, stipulating that specific performance may be decreed where the goods are unique or in other proper circumstances.

[493] See Konrad Zweigert, Hein Kötz, *Introduction to Comparative Law*, Clarendon Press, 1998, 469 ff; Edward Allan Farnsworth, "Legal Remedies for Breach of Contract", Columbian Law Review, Volume 70, No. 7, 1970, 1145, 1156; J. O. Honnold, op. cit., 226–228; M. Bridge, *The Sale of Goods*, op. cit., 531 ff.

[494] Comparative review of solutions in that respect, Shael Herman, "Specific Performance: A Comparative Analysis", *Edinburgh Law Review*, No. 1, 2003, 5–26 and No. 2, 2003, 194–217; *Principles of European Contract Law, Parts I and II,* op. cit., 399–402; Hugh Beale, Arthur Hartkamp, Hein Kötz, Denis Tallon, *Cases, materials and Text of Contract Law,* Hart Publishing Oxford and Portland, Oregon, 2002, 675 ff.

[495] See M. Müller-Chen, "Article 46", op. cit., 737: "*The regulation of the right to require performance represents a mixture of various legal traditions*".

"If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention".[496]

A special limitation on asserting the claim for performance under the CISG is imposed by Article 46, which sets forth that, in case of non-conforming goods, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract[497] within the meaning of Article 25 CISG. Therefore, the requirement for delivery of substitute goods in the CISG system operates as a remedy to be pursued *ultima ratio,* only when other remedies, such as the right to claim repair,[498] price reduction[499] and damages[500] have proved to be inadequate or insufficient to fully "remedy" the breach of contract by the seller.[501]

A conclusion may be drawn from the above rules that the CISG, following the approach generally taken in civil law countries, adopts and expressly provides for the claim for performance within the system of remedies available for breach of contract. However, by means of the rules contained in Article 28, it finds the way to release the common law courts from the obligation to accept this solution. In this way, the Convention succeeds in bridging the sharp differences between these systems and setting the rules that would not pose difficulties to courts in interpreting and applying the CISG.

III. TERMINATION OF CONTRACT DUE TO NON-PERFORMANCE

Introduction. – An overview of how the theory of contract termination due to non-performance evolved through the history of law and the positions taken in legal doctrine, allows for a conclusion that the underlying aspects of the issue at stake have been determined through development of general and legal culture. From the fragmentary solutions of Roman law to the comprehensive system developed by theories of Pothier and Capitant, the mechanism of contract termination

[496] Commentary, Markus Müller-Chen, "Article 28" in *Schlechtriem & Schwenzer Commentary,* 2016, 482–493; Andrea Björklund, "Article 28" in *Commentary,* Kröll/Mistelis/Perales Viscasillas, 2018, 373–383; Ole Lando, "Article 28" in *Commentary,* C. M. Bianca, M. J. Bonell, 1987, 232–239; K. H. Neumayer, C. Ming, op. cit., 230–233; J. O. Honnold, op. cit., 223–228.

[497] Article 46 Paragraph 2 CISG.

[498] Article 46 Paragraph 3 CISG.

[499] Article 50 CISG.

[500] Article 74 CISG.

[501] See M. Müller-Chen, "Article 46", op. cit., 741 ff.

for non-performance has come a long way, attended by various theoretical explications in attempts to provide answers as to its permissibility, grounds and manner of application. The answers produced were widely diverse: from arguing its general impermissibility, to justifying its acceptance by criteria sometimes based on the general ideas of fairness and moral, and sometimes on precise legal categories such as the implied resolutory condition and the cause of contract. An understanding of modern rules of contract termination for non-performance requires that note be taken of all of them. Comparative law solutions of this matter, viewed in the light of court practice and positions taken in the doctrine, lead to a general conclusion that contract termination for non-performance is a remedy available to the creditor whereby he endeavours to preserve his economic interests while withdrawing from the contract. At the same time, however, a termination of contract is also a moral action whereby a claim to fairness is achieved.[502]

Requirements of modern business transactions, and in particular the international sales practice, have determined the general direction the evolution of this issue would take. It entails abandoning the exclusive application of the *pacta sunt servanda* principle and deciding in favour of contract termination when the appropriate conditions are met. Modern rules on contract termination due to non-performance are based on the understanding that, when for one party, due to non-performance of the other party, contract performance becomes void of economic interest to the extent that the purpose of the contract is no longer achievable for such party, the performing party should not be held bound by the contract "at all costs". In other words, when a serious breach of contract occurs in such a way as to defeat the purpose for which it was concluded, both parties should be released from such grounds of obligations as soon as practicable.

A comparative review of the solutions on contract termination due to non-performance in national legislations and uniform rules, in spite of considerable differences between them, points to a general conclusion: the issues of permissibility of termination, termination procedure, and terms of termination, are permeated by two, essentially contrary, ideas – traditional principle of preserving the contract in force wherever possible, on the one hand, and the need to allow the performing creditor, in case of non-performance of fundamental obligation by the debtor, the safest, and most efficient possible "exit" from contractual relationship, on the other.[503]

As for whether or not the creditor may terminate the contract, vast majority of sources link the answer to this question to the gravity of non-performance, or

[502] J. Perović, *Bitna povreda ugovora Međunarodna prodaja robe*, op. cit., 349.

[503] J. Perović, *Bitna povreda ugovora Međunarodna prodaja robe*, op. cit., 345.

the consequences arising from non-performance.[504] The guiding principle here is to take the consequences of non-performance, or rather the degree of its gravity as the primary test of the right to terminate the contract. In other words, a contract may not be terminated on grounds of any non-performance, but only such as deprives the other party of the expected benefit, which calls into question the purpose of the contract. The assessment of this matter is at the discretion of the court which must determine in each particular case whether the failure to perform a contractual obligation constitutes grounds for contract termination.[505]

In the context of these general factors, the comparative law is familiar with a vast array of differences in solutions governing contract termination due to non-performance. These differences relate primarily to the grounds for contract termination (A) and achieving termination (B). This section of the paper will be devoted to an analysis of the aforementioned questions in the light of the CISG solutions, accompanied with a comparative examination of the corresponding rules of the Serbian Law of Obligations.

A. GROUNDS FOR CONTRACT TERMINATION DUE TO NON-PERFORMANCE

General. – The CISG and Serbian Law of Obligations adopt different solutions with respect to the grounds for contract termination for non-performance. The CISG in this context relies on the fundamental breach of contract, a concept unknown to the Law of Obligations; instead, the Law provides for non-performance as general grounds for termination of bilateral contracts, on the one hand, and material and legal defects as special grounds for termination of contracts of sale, on the other. A summary of these solutions is provided below.

1. Grounds for Avoidance under the CISG

1.1. Fundamental Breach of Contract

Definition and sphere of application in the CISG. – The Convention relies on fundamental breach of contract (*contravention essentielle*, *incumplimiento esencial*,

[504] See Guenter Treitel, "Remedies for Breach of Contract. Courses of action open to the party aggrieved", *International Encyclopedia of Comparative Law,* Volume VII: *Contracts in General*, Tübingen, Mohr Siebeck, 1989, 147 ff, underlining in this context: "*The most important principle is that the default attains a certain minimum degree of seriousness*".

[505] J. Perović, *Bitna povreda ugovora Međunarodna prodaja robe*, op. cit., 122.

wesentliche Vertragsverletzung, *wezentlijke tekortkoming*, *infrazione essenziale,* bitna povreda ugovora) as grounds for contract avoidance. Under the CISG, "A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result (Article 25).[506]

A fundamental breach of contract appears in the context of: a) the right of the buyer to declare the contract avoided if the failure by the seller to perform any of his obligations under the contract or the CISG amounts to a fundamental breach of contract (Article 49 Paragraph 1 Item a); b) the right of the buyer to declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of contract (Article 51 Paragraph 2); c) the right of the seller to declare the contract avoided if the failure by the buyer to perform any of his obligations under the contract or the CISG amounts to a fundamental breach of contract (Article 64 Paragraph 1 Item a); d) the right to declare the contract avoided if prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract (Article 72 Paragraph 1) *and* e) the right to declare the contract avoided in the case of a contract for delivery of goods by instalments (Article 73, Paragraphs 1 and 2). Furthermore, in case of non-conformity of goods, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract (Article 46 Paragraph 2). Finally, a fundamental breach of contract appears in the context of the passing of risk; if committed by the seller, the buyer's rights to invoke the remedies

[506] On fundamental breach of contract under Article 25 CISG see for example: Ulrich G. Schroeter, "Article 25" in *Schlechtriem & Schwenzer Commentary,* 2016, 416–460; Michael Will, "Article 25" in *Commentary,* C. M. Bianca, M. J. Bonell, 1987, 205–221; Andrea Björklund, "Article 25" in *Commentary,* Kröll/Mistelis/Perales Viscasillas, 2018, 333–351; K. H. Neumayer, C. Ming, op. cit., 206–221; J. O. Honnold, op. cit., 204–212; V. Heuzé, op. cit., 348 ff; P. Schlechtriem, *Uniform Sales Law – The UN – Convention on Contracts for the International Sale of Goods*, op. cit., 58; Franco Ferrari, "Fundamental Breach of Contract Under the UN Sales Convention: 25 Years of Article 25 CISG", *Journal of Law and Commerce,* No. 25, 2006, 489–508; Robert Koch, "The Concept of Fundamental Breach of Contract under the United Nations Convention on Contracts for the International Sale of Goods (CISG)", *Review of the Convention on Contracts for the International Sale of Goods (CISG)*, Kluwer Law International, 1999, 177–354; Jelena Perović, *La contravention essentielle au contrat comme fondement à le résolution des contrats dans les codifications de droit uniforme,* Revue de droit international et de droit comparé, Bruxelles, Bruylant, 2008, No. 2 and 3, 272–306; In Serbian, J. Perović, *Bitna povreda ugovora Međunarodna prodaja robe,* op. cit., entire; L. Graffi, op. cit., 237–259.

available to him (to require performance or declare the contract avoided) are not impaired, even though the risk has passed to him (Article 70).

1.2. Failure to Perform in Additional Period of Time Fixed for Performance

Nachfrist. – In addition to the right to contract avoidance due to a fundamental breach, the CISG allows the contract to be avoided in case of non-performance in an additional period of time fixed for performance of the obligation *(Nachfrist),*[507] in which case the party declaring the contract avoided need not invoke the fundamental breach. This rule is strictly limited to non-delivery of the goods by the seller (Article 49 Paragraph 1 Item b) and failure to pay the price or take delivery by the buyer (Article 64 Paragraph 1 Item b) and does not apply in case of non-conformity of the goods,[508] or in other cases of breach of contract.[509] Thus, under the CISG, the buyer may declare the contract avoided if the seller has failed to deliver the goods in the additional period of time fixed by the buyer[510] or has declared he will not deliver within the period so fixed (Article 49 Paragraph 1 Item b),[511] while the seller may declare the contract avoided if the buyer has failed even in the additional period of time fixed by the seller[512] to perform his obligation of paying the price or taking delivery of the goods, or has declared he will not do so within the period so fixed (Article 64 Paragraph 1 Item b).[513] The application of any of these rules is without prejudice to the right of the parties to invoke a fundamental breach of contract should it have occurred in a particular case.[514]

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[507] More on this matter, U. G. Schroeter, "Article 25", op. cit., 422 and 447; Milena Milutinović, "Naknadni rok za izvršenje ugovora prema odredbama Bečke konvencije – u teoriji i praksi", *Pravni život,* No. 11, 2003, 259–277.

[508] In case of non-conformity, the buyer may declare the contract avoided only on the grounds of a fundamental breach of contract, as provided under Article 49 Paragraph 1 Item a CISG.

[509] See U. G. Schroeter, "Article 25", op. cit., 422.

[510] This period is determined in accordance with Article 47 Paragraph 1 CISG providing that: "The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations".

[511] See Markus Müller-Chen, "Article 49" in *Schlechtriem & Schwenzer Commentary,* 2016, 783–784; Peter Huber, "Article 49" in *Commentary,* Kröll/Mistelis/Perales Viscasillas, 2018, 743–744.

[512] This period is determined in accordance with Article 63 Paragraph 1 CISG providing that: "The seller may fix an additional period of time of reasonable length for performance by the buyer of his obligations".

[513] See Florian Mohs, "Article 64" in *Schlechtriem & Schwenzer Commentary,* 2016, 930–931; Gary F. Bell, "Article 64" in *Commentary,* Kröll/Mistelis/Perales Viscasillas, 2018, 869–870.

[514] See Article 49 Paragraph 1 Item a and Article 64 Paragraph 1 Item a CISG.

1.3. Origin and Importance of the Fundamental Breach Concept

History. – The idea of distinguishing a fundamental breach of contract, as grounds for contract avoidance, from a breach less important, permitting the other, performing party only the right to claim damages, first originated in the works of Ernst Rabel and was used in the early drafts of the Hague Uniform Laws.[515] It is assumed under this concept that a breach of contract is always linked to a breach of an individual obligation, specifically an obligation agreed under the contract (*e.g.* the obligation to perform delivery or take delivery), while the assessment of whether such obligation is "fundamental" is made based on the subjective test, examining the intentions of the parties. In this context, the initial work at unification round contract termination recognised two principles – breach of an individual obligation, rather than the contract in its entirety, and use of subjective test in determining the extent of the breach committed. Both principles will undergo significant changes: the former by being expanded to include the contract as a whole and the latter by embracing the objective tests in the process of assessment.[516]

During the preparatory work on the Uniform Law on the International Sale of Goods, a proposal was made to extend the breach of contract to the breach of every contractual obligation, and thus to replace the phrase "breach of fundamental obligation" with the term "fundamental breach of obligation", in an endeavour to maintain the contract in force where the damage suffered by the other party as a result of the breach was minor. This concept was adopted at The Hague Conference of 1964 and formulated in Article 10 of the Uniform Law, providing that "For the purposes of the present Law, a breach of contract shall be regarded as fundamental wherever the party in breach knew, or ought to have known, at the time of the conclusion of the contract, that a reasonable person in the same situation as the other party would not have entered into the contract if he had foreseen the breach and its effects". This solution was a subject of sharp criticism and dispute already at the Hague Conference, and the positions of the doctrine on this issue remain divided to this day.

Discussions on the elements of the fundamental breach of contract definition continued at the Diplomatic Conference in Vienna. The substantial detriment

[515] More on this matter, Ernst Rabel, *"Der Entwurfeines einheitlichen Kaufgesetzes",* in *Rabels Zeitschrift für ausländisches und internationales Privatrecht, The Rabel Journal of Comparative and International Private Law,* 1935; Ernst Rabel, "A Draft of an International Law of Sales", *The University of Chicago Law Review,* Volume V, No.4, 1938, 543 ff.

[516] More on the history of the fundamental breach of contract, U. G. Schroeter, "Article 25", op. cit., 418–420.

standard was seen as vague and insufficiently objective, and it was decided to expand the term to any detriment suffered by a party in a given case, which "substantially [deprives] him of what he is entitled to expect under the contract". On the other hand, with regard to the foreseeability element, the solution adopted was to keep the standard of "a reasonable person"[517] provided under the Uniform Law,[518] however, the term was qualified by the phrase "of the same kind,"[519] which implies a merchant in the same business doing the same functions. On the other hand, the phrase "in the same situation" was replaced with the phrasing "in the same circumstances".[520]

This is how the final definition of the notion of the fundamental breach of contract was adopted and formulated in Article 25 CISG. The provision on the fundamental breach of contract was the first provision to be adopted at the Vienna Conference with a number of negative votes and would remain surrounded by sharp criticism, controversial opinions and inexhaustible debate in the doctrine and practice of the international sale of goods law.[521]

Importance in the field of international sales law. – The CISG solution on a fundamental breach of contract is of highest importance in the matter of international sale of goods, as it provides, in a uniform way, for one of the most significant and most frequently raised issued in international business transactions. In this sense, the fundamental breach mechanism has the role of a common denominator of the possibility of avoidance of a contract governed by the CISG, except when the parties have provided otherwise in the avoidance clause.[522]

The CISG solution on a fundamental breach of contract has exerted considerable influence on numerous national laws of recent date, particularly those whose

[517] There were proposals to replace the standard of "a reasonable person" with the "*bonus pater familias*" standard. More on this matter, M. Will, "Article 25", op. cit., 218.

[518] In spite of numerous objections to a reasonable person standard, argued to be vague and difficult to understand for civil law practitioners, and linked to the moment of entering into the contract, the proposal of the English representative on introducing this standard was found to be convincing. More on this matter, Jelena Vilus, *Komentar Konvencije UN o međunarodnoj prodaji robe*, op. cit., 86–87.

[519] In French "*de même qualité*".

[520] The French version of the CISG kept the phrase "in the same situation" ("*dans la même situation*").

[521] In detail on the origin of the fundamental breach of contract concept in the CISG, J. Perović, *Bitna povreda ugovora Međunarodna prodaja robe*, op. cit., 126–131 and references quoted therein.

[522] On avoidance clause, Jelena Perović, "Formulisanje raskidne klauzule u međunarodnim privrednim ugovorima", *Pravo i privreda,* No. 4–6, Belgrade, 2015, 303–320.

rules are modelled on the CISG. Thus, the notion of a fundamental breach of contract, or a more or less similar concept, was adopted, for example, in the Scandinavian Sales Laws,[523] and the relevant laws of Estonia, the Netherlands and China.[524] Furthermore, the CISG rules on a fundamental breach of contract were reflected in other uniform rules of contract law, such as UNIDROIT Principles of International Commercial Contracts,[525] the Principles of European Contract Law[526] and Draft Common Frame of Reference for European Contract Law.[527]

"Faux amis". – In defining the notion of a fundamental breach of contract at the Diplomatic Conference in Vienna, no concepts contained in domestic laws were used; this notion was developed exclusively on the basis of the Hague Uniform Law on the International Sale of Goods. Therefore, an interpretation of a fundamental breach of contract as provided in the CISG must not rely on similar concepts from domestic law (*faux amis, false friends*) as this would go against the grain of both Article 25 and the CISG's rules of interpretation under Article 7 Paragraph 1, as previously discussed. Same can be said of the solutions similar to the fundamental breach used in other uniform rules of contract law. Indeed, a fundamental breach of contract should be construed in the light of the international character of the CISG, seeking guidance from the wording and history of Article 25 CISG, and from uniform interpretation of this solution by courts.[528]

Distinction from the English doctrine of "fundamental breach". – The notion of a fundamental breach of contract in the CISG did not derive from the English doctrine of "fundamental breach" and shares hardly any similarities with this doctrine.[529] In English law, this notion had developed against a different background

[523] More on this matter, Joseph Lookofsky, "The Scandinavian Experience", *The 1980 Uniform Sales law Old Issues Revisited in the Light of Recent Experiences,* Verona Conference 2003, (ed. Franco Ferrari), Giuffrè Editore, Sellier European Law Publishers, Milan, 2003, 110 ff.

[524] See U. G. Schroeter, "Article 25", op. cit., 418.

[525] Article 7.3.1 UNIDROIT Principles.

[526] Article 8:103 PECL. The grounds for contract termination under the UNIDROIT Principles and the PECL is defined as "fundamental non-performance", a concept with similar underlying starting points as the fundamental breach of contract adopted in the CISG, yet showing certain differences. More on this matter, J. Perović, *Bitna povreda ugovora Međunarodna prodaja robe*, op. cit., 166–170.

[527] Article III – 3:502 of the Draft.

[528] In this regard, U. G. Schroeter, "Article 25", op. cit., 423; A. Björklund, "Article 25", op. cit., 339.

[529] See M. Will, "Article 25", op. cit., 209: "'*Fundamental breach' in the Convention... calls for a warning; it has nothing to do with the English doctrine of 'fundamental breach*'". Along the same lines, J. O. Honnold, op. cit., 205.

and originally it was applied by the English courts in the context of determining legal effects of exclusion clauses in case of a fundamental breach of contract. The main idea underlying this doctrine was that a party may invoke the exclusion clause only of he had not committed a fundamental breach of contract.[530] In any case, the English doctrine of fundamental breach was not considered in defining the concept of a fundamental breach of contract in the CISG and the greatest similarity it bears with the CISG is of terminological nature.[531] This fact has led some authors to call this notion a false forerunner[532] of the fundamental breach of contract established by the CISG.[533]

1.4. Application to Contractual Obligations

A fundamental breach of contract under Article 25 CISG exists where a breach of any contractual obligation has occurred, regardless of whether it has been specifically provided for in the contract or arises from the CISG. In addition to a "standard" obligation, typical of a sales contract, it may also be a specific obligation, fixed by the parties through agreement of wills, providing that it is a constituent part of the contract and falls within the sphere of the CISG.[534] In this context, courts have recognised a fundamental breach of contract arising from a breach of duty to inform and to advise,[535] duty of confidentiality,[536] duty to respect an industrial property right of the other party when manufacturing goods,[537] duty to refrain from exporting or re-importing goods into certain countries,[538] as well as prohibition of competition agreed under the sales contract.[539] In this regard, a fundamental

[530] On this doctrine, *Anson's Law on Contract*, op. cit., 163 ff.

[531] See J. Perović, *Bitna povreda ugovora Međunarodna prodaja robe*, op. cit., 125.

[532] M. Will, "Article 25", *ibidem*.

[533] J. Perović, *Bitna povreda ugovora Međunarodna prodaja robe*, *ibidem*.

[534] See U. G. Schroeter, "Article 25", op. cit., 427.

[535] See for example an award of the ICC International Court of Arbitration of 01 January 1995 (available at: *https://iicl.law.pace.edu/cisg/case/case-report-does-not-identify-parties-proceedings-1*).

[536] See U. G. Schroeter, "Article 25", op. cit., 425.

[537] See for example a decision of *Oberlandesgericht Frankfurt am Main* of 17 September 1991 (available at: *https://iicl.law.pace.edu/cisg/case/germany-oberlandesgericht-hamburg-oberlandesgericht-olg-provincial-court-appeal-german-168*).

[538] See for example a decision of *CA Grenoble* (*BRI Production "Bonaventure" v. Pan African Export*) of 22 February 1995. (available at: *https://iicl.law.pace.edu/cisg/case/france-february-22-1995-cour-dappel-court-appeals-sarl-bri-production-bonaventure-v*).

[539] See U. G. Schroeter, "Article 25", *ibidem*.

breach of contract may refer to a duty not to act, or rather to refrain from acting to which the party is normally entitled.[540] A breach of any practice established between the parties, or of usage the parties have agreed upon in accordance with Article 9 CISG also amounts to a fundamental breach of contract.[541] Finally, a party may commit more than one breach of obligations under the same contract; such "multiple" breaches may constitute a fundamental breach of contract, if preconditions of Article 25 CISG are met.[542] In the context of determining a fundamental breach of contract, some authors have proposed treating intentional breaches of contract as always being fundamental.[543] However, it is generally agreed among the commentators of the CISG that such approach cannot be adopted as the notion of a fundamental breach of contract does not require fault, it exists irrespective of the subjective categories such as intention and negligence.[544]

1.5. Criteria of Establishing a Fundamental Breach of Contract

Two criteria. – Two basic criteria may be deduced from the definition of a fundamental breach of contract adopted in the Convention. These are: the criterion of a detriment which substantially deprives the other party of what he is entitled to expect under the contract and the criterion of foreseeability of the detriment by the party in breach, or foreseeability of the detriment by a reasonable person of the same kind in the same circumstances.

Substantial detriment. – According to the definition of a fundamental breach of contract under Article 25 CISG, "A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract". The CISG does not provide for a definition of "substantial detriment", which raises the

[540] See for example a decision of *Oberlandesgericht Frankfurt am Main* of 24 March 2009 (available at: *https://dejure.org/dienste/vernetzung/rechtsprechung?Gericht=OLG%20Frankfurt&Datum=24.03.2009&Aktenzeichen=5%20U%20214/05*).

[541] See for example a decision of *Tribunale di Forli* (*Mitias v. Solidea S.r.l.*) of 11 December 2008 (available at: *https://iicl.law.pace.edu/cisg/case/italy-december-11-2008-tribunale-district-court-mitias-v-solidea-srl-translation-available*).

[542] In that sense, A. Björklund, "Article 25", op. cit., 341; U. G. Schroeter, "Article 25", op. cit., 427–428.

[543] More on this matter, U. G. Schroeter, "Article 25", op. cit., 427.

[544] See for example, Ulrich Magnus, "The Remedy of Avoidance of Contract under CISG – General Remarks and Special Cases", *Journal of Law and Commerce,* No. 25, 2005–6, 423 ff; A. Björklund, "Article 25", *ibidem.*

question of the criteria to be applied by the courts in addressing this notion.[545] It is noted in this regard in scholarly articles that the history of Article 25 CISG clearly points to the fact that the decisive test for establishing "substantial detriment" does not refer to the extent of a loss, but rather to the importance of the interest which the contract and each individual contractual obligation have created for the other party.[546] It is therefore necessary, when determining substantial detriment in each particular case, to establish the importance created for the creditor under the contract of the obligation in relation to which a fundamental breach of contract occurred.[547]

Any contract provides for such obligations that are of substantial importance for the parties (one or both) and whose non-performance deprives the injured party of the expected benefit to such an extent as to thereby defeats the purpose of the contract, and continuing in such contractual relationship loses all meaning and purpose for such party. In such cases, the party affected by non-performance, as a rule, has an interest to declare the contract avoided as soon as practicable, without allowing additional time for performance and without any further delay.[548]

[545] See *Secretariat Commentary*, Art. 23 (now Art. 25) Para 3, stating: "*The determination whether the detriment is substantial must be made in the light of the circumstances of each case, e. g., the monetary value of the contract, the monetary harm caused by the breach, or the extent to which the breach interferes with other activities of the injured party*" (available at: *http://www.cisg-online.ch/index.cfm?pageID=644#Article%2023*).

[546] In this context, attention needs to be drawn to the specific term "detriment" adopted in the English version of the CISG. The term "detriment" is completely new in the context of this matter, and as such is unusual even in international legal documents of the common law system. It is therefore construed in the light of history of drafting the CISG. The term was first employed in the work of the UNCITRAL in 1975 to refer to not merely the injury, harm, result, but also to the monetary harm and damage caused by harming or limiting other activities of the injured party (*interference with other activities*). The position adopted during the Vienna Conference was that the term "detriment" needs to be broadly interpreted. "Detriment" is a concept wider than actual damage or similar loss and therefore the CISG commentators warn that a translation of this term into another language must not rely on the restrictive terms of the domestic law (more on this matter, M. Will, "Article 25", op. cit., 210–211).

[547] See P. Schlechtriem, *Uniform Sales Law – The UN – Convention on Contracts for the International Sale of Goods*, op. cit., 58, stating in this context: "*the determination of this interest depends entirely on the individual terms of the contract. The question of whether damages caused by a delay in delivery amount to a breach of contract does not depend on the amount of the damages, but rather on the terms in the contract concerning the time of delivery*"; R. Koch, op. cit., 262–263; M. Will, "Article 25", op. cit., 215.

[548] In that regard, the courts take the position that a breach of contract is to be treated as fundamental when it frustrates the purpose of the contract for the injured party to such extent as to defeat any interest for contract performance. See decision of *Oberlandesgericht Frankfurt am Main*

On the other hand, there are such obligations whose non-performance, in their nature or significance, does not lead to a fundamental breach of contract and contract avoidance, with legal consequences of non-performance being rather limited to damages.

In certain cases, the importance of a specific contractual obligation is expressly laid down in the contract or arises from the nature of the transaction. A typical example in this regard is a contract with a fixed delivery period, where failure to deliver within the fixed date[549] as a rule triggers the fundamental breach of contract.[550] Thus, for example, the courts have accepted delay in delivery to constitute a fundamental breach of contract in the cases: when the buyer required the goods for an ongoing manufacturing process;[551] when agreed delivery was "within 10 to 15 days", and the buyer has repeatedly emphasized his need for quick delivery;[552] when seasonal goods are the subject of sale, such as, for example, spring collection[553]

(Shoes case) of 17 September 1991 (available at: *https://iicl.law.pace.edu/cisg/case/germany-oberlandesgericht-hamburg-oberlandesgericht-olg-provincial-court-appeal-german-168*).

[549] It should be noted that the period for performance is considered to be fixed if so contractually agreed or if from the circumstances of the case it arises that the date of performance carries substantial weight in the contract in hand. In general on fixed contracts, S. Perović, *Obligaciono pravo,* 511 ff; J. Perović, *Međunarodno privredno pravo,* op. cit., 261 ff.

[550] U. G. Schroeter, "Article 25", op. cit., 429, noting that in fixed contracts, delivery by a fixed date is the substantial interest of the parties, and failure to observe such date gives rise to a fundamental breach of contract, regardless of the loss suffered by the buyer as a result of the delay in delivery.

[551] See a decision of *Tribunale di Forli* of 12 November 2012 (available at: *https://iicl.law.pace.edu/cisg/case/italy-november-12-2012-tribunale-district-court*). In this case, a manufacturer of industrial equipment from China and a seller from Italy concluded a contract for the sale of chargers, with the buyer notifying the seller in the course of negotiations of the importance of observing the agreed delivery schedule. Deciding on the dispute, the Court held that delay in delivery constituted a fundamental breach of contract.

[552] See a decision of *Pretura circondariale* (*Foliopack v. Daniplast*) of 24 November 1989 (available at: *https://iicl.law.pace.edu/cisg/case/italy-november-24-1989-pretura-lower-court-foliopack-ag-v-daniplast-spa-translation*).

[553] See an award of *ICC International Court of Arbitration* of 01 January 1997 (available at: *http://www.cisg-online.ch/content/api/cisg/display.cfm?test=749*). In this case, the contract provided for a delivery "a week before Easter" since the buyer planned to sell the goods during the Easter Holiday. Ruling on this dispute, arbitrators held that the delayed delivery constituted a fundamental breach of contract. Conversely, a decision of *LG Stuttgart* (*Women's clothes case*) of 13 August 1991 (available at: *https://iicl.law.pace.edu/cisg/case/germany-lg-aachen-lg-landgericht-district-court-german-case-citations-do-not-identify-197*) which held that delivery of seasonal goods with a two-day delay does not amount to a fundamental breach of contract. In this case, the court held that the delay did not affect the value of the relevant clothes and that the circumstance of the goods being displayed

or knitwear ordered for the end of year sale;[554] when the seller has been informed by the buyer that the fixed delivery deadline must be met due to the buyer's obligations towards his own customers;[555] when delivery was agreed to take place before the buyer announces closure of his business;[556] when the goods are subject to major fluctuation in price[557] etc.[558] Conversely, in the absence of an appropriate provision in the contract itself, the importance of specific obligation may not be easily determined in a large number of contracts, and the issue of determining "substantial detriment", and consequently the right to contract avoidance, proves controversial and open to different interpretations.

It is therefore necessary for the parties to contractually distinguish "grave" from "minor" breaches of contract,[559] *i.e.* to specify which cases of non-performance amount to a fundamental breach of contract. With regard to contracts for the international sale of goods, these are most likely to be the cases of failure to deliver by a fixed date, or non-conforming goods (specifically in terms of kind, quality, characteristics, origin and purpose of goods, as well as their quantity,

in the market two days after the agreed time constituted a breach that may not be treated as fundamental. Commentary to the decision, C. Witz, op. cit., 95, J. Perović, *Bitna povreda ugovora Međunarodna prodaja robe,* op. cit., 148.

[554] See a decision of *Corte di Appello di Milano* (*Italdecor v. Yiu's Industries*) of 20 March 1998 (available at: *https://iicl.law.pace.edu/cisg/case/italy-march-20-1998-corte-di-appello-appellate-court-italdecor-sas-v-yius-industries-hk*).

[555] See a decision of *Bundesgericht* (*FCF S.A. v. Adriafil Commerciale S.r.l.*) of 15 September 2000 (available at: *https://iicl.law.pace.edu/cisg/case/switzerland-september-15-2000-bundesgericht-federal-supreme-court-fcf-sa-v-adriafil-0*). In this case a seller from Egypt delivered the cotton agreed to a buyer from Italy so late that the buyer had to sell substitute goods to his own customers in order to fulfil his obligations towards them, the seller having been informed of the importance of the date of delivery for the buyer. The court held that the delay in delivery amounted to a fundamental breach of contract.

[556] See a decision of *Oberlandesgericht Karlsruhe* of 20 July 2004 (available at: *https://iicl.law.pace.edu/cisg/case/germany-oberlandesgericht-hamburg-oberlandesgericht-olg-provincial-court-appeal-german-148*), decision published in *Internationales Handelsrecht (IHR)*, 2004, 246–251.

[557] See the above decision of *Bundesgericht* (*FCF S.A. v. Adriafil Commerciale S.r.l.*) of 15 September 2000 (available at: *https://iicl.law.pace.edu/cisg/case/italy-march-20-1998-corte-di-appello-appellate-court-italdecor-sas-v-yius-industries-hk*). Conversely, a decision of *OLG Hamm* (*Memory module case*) of 12 November 2001 (available at: *https://iicl.law.pace.edu/cisg/case/germany-oberlandesgericht-hamburg-oberlandesgericht-olg-provincial-court-appeal-german-24*).

[558] See U. G. Schroeter, "Article 25", 439.

[559] In this context, the distinction between main and ancillary obligations is irrelevant (see U. G. Schroeter, "Article 25", op. cit., 429).

dimensions, etc),[560] but may also relate to any other contractual obligation, depending on the intention and interests of the parties in each particular case.

In the disputes concerning whether a contract governed by the CISG may be avoided, parties typically invoke a fundamental breach of contract for non-confirming goods, late delivery, failure to pay the price and failure to take delivery.[561]

Foreseeability of the detriment. – For a breach of a contractual obligation to amount to a fundamental breach of contract, it is not sufficient that such breach has caused substantial detriment to the other party. A fundamental breach of contract under Article 25 CISG exists "unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result". The notion and importance of "foreseeability" in the context of a fundamental breach of contract attracted much dispute and controversy during the drafting of the CISG, and remain, after its adoption, a source of unflagging debate in the doctrine and different approaches in court practice.[562]

The foreseeability requirement in this sense practically means that, if a breach of contract committed by a party results in a substantial detriment to the other party, the party in breach may still avoid legal consequences of a fundamental breach of contract, if it should be determined that he did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such detriment. In other words, a precondition for the fundamental breach of contract is the fact that the breaching party has foreseen such result; if that is not the case, there is no fundamental breach of contract, in spite of there being detriment which substantially deprives the other party of what he is entitled to expect under the contract.[563]

Such solution has been strongly criticised in literature and described as a kind of limitation or an "additional filter" which serves only to encourage the breaching party to claim his own lack of knowledge, thus precluding the other

[560] See for example The ICC Model International Sale Contract (available at: *https://iccwbo.org/*), as well as The ITC Model Contract for the International Commercial Sale of Goods, Model Contracts for Small Firms Legal Guidance for Doing International Business, International Trade Centre, Geneva, 2010, 35–59.

[561] On specific cases and positions held by courts in this regard, U. G. Schroeter, "Article 25", op. cit., 437–462; A. Björklund, "Article 25" op. cit., 345 ff; L. Graffi, op. cit., 244 ff; J. Perović, *Bitna povreda ugovora Međunarodna prodaja robe*, op. cit., 134–152.

[562] More on this matter, U. G. Schroeter, "Article 25", op. cit., 430 431; A. Björklund, "Article 25", op. cit., 343–345; M. Will, "Article 25", op. cit., 215 ff; P. Schlechtriem, *Uniform Sales Law – The UN – Convention on Contracts for the International Sale of Goods*, op. cit., 69; R. Koch, op. cit., 264.

[563] See J. Perović, *Bitna povreda ugovora Međunarodna prodaja robe,* op. cit., 153.

party from declaring the contract avoided.[564] It is argued, in response to this criticism, that the solution requiring the substantial detriment to have been foreseeable to a "reasonable person of the same kind in the same circumstances" as the breaching party, introduces an objective component into the assessment of foreseeability, and is therefore exactly aimed at avoiding the issue of proving foreseeability of the very party in breach.[565] This approach takes account of the fact that the CISG applies in practice to commercial sales, which as a rule, rely on the standard of a merchant (businessman) with reasonable degree of knowledge and experience in the specific line of trade, including the knowledge of relevant market conditions, both regional and global.[566]

Essentially, the issue of foreseeability emerges only when the significance of a specific contractual obligation for the parties has neither been defined in the contract nor arises from the nature of the transaction or circumstances of the case.[567] In such cases, the contract needs to be construed in accordance with Article 8 CISG, which means that statements and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was. Where this criterion is inapplicable, statements and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.[568] In other words, it is up to the court to decide if a reasonable merchant in the same trade or economic field would have understood the importance of the obligation breached in the case in hand.

The definition of a fundamental breach of contract, as given in the CISG, does not provide for the moment in time when the breaching party must be aware of, or foresee the result of such breach.[569] This invites a question of whether such moment should be linked to the time of the conclusion of the contract

[564] More on this matter, M. Will, op. cit., 215.

[565] P. Schlechtriem, *Uniform Sales Law – The UN – Convention on Contracts for the International Sale of Goods*, *ibidem*; A. Björklund, "Article 25", op. cit., 344.

[566] A. Björklund, "Article 25", *ibidem*.

[567] More on this matter, J. Perović, *Bitna povreda ugovora Međunarodna prodaja robe,* op. cit., 154 ff.

[568] Commentary to Article 8 CISG, Martin Schmidt-Kessel, "Article 8" in *Schlechtriem & Schwenzer Commentary,* 2016, 143–180; Edgar Allan Farnsworth, "Article 8" in *Commentary,* C. M. Bianca, M. J. Bonell, 1987, 95–102; Alberto I. Zuppi, "Article 8" in *Commentary,* Kröll/Mistelis/Perales Viscasillas, 2018, 146–161; K. H. Neumayer, C. Ming, op. cit., 111–115; J. O. Honnold, op. cit., 115–123.

[569] Criticism in that respect, J. O. Honnold, op. cit., 207–208; M. Will, op. cit., 220.

(as provided in the Uniform Law),[570] the time of the breach of obligation, or indeed, another time in the course of contract performance.[571] The opinions of authors are divided on this point. Some authors find the time of the conclusion of the contract to be decisive,[572] others find it to be the time of breach[573] or the period directly preceding such time,[574] while yet others consider as decisive the information obtained after the conclusion of the contract and before its performance,[575] or rather the knowledge subsequently gained by the breaching party, but only in exceptional cases and only where preparations for the performance of the contract have started or are about to start.[576]

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[570] In spite of much debate on this issue at the Diplomatic Conference in Vienna and attempts to add the wording "at the time of the conclusion of the contract", the issue remained unresolved. See M. Will, op. cit., 220.

[571] The importance of the issue is amply illustrated by the example offered by J. O. Honnold, op. cit., 208. In a case, the seller undertook to ship 100 bags of rice to the buyer packed in new bags, upon the buyer's order. However, the seller prepared the rice for shipment in used bags that he believed were of the same quality as new bags and would be acceptable to the buyer subject to an appropriate price allowance. However, before shipment took place, the buyer telexed the seller to inform him that he had obtained a contract of resale of rice with a third party, which expressly provided that the rice must be packed and delivered in new bags. Although used bags would normally be acceptable subject to a price allowance, use of new bags for the shipment of rice was of utmost importance to him in this case. Since the seller replied that he would still make the shipment in used bags of "extra high" quality, the buyer declared the contract avoided because the sub-purchaser may reject the goods so bagged. The question raised in this case is whether the knowledge subsequently acquired by the seller from the information given by the buyer on having concluded a contract with a sub-purchaser should be taken into account, or, it must be limited to the time when the contract was concluded.

[572] Adhering to this view, U. G. Schroeter, "Article 25", *ibidem*; A. Björklund, "Article 25", op. cit., 345; P. Schlechtriem, *Uniform Sales Law – The UN – Convention on Contracts for the International Sale of Goods*, op. cit., 60; R. Koch, op. cit., 265.

[573] K. H. Neumayer, C. Ming, op. cit., 217: "*Afin de déterminer si les conditions de l'article 25 concernant la prévisibilité du préjudice sont réunis, il faut se placer au moment de commission de la contravention au contrat*".

[574] Authors taking this approach are listed in M. Will, "Article 25", op. cit., 221.

[575] According to this view, such information would be the means for a party to become aware that the breach of specific obligation would result in "substantial detriment" to the other party. In other words, doubts about knowledge or "foresight" of the breaching party may be removed through the information obtained by such party subsequent to contract conclusion and prior to performance of the obligation in question. In that regard, J. O. Honnold, op. cit., 209.

[576] Proponents of this test cite a case where the seller, immediately after conclusion of the contract, and at the time of packing the goods and preparing them for shipment, learns that tagging goods is crucial for their re-sale in the buyer's country; if the seller at that time fails to act in line with

This paper takes the view that the time decisive for a party's knowledge of facts that may result in "substantial detriment" to the other party is the time of the conclusion of the contract. At the time of concluding the contract and determining the consideration, the parties take account of the existing circumstances, as well as those future circumstances that may be foreseen by the parties. Therefore, they assume that the contract will be performed under the circumstances existing at the time of the conclusion of the contract or under the somewhat changed circumstances they may expect to occur.[577] Thus, the time of the conclusion of the contract should be taken as decisive in the context of this issue; it allows for determining the importance of specific obligation for the parties, which is indeed vital for determining the gravity of the breach committed.[578]

2. Grounds for Contract Termination under the Law of Obligations

The Serbian Law of Obligations relies on non-performance as general grounds for contract termination.[579] Under the general rule of the Law governing contract termination due to non-performance, if a party fails to perform an obligation in a bilateral contract, the creditor may, unless otherwise agreed, request performance of the obligation or terminate the contract by simple notice where termination does not occur by operation of law itself.[580] Where performance within a fixed deadline is an essential element of the contract (fixed-term contract), such contract is terminated by operation of law in case of a delay.[581] If, however, performance within a fixed deadline is not an essential element of the contract, the creditor

this knowledge, this will result in a fundamental breach of contract not allowing a "non-foreseeability" plea. See M. Will, "Article 25", op. cit., 221.

[577] S. Perović, *Obligaciono pravo*, op. cit., 429.

[578] This is also the prevalent position in court practice. See for example Decision of *Bundesgericht* (*Wire rod case*) of 23 September 2013 (available at: https://iicl.law.pace.edu/cisg/case/switzerland-september-23-2013-bundesgericht-federal-supreme-court-wire-rod-case) and Decision of *Oberlandesgericht Hamburg* of 25 January 2008 (available at: *https://iicl.law.pace.edu/cisg/case/germany-oberlandesgericht-hamburg-oberlandesgericht-olg-provincial-court-appeal-german-19*). More on court decisions in this regard, U. G. Schroeter, "Article 25", op. cit., 434.

[579] In details on contract termination due to non-performance under the Serbian Law of Obligations and, in general, in Serbian as well as comparative law, S. Perović, *Obligaciono pravo*, op. cit., 493–519.

[580] Article 124 of the Law.

[581] Article 125 of the Law.

must allow the debtor a suitable additional period of time for performance,[582] unless the debtor's conduct is such as to evince that he will not perform his obligation even within additional time.[583] The Law also provides for general rules of contract termination prior to expiration of the deadline for performance[584] and termination of a contract of successive performance.[585] A creditor intending to terminate the contract due to non-performance is under the obligation to notify the debtor thereof without delay.[586] The Law does not permit a contract to be terminated due to non-performance of a minor part of the obligation.[587] The general rules of contract termination due to non-performance are appropriately applicable in the Law to the matter of contracts of sale, within the rights of the buyer to terminate the contract due to material[588] and legal defects[589] in goods. Furthermore, beyond the defects in goods, the Law specifically provides for the right of the seller to terminate the contract in case of unjustified refusal on part of the buyer to take delivery.[590]

An examination of the general rules of the Law governing contract termination due to non-performance, as well special rules applicable to contracts of sale, allows for a broad conclusion. The Law does not recognise a fundamental breach of contract as uniform grounds for contract termination; rather, it relies on non-performance as general grounds for contract termination on the one hand, and material and legal defects as special grounds for termination of contracts of sale, on the other. However, although the Law deals separately with these two grounds, all circumstances that give rise to contract termination, different as they may be,

[582] Article 126 of the Law.

[583] Article 127 of the Law.

[584] Article 128 of the Law.

[585] Article 129 of the Law.

[586] Article 130 of the Law.

[587] Article 131 of the Law. Commentary to Articles 124–131 of the Law, Slobodan Perović, *Komentar Zakona o obligacionim odnosima*, Slobodan Perović, I Knjiga, 1995, 243–258; B. Vizner, *Komentar Zakona o obveznim (obligacionim) odnosima,* 1. knjiga, op. cit., 506–525.

[588] Articles 488–497 of the Law. See *Komentar Zakona o obligacionim odnosima*, Slobodan Perović, II Knjiga, 1995, 926 – 938; Ivan Bukljaš, Boris Vizner, *Komentar Zakona o obveznim (obligacionim) odnosima,* 3. knjiga, Zagreb, 1979, 1628–1652.

[589] Article 510 of the Law. Commentary, Slobodan Perović, "Član 510", *Komentar Zakona o obligacionim odnosima*, Slobodan Perović, II Knjiga, 1995, 957–958; I. Bukljaš, B. Vizner, *Komentar Zakona o obveznim (obligacionim) odnosima,* 3. Knjiga, op. cit., 1667–1668.

[590] Article 519 of the Law. See *Komentar Zakona o obligacionim odnosima*, Slobodan Perović, II Knjiga, 1995, 965–967; I. Bukljaš, B. Vizner, *Komentar Zakona o obveznim (obligacionim) odnosima,* 3. knjiga, op. cit., 1752–1757.

may directly or indirectly be subsumed under the broad field of non-performance. In other words, the concept of non-performance, as developed in the Law of Obligations, *de facto* "covers" all causes of contract termination, regardless of whether they are provided for in the general rules or in the sales matter. Those causes range between total and partial non-performance, including default, material and legal defects, refusal to take delivery, as well as any other cases of failure to perform the obligation as agreed under the contract.[591]

Although the Law of Obligations is not familiar with a fundamental breach of contract, this concept is not entirely unknown to Serbian law. A fundamental breach of contract was provided for in the Draft Code of Obligations and Contracts, which took over the solution developed by the Uniform Law on International Sale of Goods from 1964. Under the Draft Code, a breach of contract shall be fundamental if the breaching party knew, or ought to have known, at the time of the conclusion of the contract, that a reasonable person of the same type, being in the same situation as the other party, would not have entered into the contract if he had foreseen the breach and its effects.[592]

Relying on a fundamental breach of contract as uniform grounds for termination, the Draft Code differentiates between two broad situations: when failure to perform within a fixed deadline is a fundamental breach of contract[593] and when failure to perform within a fixed deadline is not a fundamental breach of contract.[594] In the former situation, the other party is entitled, at his option, either to require performance or give notice of termination. In either case, he is required to notify the other party of his choice within reasonable time, lest the contract be terminated by operation of law. The contract is terminated by operation of law also where the debtor requests from the creditor to be notified of his choice, and the creditor fails to furnish response without delay. However, where the creditor has elected performance, and the performance is not delivered within a reasonable time, he may declare the contract terminated. These rules also apply where the parties have agreed for the contract to be deemed terminated if not performed within a fixed deadline. On the other hand, whenever failure to perform the obligation within a fixed deadline does not constitute a fundamental breach of contract, the debtor reserves the right to perform his obligation, and the creditor to require its performance. Furthermore, the creditor may allow the debtor a suitable additional

[591] J. Perović, *Bitna povreda ugovora Međunarodna prodaja robe,* op. cit., 172–173.

[592] Article 95 Paragraph 1 of the Draft Code.

[593] Article 94 of the Draft Code.

[594] Article 96 of the Draft Code.

time for performance, and failure to perform the obligation within this additional time will constitute a fundamental breach of contract. The Draft Code furthermore lays down the rules on contract termination without allowing an additional time,[595] contract termination before expiry of the deadline for performance,[596] and termination of a contract of successive performance,[597] which are almost fully reflected in the Law of Obligations. The Draft Code also deals with proper understanding of the clause on forfeiture of rights, providing that a clause whereby a party forfeits his rights under the contract if he fails to perform his obligations, as a rule only entitles the other party to terminate the contract without allowing an additional time to the debtor.[598] Finally, according to the Daft Code, a contract may not be terminated due to non-performance of a minor part of the obligation,[599] a rule likewise adopted by the Law of Obligations. With regard to the contracts of sale, the Daft Code permits termination due to material[600] and legal defects in goods,[601] but unlike the Law, links these defects to a fundamental breach of contract.

On the other hand, the Preliminary Draft Civil Code of Serbia contains a proposal for adopting a fundamental breach of contract as general grounds for contract termination due to non-performance. According to the Preliminary Draft, "The creditor may declare the contract terminated when non-performance constitutes a fundamental breach of contract. A fundamental breach of contract exists when non-performance by the debtor results in a detriment to the creditor of such an extent that it substantially deprives him of the benefit he expected under the contract or renders the purpose of the contract no longer achievable for the creditor.

[595] Article 97 of the Draft Code.

[596] Article 99 of the Draft Code.

[597] Article 100 of the Draft Code.

[598] Article 98 of the Draft Code.

[599] Article 101 of the Draft Code.

[600] Thus, when a defect constitutes a fundamental breach of contract, the buyer may terminate the contract. However, should the buyer fail to terminate the contract within reasonable time from notification of the seller of the defect, such defect will be deemed not to constitute a fundamental breach of contract (Article 417). On the other hand, when a material defect does not constitute a fundamental breach of contract, the buyer may not terminate the contract forthwith, but only providing that the seller fails to remove such defect, or fails to deliver the goods free of defects within an appropriate period as fixed by the buyer. The buyer will forfeit the right to terminate the contract if he fails to exercise it within a reasonable time upon expiry of the additional time allowed to the seller, but he may still require performance and set another additional period to the seller, and upon ineffective expiry of such additional period, he may either reduce the price or still require performance (Article 418).

[601] See Article 438 of the Draft Code.

The notice of termination is effective only if made by notice to the debtor. Where a fundamental breach of contract is committed, the creditor is not required to leave an additional time for performance to the debtor".[602] It is immediately obvious that this solution in principle bears similarities to the concept of a fundamental breach of contract adopted by the CISG. In this context, the "substantial detriment" test, the rule that in case of a fundamental breach of contract no additional time needs to be allowed to the other party, the requirement to give notice of termination to the debtor, are all identical to the respective solutions developed by the CISG. Unlike the CISG, however, the Preliminary Draft provides explicitly for a case where, due to non-performance, "the purpose of the contract is no longer achievable for the creditor". On the other hand, the Preliminary Draft does not adopt the "foreseeability of the detriment" test explicitly provided for by the CISG while defining a fundamental breach of contract.

B. EFFECTING CONTRACT TERMINATION DUE TO NON-PERFORMANCE

A termination of contract due to non-performance results in expiry of legal grounds for creating obligations. At the moment of termination, parties are released from their contracted obligations and no party can require performance of the contract since the contract no longer exists.[603] For contract termination to occur, it does not suffice that grounds for termination exist, rather the party intending to terminate the contract needs to take certain steps in order to effect termination.[604] It is therefore that the knowledge of the procedure of achieving contract termination, which amounts to expiry of its existence as grounds for creating obligations, is of particular importance in cases of termination of contract due to non-performance.

There are significant differences in comparative law regarding the achievement of contract termination due to non-performance. They revolve round two essential issues: 1) should termination be declared by the court (judicial termination) or it may also be achieved out of court, by simple declaration of the creditor's will (out-of-court termination) and 2) is giving notice of termination to the other party required in order to effect termination, or termination occurs by operation of

[602] Article 138 of the Preliminary Draft, *Prednacrt Građanskog zakonika Republike Srbije,* Druga knjiga, op. cit., 52.

[603] S Perović, *Obligaciono pravo*, op. cit., 517.

[604] Except in case of automatic, *ipso facto* termination.

law (*ipso iure, ipso facto, de plain droit*). Such differences exist both among respective uniform rules of the contract law and among the uniform rules, on the one hand, and national legal systems on the other. Differences may be perceived even between respective solutions of national legal systems,[605] particularly conspicuous being those relating to judicial termination of contract adopted in the countries of Romanic legal tradition *(la résolution judiciaire*).

Effecting termination of contract due to non-performance will be examined further below in the light of the solutions adopted by the CISG, accompanied by a comparative review of the corresponding rules of the Law of Obligations.[606]

1. Declaration of Avoidance as Means of Effecting Contract Avoidance under the CISG

1.1. General Rule

Within the system of avoidance adopted by the CISG, for contract avoidance to be achieved, the creditor must declare the contract avoided, and the debtor must be given notice of such declaration. This requirement is set forth in Article 26 CISG: "A declaration of avoidance of the contract is effective only if made by notice to the other party". The rule on effecting contract avoidance applies in a uniform way, once the requirements for contract avoidance under the CISG have been met (Articles 49, 64, 72 and 73) or through wills of the parties – avoidance clause *(unless the avoidance clause provides for another means of effecting contract avoidance).*

If declaration of avoidance is made in spite of the fact that no requirement for contract avoidance has been met,[607] such declaration of avoidance may amount to a breach of contract entitling the other party to require performance.[608] Furthermore, in such a case, the other party may, where conditions have been met, suspend

[605] For this issue in Serbian law, S. Perović, *Obligaciono pravo,* op. cit., 505 ff; J. Perović, *Bitna povreda ugovora Međunarodna prodaja robe,* op. cit, 321–344.

[606] In details on this issue, J. Perović, *Bitna povreda ugovora Međunarodna prodaja robe,* op. cit., 295–349; Jelena Perović, "Izjava o raskidu kao uslov za raskid ugovora zbog neispunjenja obaveze", *Pravni život*, No. 11, Belgrade, 2005, 473–499; Jelena S. Perović Vujačić, "Kako raskinuti ugovor o međunarodnoj prodaji robe? Pogled na rešenje Konvencije UN o međunarodnoj prodaji robe", *Izazovi međunarodnog poslovnog prava i prava Evropske unije, Liber Amicorum in honour of Radovan Vukadinovic*, (ed. V. Popović, J. Vukadinović Marković, A. Tatham), Academy of Sciences and Arts of the Republic of Srpska and Association for European Law, Belgrade 2020, 377–397 (in manuscript).

[607] This is typically the case when the breach of contract committed does not amount to a fundamental breach under Article 25 CISG and does not entitle the creditor to avoid the contract.

[608] See Articles 46 Paragraph 1 and 62 Paragraph 1 CISG.

the performance of his obligations.[609] Finally, if a fundamental breach of contract has been committed by a party making declaration of avoidance without grounds, the other party may declare the contract avoided[610] and claim restitution of whatever he has supplied or paid under the contract.[611] In all these cases, the other party may also claim damages where conditions for this have been met.[612]

It is to be inferred from the provision of Article 26 CISG that the Convention accepts the out-of-court avoidance of contract, based on which the creditor, whenever the requirements for avoidance are met, may avoid the contract himself, by making a declaration of avoidance to the debtor, rather than go to court.

The Convention rejected the system of *ipso facto* avoidance adopted by the Hague Uniform Law on the International Sales of Goods.[613] The CISG commentators take the unanimous view that contract avoidance by a declaration of avoidance achieves a greater degree of legal certainty[614] than *ipso facto* avoidance,[615] arguing that it removes uncertainty as to the parties' rights and obligations, notably because it allows for establishing the point in time from which the avoidance begins to produce legal effect.[616] This assessment seems acceptable, particularly

[609] See Article 71 CISG.

[610] See Articles 49, 64, 72 and 73 CISG.

[611] See Article 81 CISG.

[612] See Articles 74–80 CISG.

[613] The Hague Law did not provide for a special rule on effecting avoidance of contract, but rather linked the manner of contract avoidance to the specific grounds for avoidance. This is a hybrid system, where contract is avoided by declaration of avoidance in some cases, and in others, as *ipso facto* avoidance (see articles 24, 25, 26, 30, 43, 55, 62, 70). More on this matter, J. Perović, *Bitna povreda ugovora Međunarodna prodaja robe*, op. cit., 296–300.

[614] During the drafting of the CISG, the *ipso facto* system of avoidance drew sharp criticism. More on this, J. Perović, *Bitna povreda ugovora Međunarodna prodaja robe*, op. cit., 299.

[615] Note should be taken, however, that compelling arguments were put forward in favour of *ipso facto* avoidance in the context of the solutions of the Hague Law. Thus, according to Tunc, *ipso facto* avoidance works in the interest of both parties, the debtor, for not allowing the creditor to wait for the moment most opportune for him, depending on the circumstances of the case, to declare the contract avoided (for example, price fluctuations), and the creditor, for not keeping him bound by the contract he cannot avoid and thus subjecting him to a greater loss. Furthermore, *ipso facto* avoidance is justified on the understanding that, in case of a fundamental breach of contract, the creditor may reasonably be assumed to have no further interest in contract performance (see André Tunc, "Commentary of the Hague Conventions of the 1st of July 1964 on International Sale of Goods and the Formation of the Contract of Sale" op. cit., 50).

[616] See Andrea Björklund, "Article 26" in *Commentary,* Kröll/Mistelis/Perales Viscasillas, 2018, 356.

in the light of the fact that the CISG adopts a uniform system of contract avoidance based on a fundamental breach of contract and, unlike the Hague Law, does not link the way of effecting avoidance to different grounds of avoidance. In this context, it may be inferred that the issue of accepting *ipso facto* avoidance largely relies on the general concept adopted in a particular system, above all with regard to the grounds for contract avoidance. In other words, justification for accepting *ipso facto* avoidance should be sought depending on whether uniform grounds for contract avoidance are accepted (a fundamental breach of contract) or such grounds are contained in different, specially regulated cases of non-performance, which, subject to particularities of each individual case, leave room for various methods of effecting contract avoidance – by declaration of avoidance or by operation of law (*ipso facto*).[617]

1.2. Form and Contents of a Declaration of Avoidance

Forma. – In line with the freedom from form principle established in Article 11 CISG, a declaration of avoidance need not meet requirements of any particular form and can be made both in writing and orally.[618] However, this rule of the Convention will not apply if the contract, usage or practices established between the parties provide for a specific form; in such cases, a declaration of avoidance not made in the form as provided for will produce no legal effects.[619]

The form itself of the declaration is of no particular importance; what is of importance is for the other party to be given notice of the declaration, and for the declaration, as far as the content is concerned, to be clear and definitive. Thus, for example, a declaration of avoidance can be made over the telephone[620] or by means of electronic communication, if the addressee in the case in hand has explicitly or implicitly agreed to that kind of communication.[621] As to whether a contract

[617] J. Perović, *Bitna povreda ugovora Međunarodna prodaja robe*, op. cit., 300.

[618] *Secretariat Commentary*, Art. 24, No 4. See Christiana Fountoulakis, "Article 26" in *Schlechtriem & Schwenzer Commentary,* 2016, 463; A. Björklund, "Article 26", op. cit., 357–359.

[619] See Ch. Fountoulakis, "Article 26", op. cit., 463.

[620] See decision of *Oberster Gerichtshof* (Dividing wall panels case) of 29 June 1999 (available at: *https://iicl.law.pace.edu/cisg/case/austria-ogh-oberster-gerichtshof-supreme-court-austrian-case-citations-do-not-generally-72*). In that context, A. Björklund, "Article 26", op. cit., 353 and the authors and court rulings cited therein.

[621] CISG – AC Opinion No. 1, Electronic Communications under CISG, 15 August 2003. Rapporteur: Professor Christina Ramberg, Gothenburg, Sweden, Art. 26, (available at: *http://www.cisgac.com/cisgac-opinion-no1/*); A. Björklund, "Article 26", *ibidem*.

may also be avoided by a conclusive action without there being a declaration of avoidance, the overwhelming majority of the scholarly articles, as well as rich court practice, reply in the affirmative.[622]

Content. – A declaration of avoidance must be clear, definitive and unambiguous. Although it need not include the term "avoidance",[623] such declaration

[622] This view, which relies on the fact that the CISG rules on effecting avoidance do not require an explicit declaration, allows for avoidance by means of appropriate actions of the debtor, which may be seen as constituting tacit avoidance. However, in order to be taken for avoidance, such actions must clearly and unambiguously indicate the intention to avoid the contract. It is determined, in this context, that acceptance of tacit avoidance in the sense of Article 26 CISG is not contrary to the fact that the CISG rejects the possibility of *ipso facto* avoidance, for reasons of legal certainty. See J. Perović, *Bitna povreda ugovora Međunarodna prodaja robe,* op. cit., 302 ff; Ch. Fountoulakis, "Article 26", *ibidem* and the authors cited therein*;* K. H. Neumayer, C. Ming, op. cit., 223, stating "However, under the circumstances, such conduct [on part of the creditor] may be considered to be an implicit declaration of avoidance of contract in view of the fact that Art 26 [CISG] does not require there to be an explicit declaration"; V. Heuzé. op. cit., 381. See Decision of *CA Milano* (*Italdecor v. Yiu's Industries*) of 20 March 1998, stating that the cancellation of the purchase order by the buyer following expiry of the date for delivery has to be considered as a declaration of avoidance under the CISG (available at: *https://iicl.law.pace.edu/cisg/case/italy-march-20-1998-corte-di-appello-appellate-court-italdecor-sas-v-yius-industries-hk*); Decision of *AG Charlottenburg* (*Shoes case*) of 04 May 1994, establishing that a notice by the buyer containing an offer to return the non-conforming goods to the seller amounts to a declaration of avoidance of contract under Article 26 CISG (available at: *https://iicl.law.pace.edu/cisg/case/germany-may-4-1994-amtsgericht-local-court-german-case-citations-do-not-identify-parties*); see arbitral award of *ICC International Court of Arbitration* of 01 March 1999 (available at: *https://iicl.law.pace.edu/cisg/case/march-1999-icc-arbitral-award-no-9978-march-1999*). However, according to a different view, it is to be inferred from the wording of Article 26 relating to a "declaration of avoidance", that the Convention does not accept contract avoidance by means of conclusive actions which are not attended by an explicit declaration of avoidance. In that sense, Fritz Enderlein, Dietrich Maskow, Heinz Strohbach, *Internationales Kaufrecht*, Berlin, Haufe, 1991, Art. 26, note 2 and Art. 8, note 2.2, cited from Ch. Fountoulakis, "Article 26", *ibidem*; Burghard Piltz, *Internationales Kaufrecht. Das UN-Kaufrecht in praxisorienter Darstellung,* 2nd edition, München, C. H. Beck, 2008, par. 5–308; Jan Hellner, Jan Ramberg, *Speciell avtalsrätt I. Köprätt,* Stockholm, 1989, 290, cited from K. H. Neumayer, C. Ming, *ibidem.* See Decision of *OLG Graz* (*Construction equipment case*) of 29 July 2004, wherein the Court held that in the interest of legal certainty, only an explicit declaration may be accepted as a declaration of avoidance within the meaning of Article 26 CISG (available at: *https://iicl.law.pace.edu/cisg/case/austria-july-29-2004-oberlandesgericht-appellate-court-translation-available*).

[623] See Award of Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce of 01 October 2007 explicitly stating that, within the meaning of Article 26 CISG, a contract may be avoided explicitly or implicitly. In this context, it was of crucial importance that in this case the seller was clearly notified that the buyer did not wish to be bound by the contract that had been breached by the seller (available at: *https://iicl.law.pace.edu/cisg/case/1-october-2007-foreign-trade-court-arbitration-attached-serbian-chamber-commerce*).

must in a certain manner[624] state the intention of the party to withdraw from the contract.[625] In this regard, courts take the position that "the declaration of avoidance under Article 26 CISG must satisfy a high standard of clarity and certainty"[626] and must "be unambiguous in that the party does not want to keep the contract on foot".[627] The statements of the parties are in each case to be interpreted using the standard of a reasonable person within the meaning of Article 8 Paragraph 2 CISG. Finally, the declaration of avoidance must be made in the language understood by the parties (for example in the language of the contract).[628]

The CISG does not require the party avoiding the contract to give the other party an advance notice of his intention to declare the contract avoided; an effective avoidance requires only one notice – a declaration of avoidance within the meaning of Article 26 CISG.[629] However, where an additional period of time has been allowed to the other party for performance of the obligation (*Nachfrist*), and the obligation is still not met within that period, the party intending to avoid the contract must declare the contract avoided[630] upon expiry of the additional period of time.[631]

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[624] See Christopher M. Jacobs, "Notice of Avoidance under the CISG: A Practical Examination of Substance and Form Considerations, the Validity of Implicit Notice, and the Question of Revocability", *University of Pittsburgh Law Review,* No. 64, 2003, 409.

[625] Thus, for example, a notice from a buyer addressed to the seller requesting a return of the price, as well as letters using the wording "the glass is full", "enough is enough" etc were considered by courts clear enough an indication of the intention to avoid the contract (Ch. Fountoulakis, "Article 26", op. cit., 462).

[626] Arbitral award of *ICC International Court of Arbitration* of 01 March 1999. (available at: *https://iicl.law.pace.edu/cisg/case/march-1999-icc-arbitral-award-no-9978-march-1999*).

[627] Decision of *Oberster Gerichtshof* (*Jewelry case*) of 28 April 2000 (available at: *https://iicl.law.pace.edu/cisg/case/austria-ogh-oberster-gerichtshof-supreme-court-austrian-case-citations-do-not-generally-52*).

[628] M. Müller-Chen, "Article 49", op. cit., 787.

[629] *Secretariat Commentary,* Art. 26, No 3.

[630] *Secretariat Commentary,* Art. 26, No 3, footnote 2.

[631] Still, it is possible for the party fixing an additional period of time to declare at the same time that the contract will be avoided if the obligation is not met within such time. In that regard, he may declare that he will not accept performance after the ineffective expiry of such additional period or use another similar wording which clearly indicates his intention to avoid the contract in case of non-performance within the additional period of time. In such a case, a separate declaration of avoidance upon expiry of the additional period is not deemed to be necessary as a rule. See M. Müller-Chen, "Article 49", op. cit., 786; Ch. Fountoulakis, "Article 26", op. cit., 465; Arbitral award of *Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry* of 02 November 2004. (available at: *https://iicl.law.pace.edu/cisg/case/russian-federation-november-2-2004-translation-available*).

In this case, there are two different notices – one fixing an additional time for contract performance and the other relating to contract avoidance. Otherwise, where the party having fixed the additional period does not declare the contract avoided upon ineffective expiry thereof, he may allow the other party another additional period (or more) or extend the additional period initially fixed.[632] On the other hand, it is sometimes difficult to establish in practice if the notice in hand is that of contract avoidance or that of lack of conformity whereby the buyer requires delivery of other goods as replacement or removal or defects. There may also be difficulties in establishing whether or not the notice in question is that of declaration of avoidance where a party states his general dissatisfaction with performance/non-performance by the other party,[633] without mentioning specific reasons.[634]

1.3. Dispatching a Declaration of Avoidance

Who is the declaration addressed to? – A declaration of avoidance is to be directed towards the other party. The fact that it is a unilateral declaration of will of a constitutive nature calls for precision regarding the identity of the other party when dispatching a declaration of avoidance.[635] In this context, a declaration of avoidance directed to an unidentified person or persons, such as a press release, would produce no legal effect.[636] If the declaration of avoidance was made by a representative, the issue of his authority is decided by the applicable national law, while applying the rules of interpretation under Article 8 CISG.[637]

Time limit for dispatching the declaration. – The CISG does not specify the time limit within which the declaration must be made. Unlike the Hague Law, which in that regard provided for a "reasonable" or "short" period (depending on the specific grounds for avoidance),[638] the CISG keeps silent on this issue, with the exception of Articles 49 Paragraph 2 and 64 Paragraph 2 which link the exercise of the right to avoidance to a "reasonable time".[639] Although, as a rule, avoidance in

[632] More on this issue, M. Müller-Chen, "Article 49", *ibidem.*

[633] See Ch. M. Jacobs, op. cit., 416.

[634] See A. Björklund, "Article 26", op. cit., 357.

[635] J. Perović, *Bitna povreda ugovora Međunarodna prodaja robe,* op. cit., 304.

[636] Samuel K. Date Bah, "Article 26" in *Commentary,* C. M. Bianca, M. J. Bonell, 1987, 225.

[637] Ch. Fountoulakis, "Article 26", op. cit., 468.

[638] See Articles 26, 30, 43, 55, 62, 70 of the Hague Law.

[639] Concerning the reasonable time provided under Article 49 Paragraph 2 Item b CISG, see Markus Müller-Chen, "Article 49" in *Schlechtriem & Schwenzer Commentary,* 2016, 791–796. On this

as short as possible a period of time is in the interest of the avoiding party,[640] the absence of a general time limit in that respect leaves room for different interpretations in the application of Article 26 CISG.[641] Furthermore, the avoiding party, if not bound by a time limit, may "pick" a time to declare the contract avoided, guided solely by his own interests (*e.g.* in the light of fluctuating prices).[642] It is therefore that doctrine takes the view that a reasonable time ought to be accepted as the time within which avoidance may be declared as a general rule[643] (*i.e.* applied also to the cases not covered by Articles 49 Paragraph 2 and 64 Paragraph 2 CISG), with this period running from the date the avoiding party knows or ought to know of his right of avoidance.[644] It is argued in this context that imposing such time limit reduces the possibility of various market speculations and enhances legal certainty in general[645].[646]

Who is to bear the transmission risk of the declaration? – The transmission risk of the declaration of contract avoidance is governed by Article 27 CISG, providing that: "Unless otherwise expressly provided in this Part of the Convention, if any notice, request or other communication is given or made by a party in accordance with this Part and by means appropriate in the circumstances, a delay or error in

time limit under Article 64.2.b CISG, see Florian Mohs, "Article 64" in *Schlechtriem & Schwenzer Commentary,* 2016, 934–935. For positions taken by courts as to what is to be regarded as a reasonable time in that context see *UNCITRAL Digest of Case Law on the United Nations Convention for the International Sale of Goods*, op. cit., Note 21, 119.

[640] Above all within the meaning of the CISG rule on mitigation of loss, providing that: "A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated" (Article 77).

[641] See V. Heuzé, op. cit., 381–382.

[642] See J. Perović, *Bitna povreda ugovora Međunarodna prodaja robe,* op. cit., 307–308.

[643] In the opinion of certain authors, the four-year limitation period set by the United Nations Convention on the Limitation Period in the International Sale of Goods from 1974 should be accepted as the time limit for a declaration of avoidance. In that regard, A. Björklund, "Article 26", op. cit., 358.

[644] This view is taken for example by Ch. Fountoulakis, op. cit., 469; Henry D. Gabriel, *Contracts for the Sale of Goods*, Oxford, Oxford University Press, 2009, 94–95; Joseph Lookofsky, *Understanding the CISG in the USA,* The Hague, Kluwer, 2004, 110.

[645] Ch. Fountoulakis, "Article 26", *ibidem.*

[646] The solution linking the time allowed for giving notice of termination to a reasonable time has been accepted in more recent uniform rules such as UNIDROIT Principles of International Commercial Contracts (Article 7.3.2 (2)), Principles of European Contract Law (Article 9:303(2)), Draft Common Frame of Reference of European Private Law (Article III.-3:508 (1)) and Common European Sales Law (Article 119).

the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication".[647]

It is to be inferred from this that the party making the declaration by appropriate means bears no risk for any delay or error in the transmission, or where the declaration has not reached the other party; this risk is borne by the addressee, *i.e.* the party in breach of the contract. Thus, with regard to transmission of the declaration, the CISG relies on the dispatch theory,[648] departing from the reception theory[649] it adopts for the time when the offer and its acceptance become effective (Article 15 Para 1 and Article 18 Para 2 CISG).[650]

The rule under Article 27 deals solely with the transmission risk of the declaration and keeps silent on the moment the declaration of avoidance becomes effective – whether the moment of its dispatch to or its receipt by the other party. This is a controversial and frequently debated issue[651] giving rise to different approaches in scholarly articles and sometimes even sharp criticism that seem justified, above all in the context of determining relations between Articles 26 and 27 CISG.[652]

Thus, in the view relying on consistent application of the reception theory, Article 27 CISG deals only with the risk in the event of delay or error in transmission of a declaration, which is without prejudice to the issue of legal effects of the declaration; for a declaration to be effective, it must reach the addressee.[653] On the

[647] In detail on Article 27 CISG, Ulrich G, Schroeter, "Article 27" in *Schlechtriem & Schwenzer Commentary,* 2016, 471–481; Andrea Björklund, "Article 27" in *Commentary,* Kröll/Mistelis/Perales Viscasillas, 2018, 364–372; Samuel K. Date Bah, "Article 27" in *Commentary,* C. M. Bianca, M. J. Bonell, 1987, 226 - 231; J. O. Honnold, op. cit., 216–217; K. H. Neumayer, C. Ming, op. cit., 225–229.

[648] U. G. Schroeter, "Article 27", op. cit, 471; A. Björklund, "Article 27", op. cit., 361–362; K. H. Neumayer, C. Ming, op. cit., 225; J. O. Honnold, op. cit., 216; Albert H. Kritzer, *Guide to Practical Application of the United Nations Convention on Contracts for the International sale of Goods,* Deventer: Kluwer Law and Taxation, 1989, 220.

[649] In general on theories about the moment of entry into contract, S. Perović, op. cit., 280–284.

[650] Under these rules, an offer becomes effective when it reaches the offeree (Art 15.1 CISG), and the acceptance becomes effective at the moment the indication of assent reaches the offeror (Art 18.2 CISG).

[651] Of particular practical importance in this context is the issue of revocability of the declaration of avoidance, *i.e.* whether this declaration may be withdrawn before it reaches the other party or whether it becomes binding when dispatched. See Ch. Fountoulakis, "Article 26", op. cit., 467–468; U. G. Schroeter, "Article 27", op. cit, 480–481; K. H. Neumayer, C. Ming, op. cit., 227; A. Björklund, "Article 27", op. cit., 363–364; Ch. Jacobs, op. cit., 422.

[652] See for example K. H. Neumayer, C. Ming, op. cit., 222–224 i 228–229.

[653] E. Stern, Erklärungen im UNCITRAL-Kaufrecht, Wien, Manz, 1990, Para 454, cited from U. G. Schroeter, "Article 27", op. cit., 480.

other hand, some authors adopt a modified reception theory arguing that a declaration becomes effective at the moment of its receipt, and if a declaration is lost, the time normally required for such declaration to reach the other party should be taken as relevant (hypothetical time of receipt),[654] in line with rule 24 CISG.[655] However, the view taken by an overwhelming majority of CISG commentaries, relying on "pure" dispatch theory, is that the declaration of avoidance becomes effective at the moment of dispatch.[656] This view is also reflected in a large number of court decisions.[657]

The burden of proof that the declaration of avoidance was made is on the avoiding party, who must prove not only that the declaration of avoidance has been dispatched, but also the time and means of the dispatch.[658] Where parties have agreed on special means of communication, the avoiding party must prove that the declaration of avoidance was made in the form agreed.[659] On the other

[654] K. H. Neumayer, C. Ming, op. cit., 224.

[655] Under Article 24. CISG: "For the purposes of this Part of the Convention, an offer, declaration of acceptance or any other indication of intention "reaches" the addressee when it is made orally to him or delivered by any other means to him personally, to his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence".

[656] Peter Schlechtriem, "Article 27" in *Commentary*, Schlechtriem, 1998, 196; G. Schroeter, "Article 27", op. cit, 480; Ch. Fountoulakis, "Article 26", op. cit., 466–467; J. O. Honnold, op. cit., 215–217; A. Björklund, "Article 27", op. cit., 362–364 voicing a different view as to the revocability of the declaration of avoidance before it reaches the other party.

[657] See *UNCITRAL Digest,* op. cit., Note 1, 121. Thus, for example, in a dispute before a German court arising from avoidance of a contract for international sale of goods, the Court held: "Under the dispatch theory under Art 27 CISG, if any communication is given by a party by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication. This means that [in the case in hand] the seller bears the transmission risk of the declaration, and the rights of the buyer relating to despatch [of the declaration] remain intact even where communication is not received..." (decision of *OLG München* (*Dust ventilator case*) of 17 November 2006 (available at: *https://iicl.law.pace.edu/cisg/case/germany-oberlandesgericht-hamburg-oberlandesgericht-olg-provincial-court-appeal-german-99*). A contrary view is reflected in decision of *Bundesgerichtshof* (Tools case) of 24 September 2014 (available in German: *https://iicl.law.pace.edu/cisg/case/germany-september-24-2014-bundesgerichtshof-federal-supreme-court-german-case-citations-do*), cited from Ch. Fountoulakis, op. cit., 467.

[658] See Ch. Fountoulakis, "Article 26", op. cit., 470; in the context of Article 49 CISG M. Müller-Chen, "Article 49", op. cit., 788; in the context of Article 64 CISG, F. Mohs, "Article 64", op. cit., 940; K. H. Neumayer, C. Ming, op. cit., 222. On positions taken in court practice, see *UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods,* op. cit., 120.

[659] See decision of *Rb Arnhem* (*Tree case*) of 11 February 2009 (available at: *https://iicl.law.pace.edu/cisg/case/netherlands-rechtbank-arnhem-2*).

hand, relying on the dispatch theory, the avoiding party need not prove that the declaration has reached the other party as the declaration becomes effective at the moment of dispatch.[660]

2. Effecting Termination of Contract Due to Non-Performance under the Law of Obligations

2.1. General Rules

Two different cases. – Under the general rule of the Law of Obligations on effecting contract termination due to non-performance, the creditor intending to terminate the contract due to the debtor's failure to perform his obligation is bound to notify the debtor thereof without delay (Article 130). In this context, the Law recognises two cases – when performance within a fixed deadline is an essential element of the contract (Article 125) and when performance within a fixed deadline is not an essential element of the contract (Article 126).

Fixed-term contracts. – Where performance within a fixed deadline is an essential element of the contract (fixed-term contract), the Law provides for contract termination by operation of law (*ipso iure, ipso facto, de plain droit*). Under the Law, should performance within a fixed deadline be an essential element of the contract, and the debtor fails to perform within such deadline, the contract is to be terminated by operation of law. The creditor, however, may keep the contract in force by notifying the debtor, immediately upon expiry of the deadline, that he is requesting performance. Where the creditor's request for performance has not been met within a reasonable time, he may declare the contract terminated. The Law also lays down that these rules on termination apply both where the parties have agreed to consider the contract terminated if not performed within a fixed deadline, and where performance within a fixed deadline is an essential element by the nature of the transaction.[661]

Therefore, where the parties have provided that the contract is to be terminated if not performed within a fixed deadline, or where it is to be inferred from the circumstances of the case and the nature of the transaction that performance

[660] See A. Björklund, "Article 27", op. cit., 364; *UNCITRAL Digest*, *ibidem*. See decision of *OLG Naumburg* (*Automobile case*) of 27 April 1999 stating: "In his written communication of 11 April 1997, [the buyer] declared the contract avoided (Art 49(1) CISG). It is irrelevant whether or not [the seller] received such communication" (available at: *https://iicl.law.pace.edu/cisg/case/germany-oberlandesgericht-hamburg-oberlandesgericht-olg-provincial-court-appeal-german-113*).

[661] Article 125 Law of Obligations.

within a deadline constitutes an essential element of the contract, the non-performance gives rise to contract termination by operation of law[662].[663] In this respect, the Law departs substantially from the CISG, which does not accept this kind of termination, as already discussed.

Where performance within a fixed deadline is not an essential element of the contract. – On the other hand, where performance within a fixed deadline does not pose as an essential element of the contract, the debtor keeps the right to perform his obligation even after the deadline has expired, and the creditor to request the performance. However, should the creditor wish to terminate the contract, he must allow the debtor a suitable subsequent deadline for performance. If the debtor fails to perform his obligation within the subsequent deadline, this gives rise to the same consequences as if the time limit were an essential element of the contract[664].[665]

The subsequent suitable deadline for performance under the Law of Obligations has the character of an additional period, as it is assumed that the debtor has commenced performance within the deadline initially fixed.[666] The length of the subsequent period is determined from the circumstances of the case, giving due regard to the nature of the contractual relation, the debtor's readiness to deliver performance in full, nature of his obligation (*e.g.* whether it concerns finished goods or goods to be manufactured),[667] manner of the debtor's regular business operations which parties relied on in contract formation, market opportunities, etc.[668] What is particularly significant in this context is the fact that the criteria for determining

[662] See S. Perović, "Član 125" in *Komentar Zakona o obligacionim odnosima*, Slobodan Perović, I Knjiga, 1995, 250; B. Vizner, *Komentar Zakona o obveznim (obligacionim) odnosima*, 1. knjiga, op. cit., 516; S. Cigoj, op. cit., 417–418.

[663] Examples of domestic case law relative to this rule, J. Perović, *Bitna povreda ugovora Međunarodna prodaja robe*, op. cit., 336 337.

[664] Article 126 Law of Obligations.

[665] Debate on consequences of non-performance in a subsequent period, *i.e.* whether failure to perform the obligation even in the subsequent period of time gives rise to contract termination by operation of law, or the creditor is still required to give notice of termination to the debtor, J. Perović, *Bitna povreda ugovora Međunarodna prodaja robe*, op. cit. 328–330.

[666] S. Perović, *Obligaciono pravo,* op. cit., 509.

[667] See in this regard decision of the Supreme Commercial Court Sl-1116/70 of 10 March 1970, stating: "In determining the duration of a subsequent period, it is to be assumed that the seller already has at his disposal the goods sold and not that the goods sold are yet to be procured". Cited from Ratimir Kašanin, Tiosav Velimirović, *Opšte uzanse za promet robom sa objašnjenjima,* Belgrade, 1976, 344.

[668] See S. Perović, "Član 126" in *Komentar Zakona o obligacionim odnosima*, Slobodan Perović, I Knjiga, 1995, 251–253; B. Vizner, *Komentar Zakona o obveznim (obligacionim) odnosima,* 1. knjiga, op. cit., 519; S. Cigoj, op. cit., 421.

the duration of the subsequent period are objective in nature, which will protect the interests of both the debtor and the creditor.[669] This is also the position unambiguously taken by domestic courts, which hold that: "in allowing the debtor a period for subsequent performance, the creditor must allow such period as would permit the debtor to meet his obligations, under the normal conditions of business operations and by means contemplated by the parties at the time of entry into contract",[670] and that "suitability of the period means that, under the circumstances of the case in hand, this period must be sufficiently long for one or the other party, bound by the contract, to deliver the required performance."[671]

Under the Law of Obligations, no subsequent deadline need to be allowed if it may be inferred from the debtor's conduct that he will not perform his obligation even within the subsequent period,[672] or where prior to expiry of the deadline for performance it becomes obvious that the debtor will not meet his obligation.[673] The creditor intending to terminate the contract in such cases is still required to notify the debtor thereof without delay within the meaning of Article 130 of the Law.[674]

2.2. Notice of Termination

Notice of termination as a general rule. – The solution under Article 130 of the Law providing for contract termination by simple notice to be given by the creditor to the debtor without delay resembles the rule under Article 26 CISG whereby a declaration of avoidance is effective only if made by notice to the other party.

Deadline for making the notice of termination. – Unlike the CISG which keeps silent on the time within which the declaration of avoidance is to be made, the Law lays down that a notice of termination must be given "without delay" by the creditor. In interpreting the term "without delay"[675] it seems pertinent to take

[669] See S. Perović, "Član 126", op. cit., 251.

[670] Judgement of the Supreme Commercial Court Sl-152/56 of 4 May 1956.

[671] Judgement of the Supreme Commercial Court Sl-1943/69 of 11 September 1970 cited from, R. Kašanin, T. Velimirović, op. cit., 344.

[672] Article 127 Law of Obligations.

[673] Article 128 Law of Obligations.

[674] See S. Perović, *Obligaciono pravo*, 513–514; Slobodan Perović, "Član 127" and "Član 128" in *Komentar Zakona o obligacionim odnosima*, Slobodan Perović, I Knjiga, 1995, 254–255.

[675] See Slobodan Perović "Član 130" in *Komentar Zakona o obligacionim odnosima*, Slobodan Perović, I Knjiga, 1995, 257, stating that the creditor must meet certain standards, because "the term 'without delay' will be construed in accordance with the specific circumstances and the usual codes of conduct".

into account the Draft Code of Obligations and Contracts, where "without delay" means that the creditor is bound to make the notice of termination in as short a period as possible, given the circumstances, from the moment this is reasonably doable[676].[677] This means that the rule of the Law of Obligations applied to a contract for the international sale of goods should be interpreted so that the creditor intending to terminate the contract must notify the debtor thereof as soon as possible, always in accordance with the circumstances of the case and what is customary in the specific area of trade.[678]

Form of the notice. – The Law of Obligations does not provide for the form in which the notice of termination is to be made, and in this respect shows similarities with the above discussed solutions of the CISG. This means that a notice of termination need not meet any requirements as to form and may be given both orally and in writing.[679]

What is important in this context is that the will for contract termination has been expressed in no uncertain manner and that the other party has been notified of such will. This principle is explicitly laid down in the General Usage, which provides that the creditor withdrawing from the contract due to the debtor's delay, must notify the debtor of this withdrawal in no uncertain manner.[680] What may be considered as "no uncertain manner" is determined from the circumstances of each particular case.

Whether or not a contract may be terminated by means of creditor's conclusive actions, seems to require an examination of the conclusive actions themselves; should they be of such nature as to unambiguously express the creditor's will to withdraw from the contract (*e.g.* buyer's returning the goods with defects and refusing to pay the price), a notice should be deemed to have been given in no uncertain manner.[681] Conversely, the creditor's silence, or his prolonged passivity, showing no interest in opting for any of the rights available to him, does not signify his declaration of will, and may not be considered as tacit (indirect) declaration of

[676] Draft Code of Obligations and Contracts, Article 95 Paragraph 2.

[677] General Usage provided that, for prompt delivery, a delivery deadline described in the contract with terms "immediate", "prompt", "quick", "urgent" and similar meant that the delivery was to be made within eight days of entry into contract (General Usage of Trade from 1954, Article 81).

[678] J. Perović, *Bitna povreda ugovora Međunarodna prodaja robe*, op. cit., 323.

[679] See S. Perović, *Obligaciono pravo*, op. cit., 507; Slobodan Perović "Član 130", *ibidem.*

[680] General Usage of Trade from 1954, Usage No. 216.

[681] Taking this position, S. Perović, *Obligaciono pravo*, op. cit., 511.

termination.[682] This view is also taken by national courts which hold that: "it does not suffice for the buyer to keep silent for a sustained period of time, rather such conditions must be met as would lend to the buyer's protracted silence the meaning of tacit withdrawal from the contract".[683] In this context, the courts have taken considerably more restrictive views. Thus, it is held in one decision that: "the fact itself that the creditor has allowed the defaulting debtor a subsequent period and the debtor failed to perform the contract even within that period, is not sufficient for the creditor to withdraw from the contract; he also needs to notify the debtor of his withdrawal in no uncertain manner".[684]

Transmission risk of the notice. – The risk of delay or error in transmission of communication is borne by the party intending to terminate the contract.[685] The general rule on liability for failure to give notice applies, providing that the party responsible for giving notice to the other party of the facts relevant to their contractual relationship, is to be held liable for loss sustained by the other party for not having been notified on time.[686]

2.3. Rules Specific to Sale

General rules applicable to a contract of sale. – The general rules of the Law of Obligations on effecting contract termination are appropriately applicable to the matter of contracts of sale, in terms of the rights of the buyer to terminate the contract due to material and legal defects in goods,[687] as well as the rights of the seller to terminate the contract in case of refusal on part of the buyer to take delivery.[688]

Material defects. – A buyer who has given timely and proper notice of a defect to the seller, may, among other rights, declare the contract terminated, but only

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[682] S. Perović, *Obligaciono pravo*, *ibidem.*

[683] Judgement of the Supreme Commercial Court, Sl. 81/56. Digest of Law, Vol. I, Book. I, No. 245.

[684] See Miloš Isaković, Petar Šurlan, *Opšte uzanse za promet robom s objašnjenjima i sudskom praksom*, Belgrade, 1961, 193, cited from S. Perović, *Obligaciono pravo,* op. cit., 512. Contrary view reflected in a Judgement of the Supreme Commercial Court Sl-121/56 of 8 February 1956 stating: "where the buyer fails to request performance or damages for a protracted period of time, the seller may conclude that the buyer has withdrawn from contract by silence, if circumstances exist that would logically justify such conclusion".

[685] See S. Perović, "Član 130", *ibidem*.

[686] Article 268 of the Law. More on this issue, S. Perović, *Obligaciono pravo*, op. cit., 507.

[687] See Articles 488–497 and 508–515 Law of Obligations.

[688] Article 519 Paragraph 2 Law of Obligations.

after having allowed the seller a subsequent period for performance,[689] *i.e.* for removal of the defect or delivery of other goods free of defects. The buyer, therefore, does not enjoy the absolute freedom of choice in case of material defects, but rather needs to grant to the seller a subsequent period for performance in order to achieve contract termination.[690] However, the buyer may terminate the contract even without granting a subsequent period, if following a notification of defects, the seller should inform him that he will not perform the contract, or where the circumstances of the case in hand clearly show that the seller will be unable to perform the contract even within the subsequent period.[691] If the seller fails to perform his obligation within the subsequent deadline, the contract is terminated by operation of law, however the buyer may keep it on foot by immediately declaring to the seller his intention to keep it in force.[692] In terms of partial defects, the Law provides, where only a part of delivered goods is defective, that the buyer may terminate the contract under the above conditions only with regard to the defective part. He may terminate the entire contract only if the goods delivered constitute a whole, or if the buyer otherwise has a justified interest in taking delivery of the agreed goods as a whole.[693]

On the other hand, the buyer forfeits the right to terminate the contract for a defect in goods if he is unable to return the goods or return them in the state they were in when received by him.[694] In such case, he keeps the other rights available to him under the Law on account of a defect,[695] providing that he had given timely and proper notice to the seller of the defect.[696] However, the buyer may terminate contract even in such a case, if the goods are partially or entirely lost or damaged due to a defect justifying contract termination, or due to an event not caused by him or a person under his responsibility.[697] Furthermore, the buyer may

[689] Article 490 Paragraph 1 Law of Obligations.

[690] The rule providing that it is mandatory to leave a subsequent period of time in case of contract termination due to material defects, is a novelty over the solutions of the Usage which provided for this obligation only in case of delay, while termination for defects in goods did not require giving any subsequent period of time (Usage No. 154).

[691] Article 490 Paragraph 2 Law of Obligations.

[692] Article 491 Law of Obligations.

[693] Article 492 Law of Obligations.

[694] Article 495 Paragraph 1 Law of Obligations.

[695] Article 496 Law of Obligations.

[696] Article 488 Paragraph 1 Law of Obligations.

[697] Article 495 Paragraph 2 Law of Obligations.

terminate the contract where the goods are partially or entirely lost or damaged due to non-performance of the buyer's obligation to inspect the goods, or where, before the defect was discovered, the buyer had consumed or altered part of the goods in the course of its regular use, and if damage or alternation is without significance[698].[699]

Legal defects. – When legal defects are relied upon for contract termination, the Law provides for different ways of achieving it – termination by operation of law in case of total eviction and termination by notice to the seller in case of partial eviction and where a legal defect renders the purpose of the contract unattainable.

In this context, where the buyer suffers total eviction, the contract is terminated by operation of law.[700] In other words, if the buyer has timely notified the seller of a third party's right in goods and requested him to grant him protection,[701] and the seller has failed to act upon this request, and the buyer becomes dispossessed of the goods, no notice of termination is required and the contract is terminated automatically, by virtue of occurrence of total eviction. However, in case of partial eviction, the contract is not terminated by operation of law; if the buyer's right has been reduced or limited, he may opt between two legal remedies – contract termination on the one hand, and claim for a proportionate price reduction on the other.[702] Where the buyer has opted for contract termination in such a case, he is required to notify the seller thereof without delay, in accordance with Article 130 of the Law. The contract may be terminated in the same way where, due to a legal defect, its purpose may not be achieved, and the seller has failed to release the goods from the third party's right or claim, as required by the buyer[703].[704]

Contract termination due to the buyer's refusal to take delivery. – The Law entitles the seller to declare the contract terminated should the buyer refuse, without justified grounds, to take delivery of the goods offered to him in the agreed or

[698] Article 495 Paragraph 3 Law of Obligations.

[699] In detail on contract termination due to material defects, J. Perović, *Bitna povreda ugovora Međunarodna prodaja robe*, op. cit., 340–343 and the authors cited therein; S. Perović, *Obligaciono pravo,* op. cit., 394–399.

[700] Article 510 Paragraph 1 Law of Obligations.

[701] Article 509 Law of Obligations.

[702] Article 510 Paragraph 1 Law of Obligations.

[703] Article 510 Paragraph 2 Law of Obligations.

[704] In detail on contract termination due to legal defects, J. Perović, *Bitna povreda ugovora Međunarodna prodaja robe*, op. cit., 343–344 and the authors cited therein; S. Perović, *Obligaciono pravo,* op. cit., 386–387.

usual manner and on time; the seller's right to notice of termination is contingent on there being justified grounds to doubt that the buyer will pay the price.[705] In such a case, it is clear from the wording of the rule itself ("the seller may declare the contract terminated"), that notifying the buyer of contract termination is a necessary requirement for effecting such termination.[706]

C. SYNTHESIS

An overview of the above solutions of the CISG and the Law of Obligations points to a general conclusion that the grounds for contract termination due to non-performance are dealt with differently in these sources. Depending on the specific rules applicable to a contract, a contract may be terminated on valid grounds under the Law of Obligations, while under the CISG the very same termination may be deemed to be impermissible and vice versa. Furthermore, the rules of the CISG and the Law of Obligations provide only for general criteria of assessing whether or not there have been proper grounds for termination, some of which, like the foreseeability of the detriment criterion envisaged by Article 25 CISG, have proved to be particularly difficult to apply in practice. Therefore, a "safe road" towards contract termination needs to be "charted" into the contract itself, by parties providing in the termination clause for precise grounds for termination as well as the terms of effecting contract termination due to non-performance.

With regard to specific solutions, in the first place it may be inferred that the CISG system, by establishing a fundamental breach of contract as uniform grounds for contract avoidance, greatly simplifies a number of issues normally arising in the context of contract termination. For a contract to be avoided, there need to have occurred a fundamental breach which meets the requirements of Article 25 CISG, it being irrelevant whether the breach in question is that of total non-performance, partial non-performance, or performance not confirming to what was agreed in the contract. A fundamental breach of contract exists regardless of the fault of the debtor, regardless of whether it concerns the primary or secondary obligation, and whether it arises from the rules of the CISG or the contract itself. Viewed from this angle, the concept of a fundamental breach of contract may be seen in a positive light in the opinion of this author. However, the criteria for establishing a fundamental breach of contract – substantial detriment and foreseeability of the detriment, as provided under the CISG, come across as insufficiently clear and complex

[705] Article 519 Paragraph 2 Law of Obligations.

[706] See J. Perović, *Bitna povreda ugovora Međunarodna prodaja robe*, op. cit., 344.

for application, particularly in the absence of appropriate contractual provisions. This is evidenced by the positions in the doctrine that have been and remain starkly divided over the issue of the criteria for establishing a fundamental breach of contract, as well as a profusion of different positions in court practice regarding this issue.

On the other hand, the Law of Obligations, while not recognising a fundamental breach of contract, provides for non-performance as general grounds for contract termination, on the one hand, and material and legal defects as special grounds for termination of contracts of sale, on the other. The Law does not enumerate exhaustively the requirements for contract termination, rather they arise from the overall contents of the provisions governing termination. The first requirement, which stems from the very notion of termination, is the failure by a party to perform obligations under a bilateral contract and that is the *conditio sine qua non* of termination. It is laid down already in the first words of Article 124 of the Law, stipulating that when a party fails to perform his obligation, the other party may terminate the contract by simple notice. The Law, however, does not define how significant such non-performance needs to be in order to constitute grounds for contract termination. And yet, Article 131 of the Law expressly provides that a contract may not be terminated due to non-performance of a minor part of obligation. In this context, except for non-performance of an essential element of the contract, the borderline between "grave" breaches of contract (giving rise to termination) and "minor" (not allowing for termination), is quite elastic and subject to the assessment of the court deciding on this matter in the light of relevant circumstances of each particular case. Within such legal framework, in the absence of an appropriate contractual clause, it is often subtle details that decide the right to termination, lending the non-performance in hand either the importance of grounds for contract termination, or merely grounds for claiming damages.

Two specific conclusions may be drawn from a comparative analysis of the rules governing grounds for contract avoidance in the CISG and contract termination in the Law of Obligations. In the first place, adopting uniform grounds for contract termination due to non-performance has distinct advantages over a system where grounds for termination are regulated separately, depending on the type of non-performance. In this regard, the solution of the Draft Code of Obligations and Contracts, as well as the proposal set forth in the Preliminary Draft Civil Code of Serbia may serve as a basis for an analysis of potential reforms of Serbian legislation in the domain of contract termination. On the other hand, with regard to the contracts governed by the CISG, the concept of a fundamental breach of contract

under Article 25 requires the parties to pay special attention and be aware of the problems that may arise from the application of the criteria set out in that rule. In that context, the contract needs to precisely provide for all the issues that may affect determining the right to avoidance, and particularly the issue of importance of specific contractual obligations and legal consequences of their non-performance.

With regard to effecting termination, it seems that any attempts to find an optimal solution *for* the application of the CISG rules need to look into the purpose they seek to achieve, namely to avoid legal uncertainty in the relationship between the parties. It is in this light that we need to see complete rejection of *ipso facto* avoidance in the CISG, as well as the requirement of Article 26 that a contract may be avoided by means of a declaration of avoidance, effective only if made by notice to the other party. On the other hand, the aggrieved party should not be put in a situation where he is unable to avoid the contract and thus effectively exercise his right simply because the other party evades receiving the declaration of avoidance. It is within this broad and flexible framework that the court needs to decide whether or not requirements for contract avoidance have been met, giving due care to all relevant circumstances of each particular case. On the other hand, although not required under the CISG, the avoiding party may be wise to make a declaration of avoidance in writing, stating clearly and unequivocally that the contract is being avoided and giving the reasons for avoidance, and furnishing the other party with such declaration in a way that ensures proof of having dispatched the declaration. This would considerably reduce the likelihood of different interpretations and disputes in the context of effecting contract avoidance.

On the other hand, the system of effecting contract termination provided under the Law of Obligations seems flexible and therefore adapted to the needs of modern transactions. The rules of the Law offer a broad framework for contract termination in various cases of non-performance, without limiting the party intending to terminate the contract with strict requirements of form. It seems, however, that the interests of legal certainty speak in favour of abandoning contract termination by operation of law, as provided by the Law in cases of "grave" breaches of contract (fixed-term contract, total eviction); instead, a solution may be to provide in these cases for a termination of contract without requiring a subsequent period to be allowed for performance, while enjoining the creditor to give notice of termination to the debtor without delay (obviously, only unless otherwise agreed in the contract). Furthermore, due to an inadequate systematisation of general rules pertaining to termination procedure (Articles 125, 126 and 130), the Law conveys an impression of vague solutions, inviting various and contradictory interpretations. It is therefore that the creditor intending to terminate the contract must exercise

special caution when leaving a subsequent period for performance and deciding whether or not to give a separate and explicit notice of contract termination to the debtor. In case of a dispute, the court is required to carefully evaluate the relevant circumstances of the particular case, so as to properly interpret the intention of the legislator and resolve whether or not requirements have been met for contract termination.

IV. DAMAGES FOR BREACH OF CONTRACT

Introduction. – A breach of contractual obligation is invariably attended by the legal sanction of damages. In the broadest possible sense, the exercise by the aggrieved party of the right to damages for breach of contract requires that the other party has breached the contract, that the aggrieved party has suffered loss recoverable under the applicable law, that the loss has occurred as a consequence of a breach of contract and that no circumstances exist that would exclude the liability of the breaching party. One of the most important issues in this area pertains to the extent of damages for breach of contract.[707] This part of the paper will address the rules of the Convention concerning the extent of damages (A), and their comparison with the corresponding rules of Serbian Law of Obligations (B).[708]

A. THE CISG RULES ADDRESSING THE EXTENT OF DAMAGES

1. General

The CISG rules addressing the extent of damages for breach of contract rely on two fundamental principles – the principle of full compensation and the principle of limitation of liability by the foreseeability rule.[709] Article 74 CISG provides that: "Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of

[707] A comprehensive scientific study of this issue, M. Đorđević, *Obim naknade štete zbog povrede ugovora o međunarodnoj prodaji robe,* op. cit., (in entirety).

[708] In detail on this, J. Perović, *Standardne klauzule u međunarodnim privrednim ugovorima,* op. cit., 96–120.

[709] The same principles also underlie the rules governing damages under the UNIDROIT Principles of International Commercial Contracts (Articles 7.4.2 and 7.4.4) and the Principles of European Contract Law (Articles 9:502 and 9:503).

the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract"[710].[711]

Article 74 CISG is applicable to breaches of contract by the seller[712] or the buyer[713] and constitutes the general rule of the CISG for the calculation of damages arising from a breach of contract. The rule under Article 74 is also applicable to the cases of contract avoidance under Articles 75[714] and 76[715] CISG. Furthermore, the Convention provides that the debtor's liability is limited by the creditor's duty to mitigate the loss, within the meaning of Article 77.[716] Finally, the buyer loses the

[710] This rule was taken over from Article 82 ULIS, the difference being that Article 74 CISG also applies where the contract has been avoided, while the corresponding rule of the ULIS covers only the cases where the contract has not been avoided.

[711] Commentary, Ingeborg Schwenzer, "Article 74" in *Schlechtriem & Schwenzer Commentary,* 2016, 1057–1086; Milena Đorđević, "Article 74" in *Commentary,* Kröll/Mistelis/Perales Viscasillas, 2018, 956–991; Hans Stoll, "Article 74" in *Commentary*, Schlechtriem, 1998, 552–572; Victor Knapp. "Article 74" in *Commentary,* C. M. Bianca, M. J. Bonell, 1987, 538–548; K. H. Neumayer, C. Ming, op. cit., 482–498; J. O. Honnold, op. cit., 445–448.

[712] See Article 45 CISG.

[713] See Article 61 CISG.

[714] Under Article 75 CISG, "If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74". Commentary, Ingeborg Schwenzer, "Article 75" in *Schlechtriem & Schwenzer Commentary,* 2016, 1087–1095; Milena Đorđević, "Article 75" in *Commentary,* Kröll/Mistelis/Perales Viscasillas, 2018, 992–1004; M. Đorđević, *Obim naknade štete zbog povrede ugovora o međunarodnoj prodaji robe,* op. cit., 416–418.

[715] Under Article 76 CISG, "If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 75, recover the difference between the price fixed by the contract and the current price at the time of avoidance as well as any further damages recoverable under article 74. If, however, the party claiming damages has avoided the contract after taking over the goods, the current price at the time of such taking over shall be applied instead of the current price at the time of avoidance (1). For the purposes of the preceding paragraph, the current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at such other place as serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods (2)". Commentary, Ingeborg Schwenzer, "Article 76" in *Schlechtriem & Schwenzer Commentary,* 2016, 1096–1103; Milena Đorđević, "Article 76" in *Commentary,* Kröll/Mistelis/Perales Viscasillas, 2018, 1005–1014; M. Đorđević, *Obim naknade štete zbog povrede ugovora o međunarodnoj prodaji robe,* op. cit., 418–423.

[716] Under Article 77 CISG, "A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated". Commentary,

right to claim damages for loss of profit if he fails to give a timely notice to the seller of the lack of conformity or the right or claim of the third party.[717]

The right to damages within the meaning of Article 74 arises where a party fails to perform any of his obligations under the contract or the CISG.[718] As already pointed out, non-performance covers total non-performance, partial non-performance as well as cases of performance different from what the parties contracted. Furthermore, an exercise of the right to damages does not require non-performance to be a fundamental breach of contract within the meaning of Article 25 CISG. Under the CISG only such loss is recoverable as may be directly or indirectly caused by breach of contract[719] (*conditio sine qua non, but-for rule*).[720] A claim for damages may be raised as a stand-alone claim or concurrently with a claim for performance or price reduction, as well as for contract avoidance.[721] It follows from the text of the Convention that the compensation must be made in money.[722]

2. The Principle of Full Compensation

The principle of full compensation whereby the compensation equals the actual loss (*damnum emergens*) and loss of profit (*lucrum cessans*) is broadly recognised

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Ingeborg Schwenzer, "Article 77" in *Schlechtriem & Schwenzer Commentary,* 2016, 1104–1110; Milena Đorđević, "Article 77" in *Commentary,* Kröll/Mistelis/Perales Viscasillas, 2018, 1015–1026; M. Đorđević, *Obim naknade štete zbog povrede ugovora o međunarodnoj prodaji robe,* op. cit., 241–258.

[717] See Articles 39, 43 and 44 CISG.

[718] Articles 45 and 61 CISG.

[719] In that regard, the CISG rules governing damages do not apply to the liability of the seller for death or personal injury caused by the goods to any person (Article 5 CISG), or to any loss arising from suspension of negotiations since precontractual liability lies beyond the scope of the CISG, as discussed herein while addressing Article 4 CISG.

[720] I. Schwenzer, "Article 74", op. cit., 1061 and 1074, stating that: "*The mere breach of a contractual obligation is sufficient to trigger liability*"; M. Đorđević, "Article 74", op. cit., 961. More on causation in the CISG, Djakhongir Saidov, *The Law of Damages in International Sales The CISG and Other International Instruments,* Portland, Oxford and Portland, Oregon, 2008, 79–101.

[721] See K. H. Neumayer, C. Ming, op. cit., 482.

[722] The Serbian text of the CISG does not specify explicitly that the compensation must be made in money. The situation is similar in the French version. However, such conclusion is drawn from the English version of the CISG "*damages... consist of a sum equal to the loss...*", as well as from the wording of this rule in some other languages (*e.g.* Russian, Spanish, etc). See K. H. Neumayer, C. Ming, op. cit., 486; I. Schwenzer, "Article 74", op. cit., 1063; M. Đorđević, "Article 74", op. cit., 966; P. Schlechtriem, "Uniform Sales Law – The UN – Convention on Contracts for the International Sale of Goods", op. cit., 97: "*damages are always monetary compensation*".

in comparative law.[723] This principle relies on the idea of full compensation of loss. The aim is to put the creditor in the same financial position as he would have been in had the contractual obligations been performed in full as agreed[724] (*performance principle*).[725] What matters for the creditor is the integral compensation,[726] the fault of the other party being irrelevant as a rule. Under the CISG, the debtor is held liable for any loss arising from a breach of contract, regardless of fault (*strict liability system*),[727] except where exempted from liability under Articles 79[728]

[723] For example, in Serbian, German, Austrian, French, Italian Portuguese, Dutch law. It is also accepted in the UNIDROIT Principles (Article 7.4.2) and the PECL (Article 9.502).

[724] See Harvey McGregor, *McGregor on Damages*, 18e éd., Sweet&Maxwell, Thomson Reuters, 2009, 199, stating: "*The starting point in resolving a problem as to the measure of damages for breach of contract is the rule that the claimant is entitled to be placed, so far as money can do it, in the same position as he would have been if had the contract been performed*". In detail on this principle, Guenter Treitel, *The Law of Contract*, 12e éd, London Sweet&Maxwell, 2007, 991–1091.

[725] In the common law system this principle is referred to as "protection of the expectation/performance interest". On the relationship between the full compensation principle in the civil law system and the performance interest in the common law system, Dj. Saidov, op. cit., 25–29.

[726] Under the CISG, the extent of damages needs to be determined so as to achieve full compensation for the creditor in terms of the *purpose* of the contract in hand. See I. Schwenzer, op. cit., 1063; K. H. Neumayer, C. Ming, op. cit., 497; V. Heuzé, op. cit., 401; B. Audit, op. cit., 163; CISG-AC Opinion No. 6, *Calculation of Damages under CISG Article 74*. Rapporteur: Professor John Y. Gotanda, Villanova University School of Law, Villanova, Pennsylvania, USA (available at: *https://www.cisgac.com/cisgac-opinion-no6/*).

[727] See I. Schwenzer, "Article 74", op. cit., 1061 ff; M. Đorđević, "Article 74", op. cit., 961: "*The remedy of damages as set forth in the Convention is available irrespective of fault on behalf of the breaching party*"; B. Audit, op. cit., 162 ff; K. H. Neumayer, C. Ming, op. cit., 483; V. Heuzé, op. cit., 400 ff; J. O. Honnold, op. cit., 445–449.

[728] This rule provides for exemption from liability for non-performance, stating that: "A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences" (Article 79 Paragraph 1). Under this rule, for a debtor to be exempt from liability for non-performance, the following conditions need to be met: a) that the non-performance was caused by an impediment beyond the debtor's control; b) that the impediment was not foreseeable to the debtor at the time of the conclusion of the contract and c) that the debtor could not reasonably be expected to have avoided or overcome such impediment and its consequences. This rule of the CISG has exerted considerable influence on the corresponding solutions of other sources of uniform contract law, above all the UNIDROIT Principles (Article 7.1.7), the PECL (Article 8.108) and Draft Common Frame of Reference of European Private Law (III.-3:104), which provide for similar rules on exemption from liability. In detail on exemption from liability in comparative law, and in particular with regard to the CISG rules and Serbian Law of Obligations, J. Perović, *Standardne klauzule u međunarodnim privrednim ugovorima,* op. cit., 59–79.

and 80[729] CISG and where the parties have provided otherwise.[730] It is emphasized in the commentaries to Article 74 CISG in this context, that the debtor is required to compensate the creditor for the entire loss, meaning all losses incurred,[731] including the losses incurred by the creditor in an attempt to avoid or mitigate the loss.[732]

Under the principle of integral compensation recognised in the CISG, any type of loss arising as a result of breach of contract,[733] subject to fulfilment of the required conditions,[734] may be recoverable.[735] In this context, both types of loss – actual loss and loss of profit are treated equally[736] and enjoy the same level of protection.[737]

[729] Under Article 80 CISG, "A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission". This rule is addressed in this paper in the section dealing with general principles of the CISG. In detail, Thomas Neumann, *The Duty to Cooperate in International Sales The Scope and Role of Article 80 CISG*, Sellier European Law Publishers, Munich, 2012 (in entirety).

[730] In the light of the dispositive character of the CISG, the parties may provide in the contract for certain special requirements for the liability for loss, such as fault. See decision *Hovioikeus Turku* of Finnish Court of Appeal (*Forestry equipment case*) of 12 April 2002 (available at: *https://iicl.law.pace.edu/cisg/case/finland-april-12-2002-hovioikeus-court-appeals-finnish-case-citations-do-not-generally*). In this case, the seller's warranty, incorporated into the contract, provided that the buyer shall not be entitled to damages for non-conformity of goods, unless the loss or non-conformity resulted from wilful or grossly negligent action on part of the seller. Ruling on this dispute, the Court accepted fault as a requirement for liability for loss, regardless of the strict liability principle of the CISG, arguing that the parties were free to stipulate requirements for liability for non-conformity. Commentary on the decision, Dj. Saidov, op. cit., 23.

[731] V. Knapp. "Article 74", op. cit., 543.

[732] In that sense, K. H. Neumayer, C. Ming, op. cit., 487; I. Schwenzer, "Article 74", op. cit., 1061.

[733] It seems worth noting in this context that the CISG does not provide for punitive damages. These damages are considered to be contrary to the basic principle of the CISG on full compensation and foreseeability of loss. See M. Đorđević, *Obim naknade štete zbog povrede ugovora o međunarodnoj prodaji robe,* op. cit., 123; M. Đorđević, "Article 74", op. cit., 980–981 and the authors therein cited.

[734] Articles 74–80 CISG.

[735] In detail on certain types of loss under the CISG general rules, I. Schwenzer, "Article 74", op. cit., 1064–1074; M. Đorđević, "Article 74", op. cit., 973 ff; M. Đorđević, *Obim naknade štete zbog povrede ugovora o međunarodnoj prodaji robe,* op. cit., 112; J. Perović, *Standardne klauzule u međunarodnim privrednim ugovorima,* op. cit., 113–117; Jelena Perović, "Indirektna šteta u međunarodnoj prodaji robe", *Pravo i privreda*, No. 4–6, Belgrade, 2011, 732–744; Jelena Perović, "Etendue et limitation de la responsabilité contractuelle selon la Convention de Vienne sur les contrats de vente internationale de marchandises – Quid en particulier des clauses excluant les consequential damages?"*, Revue de droit International et de droit comparé* (eds. G. Keutgen, Y. De Cordt), Bruylant, Bruxelles, 2010, No. 4, 571–604.

[736] More, M. Đorđević, "Article 74", op. cit., 962.

[737] With the exception, as pointed out, of the loss of right to claim loss of profit as provided under Article 44 CISG.

In the international sale of goods, the loss of profit often covers cases where the buyer, due to a breach of contract by the seller, is unable to resell the goods and thus generate profit. This type of loss is recoverable from the seller based on Article 74 insofar as the seller, at the time of the conclusion of the contract, foresaw or ought to have foreseen the fact that the goods were intended for resale by the buyer, which is a common case in commercial transactions.[738] Generally speaking, loss of profit may only cover the profit that would have been effectively realised had the contractual obligations been duly performed.[739]

A question is raised, in this context, as to recoverability under the CISG of *loss of a chance*, which essentially does not constitute loss of profit, but rather *loss of a chance to profit.*[740] The CISG commentators and the courts are divided on this point.[741] Some take the view that damages for the loss of a chance itself to profit are in principle not recoverable,[742] while others hold that loss of a chance is to be recognised as recoverable under Article 74 [743] since it is beyond doubt that it has economic value.[744] Finally, according to a third view, such damages may exceptionally be recoverable when the creditor and the debtor have entered into a contract for the very purpose of earning a profit; the creditor enters into a contract in order to obtain a chance of earning a profit, so if he misses that chance due to a breach of contract by the debtor, he is entitled to claim damages.[745] It may be inferred from the foregoing that the CISG leaves open the issue of recoverability of "loss of a chance", and that the scholarly articles and courts are far from reaching a consensus on this matter.

With regard to the CISG rules dealing with loss of profit, it is worth noting that, based on the principle of full compensation, not only the profits that have been lost up until the decision of the court or arbitral tribunal are recoverable by the creditor, but also future profits to the extent they may be reasonably predictably

[738] See K. H. Neumayer, C. Ming, op. cit., 493.

[739] See M. Đorđević, "Article 74", op. cit., 976; K. H. Neumayer, C. Ming, *ibidem*; I. Schwenzer, "Article 74", op. cit., 1061.

[740] Economic analysis of the term *"opportunity loss"*, Robert Cooter, Thomas Ulen, *Law & Economics*, Pearson Addison Wesley, 2004, 242 ff.

[741] Examples of court decisions addressing this issue, Dj. Saidov, op. cit., 70 ff.

[742] This view was reflected in decision of *HG Zürich* (*Art books case*) of 10 February 1999 (available at: *https://iicl.law.pace.edu/cisg/case/switzerland-handelsgericht-commercial-court-aargau-22*). Commentary on decision Đorđević, "Article 74", op. cit., 984.

[743] More on this, Dj. Saidov, op. cit., 72 ff.

[744] I. Schwenzer, op. cit., 1014.

[745] CISG-AC Opinion No. 6. op. cit.

calculated, in compliance with the CISG requirements relating to the foreseeability of loss and the obligation to undertake actions to mitigate the loss.[746]

3. Foreseeability Rule

The foreseeability rule, emanating from French law[747] and the English leading case *Hadley v. Baxendale* (*contemplation rule*),[748] limits the extent of damages to the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract. The foreseeability rule has been incorporated into a large number of national legal systems, as well as the UNIDROIT Principles (Article 7.4.4) and the PECL (Article 9:503).[749] The limitation of liability to foreseeable loss is justified[750]

[746] I. Schwenzer, "Article 74", op. cit., 1072; M. Đorđević, "Article 74", op. cit., 976; CISG-AC Opinion No. 6, op. cit.

[747] Although the notion of foreseeable loss is usually associated with common law, it is worth noting that the first framework for this notion was provided in French law. Already in the 16th century *Dimoulin* formulated the rule that in determining the extent of loss, care should be taken of the foreseeability of the loss at the time of entry into the contract. The foreseeability rule was recognised in French theory and the French Civil Code adopted a rule providing that: "*Le débiteur n'est tenu que des dommages et intérets qui ont été prévus ou qu'on a pu prévoir lors du contrat, lorsque ce n'est point par son dol que l'obligation n'est exécutée*" (Article 1150 before the 2016 reform). More on the foreseeability rule in French law, Jean Carbonnier, *Droit civil*, Tome Second, 4e éd, Paris, Presses Universitaires de France, 1964, 515–516; François Terré, Philippe Simler, Yves Lequette, *Droit civil Les obligations*, 6e éd, Dalloz, Paris, 1996, 538, 539 and 540; Alain Bénabent, *Droit civil Les obligations*, Montchrestien, Paris, 1995, 414 and 415.

[748] A case from 1854 introducing the rule on foreseeability of loss to English law – *contemplation rule*. The rule was further developed in the case of *Victoria Laundry (Windsor) Ltd. v. Newsman Industries, Ltd.* from 1949. More on these cases, H. McGregor, op. cit., 200 ff; Arthur G. Murphey, "Consequential Damages in Contracts for the International Sale of Goods and the Legacy of Hadley", *The George Washington Journal of International Law and Economics*, No 2, 1989, 430 ff; *Benjamin's Sale of Goods,* 7e éd, Thomson Sweet&Maxwell, London, 2006, 988 ff; *Anson's Law of Contract*, op. cit., 555 ff; Hugh Beale, Arthur Hartkamp, Hein Kötz, Denis Tallon, *Cases, Materials and Text on Contract Law*, Hart Publishing, Oxford and Portland, Oregon, 2002, 821 ff; P. D. V. Marsh, *Comparative Contract Law England, France, Germany, Gower*, 1994, 314–315. On this rule in English *Sale of Goods Act (sec. 54)* and in general in the field of the sales law in English law, M. Bridge, *The Sale of Goods*, op. cit., 571 ff. The foreseeability of loss rule is also adopted in the US Uniform Commercial Code (Article 2–715).

[749] A comparative law overview of this rule, H. Beale, A. Hartkamp, H. Kötz, D. Tallon, op. cit., 818 ff.

[750] A justification for limiting the debtor's liability for breach of contract may also be found in the adequate causation theory. See Henri et Léon Mazeaud, André Tunc, *Traité théorique et pratique de la responsabilité civile délictuelle et contractuelle*, Tome II, 5e éd, Éditions Montchrestien, Paris, 1960, 422 ff.

by numerous arguments[751] emphasizing, *inter alia*, that this rule enables the parties to contemplate and take into account, already at the time of entry into the contract, the potential financial consequences arising from a breach of contract[752] and consequently protect themselves from any liability, and that the foreseeability rule allows for a fair and reasonable allocation of risk[753].[754]

According to the foreseeability rule under Article 74 CISG, the debtor is held liable only for the risks he could reasonably have foreseen at the time of the conclusion of the contract, bearing in mind all circumstances of the case and the purpose of the contract.[755] This rule is applicable regardless of whether or not the debtor is responsible for the breach, which would imply that the foreseeability limitations also apply to the cases of non-performance attributable to the debtor's fault.[756] In this regard, the CISG solution is not in line with the rules of Serbian Law of Obligations[757] where the limitation of damages to foreseeable loss is inapplicable in cases of intentional or grossly negligent breaches of contract.[758]

The relevant moment for determining foreseeability is the time of the conclusion of the contract,[759] giving due regard to the facts which the party in breach

[751] In detail, Dj. Saidov, op. cit., 23.

[752] K. H. Neumayer, C. Ming, op. cit., 490.

[753] H. Stoll, "Article 74", op. cit., 555; I. Schwenzer, "Article 74", op. cit., 1001.

[754] In detail on foreseeability of loss rule under the CISG, M. Đorđević, *Obim naknade štete zbog povrede ugovora o međunarodnoj prodaji robe,* op. cit., 219–241.

[755] Foreseeability is determined using an objective test, relying on what a reasonable person in debtor's shoes could have foreseen, taking into account the circumstances at the time of entry into the contract. The objective test is supplemented by subjective elements, relying on what the specific debtor could have foreseen in the specific circumstances. See J. Perović, *Standardne klauzule u međunarodnim privrednim ugovorima*, op. cit., 102; M. Đorđević, "Article 74", op. cit., 968.

[756] See B. Audit, op. cit., 163, asserting that: "*... la réparation est indépendante, selon la convention, de toute idée de faute";* I. Schwenzer, "Article 74", op. cit., 1077, stating: "*... the foreseeability rule concerns only the consequences of liability independent of whether and to what extent the promisor is responsible for the breach*"; H. Stoll, "Article 74", op. cit., 554, pointing out that: "*The contemplation rule has nothing to do with the fault principle*" 764. With reservations about interpretations of this rule, V. Heuzé, op. cit., 404.

[757] See Article 266 Paragraph 2 of the Law.

[758] This solution was also adopted in the PECL (Article 9:503), as well as Draft Common Reference for European Contract Law (III.–3:703). A majority of national laws contain a similar solution. In this context, some legislators provide only for intent, while others extend this rule to gross negligence. Comparative law overview of this issue, *Principles of European Contract Law, Parts I and II*, 388–389.

[759] I. Schwenzer, "Article 74", op. cit., 1078; M. Đorđević, "Article 74", op. cit., 969. In that sense, Dj. Saidov, op. cit., 119 ff: "*... the rule is generally fair: only the risk assumed by the party at the*

then knew or ought to have known.[760] Thus, in determining what is foreseeable within the meaning of Article 74, the time of breach of contract is not taken into account, and it is as a rule irrelevant whether, after the time of the conclusion of the contract, the party in breach knew or ought to have known of certain additional risks[761].[762]

Under the foreseeability rule of the CISG, only the loss itself must have been foreseeable at the time of the conclusion of the contract, and not the breach of contract which gives rise to the claim for damages.[763] In this regard, a question is raised whether the foreseeability requirement relates to the type (nature) of loss, to its extent, or covers both elements. Another question is whether the extent of loss relates to the general extent in terms of limits on debtor's liability, or it requires foreseeability of the precise amount of loss.[764] The CISG keeps silent on this matter,

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conclusion of the contract should, as a rule, be of legal significance because the time of making the contract is the only time when the party has an opportunity to protect himself (for example, by raising the price, excluding or limiting liability, or by procuring insurance). If foreseeability were to be assessed at a time after the contract was concluded, the party would be denied of opportunity for self-protection".

[760] The time of the conclusion of the contract was considered relevant in *Hadley* case as well. In the case of *Gee v. Lancashire and Yorkshire Ry* (1860) an English court suggested that the time rule established in *Hadley* ruling should be changed to allow for notice after the contract was made. This suggestion was not accepted in later decisions. More details, A. G. Murphey, op. cit., 446–451. The US Uniform Commercial Code in Article 2–715 also opts for the time of contracting.

[761] M. Đorđević, "Article 74", op. cit., 969; K. H. Neumayer, C. Ming, op. cit., 491; V. Heuzé, op. cit., 403. Discussion on this issue, Dj. Saidov, op. cit., 120.

[762] The application of this test in court practice is amply illustrated by the decision of the German Supreme Court which, ruling on the foreseeability of loss in a contract for the international sale, held the time of the conclusion of the contract to be decisive. In this case, a German importer entered into a contract for the sale of cheese with a Dutch exporter. Because 3% of the cheese delivered was defective, the buyer suffered loss, including loss of profit as a result of: the loss of four customers, damages paid by the buyer to one of his customers who lost his own customers as a result of the defective cheese, and the loss of several delivery arrangements which incurred additional transport costs to the buyer. In this case, two lower courts denied the buyer's claims for loss of profit, stating that the buyer could only have been entitled to recovery if the seller had been able to foresee that 3% of defective cheese could cause such loss. However, the German Supreme Court took the reverse position noting that the seller knew at the time of the formation of the contract that the buyer was a *reseller* of the goods. Decision *Bundesgerichtshof* (*Cheese case*) of 24 October 1979. Commentary on the decision, Larry A. DiMatteo, Lucien Dhooge, Stephanie Greene, Virginia Maurer, Marisa Pagnattaro, "The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence", *Northwestern Journal of International Law and Business*, No. 34, 2004, 420. See also decision of U.S. District Court, Northern District of New York (*Delchi Carrier v. Rotorex*) of 09 September 1994 (available at: *https://iicl.law.pace.edu/cisg/case/united-states-september-9-1994-district-court-delchi-carrier-spa-v-rotorex-corp*).

[763] I. Schwenzer, "Article 74", op. cit., 1079.

[764] A detailed analysis of these issues, Dj. Saidov, op. cit., 113 ff.

and divergent positions in the comparative law[765] further complicate the interpretation of this issue within the meaning of Article 74. If the issue is considered from the viewpoint of the practices of international commercial transactions, it is clear that the precise *amount* of loss cannot be foreseen in most cases; what the parties, as a rule, may be able to foresee at the time of the conclusion of the contract will be the nature of loss and its general extent.[766] Consequently, if the foreseeability requirement relied on the precise amount of loss, the aggrieved party would in most cases be deprived of damages. In this regard, it is held in the commentaries on the CISG that the decisive question for determining what is foreseeable within the meaning of Article 74, is whether the possibility of the occurrence of loss as well as the nature of loss were foreseeable to the debtor at the time of the conclusion of the contract. It is further argued that although it is not necessary for the debtor to have foreseen the precise amount of loss, its general extent must nevertheless have been foreseeable to him.[767]

In case law, however, this rule has different interpretations. In some cases, the courts and arbitral tribunals required foreseeability of the exact amount of loss under Article 74. Thus in a dispute before CIETAC,[768] the claim raised by the buyer for compensation of loss of profit was denied, the reasoning being that the difference between the price agreed between the buyer and the seller (contract price) and the price at which the buyer resold goods to his customers (resale price) was not foreseeable by the seller at the time of the conclusion of the contract.[769] On the other hand, in a dispute before ICAC,[770] the arbitral tribunal found that Article 74 CISG does not require foreseeability as to the extent of loss, but only as to the type

[765] For different solutions to this issue in national legal systems, H. Beale, A. Hartkamp, H. Kötz, D. Tallon, op. cit., 818 ff; P. D. V. Marsh, op. cit., 313 ff. For this issue specifically in French law, Barry Nicholas, *The French Law of Contract*, 2e éd, Clarendon Press, Oxford, 1992, 230 ff; F. Terré, Ph. Simler, Y. Lequette, op. cit., 439, stating the positions of recent French jurisprudence according to which: "*... c'est la quotité du dommage qui doit être prise en consideration pour savoir ce que l'on entend par dommage prévisible*".

[766] See Dj. Saidov, op. cit., 114 ff.

[767] I. Schwenzer, "Article 74", op. cit., 1079; H. Stoll, "Article 74", op. cit., 569; V. Heuzé, op. cit., 404; B. Audit, op. cit., 163. On this issue in arbitral practice, Hans Van Houtte, "The Vienna Sales Convention in ICC Arbitral Practice", ICC *International Court of Arbitration Bulletin*, Volume 11, No. 2, 2000, 30.

[768] China International Economic and Trade Arbitration Commission.

[769] CIETAC Arbitration proceeding (*Silicon and manganese alloy case*) of 1 February 2000 (available at: *https://iicl.law.pace.edu/cisg/case/china-february-1-2000-translation-available*).

[770] Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry.

of loss that may arise from a breach of contract. In this case the buyer claimed from the seller the recovery of the amount of the contractual penalty paid by the buyer to his customer, whilst the seller argued that the amount of the penalty was unreasonably high and not foreseeable by him at the time of the conclusion of the contract. Based on the above interpretation, the arbitral tribunal held that foreseeability of the penalty itself was sufficient, the foreseeability of its amount by the debtor being irrelevant for the purpose of Article 74 CISG.[771] On the other hand, a large number of decisions take the view that the extent of loss is covered by the foreseeability requirement.[772] Thus, for example, in a contract for the international sale of goods, the buyer had to take out a loan to make an advance payment to the seller. However, due to a breach of contract by the seller, the buyer was rendered unable to return the loan on time and, as a result, had to pay additional interest on the sum in arrears. Deciding on the buyer's claim for damages against the seller, the court held that the seller could not foresee the interest rate on the sum in arrears in the buyer's country (Lithuania), given that it essentially differed from interest rates in Western Europe, and awarded damages to the buyer by reference to the interest rate which, in the court's opinion, would be foreseeable to the seller.[773]

Bearing in mind different positions taken in case law with regard to the foreseeability requirements, as well as the fact that the Convention does not provide for this issue in explicit terms, special care should be exercised in the interpretation of this matter. In this context, it is worth emphasising here again that the international character of the Convention obliges the courts to interpret the foreseeability rule under Article 74, as well as any other rules and notions accepted in the CISG, autonomously, and not in the light of national law criteria. Although the foreseeability rule in the CISG was adopted under the influence of the Anglo-American contemplation rule, there are significant differences between these solutions. It is therefore, as underlined in commentaries on the CISG, that case law on domestic law of Anglo-American States cannot be used for the interpretation of

[771] ICAC Arbitration proceeding 97/2004 of 23 December 2004 (available at: *https://iicl.law.pace.edu/cisg/case/russian-federation-december-23-2004-translation-available*).

[772] See for example decision of *Polimeles Protodikio Athinon* (*Bullet-proof vest case*) of 1 January 2009 (available at: *https://iicl.law.pace.edu/cisg/case/greece-2009-polimeles-protodikio-multi-member-court-first-instance*) and decision of *Oberster Gerichtshof* (*Cooling system case*) of 14 January 2002 (available at: *https://iicl.law.pace.edu/cisg/case/austria-january-14-2002-oberster-gerichtshof-supreme-court-austrian-case-citations-do-not*). Relevant case law, Dj. Saidov, op. cit., 116 ff.

[773] Decision of District Court of Kuopio *(Butter case)* of 05 November 1996 (available at: *https://iicl.law.pace.edu/cisg/case/finland-tampere-court-first-instance-tampereen-k%C3%A4r%C3%A4j%C3%A4oikeus*). Commentary, Dj. Saidov, op. cit., 116.

Article 74 CISG,[774] while authors hailing from the Anglo-American legal system warn that the rules derived from the *Hadley* case differ from the CISG rules on foreseeability of loss.[775] It is in this vein that we need to perceive certain similarities between the foreseeability rule under Article 74 CISG and the corresponding notions adopted in the civil law countries, due to which courts have shown tendency to interpret the above rule relying on the requirements set in that regard by the domestic law.[776] In this context, in the interpretation of the foreseeability requirement under Article 74 CISG, it seems necessary to consider first and foremost the purpose of this rule. This purpose is reflected, *inter alia*, in fair and reasonable allocation of risk, achieved as a rule through an assessment, at the time of the conclusion of the contract, of possible loss (its type or nature) and its general extent, in terms of monetary limits on the debtor's liability.[777]

4. Comparison with Solutions of the PECL and the UNIDROIT Principles

The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law, in terms of the limitation of liability, essentially follow the solutions of the CISG based on the full compensation principle and limitation of liability by the foreseeability rule.

The full compensation principle is established in Article 7.4.2 UNIDROIT Principles, providing that the creditor is entitled to full compensation for the harm sustained as a result of the non-performance. Such harm includes both any loss suffered by the creditor and any loss of profit, taking into account any gain to the creditor resulting from his avoidance of cost of harm. Unlike the CISG, the Principles explicitly provide that the recoverable harm may be non-pecuniary and includes, for instance, physical suffering or emotional distress.[778] This rule departs

[774] I. Schwenzer, "Article 74", op. cit., 1077.

[775] Thus, for example, it is stated in A.G. Murphey, op. cit., 417, that: "*US judges should try to divorce themselves from the influence of Hadley as much as possible; its rules are not the same as those under the consequential damages article of the CISG*".

[776] Examples of court decisions where courts acted in this way, M. Đorđević, "Article 74", op. cit., 968.

[777] See P. Schlechtriem, "Uniform Sales Law – The UN – Convention on Contracts for the International Sale of Goods", op. cit., 97: "*The underlying idea is that the parties, at the conclusion of the contract, should be able to calculate the risks and potential liability they assume by their agreement*".

[778] See commentary to this article, *UNIDROIT Principles of International Commercial Contracts 2016*, op. cit., 271–274.

significantly form the corresponding solution of the CISG in that it lays down explicitly that the compensation includes also future harm, established "with a reasonable degree of certainty",[779] as well as compensation for "the loss of a chance".[780] A limitation on compensation by the foreseeability rule is adopted under Article 7.4.4 Principles, providing that the non-performing party is liable only for the harm which he foresaw or ought to have foreseen at the time of the conclusion of the contract as being likely to result from non-performance.[781]

The Principles of European Contract Law adopt a similar approach with regard to the full compensation principle,[782] but provide explicitly that the loss for which damages are recoverable includes non-pecuniary loss and future loss "which is reasonably likely to occur".[783] The "loss of chance" is not covered by this rule, although the commentary of the Principles states that the "loss of chance" is a form of the future loss.[784] Finally, it is important to emphasize that the PECL, unlike the CISG and the UNIDROIT Principles, expressly provides that the foreseeability rule is not applicable to the cases of intentional or grossly negligent non-performance.[785]

B. RULES OF THE LAW OF OBLIGATIONS ADDRESSING THE EXTENT OF DAMAGES – SUMMARY COMPARISON WITH THE CISG RULES

General rule. – Under the rules of the Law of Obligations addressing the extent of damages, the creditor is entitled to a compensation of the actual loss and loss of profit, which at the time of the conclusion of the contract should have been foreseen by the debtor as a possible consequence of breach of contract, in the light of the facts of which the debtor knew or ought to have known at that time.[786]

[779] Article 7.4.3 Paragraph 1.

[780] Article 7.4.3 Paragraph 2. See commentary to this article, *UNIDROIT Principles of International Commercial Contracts 2016*, op. cit., 275–276.

[781] See commentary to this article, *UNIDROIT Principles of International Commercial Contracts 2016*, op. cit., 276–277.

[782] See in full Articles 9:501 and 9:502 PECL.

[783] Article 9:501 Paragraph 2 PECL.

[784] *Principles of European Contract Law, Parts I and II*, op. cit., 436, stating: "*Future loss often takes the form of the loss of a chance*".

[785] Article 9.503 PECL. See commentary to this article, *Principles of European Contract Law, Parts I and II*, op. cit., 442. The same solution is adopted in the Draft Common Frame of Reference of European Private Law (III.–3:703).

[786] Article 266 Paragraph 1 Law of Obligations. This Article of the Law also provides for the rule on reducing damages where a profit arises for the creditor in the course of breach of contract

This solution of the Law, based on the full compensation principle[787] and the principle of limitation of liability by the foreseeability rule,[788] generally corresponds to the solution adopted in the CISG.[789]

Key point of departure from the CISG. – However, unlike the CISG, the Law provides explicitly that the limitation to foreseeable loss does not apply when the loss has occurred as a result of a fraud (*fraus*), non-performance through wilful misconduct (*dolus*) or gross negligence (*culpa lata*). In such cases, the creditor is entitled to claim damages from the debtor for the entire loss arising from the breach of contract. The principle is formulated in the text of the Law as follows: "In case of fraud or non-performance through wilful misconduct, as well as of non-performance due to gross negligence, the creditor shall be entitled to demand from the debtor compensation for the entire loss sustained due to breach of the contract, regardless of the debtor not being aware of particular circumstances causing the loss".[790] Thus, the presumption of fault test applies only to ordinary negligence (*culpa levis*), as the lowest degree of negligence, and not to the more severe degrees of debtor's fault (*dolus* and *culpa lata*).[791]

Criteria for determining foreseeability. – Foreseeability is in principle assessed by applying the objective criterion (*in abstracto*). The fundamental question in this

(Article 266 Paragraph 3), and the rule enjoining the party claiming breach of contract to take all reasonable steps to mitigate the loss caused by the breach (Article 266 Paragraph 4). Rules under Article 266 apply accordingly to breach of obligations not arising from a contract, unless otherwise provided for under the Law (Article 266 Paragraph 5). Commentary on Article 266 of the Law, Ivica Jankovec, "Član 266" in *Komentar Zakona o obligacionim odnosima*, Slobodan Perović, I Knjiga, 1995, 607–622; Boris Vizner, *Komentar Zakona o obveznim (obligacionim) odnosima*, 2. knjiga, Zagreb, 1978, 1083–1087; S. Cigoj, op. cit., 271–275.

[787] See S. Perović, "Osnovna koncepcija Zakona o obligacionim odnosima", op. cit., 80, stating that the Law in principle does not accept calculation of compensation based on the degree of fault, relying on the full compensation idea and the position that the interest of the aggrieved party should come first and foremost in the entire compensation system.

[788] The foreseeability criterion is applicable only to contractual liability, while no such limitations apply to extra-contractual (tortious) liability and the tortfeasor is obliged to compensate the injured party for the entire injury, both foreseeable and non-foreseeable.

[789] In detail, J. Perović, *Standardne klauzule u međunarodnim privrednim ugovorima,* op. cit., 118 ff; Jelena Perović, "Limitations on Liability for Damages Caused by a Breach of Business Contracts – From the Perspective of the Serbian Law of Obligations", *Ekonomika preduzeća,* November–December, Belgrade, 2017, 468–479.

[790] Article 266 Paragraph 2 of the Law. Detailed commentary, I. Jankovec, "Član 266", op. cit., 610–617. In general on limitation of liability to foreseeable loss, Ivica Jankovec, *Ugovorna odgovornost*, op. cit., 342–363.

[791] See B. Vizner, *Komentar Zakona o obveznim (obligacionim) odnosima*, 2. knjiga, op. cit., 1085.

regard is what an average person in the shoes of the debtor, aware of the circumstances that existed at the time of the conclusion of the contract, ought to have foreseen as a possible consequence of breach of contract. The assessment relies on appropriate standards (care of a prudent owner, prudent businessman, prudent professional),[792] giving due consideration to the circumstances of each particular case. The burden of proof that the loss was unforeseeable is on the debtor. On the other hand, where the debtor was also aware of certain special circumstances, which, in case of non-performance, would result in a greater loss to the creditor than would normally have occurred, importance is attached to the subjective criterion (*in concreto*) which deals with consequences of the loss which a particular debtor ought to have foreseen in particular circumstances. The burden of proof in such cases lies with the creditor.[793]

Timing for determining foreseeability. – The relevant moment for determining foreseeability is the time of the conclusion of the contract. Thus, for a limitation on the debtor's liability, it is irrelevant whether, after the time of the conclusion of the contract, the debtor became aware of certain special circumstances or additional risks that may lead to a greater loss, or a loss more severe than could be foreseen under the usual circumstances. In terms of degree of probability required for an assessment of foreseeability of loss, such loss as usually occurs due to a breach of contract of a certain type is assumed as a rule to be foreseeable. In contrast, any harmful consequences that may in practice arise rarely or by way of exception from a breach of contract of a certain type, are not considered as foreseeable within the meaning of the rules of the Law of Obligations governing limitation of liability.[794]

Subject matter of foreseeability. – Under the foreseeability of loss criterion, it is the loss itself that ought to have been foreseeable at the time of the conclusion of the contract, and not the breach of contract that gave rise to claim for damages. In this context, domestic scholarly articles and courts take the view that this requirement relates to the type of loss, rather than to its amount.[795]

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[792] See general rule of the Law concerning the conduct of the parties in performing obligations and exercising rights, as provided under Article 18 of the Law.

[793] See I. Jankovec, "Član 266" op. cit., 612–613; B. Vizner, *Komentar Zakona o obveznim (obligacionim) odnosima,* 2. knjiga, op. cit., 1085.

[794] More on these issues, I. Jankovec, "Član 266", op. cit., 613–615.

[795] See B. Vizner, *Komentar Zakona o obveznim (obligacionim) odnosima,* 2. knjiga*, ibidem*, emphasizing that foreseeability in contractual liability for loss as a rule applies "only to the loss and the causal relation between such loss and breach of the existing obligation, rather than to certain pecuniary amount (price) of the loss". In this sense, I. Jankovec, *Ugovorna odgovornost*, op. cit., 353, also citing relevant domestic case law.

C. SYNTHESIS

A comparative analysis of the respective solutions of the CISG and the Law of Obligations addressing the extent of damages arising from a breach of contract suggests that both sources adopt the principle of integral compensation limited by the foreseeability of loss rule. In this context, the key points of departure pertain to the issue of applicability of the limitation of liability to foreseeable loss regardless of the debtor's liability for the loss (the CISG) or rather inapplicability of such limitation where the contract is breached with intent or through gross negligence (Law of Obligations). On the other hand, what they have in common is the position that the time of the conclusion of the contract is decisive for the assessment of foreseeability and the requirement that the foreseeability relates to the loss itself, rather than the breach of contract that gave rise to the loss. As to whether the foreseeability requirement refers only to the type of loss or the value of loss must also have been foreseen, the prevailing view is that the main test relies on the assessment of whether the occurrence of loss and its nature could have been foreseeable to the debtor at the time of the conclusion of contract.

CONCLUSION

The solutions of the CISG pertaining to the sphere of its application, its interpretation, as well as the remedies for breach of contract have been examined in this paper in the light of many different standpoints in legal doctrine and a great abundance of court decisions and arbitral awards that deal with these issues. This examination is accompanied by a comparative review of the relevant principles and rules of the Law of Obligations, with the aim of finding the most adequate angle from which a totality of relationships arising from a contract for the international sale of goods should be viewed when Serbian law is applicable to the contract. Within this framework, the examination of each solution is rounded off by a specific conclusion summing up the main issues and underlining the key similarities and disparities between the CISG and the Law of Obligations.

Two general conclusions stem from the above. One deals with the appraisal of the level of legal certainty achieved through the CISG in the sphere of international sale of goods, while the other pertains to the final assessments based on a comparation of the CISG and the Law of Obligations.

The Convention, through its presence and the role it serves in the domain of international sales law, substantially contributes to overcoming the differences peculiar to distinct national legal systems. Its rules have the role of a common denominator of contractual relationships in the field of international sale, thus strongly encouraging and facilitating the conclusion and performance of contracts at an international level. In the course of the forty years of its existence, the CISG has achieved a high level of unification of the international sales law, as testified by the fact that the rules of this document have expanded to the horizons of more than ninety states worldwide. However, a unification of the law in itself does not necessarily also lead to raising the level of legal certainty in the field it addresses. This applies to all instruments of unification, even the CISG, which is rightfully described as a universal codifying act in the sphere of international sale. Raising the level of legal certainty in the relationships the CISG bears upon, requires a proper application of the CISG and an autonomous and uniform interpretation of its rules. On the other hand, a failure by the courts to apply the CISG when requirements for its application have been met, as well as inadequate and non-uniform application of its rules, produce the contrary effect, paving the way for different interpretations and legal uncertainty.

If the analysed solutions of the CISG are considered in the context of their comparison with the relevant principles and rules of the Law of Obligations, it becomes apparent that they share many similarities, but also exhibit important differences. The fundamental similarity in the respective solutions of these documents is revealed at the first glance; it derives from the fact that the Draft Code of Obligations and Contracts, used as the basis of the Law of Obligations, in many instances followed the lead of the Hague Uniform Laws which preceded the CISG and as such wielded a strong influence on its solutions. Speaking of differences, in general terms, they logically arise from the very nature and basic scope of these documents – while the Law of Obligations governs the matter of obligations as a whole, the sphere of application of the CISG is limited to a contract for the international sale of goods, as defined by Articles 1–6 CISG. Specific differences are reflected in a number of rules, particularly prominent among them being the notions of non-conformity of goods and a fundamental breach of contract which are adopted by the CISG, but not recognised by the Law of Obligations.

In the context of comparison between the CISG and the Law of Obligations, it seems worth noting that a large number of solutions contained in the CISG were developed as a result of a compromise between often discordant, and sometimes even acutely opposing systems of the civil law and common law legal traditions. In scholarly articles, this compromise is often described as one of the factors contributing to the successful application of the CISG, as rendering it acceptable to the members of both large legal families. It seems, however, that some of the CISG provisions resulting exactly from this compromise (such as Article 7 Paragraph 1, relating to the role of good faith in the interpretation of the CISG) convey vague and sometimes also controversial solutions which allow for different interpretations. On the other hand, certain solutions of the Law of Obligations, particularly where departing from the solutions of the Draft Code, show certain deficiencies, which, subject to a detailed analysis, and whilst exercising special care and great caution, ought to be removed through any potential future reforms of the legislation in this field. The proposals made in the Preliminary Draft Civil Code of the Republic of Serbia may serve as the optimum initial grounds in that respect.

The CISG and the Law of Obligations should not be seen as "competing" and "opposing parties" in the field of the international sales law. Quite to the contrary, these sources ought to be applied within the framework determined by their own nature and the sphere of their application – the CISG, as a unifying act, always giving regard to its international character which calls for its autonomous interpretation, and taking into account the need for its uniform application, and the Law of Obligations, as an act of a successful codification of domestic law in the area of obligation relations. In this way, the CISG and the Law of Obligations serve to achieve a common goal – enhancing legal certainty in contractual relations and encouraging further evolution of the law in the field of international sales.

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UGOVOR O MEĐUNARODNOJ PRODAJI ROBE

KOMPARATIVNI POGLED NA REŠENJA BEČKE KONVENCIJE O MEĐUNARODNOJ PRODAJI ROBE I SRPSKOG ZAKONA O OBLIGACIONIM ODNOSIMA

Rezime

Život Bečke konvencije započeo je pre četrdeset godina. Nastala kao izraz potrebe za postojanjem jedinstvenog prava međunarodne prodaje, ova Konvencija danas je svetionik procesa unifikacije ugovornog prava, uzor brojnih nacionalnih zakona i međunarodnih dokumenata i jedan od stubova razvoja zajedničke kulture prava. Značaj Bečke konvencije na međunarodnom planu, kao i njeno dugogodišnje prisustvo u pozitivnom pravu Srbije, čine osnov i inspiraciju za jedan opšti naučni pogled na rešenja ovog međunarodnog dokumenta, uz njihovu komparaciju sa odgovarajućim pravilima srspkog Zakona o obligacionim odnosima. Nošen ovom idejom, autor se opredelio da u radu analizira ona pravila Bečke konvencije koja se čine najznačajnijim sa stanovišta njihovog poređenja sa odgovarajućim pravilima usvojenim u Zakonu o obligacionim odnosima. Reč je o rešenjima koja se odnose na oblast primene Konvencije, tumačenje Konvencije, kao i odredbama Konvencije relevantnim za pravna sredstva u slučaju povrede ugovora. Pomenuta rešenja u radu su analizirana u svetlu mnoštva različitih stavova pravne doktrine i velikog broja odgovarajućih sudskih i arbitražnih odluka. Svako od pravila Konvencije analizirano u ovom radu praćeno je komparativnim pogledom na relevantno rešenje Zakona o obligacionim odnosima.

Ključne reči: Bečka konvencija, Zakon o obligacionim odnosima, ugovor, unifikacija, međunarodna prodaja

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