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The Law Applicable to the International Contracts for the Provision of Computer Software Made Available Via the Internet – Thoughts from the Case Corporate Web Solutions Vs. Dutch Company and Vendorlink B.V.

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ABSTRACT

Today's challenges scream for a different type of response. Globalization and the emergence of new transnational threats, such as Terrorism, have created new realities and fundamentally changed the nature of the purpose of international law. International law can help set up a framework, but terms of homeland defence to make the country less vulnerable have to be set by each country.
Until now, no international definition of Terrorism has been produced, creating tensions between states and allowing states to enact laws against the opponents of the regime. At the same time, one of the reasons for the lack of definition at the international level is that countries stick to their national vision of Terrorism. This vicious circle raises the question of whether it is not time to abandon the domestic approach to international law to define Terrorism at the international level successfully.

Introduction

The Vienna Convention on Contracts for the International Sale of Goods (CISG) has been in force in the world for more than 30 years. Nonetheless, the application of some of its provisions still causes much controversy[1]. Particularly contested is the long-discussed issue of its application to contracts for the provision of computer software. The question arises, on the one hand, whether - and if - under what conditions such content constitute goods within the meaning of the Convention and, on the other hand, whether the contract to which they are subject should be classified as a sale. The judgment of the Dutch Court, Rechtbank Midden-Nederland, of 25 March 2015 has made an important contribution to this discussion.[2] The Court has also raised the questions of the

[1]Regarding doubts related to the adaptation of the provisions of CISG to the specificity of international trade, See: R W Riegert, R J Lane, „Canadian Production in and to American Markets: Bilateral Trading Issues" (1994) XXXIII, 2, Alta.L.Rev, at 291 – 292.

[2] Corporate Web Solutions (Vancouver, Canada) vs. Dutch company and Vendorlink B.V. (Veenendal, The Netherlands) (March 25,2015) No. C/16/364668/HA ZA 14-217 (Rechtbank Midden-Nederland), online: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBMNE:2015:1096>. Abstract in English prepared by M. Hau In: Case Law on UNCITRAL Texts 28.06.2016, A/CN.9/SER.C/ABSTRACTS/170, at 11 – 12.

law applicable to the assessment of the validity of contractual provisions prohibiting further trading of the purchased copy of the Software, the legal basis for the determination on whose behalf the statement is made, and the norms governing the interpretation of the licensing provisions contained in the agreement subject to the Vienna Convention.

This study is not intended to exhaustively discuss the judgment in question. It focuses on issues related to the scope of the application of the uniform sales law.

I. FACTS AND DECISION

The facts of the case are as follows. Defendant 1, using the online form available on the plaintiff's company's website, ordered on 8 April 2008 a license to use the Software, the function of which is to generate diagrams and other graphical representations based on the provided data. In the aforementioned form, the ordering party accepted the terms of the license impliedly and indicated that the Software in question would be used on the www.vendorlink.nl web server. The plaintiff confirmed the order via e-mail (with a file containing the license key as an attachment) and attached the license terms. Their content stipulated in particular that the Software was licensed, not sold, and moreover, that it could be used only in the domain specified at the time of placing the order. It could not be rented or leased, the rights under the license agreement were not transferable, and the plaintiff solely retained the ownership of the Software. The plaintiff was also granted the right to terminate the contract in the event of its breach.

On 18 May 2009, a declaration was made, according to which the limited liability company Vendorlink B.V. (established on that same day) confirmed all legal actions performed on behalf of the company before its establishment.

On 17 December 2013, the plaintiff conditionally (provided there was a license agreement with Vendorlink) terminated the license agreement in writing.

Specifying its claim, the plaintiff indicated that defendant 1 had not fulfilled his obligations under the license agreement or (alternatively) that it was unjustly enriched at the expense of the plaintiff, and the resulting damage must at least compensate for the benefits received by the defendant 1. As regards defendant 2, the plaintiff pointed out that he had acted unlawfully in relation to the plaintiff, infringing his copyrights or had unjustly enriched at its expense and must at least compensate for the damage thus suffered or return the benefit received. As an additional basis for the claim, it indicated the obligation to remedy the damage resulting from Vendorlink's breach of the obligations under the license agreement. As a consequence, the plaintiff demanded that the defendants refrain from unlawful use of the plaintiff's Software and disclose the persons to whom the Software had been made available and the number of fees paid by them. He also requested that the defendants be jointly and severally obliged to pay the penalty in the event of failure to meet the indicated obligations, as well as be jointly and severally ordered to pay the legal costs incurred in the proceedings.

In response, the defendants raised a claim that the Software provided was not covered by copyright.

After the Court confirmed its jurisdiction to hear the case pursuant to art. 24 of the Brussels I Regulation[3], it proceeded to determine the legal basis for the decision.

[3]Council Regulation (EC) No 44/2001 of December 22, 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 12, 16.1.2001, p. 1).

In relation to the claims resulting from the license agreement, first and foremost, it analyzed the application of the provisions of the Vienna Convention on contracts for the international sale of goods, noting that both Canada and the Netherlands are parties to it. However, the Convention applies only to contracts for the sale of goods within its meaning, which involves the need for legal qualification of the contract in question.

The Court noted that the concept of the sale of goods was not defined in the Convention. However, under Article 7 CISG, the Convention should be interpreted by taking into account its international character, the need to promote uniformity in its application and the observance of good faith in international trade, and the general principles on which it was based. As a consequence, the Court reasoned that, in light of the purpose of the CISG to remove legal barriers to trade through uniformity, a broad definition of goods must be assumed. The definition must also cover intangible items, even if they were not stored on a tangible medium such as a DVD, CD or USB stick.

Subsequently, the Court went on to determine whether the software licence agreement could be considered a sales contract for the purposes of the CISG. When interpreting the CISG, one should follow the guidelines resulting from art. 8 bearing in mind that the qualification of the contract is not determined by its name but by the real intent of the parties or the understanding that a reasonable person would have had with regard to the contract. In light of art. 30 and 53 CISG, the contract under which the seller is obliged to deliver the goods to the buyer and transfer their property, and the buyer is obliged to pay the purchase price and receive the goods shall be treated as a sale.

The Court noted that in the case in question, the buyer's use of the Software had not been limited in time and that it was transferred as a result of a single payment as opposed to monthly instalments. Therefore, in the Court's opinion, the agreement was consistent with the nature of a sales contract as found under Articles 41 and 42 CISG, which provided that the seller must deliver goods to the buyer without any rights or claims of third parties, including rights to intellectual property. As a consequence, the Court stated that, despite the contract's name, the actual intention of the parties had been to conclude a contract of sale to which the provisions of the Vienna Convention applied.

Having found that the contract was governed by the CISG, the Court proceeded to assess the effectiveness of the prohibition on further transfers of the software copy stipulated by the claimant. The Court pointed out that in line with the European Court of Justice's UsedSoft decision, clauses completely prohibiting transfer were not binding.

As regards the law applicable to the assessment of claims based on copyright infringement, the Court stated that irrespective of the date of the alleged infringement (both before and after the entry into force of the Rome II Regulation4), the law of the country for which protection was sought should be applied, in this case – the Dutch law.

This law was also applicable to the alleged unjust enrichment pursuant to art. 13 and art. 8 of the Rome II Regulation. The result would also be similar under the Dutch domestic conflict-of-law rules, formerly in force.

Moving on to the merits of the dispute, the Court first focused on assessing who was the other party to the

[4] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (OJ L 199, 31.7.2007, p. 40 – 49).

agreement concluded with the plaintiff. In the opinion of the Court, in light of art. 4 CISG, this issue could not be resolved on the basis of the provisions of the Vienna Convention, which only regulates the rights and obligations of the seller and the buyer. Therefore, the law applicable to the company should apply in this regard, i.e. according to the Dutch private international law - the law of the country under which the company has been formed. In this respect, the Court agreed with the plaintiff's position, who alleged that, when placing the order, defendant 1 had not signalled that he was acting as a representative of another entity, in this case - as the founder of Vendorlink.

This necessitated considering the effectiveness of the defendant's 1 transfer of rights to a copy of the Software to Vendorlink and, first of all, assessing the validity of the clause in the contract that excluded the transfer. In this respect, the Court noted that in light of Art. 4 CISG, the Convention is not concerned with the validity of the contract or its individual provisions, and therefore the question must be assessed on the basis of the provisions of the applicable national law.

According to the Court, in light of the judgment of the European Court of Justice in UsedSoft and Art. 4 of the Software Directive[5], the validity of a contractual transfer prohibition must be assessed on the basis of the law that applies to copyright, i.e. under the Dutch Copyright Act. According to that law, if such goods have been placed on the market for the first time by or with the consent of the creator or his legal successor in one of the Member States of the European Union or the European Economic Area by transferring ownership, the circulation of this copy does not infringe copyright. This rule is based on the Copyright and Software Directives and should therefore be interpreted as much as possible in light of these guidelines. In the circumstances of the case at hand, due to the nature of the Software, only the exhaustion provisions of the Software Directive were to be applied.

In UsedSoft, the Court of Justice ruled that the "first sale of a copy of a computer program" within the meaning of art. 4 sec. 2 of the Software Directive also applies if the copyright owner:

- has allowed downloading a copy of the computer program to a data carrier,
- has granted the right to use this copy without any time limit and,
- may receive compensation corresponding to the economic value of the copy.

According to the Rechtbank Midden-Nederland these conditions had been met in the case under assessment. This resulted in the exhaustion of the plaintiff's right to distribute the copy of the Software made available to defendant1 within the meaning of art. 12b of the Dutch Copyright Act, the provision of which is to be regarded as mandatory in light of the directives and the judgment in UsedSoft. The plaintiff could therefore not effectively oppose the further transfer of the sold copy under the provisions of the agreement which prohibited the transfer of rights because of the invalidity of such a clause. This meant that the defendant 1 had not breached the concluded contract and could not be held liable for unjust enrichment.

In the opinion of the Court, the infringement of copyright by Vendorlink could not be accepted as the grounds for liability since the defendant 1 had successfully acquired the ownership of the copy of the Software and

[5]Directive 2009/24/EC of the European Parliament and of the Council of April 23, 2009 on the legal protection of computer programs (Codified version) (Text with EEA relevance) (*OJ L 111, 5.5.2009, p. 16 – 22).*

could transfer it, which was evidenced by the fact that the Software was never used by both defendants at the same time.

Considering the allegation of violation of the license terms by Vendorlink, the Court assumed that they should be interpreted on the basis of Art. 8 CISG. However, such an interpretation did not lead to conclusions consistent with the plaintiff's position. The correct interpretation of the contract indicated that Vendorlink had not been prohibited from using Software for its services to customers and was therefore also allowed to advertise it on its website by displaying diagrams generated with the plaintiff's Software.

As a result of this assessment, the Court dismissed the claim against both defendants.

II. The Qualification of the Online Software Licence Agreement for The Purposes of the CISG

A. Introduction

The main issue addressed by the Court in the discussed judgment was the application of the CISG to the contract concluded by the parties. It is beyond dispute that the contract was of international character in the case at hand, as required for the Convention to apply. The parties to the agreement had their commercial headquarters in two different countries, both of which (the Netherlands and Canada) are contracting states of the CISG. More controversial, however, was the qualification of the subject of the seller's performance as goods within the meaning of the Convention and, on the other hand, the contract itself as a sale.

B. Software as Goods within the meaning of the Vienna Convention

The doctrine and jurisprudence prevail in favour of applying the CISG to contracts for the provision of standard computer software, but generally only in relation to programs recorded on a tangible data carrier[6]. In the case in question, however, the Software was the content available via the Internet. Nevertheless, the Court was of the opinion that the object of the seller's performance met the criteria for being considered goods within the meaning of the Convention. That conclusion was based on the directives for the interpretation of its provisions under art. 7 CISG, namely, the postulate to take into account its international character, the need to strive for its uniform application, respect for good faith in international trade and the general principles on which it was based. In the opinion of the Court, these considerations justified giving the concept of goods a broad meaning, to include also intangible objects, even if not recorded on a physical medium.

One should agree with this assessment.

In the absence of a legal definition of goods in the provisions of the Vienna Convention, the correct understanding of this concept remains a matter of interpretation which requires taking into account the considerations listed in art. 7 CISG. Unlike the Hague

[6]P Schlechtriem, *Internationales UN-Kaufrecht. Ein Studien- und Erläuterungsbuch zum Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf (CISG)* (Tübingen, 1996) at 20; H Honsell, *Kommentar zum UN-Kaufrecht* (Berlin, Heidelberg, New York, 1997) at 60. See in the jurisprudence: *Parties unknown* (February 8, 1995) 8 HKO 24667/93 (LG München), online: <http://www.unilex.info/cisg/case/225>; *Parties unknown* (June 21, 2005) 5 Ob. 45/05m (OGH), online: <http://www.cisg-online.ch/content/api/cisg/urteile/1047.pdf>; *Parties unknown* (4 December 1996) VIII ZR 306/95 (BGH), online: <http://www.cisg-online.ch/content/api/cisg/display.cfm?test=260>.

Convention (ULIS)[7], the French version of which, through the use of the term objects mobiliers corporels, actually limits their material scope of application, the more neutral nomenclature[8] used by the Vienna Convention does not impose an analogous approach[9]. Neither its title nor any of its provisions directly define the features that the object of the service should pose in order to be considered goods within its meaning. At the same time, the interpretative directives expressed in art. 7(1) CISG argue in favour of giving the terms used in it a fully international and autonomous meaning, free from the attachment to a world of the concepts of any domestic legal order[1] . Only in this way is it possible to ensure its uniform application regardless of the country in which the dispute is being settled. Therefore, it seems that there are no arguments to limit the concept of goods under the rule of the Convention to only physical movable things[1] .

It should be remembered that the manner of understanding and classifying "things" (res) differs between legal systems. Apart from the legal systems which, give this concept a narrow meaning, applying it only to tangible objects (e.g. the German[1] or Polish[1] legal systems), there are also legal systems (e.g. the Austrian law)[1] that adopt – like the Roman law – a broad understanding of the term "thing," introducing within its meaning a distinction between physical and non-physical objects. Whether a given item is a "thing" and what kind of "thing" it is can therefore be decided only on the basis of the law of the place where the property ("thing") in question is located - the lex rei sitae. However, such an approach would shift the burden of assessing the conditions for applying the Convention to the level of domestic laws, which the authors of the Vienna Convention specifically wanted to avoid[1] . Therefore, the Court rightly accepted in the discussed judgment[1] that in the light of art. 7 sec. 1 of the CISG, the concept of goods should be given an autonomous meaning[1] , understood in a broad sense[1] . Any goods that have a pecuniary value and can be rendered in commercial transactions should be covered, even if they do not constitute a "thing" in a sense prescribed by domestic legis rei sitae[1] . Only such an approach can be reconciled with the aims of the Convention as expressed in its preamble – striving to remove legal obstacles in international trade by creating

[7] The Hague Convention of July 1, 1964 relating to a Uniform Law on the International Sale of Goods, online: <https://www.unidroit.org/instruments/international-sales/international-sales-ulis-1964>.

[8] U Magnus, *Julius von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen. Wiener UN-Kaufrecht (CISG)* (Berlin, 1999) at 63.

[9] T Twibell, „International Law: Understanding the UN Convention on Contracts for the International Sale of Goods (CISG)" (1998) September LSJ at 66.

[1] T Ämmälä, „International Trade in Finland – the Applicable Rules" (2003) 1 5 Turku Law Journal, at 85.

[1] B Piltz In: F. Graf von Westphalen (eds.), *Handbuch des Kaufvertragsrechts in den EG-Staaten* (Köln, 1992) at 10.

[1] § 90 BGB.

[1] Art. 45 k.c.

[1] § 285 ABGB.

[1] R Herber in: E von Caemmerer, P Schlechtriem (eds.), *Kommentar zum Einheitlichen UN-Kaufrecht* (München, 1995) at 48; F Diedrich, „Lückenfüllung im Internationalen Einheitsrecht. Möglichkeiten und Grenzen richterlicher Rechtsfortbildung im Wiener Kaufrecht" (1995) 5 RIW at 170.

[1] Diedrich, *supra* note 9 at168 – 169, 173; *Mitias d.o.o. v Solidea S.r.l.* (11 December 2008) 2280/2007 (Tribunale di Fori), online: <http://www.cisg-online.ch/content/api/cisg/display.cfm?test=1729>.

[1] B Czerwenka, *Rechtsanwendungsprobleme im internationalen Kaufrecht. Das Kollisionsrecht bei grenzüberschreitenden Kaufverträgen und der Anwendungsbereich der internationalen Kaufrechtsübereinkommen* (Berlin, 1988) at 145; T Fox, *Das Wiener Kaufrechtsübereinkommen. Ein Vergleich zum italienischen und deutschen Recht* (München, 1994) at 33; B Piltz, *Internationales Kaufrecht. Das UN-Kaufrecht (Wiener Übereinkommen von 1980) in praxisorientierte Darstellung* (München, 1993) at 30.

[1] Herber, *supra* note 9 at 48; M Karollus, *UN-Kaufrecht. Eine systematische Darstellung für Studium und Praxis* (Wien, New York, 1991) at 21; Piltz, *supra* note 11 at 30.

uniform rules governing contracts for the international sale of goods. Therefore more and more authors support the view that the qualification of the Software under the rules of the Convention should not depend on whether it has been recorded on a material data carrier or not[1].

The Convention does not require for a given object to be recognized as a good that is transferred to the buyer in any specific manner. Thus, there are no grounds for making such a distinction also in the case of the Software[2]. The same item cannot be qualified differently depending on how it is made available. Such an approach would be artificial. It could jeopardize the Convention's aim of unifying the law of international sales contracts[2].

Furthermore, the narrow interpretation of the term "goods" would be detached from the needs of modern commercial practice. One should bear in mind that in the era of the intensive development of the Internet of Things, the operation of an increasing number of devices is based on Software or other data not recorded on any material medium but obtained, often automatically, directly from the Internet or from other connected devices. In such cases, serious complications could arise if one denied digital content downloaded online the status of goods under the Convention. The rights and obligations of the parties would then be subject to the rules of a uniform law of the CISG when it came to the tangible "thing" itself, while with regard to the Software that determines its functioning, the applicable law would be sought under the conflict-of-law rules in force at the seat of the Court.

Moreover, whether certain digital content has been recorded on a material data carrier or not, does not seem to have such a significant impact on the essence of the problems arising from contracts regarding their performance. The application of different legal regulations is thus not justified. For example, when considering the problem of liability for defects also in the case of the content transferred in a physical form, what is relevant is the lack of specific functionality of the content itself, and not the disadvantages relating to the medium on which the content has been recorded[2]. The same is true when the content is made available via the Internet.

Admittedly, a number of the provisions of the Convention were created for the purpose of trading tangible objects. These concerns, e.g. the rules, were dealing with the passing of risk[2]. However, it does not seem that adapting these rules to the specificity of digital content made available in a dematerialized form would encounter insurmountable obstacles or pose a genuine threat to the uniform application of the Convention.

Thus, the Court correctly assumed that in order to recognize Software as goods within the meaning of the Vienna Convention, it is enough for it to be available against payment. It does not matter, however, whether it has been recorded on a data carrier or downloaded via the Internet or forwarded between computers[2].

[1] Karollus, *supra* note 12 at 21; Herber *supra* note 9 at 48; Piltz, *supra* note 5 at 10; F Diedrich, „Anwendbarkeit des Wiener Kaufrechts auf Softwareüberlassungsverträge. Zugleich ein Beitrag zur Methode autonomer Auslegung von Internationalem Einheitsrecht“ (1993) RIW 451-452; Magnus, *supra* note 2 at 64; I. Saenger In: H G Bamberger, H Roth (eds.), *Kommentar zum Bürgerlichen Gesetzbuch, T. 3, § 1297-2385, EGBGB, CISG* (München, 2003) at 2767.

[2] Magnus, *supra* note 2 at 64; Ch Brunner, *UN-Kaufrecht – CISG. Kommentar zum Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf von 1980* (Bern, 2004) at 22.

[2] Saenger, *supra* note 13 at 2767.

[2] *Parties unknown* (February 8, 1995) 8 HKO 24667/93 (LG München), online: <http://www.unilex.info/cisg/case/225>

[2] Articles 67 – 69 CISG.

[2] L Tichy, *CISG. Umluva OSN o smlouvach, o mezinarodni koupi zboži. Komentar* (Praha, 2017) at 22.

C. The Qualification of the Contract regarding the Supply of Software

Another issue that the Court focused on in the commented judgment was the legal nature of the contract under which the plaintiff made the Software available. The Court considered it a sales contract, stated that where the buyer's right to use the Software was not limited in time and its transfer was made for a one-time payment, as opposed to monthly instalments, the contract showed the characteristics of a sale within the meaning of the Vienna Convention. Although the conclusion itself must be accepted, not all arguments supporting its justification are convincing.

In the case in question, the assessment of the legal qualification of the contract focused on two elements: the unlimited duration of the right to use the supplied content and one-off payment. These criteria had already been considered decisive for the application of the Vienna Convention to software trade[2], although – it should be noted – in the jurisprudence to date only in relation to Software recorded on tangible data carriers[2]. It remains to be asked whether this approach is justified.

First of all, it should be noted that the concept of a contract of sale is not defined in any of the provisions of the Convention[2]. Nevertheless, on the basis of its rules, it is assumed that a sale means a contract by which the seller undertakes to deliver the goods with all relevant documents and transfer their property to the buyer (Art. 30 CISG), and the buyer – to collect the goods and pay the agreed price (Art. 53 CISG)[2]. One must remember, however, that the transfer of ownership itself is excluded from the scope of the Convention. It is subject to the provisions of the law determined by the conflict-of-law rules of the forum. Although a sale understood in this way prima facie does not differ from how it is defined in most national legal systems, it should not be forgotten that art. 7(1) CISG mandates that the concept (as in the case of goods) is understood in an autonomous manner, the interpretation of which should not be guided by the criteria adopted in any national law[2]. The question arises whether the above characteristic of the sales contract corresponds to the contract for the paid provision of digital content, especially when it is not recorded on a material data carrier but downloaded from the Internet or copied from another device.

It is submitted that the contract may be classified as sales within the meaning of the Vienna Convention if the purchaser's use of the Software made available to him is unlimited in time, i.e. there[5] is no limit on the duration of the use of the Software. A contractual performance having such characteristics corresponds in functional[6] terms to the nature of the seller's obligations as described in art. 30 CISG.

Therefore, one should agree with the Rechtbank Midden-Nederland[7] that for the purposes of the qualification of the contract as sales, no particular

[2] Brunner, *supra* note14 at 22.

[2] *Parties unknown* (February 8, 1995) 8 HKO 24667/93 (LG München), online: <http://www.unilex.info/cisg/case/225>; *Parties unknown* (June 21 2005) 5 Ob. 45/05m (OGH), online: <http://www.cisg-online.ch/content/api/cisg/urteile/1047.pdf>.

[2] Piltz, *supra* note 5 at 9.

[2] Karollus, *supra* note 12 at 20; G Reinhart, *UN-Kaufrecht Kommentar zum Übereinkommen der Vereinten Nationen vom April 11, 1980 über Verträge über den internationalen Warenkauf* (Heidelberg 1991) at 13; F Enderlein, D Maskow, *International Sales Law. United Nations Convention on Contracts for the International Sale of Goods: Convention on the Limitation Period in the International Sale of Goods* (New

[5] York – London – Rome, 1992) at 27; Fox, *supra* note 11 at 31;

[6] Herber, *supra* note 9 at 47; Brunner, *supra* note 14 at 23.

[2] Piltz, *supra* note 11 at 23; *Mitias d.o.o. v Solidea S.r.l.* (December 11, 2008) 2280/2007 (Tribunale di Fori), online: http://www.cisg-

[7] online.ch/content/api/cisg/display.cfm?test=1729.

importance should be attached to the manner in which the Software has been made available. After all, it is the Software itself and not the potential medium on which it has been recorded that the essence of the service focuses on. At the same time, the buyer's focus is on the supplied content, not on the means utilized to provide it.

Moreover, under Art. 7 CISG, for the legal qualification of the contract, it should not matter whether the buyer obtains ownership of the Software as a result of the supplier's performance. For the purposes of the Convention, the legal nature of the right acquired by the buyer - or, more precisely, whether the buyer acquires the right of ownership - cannot be decisive. The legal nature of the property rights - similarly to the premises for the acquisition of the property rights and determination of what may constitute their subject matter, remains the domain of the national law, determined under the conflict-of-law rules of the forum.

From the point of view of the qualification of the contract, the very nature of the performance, the essence of which is to make digital content available to the buyer, is critical. The autonomously understood concept of delivering goods consists of acts that allow the buyer to take control of the item in question to the extent that it can be received, checked for its compliance with the contract, used in accordance with its intended purpose and transferred to the third parties. It is submitted that the concept of delivery understood in this way includes not only the provision of Software stored on a tangible data carrier but also – as the Rechtbank rightly observed - the possibility of downloading its copies from the Internet or from another device.

However, in my view, the above-specified criteria would not be met by only providing access to data placed in the cloud or streamed without the possibility of copying it onto the customer's device. In such a case, it would be difficult to consider that the interested party gains real control over the content made available in this way. The rights of the buyer would be limited only to day-to-day use of the data under the control of the sharing entity, the performance of which would take the form of continuous activity and not – as is in the case of sales – a one-off transaction.

Contrary to the position taken by Rechtbank in the commented judgment, it does not seem, however, that the decisive factor in the classification of the contract should be the method of payment for the Software provided. Restrictions in this respect have not been formulated with regard to the contracts for any "classic" type of goods. After all, the application of the Convention to the hire-purchase contract of tangible movables was never disputed[3] . Therefore, it is difficult to find arguments for treating differently the issue of payment related to the contracts for the provision of Software.

The utmost importance should be attached – in my view – not to the agreed method of payment but to what constitutes an equivalent according to the parties. If the payment occurred in exchange for the ongoing use of the Software under the supplier's control and made available on a continuous basis, and if both benefits are interconnected in such a way that the global amount of the buyer's cash benefits is determined by the time of such use, the contract should not be considered sales. Consequently, it should not be subject to the Convention, which does not apply to contracts of rent, lease, or financial leasing agreements[3] . The situation is different, however, when

[3] P Schlechtriem, *supra* note 1 at 16.

[3] F Enderlein, D Maskow, M Stargardt, *Kommentar. Konvention der Vereinten Nationen über Verträge über den internationalen Warenkauf. Konvention über die Verjährung beim internationalen Warenkauf. Protokoll zur Änderung der Konvention über die Verjährung beim internationalen*

the value of the cash benefit is not determined by the time of usage of the provided Software but is expressed in a predetermined amount, which is the economic equivalent of the market value of its copies recorded on a data carrier or downloaded by the buyer. In such a case, even if the payment itself is divided in to instalments, it should not prevent the contract from being considered a sale within the meaning of the Vienna Convention.

When classifying software contracts from the uniform law perspective, it would be difficult not to take into account one more aspect, namely, intellectual property rights relating to the Software provided. It is obvious, after all, that the essential meaning of the transaction, in this case, does not come down to the acquirer's power over the material medium or the downloaded copy of the file which contains the recording but consists in the possibility of making use of the content recorded therein. However, such content is usually subject to separate intellectual property rights, which means that the buyer must meet the conditions for the admissibility of use of such rights.

The creation, existence, content, expiry of such rights, their subject, scope and means of protection, as well as the premises for the admissibility of using their object, whether in the form of the requirement to obtain the consent of the rights holder or operation under conditions of fair use, should be determined on the basis of the provisions of the law applicable to the intellectual property rights, which is determined by the conflict-of-law rules (whether originating from an international or national source) in force at the seat of the Court[3] . However, this should not constitute an argument against the application of the provisions of the Vienna Convention to software contracts. Similarly, there are no such reservations in relation to sales of works of art, copies of a published book, or items bearing a trademark or protected in a given territory due to the granted patent, all of which involve a need to protect the intellectual property[3] .

The impact of the existence of such exclusive rights on the content of the seller's obligation must be assessed on the basis of the provisions of the Convention – especially Arts. 30, 34 and 42 CISG. The last of the above-mentioned provisions oblige the seller to deliver goods that are free from any right or claim of a third party based on industrial property or other intellectual property, of which at the time of the conclusion of the contract, the seller knew or could not have been unaware, provided that the right or claim is based on industrial property or other intellectual property: (a) under the law of the State where the goods will be resold or otherwise used if it was contemplated by the parties at the time of the conclusion of the contract that the goods would be resold or otherwise used in that State; or (b) in any other case, under the law of the State where the buyer has their place of business.

Even if the mere granting of a potential license intended to ensure the buyer the right to use the Software made available to him was to be governed by the law designated by the conflict-of-law rules of the forum (which I will come back to later), this should not affect the qualification of the contract and the application of the Convention. Actually, there is nothing unusual about such confluence of application of different laws. Consider, for example, the seller's obligation to transfer the ownership of the goods, which in any event is subject to legal rei sitae.[2]

Warenkauf (Berlin, 1985) at 35; Enderlein, Maskow, *supra* note 21 at 28; Saenger, *supra* note 13 at 2766; Honsell, *supra* note 1 at 59; Piltz, *supra* note 5 at 9.

[3] Regarding the shape of such norms, and in particular the importance of the principle of territorialism See: J Fawcett, P Torremans, *Intellectual Property and Private International Law*

[2] (Oxford, 1998) at 462; S von Lewinski, *International Copyright Law and Policy* (Oxford, 2008) at 6.

[3] S Green, D Saidov, „Software as Goods", (2007) J.B.L. at 174.

On the other hand, the provisions of the Convention remain decisive for assessing the consequences of failure to grant the buyer the admissibility of using the Software as a subject of separate intellectual property rights in particular – for the seller's liability for the breach of the contract.

III. The Law Applicable to the Identification of the contracting Party

While the position of the Court regarding the application of the Convention to the contract for the provision of computer software should be welcomed, it is difficult to agree with the judgment when it comes to the legal basis for determining which entity acted as the buyer in this case. Obviously, the assessment of the admissibility, premises and effects of acting for another person as a matter of broadly understood validity of the contract is, in light of the art. 4 CISG, excluded from the material scope of the Convention. Still, one cannot conclude that this exclusion also covers the determination on whose behalf the contractual statements are made.

Contrary to the view expressed in some decisions[3], in my view, the issue should be perceived as an element of the interpretation of the parties' statements under the contract. However, this matter falls within the scope of the uniform law and is subject to art. 8 CISG[3] (unless the parties agree otherwise according to Art. 6 CISG). Article 8 excludes the application of the provisions of any domestic law when it comes to interpretation of the contract. Whether a person is acting in its own name or for someone else's behalf should therefore be determined on the basis of the Convention itself. Only if it was found that the intention of the party making the statement was to cause effects in someone else's legal sphere, should one refer to the provisions of the applicable domestic law in line with the exclusion contained in art. 4 a CISG[3]. Such an approach also seems to prevail in jurisprudence[3].

IV. The Law Applicable to the contractual Prohibition of further Trading in the purchased copy of the Software

The position taken by Rechtbank regarding the lack of grounds for applying the Vienna Convention to assess the validity of a contractual provision prohibiting the buyer from further transferring the purchased copy of the Software is, on the other hand, correct. The CISG - except as otherwise expressly provided in the Convention - is not concerned with the validity of the contract or its individual provisions (Art. 4(a))[4]. However, to the extent one considers the content of the contract or the content of its individual provisions, there is no such specific regulation in the CISG. Article 6 CISG, expressing the[5]

[3] *Parties unknown* (October 22, 2001) 1 Ob 49/01i (OGH), online:<http://www.unilex.info/cisg/case/816>, critically assessed by T Petz, „Fragen der Vollmacht zum Vertragsabschluss fallen nicht unter UN-Kaufrecht "(2003) 1 ZfRV, at 31-32.

[3] For the application of this provision to assess the entity with which the contract was concluded See in the jurisprudence: *Parties unknown* (December 1, 1993) 2 HO 1434/92 (LG Memmingen) (1995) 5 IPRax 1995/5, at 251; *Guang Dong Light Headgear Factory Co. Ltd. v ACI International, Inc.* (September 28, 2007) 03-4165-JAR (Federal District Court Kansas), online: <http://cisgw3.law.pace.edu/cases/070928u2.html>.

[3] Karollus, *supra* note 12 at 41; A K Schluchter, *Die Gültigkeit von Kaufverträgen unter dem UN-Kaufrecht* (Baden-Baden, 1996) at 59; Piltz, *supra* note 11 at 67;Brunner, *supra* note 14 at 53.

[3] *Parties unknown* (September 26, 1990) 5 0 543/88 (LG Hamburg), online: <http://www.unilex.info/cisg/case/7>; *Parties unknown* (December 19, 1995) ZB 95 22 (Obergericht des Kanton Thurgau), online:<http://www.cisg-online.ch/content/api/cisg/urteile/496.pdf>.

principle of freedom of contract (being one of the fundamental principles of the Convention), does not constitute such a regulation[3] . Although this provision allows the parties to exclude the application of a uniform law or - subject to art. 12 CISG – to exclude the application or change the effects of its individual provisions, at the same time, neither this very Article nor any other provision of the Convention sets any limits to contractual freedom (as is the case under the relevant norms included in individual national legal systems). This does not mean, however, that the parties to the contract for the international sale of goods are not subject to restrictions. As one of the aspects of validity, the scope of the contractual freedom was intentionally omitted during the works on the Convention. Consequently, its assessment has been left to the law applicable as per the forum's conflict-of-law rules[3] . As a result, a contractual clause may turn out to be invalid as a consequence of a breach of prohibitions contained in the mandatory rules, embodied not only in the Convention itself but also – in the matters not regulated by it – in the provisions of the applicable national law[4] .

Basically, in light of art. 8(1) of the Rome Convention[4] , the validity of the contract and its individual provisions should be assessed on the basis of the law applicable to the contract. However, due to the type of the subject matter under assessment in the case in question, i.e. the admissibility of a contractual prohibition on the transfer of an effectively acquired copy of the Software, the Court decided to base its ruling on provisions of the law applicable to the copyright according to the Dutch private international law rules, i.e. the Dutch Copyright Act and more specifically – its Art. 12b. This provision, being an implementation of art. 4(2) of the Directive 2009/24, stipulates that it does not infringe the copyright of the rightsholder to trade a copy of the Software sold for the first time by or with the consent of the rightsholder or their successor in one of the Member States of the European Union or the European Economic Area. As was rightly accepted by the Court in the light of the European Court of Justice's UsedSoft decision, the rule of exhausting the right to distribute expressed in the aforementioned provision applies equally to the copies of the Software sold on tangible data carriers and made available to be downloaded[4] .

[3] U Magnus, "Die allgemeinen Grundsätze im UN-Kaufrecht" (1995) 59 RabelsZ at 480; D Dokter, "Interpretation of exclusion-clauses of the Vienna Sales Convention" (2004) 68 RabelsZ at 433.

[3] M J Bonell In: C M Bianca, M J Bonell (eds.), *Commentary on the International Sales Law – The 1980 Vienna Sales Convention* (Milan, 1987) at 60; Schluchter, *supra* note 33 at 179-18; J Erauw, H M Flechtner, *Remedies under the CISG and limits to their uniform Character* In: P Šarčević, P Volken (eds.), *The international sale of goods revisited* (The Hague – London - New York, 2001) at 67; Brunner, *supra* note 14 at 72.

[4] Bonell, *supra* note 36 at 60; Schluchter, *supra* note 33 at 181; *parties unknown* (May 21, 1996) 22U 4/96 (OLG Köln), online: <http://www.unilex.info/cisg/case/227>; *parties unknown* (March 1, 1999) 9978 (ICC Court of Arbitration), online:<http://www.cisg-online.ch/content/api/cisg/urteile/708.htm>.

[4] 1980 Rome Convention on the law applicable to contractual obligations (consolidated version) (OJ C 027, 26.1.1998, p. 34-46).

[4] Despite the entry into force of the Rome I Regulation on 25 July 2008 and the fact that it applies from 17 December 2009 (see Art. 29), the Rome Convention applied in the case decided by the Rechtbank. This is because the agreement in question was concluded before 17 December 2009 and the Rome I Regulation applies only to contracts concluded after that date (see Art. 28). It follows, that in mattes not regulated by the Vienna Convention, the conflict of law rules contained in the Rome Convention were applicable.

[4] UsedSoft GmbH v. Oracle International Corp. (July 3, 2012 r.) C-128/11 (ECJ), EU:C:2012:407.

The decision to apply the above rule should be welcomed. The following arguments support this approach.

First of all, the scope of the autonomy of the parties will in introducing potential exceptions to the principle of exhaustion of the right to distribute copyright-protected items cannot be assessed on the basis of the law other than that governing the principle of exhaustion itself. After all, it is the law introducing the principle of exhaustion that determines its dispositive or binding character. As a result, the solution to the problem of indicating the law applicable to the validity of contractual deviations from the statutory principle of exhaustion lies in the correct differentiation of the scopes of the law applicable to the contract, on the one hand, and the law applicable to copyright, on the other hand[4] . In this case, it should be in favour of the latter. Thus, the admissibility and effects of contractual provisions prohibiting the further transfer of a copy of the Software previously sold by the copyright holder or with their consent should be determined under the law applicable to copyright.

The application of art. 12b of the Dutch Copyright Act to the assessment of the validity of selected contractual provisions may, however, be justified also by reference to the overriding public interest. Namely, one may argue that the principle of exhaustion protects not only the private interests of the parties but also the prevention of foreclosure of markets, which constitutes an overriding public interest. As indicated by the European Court of Justice in UsedSoft, the objective of the principle of the exhaustion expressed in art. 4 sec. 2 of Directive 2009/24 is to limit restrictions of the distribution of works protected by copyright to what is necessary to safeguard the specifics of the intellectual property, in order to avoid market divisions.[4] . Consequently, the provisions of the law of the Member State implementing the Directive may be regarded as overriding mandatory provisions in the meaning of art. 7 Rome Convention[4] . As a result, contractual clauses do not comply with a rule such as art. 12b of the Dutch Copyright Act –are void and do not produce the intended legal effects. Because of Art. 7 of the Rome Convention, this result occurs even if there are no grounds to apply the law of the country, of which such a rule constitutes part, as applicable to the contract in question. [4]

Therefore, the Court rightly held that the plaintiff could not effectively oppose the transfer of a copy of the Software he had previously sold and thus derive any claims from the fact that the Software was further resold as between the defendants. In principle, this excluded the liability of the first of the defendants both for the breach of the contract and for unjust enrichment.

V. The law applicable to the interpretation of the contractual Provisions determining the acceptable Use of Software acquired

[4] On the separation of the conflict-of-laws aspects of the obligations derived from the license agreement (to which the law applicable to the contractual obligation should be applied) from the issues relating to the rights arising from the license itself (their existence, content, transferability, expiry), regulated by the law applicable to the intellectual proprerty rights (lex loci protectionis), see: Magnus, *supra* note 2 at 360; D Martiny In: Ch Reithmann, D Martiny, *Internationales Vertragsrecht. Das internationale Privatrecht der Schuldverträge* (Köln, 1996) at 578, 585.

[4] UsedSoft GmbH v. Oracle International Corp., *supra* note 39 at 62.

[4] The literature acknowledges the concept of perceiving as overriding mandatory the rules of the *legis loci protectionis* which introduce (for the sake of the public interest) restrictions on the monopoly resulting from exclusive rights, as in the case of compulsory licenses or institutions of fair use See: C Waldow, *Enforcement of Intellectual Property in European and International Law. The New Private International Law of Intellectual Property in the United Kingdom and the European Community* (London, 1998) at 457; M Świerczyński, *Naruszenie prawa własności intelektualnej w prawie prywatnym międzynarodowym* (Warsaw, 2013) at 264.

under a Contract Subject to the Vienna Convention

When analyzing the claim against the other defendant, the Court faced the need to assess the allegation of a breach of the terms of the granted license regarding the manner of using the Software by integrating it with the user's Software. This required a prior interpretation of the license provisions of the contract which was the basis for making the copy of the Software at issue available to the first purchaser. Due to the specific nature of the matter in question, the choice of the appropriate legal basis for the assessment became a key issue. The question arose whether the parties' statements should be interpreted on the basis of the provisions of the Vienna Convention or rather under the provisions of the national law applicable to the license agreement in light of the conflict-of-law rules of the forum.

In the commented judgment, the Court ultimately relied on Art. 8 CISG, which should be considered correct. As aptly noted by the European Court of Justice in UsedSoft, the downloading of a copy of Software and the conclusion of a user licence agreement for that copy constitute an indivisible entirety. Downloading a copy is pointless if it cannot be used by its possessor. As a consequence, those two operations must be examined as a unity for the purposes of their legal classification[4] . This approach corresponds to the view also presented in the literature [4] , according to which the contractual authorization to use intellectual property rights subordinated to the implementation of the main purpose of the sale should not affect the qualification of the contract.

There are no grounds to separate such provisions from the rest of the agreement concluded by the parties either. As a functional whole, it should be subject to a uniform legal assessment also in terms of interpretation. In the case of the application of the Vienna Convention, an additional justification for such an approach is art. 3(2) CISG, relating to mixed contracts covering a set of interrelated services, which the parties perceive as inseparable. This provision assumes their uniform legal perception. Depending on the mutual proportion of the individual kinds of services, the qualification of the contract should take place on the basis of the Convention or the provisions of the domestic law determined by the conflict-of-law rules of the forum. Thus, this rule opposes the segmentation of this kind of contract according to the legal nature of its constituent elements. This corresponds to the assumption that the economic unity created by the parties translates into the desire to create a uniform obligation[4] .

It is obvious that if the Vienna Convention was recognized as authoritative in such cases, not all of its provisions could be directly applied to the entire agreement. However, this does not concern the provisions relating to the conclusion of the contract or the interpretation of the parties' statements[5] .

Although Art. 3(2) CISG concerns directly contracting to contain an element of the provision of services. It seems that nothing prevents its application – at least by analogy - also to mixed contracts, in which the

[4] UsedSoft GmbH v. Oracle International Corp., *supra* note 39 at 44.

[4] M A Zachariasiewicz In: M Pazdan (eds.), *System prawa prywatnego.* T. 20B, *Prawo prywatne międzynarodowe* (Warsaw, 2015) at 241.

[4] Magnus, *supra* note 2 at 68; K Bell, „The Sphere of Application of the Vienna Convention on Contracts for the International Sale of Goods" (1996) 8 Pace Int'l L. Rev., at 251, Piltz, *supra* note 11 at27; J Lindbach, *Rechtswahl im Einheitsrecht am Beispiel des Wiener UN-Kaufrechts* (Aachen, 1996) at 73; Karollus, *supra* note 12 at 24.

[5] M Pazdan In: M Pazdan (eds.), *Konwencja wiedeńska o umowach międzynarodowej sprzedaży towarów. Komentarz* (Zakamycze, 2001) at 85.

performance characteristic for sale is accompanied by elements of another type of contract[5], e.g. license agreement[5]. In light of the assumptions formulated in the present study and the limited information contained in the reasons for the commented judgment, it seems pointless to assess the correctness of the interpretation of the disputed contract made by the Rechtbank and the effects derived therefrom. However, the legal grounds chosen for such a procedure should be considered correct.

Conclusion

The above analysis based on the commented judgment of the Rechtbank Midden-Nederland allowed for the formulation of several conclusions significant for determining the scope of application of the Vienna Convention.

First, it matters not for the classification of computer software as goods within the meaning of art. 1 CISG how the Software has been made available to the buyer. In this respect, the content downloaded from the Internet should be treated in the same way as that recorded on a tangible data carrier.

Second, the legal classification of the contract is not determined by the method of making the Software available to the buyer but by the scope of the rights resulting from such sharing. Both the very concept of a sale and the obligations of the parties which constitute a sale are to be understood autonomously for the purposes of the Convention. Thus, the seller's obligation to deliver the goods means enabling the buyer to take control of the item made available to it in the sense of its receipt, inspection, use for an undefined period of time[1] for the intended purpose, and the power to make a further transfer.

In my view, however, it is irrelevant to the legal qualification of the contract whether the buyer makes a one-off payment or pays in instalments.

Third, contrary to what was decided in the commented judgment, the assessment on whose behalf the statement under the contract was made is an element of interpretation of such statement and falls within the scope of the Convention. On the other hand, the authorization to act on behalf of another person and the consequences of the absence of such authorization fall outside the scope of the Convention.

Fourth, the Vienna Convention is not applicable to the assessment of contractual clauses prohibiting the further transfer of Software acquired from or with the consent of the rightsholder. Their validity and effects should be determined on the basis of the law applicable to the copyright as the one that creates the principle of exhaustion of the right to distribute, with which such provisions are to be confronted.

Finally, if a specific software contract is considered a sale within the meaning of the Vienna Convention, its uniform rules will also apply to the interpretation of the contractual clauses determining the scope of the permissible use of the Software's shared copy. Despite the licensing nature of the said clauses, they must be seen as an integral part of the sales contract and be subject to the same set of rules as the contract in question, here being the Vienna Sales Convention.

[5] Czerwenka, *supra* note 14 at 146; J O Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (Deventer-Boston, 1991) at 109 – 110; Reinhart, *supra* note 25 at 13; P. Schlechtriem, *supra* note 1 at 18; Tichy, *supra* note 21 at 39.

[5] Parties unknown (May 7, 1993) (Bezirksgericht Laufen) (1995) SZIER, at 277 – 278.

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5. Directive 2009/24/E.C. of the European Parliament and of the Council of 23 April, 2009 on the legal protection of computer programs (Codified version) (Text with EEA relevance) (*O.J. L 111, 5.5.2009, p. 16 – 22).*

6. P Schlechtriem, Internationales UN-Kaufrecht. Ein Studien- und Erläuterungsbuch zum Űbereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf (CISG) (Tübingen, 1996) at 20; H Honsell, Kommentar zum UN-Kaufrecht (Berlin, Heidelberg, New York, 1997) at 60. See in the jurisprudence: Parties unknown (February 8, 1995) 8 HKO 24667/93 (LG München), online: <http://www.unilex.info/cisg/case/225>; Parties unknown (June 21, 2005) 5 Ob. 45/05m (OGH), online: <http://www.cisg-online.ch/content/api/cisg/urteile/1047.pdf>; Parties unknown (4 December 1996) VIII ZR 306/95 (BGH), online: <http://www.cisg-online.ch/content/api/cisg/display.cfm?test=260>.

7. The Hague Convention of 1 July, 1964 relating to a Uniform Law on the International Sale of Goods, online: <https://www.unidroit.org/instruments/international-sales/international-sales-ulis-1964>.

8. U Magnus, Julius von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen. Wiener UN-Kaufrecht (CISG) (Berlin, 1999) at 63.

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11. B Piltz In: F. Graf von Westphalen (eds.), Handbuch des Kaufvertragsrechts in den EG-Staaten (Köln, 1992) at 10.

12. R Herber In: E von Caemmerer, P Schlechtriem (eds.), Kommentar zum Einheitlichen UN-Kaufrecht (München, 1995) at 48; F Diedrich, „Lückenfüllung im Internationalen Einheitsrecht. Möglichkeiten und Grenzen richterlicher Rechtsfortbildung im Wiener Kaufrecht "(1995) 5 RIW at 170.

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17. Magnus, supra note 2 at 64; Ch Brunner, UN-Kaufrecht – CISG. Kommentar zum Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf von 1980 (Bern, 2004) at 22.

18. Saenger, supra note 13 at 2767.

19. L Tichy, CISG. Umluva OSN o smlouvach, o mezinarodni koupi zbożi. Komentar (Praha, 2017) at 22.

20. Karollus, supra note 12 at 20; G Reinhart, UN-Kaufrecht Kommentar zum Übereinkommen der Vereinten Nationen vom April 11, 1980 űber Verträge űber den internationalen Warenkauf (Heidelberg 1991) at 13; F Enderlein, D Maskow, International Sales Law. United Nations Convention on Contracts for the International Sale of Goods: Convention on the Limitation Period in the International Sale of Goods (New York – London – Rome, 1992) at 27; Fox, supra note 11 at 31; Herber, supra note 9 at 47; Brunner, supra note 14 at 23.

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23. Regarding the shape of such norms, and in particular the importance of the principle of territorialism See: J Fawcett, P Torremans, Intellectual Property and Private International Law (Oxford, 1998) at 462; S von Lewinski, International Copyright Law and Policy (Oxford, 2008) at 6.

24. S Green, D Saidov, "Software as Goods", (2007) J.B.L. at 174.

25. Parties unknown (October 22, 2001) 1 Ob 49/01i (OGH), online:<http://www.unilex.info/cisg/case/816>, critically assessed by T Petz, „Fragen der Vollmacht zum Vertragsabschluss fallen nicht unter UN-Kaufrecht "(2003) 1 ZfRV, at 31-32.

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27. Karollus, supra note 12 at 41; A K Schluchter, Die Gültigkeit von Kaufverträgen unter dem UN-Kaufrecht (Baden-Baden, 1996) at 59; Piltz, supra note 11 at 67; Brunner, supra note 14 at 53.

28. Parties unknown (26 September, 1990) 5 0 543/88 (LG Hamburg), online: <http://www.unilex.info/cisg/case/7>; Parties unknown (19 December, 1995) Z.B. 95 22 (Obergericht des Kanton Thurgau), online:<http://www.cisg-online.ch/content/api/cisg/urteile/496.pdf>.

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34. M Świerczyński, Naruszenie prawa własności intelektualnej w prawie prywatnym międzynarodowym (Warsaw, 2013) at 264.

35. UsedSoft GmbH v. Oracle International Corp., supra note 39 at 44.

36. M A Zachariasiewicz In: M Pazdan (eds.), System prawa prywatnego. T. 20B, Prawo prywatne międzynarodowe (Warsaw, 2015) at 241.

37. Magnus, supra note 2 at 68; K Bell, „The Sphere of Application of the Vienna Convention on Contracts for the International Sale of Goods" (1996) 8 Pace Int'l L. Rev., at 251, Piltz, supra note 11 at27; J Lindbach, Rechtswahl im Einheitsrecht am Beispiel des Wiener UN-Kaufrechts (Aachen, 1996) at 73; Karollus, supra note 12 at 24.

38. M Pazdan In: M Pazdan (eds.), Konwencja wiedeńska o umowach międzynarodowej sprzedaży towarów. Komentarz (Zakamycze, 2001) at 85.