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CISG Advisory Council Opinion No. 4: Contracts for the Sale of Goods to Be Manufactured or Produced and Mixed Contracts (Article 3 CISG)

CISG ADVISORY COUNCIL OPINION NO. 4:[†1] CONTRACTS FOR THE SALE OF GOODS TO BE MANUFACTURED OR PRODUCED AND MIXED CONTRACTS (ARTICLE 3 CISG) [2]

To be cited as: CISG-AC Opinion no 4, Contracts for the Sale of Goods to Be Manufactured or Produced and Mixed Contracts (Article 3 CISG), 24 October 2004. Rapporteur: Professor Pilar Perales Viscasillas, Universidad Carlos III de Madrid.

Adopted by the CISG-AC on the 7th meeting held in Madrid with no dissent. Reproduction of this opinion is authorized.

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† Editor's Note: While The Pace International Law Review adheres to The Bluebook Uniform System of Citation, the Law Review has deferred to the Advisory Council's chosen citation in the interest of the uniformity of their opinions.

[1] The Advisory Council of the United Nations Convention on Contracts for the International Sale of Goods (CISG-AC) is a private initiative supported by the Institute of International Commercial Law at Pace University School of Law and the Centre for Commercial Law Studies, Queen Mary, University of London. The CISG-AC is in place to support understanding of the United Nations Convention on Contracts for the International Sale of Goods (CISG) and the promotion and assistance in the uniform interpretation of the CISG.

At its formative meeting in Paris in June 2001, Prof. Peter Schlechtriem of Freiburg University, Germany, was elected Chair of the CISG-AC for a three-year term. Dr. Loukas A. Mistelis of the Centre for Commercial Studies, Queen Mary, University of London, was elected Secretary. The CISG-AC has consisted of: Prof. Emeritus Eric E. Bergsten, Pace University; Prof. Michael Joachim Bonell, University of Rome La Sapienza; Prof. E. Allan Farnsworth, Columbia University School of Law; Prof. Alejandro M. Garro, Columbia University School of Law; Prof. Sir Roy M. Goode, Oxford; Prof. Sergei N. Lebedev, Maritime Arbitration Commission of the Chamber of Commerce and Industry of the Russian Federation; Prof. Jan Ramberg, University of Stockholm, Faculty of Law; Prof. Peter Schlechtriem, Freiburg University; Prof. Hiroo Sono, Faculty of Law, Hokkaido University; Prof. Claude Witz, Universität des Saarlandes and Strasbourg University. Members of the Council are elected by the Council. At its meeting in Rome in June 2003, the CISG-AC elected as additional members, Prof. Pilar Perales Viscasillas, Universidad Carlos III de Madrid, and Prof. Ingeborg Schwenzer, University of Basel.

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[2] This opinion is a response to a request by the Study Group on a European Civil Code and its Steering Committee for the Council to reflect on the interpretation of Art. 3 CISG and provide answers to the following questions:

Opinion

1. Paragraphs (1) and (2) of Article 3 CISG govern different matters, though in complex transactions there may be some reciprocal influence in their interpretation and application.

Article 3(1) CISG: Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture.

2. In interpreting the words "substantial part" under Article 3(1) CISG, primarily an "economic value" criterion should be used. An "essential" criterion should only be considered where the "economic value" is impossible or inappropriate to apply taking into account the circumstances of the case.

3. "Substantial" should not be quantified by predetermined percentages of value; it should be determined on the basis of an overall assessment.

4. The supply of labour or other services necessary for the manufacture or production of the goods is covered by the words "manufactured or produced" of Article 3(1) CISG and is not governed by Article 3(2) CISG.

5. The words "materials necessary for such manufacture" in Article 3(1) CISG do not cover drawings, technical specifica-

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1. If both parties supply materials to be used in the manufacture of goods for one of the parties, what are the relevant factors under Art. 3(1) to draw the line between a sales contract governed by the Convention and a service contract governed by domestic law?
2. If a party has undertaken to deliver goods and to provide services, what are the relevant factors under Art. 3(2) CISG determining the applicability of the CISG instead of domestic law in such cases?
3. What is the relation between paras. (1) and (2) of Art. 3 CISG?

tions, technology or formulas, unless they enhance the value of the materials supplied by the parties.

6. In the interpretation of Article 3(1) CISG, it is irrelevant whether the goods are fungible or non-fungible, standard or custom-made.

Article 3(2): This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services.

7. Article 3(2) CISG governs mixed contracts. Whether the different obligations as to goods and services are agreed upon in one mixed contract or in several contracts is a matter of contract interpretation.

8. In the interpretation of the parties' agreements relevant factors include, inter alia, the denomination and entire content of the contract, the structure of the price, and the weight given by the parties to the different obligations under the contract.

9. In interpreting the words "preponderant part" under Article 3(2) CISG, primarily an "economic value" criterion should be used. An "essential" criterion should only be considered where the "economic value" is impossible or inappropriate to apply taking into account the circumstances of the case.

10. "Preponderant" should not be quantified by predetermined percentages of value; it should be determined on the basis of an overall assessment.

11. The plural form of the word "obligations" in Article 3(2) CISG should prevail, despite the use of the singular in the Arabic and French text of the Convention.

Comments

1. Introduction

1.1. Article 3 CISG is one of the provisions that define the field of application of the Convention. It considers contracts for the supply of goods to be manufactured or produced to be contracts for the sale of goods, unless the buyer undertakes to supply a substantial part of the materials necessary for the manufacture or production (Article 3(1) CISG). Under Article 3(2) CISG the Convention does not apply to mixed contracts in which labour or other services are involved if the labour or other services form the preponderant part of the obligations of the party who furnishes the goods.

1.2. Paragraphs (1) and (2) of Article 3 CISG govern different matters, though in complex transactions there may be some reciprocal influence in their interpretation and application. For example, where the materials supplied by the buyer are not themselves the substantial part of the materials necessary to manufacture the goods (and therefore, under Article 3(1), the CISG would apply), and the services to be provided by the seller evaluated alone are not the preponderant part of the services part of the mixed contracts (so that, under Article 3(2), CISG would also apply to this part), nevertheless, under exceptional circumstances, both contributions combined might change the character of the transaction as a whole so much that it cannot be qualified as a sale governed by the CISG. However, in these situations, not only the entire transaction has to be considered and characterized, but also the policy that in case of doubt application of the Convention is to be preferred.

1.3. Distinguishing contracts for the sale of goods from services contracts is a highly controversial issue under many domestic legal systems where a sub-category of the latter is often found: work contracts in which one of the parties provides the necessary materials for the construction by the other party (contracts for works and materials). Although the different legal systems would almost unanimously consider a contract to be a work contract when the buyer (owner) provides all or a substantial part of the materials, when the seller (contractor) provides them, different solutions are considered: sales contracts, work contracts, or even mixed or *sui generis* contracts.

1.4. Domestic legal systems differ as to the criteria and factors to be applied in order to characterize a contract as a sales contract. The criteria to be followed include, among others, the comparison between the obligation to do and the obligation to give; the character of the object/goods (fungible/nonfungible; standard/custom-made); the possible alteration of the object (whether or not an item with its own individuality is created); whether the production of the goods was done before the contract, or if the goods belong to the kind of goods that are usually produced by the seller; the skill of the person who is to produce the goods; and, finally, the need to transfer property in the goods.[3]

1.5. As compared to the diversity of approaches encountered in domestic law, the Convention adopts two criteria of distinction, "substantial part" (Article 3(1) CISG) and "preponderant part" (Article 3(2) CISG). Therefore, the Convention considers as sales contracts, contracts for the supply of goods to be manufactured or produced by the seller with materials provided by him or by the buyer if the buyer undertakes to provide some but not a substantial part of the materials necessary for the manufacture or production (Article 3(1) CISG).[4] However, under

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[3] See, Pilar PERALES VISCASILLAS, Hacia un nuevo concepto del contrato de compraventa: desde la Convención de Viena de 1980 sobre compraventa internacional de mercancías hasta y después de la Directiva 1999/44/CE sobre garantías en la venta de bienes de consumo. Actualidad Civil, n° 47-48, 15 al 28 de diciembre de 2003, pp. 1199-1224

[4] In this situation, the rules of the Convention apply to the non-performance or malperformance of the buyer with the necessary adaptations. See: SCHLECH-

many domestic laws such contracts would not be considered to be sales of goods contracts. On the other hand, the Convention is not applicable if the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services.

1.6. The terms "substantial" and "preponderant" have been subject to conflicting views by legal writers and the case law. Many of these interpretations are derived from and reflect national doctrines applied to the analysis of Article 3 CISG. An autonomous, international and uniform interpretation of Article 3 CISG is needed (Article 7(1) CISG).

1.7. The analysis of Article 3 CISG becomes even more complex due to four other factors:

a) Differences among the different authentic texts of the Convention as regard the words "substantial" (Art. 3(1)), "preponderant" (Article 3(2)) and "obligations" (Article 3(2));
b) "Different" interpretations of Article 3 CISG and other relevant international treaties;[5]
c) Comments and case law on Article 3 are scarce and often do not contain thoughtful analyses of the different issues of interpretation involved;
d) Finally, the relationship between Article 3(1) and Article 3(2) CISG.

TRIEM/SCHWENZER/SCHLECHTRIEM, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 2nd ed., Oxford: 2005, Art. 3 n° 3.

[5] The English text of Article 4 of the Hague Convention on the Law Applicable to International Sales Contracts (22 December 1986) is identical to Article 3 CISG. However, in this instance, the French text does not use the term "part essentielle" (as in Article 3(1) CISG), but "part importante".

Article 6 of the 1974 UN Convention on the Limitation Period in the International Sale of Goods is almost identical to Art. 3 CISG. The Spanish version follows the French rather than the English version and therefore the standard used is "parte esencial" instead of "parte sustancial" (*substantial part*) as in CISG.

2. Article 3(1) CISG: Contracts For The Supply Of Goods To Be Manufactured Or Produced

a) The interpretation of "substantial part"

2.1. The Convention uses a vague term, "substantial part", as one of the key elements in the interpretation of Article 3(1) CISG. There are differences among the authentic texts of the Convention ("substantial part", "parte sustancial", and "part essentielle"), which seem to denote different standards of interpretation. Scholars have also used different undefined terms to delimit "substantial part" which does not help clarify its meaning. For example, "substantial part" has been defined as "considerable part,"[6] or as "parte cuantiosa."[7]

2.2. Two different criteria of interpretation of the term substantial are found: economic value and essential. Also, it would be necessary to assess the need to quantify the term "substantial".

1) The "economic value" v. "essential" criterion

2.3. Several scholars have considered that "substantial part" means economic value[8]: the materials provided by the buyer ought to be higher in value (price) as compared to those provided by the seller in order to exclude the CISG.[9] This criterion has also been followed by some cases.[10]

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[6] Warren KHOO, Article 3, n°2.2, in Cessaro Massimo BIANCA and Michael Joachim BONELL (eds.), *Commentary on the International Sales Law. The 1980 Vienna Sales Convention,* Milano: Giuffrè, 1987.

[7] Jorge ADAME GODDARD, *El contrato de compraventa internacional,* México: Mc Graw-Hill, 1994, p. 50.

[8] See among others: John O. HONNOLD, *Uniform Law for International Sale under the 1980 United Nations Convention*, The Hague: Kluwer Law International, 3ª ed, 1999, n° 106. Some scholars also use the "essential" test as a secondary criterion after the economic value test: Fritz ENDERLEIN/Dietrich MASKOW, *International Sales Law,* Oceana, 1992, pp. 36-37.

[9] Also in case law comparing the value of the materials supplied by the seller with the value of the materials supplied by the buyer: LG Berlin, 24 March 1998 (Germany); HG Zürich, 10 February 1999 (Switzerland); and HG Zürich, 8 April 1999 (Switzerland).

[10] Arbitration Court of the Chamber of Commerce and Industry of Budapest, 5 December 1995 (VB/94131) (Hungary): supply of waste containers to be produced by the seller, the value of the materials supplied by the buyer only amounted to approximately 10% of the total value of the containers to be produced, hence the

2.4. Other scholars, as supported by some case law, consider that the standard of interpretation of the term "substantial part" should be based in the essentiality of the goods, i.e., in the quality/functionality of the materials provided by the parties, as the French version seems to suggest using the term "essential part".[11] There have also been cases that have followed this approach.[12]

2.5. The legislative history of the Convention supports the conclusion that the essential criterion was rejected. Both Article 6

CISG was applicable by virtue of Art. 3(1); HG Zürich, 8 April 1999 (Switzerland); and ICC 8855/1997, JDI, 2000, 4, p. 1070, with J. Arnaldez observations, stating that Art. 3(1) refers to "la part prépondérante, c'est-à-dire la valeur essentielle".

OLG München, 3 December 1999 (Germany) is an interesting case because it applies both an economic value and an essential criterion, the latter on the basis of the wording of the French text: *"The few tools which were to be supplied by the buyer are neither with respect to their value nor their function essential ones"*.

[11] There are case law and legal commentaries that have considered that the French term "part essentielle" implies an interpretation based upon the quality/functionality of the materials provided by the parties. For example: Bernard AUDIT, *La vente internationale de marchandises (Convention des Nations-Unies du 11 Avril 1980)*, Droit des Affaires. Paris: L.G.D.J., 1990, n° 25, pp. 25-26. And OLG München, 3 December 1999 (Germany), where the Court considered the essential criterion on the basis of the French text: *"The few tools which were to be supplied by the [buyer] are neither with respect to their value nor their function essential ones -the French text of the Convention speaks of "part essentielle" -not "substantial parts "— as stated in the English text — of the plant to be delivered"*.

The "essential" criterion has been used as complementary to the economic value criterion by some legal writers, although others consider the essential criterion to be at the same level as the economic criterion: See among the most recent commentaries: Francisco OLIVA BLAZQUEZ, *Compraventa internacional de mercaderías (Ambito de aplicación del Convenio de Viena de 1980*, Valencia: Tirant lo blanch, 2002, p. 194. The essential criterion is rejected by: KHOO, Article 3, n° 2.2: *("The materials supplied need not be essential for the manufacture or production. Nor is it sufficient to take the transaction out of the Convention that the material supplied is an essential part")*.

[12] ICC 11256/ESR/MS, 15 September 2003 (Los Angeles) (unpublished) (on file with the rapporteur) considered the CISG inapplicable on the basis of Art. 3(1). It concluded that the motors provided by the buyer were a substantial part of the materials necessary for the manufacture of the trucks, because they were necessary for the product to be considered a "vehicle".

In Cour d'appel de Grenoble, 21 October 1999 (France), the tribunal analyzed a case in which the seller had to manufacture shoes with some elements supplied by the buyer: the soles and a characteristic metal decoration of the brand Pierre Cardin, and stated that *"having as its object a sale of goods to be made for which the essential material elements — other than soles and a characteristic metal decoration of the brand Pierre Cardin — necessary for the manufacture, were supplied by the seller"*.

of the 1964 Uniform Law on International Sale of Goods (ULIS) and Article 1(7) of the 1964 Uniform Law on Formation (ULF) state that the Uniform Law is excluded if the party who orders the goods provides an *essential and substantial part* of the materials. The word "essential" was deleted suggesting that the essential criteria was rejected by the drafters of the CISG. However, despite the fact that "essential" was there "thrown out the door", it re-entered "through the window" via the French text of the Convention, and the interpretation made by some legal writers and in some of the case law.

2.6. The "economic value" criterion should prevail in the interpretation of the words "substantial part" in Article 3.1 CISG. Absent any other indication in the contract, the price of the materials to be considered is that of the buyer's market at the time of the conclusion of the contract.[13]

2.7. An "essential" criterion should only be considered where the "economic value" is impossible or inappropiate to apply, i.e., when the comparison of the materials provided for by both parties amounts to nearly the same value.

2) Quantification of the term "substantial part"

2.8. Legal writers who follow the economic value criterion have generally quantified the term "substantial part" by comparing Article 3(1) CISG (substantial) with Article 3(2) CISG (preponderant): substantial being less than preponderant. In this way, legal writers have used the following percentages to quantify substantial: 15%,[14] between 40% and 50%,[15] or more generally 50%.[16] At the same time, other authors, although they have not

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[13] See SCHLECHTRIEM/SCHWENZER/SCHLECHTRIEM, Article 3, n° 3 a).

[14] HONNOLD, *Uniform Law*, n° 59. See example 3B, in which the value of the chromium — an essential ingredient for the manufacture of stainless steel — comprised 15% of the total value of the materials used in manufacturing the goods. Prof. Honnold states that *"a tribunal might well conclude that 15% is 'substantial' but the evaluation of such questions of degree is difficult to predict"*. As will be shown, the 15% standard as well as any other standard below 50% should be considered too low in the interpretation of the words "substantial part" (see, *infra* 2.10).

[15] ADAME, p. 51, who also states that if the value represents a percentage of 35%, the Court would need to decide whether or not it is substantial on a case-by-case basis.

[16] See for all: ENDERLEIN/MASKOW, p. 36.

fixed any numbers in regard to the quantification of the term "substantial" have declared that "preponderant" means "considerably more than 50% of the price" or "clearly in excess of 50%".[17] Thus it seems that for the latter authors, the quantification of the term "substantial" is placed above the 50% figure. Also, some Courts have followed this approach.[18]

2.9. To consider a fixed percentage might be arbitrary due to the fact that the particularities of each case ought to be taken into account; that the scholars are in disagreement; and that the origin of those figures is not clear.[19] Therefore, it does not seem to

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[17] Peter SCHLECHTRIEM, *The UN-Convention on Contracts for the International Sale of Goods*, Vienna: Manz, 1986, p. 31: *"preponderant in this sense should be considerably more than 50% of the price"*; and SCHLECHTRIEM/HERBER, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 1st ed., Oxford: 1998, Art. 3, n° 4.

[18] HG Zürich, 8 April 1999 (Switzerland), referring to Art. 3(1) CISG, stated that: *"The CISG is also applicable if the materials to be delivered are a good deal less in proportion to the price of the goods and therefore the manufacture is the crucial factor herein."*

OLG München, 3 December 1999 (Germany) stated in regard to Art. 3(2) CISG: *"An approximately identical value of the different obligations is sufficient to render the Convention applicable (Staudinger/Magnus, note 22)"*; and Arbitration Award, 30 May 2000 (356/1999) (Russia) where the tribunal considered the CISG applicable — Art. 3(2), although the tribunal referred to Art. 3(1) — to a contract of shipment of equipment and some post-delivery services since the price of the equipment to be delivered amounted to more than 50% of the entire price of the contract.

[19] Fixed percentages were mentioned only three times during the preparatory work of the Convention. One was in relation to Article 3(2) CISG, Mr. Sevón (Finland) referred to a UK proposal to substitute the words "preponderant part" for "major part in value"; he said that: *"Under that proposal 51 per cent of the value of a contract would decide the nature of that contract. The existing text was not so rigid"* (A/CONF.97/C.1/SR.2, p. 242; also in John O. HONNOLD, *Documentary History of the Uniform Law for International Sales*, Deventer/Netherlands: Kluwer Law and Taxation Publishers, 1989, p. 463). It seems that for the Finnish delegate "major part in value" meant that it should take more than 51% in value to exclude the Convention. The other two interventions were made in relation to paragraph (1) of Article 3 CISG. Mr. Rognlien, of Norway, proposed the exclusion of the Convention only when the buyer undertook to supply "all or the substantial part" (A/CONF.97/C.1/L.13, p. 84; also in HONNOLD, *Documentary History*, p. 656). In order to explain that proposal, Mr. Rognlien, stated that the word "substantial" might be replaced by "major", indicating that the proportion must be over 50% (Official Records, p. 243; also in HONNOLD, *Documentary History*, p. 464). It seems that for the Norwegian and Finnish delegations, the definition of "major" is over 50%. The last intervention was made by Mr. Herber (Federal Republic of Germany), who in relation to the Norwegian proposal stated: *"His delegation had not previously held the view that it must necessarily imply over 50 per cent. If the origi-*

be advisable to quantify the word "substantial" *a priori* in percentages. A case-by-case analysis is preferable and thus it should be determined on the basis of an overall assessment.

2.10. Even if one were to use a percentage, the 50% figure may be too low to justify exclusion of the Convention, particularly in the view of the aim of the CISG (Article 3(1)), which states a "pro Convention principle". An approach that favors the application of the Convention is preferred because Article 3(1) CISG is drafted expressing a general rule (applicability of the Convention) and an exception (exclusion of the CISG). Furthermore, an approach based on the principles of international and uniform interpretation and application of the Convention should be sought (Article 7 CISG). Besides, the modern legal and economic approach to contracts for the sale of goods is even wider than the approach embodied in Article 3(1) CISG.[20]

b) Interpretation of term "materials necessary for such manufacture or production"

2.11. Another key element in the interpretation of paragraph (1) of Article 3 CISG is the analysis of the phrase "materials necessary for the manufacture or production" of the goods. It is clear that raw materials are included, and also that so-called accessory elements such as materials needed for the packaging

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nal text was unclear, his delegation could support the Norwegian proposal" (Official Records, p. 243, also in HONNOLD, *Documentary History*, p. 464).

[20] This tendency can be observed in several recent national and international instruments: EU Directive 1999/44, 25 May 1999, of the European Parliament and of the Council on certain aspects of the sale of consumer goods and associated guarantees (OJ L 171, 7 July 1999, pp.12 et seq), Art. 1.4: *"Contracts for the supply of consumer goods to be manufactured or produced shall also be deemed contracts of sale for the purpose of this Directive"*; Principles of European Sales Law, Draft 14, June 2004. Utrecht Working Team on Sales Law, subgroup of the Sales, Services and Long-Term contracts group, Article 1:102(1) follows the text of Art. 3.1 CISG. Paragraph 2 of Article 1:102 adopts the same criteria as the Directive 1999/44: *"In a consumer transaction any contract for the supply of goods to be manufactured or produced is to be considered as a contract of sale"*. See also new section 651 BGB (German Civil Code) (Application of Sales Law): *"The provision concerning the sale of goods applies to a contract for the supply of moveable things that are to be produced or manufactured (. . .). Where the moveable things to be produced or manufactured are specific goods, sections 642, 643, 645 and 650 apply, except that the relevant time under sections 446 and 447 replaces the time of acceptance of the work*. See among the most recent legal writers: PERALES VISCASILLAS, Hacia un nuevo, pp. 1199-1224.

and transportation of the goods, or materials needed for an acceptance test are excluded. Moreover, materials that are not strictly speaking needed for the manufacture or production of the goods cannot be considered materials in this sense. An example would be the printing film provided by the buyer in a contract of sale under which the seller was to print and deliver books, since in this case the film provided is needed for the process of production of the goods and its requirements, but does not become part of the goods themselves.[21]

2.12. More problematic within the meaning of the term "materials" is the inclusion or exclusion of the technology, technical specifications, drawings, formulas and designs necessary for the production of the goods. Case law and legal writers are in disagreement. The controversy began with a French decision (Cour d'appel de Chambéry, 25 May 1993) that did not consider the CISG applicable on the basis that the production of the goods had to be made following the designs provided by the buyer. In the opinion of the French court, the designs amounted to a substantial part of the materials in the sense of Article 3(1) CISG. It appears from the report of the case that the *only* "material" provided by the buyer were the designs.

2.13. This decision has been criticized because the designs are not within the concept of materials and because contracts in which know-how is transferred *are* governed by the CISG.[22] The legislative history of the Convention supports this criticism. There was a proposal, that was opposed and finally withdrawn, by the UK delegation aimed at excluding the Convention when

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[21] ICC 8855/1997, JDI, 2000, 4, p. 1070, with J. Arnaldez observations. The court said: *"La distinction mentionnée à l'Article 3, paragraphe 1 de la Convention est fondée sur l'origine des matériaux de fabrication et non sur la nature particulière du procédé de fabrication ou de ses conditions."*

See also: HG Zürich, 10 February 1999 (Switzerland) in a contract for printing, binding and delivery of art books and catalogues, the court held that *"In the present case, it is undisputed that — while the (buyer) delivered the setting copies for the artistic content of the art catalogues — the (seller) himself had to acquire the material for the execution of the printing orders. Therefore, the CISG applies insofar as it contains relevant provisions for the parties' contractual relationship."*

[22] See, e.g.,: Ulrich C. SCHROETER, Vienna Sales Convention: Applicability to "Mixed Contracts" and Interaction with the 1968 Brussels Convention. Vindobona Journal of International Comercial Law and Arbitration, 2001, p.74, with further citations.

the buyer supplied the know-how, e.g, when *"the party who orders the goods undertakes to supply: a) a substantial part of the materials; or b) the information or expertise necessary for such manufacture or production"*.[23] The CISG-AC considers that contracts in which the buyer supplies only designs (or drawings, technical specifications, technology or formulas) *are* covered by the Convention[24] as shown by the legislative history of the Convention and impliedly by Article 42(2)(b) CISG.

2.14. Nevertheless, the French decision introduces a very important ramification in the interpretation of the term "materials" under the Convention. Know-how, or designs provided by either of the parties are taken into account only if they are enhancing the value of the materials. However, if the drawings, technical specifications or designs are accessory, they are not to be considered as materials.[25] First, the legislative history

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[23] A/CONF.97/C.1/L.26, p. 84; also in HONNOLD, *Documentary History*, p. 656.

[24] See impliedly the Swiss Federal Supreme Court, 17 October 2000 analyzing a contract of sale of lockers to be manufactured by the seller following the buyer's drawings. The Federal Supreme Court did not discuss the CISG's applicability that was denied by the Appellate Court on the basis of Art. 3(2) CISG, e.g., the supply of services (installation work) was considered to be the preponderant part.

[25] OLG München, 3 December 1999 (Germany) is an example of this situation. Under the contract, the seller had to manufacture and deliver a window production plant (also there were some post-delivery obligations). According to the contract, the buyer had also the obligation to deliver some tools and *drawings of the types of windows to be produced by the plant*. When analyzing paragraph (1) of Article 3 CISG, the tribunal did not refer to the drawings. There are two possible explanations to that silence: first, that the tribunal did not consider the drawings to be within the concept of materials in Art. 3(1) CISG, or a second reading in line with the concept that accessory materials do not qualify as "materials necessary for such manufacture or production": the drawings to be provided by the buyer were not for the production of the window plant (object of the contract) but of the types of windows to be produced by the plant.

OGH, 18 April 2001 (Austria): the parties concluded an "agreement of cooperation" to develop a sealing material called "Resitrix". The buyer, who was the owner of the patent, was obliged to deliver the semi-finished product in order to be processed by the seller in accordance with a jointly developed specification; the seller had the exclusive licence to distribute the product in several countries. Although the contract was in any case outside the temporal scope of the Convention, the Court referred to Art. 3 CISG and held that it was not applicable because the buyer had to deliver a substantial part of the materials: the semi-finished goods influenced decisively the finished product.

OLG Frankfurt a.M., 17 September 1991 (Germany) ruled within the scope of the CISG (Art. 3(1)) a contract in which shoes were to be manufactured according to the buyer's instructions and marked with an "M" trademark.

shows that within the concept of materials not only raw materials are included[26] and thus, at least, the only components of the final object – wholly manufactured or not – would be included. Second, the withdrawn UK proposal did not suggest that, within the concept of materials, know-how is always excluded, but that a contract will not be considered a sales contract in a situation in which the buyer *only* supplied the expertise necesary for the manufacture or production of the goods, as is shown by the fact that the proposal consisted in two separate choices (a/b), as well as from the use of the conjunctive "or".

2.15. However, not all designs or drawings would be included within the concept of materials, only those necessary for the manufacture and production of the goods and therefore that contribute originality, speciality or exclusivity to the goods. This will usually imply that where the buyer or the seller contributes material that embodies industrial or intellectual property rights (e.g., a patent or other industrial property rights), these rights should be included in the idea of enhancing the value of the goods in the sense of Article 3(1) CISG.[27]

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[26] The term "raw materials" appeared for the first time in several Hague Conventions on the Law Applicable to the Contract of Sale (Art. 1 *Convention sur la loi applicable aux ventes à caractère international d'objets mobiliers corporels*, 15 June 1955; Art. 1 *Convention sur la loi applicable au transfert de la propriété en cas de vente à caractère international d'objets mobiliers corporels*, 15 April 1958; and Art. 1 *Convention sur la compétence du for contractuel en cas de vente à caractère international d'objets mobiliers corporels*, 15 April 1958). These texts provided that: *"Pour son application sont assimilés aux ventes les contrats de livraison d'objets mobiliers corporels à fabriquer ou à produire, lorsque la partie qui s'oblige à livrer doit fournir les matières premières nécessaires à la fabrication ou à la production"*. That text was the basis for the deliberation of the 1964 Uniform Laws (ULIS, and ULF), that decided to refer just to the term "materials".

[27] LG Mainz, 26 November 1998 (Germany) provides an example. In this case, the parties agreed on the production and delivery of a crepe-cylinder for the production of tissue paper and there were also accesory obligations: "loading, transport, unloading, installation, insurance until the end of the installation, the waste management of the old cylinder as well as extra work under additional agreements". Although the discussion was in relation with Article 3(2) CISG, it is stated that: *"The court is aware that before the cylinder (which had been fitted for [buyer's] individual needs) was produced and delivered, a major engineering effort as well as planning and conceptual work was required. However, these engineering efforts contributed to the production and delivery of the unit, determine its value, and therefore do not change the fact that the focus of the contract was the cylinder itself. [Seller's] further contractual obligations (transport, installation, maintenance) are therefore accessory obligations that pale in comparison to the value of the manufactured cylinder. This assessment leads to the application of the United Nations Con-*

3. Article 3(2) CISG: Contracts for the Supply of Labour and Other Services

3.1. A seller often has to perform services ancillary to delivery such as packaging, dispatching the goods, concluding contracts with carriers, etc. These services do not alter the qualification of the contractual relations between the parties as a sale. However, frequently the seller undertakes more, i.e. services that could also be the subject of an independent contract such as the installation of the assembly line sold,[28] installation of modular wall partitions,[29] assembly of the parts of a plant to manufacture windows,[30] training of the employees of the buyer in the operating of a machine sold, marketing of the goods to be produced by a plant sold, etc. If such services are undertaken in the same contract that contains the obligation to deliver goods and transfer property, the question arises whether such a mixed contract is governed by the Convention. Article 3(2) CISG is meant to solve this question. It excludes from the scope of the Convention contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services. Therefore, a comparison between the obligations related to the goods and the obligations of labour or services is needed in order to see whether the Convention applies. The Convention presupposes a single unified contract, but it has to be analyzed first whether the different obligations are indeed part of a single, albeit mixed contract. This is an issue of contract interpretation. If there is one contract for the supply of goods and services, the Convention applies to the contract as a whole (Article 3(2) CISG).[31] However,

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vention on Contracts for the International Sale of Goods (cf. v. Caemmerer/ Schlechtriem, Einheitliches UN-Kaufrecht, 2nd ed., Art. 3 n. 8)". Impliedly, the same approach is found in OLG Köln, 26 August 1994 (Germany), where a contract for the elaboration and delivery of a market analysis was not considered within the scope of the Convention because it cannot be considered a sale of goods, and also was not a contract within Art. 3(1) CISG. *A sensu contrario*, it is implied from the case that when the ideas (intellectual work) are included in the goods, the contract might be governed by the Convention.

[28] ICC 7660/1994.

[29] Cour of Appeal of Lugano, 29 October 2003 (Switzerland) stating that the installation must be an optional service (art.3(2) CISG).

[30] OLG München, 3 December 1999.

[31] In this situation, the legal remedies of the CISG apply to the breach of the service obligations with the necessary adaptations (Art. 7(2)), see further: Peter

if the parties intended to conclude two separate contracts, the Convention would be applicable to the sales contract, so long as the other requirements for its application were met.

3.2. There are several issues of interpretation in regard to Article 3(2) CISG. The first one is the interpretation of the words "preponderant part" ("principal", "prépondérante"). The interpretation is difficult due to three factors: the standard to be applied (economic value or essential criterion); the mixing up of the interpretation of the words "preponderant" and "substantial" by legal writers; and the quantification in percentages.

3.3. Although, there are certain doubts as to the application of the economic value criterion since a proposal from the UK, that was finally withdrawn, tried to substitute the term "preponderant" for "major part in value,"[32] the economic value approach is correct. The UK proposal did not find support among the delegates because of the change of the word "preponderant" for "major part,"[33] not because it adopted the economic value criterion.[34] An "economic value"[35] criterion prevails, and the

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SCHLECHTRIEM, Interpretation, gap-filling and further development of the UN Sales Convention, May 2004, available online at <http://cisgw3.law.pace.edu/cisg/biblio/schlechtriem6.html>; and Rb Hasselt, 4 February 2004 (Belgium), stating that rules on notice in the CISG apply to the services part of the contract. See also Cour of Appeal of Lugano, 29 October 2003 (Switzerland) stating that the CISG is applicable in a comprehensive manner to a contract for the delivering and installation of goods.

[32] A/CONF.97/C.1/L.26, p. 84; also in HONNOLD, *Documentary History*, p. 656.

[33] It is interesting that the Council of Ministers of the Organization for the Harmonization of Business Law In Africa (OHADA) aproved on 17th April 1997, entered into force on 1st January 1998, a Uniform Act relating to General Commercial Law. Book V (Commercial Sale) which follows very closely the CISG regime, has adopted the standard of "major part" for the English text. Article 204, which is counterpart of Article 3.2 CISG, states that *"The provisions of this Book shall not apply to contracts in which the major part of the obligations of the party that delivers the goods shall be the supply of manpower or other services"*. The French version uses the words "part préponderante". The Act does not reflect a provision similar to Article 3(1) CISG. It has to be noted that OHADA texts are written in French and later translated into English.

[34] A/CONF.97/C.1/SR.2, p. 242; also in HONNOLD, *Documentary History*, p. 463. But see the intervention of Prof. Farnsworth (USA).

[35] In the case law: LG Mainz, 26 November 1998 (Germany), comparing the value of the crepe-cylinder with the value of the post-delivery services; OLG München, 3 December 1999 (Germany): *"In the present case, the value of the agreed services for several mechanics for the period of six weeks merely constitutes a small*

relevant time to assess the value would be the conclusion of the contract. The essential criterion should only be considered where the economic value is impossible or inappropiate to apply taking into account the circumstances of the case.

3.4. The word "preponderant" should not be quantified by predetermined percentages of values but on the basis of an overall assessment. In its interpretation, as well as in the interpretation of the parties' agreements, the intention of the parties as expressed in the documents and the formation of the contract should be taken into account as well. Among the relevant factors to be considered by courts and arbitral tribunals are: the

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part of the total costs for the plant of DM 1,245,000.00"; ICC 7153/1992, in which, according to Hascher, the conclusion of the Arbitral Tribunal that the contract was governed by the Convention (Art. 3(2)) was confirmed by an invoice where the price paid for the assembly of the material was of a completely secondary order of magnitude compared to that of the price of the materials (Dominique HASCHER, ICC 7153/1992. JDI, 1992, n° 4, pp. 1005-1010); Cour d'appel de Grenoble, 26 April 1995 (France): Art. 3(2) CISG was applicable to a sale of a warehouse in which there was also an obligation of dismantling and delivery. The price paid for the contract was 500,000 French francs, with 381,200 francs allocated to the warehouse and 118,800 francs for the dismantling and delivery); KG Bern-Laupen, 29 January 1999 (Switzerland), although wrongly comparing the cost of the materials with the manufacturing of the goods, the value of the manufacture of the goods amounted to 56.25% of the total price (400,000 French francs); KG Zug, 25 February 1999 (Switzerland) in a contract in which the seller was to provide the construction material for a roof and also its installation. The tribunal compared the labour costs with the supply costs and held that the former were not substantially higher as compared with the latter; Arbitration Award, 30 May 2000 (356/1999) (Russia). The Arbitral Tribunal considered the CISG applicable (Art. 3(2)), although the tribunal referred to Art. 3(1)) to a contract of shipment of equipment and some post-delivery services since the price of the equipment to be delivered amounted to more than 50% of the entire price of the contract; HG Zürich, 17 February 2000 (Switzerland), although it did not cite Article 3(2) CISG, the court made a comparison of the value of the services provided by the seller; LG München, 16 November 2000 (Germany): the contract was for the delivery and installation of pizzeria fittings into the buyer's restaurant-facilities. The tribunal considered it to be a contract of sale governed by the Convention (Art. 3(2) CISG). After interpreting the contract and the fact that the price was unitary, i.e., no separation fee for the service, the tribunal held that: *"In view of the considerable amount and value of the objects, which can be gathered from the individual prices, the delivery of goods does not diminish against the performed works, even if a longer period of time is required for the installation"*. And Cour of Appeal of Lugano, 29 October 2003 (Switzerland) considering the CISG applicable since the delivery of the goods (modular wall partitions) constitute the preponderant part of the contract and was of greater value in the performance of the entirety of the contract in dispute.

denomination and entire content of the contract,[36] the structure of the price,[37] and the weight given by the parties to the different obligations under the contract.[38] If, however, a fixed percentage of value is used, a percentage of 50% or below should be disregarded in order to exclude the Convention. Furthermore, a percentage slightly above 50% would not be generally decisive to exclude the CISG. The value of the services rendered ought to be preponderant.

3.5. Whether the so-called *turnkey contract* (*contratos llave en mano*, *clé en main*, *Lieferverträge mit Montagverplichtung*) falls under Article 3(2) CISG is highly controversial. Although some authors have stated that Article 3(2) was introduced in order to exclude those types of contracts from the Convention,[39] a case-by-case analysis is needed, and thus, disregarding the denomi-

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[36] See ICC 7153/1992. The tribunal held that a contract for the furnishing and assembly of materials for a hotel was governed by the CISG, since the contract made it very clear that it was a sales contract.

[37] See LG München, 16 November 2000 (Germany): the contract was for the delivery and installation of pizzeria fittings into the buyer's restaurant-facilities. The tribunal stated that the contract was governed by the CISG: *"According to the written contract, the price for the "entire delivery" was determined by the addition of the individual prices for individual Articles. The "construction", that is, the installation of the fittings, was included in the overall price, as was the shipping; a service fee was not invoiced. This indicates that the preponderant part of the seller's obligation was the delivery of the fitting Articles and not the work rendered during the installation."*

[38] This was precisely the holding of the LG Mainz 26 November 1998 (Germany) in interpreting "preponderant part" under Art. 3(2) CISG. In the case, the price of the production/delivery/and post-services of a crepe-cylinder was a unitary price and the court found it impossible to ascertain the value of the seller's obligations under the contract. Therefore, the tribunal took into account both the contractual documents and the circumstances of the formation of the contract in order to ascertain whether the parties saw the preponderant part of the seller's obligation in the delivery of the crepe-cylinder or in the services accompanying the delivery. In this regard, the tribunal pointed out that the production and delivery obligations were very detailed in the contract as opposed to the post-services obligations.

See also: OLG München, 3 December 1999 (Germany): *"Additionaly, the particular interest that the purchasing party place on an obligation, e.g., the characteristic obligation can be decisive (Herber, note 5 on Art. 3 CISG; Staudinger / Magnus, BGB, 13th ed., note 21 on Art. 3 CISG)"*. And Corte di Cassazione, 9 June 1995 (Italy), considering *"the essential aim of the contract and its meaning that, relative to it, the delivery and contribution of doing assume, considering the result the parties wanted to accomplish"*.

[39] SCHLECHTRIEM/HERBER, Art. 3, n° 8 (1st ed).

nation, each situation would require an special examination to see whether or not the test of Article 3(2) CISG is satisfied.[40]

4. The Relationship Between Paragraphs (1) and (2) of Article 3 CISG

4.1. Paragraphs (1) and (2) of Article 3 CISG govern different matters. A relationship between them might be derived from the use of the singular of the word "obligation" in some of the authentic texts of the Convention. The French text and the Arabic text use the singular, while the other official languages, except for the Chinese text which is linguistically neutral on this point, use the plural form. The impact of the use of the word "obligation" in singular has clear implications in the interpretation of the text. The singular might invite an interpretation that labour and other services have to be compared instead of labour and services on the one hand and furnishing of goods on the other hand. Or even worse, it might be that the use of the singular might create a relationship between paragraphs (1) and (2) of Article 3 CISG in the sense that the work obligation in manufacturing the goods would be compared with the delivery obligations. The intention of the drafters was to refer to the plural form, and therefore the use of the singular should be rejected.[41]

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[40] In the case law, HG Zürich, 9 July 2002 (Germany) does seem to automatically exclude the Convention in the presence of a *turnkey contract*. In the case, the seller had the obligation to plan, deliver, assemble, supervise the assembly, and put into operation a complete plant for the breaking down and separation of food-cardboard packaging. The tribunal regarded this as a *turnkey contract* that was not governed by the Convention (Art. 3(2)): *"It goes without saying that the supply of labour for the assembly, supervision of the assembly and the putting into operation of the plant plays a very important role in such a project. Oftentimes, the functioning, respectively the correct adjustment of the various plant parts and their coordination with each other can only be undertaken when the plant is already effectively in operation (. . .).Accordingly, the assembly, adaptation, instruction and similar works constitute a considerable part of the contractual performance. In accordance with scholarly opinion, the court therefore assumes that the CISG is not supposed to apply to turnkey contracts, which do not so much provide for an exchange of goods against payment, but rather for a network of mutual duties to collaborate with and assist the other part (. . .)".*

[41] The use of the singular is also seen in the French version of Art. 4.2 of the Hague Convention on the Law Applicable to International Sale of Goods, 1986. Note, however, that the French text of the 1974 Limitation Convention on the International Sale of Goods (Art. 6(1)) uses the plural. See, among the scholars: Peter

4.2. Also an incorrect relationship has been created by legal writers and case law[42] in contracts for goods to be manufactured or produced by the seller: the weight of the interpretation is on the term "materials" and not on the obligation of manufacturing the goods. However, the process of manufacturing or producing the goods requires some kind of work/labour obligations that might be and has been wrongfully included in the analysis of paragraph (2) of Article 3 CISG.[43] Some cases have also drawn a link between paragraph (1) and paragraph (2) of Article 3 CISG on the basis of the distinction between standard goods and custom-made goods.[44] If the goods are standard, no activity of production is made by the seller and therefore there

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SCHLECHTRIEM, *Internationales Kaufrecht*, Mohr, Siebeck, 2003, pp. 21-22, footnote 39.

[42] For example, as shown before, the discussion of what is substantial part is wrongfully mixed with the discussion of what is preponderant part.

[43] ADAME, p. 51, states that paragraph (2) may be applied to the situations referred to in paragraph (1) of Article 3 CISG. This has been done by LG München, 16 November 2000 (Germany): the contract was for the delivery and installation of pizzeria fittings into the buyer's restaurant facilities, the court analyzed the manufacture of the fittings as part of the seller's obligations under Art. 3(2) CISG; OGH, 27 October 1994 (Austria) in a contract for manufacturing brushes and brooms with raw materials provided by the buyer, the CISG was held inapplicable on the grounds that the buyer supplied a substantial part (Art. 3(1)) and that the processing of the raw materials was the main obligation of the seller (Art. 3(2)); and Kreisgericht Bern-Laupen, 29 January 1999 (Switzerland), where the tribunal did not consider the CISG applicable on the grounds that the manufacturing of the machine was the characteristic element of the contract (Art. 3(2) CISG), e.g., the interest of the buyer was mainly in the production of the machine.

It seems to be also the position of HG Kanton Aargau, 5 November 2002 (Switzerland), in which the CISG was considered to be applicable on the basis of Art. 3(1) CISG in a contract for the production, labelling, positioning, service and removal of three inflatable triumphal archs; the court stated that the substantial subject matter of the contract was the production of the goods.

[44] This approach has been wrongfully followed by some cases, particularly, from Germany, when considering the application of the Convention to software contracts. Although this Opinion does not deal with software contracts, the cases serve as an illustration of the different treatment accorded standard goods and custom-made goods.

- For cases considering that standard software is governed by the CISG, but not custom-made software, see: OLG Köln, 16 October 1992 (Germany); OLG Köln, 26 August 1994 (Germany); and LG München, 8 February 1995 (Germany).
- On the other hand, HG Zürich, 17 February 2000 (Switzerland), considered the sale of software as well as the joint purchase of software and hardware as a sale of goods within the CISG, citing Articles 1, 3(1), and 51.

is no performance of services or work.[45] However, such a distinction is not adopted by the Convention.

4.3. The work, labour or other services obligations ought to be considered as part of the obligations to manufacture or produce the goods referred to in Article 3(1) CISG. This position is confirmed by scholars[46] and the majority of the case law.[47] How-

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[45] See LG München, 16 November 2000 (Germany): the contract was for the delivery and installation of pizzeria fittings into the buyer's restaurant facilities. The court stated that: *"It follows that the fitting objects were not designed by the (seller), but that they were standard goods which were only adjusted in their measurements to the customer's requirements and the conditions of the restaurant facilities. Consequently, the production of the objects also did not constitute a performance of works or services, which is in the fore in contrast to the delivery of goods"*. In OLG München, 3 December 1999 (Germany) the tribunal, when analyzing the term "substantial part", considered relevant the fact that the plant to be produced was of a standard model.

[46] Contracts that require production, assembly, and delivery of a machine are governed by Article 3(1) CISG. See, among others, HONNOLD, *Uniform Law*, n° 60.1, footnote n° 4: *"As a result of the basic rule of Art. 3(1), labor costs in manufacturing the machinery would be irrelevant; such costs are not the "supply of labour or other services" under Art. 3(2)"*).

The solution is logical because otherwise it might be that the contract is considered to be governed by the Convention by virtue of Art. 3(1) CISG, but excluded applying paragraph (2).

[47] ICC 7660/1994: A contract for the production, delivery, and installation of a complete automatic assembly line for batteries is governed by Art. 3(1) CISG; Cour d'appel de Paris, 14 June 2001 (France), in which the parties agreed to the manufacture of 128 decorated crystal panels to be installed in the wall of a hotel in Egypt. The tribunal held that the contract was not a contract *d'entreprise*, as stated by the Court of First Instance, but a contract of sale. The tribunal stated that Art. 3(2) CISG did not apply since the obligation of the work done for the production of the crystal panels cannot be considered as a work or service obligation in the sense of that provision (JDI, 2002, n° 2, pp. 483 et seq., with note of Claude Witz, who also favors the approach of the court). The decision went into appeal to the Supreme Court that did not mention Art. 3 CISG (Cour de Cassation, 24 September 2003 (France)). See also: HG Zürich, 8 April 1999 (Switzerland); LG Mainz, 26 November 1998 (Germany); OLG München, 3 December 1999 (Germany); St. Gallen, Gerichtskommission Oberrheintal, 30 June 1995 (Switzerland) in reviewing a contract for the delivery and installation of four sliding gates to be used for the construction of two halls, held that the manufacture of the doors was within paragraph (1) of Art. 3, and that the installation was in paragraph (2); Tribunal de commerce de Namur, 15 January 2002 (Belgium), in a contract of sale of a "processing center" where the parties agreed to the construction of the machine in the seller's workshops; provisional receipt; the dissembling and the transport of the parts in the establishment of the buyer; the assembling of the machine and the putting in service and the final receipt. The Court considered the contract within Art. 3(1) and did not discuss the application of Art. 3(2) CISG; and KG Schaffhausen, 25 February 2002 (Switzerland), although the Court did not refer to Art. 3(2)

ever, when interpreting a situation in which there is no work or services obligations involved in the manufacture or production of the goods (Article 3(1) CISG), the services prior to, concurrent with and after delivery of the goods would be analyzed under Article 3(2) CISG.

4.4. Finally, as it has been already pointed out,[48] an autonomous interpretation of paragraphs (1) and (2) of Article 3 CISG is advisable. However, it might be that in complex transactions there may be some reciprocal influence in their interpretation and application. In those situations, the transaction as a whole should be analyzed taking into account the "pro Convention" principle.

5. Table of Cases Cited

Unless otherwise indicated, full-text original-language texts of all cases cited are available online at the CISG Autonomous Network Website for the country reported [For the URLs of these websites, go to <http://cisgw3.law.pace.edu/network.html>]. Full-text original-language case texts and English abstracts of most of the cases cited are also available online at Unilex <http://www.unilex.info>. Where, in addition, a full-text English translation of a case is available online, the URL is presented below.

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Oberster Gerichtshof, 18 April 2001

Belgium

Tribunal de commerce de Namur, 15 January 2002, English translation available online at <http://cisgw3.law.pace.edu/cases/020115b1.html>
Rechtbank van Koophandel Hasselt, 4 February 2004

CISG, it considered the Convention applicable because the services (installation, transport) were of subsidiary importance as compared with the obligation to deliver the goods (four drilling apparatus items, three high-pressure pumps, two mixing machines and several replacement parts).

[48] See, *supra* 1.2.

France

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