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CISG AND ITS APPLICABILITY TO SOFTWARE SALES

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ABSTRACT

The United Nations Convention on Contracts for the International Sale of Goods (CISG) is an body of international law that has developed a peculiar system of interpretation that among the years has being invigorated its applicability when facing the development of the modern society together with new technologies. And one example of a human creation in a way to form a systematic application towards the use of information is the scenario where the software becomes the subject matter for the international sales among parties from different legal systems. The present paper aims to focus on the applicability of the CISG among the software sales and to present elements and principles that can lead to a more substantial interpretation of the convention involving software transactions.

Key-Words: Software. Applicability. Autonomous Interpretation. CISG.

I. Introduction

This present paper aims to pursuing and overview the CISG[1] applicability on today's global commerce dwelling the specificities as to its application over the software contracts.

The consideration became intriguing since the CISG initially did not seek to regulate in its specificity the foreign trade of software due to a lack of its existence, incipient or insignificant relevance of it the time of its drafting.

And for the purposes of identify the various aspects of the treaty that may or may not apply to the mentioned transaction we will establish a notion of the legislature goal at a time, the scope of application, principles and rules of the treaty and - according to the various elements of a contract related to software – interpret if the international sale of software can be subject to fall within the scope of mentioned treaty.

II. Historical Briefing of the CISG

In order to pursue the scope of applicability of the convention it is a very useful tool – specially to provide a perspective of its international character – to determine what the legislature were aiming and what were the international community expectancy over its content.[2]

[1] United Nations Convention on Contracts for the International Sale of Goods, Apr. 10, 1980, S. TREATY DOC. NO. 98-9 (1983); 19 I.L.M. 668-99 (1980); see also Final Act of the United Nations Convention on Contracts for the International Sale of Goods, Annex I, U.N. Doc. A/Conf.97/18 (1980), in Official Records, Conference on Contracts for the International Sale of Goods 178, U.N. Doc. A/Conf.97/19 (entered into force on Jan. 1, 1988) hereinafter CISG.also called the "United Nations Convention for the International Sale of Goods", the "Vienna Convention" or the "UN Sales Convention".

[2] The preamble or preliminary recitals of the CISG shows two major motives for the convention: a) facilitate and regulate the consequences of a *new economic order;* b) and *removal of legal barriers in international trade and*

And another reason for the relevancy of a historical analysis is to identify some of the founding principles that remain applicable to the various forms of facts and actions regulated by the norm as to reach some acts of commerce not foreseeable at a time but as well subject to the treaty.

The *new economic order* increased the importance of the international trade as to a consequence of the 19th century industrialization, added by the development and celerity of the means of transnational transportation what made possible a quantity of transactions never seen before with countries that were not used to trade among then. Despite of that historical fact the growth of international trade was not the only driving force take into consideration on its drafting. *While commercial law was largely harmonized until the end of the 18th century, the 19th century witnessed the nationalization or domestication of civil and commercial law, introducing a high level of disunification of the law. Commercial and trade realities brought the quest for harmonization back to the agenda.*[3]

Due to a domestic view of the international trade allied with the new reality aforementioned created a major concern over the certainty and expectations of the legal rules as to apply especially those from regimes of obsolete, fragmentary or inadequate rules applicable to international transactions.

In 1930 the UNIDROIT[4] committee then began the initiative - at this world wide proportion – to unify the substantive rules for the international sales of

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promote the development of international trade related to the international sales of good, all to be consolidated trough such a uniform law.

[3] Kröll, S., Mistelis, L., & Viscasillas. (2011) *UN convention on contracts for the international sale of goods (CISG)* Oxford: Hart Publisher at 2.

[4] UNIDROIT – International Institute for the Unification of Private International Law, is a international independent intergovernmental Organization based in Rome and established trough a multilateral agreement for the purpose of - according to the Article 1 of its Statute - *examine ways of harmonizing and coordinating the private law of States*

goods. Despite of the initial proposal to dwelt with all the aspects of it in 1934 the committee decided to separate the rules of formation from the rules of performance, due to the greater importance attributed to the last one. After several drafts and the interruption due to the World War II, 28 States gather up at Hague during three weeks with the task to approve two conventions which they did on July 1st, 1964: a) The Convention relating to the Uniform Law on International Sales of Goods (with the Annex so called The Uniform Law on International Sales of Goods – ULIS); and, b) The Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (with the Annex so called The Uniform Law on the Formation of the Contracts for the International Sales of Goods (ULF), both together called as Uniform Laws.

On August 18th, 1972 the ULIS entered into force and five days later was the ULF. However they did not reach the universal acceptance of many countries for the following reasons: a) 22 of the States represented were Western Europe countries with more consistent and developed legal systems; b) the States that adopted the rules were those with more similar attitudes towards international trade; c) only nine States ratified both conventions[5]; d) the pressure of the civil law legal systems States - which consisted the majority of the draft committee – leaded to some unclear and abstract draft rules typical from those systems.

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and of groups of States, and to prepare gradually for the adoption by the various States of uniform rules of private law. Today among Brazil, USA and China it has 64 acceding member states.

[5] Belgium, Gambia, Israel, Italy, Luxembourg, Netherlands, San Marino and the United Kingdom. The current status is available at Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (ULFIS), UNIDROIT, http://www.unidroit.org/english/implement/i-64ulf.pdf (last visit Dec. 12, 2012, 10:00 AM)

The uniform laws although did not reach the broad acceptance they were designed but served for the bases of the following legislature work.[6]

Between 1964 and 1966 initiated by a request to harmonization and unification of the international trade law from the Hungarian representative before the United Nations a research document was prepared by Prof. Schmitthoff. Those studies were the basis for the Report of the Secretary General and leaded to the establishment of the United Nations Commission on International Trade Law (UNCITRAL) on December 17th, 1966.[7]

Initially the UNCITRAL decided to work[8] separately on the issues of formation of the contract and the rights and obligations of the parties. In January, 1976 the draft based on ULIS was concluded and on 1978 it was the turn of UKF be concluded. Finally the commission decided that both works should be unified in a single draft convention which was accepted.

In March 10th, 1978 in a diplomatic conference called by the UN and with the presence of 62 States representatives the convention was adopted by 42 votes in favor and opened for accession on April 11th, 1980, entered in force on January 1st, 1988.[9]

The Vienna Convention once ratified by a particular State, it is fully incorporated to its legal system and today It counts for more than 78

[6] The Uniform Law also called "*The Hague"* is still in force in Gambia, San Marino and UK.

[7] UNCITRAL is a Commission of the United Nations established by its General Assembly trough resolution 2205 (XXI) of 17 December 1966 (see annex I) Resolution 2205 (XXI) and begun its work on 1968 over the CISG.

[8] The initial working group headed by Prof. Marrera Graf was composed of members of 15 countries taking into consideration different legal, social and economic systems.

[9] According to article 99 only after the ratification of China, Italy and USA the convention reached the number of countries for entry into force.

States.[10] One of the advances of the convention is that it created a international text that the trade community can rely on as the substantive law applicable. Once it ratified it becomes part of the domestic legal system[11] of the State displacing the national legal regime.[12]

III. Scope of Application

The Convention on Contracts for the International Sale of Goods ("CISG") is an international treaty which has been signed and ratified by the United States and Canada, among other countries. The CISG was adopted for the purpose of establishing "substantive provisions of law to govern the formation of international sales contracts and the rights and obligations of the buyer and the seller." U.S. Ratification of 1980 United Nations Convention on Contracts for the International Sale of Goods: Official English Text, 15 U.S.C. App. at 52 (1997). The CISG applies "to contracts of sale of goods between parties whose places of business are in different States ... when the States are Contracting States." 15 U.S.C. App., Art. 1(1)(a). Article 10 of the CISG provides that "if a party has more than one place of business, the place of business is that

[10] The CISG Member States is available at *Status 1980 - United Nations Convention on Contracts for the International Sale of Goods,* UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (last visited Dec. 12, 2012, 10:00 AM) and nowadays includes China, EUA, Russia and most recently Brasil as the ratification took place trough Decree 538 of October 18th, 2012.

[11] The duality of civil and commercial aspects are of the awareness of the Committee as It can be stated at article 1(3) of the treaty showing that the party legal regime divided in commercial or civil matter has barely no influence of the applicability of the convention which constitute an autonomous substantive law although it still part of the domestic law system.

[12] The applicable regime of the CISG coexists with the domestic regime as especial rule applicable to the subject matter of its content and only in some instances is relevant the need for the consideration of the other domestic sources , i.e. when the matter is excluded from the CISG (art. 6) or when a gap cannot be filled within the system of the Convention (art.7(2)).

which has the closest relationship to the contract and its performance." 15 U.S.C. App. Art. 10.[13]

With the opening statement above there can be inferred two basic assumptions for the applicability of the CISG: a) the subject matter is about international sales of sales of goods; b) between two different ratified States[14].

Those requirements are placed on article 1 of the treaty:

> Article 1
> This Convention applies to contracts of sale o f 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.[15]

The definition of sales of goods are not given directly by the Convention but can be inferred by the joint interpretation of article 30 and 53 that provides the sales contract to be an agreement where the *seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods* in one hand and the buyer must "pay the price for the goods and take delivery of them" according to what was required by the parties and the Convention.

[13] *Asante Technologies, Inc. v. PMC-Sierra*, INC. 164 F. Supp. 2d 1142 (N.D. Cal. 2001) United States 27 July 2001 Federal District Court.
[14] There might be a case when The rules of international law lead to the application of the rules of a contracting state not a member of the treaty according to article 1(2).
[15] Rules of international law for the purpose of defining the CISG applicable law take place when the conflict of rules makes reports to the Convention although one of the parties State is not a contracting State.

Nevertheless not all sales contract are subject to the CISG.

Although the scope of application - subject matter for sales of good as in article 1 – is very contained and consists a broad guidance for its scope the CISG adopt a system of exclusions. And still dealing with the subject matter the Convention also gives a lead to in what aspects and extent it regulates[16] the sales of goods governing its formation and the rights and obligations of both buyer and seller arising from such contract (article 4).

Pertaining to the sales exclusion not governed by the CISG they are (a) sales for personal, family or household use; (b) sales by auction; (c) on execution by authority of law; (d) of stocks, shares, investments securities, negotiable instruments or money; (e) of ships, vessels, hovercraft or aircraft; and (f) electricity.

When the sales consists on the supply of goods it is also relevant to point the exclusions on article 3 that avoid applicability of the Convention. They happen when (a) the goods to be manufactured or produced has a substantial part of the materials provided by the buyer; (b) the preponderant part of the obligation of the party who furnishes goods consists in the supply of labor or other services. This last exclusion will take an important role to the conclusion of this paper.

Before we enter into the applicability of the CISG over the sales of software It is needful to determine the rules and principles to apply, the kind of interpretation to adopt as well as what can fall into the subject matter of the

[16] The convention expressly excludes its governance over the (a) validity of the contract or of any of its provision or usage; (b) the effect which the contract may have on the property in the goods sold. For this matter includes the effect related to intellectual property.

convention. define what can be considered a good for the purpose of the negotiation covered by the Convention

IV. General Principles: Internal and External Principles and Gap Filling

Defining the scope of application for the CISG brings to the scenario a relevant tool not just to set limits to the boundaries of the convention but to understand the mechanism it created to a more accurate and exact reach of the mentioned treaty.

The importance of the principles and rules for that matter finds presence on the provision of Article 7 of the Convention, especially at section 2:

> *(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.*
> *(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.*

Nevertheless the general principles of the present uniform law under study represent a different concept when compared to uniform law.

A modern approach in legal theory affirms the distinction between rules and principles as a matter of quality[17] in which the main distinction resides on the fact that the first are "commands to optimize" and the others a mandatory command applicable in a all-or-nothing fashion.

The rules have one single vector to be the validity. This means that as to the rule the validity must apply *in totum* or not apply at all [18] what in case of a conflict of rules leads to either the insertion of an exception of one or the declaration of invalidity or inapplicability of the other.

In the other hand the principle adopts a more nuanced approach and represents a dimension of weight or importance to the concrete facts or situation. In context a principle can even be weighed against other principles.[19]

Another approach that can differ the principles can be made according to the degree of abstraction and generality. For that principles and rules diverge from each other for its degree of abstraction. [20]

Nevertheless for the purposes of the CISG uniform law at articles 7 (b) leveled up the principles as to govern the sales of goods and to settled it *in*

[17]Cf. Alexy, R. Teoría de los Derechos Fundamentales.(1993) Madrid: Centro de Estudios Políticos y Constitucionales at 86-87. *"El punto decisivo para la distinción entre reglas y princípios es que los princípios son normas que ordenan que lago sea realizado em la mayor medida posible, dentro de las posibilidades jurídicas y reales existentes. Por la tanto, los princípios son mandatos de optimización, que están carcatrizados por el hecho de que pueden ser cumplidos em diferente grado y la medida debida de su cumplimiento no solo depende de lãs posibilidades reales sino también de las juridicas. El âmbito de lãs posibilidades jurídicas es determinado por los princiíos y reglas opuestos. Em cambio, las reglas son normas que solo pueden ser cumplidas o no. Si uma regla es álida, entoces de hacerse exactamente lo que ella exige, ni más ni menos. Pó lo tanto, las reglas contienem determinaciones em el âmbito de lo fáctica y jurídicamente posible. Esto significs que la diferencia entre reglas y princípios es cualitativa y no de grado. Toda norma es o bien uma regla o un principio."*

[18]See Dworkin, R. Taking Rights Seriously. (1977) Cambridge: Harvard University Press at 24.

[19] Cf. Dworkin (Supra 18) at 27.

[20]See HART, H. L. A. *The Concept of Law.* (1994) New York: Oxford University Press at 262

conformity with the general principles – some of those representing express rules.[21]

For the purpose of CISG interpretation and to determine its applicability over software sales the principles of the Convention shall be taken into consideration in their dichotomy as internal and external principles.

Among the *internal principles*[22] on which the CISG "is based" are those *connected with and taken*[23] from the system of the uniform law. *External principles* are requirements and arguments derived from outside the uniform law.

A example of external principles to apply would be the UNIDROIT in the means of interpretation and supplement the Convention.[24]

There might be cases when even with the tools of interpretation contained in the convention are not *per se* effective to match the real facts raising some apparent gap fillings and for that situation the CISG provides[25] that the law applicable will be "by virtue of the rules of international law".

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[21] Gebauer, M. Uniform Law, General Principle and Autonomous Interpretation. Uniform Law Review (2000-4) 683-705 at 687

[22] The good faith is tough one relevant principle of CISG interpretation. Another leading principles are those crystallized on article 6 and 9 as party autonomy and freedom of contract. Moreover it is the principle of respect of customs and practices between the parties or those in adopted in a particular industry or region as the article 9 provides the respect over the usage and practices. There are more principles to be stated but for the purpose of this paper those are the ones that can be strongly depurated from the CISG text and together with article 7 can provide either internal or circumstantial guidance towards the applicability of the convention and its interpretation.

[23] Cf. Gebauer (Supra 21) at 683.

[24] See M.J. Bonell, *The Unidroit Principles of International Commercial Contracts and CISG - Alternatives or Complementary Instruments?* (1996) 26 Uniform Law Review at 34 "The only condition which needs to be satisfied is to show that the relevant provisions of the UNIDROIT Principles are the expression of a general principle underlying CISG" what can attend the purpose of its international character and uniformity.

[25] See article 7(2) of the Convention.

In case of gap filling the convention adopts a system that combines[26] the application of the CISG general principles and, in case of such principles cannot be found or derived from the convention, than shall the domestic law apply to be determined by the private international law.

V. The Interpretation of the Convention

The interpretation of a uniform law is such a relevant issue especially when a legal fact or act to be submitted to its applicability could not be foreseeable by the time of the *travaux préparatories*[27] or it could be foreseeable but for the peculiarity of the facts diverges from a mere theological application.

The roman jargon *in claris cessat interpretatio*[28] has no current doctrine application since the various methods or principles of interpretation provides – despite of the more clear subsumption it may occur - always a balance and applicability of the methods. Even when a method indicates a more clear vector of solution the interpretation a method cannot be fractioned but constitute a body of a system including a logical or theological approach[29].

[26] Cf. FERRARI, F. *Uniform interpretation of the 1980 Uniform Sales Law*. 24 Georgia Journal of International and Comparative Law (1994) at 198 -200.

[27] Cf. Green, J. Dictionary of Jargon (1987) London: Routtedge & Kegan Paul.Jonathon at 567. *Travaux Preparatories* are the official record of a negotiation. Sometimes published, the "travaux" are often useful in clarifying the intentions of a treaty or other instrument. This is reflected in Article 32 of the Vienna Convention on the Law of Treaties VCLT). When interpreting treaties, the VCLT places this form of interpretation as secondary or less important than looking to the ordinary meaning (see Articles 31 and 32). The travaux are often available to the public on the websites created for a specific treaty (such as the Rome Statute) or on the United Nations website.

[28] See Pereira, C. *Instituições de Direito Civil* [*Institutes of Civil Law*] (1987) São Paulo: Forense at 38.

[29] Cf. Maximiliano C. (2004) *Hermenêutica e aplicação do direito [Hermeneutic and Law application]* 19ª. Rio de Janeiro: Forense. *A interpretacão e' uma só; não se fraciona: exercita-se por vários processos, no parecer de uns; aproveita-se de elementos diversos, na opnião de outros: o gramatical, ou melhor, filológico; e o lógico, subdividido, por sua vez, em lógico propriamente dito, e social ou sociológico.*

Although the traditional methods of interpretation[30] could be useful in order to figure the extent, reach and effect of a particular treaty the CISG has in the other hand one particular principle of interpretation - the autonomous interpretation.

Provisions of article 7(2) indicates that CISG was intended to limit the methods of interpretation under a self-contained law of sales, to be construed and applied autonomously without any reference to or interference from the different national laws. It is clearly that the interpretation vectors will lead the interpreter to find a solution to the conflict of interpretation by using the signs and meaning derived from the CISG and in the absence of those principles – including those of harmonization and good faith mentioned on article 7(1) – it will find rescue on the rules of private international law.

The method of searching the hints provided by the treaty itself is the so called autonomous interpretation which is a *unique, supranational interpretation method that involves separate steps*[31] as follows:

> (a) Wording - start with the wording of the languages used by the drafters and since the treaty is the source of supranational rules have in mind that the meaning and connotation that a *word or term might have under the domestic law most closely connected with the authentic language*. Although the final Conference of 1980 was conducted mostly in English and less in French a term from the

[30] The traditional methods of interpretation are not excluded from the CISG system vectors of interpretation but together with the autonomous interpretation limited some of them in that extent.

[31] Diedrich, Frank. *The CISG Software Revisited.* 6 Vindobona Journal of International Commercial Law and Arbitration, Supplement (2002) 55-75 at 61-66.

last language shall not to be considered without all the other steps of the autonomous interpretation method.

(b) Systemic – Interpreter will assess the hints derived from different sections and indirect meanings of the term or "instituto", including the implications of the interpretation in role of harmonization and other principles of the treaty;[32]

(c) Legislative history- the drafting process can provide the *mens legem,* the intention of the legislators. The interpreter can search the officially published *travaux préparatoires*, to find out about the intentions of the 'international legislator'. However the intention of the legislator cannot lead itself to the crystallization of the norm. The intentions might be in one way nevertheless the circumstances not predictable at the time might have change to embrace some facts or acts that despite of not being expected or thought at the time the norm that is contrary to the willingness of the legislature.

(d) Purposes - the intentions and goals of the convention itself shall be taken into consideration as an important vector to its interpretation. Those purposes are to be found at the Preamble and through other underlying concepts, especially the uniformity, removal of legal barriers in international trade and promotion of its development.

(e) Jurisprudence - the decision of the courts from a member State - especially in the case that the other methods has a very low effectiveness in order to bring a more strong and substantial interpretation - can dictates or point out a more significant and substantial interpretation of a certain matter. The courts from a

[32] The interpreter must identify the principles that govern the particular situation and face it against a non-conflicting interpretation of the whole piece of legislation. *Incivile est, nisi tota lege perspecta, una aliqua particula ejus proposita, judicare, vel respondere.*

particular Member State does not have to be necessarily closely connected to the conflict and it does not mean that a domestic law is to be applicable. The supranational principal of the treaty shall be taken into consideration as well as the other court decisions since this method aims to give a extent of the harmonization trough the different approach of different States and its players from the international trade community. *It has to be stressed that the latter comparison of domestic laws of member states to the CISG can methodically only be justified if one pursues the goals of any interpretation as set by Art. 7(1) CISG and the general goal of the CISG as a whole as being laid down by the Preamble*. [33]

That consideration made it is important to bring the different aspects of CISG interpretation in order to a conclusion over its applicability over sales of software.

VI. The *autonomous interpretation* as a principle of the CISG and the resource on national law as to uniformity of its applicability

The CISG and its aim for the uniformity of the regulation on international sales were successfully achieved by the *eclectic* system of interpretation systemically created by it.

Strengthen up what discussed prior most of the uniform law has developed a system that crystallized on its text the rules of interpretation and the applicability itself. The CISG created a system that rather than the merely use of the traditional methods of interpretation determined the autonomous interpretation as a vector of interpretation.

[33] See Diedrich (supra 33) at 61.

And furthermore, together with *bona fide* represent a principle that shall lead the traditional methods to a more significant and accurate conclusion of interpretation. This means that when facing a question of interpretation over any terms or its applicability over a factual situation more attention shall be paid to the meaning of the system created by the treaty.

Nevertheless this does not means that the CISG is not submitable to any interference of the States national rules. The principle of autonomous interpretation establish an hierarchical principal that shall prevail at first as to subordinate the domestic rules as its specificity to the matter of scope of the CISG.

Although it might give to one the impression of prevalence of the CISG among any other sources it is autonomous and the gap or interpretation shall be leaded or fill up by other means such domestic interpretation of the courts or systems. As a principle the CISG autonomous interpretation will lead to – in some jurisdiction - to a different approach of the terms and factual situation but grant with certain leverage to the interpreter the possibility to search trough the principles and to the rules of substantive matters and interpretation restrained at this particularly system.

The national law and court interpretation pays an important rule as to the interpretation of the CISG. It created a mechanism that through the principles and its reliance on the development and debate over new technologies, procedures and usage, to autonomously give an answer of certainty to the new goods subject to international sale.

VII. Definition of Goods, Tangible or Intangible and the Distinction between Goods and Services

Once we set forth the principles of interpretation on which the uniform law under study are based we can proceed to determine if there the sales of software can reach the scope of its applicability.

As to the *personarum* requirement for the application of the CISG there must be a match of the conditions set forth on article 1(a)(b) which mean that the parties must have their place of business in different States both contracting Sates of the Convention or have some particular rule of international law to apply on regard of a sales of good.

As to the subject matter or *materiae* requirement of the convention there is the "sales of goods".[34]

There are no major conflict on defining "sales of goods" since it is notoriously a declaration of will where one assume the obligation to deliver something to the other against the payment of a price or something that can ultimately makes its turn. [35]

The roman system adopted the *traditionibus nos nudis pactis dominia rerum transferuntur* which mean that the sale contract does not transfer the

[34] Reminding that according to article 6 the parties must not have opted out the CISG: ***Article 6*** *The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.*

[35] Cf. Venosa, S. *Direito Civil – Contratos em Espécie* - [Civil Law – Species of Contracts] (2008). São Paulo: Forense at 7. According to the author the French code establishes the character of *ownership transfer* to the Sales contract followed by the Polish, Italian and Portugal Civil Codes. Some other systems including the Brazilian the sale contract generates as its general rule only the obligation to the seller to deliver the subject of the sale to the buyer.

property of the subject being sold. Some other systems including the French the mere consent to the sale transfer the ownership.

Furthermore the CISG gives also an indirect definition that consists on an offer pursuant to Art. 14 in one hand and an acceptance pursuant to Art. 18 according to the obligation and duties defined within their terms.

More complex is to interpret what can be considered a good according to the Convention and for that how the autonomous interpretation plays its hole.

The definition of a good is of relevant importance since for the matter of existence of a sale the bilateral act of will shall consist on an obligation to deliver and in the other hand to pay the price for a tangible or intangible thing.

What is a good pertaining to the CISG and how can we use this concept to either frame or avoid the comprise of it to software demands at first, and to pursue the meaning "good" and then if a software fits into this concept at second.

Literal. The language of drafters at the late 1980 Diplomatic Conference was mainly English and occasionally French. The word *'merchandises'* as a related term to the English word "good" *. 'marchandises' has a strong supports the commercial character of the CISG as it refers to goods sold commercially, i.e. by merchants*. [36]

In respect to the meaning of 'goods/marchandises' pursuant to Art. 1 CISG there is almost nothing to be found in the *travaux préparatoires:*

[36] Cf. Diedrich (supra 33) at 68.

Nevertheless the term merchandise suits best as to be all moveable things[37]. This term was not subject to any form of criticism at the UNCITRAL.

Nevertheless, the wording and literal interpretation of the term presents no conflict between the meaning in English and French according to Art. 33 of the 1969 Vienna Convention on the Law of Treaties stress the real or normative intention of the final diplomatic conference shall be decisive if there are disparities between equally authentic texts of a treaty. This is a resource of rules of international law and will not prevail under the autonomous interpretation which leads to further considerations and methods of interpretation.

Systemic. Although the CISG has no definition of a good the boundaries of interpretation could be given by the aspects of both seller and buyer obligations and its relation with the goods.

The seller shall deliver and hand over any documents related to the transfer of property (Art. 30 CISG) or at least its possession since there is no obligation for the seller to own the property of the goods. At first to be subject to delivery brings the necessary logical idea that the goods shall be for any mean subject to transportation (moveable) for any mean possible, and the includes electronic and internet means. As to the property of the goods the CISG itself give the possibility to the buyer to take the goods subject to a right or claim of a third party as related (Art. 41 CISG) especially to what is related to intellectual property.

[37] American domestic sales law, UCC § 105(1) defines goods as *'all things which are movable at the time of identification to the contract for sale'.*

Article 42(2)(a) CISG holds the provision of a good having its intellectual property rights subject to a right or claim of a third party based on industrial property or other intellectual property.

The seller can transfer the goods and retain its property in one hand and the buyer will hold the right of usage together with the rights of conformity (Art. 35(1), (2) CISG). The intellectual property especially software can be subject to license or transfer of property. Nevertheless the seller has to inform any violation or third party rights or dispute over the property and the buyer has to agree. Otherwise the seller might become liable for breach of contract.

The exclusion for the application of the CISG can be provided in a way that some of the contracts that will orbit over the software will have to be assess according to the more or less presence of a service. Exclusions of Article 3(2) and 3(1) applicable to software as a "preponderant "part of the obligation

Moreover, the goods need not to be ready-made. Article 3(1) CISG makes it clear that goods to be manufactured or produced are also generally regarded a *good* under the CISG. Thus goods made to order/custom-made goods can be the subject of a CISG sales contract, too.

Finally, the goods must not belong to the items expressly excluded from the sphere of application in Art. 2(d), (e) and (f) CISG, i.e. stocks, shares, investment securities, negotiable instruments, money (d), ships, vessels, hovercraft, aircraft (e), and electricity (f).

Theological. The convention has its subject matter the sales of goods. According to the aims of the drafter it was designed to bring uniformity to international trade, facilitating the certainty and agility necessary so much today than back then. This shall bring to this present paper a theological limitation. The CISG has on its body remedies based on conformity of delivery, quality and quantity of the goods.

In addition has an express provision excluding from its scope of application services that might put away the traditional commercial relation (order – deliver – payment/ order – payment/deliver). Even the provision of Art. 3(1) supports this idea since the more related to a business association or service the negotiation is the less it is to fall into the subject matter governed by the CISG.

The term goods as applicable to software sale can be subject to the CISG but not in all cases according to the limits of the CISG body of principles and its autonomous interpretation. Therefore to apply those principles it is most relevant to identify what are the software regime and its particular regime to match the concept of a good to be offer to sale according to the uniform law.

VIII. The Software and Its General Rules

The United States systemically categorized the intellectual property in four types: patents; trademarks and service marks; copyrights; and trade secrets. Software fall into the category of copyright. With the exception of trade secrets, the other intellectual property rights are primarily regulated at the federal level. Applicable federal statutes are: (a) the Patent Act of 1952;

(b the Copyright Act; and (c) the Lanham Act (as amended by the Trademark Law Revision Act of 1986). [38]

On the international scenario, due to the importance of the intellectual property on the international trade, most of the products subject to international trade have a major acceptance cross borders and a different market value according to the higher proportion of invention, design and technology they can aggregate.

The extent of protection and enforcement for the purpose of the present work is a minor issue since we sustain that in the case of software the failing to comply with the intellectual property rules is to be a subject of non-conformity of the goods.

Nevertheless it is important to bring some of the international regulations over the intellectual property specially software for that matter.

As to the attempt of bringing uniformity to the gap that intellectual property faced on different jurisdiction and to bring it to a common ground the TRIPS Agreement[39] took place. This agreement covered some major topics such as (a) conflict of intellectual property agreements; (b) enforceability of intellectual rights within the parties territory; (c) methods and procedures for dispute resolutions.

For the basic principles it established non-discrimination features prominently: *national treatment* (treating one's own nationals and foreigners

[38] Cf. 2009 Thomson Reuters (Legal) Limited 2008 IADALA 16.2

[39] See Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 320 (1999), 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) hereinafter TRIPS Agreement.

equally), and *most-favored-nation* treatment (equal treatment for nationals of all trading partners in the WTO). National treatment is also a key principle in other intellectual property agreements outside the WTO.[40]

As to the definition of software, the TRIP´s bring in at article 10 the following:

> Computer Programs and Compilations of Data
> 1. Computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention (1971).
> 2. **Compilations of data or other material**, **whether in machine readable or other form**, which by reason of the **selection** or **arrangement** of their contents constitute intellectual creations shall be protected as such. Such protection, which **shall not** extend to the **data or material** itself, shall be without prejudice to any copyright subsisting in the data or material itself

Although it gives a relevant idea of a software to be an corporeal or extra corporeal arranged or selected in a certain way, it also split the intellectual property from the media.

And for last, the standards of protection already in existence before the TRIPS also provided some common grounds in the international Field such as the Paris Convention for the Protection of Industrial Property (patents, industrial designs, etc) and the the Berne Convention for the Protection of

[40] See Trade-Related Aspects of Intellectual Property Rights available at http://www.wto.org/english/english/docs_e/legal_e/legal_e.htm#TRIPs (last visit Dec. 12, 2012, 8:30 AM)

Literary and Artistic Works[41](copyright), this last where the software fall into.

IX. Meanings of Software and Its related transactions

We are experiencing a fast change on the society particularly on the meanings of wealth production. The relevancy of mechanization so important during the eighteenth century has no longer been enough to deal with the needs of an ever growing population and the respectively scarcity of resources. The interaction with the machine for the optimization of resources based on a market economy of scale had structure the foundation for the shift from a personal interaction over the machine to a matter of optimization of machine interoperability.

But this shift couldn´t be able to be experienced without innovation and the development of various systems of interoperability applied for a specific purpose and based on a single *substractum* – the information.

Information itself is just a *substractum* of the Knowledge society that we live in and the legal transaction or system of information impounded for a specific need of innovation or production is often and increasingly subject of commercial transactions.[42]

[41]See Berne Convention for the Protection of Literary and Artistic Works, Sep. 9, 1886, Bern Convention" of September 9, 1886, 102 Stat. 2853-2861, 1 B.D.I.E.L. 715 available at http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html (last visit Dec. 12, 2012, 09:00 AM) The Berne Convention discussed and promoted by The World Intellectual Property Organization (WIPO) which is the United Nations agency dedicated to the use of intellectual property (patents, copyright, trademarks, designs, etc.) as a means of stimulating innovation and creativity

[42] Expanding the boundaries – those systems of information as to be considered intangibles *assume the role that real estate held in a farm economy and that tangible property played after the industrialization*.

The CISG has its own autonomous interpretation and in addition a very particular system of remedies that orbitates around the *negotie iuridice* so called sales of goods. As a result of the interpretation of its terms there is relevant to establish the legal regime of the subject of the sale – the software itself.

Although the international conventions does not bring a definition by themselves that could be able to enlighten the contours of the nature of the institute subject to this study some domestic laws of States member of the CISG may provide some grounds.

The software is defined as a *set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result*. [43]

The definition above of the US Code on copyrights exteriorize the idea that a software is a set of statements and instruction, at last extent to be a computer related tool to be applied for specific result.

The Berne Convention also brings a definition of software that recognizes the existence of a tangible physical support although it did not denied the intangible element.

Despite of the presence of the subsidiary aspect – applicability on computer – the Brazilian Federal Law amplified the purposes of a software application for any machines and equipments, and brought the idea of the requisite of the need of this set to have a physical support:

[43] See 17 US Code on copyrights, § 101 (1976).

> *Article 1º Computer program is the expression of an organized set of instructions in natural language or encoded contained in any kind of physical support, for the necessary use in automatic machines of information processing, tools or peripherichal equipments, based on digital or analog technical to make then function in a way or for purposes determined.*

The idea of a physical support is more related to the strong influence of the theory of possession from Savigny[44] that portraits the need to have power with the intent of *animus domini* – in the case over a set of instruction - and being able to reproduce it in any other physical support (Hardware, Computer or even other machines).

The software fall into the category of personal property and for the purpose of the present work the subject of the sale is an organized systemic set designed to function itself, a machine or other object of material life.[45] The question of being tangible (*res corporalis)* or intangible (*res incorporalis*) is irrelevant singly to pursue the limits of applicability of the CISG.

An *res incorporalis* can be subject to commerce and when related to software the subject of the purchase may vary whatsoever to the limitations of ownership that has been negotiated.

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[44] See Posner, R. A. Frontiers of the Legal Theory. (2004) Cambridge: Harvard University Press at 46. Postner assigns a very pragmatic view of the doctrine of both Savigny and Holmes. According to Savigny the possession was a conjunction of physical Power over a thing and the intention to own it in the sense of factual rather than legal (*animus domini).* And according to him possession could never be joint – except when the it could be divisible without destroying the organic unity as in land division. For Holmes it was also necessary to configure possession the power over a thing but the intent is merely to exclude others. In both cases there is a power over the thing that reveals an intent to in some extent - as it happens with information systems – to exercise powers over a thing.

[45] Cf. Holmes, O. W. *The Common Law* (2011). Toronto: University of Toronto Law School Typographical Society (Original work published 1881) at 85. According to the author *possession is the objective realization of the free will*. The exteriorization of the free will applied in an environment of a software system can be remarkly exteriorize trough the power over this system and information put together for a specific purpose.

In truth what the owner of the software - intellectual property rights over the intangible creation of a system to function for a specific purpose- can decide is the boundaries and limitation of what is about to be transferred to the buyer. [46]

The apparent conflict of interpretation of the CISG has arisen due to a unforeseeable development of the information society sustained by technology no originally taken into consideration by the original legislator.

The rules of interpretation given by the CISG focus on the subject of the transactions and other relevant implication of the "good" that might or might not able the parties to apply the remedies or the scope of its application.

And for that there is relevant to bring to discussion that the information traditionally understood as knowledge and communication, intertwined with personhood has developed to a commoditization of the information by the means of marrying information to the physical – embodied by mean of any legal or physical boundaries. *The more that information can be divested of its links with personhood and assimilated to the categories of objects (machines, tangibility, functionality), the more it can be commodiffied.* [47] One aspect of the thinking to understand that a hypothetical "goods" to be sold under the CISG is to considerer it as any right over a thing that can be

[46] Cf. Blum, R. M. S. O., Brunjo, M. G. S., Abrusio J. C. (2006) *Manual de Direito Eletrônico e Internet*.[Internet and Eletronic Law Manual] São Paulo: Lex Editora, 2006 at 478-475. *The ownership of the intellectual property of software grants to its owner the will of affording it as its own convenience. Nevertheless when software is sold it does not mean necessarily that the ownership (the intellectual property itself) has been sold. Most often the use of the software is the core of the purchase transaction according to the limits set by the owner. Since there is not a possibility of a transfer of the intellectual property ownership without the respective right of use we see no boundaries to apply the CISG even when the owner keeps no copyrights to himself*.

[47] See Radin, M. J. *Economics, Law and Intelectual Property* (2003) Netherlands: Kluwer Academic Publishers.

possessed and be transfer by act of commerce, in special a sale, that does not fall into the subject matter of exceptions of the Uniform Law.

The Convention establishes that is not often necessary that the seller has the property[48] of the good. Nevertheless it is necessary for the title passing that the seller posest the software as to be able to transfer it for any means to the buyer.

Actual possession exists when an individual knowingly has direct physical control over an object at a given time. Constructive possession is the power and intent of an individual to control a particular item, even though it is not physically in that person's control.

The software can be negotiated trough different means where the actual and constructive possession can be fractioned.[49] (i.e. license of sale, distribution and other related transactions that Transfer of Additional Copy or Adaptation).

Even though the sales of software involves a transfer of a property (intellectual), and even considering that the intellectual property finds no boundaries in innovation and its applicability as a tool for the development of many areas of the society, the sale of it can follow in some categories where the elements of either the system itself or the use or fruition of the property

[48]See Monteiro, W. B. Curso de Direito Civil (1975) [Course of Civil Law] São Paulo: Saraiva at 23. The dichotomy between the theory of Savigny and Ihering in the other side make the last more relevant to the present work. For Savigny the requisite for possession can be shorten as to be the physical power over a thing (*corpus*)and the exteriorization of the intention to own (*animus domini)* and for Ihering possession is *the exteriorization of the property.* The last opens the doors to the possession of personal rights.

[49] Some academics (see *infra 54*) might affirm that *software may mean the 'information' (ie the program expressed by codes) per se* but nobody (not even the copyright-holder) owns the 'information' per se. We disagree with this perspective in a way that once the subject of the sale is subject to possession and can be transfer for a third person it shall fall into the scope of application of the CISG.

are major concerns as to fall in the quality and quantity of the negotiation and furthermore, will represent conditions of conformity of the goods.

Due to the many differences of treatment that the domestic laws of the member States shall attribute to the use, transfer and protection of the software and considering the many types of legal designation of the transaction related to *Software* we will base conclusions on the individual analysis of each transactions lined up in accordance to the limits of the ownership rights to be transferred.

X. Basic Elements to differ the Many a One-by-One Case Analysis of Applicability

We understand that the more or less copyright protection that the software might have under some particular law of a member state on the grounds of international laws - even the disparities of designation attributed to the transaction (license, sale) or the vehicle (physical media, download, upload) - has to be considered under the scope of the rights granted trough the transaction as to pursue what is being sold and how it can fall into the subject matter of the Convention.

Initially the sale of software transfer through the meanings of a media has no relation to avoid the application of the CISG. When we are before a media such as a CD-ROM, DVD, microchip or any other media that represents a vehicle of the software the only aspect that should matters to the CISG is the moment of shipment and delivery. Those digital or physical support functions as a carrier of the software and shall have the importance relevant

in order to deliver the software and nearer the software to a more tangible aspect. [50]

Nevertheless a approach itself only focus on the media to consider a transaction a sale or a license is not accurate solely since the essential purpose of the transaction is to the use of the software not the media – this last paying a short role to the negotiation.

The use of the software might be to sale or distribution or any other means that will restrict or wide up the rights of the buyer over the software. What is important for the CISG is that any of the right of ownership is to be fully transferred and possessed by the buyer.

One thing is to have limited intellectual property rights another is have any by the time of the selling. This fall from nonconformity of goods to non delivery at since none can deliver more rights than what they own.
Following the many aspects of an autonomous interpretation one boundary very important for the application of the CISG is the one at article 3(2) as to what can be considered a service. Some of the transactions involving the sales of software can have also provisions of maintenance. If the maintenance is condition essential to the contract and cannot be fractioned from it the sale shall be considered to be a service.

Currently the sales[51] transactions types related to software can adopt a high variety of classifications according to the limits to be imposed by the owner

[50] It might be true that the media as its physical support and appearance be significant to the sale and in this case considering the rule of the principal that follows the accessory it can be relevant altogether to verify conformity of the "good".
[51] Article 30 together with the article 53 of the CISG presupposes that a sale involves the transfer of a property and the payment of a price.

or the functionality and purpose[52] of it. For that matter we prefer for the purposes to appraise only the relevant aspects based on the boundaries provided by the CISG interpretation and the ownership boundaries of the property rights to be negotiated.[53]

Customized software can be a good example to dealt with the limits of the CISG and the exclusion to be justified on the basis of Article 3(2) CISG which provides that the CISG *does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labor or other services.'*

In *standard software* sales even when it involves the title passing of property in a physical copy (i.e. Compact Disc), the 'preponderant part of the obligations' of the licensor is not in the supply of the physical copy (the economic value of the tangible copy is minimal). It is indeed in the transfer of the information and granting of license with regard to the use of the software.

The lack of an physical copy in cases when the software sale does not involves a transfer of physical copies *(i.e. supplied online/downloaded)* has no importance over the applicability of the CISG since it functions as a merely means of deliver to be regulated under the remedies of the Convention. [54]

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[52] Sono, H. *The Applicability and Non-Applicability of the CISG to Software Transactions,* Wildy, Simmonds & Hill Publishing (2008) at 512-526. Classification in Software Sale or License, Shrink-wrap or Click-on Licenses, Online Software and Customize Software are helpful but in order to identify the subject matter of the transactions and the duties and obligations of the parties.

[53] The licensing aspects not related to the sale, specific to the delivery, quantity and quality, as well as the formation of the contract shall be governed by rules of international law. Possibly related intellectual property issues can only have applicability under the CISG if related to the sale and its conditions.

[54] *Accord:* Bernstein, H & Lookofsky, J., *Understanding the CISG in europe,* § 2-5 (The HAGUE 1997) and (HERBER in) Schlechtriem, P., *Commentary on the UM Convention on the International Sales of Goods (CISG), p. 23 (Oxford*

A more difficult interpretation is the one to be applied to contract sales of customized software in which the software is to be transferred to the other party and the tangible itself or the ancillary obligations consist in the supply of labor or other services.

The difference between customized software and standard software lies in the involvement of 'service' to develop the software[55], and this raises the possibility of exclusion based on Article 3 CISG.

> *Article 3*
>
> *(1) 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 or production.*
>
> *(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 labor or other services.*

The customized software - also known as bespoke or tailor made - as opposite to the Off-the-shelf software - pre-built to massive sales adaptable for many needs – is of the essence developed for a specific solutions applicable to suit the function of an user in special and according to its particular demand.

This implies that the seller has software that can either be modified to support the needs of the buyer or has the technology to build it from the

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1998) sustaining that the CISG may be applied to *standard and specialized* software Sales despite of they have been or not electronically transferred.

[55] Cf. Sono (supra 54) at 522.

ground. Both situations and more in the latter raise a question of whether the instructions and data provided the buyer to the seller can be considered a supply *an substantial part of the materials* for the manufacture of building of the software and then fall into the exclusion of article 3(1) of the CISG.

Two reasons may sustain that the referred article shall not apply. At first Article 3(1) has a preponderant "property based" criteria which means that if the buyer supplies a substantial part of the material then the buyer owned the substantial part of the final product. This does not apply to the data and information. [56] Secondly the rational for the article is related to supply of materials and when it come to software development is the technology the supply of the data and information is not relevant but the final result and use of the information according to the expertise and technology of the seller being those factor the substantial part of the software. Therefore this substantial part is the essence of the good and can be only provided by the seller with its know-how otherwise the customization would not be an issue for the seller.[57]

Another situation is the one *Article 3(2) CISG where 'services' which go into the manufacturing or producing of the goods should not be counted in Article 3(2) CISG.* In the customization of software according to the elements of a sale means of the essence that the seller shall deliver the goods according to the specifications of the buyer - quantity and quality. The services of development according to the instructions once and for all subject to the order of the buyer has not fall into the exception of the aforementioned article. All the autonomy work and technology applied to the delivery of the

[56] See Sono (supra 54) at 514.

[57] According to UNCITRAL – Report of the Working Group on Electronic Commerce on the work of its 38th session, A/CN.9/484, Para. 95 (14 April 2001) the conclusion sustained that the criterion of Article 3(1) is not material and when buyer has provides the substantial information, instructions and data the CISG should be excluded.

software has no relevance to the buyer but the good itself. Another situation is if the buyer intends to hire the service as a preponderant part of the software and for that has not only a directive of quality and description of the software and use, but point regularly and with hierarchical command and decision to the final work. The interference on the internal work of the buyer over the process of "furnishing" the software bring an element of great preponderance of the service and processes that will lead to a result foreseeable but not existing by the time of the order. This will fall out of the CISG.

The relevant part that the service has to the software transaction can be take place when the customized software has a mixed between sale/services i.e. the supplier´s post-delivery obligation to perform maintenance on the software sold as taken as a hole this obligation found to *predominate* the transaction. Then article 3(2) will ensure that the whole sale contract is to be removed from CISG.[58]

How the software, is license or "sale" becomes effective in respect to the laws of intellectual property and be stated because if it can be sold as a merchandise - in compliance with the article 42 the CISG – the convention shall apply.

The provision 42 of the treaty is something to be brought since it seems that the intellectual property is not an issue to avoid the application of the CISG as long as the seller delivers the merchandise in respect of the intellectual property compliance.

[58] Lookofsky, J. The 1980 *United Nations Convention on Contracts for the International Sale of Goods*, *in* Blanpais, R. *International Encyclopedia of Laws, Kluwer Law International* (2000) Published in J. Herbots editor / R. Blanpain general editor, International Encyclopaedia of Laws - Contracts, Suppl. 29 (December 2000) at 37 available at . http://www.cisg.law.pace.edu/cisg/biblio/lookofsky.html (last visited Dec. 20, 2013, 8:00 AM).

Nevertheless the lack of compliance with the intellectual property rules shall fall into the rules of remedies provided by the CISG.

XI.Relevant Case Laws

The importance of case laws to create a uniform interpretation has its fundamental provision on article 7 (1) since to interpret the CISG *regard is to be had to its international character and to the need to promote uniformity.*

Although *countless current undertakings of unifying and adjusting laws develop into completed texts and that the stream of these texts could then be directed to the already overburdened mills of national legislators*[59], the international character can be deviated or adjusted to reach the uniformity. The CISG shall work between the international and domestic laws to accommodate them and lead to encourage the potential states to join the convention and existing states to modify their position on a broader or narrower application of the treaty. [60]

Referred to software contracts application of the CISG[61], the mechanisms of interpretation of the CISG can rely on a handful tool of interpretation based on court's decision over a "good" that has been part of a major market

[59]. KÖTZ, Hein Rechtsvereinheitlichung - Nutzen, Kosten, Methoden, Ziele [Unification of law: uses, costs, methods, goals - in German] (1996) in Ulrich, M. General Principles of UN-Sales Law (1995) Hamburg, at 219 seq 221, available at http://www.cisg.law.pace.edu/cisg/text/magnus.html (last visited Dec 20, 2013 , 10AM).

[60] HARTNEL, H. E. l. *Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods* (1993) YALE J. INT'L L. 1, 21 (1993), available at http://www.cisg.law.pace.edu/cisg/biblio/hartnell.html ..

[61] The applicability of the CISG over domestic statues or influence of domestic law – especially the US Uniform Commercial Code (UCC) raises the most relevant contractual issues that often differs from the Convention, such as the formation of contract, parole evidence, missing terms (such as an open price), and the obligations of seller and buyer.

development and technological advance. The software although it gives margin to different interpretations of applicability of the CISG the technological advance and globalization of the international need and trade commerce pay a very important rule since it can narrow the distance between the natural and fact rules. These by its turn narrow the bridge to reach a court decision that will follow the usage and common fact knowledge.

As to the reasoning of interpretation set out in the previous chapter the compact disks are clearly governed by the CISG, even though the intangible content of the book (story) or disk (music, video image) is protected by an intangible property right.[62]. By its turn a German court issue a decision holding that a contract for the sale of standard software is governed by the CISG as *in* LG München, 8 February 1995, No. 8 HKO 24667/93, CLOUT Case 131, also reported in UNILEX.

Facing the problem of the nature of the software with a perspective also tending to avoid intellectual property issues of the *good* but interpret the software as to be good subject to trade under CISG can points to a view of strong value since *there are certainly good reasons to enlarge the sphere of application of the Convention by understanding the concept of goods liberally not literally, but as far as I remember from the Vienna Conference, there was a strong conviction among many delegations that the sale and transfer problems of intellectual property and the like were not within the mandate of the Conference. This alone, of course, cannot answer the question whether computer software can be regarded as movables. It is a problem much dealt with in German literature … If the contract concerns so-*

[62] According Piltz, Internationales Kaufrecht, § 2 Rd. Nrn. 47-48 in Caemmerer & Schlechtriem, Kommentar, Art. 1 Rd. Nr. 21.

called standard software, i.e., a program not designed especially to meet a specific customer's demands and if the program is recorded on a disk or tape, one could argue that the object of the sale falls under the Convention since it is movable and therefore 'goods'.[63]

Still framing a broader approach to bring elements to interpret the CISG to cover the software sale one relevant case law to be brought is ***Advent Systems Ltd. V. Unisys Corporation*** involving the transfer of hardware, manufacturing of a custom-designed computer program and the rendering of computer software related services. The court held that the term 'goods'[64] (although with support on Article 2-105(1) UCC) can apply to a variety of commercial transactions and encompasses all personal property that is transferable and identifiable except those things that are excluded by Article 2 UCC.[65] The intangible nature of software and the fact that the seller might not be entitled to pass on the intellectual property rights to the buyer were not a reason to avoid the consideration of computer software to be generally considered a 'goods' pursuant to Article 2 UCC.[66]

In German the Federal Court (BGH) of Justice framed the contracts for the transfer of custom-designed (bespoke) software as contracts of manufacture or contracts for the supply of goods and services.[67] So the supply of skilled labor in producing the software has been regarded as the true subject matter of the contract. This categorization cannot serve as a guideline for

[63] Schlechtriem P. Uniform Sales Law - *The Experience with Uniform Sales Law in the Federal Republic of Germany* in "Särtryck", Juridisk Tidskrift vid Stockholms Universitet, Årgång 3/NR 1/1991-92 pp. 7-8.
[64] American (U.C.C.) precedents on the software issue include RXX Industries, Inc. v. TEKA, 722 F.2d 543 (9th Cir. 1985) - operational software system classified as moveable goods and the essence of supplier's total obligation - and Advent Systems Ltd. v. Unisys Corp., 925 F.2d 543 (3rd Cir. 1991).
[65] Advent Systems Ltd. V. Unisys Corporation 925 F.2d 670 (3rd Cir. 1991) at 675.
[66] See Larson, M. G. *Applying Uniform Sales Law to International Software Transactions: The Use of the CISG, its Shortcomings, and a Comparative Look at How the Proposed UCC Article 2B Would Remedy Them*; 5 Tul. J. Int'l & Comp. L. 445 (1997) at p. 447.
[67] BGHZ 102, 135; BGH, NJW (1990), 3011 *in* Diedrich.

the CISG as contracts for goods to be manufactured do in general are within the sphere of application of the CISG by virtue of Art. 3(1) CISG but can point out the element of service to be a strong reason to avoid the Convention.

The application of CISG to computer software contained in a tangible medium[68] has a vast majority of .scholars adopting the application of it. The more disturbing approach is the more or less customization added that integrates the subject matter of the sales.

The Brazilian Administrative Court of Taxation has consolidated the differences between the software to a more specific limit to frame the subject of a sale as a service, software sale, or both.

> PRESUMED INCOME. "SOFTWARE". "Customized Software" is a rendering of service and subject itself to the rate of thirty-two percent to determine the basis for the tax, whereas the "standard software", also called "shelf software", designed by the company and placed available to customers, without distinction, is sold as a commodity to be, subject to the rate of eight per cent on gross revenue. In the case of miscellaneous activities, the percentage will be applied for each activity.[69]

And the Brazilian Tax Authorities ruled that it is considered a software sale if the obligation of the seller consists in an obligation to do something rather than to delivery. Therefore this shows that what is being purchase is a service. And for contracts that have more than one provision related to the

[68] Ferrari, F. Specific Topics of the CISG in the Light of Judicial Application and Scholarly Writing, 15 J.Law & Commerce (1995) at 1.
[69] Secretaria da Receita Federal - DISIT 8, DECISÃO Nº 263 de 30 de Novembro de 2000 (Braz.)

software such as maintenance or other that does not consist itself the end result or essential subject of the purchase therefore it will be considered a service.

> PRESUMED INCOME. SALE OF SOFTWARE. DETERMINATION OF THE BASIS OF CALCULATION. APPLICABLE PERCENTAGE. The sale of a ready software (shelf, standard) is classified as sale of goods and rate to determine the basis for calculation of Corporate Income Tax is eight percent. The sale of custom software is classified as service provision and the percentage for determining the basis for calculation of Corporate Income Tax is 32%. The sale of software tailored (customized), assuming that adaptation correspond only to an activity-means in order to reach the target activity-end (software delivery), is classified as sale of goods. When adaptation is of such importance that substantially modifies the structure of the software, the obligation is to become evident, and the activity is classified as a render of service. The software update (upgrade) undergoes the same classification criteria used in the sale (obligation to do or delivery). The provision of technical assistance and ongoing maintenance represent an obligation to do, and therefore is classified as service provision. The software lease activity software is subject to the percentage for determining the basis for calculation of corporate Income Tax as of 32%. The companies that opt in for the presumed income shall segregate the revenue from each activity and apply the relevant percentage for determining the basis for calculating the Corporate Income Tax.[70]

[70] Secretaria da Receita Federal , SOLUÇÃO DE CONSULTA Nº 99 de 15 de Abril de 2003. ASSUNTO: CORPORATE TAX REVENUE IRPJ (Bras.).

XII. Conclusion and Outcome

According to what was presented there is to conclude that the CISG is applicable to software contracts as long as they are not considered a service. The matter of compliance with the intellectual property rule is only a matter of conformity of goods.

To put the whole matter into a nutshell one can conclude from the autonomous interpretation that any item that can be commercially sold and in which property can be passed on and which is not explicitly excluded from the CISG's sphere of application by virtue of Art. 2 CISG can be the subject matter of a contract of sale.

The software can be transferred in various forms pursuant to the needs of the parties and requirements of the contract: via floppy disc or from hard-drive to hard-drive, wireless via infrared or other cellular ports, or online via the internet. What is relevant to determine the nature of the software is to pursue the nature of obligations and therefore fit it or not to the scope of CISG application together with its principles such as the autonomous interpretation.

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