

**International and European Business Law**  
by Schulze / Lehmann

# **Commercial Law**

**Article-by-Article Commentary**

**Mankowski / Cuniberti / Lehmann**

**Second Edition**



Mankowski/Cuniberti/Lehmann  
Commercial Law

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## Article-by-Article Commentary

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## Foreword (second edition)

Peter Mankowski passed away in February 2022 at the age of 56. Through numerous collaborations and common projects, some of which were still in the making, we had come to know and appreciate him personally. We admired his intelligence, erudition and perseverance, but we also very much enjoyed his sense of humour and wit.

Peter had been the sole editor of the first edition of this commentary. In his inimitable manner, he had made great efforts in covering the vast field of commercial law both exhaustively and in great detail. For this purpose, he had made a logical structure, assembled a brilliant team of authors, and carefully reviewed all of their contributions himself.

After Peter's untimely death, the two of us were asked to take over the editorship, and gladly accepted. Our motivation was the desire to avoid this book becoming discontinued and outdated. That is why we have asked the authors to update their contributions, while keeping the original structure and the style of the commentary. We hope that Peter would have approved of this approach, but feel that it is nothing less than a tragedy that he could not see it in print.

This new edition reflects the latest developments in international and uniform commercial law. We would like to thank the authors for their willingness to cooperate with us and the kind and productive collaboration. Thanks also to Paul Eichmüller and to the team at Nomos, in particular Matthias Knopik, for their unwavering support.

We dedicate this edition to the memory of Peter Mankowski.

Luxembourg and Vienna, August 2025

*Gilles Cuniberti and Matthias Lehmann*

## Foreword (first edition)

Cross-border trade substantially fosters the wealth of nations. Today it is a multi-trillion euros business. Cross-border dealings are in particular dependent on reliable rules and legal certainty. Legal ramifications and a dependable legal framework are thus of the absolute essence. Commercial law is the branch of the law called upon to perform this task. In a cross-border, and that is: in a truly international context, this poses a particular challenge. Not surprisingly, international commercial law has become the main field of international legal unification. The commercial needs involved are all too pressing and too real to be ignored or neglected. The United Nations Convention on Contracts for the International Sale of Goods (CISG) is said to be the greatest success of substantive uniform law. The law of carriage of goods or passengers comes a close second if not an equal-ranked first. Beneath and besides this unification of law between States another level of 'private codifications' has developed over the last decades. Its most prominent protagonists are the Incoterms, the Uniform Customs and Practices for Documentary Letters of Credit (UCP) and the UNIDROIT Principles on International Commercial Contracts (PICC). The ensuing panorama is both complex and fascinating. Its fascination also stems from the manifold interfaces and interactions between the various sub-branches of commercial law.

The common denominator of the present volume can be described fairly easily and comprehensibly: cross-border transactions concerning goods. In this, "concerning goods" has to be understood in a broad, untechnical sense. First, goods can be sold. Hence the CISG, the Limitation Convention, and the Incoterms®. Second, goods must be carried and transported cross-border. Hence the CMR, the Montreal Convention, the CMNI, and the CIM. Functionally, transport is often part of the commercial sale transaction. Transport law renders auxiliary services to the sale of goods. Third, transactions must be financed. Hence the UCP and – *cum grano salis* – the Cape Town Convention. Fourth, goods must be marketed. Hence the Commercial Agents Directive. To this blend some elements are added from the quarters of general contract law, namely the UNIDROIT Principles (PICC, also known as UPICC) and the Late Payment Directive.

The present volume attempts at exerting the particular strength of a combined commentary covering at least the major sub-branches of commercial law. It ventures at an 'all-in-one' effort. The team assembled displays the virtue of genuine internationality. Accomplished authors from Germany, Austria, Switzerland and Italy to Australia and New Zealand have joined forces. May their effort capture the readers' (and hopefully users') benevolence!

Hamburg, October 2018

*Prof. Dr. Peter Mankowski*

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# I.

## UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

**Travaux préparatoires and official materials:** Official Records, UN Doc. A/CONF.97/19 (cited as “OR”)

Commentary on the Draft Convention on Contracts for the International Sale of Goods, prepared by the Secretariat [of UNCITRAL], A/CONF.97/5 = OR p. 5 (cited as “Secretariat Commentary”)

Further entries may be found in: Honnold, *Documentary History of the Uniform Law for International Sales* (Kluwer, Deventer 1989)

**General Bibliography (Works will be cited by editor’s or editors’ name(s) only unless otherwise indicated):** Hau/Poseck, *BeckOK-BGB* (66<sup>th</sup> ed., Beck, Munich 2023); Bianca/Bonell, *Commentary on the International Sales Law – The Vienna 1980 Sales Convention* (Giuffrè, Milano 1987); Bucher (ed), *Wiener Kaufrecht* (Stämpfli, Bern 1991); Brunner, *UN-Kaufrecht – CISG* (2<sup>nd</sup> ed., Stämpfli, Bern 2014); Díez-Picazo, *La compraventa internacional de mercaderías* (Civitas, Madrid 1998); DiMatteo/Janssen/Magnus/Reiner Schulze (eds), *International Sales Law – Contract, Principles & Practice* (2<sup>nd</sup> ed., Beck/Hart/Nomos, Munich/Oxford/Baden-Baden 2021); DiMatteo/Magnus (eds), *International Sales Law – A Global Challenge* (CUP, New York 2014); Peter Doralt (ed), *Das UNCITRAL-Kaufrecht im Vergleich zum österreichischen Recht* (Manz, Wien 1985); Enderlein/Maskow/Stargardt, *Konvention der Vereinten Nationen über Verträge über den internationalen Warenkauf* (Staatsverlag der DDR, Berlin 1985); Erman, *BGB* (16<sup>th</sup> ed., Otto Schmidt, Cologne 2020); Ferrari (ed), *Quo vadis CISG?* (Sellier, Munich 2005); Ferrari/Flechtner/Brand (eds), *The Draft UNCITRAL Digest and Beyond* (Sellier, Munich 2004); Ferrari/Kieninger/Mankowski/Karsten Otte/Saenger/Götz Schulze/Ansgar Staudinger, *Internationales Vertragsrecht* (3<sup>rd</sup> ed., Beck, Munich 2018); Herber/Czerwenka, *Internationales Kaufrecht* (Beck, Munich 1991); Honnold/Flechtner, *Uniform Law for International Sales under the 1980 United Nations Convention* (5<sup>th</sup> ed., Kluwer, Alphen aan den Rijn 2021); Honsell, *Kommentar zum UN-Kaufrecht* (2<sup>nd</sup> ed., Springer, Berlin etc. 2010); Hoyer/Posch (eds), *Das Einheitliche Wiener Kaufrecht* (Orac, Wien 1992); Karollus, *UN-Kaufrecht* (Springer, Wien etc. 1991); Kröll/Mistelis/Perales Viscasillas, *UN Convention on Contracts for the International Sale of Goods* (2<sup>nd</sup> ed., Beck/Hart/Nomos, Munich/Oxford/Baden-Baden 2018); *Münchener Kommentar zum BGB*, vol. 3 (8<sup>th</sup> ed., Beck, Munich 2019); *Münchener Kommentar zum HGB*, vol. 5 (5<sup>th</sup> ed., Beck, Munich 2021); Neumayer/Ming, *Convention de Vienne sur les contrats de vente internationale de marchandises* (CEDIDAC, Lausanne 1993); Reinhart, *UN-Kaufrecht* (C.F. Müller, Heidelberg 1991); Schlechtriem/Magnus (eds), *Internationale Rechtsprechung zum Einheitlichen Kaufgesetz* (Nomos, Baden-Baden 1987); Schlechtriem/Schwenzer/Schroeter, *Kommentar zum Einheitlichen UN-Kaufrecht* (7<sup>th</sup> ed., Beck/Helbing & Lichtenhahn, Munich/Basel 2013) (cited as: Schlechtriem/Schwenzer (D)); Schlechtriem/Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)* (5<sup>th</sup> ed., OUP/Beck, Oxford/Munich 2022); Schroeter, *Internationales UN-Kaufrecht* (7<sup>th</sup> ed., Mohr, Tübingen 2022); Soergel, *BGB, CISG* (14<sup>th</sup> ed., Kohlhammer, Stuttgart 2021); Staudinger, *BGB, CISG* (Sellier de Gruyter, Berlin 2018); Witz/Salger/Lorenz, *International Einheitliches Kaufrecht* (2<sup>nd</sup> ed., Deutscher Fachverlag, Frankfurt/M 2016).

## Introduction

The CISG has become the epitome of uniform law. The reasons for its success can be easily explained: first, it addresses the by far most important kind of contract, dominating cross-border trade. Second, it is a well-designed compromise between different traditions upon which every state can agree that is willing to sacrifice parochiality and natural monopolies in favour of its domestic legal industry for a safer ground for cross-border commerce. Third, countries from all parts of the world participated in its making and in the negotiations leading to it, so that nobody could feel excluded. It was not an effort solely of the Western or First World. Fourth, it could draw upon

## Introduction CISG

the experiences made under the former Hague Sales Laws, ULIS<sup>1</sup> and ULF,<sup>2</sup> the direct predecessors of the CISG. Fifth, its history traces back even further to the seminal work of *Ernst Rabel*,<sup>3</sup> his first Draft Proposal for a Uniform International Sales Law<sup>4</sup> and his so-called Blue Report.<sup>5</sup> Sixth, success hacks success. The more States become Contracting States, the less a State dependent on cross-border trade can afford to stay outside. Positive network externalities grow. Seventh, to a certain degree, the CISG served as a kind of Model Law for subsequent national law reform importing ideas which were made popular and practical by the CISG into national laws of obligations.<sup>6</sup>

- 2 The list of Contracting States as of 1 July 2023 reads (in brackets the date when the CISG entered into force for the single State is added): Albania (1 June 2010), Argentina (1 January 1988), Armenia (1 January 2010), Australia (1 April 1989), Austria (1 January 1989), Azerbaijan (1 June 2017), Bahrain (1 October 2014), Belarus (1 November 1990), Belgium (1 November 1997), Benin (1 August 2012), Bosnia and Herzegovina (6 March 1992), Brazil (1 April 2014), Bulgaria (1 August 1991), Burundi (1 October 1999), Cameroon (1 November 2018), Canada (1 May 1992), Chile (1 March 1991), People's Republic of China (1 January 1988),<sup>7</sup> Colombia (1 August 2002), Congo (1 July 2015), Costa Rica (1 August 2018), Croatia (8.10.1991), Cuba (1 December 1995), Cyprus (1 April 2006), Czechia (1 January 1993), Denmark (1 March 1990), Dominican Republic (1 July 2011), Ecuador (1 February 1993), Egypt (1 January 1988), El Salvador (1 December 2007), Estonia (1 October 1994), Fiji (1 July 2018), Finland (1 January 1989), France (1 January 1988), Gabon (1 January 2006), Georgia (1 September 1995), Germany (1 January 1991), Greece (1 February 1999), Guatemala (1 January 2021), Guinea (1 February 1992), Guyana (1 October 2015), Honduras (1 November 2003), Hungary (1 January 1988), Iceland (1 June 2002), Iraq (1 April 1991), Israel (1 February 2003), Italy (1 January 1988), Japan (1 August 2009), Kirgizstan (1 June 2000), Republic of Korea (1 March 2005), Democratic People's Republic of Korea (1 April 2020), Laos (1 October 2020), Latvia (1 August 1998), Lebanon (1 December 2009), Lesotho (1 January 1988), Liberia (1 October 2006), Liechtenstein (1 May 2020), Lithuania (1 February 1996), Luxemburg (1 February 1998), Madagascar (1 October 2015), Mauretania (1 September 2000), North Macedonia (17 November 1991), Mexico (1 January 1989), Moldova (1 November 1995), Mongolia (1 January 1999), Montenegro<sup>8</sup> (3 June 2006), Netherlands (1 December 1991), New Zealand (1 October 1995), Norway (1 August 1989), Palestine (1 January 2019), Paraguay (1 February 2007), Peru (1 April 2000), Poland (1 June 1996), Por-

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<sup>1</sup> Convention relating to a Uniform Law on the International Sale of Goods of 1 July 1964, 834 UNTS 107.

<sup>2</sup> Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods of 1 July 1964, 834 UNTS 169.

<sup>3</sup> Rabel, *Das Recht des Warenkaufs*, vol. I (de Gruyter, Berlin 1936), vol. II (de Gruyter/Mohr, Berlin/Tübingen 1958).

<sup>4</sup> See 'Report A of UNIDROIT', *RabelsZ* 3 (1929), 402, 406.

<sup>5</sup> Rapport sur le droit comparé de vente par le Institut für ausländisches und internationales Privatrecht de Berlin (Pallotta, Roma 1929).

<sup>6</sup> Chianale, 'The CISG as 'Model Law': A Comparative Law Approach', (2016) *Singapore Journal of Legal Studies* 29. The German *Schuldrechtsreform* of 2002 and to a certain degree the recent reform of the French *Code civil* may serve as prominent examples.

<sup>7</sup> On Hong Kong (1 July 1997) and Macao (20 December 1999) Schroeter, 'Die Vertragsstaateneigenschaft Hongkongs und Macaus unter dem UN-Kaufrecht', *IHR* 2004, 7; id., 'The Status of Hong Kong and Macao under the United Nations Convention on Contracts for the International Sale of Goods', 16 *Pace International Law Review* (2004) 307.

<sup>8</sup> Montenegro has declared to succeed after the former Union of Serbia and Montenegro on 3 June 2006, but it has been bound already as of 27 February 1992.

tugal (1 October 2021), Romania (1 June 1992), Russia (24 December 1991), San Marino (1 March 2013), Serbia (27 April 1992), Singapore (1 March 1996), Slovakia (1 January 1993), Slovenia (25 June 1991), Spain (1 August 1991), St. Vincent and the Grenadines (1 October 2001), Sweden (1 January 1989), Switzerland (1 March 1991), Syria (1 January 1988), Turkey (1 August 2011), Turkmenistan (1 June 2023), Uganda (1 March 1993), Ukraine (1 February 1991), Uruguay (1 February 2000), USA (1 January 1988), Uzbekistan (1 December 1997), Vietnam (1 January 2017), Zambia (1 January 1988).

This makes the impressive number of 95 Contracting States as of 1 July 2023. If one paints the Contracting States on a map of the world<sup>9</sup> the northern hemisphere is almost all coloured with only few exceptions (amongst the Member States of the EU, only Ireland and Malta are absentees; notably, the United Kingdom is not party to the CISG either). Important states in the Southern Hemisphere are to be added: Oceania is coloured too, as is the major part of South America.

As a truly international instrument, the CISG must be interpreted autonomously without recourse to domestic law. The CISG is an instrument of internationally uniform substantive law. But for Art. 1 (1), it does not contain conflict rules on private international law.

The CISG is structured in four Parts: Scope of application and general provisions (Part I; Arts. 1–13); Formation of the contract (Part II; Arts. 14–24); Sale of goods (Part III; Arts. 25–88); Final provisions (Part IV; Arts. 89–101). Evidently, Part III is the core of the CISG. But for Art. 92, the CISG is a unified instrument which avoids subjecting formation and performance of the very same sales contract to regimes contained in formally different instruments, a mistake committed by splitting and separating ULIS and ULF.

## PART I SPHERE OF APPLICATION AND GENERAL PROVISIONS

### Chapter I Sphere of application

#### Art. 1 CISG

**(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:**

- (a) when the States are Contracting States; or**
- (b) when the rules of private international law lead to the application of the law of a Contracting State.**

**(2) 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.**

**(3) 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.**

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<sup>9</sup> See, impressively, [https://en.wikipedia.org/wiki/United\\_Nations\\_Convention\\_on\\_Contracts\\_for\\_the\\_International\\_Sale\\_of\\_Goods#/media/File:CISGworldmap-updatedforbrazil.png](https://en.wikipedia.org/wiki/United_Nations_Convention_on_Contracts_for_the_International_Sale_of_Goods#/media/File:CISGworldmap-updatedforbrazil.png) (1.7.2023).

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## I. Generalities

- 1 Art. 1 CISG demarcates the *international* scope of application of the CISG. It has a dual nature as both a rule of private international law and as a rule of substantive law drawing the line between different parts of the substantive law of the Member States, plus a hierarchical dimension of both elements giving precedence to the CISG over national rules.<sup>1</sup> The CISG is specifically designed law for cross-border commercial sales contracts. Its Contracting States acknowledge this and abide by it.

## II. Contracts for the sale of goods

### 1. Sale

- 2 Perhaps surprisingly, the CISG does not contain a definition of its central concept although this concept features even in the title of the Convention: contracts for the sale of goods. But this lack of a proper definition does not do too much harm. The basic characteristics of a sales contract are easily discernible from the obligations which the CISG imposes upon the parties. In a nutshell, → Arts. 30 and 53 CISG display the parties' basic obligations: the seller has to deliver the goods and to pass title in them to the buyer; the buyer has to pay and has to take delivery of the goods. A sale back, a repurchase agreement and any obligation to sell back also constitute a sale for the purposes of the CISG.<sup>2</sup>
- 3 Leasing presents different sub-types of agreements. The first one, operating leasing combines elements of renting and buying. In particular, hire-purchase contracts as a sub-sub-type include at least an option to sell or buy, if not a downright deferred sales agreement where an obligation to buy after a certain period is fixed. The second one is financial leasing. It features three persons involved and economically combines elements of loan, letting and sale. The sales element is the contract between seller and lessor. It should fall within the CISG.<sup>3</sup> The other contractual relationships are domi-

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<sup>1</sup> In detail Mankowski, 'Spezielle vertragsrechtliche Gesetze und Internationales Privatrecht' *IPRax* 1995, 230; Maultzsch, 'Die Rechtsnatur des Art. 1 Abs. 1 lit. b CISG zwischen internationaler Abgrenzungsnorm und interner Verteilungsnorm', *FS Ingeborg Schwenzer* (Bern, Stämpfli 2011) p. 1213, 1224–1226.

<sup>2</sup> BGH *RIW* 2014, 609; Schroeter, 'Rückkaufvereinbarungen und 'contra proferentem'-Regel unter dem UN-Kaufrecht', *IHR* 2014, 173; Schmidt-Kessel/Blüher, Case note, *EWiR* 2014, 681; Blaschczyk, Case note, *BB* 2014, 2513.

<sup>3</sup> Ferrari, 'Art. 1 CISG', in: Schlechtriem/Schwenzer (D), para 29; Hachem, 'Art. 1 CISG', in: Schlechtriem/Schwenzer, para 14.

nated by the other elements. UNIDROIT has recognised this by devoting a separate Convention to financial leasing.<sup>4</sup>

Sale-and-lease-back transactions feature two separate contracts which should be judged distinctly: the original sales contract qualifies as a sales contract whereas the leasing agreement is typically (but of course depending on the concrete stipulations) a hire-purchase agreement.<sup>5</sup> The same applies to a supply agreement and a guarantee agreement, which are deemed to be legally independent.<sup>6</sup>

Pre-contracts only oblige to conclude a final and binding sales contract. It is not for them, but for the ensuing final contract to exact the obligations under Arts. 30 and 53 CISG. Even fewer instruments which are less binding than pre-contracts, like memoranda of understanding or letters of intent, qualify *per se* as sales contracts. But it would be detrimental to introduce a split within the negotiation process, a turning point before which the CISG would not apply, whereas it would apply afterwards. The envisaged final contract should insofar exert effect already prior to its conclusion and should attract the application of the CISG, although, admittedly, this is less convincing if eventually a final contract is not concluded and the preliminary instruments consequently become stand-alones.

Barter contracts feature a different consideration than paying money. Thus, they would see two sellers, but no buyer. Arts. 53 et seq. CISG could not possibly apply to them. These characteristics distinguish them from sales contracts. Furthermore, UNCITRAL contemplated a separate framework for barter contracts independent from the CISG.<sup>7</sup> Hence, the better arguments speak against classifying them as sales contracts.

In principle, countertrade follows the same lines as barter contracts. But in each case, it should be closely and diligently examined whether a single, uniform contract is at stake (to which the CISG would not apply) or two separate contracts in the mode of a counter-purchase (to which the CISG would apply).

Donations and gifts by their very definition lack the necessary element of consideration in money and thus fall outside the CISG. The case can be different, however, if goods are deliberately sold under value. In this event, the contract might be split if at all possible: insofar as a price is paid, consideration is given and the CISG applies; beyond that, gratuity prevails and the CISG is not applicable. A mere symbolic price (e.g. 1\$) is to be disregarded, though.<sup>8</sup> If the contract cannot be split, the CISG applies.

Franchising agreements display a vast array of important and defining elements beyond a mere sale, i.a. a transfer of intellectual property rights, obligations as to contributing to the external image etc. They are not covered by the CISG.<sup>9</sup>

Agreements to modify, alter or avoid the original sales contracts are subject to the CISG as → Art. 29 CISG clearly indicates, the rule of which would otherwise lack any

<sup>4</sup> UNIDROIT Convention on International Financial Leasing, signed at Ottawa on 28 May 1988 ([www.unidroit.org/leasing-ol/leasing-english](http://www.unidroit.org/leasing-ol/leasing-english)).

<sup>5</sup> Magnus, 'Art. 1 CISG', in: Staudinger para 36.

<sup>6</sup> Cour supérieure du Québec CISG-online 6205.

<sup>7</sup> UNCITRAL Yb. IX (1978), 190–191 and X (1979), 37.

<sup>8</sup> Mankowski, 'Art. 1 CISG', in: MüKo-HGB, para 16.

<sup>9</sup> Mankowski, 'Art. 1 CISG', in: MüKo-HGB, para 23.

sensible meaning.<sup>10</sup> This in principle also includes settlements,<sup>11</sup> apart from those forming part of an overarching deal.<sup>12</sup>

## 2. Goods

- 11 Goods are mobile and tangible chattels. The Hague Sales Conventions used “objets mobiliers corporels” and this is to be continued as a substance, even though the French wording switched to “marchandises” whereas the English “goods” was maintained throughout.<sup>13</sup>
- 12 Living cattle and living animals are included<sup>14</sup> as are plants, flowers, vegetables and fruits.<sup>15</sup> Artificial limbs or organs also feature amongst goods,<sup>16</sup> followed by (medicinal) drugs, art<sup>17</sup> or liquid gas.<sup>18</sup> The characteristic as goods does not depend on the chattels being intra commercium or freely tradeable. These aspects might render the contract invalid, but that is another issue (are → Art. 4 lit. a CISG).<sup>19</sup>
- 13 Rights, shares and securities as well as patents, trademarks, licenses and other intellectual property rights do not qualify as tangibles. Even if they are documented on paper or electronically, they are not physical. The same goes for cryptocurrencies, such as Bitcoin,<sup>20</sup> and other digital assets. Contracts about them as the main performance fall outside the Convention's scope. However, cryptocurrencies and certain tokens may be used as a means of payment for other goods. The CISG does not require that the payment is made in an official or 'fiat' currency. Therefore, the CISG applies to such cases.<sup>21</sup>
- 14 Real estate does not qualify as goods.<sup>22</sup> The line between moveables and immovables is drawn at the intended time of the delivery. If the chattel at stake is moveable at that time, it is moveable for the purposes of the CISG even if it is afterwards attached to real estate. A kit for building a log house before erection of the house<sup>23</sup> is thus a moveable as is a fitted kitchen before being fitted.<sup>24</sup> Conversely, it is not necessary that the chattel at stake is moveable already at the time when the contract is concluded.

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<sup>10</sup> OLG Köln *RIW* 1994, 872; OLG Hamburg CISG-online No. 473; OLG Munich CISG-online No. 143; ICC Award 7331 (1994), CISG-online No. 106; LG Hamburg *IPRax* 1991, 400. *Contra* OLG Köln CISG-online Nr. 2401.

<sup>11</sup> Magnus, ‘UN-Kaufrecht – Konsolidierung und Ausbau nach innen und gleichzeitig Erodierung nach außen? – Aktuelles zum CISG’, *ZEUP* 2015, 159, 167. *Contra* OLG Köln CISG-online No. 2401.

<sup>12</sup> Mankowski, ‘Art. 1 CISG’, in: MüKo-HGB, para 13.

<sup>13</sup> Magnus, in: Staudinger Art. 1 CISG para 43.

<sup>14</sup> Hof Arnhem *Nederlands Internationaal Privaatrecht* 1995 Nr. 514; OLG Jena *TranspR-IHR* 2000, 25; CA Paris *IHR* 2001, 128, OLG Schleswig *IHR* 2003, 67; Rb. Kh. Hasselt RW 1997–1998, 1294; LG Freiburg *IHR* 2001, 67; Magnus, in: Staudinger Art. 1 CISG para 48.

<sup>15</sup> OLG Innsbruck *SZIER* 1996, 51; Rb. ‘s-Gravenhage *Nederlands Internationaal Privaatrecht* 1995 Nr. 524.

<sup>16</sup> LG Aachen *RIW* 1993, 761; Magnus, in: Staudinger Art. 1 CISG para 48.

<sup>17</sup> In detail Siehr, ‘UN-Kaufrecht von 1980 und der Handel mit Kulturgütern’, *FS Ingeborg Schwenzer* (2011) p. 1593.

<sup>18</sup> OGH *RdW* 1996, 203.

<sup>19</sup> Magnus, in: Staudinger Art. 1 CISG para 49.

<sup>20</sup> Király, ‘The Vienna Convention on International Sales of Goods and the Bitcoin’, 16 *US-China L. Rev.* (2019) 179, 181.

<sup>21</sup> *Ibid.*

<sup>22</sup> See only Magnus, in: Staudinger Art. 1 CISG para 53.

<sup>23</sup> Korkein Oikeus (www.cisgw3.law.pace.edu/cases/051014f4.html).

<sup>24</sup> BG CISG-online No. 1319.

This also bears relevance for minerals yet to be mined or crops yet to be grown or harvested.<sup>25</sup>

M&A deals can only concern goods that are designed as asset deals, whereas share deals fall outside the CISG since they do not relate to tangible chattels.<sup>26</sup> Asset deals about real estate, rights or intellectual property also fall outside the CISG.<sup>27</sup> Hence, asset deals have to be viewed contract by contract and item by item. They subdivide the business sold and split it into pieces, not formally preserving it as an entity. If, exceptionally, an asset deal is truly and substantially a uniform contract, a quantitative approach ought to be preferred stating whether the goods at stake in their majority are goods or not.<sup>28</sup> A successor's liability, stemming from acquiring or continuing a business, is outside the CISG in any event.<sup>29</sup>

### III. Internationality

#### 1. Parties' places of business in different states

Art. 1 (1) CISG requires an element of internationality. The contract at stake must be a cross-border contract. This does not relate to the movement of the goods, to the place of shipment, to the place of destination or to any other place of performance. The localisation of the parties to the contract is what matters. Art. 1 (3) CISG adds a most welcome clarification that the parties' nationalities are not relevant. Solely and exclusively their places of business are to be taken into account. Other personal qualities of the contracting parties do not bear relevance.

The parties to the contract are the only relevant factors. Therefore, only their places of business matter. Third parties are not to be taken into consideration, not even in the rather unlikely event that a sales contract is made out as a contract for a third party's benefit. If an agent acts for a principal, only the principal's place of business is to be taken into account<sup>30</sup> whereas the agent's place of business is neglectable.<sup>31</sup>

The relevant point of time is the time of the formation of the contract. Developments and switches of places of business after the conclusion of the contract do not bear any relevance. Opposed to that, similar events which occur prior to the formation of the contract, even if they take place during possibly prolonged negotiations, could indeed affect the internationality of the contract. Only a proper contract with exacting binding obligations matters, not preliminary agreements like memoranda of understanding or letters of intent.

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<sup>25</sup> Bridge, *The International Sale of Goods* (2<sup>nd</sup> ed., OUP, Oxford 1007) para 11.18; Schwenzer/Hachem, 'Art. 1 CISG', in: Schlechtriem/Schwenzer para 17.

<sup>26</sup> In detail Merkt, 'Internationaler Unternehmenskauf und Einheitskaufrecht', 93 *Zeitschrift für Vergleichende Rechtswissenschaft* (1994), 353; id., 'Zum internationalen Unternehmenskauf durch Beteiligungserwerb', *Festgabe Otto Sandrock* (Recht und Wirtschaft, Heidelberg 1995) p. 138; id., 'Internationaler Unternehmenskauf durch Erwerb der Wirtschaftsgüter', *RIW* 1995, 533; Göthel, in: Göthel, *Grenzüberschreitende M&A-Transaktionen* (5<sup>th</sup> ed., Otto Schmidt, Cologne 2020) § 6 para 11 et seq.

<sup>27</sup> Magnus, in: Staudinger Art. 1 CISG para 51; Hachem, 'Art. 1 CISG', in: Schlechtriem/Schwenzer para 22.

<sup>28</sup> Göthel, in: Göthel, *Grenzüberschreitende M&A-Transaktionen* (5<sup>th</sup> ed., Otto Schmidt, Cologne 2020) § 6 para 19, stating a threshold of 50%.

<sup>29</sup> BGH *IHR* 2014, 25.

<sup>30</sup> See only KG *RIW* 1986, 905; Piltz, 'Der Anwendungsbereich des UN-Kaufrechts', *AnwBl* 1991, 57, 60.

<sup>31</sup> OLG Stuttgart *IHR* 2001, 65.

**2. Additional subjective test and burden of proof (Art. 1(2))**

- 19 Art. 1 (2) introduces an additional subjective test delimiting internationality and restricting Art. (1) (a) and (b): the fact that the parties have their places of business in different states is to be disregarded whenever this fact does not appear either in the contract or in any dealings between, or from information disclosed by the parties, at any time before or at the conclusion of the contract. Neither party with justified unawareness of the international nature of the contract shall be surprised by the application of the CISG.
- 20 The important issue of Art.1 (2) is that it distributes the burden of proof and pleading between the parties: where the parties objectively have their respective places of business in different states, the burden to discharge the applicability of the CISG is on the party alleging that it did not know about the other party having its place of business in another state, i.e. that it was entitled to believe the contract to be a purely domestic one.<sup>32</sup>
- 21 Such an allegation stands little chance of succeeding if the other party advertised, displayed or at least indicated in any piece of communication directed at the first party or in any presentation where its relevant place of business was located. Letterheads, business cards, e-mail addresses, homepages, websites or top-level domains of the other party could all prove detrimental to the first party's allegation. Whether the list as contained in Art. 1 (2) is exhaustive or not<sup>33</sup> bears relatively small relevance given that "dealings" and all "information disclosed" feature in it. A positive indication that the other party's place of business is in a certain state is not required; any impression that that place of business is in another than the first party's state is sufficient, even without expressly nominating the other state.<sup>34</sup>
- 22 The reference in Art. 1 (2) is not to knowledge or negligent lack of knowledge of the particular party.<sup>35</sup> It establishes an effective test, assessing whether the location of the parties' places of business in different states is not concealed, rather than whether it is subjectively discernible.<sup>36</sup>
- 23 Art. 1 (2) might gain most importance in instances of undisclosed agency.<sup>37</sup> The other party will only see the acting agent whereas the undisclosed principal enters into the contract. If not even the principal's person has been disclosed, the principal's place of business will all the less be disclosed. Yet, there might be indications for a cross-border nature of the contract, nonetheless.
- 24 Art. 1 (2) works only one way. It cannot be applied *per analogiam* if the necessary element of internationality is objectively lacking but a contract party subjectively gained the impression that it existed. Art. 1 (2) exacts only a limiting, but never an extending effect on Art. 1 (1).

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<sup>32</sup> See only Pünder, 'Das Einheitliche UN-Kaufrecht – Anwendbarkeit kraft kollisionsrechtlicher Verweisung nach Art. 1 Abs. 1 lit. b CISG', *RIW* 1990, 869 at 869.

<sup>33</sup> To this avail e.g. Kreße, 'Art. 1 CISG', in: Soergel para 7; Hachem, 'Art. 1 CISG', in: Schlechtriem/Schwenzer para 44; Mankowski, 'Art. 1 CISG', in: *MüKo-HGB*, para 38.

<sup>34</sup> Ferrari, 'Art. 1 CISG', in: Schlechtriem/Schwenzer (D) para 51; Hachem, 'Art. 1', in: Schlechtriem/Schwenzer para 45.

<sup>35</sup> UNCITRAL Yb. III (1972), 83, negating UNCITRAL Yb. II (1971), 52 para 13 Art. 2 (a).

<sup>36</sup> Hachem, 'Art. 1 CISG', in: Schlechtriem/Schwenzer para 42.

<sup>37</sup> See only Czerwenka, *Rechtsanwendungsprobleme im internationalen Kaufrecht* (1988) p. 135; Magnus, in: Staudinger Art. 1 CISG para 75.

#### IV. Place of business

The CISG does not contain an express definition what constitutes a place of business. → Art. 10 is headed misleadingly for it addresses only two rather smallish side issues. 25

“Place of business” has to be defined autonomously, without recourse to national law.<sup>38</sup> The simple form of definition is the place from which a business is effectively and primarily run.<sup>39</sup> A more elaborate version could read:<sup>40</sup> “an establishment which has the appearance of permanency, such as the extension of a parent body, has a management and is materially equipped to negotiate business with third parties so that the latter, although knowing that there will, if necessary, be a legal link with the parent body, the head office of which is abroad, do not have to deal directly with such parent body but may transact business at the place of business constituting the extension”. Such an establishment must be an entity capable of being the primary, or even exclusive, interlocutor for third parties e.g. in the negotiation of contracts.<sup>41</sup> The establishment thus acts as the decentralised and prolonged arm of the principal. 26

“Place of business” is not restricted to the main place of business and even less requires searching for a single place of business. Otherwise, Art. 10 (a) would be meaningless. Branches and secondary places of business are also covered.<sup>42</sup> Mere technical equipment does not suffice, thus neither do servers and websites.<sup>43</sup> Pure production facilities, warehouses and storing facilities lack the quality of negotiating external business. 27

Links under company law are not required. On the contrary, the dependent branch is the paradigm case for a place of business. Nonetheless, subsidiaries which are formally separate legal entities fall under the notion, too. But this applies only in extra-group trade. For the purposes of in-group trades between formally different members of the same group of companies, each group member has to be treated as a separate entity and must not be attributed to its parent company.<sup>44</sup> 28

Commercial agents, franchisees etc. are to be judged according to which degree of entrepreneurial independence they enjoy. Commercial agents working for several principals may not be regarded as place of business of any of those principals. 29

#### V. Applicability regardless of personal qualities of the contract parties or of the character of the contract (Art. 1 (3))

The CISG is also applicable (or not applicable, as the case may be), regardless of the civil or commercial character of the parties or of the contract. It does not positively require that one or all parties are registered as merchants or are incorporated companies. B2C contracts might be excluded in a later step by virtue of → Art. 2 (a), though. In the rare instances that the CISG applies to B2C contracts, appropriate alter- 30

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<sup>38</sup> See only Trib. cant. vaudois CISG-online No. 1532; Mistelis, ‘Art. 10 CISG’, in: Kröll/Mistelis/Perales Viscasillas para 43; Magnus, ‘Art. 10 CISG’, in: Staudinger para 4.

<sup>39</sup> OLG Stuttgart 5 U 118/99, CISG-online 583.

<sup>40</sup> Compare BGH VIII ZR 43/81, NJW 1982, 2730.

<sup>41</sup> OLG Stuttgart 5 U 118/99, CISG-online 583.

<sup>42</sup> Magnus, in: Staudinger Art. 10 CISG para 4.

<sup>43</sup> Magnus, in: Staudinger Art. 10 CISG para 4.

<sup>44</sup> See only Ferrari, ‘Art. 1 CISG’, in: Schlechtriem/Schwenzer (D) para 47; Magnus, in: Staudinger Art. 1 CISG para 66.

ations considering their particularity might prevail over a strict application of its uniform rules.<sup>45</sup>

- 31 A precondition that the contract must be civil and commercial does not exist, either. Unlike, for instance, Art. 1 (1) Brussels Ibis Regulation, Art. 1 (1) Rome I Regulation or Art. 1 (1) Rome II Regulation, the CISG does not establish any such precondition. This is related to the fact that the CISG covers only contracts of sale, hence areas where states typically do not act *iure imperii* but only *iure gestionis* in a manner in which a private entity could act likewise. This holds true, even if a good is bought by a state to be later used for sovereign purposes, like a warship or a military aircraft, or *vice versa*, where formerly sovereign goods are sold by a state.

## **VI. Parties' places of business in different Contracting States (Art. (1) (a))**

- 32 In order to trigger the applicability of the CISG, one of two additional requirements has to be fulfilled: either the contracting parties must have their respective places of business in different Contracting States of the CISG, Art. 1 (1) (a), or the conflict-of-laws rules must lead to the law of a Contracting State of the CISG being applicable, Art. 1 (1) (b). Both requirements are alternatives. It suffices if either one of them is fulfilled.
- 33 Courts, adjudicators, and lawyers are strongly advised to start with Art. 1 (1) (a) and to turn to Art. 1 (1) (b) only if Art. 1 (1) (a) is not fulfilled. Firstly, Art. 1 (1) (a) comes first in systematical order. Secondly, Art. 1 (1) (b) employs the far more complicated mechanism. Pragmatism and cost-efficiency both speak in favour of Art. 1 (1) (a) wherever possible.
- 34 In the early days of the CISG when the number of Contracting States was low and only rising, Art. 1 (1) (b) attracted preponderance. Nowadays, Art. (1) (a) clearly dominates. The CISG has gained worldwide acceptance, and most of the important trading nations have become Contracting States.
- 35 For the purposes of Art. 1 (1) (a), a Contracting State which has declared a reservation pursuant to → Art. 92 (1) CISG, shall by virtue of → Art. 92 (2) CISG not be regarded as a Contracting State in respect of matters governed by those parts of the CISG to which the reservation made applies. → Art. 93 (1) CISG offers the opportunity for federative Contracting States to declare whether the CISG is extended to all of its territories or only to some. → Art. 93 (3) CISG draws the necessary consequence that such territories to which the CISG is not extended, do not qualify as Contracting States for the purposes of Art. 1 (1) (a). This is relevant with regard to Australia, Canada, Denmark (who excluded Greenland), and New Zealand.<sup>46</sup>
- 36 The ordinary case today sees the international applicability of the CISG only as a passing station consisting of a single sentence that the parties have their places of business in two Contracting States and that thus Art. 1 (1) (a) is complied with. This has become an easy treat for adjudicators. They only have to check the current Status Table which is readily accessible via the internet.<sup>47</sup>

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<sup>45</sup> In detail Magnus, 'UN-Kaufrecht und Verbraucher', in: *Liber amicorum Kurt Siehr* (2010), p. 405, 420 et seq.

<sup>46</sup> On details [https://uncitral.un.org/en/texts/salegoods/conventions/sale\\_of\\_goods/cisg/status](https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status) and the commentary on Art. 93 CISG.

<sup>47</sup> See [https://uncitral.un.org/en/texts/salegoods/conventions/sale\\_of\\_goods/cisg/status](https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status). Just google "CISG Status".

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