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DEFINING THE BORDERS OF UNIFORM INTERNATIONAL CONTRACT LAW: THE CISG AND REMEDIES FOR INNOCENT, NEGLIGENT, OR FRAUDULENT MISREPRESENTATION

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I. Introduction

THE creation of uniform international contract law, as of uniform law in general, is never all-encompassing. Instead, uniform law instruments are typically limited in their scope, because the uniform provisions on which the drafters can agree are limited or because there is no need to unify neighboring areas of law. The borders of uniform contract law thereby created in turn create their own problems, most prominently among them the need to define the relationship between the uniform law and the rules of non-unified domestic law.[1]

Under the United Nations Convention on Contracts for the International Sale of Goods (CISG), this task is particularly important and difficult when it comes to remedies under domestic law and their applicability to CISG contracts.[2] In such cases, any recourse to local, non-unified law involves the risk of upsetting the balance of rights and obligations of international buyers and sellers that has been laid down in the CISG: whenever domestic law provides a party with a remedy it would not have under the CISG's rules, its concurrent application potentially undermines foreseeability and legal certainty in international trade. The arguably most distinctive CISG features that each party should be able to rely upon are provisions limiting the access to or the measure of its remedies. A buyer's obligation to give notice of non-conformity to the seller within a reasonable time after he has discovered or ought to have discovered it, under CISG Article 39(1), plays a significant role in practice, with Article 39(2) of the CISG cutting off all of the buyer's remedies when two years after delivery no notice has been given.[3] A party may furthermore only avoid

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1. *See* Fritz Enderlein & Dietrich Maskow, International Sales Law art. 4, ¶ 1 (Oceana Pubs. 1992), *available at* http://www.cisg.law.pace.edu/cisg/biblio/enderlein.html#art04a.

2. *See* CA 7833/06 Pamesa Ceramica v. Yisrael Mendelson Ltd. ¶ 58 [2009] (Isr.) ("[A] complex issue."); *see also* Ingeborg Schwenzer & Paschal Hachem, *Article 4*, *in* Commentary on the UN Convention on the International Sale of Goods (CISG) ¶ 19 (Ingeborg Schwenzer ed., 3d ed. 2010) ("A difficult and extremely controversial issue.") [hereinafter CISG Commentary]

3. *See* CA 7833/06 Pamesa Ceramica v. Yisrael Mendelson Ltd. ¶ 52 [2009] (Isr.) (discussing application of remedies in tort after period for giving notice of non-conformity had expired); *see also* U.N. Comm'n on Int'l Trade Law, United Nations Convention on Contracts for the International Sale of Goods art. 39(1),

the contract in cases in which the other party has committed a "fundamental" breach of contract, under Article 25 CISG, thereby making the burdensome unwinding of contracts an *ultima ratio* (remedy of last resort).[4] And the damages that a party may claim for a breach of contract may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract.[5]

In trying to prevent these and other rules of the CISG from being circumvented, the solution is generally seen in international uniform law's prevalence over concurring bodies of law:[6] "Displacing inconsistent domestic law," so it has been said, "is of the essence of establishing uniform law."[7] The theoretical foundations on which this accepted outcome is based are, on the contrary, not uniform. One approach that could be described as "international" is pointing to the rules of the CISG itself, notably Article 7(1), and arguing that the CISG's international character and the need to promote uniformity in its application require the preemption of domestic law.[8] A different line of argument with a more "national" focus primarily looks to the contracting states' domestic legal order that may explicitly or implicitly grant prevalence to the CISG. An example for the first type of rule can be found in the Australian state of New South Wales, where an express clause in the parliamentary act implementing the CISG clarifies that "[the] provisions of the Convention prevail over any other law in force in New South Wales to the extent of any inconsistency."[9] A non-CISG-specific rule of prevalence is followed in the United States, where reference has been made to the CISG's nature as federal law, which therefore "trumps" state common law and the Uniform Commercial Code.[10] The difference between these approaches may eventually be

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Apr. 11, 1980, 1489 U.N.T.S. 3 [hereinafter CISG], *available at* http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf

4. *See* CISG, *supra* note 3, art. 25; *see also* Bundesgerichtshof [BGH] [Federal Court of Justice], Apr. 3, 1996, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2364, 2366, 2008 (Ger.); Ulrich G. Schroeter, *Article 51, in* CISG COMMENTARY, *supra* note 2, ¶ 51.

5. *See* CISG, *supra* note 3, art. 74.

6. *See* Bundesgericht [BGer] [Federal Supreme Court] Sept. 15, 2000, CISG-online No. 770 (Switz.); ENDERLEIN & MASKOW, *supra* note 1, art. 4, ¶ 4.2; JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION ¶ 73 (Harry M. Flechtner ed., 4th ed. 2009); Ulrich Magnus, *Wiener UN-Kaufrecht (CISG), in* J. VON STAUDINGER'S KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH MIT EINFÜHRUNGSGESETZ UND NEBENGESETZEN AT EINL ZUM CISG ¶ 42 (rev. ed. de Gruyter 2013); BURGHARD PILTZ, INTERNATIONALES KAUFRECHT ¶¶ 2–125 (2d ed. 2008).

7. HONNOLD, *supra* note 6, ¶ 73.

8. *See* MARTIN KÖHLER, DIE HAFTUNG NACH UN-KAUFRECHT IM SPANNUNGSVERHÄLTNIS ZWISCHEN VERTRAG UND DELIKT 66 (Tübingen: Mohr 2003); PILTZ, *supra* note 6, ¶¶ 2–68.

9. *See* Sec. 6 Sale of Goods (Vienna Convention) Act 1986 No. 119.

10. *See* Asante Techs., Inc. v. PMC-Sierra, Inc., 164 F. Supp. 2d 1142, 1151 (N.D. Cal. 2001); JOSEPH LOOKOFSKY, UNDERSTANDING THE CISG § 2.3 (4th ed. 2012); William S. Dodge, *Teaching the CISG in Contracts*, 50 J. LEGAL EDUC. 72, 72

small, however, because even the "national" view tends to incorporate an international perspective, referring to the CISG's preamble which stresses that "the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade." U.S. courts have concluded that the expressly stated goal of developing uniform international contract law to promote international trade "indicates the intent of the parties to the treaty to have the treaty preempt state law causes of action,"[11] thereby supporting the prevalence of the CISG's provisions with an interpretation of the CISG itself.

The prevalence of uniform international contract law is, of course, only needed and only justified where and as far as its rules attempt to govern exclusively, and not outside the scope of the CISG's substantive coverage. The borders of the CISG therefore also define the scope of its prevalence and of domestic laws' corresponding preemption. Accordingly, the crucial question is: Where exactly do the borders of the CISG run?[12]

II. DEFINING THE BORDERS OF THE CISG: A NOVEL TWO-STEP APPROACH

Describing the substantive scope of the CISG is not easily done, both when attempted in the abstract and with regard to a particular question. Commentators have criticized that in many of the pertinent cases decided under the CISG, no detailed reasoning is given why certain issues fall within or outside the CISG's scope of application.[13] In Part A below, two "traditional" approaches that can be identified in case law and legal writings will be discussed, before an alternative approach will be presented in Part B.

(2000); John C. Duncan, Jr., *Nachfrist Was Ist? Thinking Globally and Act Locally: Considering Time Extension Principles of the U.N. Convention on Contracts for the International Sale of Goods in Revising the Uniform Commercial Code*, 2000 BYU L. REV. 1363, 1372 (2000); David Frisch, *Commercial Common Law, The United Nations Convention on the International Sale of Goods, and the Inertia of Habit*, 74 TUL. L. REV. 495, 503–04 (1999).

11. *Asante Tech.*, 164 F. Supp. 2d at 1151; *see also* Geneva Pharms. Tech. v. Barr Labs., Inc., 201 F. Supp. 2d 236, 285 (S.D.N.Y. 2002), *aff'd in part, rev'd in part*, 386 F.3d 485 (2d Cir. 2004).

12. *See* Peter Schlechtriem, *The Borderland of Tort and Contract: Opening a New Frontier?*, 21 CORNELL INT'L L.J. 467, 470–71 (1988).

13. *See* Stefan Kröll, *Selected Problems Concerning the CISG's Scope of Application*, 25 J.L. & COM. 39, 56 (2005).

A. *"Traditional" Approaches*

1. *Reliance on CISG Article 4*

A significant number of courts and authors turn to Article 4 of the CISG in order to determine where the exact borders of the CISG run.[14] This provision states:

> This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:
>
> (a) the validity of the contract or of any of its provisions or of any usage;
>
> (b) the effect which the contract may have on the property in the goods sold.[15]

By using a strict wording ("governs only"), Article 4 of the CISG at first sight indeed seems to provide a hard and fast description of the CISG's material sphere of application.[16] However, this first impression is soon refuted by the apparent incorrectness of the statement made in its first sentence: The CISG clearly also governs matters *other* than the formation of sales contracts and the rights and obligations of the seller and the buyer arising from such contracts.[17] The CISG notably also governs the modification of sales contracts, in Article 29, and the obligations of contracting states under public international law arising from the CISG, in Articles 89–101.[18] The first sentence of Article 4 of the CISG could therefore in itself be viewed as a misrepresentation, namely one made by the drafters of the CISG in respect to the CISG's content. It would then arguably qualify as a merely "innocent" misrepresentation, as the drafting history of the CISG indicates that the delegates considered the provision to

14. *See* Caterpillar, Inc. v. Usinor Industeel, 393 F. Supp. 2d 659, 674 (N.D. Ill. 2005); Oberlandesgericht [OLG] [Court of Appeals] Hamm 2010, INTERNATIONALES HANDELSRECHT [IHR] 59, 63 (Ger.); Helen Elizabeth Hartnell, *Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods*, 18 YALE J. INT'L L. 1, 19 (1993); Christoph R. Heiz, *Validity of Contracts Under the United Nations Convention on Contracts for the International Sale of Goods, April 11, 1980, and Swiss Contract Law*, 20 VAND. J. TRANSNAT'L L. 639, 647–59 (1987); Rudolph Lessiak, *UNCITRAL-Kaufrechtsabkommen und Irrtumsanfechtung*, östJBl 1989 487, 492; LOOKOFSKY, *supra* note 10, § 2.6; Joseph Lookofsky, *CISG Case Commentary on Preëmption in* Geneva Pharmaceuticals *and* Stawski, PACE REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALES OF GOODS 115 (2004), *available at* http://cisgw3.law.pace.edu/cisg/biblio/lookofsky8.html.

15. *See* CISG, *supra* note 3, art. 4.

16. *See* LOOKOFSKY, *supra* note 14, at 115 ("[S]eemingly clear-cut delimitation.").

17. *See* CISG COMMENTARY, *supra* note 2, art. 4, ¶ 2.

18. *See* CISG, *supra* note 3, art. 29 (involving modification of sales contracts); *see also id.* arts. 80–101 (involving obligations of contracting states under public international law).

be a correct shorthand description of the CISG's substantive coverage[19]—its lack of precision was apparently overlooked. In addition, and maybe equally important, the terms "formation of the contract of sale" and "rights and obligations of the seller and the buyer arising from such a contract" are themselves open to interpretation, thus providing no guidance to courts and arbitral tribunals that could not easier be drawn from an evaluation of the CISG's detailed provisions in Part II and III of the CISG.

In its second sentence, Article 4 of the CISG goes on to list two issues it is particularly "not concerned with," namely the validity of the contract or of any of its provisions or of any usage (subparagraph a) and the effect which the contract may have on the property in the goods sold (subparagraph b). Notably the "validity exception" in subparagraph (a) has gained widespread recognition as a supposedly important carve-out from the CISG's material scope,[20] and a heated discussion has developed about the need to interpret the "validity" concept autonomously[21] or in accordance with domestic law.[22]

Contrary to the approach just described, it is submitted that the second sentence of Article 4 of the CISG in truth is lacking any delimiting use because the list of issues it contains is neither inclusive nor exclusive in nature.[23] It is not inclusive because it does not provide that any question concerning the validity of sales contracts or a contract of sale's effects on the property in the goods is per se outside the CISG's scope—on the contrary, it specifically assumes that the CISG might govern such questions elsewhere in its provisions ("[E]xcept as otherwise expressly provided in this Convention . . ."). Since one of the express provisions referred to is CISG Article 7(2) with its reference to general principles underlying the CISG, the "except as" caveat makes Article 4's second sentence a mere

19. *See* UN DOC. A/CONF. 97/5, Official Records 17, art. 14 (using term "substantive coverage").

20. *See* Hartnell, *supra* note 14, at 4–5; Joseph Lookofsky, *In Dubio Pro Conventione? Some Thoughts About Opt-Outs, Computer Programs and Preëmption under the 1980 Vienna Sales Convention (CISG)*, 13 DUKE J. COMP. & INT'L L. 263, 280–81 (2003).

21. *See* CISG COMMENTARY, *supra* note 2, art. 4, ¶ 31; Milena Djordjevic, *Article 4, in* THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS ¶ 14 (Stefan Kröll, Loukas Mistelis & Maria del Pilar Perales Viscasillas eds., 2011); ENDERLEIN & MASKOW, *supra* note 1, art. 4, ¶ 4.3.1; Heiz, *supra* note 14, at 660–61.

22. *See* KARL H. NEUMAYER & CATHERINE MING, CONVENTION DE VIENNE SUR LES CONTRATS DE VENTE INTERNATIONALE DE MARCHANDISES: COMMENTAIRE art. 4, ¶¶ 2, 6, 7 (1993); Denis Tallon, *Article 79, in* COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION ¶ 2.4.3 (Cesare Massimo Bianca & Michael Joachim Bonell eds., 1987); *see also* Geneva Pharms. Tech. v. Barr Labs., 201 F. Supp. 2d 236, 285 (S.D.N.Y. 2002).

23. *Contra* Warren Khoo, *Article 4, in* COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION ¶ 2.2 (Cesare Massimo Bianca & Michael Joachim Bonell eds., 1987) ("By specifically enumerating these matters, the article places it beyond doubt that they are entirely outside the ambit of the Convention.").

reference to the need to establish the CISG's material scope by way of interpreting all of its provisions.[24] In addition, the statement's introductory phrase ("In particular . . .") makes clear that it is not exclusive in nature, so that issues not covered by the second sentence of Article 4 may nevertheless be outside the CISG's scope. Through the combination of two opposed exceptions, the provision is thus deprived of any regulatory meaning, rendering moot which issues it applies to and how its terms should be interpreted.

At the end of the day, Article 4 of the CISG therefore neither reveals with certainty which questions are governed, nor which questions are not governed by the CISG. In all but the most obvious cases, courts and arbitrators have to look elsewhere for guidance.

2. *Reliance on Dogmatic Categories of Domestic Law: Contract v. Tort, etc.*

Another frequently used approach relies on dogmatic categories in determining the scope of the CISG and its relationship to domestic law: The CISG, so it is said, "is about contracts," and accordingly neither about "procedure" nor about "tort" or other presumably "non-contractual" areas of law.[25] With respect to the relationship between the CISG and remedies for tortious behavior that is of primary interest for the purposes of the present article, this approach has found some support among commentators.[26]

a. Case Law Under the CISG: A Mixed Picture

Case law decided under the CISG, however, has been somewhat more varied in its recourses to the "contract v. tort" dichotomy. On one end of the scale is the decision in *Viva Vino Import Corp. v. Farnese Vini S.R.L.*[27] with its generic "The CISG does not apply to tort claims," a statement that has been cited with approval in further U.S. cases like *Geneva Pharmaceuti-*

24. *See* Christoph Benicke, *Article 4, in* MÜNCHENER KOMMENTAR ZUM HANDELSGESETZBUCH ¶ 4 (2d ed. 2007); Khoo, *supra* note 23, ¶ 2.1; ULRICH G. SCHROETER, UN-KAUFRECHT UND EUROPÄISCHES GEMEINSCHAFTSRECHT–VERHÄLTNIS UND WECHSELWIRKUNGEN § 6, ¶¶ 149–51 (2005); *contra* ENDERLEIN & MASKOW, *supra* note 1, art. 4, ¶ 3.1; PILTZ, *supra* note 6, ¶¶ 2–125.

25. *See* Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., 313 F.3d 385, 388 (7th Cir. 2002) ("The Convention is about contracts, not about procedure."); Bundesgericht [BGer] [Federal Supreme Court] July 11, 2000, CISG-online No. 627 (Switz.).

26. *See* Michael Bridge, *A Commentary on Articles 1–13 and 78, in* THE DRAFT UNCITRAL DIGEST AND BEYOND: CASES, ANALYSIS AND UNRESOLVED ISSUES IN THE U.N. SALES CONVENTION 235, 246 (Franco Ferrari, Harry Flechtner & Ronald A. Brand eds., 2004); Djordjevic, *supra* note 21, art. 4, ¶ 10; Joseph M. Lookofsky, *Loose Ends and Contorts in International Sales: Problems in the Harmonization of Private Law Rules*, 39 AM. J. COMP. L. 403, 409 (1991); Lookofsky, *supra* note 20, at 286.

27. No. 99-6384, 2000 WL 1224903, at *1 (E.D. Pa. Aug. 29, 2000).

cals v. Barr Laboratories,[28] *Sky Cast v. Global Direct Distribution,*[29] and *Dingxi Longhai Dairy v. Becwood.*[30]

The court in *Geneva Pharmaceuticals*, however, did not stop there. Citing Professor Schlechtriem,[31] it rather went on to caution: "Just because a party labels a cause of action a 'tort' does not mean that it is automatically not pre-empted by the CISG. A tort that is in actuality a contract claim, or that bridges the gap between contract and tort law may very well be pre-empted."[32] This line of thought was subsequently picked up by yet another U.S. District Court in *Electrocraft Arkansas, Inc. v. Super Electric Motors, Ltd.*,[33] where the court—once more citing Professor Schlechtriem[34]—said:

> Thus, a tort that is in essence a contract claim and does not involve interests existing independently of contractual obligations (such as goods that cause bodily injury) will fall within the scope of the CISG regardless of the label given to the claim . . . . The question for this Court, then, is whether Electrocraft's negligence/strict liability claim is, as argued by Super Electric, "actually . . . a breach-of-contract claim in masquerade."[35]

It accordingly moved away from primarily focusing on dogmatic categories towards considering the substance of the remedy concerned. A similar perspective was also adopted by courts outside the United States. In *ING Insurance v. BVBA HVA Koeling,*[36] a Belgian Court of Appeals held that a party to a CISG contract that commits a fault in the performance of the contract can only be held liable on an extra-contractual basis if the alleged fault is a not a fault against a contractual obligation but against the general duty of care, and if that fault causes other damage than the damage caused by faulty performance of the agreement.[37] In *Pamesa Ceramica v. Yisrael Mendelson,*[38] the Supreme Court of Israel in turn commenced by asking the rhetorical question: "Does placing the word 'tort' at the top of

28. *See* Geneva Pharms. Tech. v. Barr Labs., 201 F. Supp. 2d 236, 286 (S.D.N.Y. 2002).

29. *See* Sky Cast, Inc. v. Global Direct Distribution, L.L.C., No. 07-161, 2008 WL 754734, at *7 (E.D. Ky. Mar. 18, 2008).

30. *See* Dingxi Longhai Dairy, Ltd. v. Becwood Tech. Grp., L.L.C., 718 F. Supp. 2d 1019, 1024 (D. Minn. 2010).

31. *See* Schlechtriem, *supra* note 12, at 474.

32. *Geneva Pharms. Tech.*, 201 F. Supp. 2d at 286 n.30 (citing Schlechtriem, *supra* note 12).

33. No. 4:09-cv-00318, 2009 WL 5181854 (E.D. Ark. Dec. 23, 2009).

34. *See id.* at *5 (citing Schlechtriem, *supra* note 12, at 473).

35. *Id.*

36. Hof van Beroep [HvB] [Court of Appeal] Antwerpen, Apr. 14, 2004 (Belg.).

37. *See id.*

38. CA 7833/06 Pamesa Ceramica v. Yisrael Mendelson Ltd. ¶ 27 [2009] (Isr.).

the claim release the buyer from the inspection and notice obligations, and does it deprive the seller of the defences that the [C]onvention provides . . . ?"[39] The court then, in a very carefully reasoned decision, developed a balanced approach similar to the ones outlined above. In concluding, it held that weight should be given to the interests which the uniform law on the one hand and the domestic law on the other seek to protect, and that a claim in tort should only be allowed to be heard alongside the CISG when those interests are not identical.[40]

Courts in yet other CISG contracting states have generally given even less weight to the contract/tort dichotomy. A German court of appeals ruled that concurrent tort claims, assuming that they were available, would in any case be barred once the notice of non-conformity under CISG Article 39(1) had not been timely given,[41] thereby effectively denying an independent application of tort rules where a contract between the parties is governed by the CISG. Most recently, the German Supreme Court refrained from ruling on the relationship between the CISG's remedies and claims for damages under domestic tort law—because the additional availability of tort claims would not have affected the outcome of the pending case—but its reference to the disputed nature of the question among legal writers indicates that the Court did not consider the solution to be obvious.[42]

b. Discussion

In the author's opinion, dogmatic classifications or labels like "contract," "tort," or "procedure" can and should play no role at all in defining the CISG's substantive scope. The reason is simple: the CISG itself provides no autonomous definition of these categories, and their contents as well as limits in domestic laws are often uncertain[43] and—most important in an international uniform law setting—not internationally uniform.

The institution of common law misrepresentation, occasionally characterized as a "strange amalgam of law and equity and of contract and tort,"[44] is one case in point: while innocent misrepresentation (to be discussed in more detail below) constitutes an instrument of contract law

39. *Id.* ¶ 54.

40. *See id.* ¶¶ 69–70.

41. *See* Oberlandesgericht [OLG] [Court of Appeals Thüringen] May 26, 1998, Transportrecht, Beilage Internationales Handelsrecht [TranspR-IHR] 25, 29 (Ger.).

42. *See* Bundesgerichtshof [BGH] [Federal Court of Justice] 2013, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 304, ¶ 17 (Ger.).

43. *See* Sun Oil Co. v. Wortman, 486 U.S. 717, 726 (1988) ("Except at the extremes, the terms 'substance' and 'procedure' precisely describe very little except a dichotomy, and what they mean in a particular context is largely determined by the purposes for which the dichotomy is drawn.").

44. JOHN BURROWS, JEREMY FINN & STEPHEN TODD, LAW OF CONTRACT IN NEW ZEALAND 302 (3d ed. 2007).

under English law,[45] it is regarded as part of tort law in the United States.[46] The consequence would be that remedies for innocent misrepresentation under English law would be preempted by the CISG, while remedies under U.S. law would not—a result that hardly seems convincing, given that the content of both rules is rather similar. Uncertainties in classifying particular remedies are similarly reflected in other parts of the law of misrepresentation, with liability for negligent misrepresentations under English law having been referred to as "contract in tort's clothing."[47]

Another example is the "contract with protective effect for third parties," a legal concept developed by the courts under German law, that a well-known comparative law scholar once characterized as "a mere curiosity."[48] It assumes that contracts have protective effects for non-contracting parties if the contracting parties' intent—as determined through interpretation of their contract in accordance with the principle of good faith[49]—was such, thus resulting in the third party's own contractual claim for damages if one of the contracting partners has breached its contractual obligations. In "interpreting" the contract, German courts have often gone far beyond the wording of the contract and the intentions of commercially reasonable parties,[50] thus e.g., deducing a seller's intent to extend the protective effects of a contract with a surveyor to any buyer of the house to be sold[51] and even granting a third party a contractual claim for damages although, due to a valid limitation of liability clause, the contracting party itself would not have had such a claim.[52] The contractual classification of expert liability towards third parties can arguably only be explained with a (thinly veiled) attempt to escape German law's lack of tort liability for pure economic losses. Not surprisingly, third party claims in comparable situations would be classified differently in other legal systems, with U.S. law potentially granting a claim in tort[53] and Swiss law having created an extra category "between contract and tort."[54]

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45. *See* Michael Bridge, *Innocent Misrepresentation in Contract*, *in* 57 CURRENT LEGAL PROBLEMS 2004 277, 278 (Jane Holder et al. eds., 2004).

46. *See* RESTATEMENT (SECOND) OF TORTS § 552C (1977).

47. A.J.E. Jaffey, *Contract in Tort's Clothing*, 5 J. LEGAL STUD. 77, 101–03 (1985).

48. 1 HEIN KÖTZ & AXEL FLESSNER, EUROPEAN CONTRACT LAW 253 (Tony Weir trans., 1997).

49. *See* BÜRGERLICHES GESETZBUCH [BGB] [Civil Code], Jan. 2, 2002, Bundesgesetzblatt 38, § 242 (Ger.).

50. *See* Ulrich G. Schroeter, *Die Dritthaftung staatlich anerkannter Gutachter im deutschen und schweizerischen Recht*, *in* PRIVATE LAW: NATIONAL—GLOBAL—COMPARATIVE: FESTSCHRIFT FÜR INGEBORG SCHWENZER ZUM 60. GEBURTSTAG 1565 (Andrea Büchler & Markus Müller-Chen eds., 2011).

51. *See* Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 8, 1995, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 392, 1995 (Ger.).

52. *See id.* ¶ 25; Bundesgerichtshof [BGH] [Federal Court of Justice] 2010, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1277 (1278) (Ger.).

53. *See* RESTATEMENT (SECOND) OF TORTS § 552(1) (1977).

54. Bundesgericht [BGer] [Federal Supreme Court] Dec. 23, 2003, 130 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] III 345, 349 (Switz.).

As a third and final example, one may refer to the French instrument of "*action directe*," under which sub-buyers who have purchased goods from an intermediate seller have a direct claim against the manufacturer of the goods, relating to defects in those goods or to their unsuitability for their intended purpose.[55] In French case law and legal writing, there is agreement that this claim is contractual in nature,[56] despite the fact that this classification is clearly at odds with the privity of contracts.[57] After all, the manufacturer has undertaken no contractual obligation towards sub-buyers later purchasing the goods in the course of a chain of contracts, whose identity and domicile is generally unknown to the manufacturer. It is therefore not entirely surprising that the European Court of Justice[58] has held that, when measured against the yardstick of the categories of EU law, the French *action directe* cannot be regarded as a matter relating to a contract,[59] but rather as a matter relating to tort, delict or quasi-delict.[60] In doing so, the Court of Justice noted that "it appears that the relationships between manufacturer and sub-buyer are perceived differently in the Member States,"[61] and that in the great majority of them a manufacturer's liability in this context is not regarded as being of a contractual nature.[62]

All of the examples described above have one thing in common: the dogmatic classification that the respective legal instruments received has its source in domestic law, and particularities of the respective domestic law were the reason why some of the instruments received their dogmatic labels in the first place. It is submitted that any approach relying on such categories should therefore not be followed in an international uniform

55. *See* Michel Cannarsa & Olivier Moréteau, *The French "Action Directe": The Justification for Going Beyond Privity*, *in* EUROPEAN PERSPECTIVES ON PRODUCERS' LIABILITY 311 (Martin Ebers, André Janssen & Olaf Meyer eds., 2009).

56. *See* Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Oct. 9, 1979, Bull. civ. I, No. 241 (Fr.); Cour de cassation [Cass.] [supreme court for judicial matters] ass. plén., Jul. 12, 1991, Bull. civ., No. 5 (Fr.); Cannarsa & Moréteau, *supra* note 55, at 312.

57. *See* Cannarsa & Moréteau, *supra* note 55, at 311.

58. *See* Case C-26/91, Jakob Handte & Co. GmbH v. Traitements Mécanochimiques des Surfaces SA, 1992 ECR I-3916, ¶ 16 (discussing Article 5 No. 1 Brussels Convention on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters of 1968); Case C-543/10, Refcomp SpA v. Axa Corporate Solutions Assurance SA et al., ¶ 32 (2013) (unpublished) (reviewing Council Regulation 44/2001, art. 5(1)(a), 2001 O.J. (L 12) 1, 4 (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [hereinafter Brussels I Regulation]).

59. *See* Brussels I Regulation, *supra* note 58, art. 5(1)(a).

60. *See id.* art. 5(3); *see also* Peter Mankowski, *in* BRUSSELS I REGULATION art. 5, ¶ 200 (Ulrich Magnus & Peter Mankowski eds., 2d ed. 2012).

61. Case C-543/10, Refcomp SpA v. Axa Corporate Solutions Assurance SA et al., ¶ 38 (2013) (unpublished).

62. *See* Case C-26/91, Jakob Handte & Co. GmbH v. Traitements Mécanochimiques des Surfaces SA, 1992 ECR I-3916, ¶ 20.

law setting.[63] In essence, it would amount to an interpretation of the CISG's material scope in light of domestic law, as represented by the dogmatic classification of the competing domestic rules of law. This is arguably incompatible with Article 7(1)'s guidelines, which call for an "autonomous" interpretation of the CISG's provisions, including those defining the borders of the CISG.

B. *A Novel Two-Step Approach*

Against the background of the deficiencies that the "traditional" approaches described above have shown—most prominently among them the lack of uniformity created—it seems both necessary and appropriate to search for an alternative approach which is better in line with the demands made by Article 7(1). In this spirit, I propose in the following section a novel two-step approach designed as a tool allowing for a more uniform definition of the CISG's borders.

1. *Basic Outline*

The two-step approach's basic formula runs as follows: a domestic law rule is displaced by the CISG if (1) it is triggered by a factual situation which the CISG also applies to (the "factual" criterion), and (2) it pertains to a matter that is also regulated by the CISG (the "legal" criterion). Only if both criteria are cumulatively fulfilled, the domestic law rule concerned overlaps with the CISG's sphere of application in a way that will generally result in its preemption.[64]

The development of this two-step approach and its criteria are based on the assumption that the CISG's rules (and not domestic law) must serve as the starting point in establishing the relationship between the CISG and concurrent legal rules.[65] In developing a suitable methodical approach, Article 7(1) is the primary provision from which guidance can be drawn: the directive it provides for courts and arbitral tribunals—to have regard to the CISG's international character and to the need to promote uniformity "in its application"—also needs to be observed when determining the CISG's scope of application, because any recourse to a domestic rule of law in place of the CISG effectively means that the latter is not being applied at all. It is submitted that the desirable uniform outcome in this context can best be achieved by combining a factual criterion with a legal criterion, both of which will be outlined in more detail below.

63. *See* ENDERLEIN & MASKOW, *supra* note 1, art. 4, ¶ 4.2; Ingeborg Schwenzer & Pascal Hachem, *The CISG—Successes and Pitfalls*, 57 AM. J. COMP. L. 457, 471 (2009).

64. For a further discussion of how the outcome is different only where the CISG exceptionally governs an issue without doing so exhaustively, see *infra* notes 207–09.

65. *See* CA 7833/06 Pamesa Ceramica v. Yisrael Mendelson Ltd. 27, ¶ 53 [2009] (Isr.); Ulrich Huber, *in* COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) art. 45, ¶ 50 (Peter Schlechtriem ed., 1998).

2. *First Step: The Factual Criterion*

When investigating the factual criterion somewhat closer, it soon becomes clear that a fact-related yardstick at least comparable to the description proposed here has been frequently mentioned by commentators in the past. Professor Honnold notably argued that all domestic law rules are displaced, which turn on "the very same operative facts that invoke the rules of the Convention,"[66] and many writers have followed his approach or have used a similar test.[67]

a. Reasons

At least two reasons speak in favor of focusing on the facts of cases covered by two concurring legal rules in order to establish the relationship between these rules. First, this focus avoids the difficulties already described above[68] which inevitably arise when dogmatic categories of domestic law are being relied upon in an international setting. By looking to the substance of the rules rather than their label,[69] and with this substance being identified by factual standards, an internationally uniform solution will likely be easier to reach. And second, a factual criterion is arguably more attuned to the viewpoint of merchants for whose benefit, as can be seen from its Preamble, the CISG's rules were eventually written. From merchants' perspective, it is primarily important to know which factual behavior in the conduct of their business will result in what kind of legal consequences, so that they will be able to adjust their actions accordingly. Since the legal consequences depend on which legal rules are applicable, it is sensible to also base the precise definition of the CISG's material scope and thereby the relationship between international uniform law and domestic law on factual circumstances. Through this use of factual instead of dogmatic legal standards, one may hope that it is possible for merchants to foresee which of two conflicting laws will be applied to their case. To this end, the criterion prevents factual situations covered by the CISG from leading to a surprising application of foreign domestic rules, the latter appearing (from the merchant's perspective) like the proverbial "rabbit out of the hat."[70]

66. HONNOLD, *supra* note 6, ¶ 65.

67. *See* Enderlein & Maskow, *supra* note 1, art. 4, ¶ 3.1; CLAYTON P. GILLETTE & STEVEN D. WALT, SALES LAW: DOMESTIC AND INTERNATIONAL 49 (2000); Heiz, *supra* note 14, at 647 ("[F]actual situation triggers a provision of domestic law as well as a rule of the Convention."); KÖHLER, *supra* note 8, at 67; PILTZ, *supra* note 6, ¶¶ 2–148; Schwenzer & Hachem, *supra* note 63, at 471; Peter Winship, *Commentary on Professor Kastely's Rhetorical Analysis,* 8 NW. J. INT'L L. & BUS. 623, 638 (1988).

68. For a further discussion of the difficulties arising out of dogmatic categories of domestic law, see *supra* notes 14–24.

69. *See* HONNOLD, *supra* note 6, ¶ 65.

70. *See* Magnus, *supra* note 6, art. 4, ¶ 28.

b. The Need for a Second ("Legal") Criterion

It is submitted, however, that in many cases the factual criterion is not enough, and that it will often require a second step in order to decide whether a given domestic law rule is being displaced by the CISG. This second step is necessary because the same factual situation may well be regulated by different rules from different perspectives and for different purposes, not all of which are exhaustively covered by the CISG. The factual criterion alone may therefore be too blunt an instrument for an assessment that does not stop at finding *that* a factual setting has at all been regulated, but also takes into account *why and to which end* it has been regulated.

The case *Stawski Distributing Co. v. Zywiec Breweries PLC*,[71] decided by the United States District Court for the Northern District of Illinois in 2003, provides a practical example. It involved a longstanding business relationship between a Polish brewery and a Chicago-based importer and distributor of beer. The parties had concluded an exclusive distribution agreement which, according to the court, was potentially governed by the CISG.[72] When the seller notified the buyer that he intended to terminate the agreement, the question arose whether the provisions of the Illinois Beer Industry Fair Dealing Act[73]—a state law in relation to the beer industry which places a number of restrictions on relationships between beer wholesalers and brewers—could be applied alongside the CISG, or whether they were preempted. In case of the Illinois Beer Industry Fair Dealing Act, the factual criterion addressed above was clearly fulfilled, because the Act's applicability was triggered by a factual situation which the CISG also applied to. According to its Section 2(B), the Act "shall be incorporated into and shall be deemed a part of every agreement between brewers and wholesalers and shall govern all relations between brewers and their wholesalers," thereby also including agreements and relations between wholesalers and foreign brewers. Since the CISG in turn also applies to contracts of sale between brewers and wholesalers as long as they have their respective places of business in different states, the applicability of both the Act and the CISG is triggered by the same factual situation. Authors who exclusively rely on this factor[74] would therefore have to con-

71. No. 02 C 8708, 2003 WL 22290412 (N.D. Ill. Oct. 6, 2003).

72. *See id.* at *2. The court held that "if this were a typical case, there could be little dispute that the CISG would apply and be considered the authoritative law on this subject." *Id.* The published facts of the case do not make clear whether this assessment was correct, because exclusive distribution agreements only qualify as "contracts for the sale of goods" in the sense used by CISG Article 1(1) if they already create obligations between the parties concerning the delivery of goods, but not if they leave it to the parties to decide at a later stage whether such transactions will be conducted. *See* Schroeter, *supra* note 4, Introduction to Arts. 14–24, ¶ 66.

73. 815 ILL. COMP. STAT. 720/1 (1982).

74. For a discussion of cases that were decided upon factual criteria, see *supra* notes 61–62.

clude that the Illinois Beer Industry Fair Dealing Act is being displaced by the CISG[75]—a result that seems premature,[76] because the Act was not necessarily enacted in order to address the same type of risk as the CISG.

3. *Second Step: The Legal Criterion (or: What's the Regulated "Matter"?)*

As a second step within the two-step approach proposed here, it is therefore necessary to determine whether the domestic law rule covering the factual situation at hand also pertains to a "matter" regulated by the CISG.[77] This second step enables courts and arbitral tribunals to take into account the regulatory purpose and focus of the concurring legal rules, limiting the CISG's preemptive effect to domestic laws that pertain to a matter already regulated by the CISG, but allowing for their parallel application where the regulated matters are different.

This immediately raises the question: What's the "matter"? The CISG itself uses the term "matter" first and foremost in Article 7(2) in addressing the filling of "gaps" within the CISG's rules: it provides that "[q]uestions 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,"[78] thereby making clear that "matter" is understood as a wider term than "question," with each matter governed by the CISG potentially involving more than one question. The term "matter" furthermore is being employed in Articles 90 and 94, in which the CISG addresses its relationship towards other instruments of uniform law or instances of the same or closely related domestic laws that concern "matters governed by this Convention." In this context, there is agreement among commentators that "matter" refers not only to the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract (i.e., the broad areas mentioned in the first sentence of Article 4), but may also apply to smaller subject areas.[79] The only dispute concerns the question of whether a matter in the sense employed by Articles 90 and 94 requires a certain minimum breadth,[80]

75. *See, e.g.*, *Stawski Distributing Co.*, 2003 WL 2290412. This was the position taken by the Polish brewery in this case.

76. *See* Lookofsky, *supra* note 14, at 121.

77. *See* Schlechtriem, *supra* note 12, at 473.

78. CISG, *supra* note 3, art. 7.

79. *See* Franco Ferrari, *Article 94, in* SCHLECHTRIEM/SCHWENZER KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT ¶ 2 (Ingeborg Schwenzer ed., 5th ed. 2008); Magnus, *supra* note 6, art. 94, ¶ 4; Peter Schlechtriem, Ingeborg Schwenzer & Pascal Hachem, *Article 94, in* CISG COMMENTARY, *supra* note 2, ¶ 4). *But see* Johnny Herre, *Article 94, in* UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) ¶ 4 (Stefan Kröll, Loukas Mistelis & Maria del Pilar Perales Viscasillas eds., 2011).

80. *See* CHRISTOPH BRUNNER, UN-KAUFRECHT—CISG art. 94, ¶ 3 (2004); Magnus, *supra* note 6, art. 94, ¶ 4.

with examples given by legal writers ranging from consumer protection[81] over late payments[82] to product liability.[83] The preferable opinion rejects a minimum requirement of this sort, because neither the wording of these provisions nor policy considerations support such a narrow reading.[84]

In our context, a matter can be described as a particular risk that is being addressed in the CISG and thereby allocated between the parties.[85] For this purpose, it is not decisive through which legal tools the respective risk is addressed and allocated; in other words, it is only relevant that the matter is governed, but not how. The matter governed by the CISG in Article 27 is therefore the risk that certain communications get lost during transmission, independent of the legal consequences attached to such loss. And the matter governed in Article 45 is not the buyer's right to claim damages or to rely on other remedies, but rather the risk of the seller's contractual obligations not being fulfilled and the allocation of the consequences.

In defining the CISG's material scope of application, this "legal" criterion is useful because it allows us to make a reasoned assessment of the CISG's relationship towards domestic rules of law in cases that fall into the scope of both legal rules. When being applied to the constellation in *Stawski*, it confirms that the district court was eventually right in holding that the Illinois Beer Industry Fair Dealing Act could be applied despite the agreement between brewer and wholesaler being governed by the CISG:[86]

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81. *See* Peter Schlechtriem, *Article 94, in* COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) ¶ 4 (Peter Schlechtriem & Ingeborg Schwenzer eds., 2d ed. 2005).

82. *See id.*; c*ontra* Herre, *supra* note 79, art. 94, ¶ 4.

83. *See* Magnus, *supra* note 6, art. 94, ¶ 4.

84. *See* Schlechtriem, Schwenzer & Hachem, *supra* note 79, ¶ 4; SCHROETER, *supra* note 24, § 10, ¶ 40.

85. *See* CA 7833/06 Pamesa Ceramic v. Yisrael Mendelson Ltd. 27 [2009] (Isr.) (providing approaches comparable to, though not necessarily identical with, position taken here). The Supreme Court of Israel held that:

> [T]he interests which [the buyer] is struggling to protect are not identical to the interests which the uniform law of the convention seeks to protect, a distinction which I think should be given weight when making the decision as to whether to allow a claim in tort to be heard alongside the arrangements in the convention.

Id. ¶ 70; *see also* Markus Müller-Chen, *Article 45, in* CISG COMMENTARY, *supra* note 2, ¶ 32 ("[T]he [concurrent] remedy cannot be in conflict with the regulatory goals of the Uniform Sales Law.").

86. *See generally* Stawski Distributing Co. v. Browary Zywiec S.A., 349 F.3d 1023 (7th Cir. 2003). The district court based this (arguably correct) result on a reasoning different from the one developed here, namely the fact that the state of Illinois had promulgated the Act pursuant to the power reserved to states by the Twenty-First Amendment to the United States Constitution. A duly ratified treaty could not, therefore, override this reserved power. On appeal, the United States Court of Appeals for the Seventh Circuit characterized the district judge's suggestion that the Twenty-First Amendment entitles states to trump the nation's treaty commitments to its trading partners as "wholly novel" and vacated the judgment. *See id.* at 1026.

the Act aims at promoting the public's interest in fair, efficient, and competitive distribution of malt beverage products by regulating the business relations of brewers and wholesaler vendors, notably in order to assure that beer wholesalers are free to manage their business enterprises and maintain the right to independently establish their selling prices (despite the typically overwhelming bargaining power of breweries).[87] As the CISG neither attempts to regulate these specific issues arising in the area of beer distribution nor similar issues in other regulated industries,[88] the legal criterion was therefore not fulfilled.

III. DEMONSTRATING THE APPROACH'S PRACTICAL APPLICATION: THE CISG AND DOMESTIC LAW REMEDIES FOR MISREPRESENTATION

During the early years after the CISG's adoption, it was the relationship between the CISG and domestic law remedies for mistake that stood at the center of academic attention.[89] More recently, however, the applicability of common law remedies for misrepresentation[90] in CISG cases has started to generate discussions, triggered by an increasing number of U.S. court decisions in which the issue is being addressed. The positions adopted by commentators range from the suggestion that the CISG in general does not preempt claims for misrepresentation[91] to the opposite position that considers all rescission rights for misrepresentation displaced by the CISG.[92] In this author's opinion, it is helpful to distinguish between domestic legal rules providing remedies for innocent misrepresentation, negligent misrepresentation, and fraudulent misrepresentation, respectively. Each of these categories will be addressed in turn.

A. *Innocent Misrepresentation*

Remedies for honest or "innocent" misrepresentations made by a contracting party could be viewed as the example best suited to demonstrate the dangers inherent in applying concurrent domestic law remedies to CISG contracts. In court practice under the CISG, on the contrary, this constellation has seemingly not yet arisen, with the past cases (as far as published and accessible) all having involved claims for negligent or fraudulent misrepresentation.

87. *See* Illinois Beer Industry Fair Dealing Act, 815 ILL. COMP. STAT. ANN. 720/2(A) (West 2009).

88. *See* Schlechtriem, Schwenzer & Hachem, *supra* note 79, ¶ 39.

89. *See* Heiz, *supra* note 14, at 647–48.

90. *See* INGEBORG SCHWENZER, PASCAL HACHEM & CHRISTOPHER KEE, GLOBAL SALES AND CONTRACT LAW 214 (2012) (stressing functional comparability of doctrines of mistake and misrepresentation).

91. *See, e.g.*, Lookofsky, *supra* note 20, at 285–86.

92. *See, e.g.*, Bridge, *supra* note 26, at 243–44.

1. *Definition*

In English law, a misrepresentation as such has conventionally been defined as a false statement of material fact that at least in part induces entry into a contract with the maker of the statement.[93] In the United States, the *Restatement (Second) of Torts* uses a comparable, although not identical, description when speaking of a misrepresentation of a material fact for the purpose of inducing the other party to act or to refrain from acting in reliance upon it.[94]

The "innocent" nature of a misrepresentation is usually defined negatively. An innocent misrepresentation is a misrepresentation that is neither fraudulent nor negligent,[95] thus resulting in a form of strict liability[96] whenever this type of honest misinformation gives rise to rights or remedies on the side of a misinformed party. The remedies attached to innocent misrepresentations differ among the common law jurisdictions that know this institution, although these differences—as will be further demonstrated below[97]—are without effect for their relationship to the CISG.

2. *The Factual Criterion*

At first glance, the factual criterion within the two-step approach is clearly fulfilled in those cases:[98] Domestic law rules on innocent misrepresentation and the CISG both cover factual situations in which parties negotiating a sales contract exchange information about material facts.

Upon closer scrutiny, certain doubts may emerge when one remembers the well-known dispute about the CISG's scope with respect to pre-contractual duties. After all, the prevailing opinion among commentators holds that the CISG does not impose pre-contractual duties on the parties,[99] given that a proposal made by the (then) German Democratic Republic to introduce a general liability for "*culpa in contrahendo*" was

93. *See* Bridge, *supra* note 45, at 279; 1 CHITTY ON CONTRACTS ¶ 6-006 (30th ed. 2008); *see also* SCHWENZER, HACHEM & KEE, *supra* note 90, ¶ 17.08 (providing comparative law point of view).

94. *See* RESTATEMENT (SECOND) OF TORTS § 552C(1) (1977).

95. *See* CHITTY ON CONTRACTS, *supra* note 93, ¶ 6-094; RESTATEMENT (SECOND) OF TORTS § 552C(1) (1977).

96. *See* RESTATEMENT (SECOND) OF TORTS § 552C(1) cmt. a (1977).

97. For a further discussion, see *infra* notes 155–60.

98. *See* HONNOLD, *supra* note 6, ¶ 240.

99. *See* MICHAEL BRIDGE, THE INTERNATIONAL SALE OF GOODS: LAW AND PRACTICE ¶ 12.04 (2d ed. 2007); Urs Peter Gruber, *Article 14, in* MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH ¶ 12 (6th ed. 2012); PETER HUBER & ALISTAIR MULLIS, THE CISG: A NEW TEXTBOOK FOR STUDENTS AND PRACTITIONERS 28–29 (2007); Magnus, *supra* note 6, art. 4, ¶ 42; Lisa Spagnolo, *Opening Pandora's Box: Good Faith and Precontractual Liability in the CISG*, 21 TEMP. INT'L & COMP. L.J. 261, 291, 309 (2007); Wolfgang Witz, *Articles 14–24, in* INTERNATIONAL EINHEITLICHES KAUFRECHT Vor ¶ 17 (2000). *Contra* Michael Joachim Bonell, *Vertragsverhandlungen und culpa in contrahendo nach dem Wiener Kaufrechtsübereinkommen* 693, 700–01 (1990); Diane Madeline Goderre, Note, *International Negotiations Gone Sour:*

discussed at the Vienna Diplomatic Conference, but ultimately rejected.[100] Does this mean that there is in truth no coverage of the same factual scenarios, because innocent misrepresentation involves the violation of pre-contractual informational duties which the CISG does not provide for?

The answer to this question, it is suggested here, must be in the negative. At the outset, it should be pointed out that, irrespective of the position that one adopts in the abovementioned dispute about pre-contractual obligations under the CISG, it can hardly be doubted that the CISG covers some facts that take place at the pre-contractual stage: For once, Part II of the CISG contains elaborate rules about the two parties' declarations through which a contract is formed, namely offer and acceptance.[101] Both declarations are by definition made and received during the pre-contractual phase, since the contract is only concluded once the acceptance of an offer becomes effective.[102] And second, Article 8(3) refers to the pre-contractual negotiations between the parties as a factor to be considered for purposes of interpreting the parties' declarations and conduct.[103] That the CISG itself does not regulate the parties' pre-contractual duties does therefore not mean that it generally does not apply to any factual situations at the pre-contractual stage, thereby giving completely free reign to domestic pre-contractual regulations.

For the purposes of the two-step approach presented here, the decisive factual situation covered by the CISG is the formation of the contract. This means that the CISG only overlaps with domestic law rules on innocent misrepresentation insofar as they also apply to the formation of a sales contract, but not as far as they cover misrepresentations made without an ensuing contract formation. The latter carve-out nevertheless only insignificantly reduces the degree of overlap as to the factual situations covered. Many domestic laws quite similarly restrict the right to claim damages for innocent misrepresentations made during contract negotiations to cases in which a contract has been concluded, but offer no such remedy where the representee has refrained from entering into a contract.[104] Should a given law on misrepresentation decide otherwise, its

Precontractual Liability Under the United Nations Sales Convention, 66 U. CIN. L. REV. 257, 280–81 (1997).

100. *See* UN Doc. A/CONF. 97/5, Official Records at 294–95; *see also* PETER SCHLECHTRIEM, UNIFORM SALES LAW: THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 57 (Peter Doralt & Helmut H. Hascheck eds., 1986).

101. *See* CISG, *supra* note 3, arts. 14–17 (governing offer); *id.* arts. 18–22 (governing acceptance).

102. *See id.* art. 23.

103. *See* Goderre, *supra* note 99, at 279; Schroeter, *supra* note 4, Introduction to Arts. 14–24, ¶ 54.

104. *Compare* JOHN CARTWRIGHT, MISREPRESENTATION, MISTAKE AND NON-DISCLOSURE ¶¶ 3–50 (3d ed. 2012) (discussing English law), *with* E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217, 235 (1987) (discussing U.S. law and noting "[i]ndeed, it

rules could generally be applied to false statements made during negotiations that could have led to the conclusion of a CISG contract, but eventually did not.

The interpretation of the CISG's scope described above is more important when it comes to national rules on pre-contractual liability that may grant a party a right to damages where contract negotiations have failed,[105] but that are not triggered by the incorrectness of statements made but rather by a party's decision to break off the negotiations. In assessing the applicability of such domestic law rules[106] alongside the CISG, the CISG's limited "factual" coverage with respect to the pre-contractual stage should not conceal that the CISG covers these situations through its rules on contract formation in Articles 14–24. By providing, on one hand, that no offer can be accepted as long as no proposal has been made that indicates the offeror's intention to be bound in case of acceptance[107] or valid offers were duly withdrawn[108] or revoked,[109] and stipulating, on the other hand, that a contract is only formed once an offer has been accepted[110] and that the offeree even has a right to change his mind about acceptances made,[111] the CISG stresses the parties' right to freely walk away from contractual negotiations before their respective declarations have become binding. Domestic law rules providing for damage claims in cases where a negotiation has been broken off are therefore triggered by factual circumstances also covered by the CISG, although the latter provides that such factual situations should yield no legal consequences.[112]

In conclusion, it can be summarized that the factual criterion within the two-step approach is fulfilled where the relationship between the CISG and domestic laws on innocent misrepresentation is concerned.[113]

3. *The Legal Criterion*

The legal criterion requires more thought: Do domestic law rules on innocent misrepresentation pertain to a matter also regulated by the

would seem that a party to failed negotiations might have a claim based on any misrepresentation, including one by nondisclosure, that upon being discovered caused the negotiations to fail").

105. *See* UN Doc. A/CONF. 97/5, Official Records at 294. The unsuccessful proposal by the German Democratic Republic in Vienna would also have covered such cases. *See id.*

106. *See* Farnsworth, *supra* note 104, at 239–49, 282–84.

107. *See* CISG, supra note 3, art. 14(1).

108. *See id.* art. 15.

109. *See id.* art. 16.

110. *See id.* arts. 18, 23.

111. *See id.* art. 22.

112. *See* Schroeter, *supra* note 4, Introduction to Arts. 14–24, ¶ 63, art. 14, ¶ 29 For a further discussion relating to the fact that national rules on fraudulent behavior can always be applied alongside the Convention, see *infra* notes 208–10.

113. *See* BRIDGE, *supra* note 99, ¶¶ 12.21–.22; HONNOLD, *supra* note 6, ¶ 240.

CISG? This could be doubted if the matter was framed narrowly, for example, as "protection of contracting partners from unintended misinformation." It seems in line with the CISG's international character, however, to adopt a more functional view.[114] The matter that is indeed being regulated in both rules is *the buyer's state of knowledge about features of the goods at the moment of contract conclusion.* The CISG addresses this matter in a number of provisions in its Part III, thereby preempting concurrent rules of domestic law:[115]

a. The Parties' State of Knowledge About Features of the Goods as Regulated Matter

It does so first in Article 35(1), albeit only indirectly. By providing that the seller must deliver goods that are of the quantity, quality, and description required by the contract, Article 35(1) refers to the content of the parties' sales agreement as understood by the parties. This common understanding is to be determined in accordance with the rules on interpretation of party statements and conduct in Article 8,[116] with the relevant point in time being the moment of contract conclusion.[117] Article 35(1) CISG thereby divides the task to inform oneself or the other party between the seller and the buyer. If the seller has made a statement about the quality of the goods and the buyer accepted it, it became part of the contract (as interpreted in light of the negotiations)[118] so that the consequences of the delivered goods lacking this quality are governed by Article 45, and not by domestic law rules on innocent misrepresentation.[119] If the parties have mentioned certain technical specifications of the machine in their contract in a manner that allows a reasonable person in the buyer's position to determine the machine's production capacity, it is up to the buyer to ask for additional information before concluding the contract if the specifications given are insufficient for his individual purposes.[120]

In requiring the goods' fitness for the purposes for which goods of the same description would ordinarily be used, Article 35(2)(a) must similarly be read as referring to the "ordinary use" at the moment of contract formation,[121] although the precise point in time will rarely be decisive

114. *See* CISG, *supra* note 3, art. 7(1).

115. Note that this is not the only matter regulated in the Convention that may be the subject of a misrepresentation. *See infra* notes 188–89.

116. *See* HONNOLD, *supra* note 6, ¶ 224; Ingeborg Schwenzer, *Article 35, in* CISG COMMENTARY, *supra* note 2, ¶ 7.

117. *See* CISG, *supra* note 3, art. 23.

118. *See id.* art. 8(3).

119. *See* HONNOLD, *supra* note 6, ¶ 240.

120. Bundesgericht [BGer] [Federal Supreme Court] Dec. 22, 2000, CISG-online No. 628 (Switz.); *see also* CISG, *supra* note 3, art. 8(2).

121. *See* Stefan Kröll, *Article 35, in* THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS ¶ 68 (Stefan Kröll, Loukas Mistelis & Maria del Pilar Perales Viscacillas eds., 2011).

because ordinary uses are not prone to change. The provision nevertheless incorporates a division of informational risks comparable to the one under Article 35(1) because Article 35(3) declares the seller to not be liable if, at the time of the conclusion of the contract, the buyer knew or could not have been unaware of the goods' lack of fitness for their ordinary use. In that case, the buyer has no remedy under the CISG[122] because the goods' non-conforming nature was before the buyer's eyes to see.[123] Article 35(2)(a) and (3) do, however, impose neither an obligation on the seller to inform the buyer of such lack of fitness,[124] nor an obligation on the buyer to examine the goods prior to contract conclusion,[125] but rather pursue their regulatory goal by granting or taking away access to the CISG's remedies listed in Article 45. Articles 41 and 42 contain a functionally equivalent regulation that deals with the goods' freedom from rights and claims of third parties, and that similarly connects the availability of buyers' remedies to the parties' state of knowledge at the moment of contract conclusion. Already at the outset, the seller only owes the goods' freedom from those intellectual property rights of which, at the time of the conclusion of the contract, the seller knew or could not have been unaware of,[126] whereas other (unrecognizable) third party rights[127] or rights that the seller only becomes aware of after contract conclusion do not entail his liability.[128] The question under the law of which state the goods must be free from such rights then partially depends on the parties "contemplation" regarding the prospective use of the goods at the time of the conclusion of the contract under Article 42(1)(a). If, on the contrary, it is the buyer who knew or could not have been unaware of a right or claim at the time of the conclusion of the contract, Article 42(2)(a) declares the seller exempt from liability—knowledge only subsequently gained by the buyer, again, does not yield a similar result.[129]

With respect to the conformity of the goods, Article 35(2)(b) further provides that they do not conform with the contract unless they are fit for any particular purpose "expressly or impliedly made known to the seller" at the time of the conclusion of the contract. This provision is another

122. *See* Magnus, *supra* note 6, art. 35, ¶ 46.

123. *See* HONNOLD, *supra* note 6, ¶ 229.

124. *See* Magnus, *supra* note 6, art. 35, ¶ 48.

125. *See* ENDERLEIN & MASKOW, *supra* note 1, art. 35, ¶ 20; HONNOLD, *supra* note 6, ¶ 229; Kröll, *supra* note 121, art. 35, ¶ 160; Magnus, *supra* note 6, art. 35, ¶ 48; PILTZ, *supra* note 6, ¶¶ 5–52; Schwenzer, *supra* note 116, art. 35, ¶ 36.

126. *See* CISG, *supra* note 3, art. 42(1).

127. A dispute remains as to whether a sellers's duty flows from CISG Article 42 to investigate intellectual property. *See* Ruth M. Janal, *The Seller's Responsibility for Third Party Intellectual Property Rights Under the Vienna Sales Convention, in* SHARING INTERNATIONAL COMMERCIAL LAW ACROSS NATIONAL BOUNDARIES: FESTSCHRIFT FOR ALBERT H. KRITZER ON THE OCCASION OF HIS EIGHTIETH BIRTHDAY 203, 213–17 (Camilla B. Andersen & Ulrich G. Schroeter eds., 2008) (referring to "the adequate allocation of the contractual risk between the parties").

128. *See* Schwenzer, *supra* note 116, art. 42, ¶ 16.

129. *See id.* art. 42, ¶ 19.

example for the allocation of informational rights and duties through the CISG: Article 35(2)(b) makes the seller's liability under the CISG dependent on a particular purpose having been "made known" to him, thereby indicating that the seller is generally under no duty to enquire about particular, non-ordinary purposes for which the goods could be used, nor is he under a duty to inform the buyer about the goods' lack of fitness for such purpose. Once an intended use has been made known to him (without its "contemplation between the parties" being required, as under Article 42(1)(a))[130] and he has nevertheless entered into the contract, the seller is liable if the goods are unsuitable for the use.[131] If, on the contrary, the buyer chooses not to inform the seller about the particular purpose for which he intends to use the goods, he cannot expect compensation—any information not given by the buyer until after the contract formation does entail the seller's liability.[132] The CISG also defines autonomously how ("expressly or impliedly")[133] and by whom (in practice usually by the buyer, but information provided by a third party should similarly suffice)[134] the particular purpose must have been made known to the seller, thereby displacing standards of information and enquiry that may exist under domestic laws.[135] In addition, however, Article 35(2)(b) *in fine* demands that, under the circumstances, the buyer relied and that it was reasonable for him to rely on the seller's "skill and judgement" before the seller's liability can ensue. The CISG's latter test is remarkably similar in wording and purpose to the requirement under the English law of misrepresentation as stated in *Esso Petroleum Co. v. Mardon*,[136] where Lord Denning based liability for damages on the representation by a man "who has or professes to have special knowledge or skill."[137] This similarity indicates that both legal rules indeed pertain to the same regulatory matter.

The parties' state of knowledge *after* the moment of contract conclusion is furthermore addressed in Articles 38–40: once the buyer has discovered or ought to have discovered the goods' lack of conformity, he has to inform the seller within reasonable time under Article 39(1) at pain of otherwise losing his right to rely on the discernible non-conformity.[138] If, however, it is the seller who becomes aware or cannot be unaware of facts

130. *See* Janal, *supra* note 127, at 221.

131. *See* Magnus, *supra* note 6, art. 35, ¶ 26.

132. *See* ENDERLEIN & MASKOW, *supra* note 1, art. 35, ¶ 10; KÖHLER, *supra* note 8, at 233; Magnus, *supra* note 6, art. 35, ¶ 30; Schwenzer, *supra* note 116, art. 35, ¶ 23.

133. *See* Schwenzer, *supra* note 116, art. 35, ¶ 22.

134. *See* Kröll, *supra* note 121, art. 35, ¶ 112.

135. *See* Khoo, *supra* note 23, ¶ 3.3.3.

136. *See* Esso Petroleum Co. v. Mardon, [1976] Q.B. 801 (Eng.).

137. *See id.*

138. *See* CISG, *supra* note 3, art. 39(1).

giving rise to a non-conformity after the contract has been concluded,[139] Article 40 provides that he in turn must either inform the buyer or lose his right to rely on the buyer's insufficient notice of non-conformity. Comparable rules with respect to third party rights or claims attached to the goods are contained in Article 43.

In summary, Articles 35 and 38–44 therefore install a delicate web of awareness-related rules which are based on a balanced distribution of informational risks.[140] This distribution should not be disturbed by the application of rules of domestic law which may (and often will) allocate these risks differently.

b. The Party's State of Knowledge About the Other Party's Ability to Perform as Regulated Matter

Similarly, the parties' state of knowledge at contract conclusion about their contracting partner's ability to perform and his creditworthiness is a matter governed by Articles 71 and 72.[141] This has important effects for the CISG's relationship towards remedies under national law that are triggered by a party's innocent but incorrect statements about his or her own ability to perform or creditworthiness (although negligent or fraudulent misrepresentations about these issues are arguably more important in practice).[142]

Article 71(1) addresses the matter by providing that a party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of: (a) a serious deficiency in his ability to perform or in his creditworthiness or (b) his conduct in preparing to perform or in performing the contract. Article 71(2) supplements this right of suspension by a right of stoppage in transit if the seller has already dispatched the goods before the grounds described above become evident, and Article 72 in turn provides for a right to declare the contract avoided if, prior to the date for performance of the contract, it is clear that the other party's serious deficiency in his ability to perform or in his creditworthiness will result in a fundamental breach of contract.[143]

Articles 71 and 72 should be read as offering an exhaustive regulation of the informational risk distribution about the parties' ability to per-

139. The relevant point in time is a matter of dispute. *See* Schwenzer, *supra* note 116, art. 40, ¶ 8.

140. *See also* KÖHLER, *supra* note 8, at 231, 256.

141. *See* ENDERLEIN & MASKOW, *supra* note 1, art. 4, ¶ 3.1; Karin Flesch, *Der Irrtum über die Kreditwürdigkeit des Vertragspartner und die Verschlechterungseinrede,* Betriebsberater 873, 876–77 (1994); PETER SCHLECHTRIEM & PETRA BUTLER, UN LAW ON INTERNATIONAL SALES ¶ 261 (2009).

142. *See infra* notes 165–88 and 189–209, respectively.

143. *See* CISG, *supra* note 3, art. 25.

form,[144] thereby preempting concurrent rules of domestic law that deal with the same matter.[145] This regulatory intent becomes particularly apparent when looking at the limitations laid down in the provisions' wording which relate both to the prerequisites of the remedies provided and to their effect. By requiring that the serious deficiency in performance ability or in creditworthiness has only become apparent after the conclusion of the contract, Articles 71(1) makes it clear that deficiencies that were already apparent at an earlier stage—although maybe not positively known to the other party[146]—do not result in a right of suspension if the contract has nevertheless been entered into with the respective party.[147] The CISG thereby operates on the assumption that each party will gather sufficient information about his contracting partner in the run-up to the contract formation in order to determine the contracting partner's ability to fulfill the contract[148]—if doubts arise, he may give the prospective contracting partner a chance to dispel them or refrain from entering into the contract (*caveat creditor*). Should a party choose to neglect this pre-contractual due diligence and to conclude the contract despite his unawareness, he acts at his own risk. National laws on misrepresentation are often based on other (and internationally divergent) disclosure obligations and are therefore incompatible with the CISG's regulatory approach in this matter.

The CISG furthermore provides a structured set of remedies for the situations discussed here: the rights of suspension and stoppage under Article 71 only lead to a right to avoid the contract if the conditions laid down in Articles 49, 64, or 72 are met,[149] and Articles 45(1)(b), 61(1)(b), and 74 *et seq.* govern a party's right to claim damages[150] where the other party is lacking in his performance abilities. Domestic law rules on innocent misrepresentation may again provide for a right of rescission, damage claims, or both under different prerequisites and must accordingly be dis-

144. *See* Djakhongir Saidov, *Article 71, in* UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) ¶ 16 (Stefan Kröll, Loukas Mistelis & Maria Del Pilar Perales Viscasillas eds., 2011).

145. *See* WILHELM ALBRECHT ACHILLES, KOMMENTAR ZUM UN-KAUFRECHTSÜBEREINKOMMEN (CISG) art. 71, ¶ 1 (2000); Christiana Fountoulakis, *Article 71, in* SCHLECHTRIEM & SCHWENZER, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) ¶ 35 (Ingeborg Schwenzer ed., 3d ed. 2010); ROLF HERBER & BEATE CZERWENKA, INTERNATIONALES KAUFRECHT art. 71, ¶ 16 (1991); Magnus, *supra* note 6, art. 71, ¶¶ 40–43; SCHLECHTRIEM & BUTLER, *supra* note 141, ¶ 261. *Contra* Lessiak, *supra* note 14, at 493.

146. *See* Flesch, *supra* note 141, at 873; Saidov, *supra* note 144, ¶ 16.

147. *See* Trevor Bennett, *Article 71, in* COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION ¶ 1.9 (Cesare Massimo Bianca & Michael Joachim Bonell eds., 1987); Alexander von Ziegler, *The Right of Suspension and Stoppage in Transit (and Notification Thereof)*, 25 J.L. & COM. 353, 363 (2005).

148. *See* Fountoulakis, *supra* note 145, ¶ 24.

149. *See* Flesch, *supra* note 141, at 876.

150. *See* Fountoulakis, *supra* note 145, ¶ 55; *see also* Saidov, *supra* note 144, ¶¶ 59–60.

placed. Case law under the CISG has confirmed that Article 71 excludes all legal remedies that are provided under the applicable national law for the situation where, subsequent to the conclusion of the contract, serious doubts arise about the other party's ability to perform his obligations.[151]

c. Irrelevance of Misrepresentation Becoming Term of the Contract

The qualification of the issues just mentioned as matters regulated by the CISG must apply irrespective of whether the misrepresentation concerned has become a contractual term or not:[152] by providing uniform rules for the prerequisites under which a certain quality or description of the goods is "required by the contract" and under which the goods otherwise "conform with the contract," the CISG *e contrario* also defines the conditions under which information exchanged during the contract negotiations does not trigger a contractual obligation owed by the seller.[153] In the latter case, the CISG therefore implicitly provides that the seller shall not be subject to any remedies arising from such pre-contractual information (even if found to be false), thereby comprehensively regulating the matter and preempting domestic law. (The situation is different only where a party acts fraudulently, as will be discussed in more detail below.)[154]

d. Irrelevance of Type of Remedy Provided by Domestic Law

What has just been said with regard to the prerequisites for remedies laid down in the CISG and in domestic law is similarly true for the type of remedies provided by the respective rules. If a given matter is being regulated by the CISG, it is therefore the CISG alone which determines what remedies shall be available to the parties as part of such regulation, thereby implicitly excluding all other types of remedies that would be available under concurrent domestic laws. The CISG's prevalence over domestic law accordingly not only secures *that* the uniform sales law regulates its matters undisturbed, but also *how* it regulates them.

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151. *See* Oberster Gerichtshof [OGH] [Supreme Court] Feb. 12, 1998, docket No. 2 Ob 328/97t (Austria) (discussing Articles 1(1)(b), 6, 7(2), 38, 39, 40, 44, 45, 71, 73, 74, 75, 76, and 77); *see also* Oberlandesgericht [OLG] [Court of Appeals] Cologne May 19, 2008, Internationales Handelsrecht 181, 2008 (Ger.) (discussing Articles 4, 38, 39, 53, 71, and 81, specifically with reference to rights of retention under domestic law).

152. *Contra* Khoo, *supra* note 23, ¶ 3.3.5. *See also* BRIDGE, *supra* note 99, ¶ 12.21. On the differences in English law between misrepresentations that become part of the contract and those that do not, see BRIDGE, *supra* note 99, ¶ 12.20. Note that in cases of (failed) contract negotiations that do not result in any contract being concluded, the "factual criterion" is not fulfilled. *See infra* notes 198–201.

153. *See* CISG, *supra* note 3, art. 35(1)–(2). *But see* BRIDGE, *supra* note 99, ¶ 12.21 (expressing doubts in this respect).

154. For a further discussion, see *infra* notes 207–09.

The CISG's relationship towards domestic laws on innocent misrepresentation is therefore the same irrespective of the type(s) of remedies that the applicable law attaches to such misrepresentation. Where the two-step approach has clarified that domestic law is preempted by the CISG, preemption applies no matter whether the misinformed party would otherwise have had a right to claim damages (as under U.S. law),[155] a right to rescind the contract (as under English law),[156] or a right to rely on the courts' discretion to declare the contract subsisting and award damages in lieu of rescission (as under English law).[157] Nor does it make any difference how the measure of damages under the law of misrepresentation is calculated[158] or that avoidance of sales contracts under the CISG is prospective, while rescission for misrepresentation in common law systems is retrospective.[159] Rights to rescission under misrepresentation law do in particular not escape preemption because they could be classified as a "validity" issue under the second sentence of Article 4.[160] As earlier discussed,[161] where a given matter is regulated in the CISG, the uniform sales law has—in the words of Article 4—"expressly provided otherwise."

4. *Conclusion*

As a result, domestic law remedies for innocent misrepresentations relating to matters governed by the CISG—most importantly (but not exclusively)[162] to the two issues mentioned above, namely features of the goods and the other party's ability to perform respectively his or her creditworthiness—are preempted by the CISG; an outcome about which there is wide-spread agreement among commentators.[163] All other misrepresentations are not preempted, as for example those concerning the

155. *See generally* RESTATEMENT (SECOND) OF TORTS § 552C(1) (1977).

156. *See* Misrepresentation Act, 1967, § 2(1) (Eng.); *see also* CARTWRIGHT, *supra* note 104, ¶¶ 4–29.

157. *See* Misrepresentation Act, § 2(2).

158. *But see* RESTATEMENT (SECOND) OF TORTS § 552C cmt. b (1977) (suggesting that for domestic settings differences in measure of damages may affect relationship between actions for innocent misrepresentation and actions for breach of warranty); *see also* Electrocraft Ark., Inc. v. Super Elec. Motors, Ltd., No. 4:09-CV-00318 SWW, 2009 WL 5181854, at *6 (E.D. Ark. Dec. 23, 2009) ("In addition, Electrocraft seeks identical damages for its negligence/strict liability claim as it seeks for its breach of contract and warranty claims.").

159. *See* Bridge, *supra* note 26, at 244. On the lack of practical differences between prospective avoidance and retrospective rescission in sale of goods cases, see Bridge, *supra* note 45, at 285–86.

160. *See* Schlechtriem, *supra* note 12, at 474. *But see* Khoo, *supra* note 23, ¶ 3.3.4.

161. *See supra* notes 14–24.

162. For a discussion of another issue, i.e., the timeliness of the goods' delivery, see *infra* notes 188–89.

163. *See* BRIDGE, *supra* note 99, ¶ 12.21; Bridge, *supra* note 26, at 244; Bridge, *supra* note 45, at 303 n.124; CISG COMMENTARY, *supra* note 2, art. 4, ¶ 18; HONNOLD, *supra* note 6, ¶ 240; Schroeter, *supra* note 4, Introduction to Arts. 14–24, ¶ 62.

identity of the seller or of the buyer.[164] The answer to the question "can domestic law remedies for innocent misrepresentation be applied in CISG cases?" is therefore the proverbial lawyer's reply: "It depends . . . ."

B. *Negligent Misrepresentation*

An issue that has arisen more frequently in practice is the relationship between the CISG and remedies for negligent misrepresentation.

1. *Definition*

In the United States, the *Restatement (Second) of Torts* describes a negligent misrepresentation and its consequences as follows:

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.[165]

In English law, the functional equivalent reads:

> Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made the facts represented were true.[166]

Both concepts thus share the requirement of a lack of reasonable care (i.e., negligence) on the side of the maker of the statement, although English law fails to mention this requirement directly: Section 2(1) of the Misrepresentation Act of 1967 rather focuses on misrepresenting a person's belief in the statement's truth. While it is therefore theoretically possible that circumstances may exist in which a person may make a statement without having reasonable ground to believe it, yet in which it would be held that he was not (having regard to all the circumstances) negligent,[167] those cases will be exceedingly rare. Despite the differences in wording

164. *See* HONNOLD, *supra* note 6, ¶ 240. On further discussion of misinformation as to the parties' identity, see SCHWENZER, HACHEM & KEE, *supra* note 90, ¶¶ 17.35–.36.

165. RESTATEMENT (SECOND) OF TORTS § 552(1) (1977).

166. Misrepresentation Act, 1967, § 2(1) (Eng.).

167. *See* CHITTY ON CONTRACTS, *supra* note 93, ¶ 6-068.

and in regulatory approach, there is accordingly agreement that liability under Section 2(1) of the Misrepresentation Act, too, is essentially founded on negligence.[168]

In the past, a number of U.S. courts have had to deal with the relationship between remedies for alleged negligent misrepresentations by the seller and the CISG. Most of them allowed the application of damage claims for negligent misrepresentation alongside the CISG.[169] The essential reasoning they gave was brief and simple: "The CISG does not apply to tort claims," and therefore claims for negligent misrepresentation are controlled by state law.[170] Some commentators agree,[171] but others have rightly criticized this approach for being incompatible with the CISG's international character and its uniform interpretation.[172] After all, it relies on dogmatic categories of domestic law that are not internationally uniform. In the same spirit, a Belgian Court of Appeals held that a lack of information by the seller in relation to the use of the goods that the buyer relied upon constituted a contractual breach; therefore, it could not be used as a basis for extra-contractual liability unless the buyer could prove that the damage suffered is different than that caused by the seller's faulty contract performance.[173]

2. *The Factual Criterion*

When resorting to the alternative two-step approach proposed here, the factual criterion raises the question: Are cases of negligent misrepresentation factual situations not covered by the CISG because the CISG contains no specific rules on negligence, making negligent behavior an

168. *See* Gran Gelato Ltd. v. Richcliff Grp. Ltd., [1992] Ch. 560 at 573 (Eng.); GUENTER H. TREITEL, THE LAW OF CONTRACT 350 (11th ed. 2003); *see also* Bridge, *supra* note 45, at 301 ("[P]resumed negligence.").

169. *See* Miami Valley Paper, L.L.C. v. Lebbing Eng'g & Consulting Gmbh, No. 1:05-CV-00702, 2009 WL 818618, at *11 (S.D. Ohio Mar. 26, 2009); Sky Cast, Inc. v. Global Direct Distrib., L.L.C., No. CIV.A. 07-161, 2008 WL 754734, at *6 (E.D. Ky. Mar. 18, 2008); Geneva Pharms. Tech. v. Barr Labs., 201 F. Supp. 2d 236, 286–88 (S.D.N.Y. 2002). *But see* Electrocraft Ark., Inc. v. Super Electric Motors, Ltd., No. 4:09CV00318 SWW, 2009 WL 5181854, at *6 (E.D. Ark. Dec. 23, 2009).

170. *See Sky Cast, Inc.*, 2008 WL 754734, at *7 ("Thus, negligent misrepresentation is a tort claim completely different from a claim for breach of contract. Being a tort claim, the court concludes that it is not controlled by the CISG, which only concerns the sales of good[s] between merchants in different countries . . . ."); *Geneva Pharms. Tech.*, 201 F. Supp. 2d at 286 ("The CISG clearly does not preempt the claims sounding in tort.").

171. *See* Bridge, *supra* note 26, at 246. *But see id.* at 244; Khoo, *supra* note 23, ¶ 3.3.4; LOOKOFSKY, *supra* note 10, § 4.6; Lookofsky, *supra* note 20, at 280; Lookofsky, *supra* note 26, at 409.

172. *See* CISG, *supra* note 3, art. 7(1); Schwenzer & Hachem, *supra* note 63, at 471.

173. *See* ING Ins. v. BVBA HVA Koeling, Hof van Beroep [HvB] [Court of Appeal] Antwerpen, Apr. 14, 2004 (Belg.).

"operative fact" that, in the words of Professor Honnold, does not "invoke the rules of the Convention"?[174]

The answer is that the factual criterion is fulfilled since both rules do in fact turn on the same operative facts. The reason can be found in the Secretariat's commentary on the CISG, which states: "In order to claim damages it is not necessary to prove fault or a lack of good faith or the breach of an express promise, as is true in some legal systems. Damages are available for the loss resulting from any objective failure by the seller to fulfill his obligations."[175] The CISG accordingly embodies a deliberate choice that the question of negligence is irrelevant to the buyer's right to recover from the seller for damage caused by non-conforming goods.[176] It therefore does cover factual constellations in which negligence by a party is involved, although it is does not require that a party acted negligently.

3. *The Legal Criterion*

The second criterion works essentially along the same lines as in cases of innocent misrepresentation. Again, the matter that is regulated is the misinformed party's state of knowledge at the moment of contract conclusion. This is supported by the traditional categories within the law of misrepresentation where fraudulent misrepresentations were distinguished from non-fraudulent misrepresentations, the latter category including the innocent and the negligent variety.[177] The additional factor present in cases of negligence—the failure to exercise reasonable care—merely affects the measure of damages, but does not change the essential character of the remedy.

When applying the legal criterion to the three U.S. cases mentioned above, in which the courts found domestic law rules on negligent misrepresentation not to be displaced by the CISG, the results are as follows: *Miami Valley Paper v. Lebbing Engineering & Consulting*[178] concerned false statements by the seller according to which the goods (used machines) were "a very good deal" and the current owner was selling them because of bankruptcy. Both were considered by the district court to be mere statements of opinion ("puffery"), insufficient to support a negligent misrepresentation claim and furthermore did not relate to a matter regulated by the CISG because they neither formed part of the goods' contractual

174. HONNOLD, *supra* note 6, ¶ 62.

175. UN Secretariat, Commentary on Art. 41 of the 1978 Draft of the CISG, cmt. 3, UN Doc. A/CONF. 97/5, Official Records 37, 48, 55.

176. *See* HONNOLD, *supra* note 6, ¶ 73.

177. *See* RESTATEMENT (SECOND) OF TORTS § 552C cmt. a (1977); CHITTY ON CONTRACTS, *supra* note 93, ¶ 6-005; TREITEL, *supra* note 168, at 349–50. Under English law, the point became less clear through *Hedley Byrne & Company Ltd. v. Heller & Partners Ltd.* and the enactment of the Misrepresentation Act 1967. *See* TREITEL, *supra* note 168, at 349–50.

178. No. 1:05-CV-00702, 2009 WL 818618, at *12 (S.D. Ohio Mar. 26, 2009).

description, nor affected the purposes for which they could be used.[179] In *Geneva Pharmaceuticals v. Barr Laboratories*,[180] the alleged negligent misrepresentation consisted of the seller's failure to disclose that he was no longer willing or able to supply the buyer (a manufacturer of generic pharmaceuticals) with the goods (clathrate, a chemical substance used in the manufacture of pharmaceuticals) under future contracts.[181] At first glance, the issue could be considered a matter covered by Article 71(1) because it pertained to the seller's ability to perform. Upon closer scrutiny, however, it becomes clear that the legal criterion under our two-step approach was not fulfilled. The alleged misinformation by the seller only concerned future contracts that would have involved the same type of goods, but not the performance of the contract at hand, the latter being the only matter regulated by Article 71(1).[182] Both cases were therefore correctly decided when applying the test suggested here.

In *Sky Cast v. Global Direct Distribution*,[183] on the contrary, the legal criterion was arguably fulfilled, and domestic law remedies for negligent misrepresentation should therefore have been considered preempted.[184] In that case, the timeliness of the delivery of the goods (light poles that were needed for an ongoing construction project) stood at the center of the dispute. After the parties had agreed on delivery dates in their contract, the seller allegedly provided the buyer with false information concerning the actual time of the upcoming delivery, thereby leading to the buyer's claim for negligent misrepresentation when the announced delivery was late.[185] It is submitted that in doing so, domestic law was applied to a matter exclusively covered by Article 33 (time of delivery) and Articles 45 *et seq.* (buyer's rights in cases of late delivery) of the CISG.[186]

4. *Conclusion*

In summary, domestic law remedies for negligent misrepresentation are equally preempted as far as they relate to features of the goods sold or the ability of one party to perform the contract and therefore—in the ter-

179. *See* CISG, *supra* note 3, art. 35(1); *see also id.* art. 35(2).

180. 201 F. Supp. 2d 236 (S.D.N.Y. 2002).

181. *See id.* at 286.

182. *See* CISG, *supra* note 3, art 71(1). The "substantial part of his obligations" that Article 71(1) speaks of is a substantial part of the party's obligations under the *present* contract (the performance of which may then be suspended by the other party), not under future contracts. *See id.*

183. No. CIV.A. 07-161, 2008 WL 754734 (E.D. Ky. Mar. 18, 2008).

184. *See* SCHWENZER, HACHEM & KEE, *supra* note 90, ¶ 49.31.

185. *See Sky Cast, Inc.*, 2008 WL 754734, at *11. The district court concluded that the information given by seller had in fact not been false and therefore dismissed the claim. *See id.*

186. *Contra* Schlechtriem, *supra* note 12, at 475 (mentioning "obligations to deliver conforming goods in time" as example for topics and interests outside CISG).

minology used here—pertain to a matter also regulated by the CISG.[187] Again, remedies for other types of negligent misrepresentations remain applicable, for example, incorrect information about a third party's willingness to guarantee performance of the contract.[188]

C. *Fraudulent Misrepresentation*

This leaves us with the last type of misrepresentation, namely fraudulent misrepresentation. Does the line of arguments presented above with respect to negligent misrepresentation also apply to cases of fraud, because, after all, the CISG operates independently of notions of fault or lack of good faith?

1. *Definition*

No, it does not. Claims for or because of fraudulent inducement,[189] fraudulent misrepresentation,[190] common law fraud,[191] tortious interference with business relations,[192] *arglistige Täuschung*,[193] *absichtliche Täuschung*,[194] duress,[195] deceit, or intentional harm all remain applicable alongside the CISG. While this result is commonly agreed upon both in

187. *See* BRIDGE, *supra* note 99, ¶ 12.21; Michael Bridge, *A Comment on "Towards a Universal Doctrine of Breach—The Impact of CISG" by Jürgen Basedow*, 25 INT'L REV. L. & ECON. 501, 510 (2005); HONNOLD, *supra* note 6, ¶ 73; Peter Huber, *in* MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH art. 45, ¶ 24 (6th ed. 2012); Kröll, *supra* note 121, art. 35, ¶ 204; Schlechtriem, *supra* note 12, at 473; Schroeter, *supra* note 4, Introduction to Arts. 14–24, ¶ 62; SCHWENZER, HACHEM & KEE, *supra* note 90, ¶ 49.31; Ingeborg Schwenzer, *Buyer's Remedies in the Case of Nonconforming Goods: Some Problems in a Core Area of the CISG*, 101 ASIL PROC. 416, 421 (2007); Schwenzer & Hachem, *supra* note 63, at 471.

188. *See* Schroeter, *supra* note 4, Introduction to Arts. 14–24, ¶ 62.

189. *See* Beijing Metals & Minerals v. Am. Bus. Ctr., Inc., 993 F.2d 1178, 1180 (5th Cir. 1993) (acting under Texas law); Miami Valley Paper, L.L.C. v. Lebbing Eng'g & Consulting GmbH, No. 1:05-CV-00702, 2009 WL 818618, at *1 (S.D. Ohio Mar. 26, 2009) (acting under Ohio law).

190. *See* Dingxi Longhai Dairy, Ltd. v. Becwood Tech. Grp., L.L.C., No. 08-762, 2008 U.S. Dist. LEXIS 51066, at *6–7 (acting under Minnesota law).

191. *See* TeeVee Toons, Inc. v. Gerhard Schubert GmbH, No. 00 Civ 5189, 2006 WL 2463537, at *13–16 (S.D.N.Y. Aug. 23, 2006) (acting under New York law).

192. *See* Electrocraft Ark., Inc. v. Super Electric Motors, Ltd., No. 4:09-CV-00318 SWW, 2009 WL 5181854, at *8 (E.D. Ark. Dec. 23 2009) (acting under Arkansas law); Viva Vino Imp. Corp. v. Farnese Vini S.R.L., No. CIV.A. 99-6384, 2000 WL 1224903, at *1 (E.D. Pa. Aug. 29, 2000) (acting under Pennsylvania law).

193. *See* Oberlandesgericht [OLG] [Court of Appeals] Hamm, INTERNATIONALES HANDELSRECHT [IHR] 59, 63 (2010) (Ger.) (acting under German law).

194. Cantonal Court St. Gallen, INTERNATIONALES HANDELSRECHT [IHR] 2009, 161 (Switz.) (acting under Swiss law).

195. *See* Beijing Metals & Minerals v. Am. Bus. Ctr., Inc., 993 F.2d 1178, 1184–85 (5th Cir. 1993) (acting under Texas law).

case law[196] and in legal writing,[197] the precise reasons behind it are not often spelled out. In my opinion, they can be described in the manner explained below.

2. *The Factual Criterion*

When asking whether domestic law remedies for fraudulent misrepresentation are triggered by a factual situation which the CISG also applies to, this question cannot be denied simply because a party's fraudulent intention, i.e., one's knowledge of the untrue character of one's representation,[198] is a mere state of mind and as such does not qualify as a fact. The state of a man's mind, as the English Court of Appeals famously put it, "is as much a fact as the state of his digestion."[199] Where rules on fraudulent misrepresentation are concerned, the factual criterion is instead fulfilled because the CISG also covers cases in which the seller is positively aware of the goods' non-conformity, but nevertheless concludes the contract. Some authors, however, have expressed a different view and argued that the CISG does not address factual situations involving fraud[200]—a position which, if followed through, would arguably have to deny parties to CISG contracts that were induced by fraudulent misstatements any remedies arising from the CISG. This differs from the position taken here, which will be addressed in more detail below.[201]

3. *The Legal Criterion*

Rules on fraudulent misrepresentation, however, concern a different regulatory matter than the CISG's provisions. This, again, does not follow from the fact that many domestic laws treat fraud and its consequences as a matter of tort law. The dogmatic classification within national legal systems should not influence the autonomous interpretation of the CISG's scope in accordance with Article 7(1). Such classification is furthermore not internationally uniform. German sales law, for example, until not too long ago, considered the seller's fraudulent misrepresentation about the

196. *See* Zurich Chamber of Commerce, YB Comm. Arb. 128, ¶ 149 (1998).

197. *See* Benicke, *supra* note 24, ¶ 19; Johan Erauw & Harry Flechtner, *Remedies Under the CISG and Limits to Their Uniform Character, in* THE INTERNATIONAL SALE OF GOODS REVISITED 35, 66 (Petar Šarčević & Paul Volken eds., 2001); Fountoulakis, *supra* note 145, ¶ 25; Heiz, *supra* note 14, at 653–54; HONNOLD, *supra* note 6, ¶ 65; Kröll, *supra* note 121, art. 35, ¶ 205; Lookofsky, *supra* note 20, at 280; Schlechtriem, *supra* note 12, at 474; Schroeter, *supra* note 4, Introduction to Arts. 14–24, ¶ 62; Schwenzer, *supra* note 116, art. 35, ¶ 49; Schwenzer, *supra* note 187, at 421.

198. *See* RESTATEMENT (SECOND) OF TORTS § 526 cmt. a (1977).

199. *See* Edgington v. Fitzmaurice, [1885] L.R. 29 Ch.D. 459 at 483 (Lord Bowen L.J.).

200. *See* HONNOLD, *supra* note 6, ¶¶ 65, 73.

201. *See infra* notes 207–09.

quality of goods as one of the few reasons giving rise to a *contractual* right of the buyer to claim damages.[202]

The decisive reason is that domestic legal rules on fraudulent misrepresentation deal with violations of the "obligation of honesty" (as the *Restatement (Second) of Torts* puts it)[203] or the "general obligation of honesty in speaking" (as described by an English author),[204] which is a matter different from mere breaches of contractual obligations or from a lack of due care. The CISG does not attempt to regulate the specific consequences triggered by such party behavior. In the Hague Sales Laws of 1964, predecessors to the CISG of 1980, this point was still expressly clarified. Article 89 of the Uniform Law on the International Sale of Goods (ULIS) stated: "In case of fraud, damages shall be determined by the rules applicable in respect of contracts of sale not governed by the present Law."

The fact that ULIS Article 89 has no explicit counterpart in today's CISG should not be read as an indication of the CISG's position being different.[205] The developments during the drafting stage of the CISG made clear that the provision was merely left out in an attempt to shorten the overall length of the CISG's text, combined with the hope that it would be possible to adopt a new concurring international instrument to govern questions of fraudulent party behavior—a plan that eventually did not succeed. The lack of a provision along the lines of ULIS Article 89 did not signal an intent of the CISG's drafters to include fraud among the matters regulated by the CISG,[206] so that remedies for fraudulent misrepresentation can be applied alongside the CISG.

4. *Concurrent Applicability of Uniform and Domestic Law*

The above-mentioned result of the two-step approach raises one last question to be addressed in the present paper, namely: Does the fact that the effects of fraudulent party behavior is not among the matters regulated by the CISG mean that the CISG is displaced in favor of national rules on fraudulent misrepresentation? The answer must be "no." Rather, both sets of rules apply alongside each other, leaving the aggrieved party with the choice of which rule to base one's claims upon.[207] This follows from an interpretation of the CISG. The purpose of the CISG's remedies is the compensation of parties that have suffered a breach of contract, regardless of whether the conclusion of this contract was fraudulently in-

202. *See* BÜRGERLICHES GESETZBUCH [BGB] [Civil Code] § 463 (Ger.) (as in force until December 31, 2001).

203. RESTATEMENT (SECOND) OF TORTS § 552 cmt. a (1977).

204. CARTWRIGHT, *supra* note 104, ¶ 6-01.

205. *But see* LOOKOFSKY, *supra* note 10, § 4.6 n.71.

206. *See* SCHLECHTRIEM, *supra* note 100, at 34; Schlechtriem, *supra* note 12, at 474.

207. *See* Cantonal Court St. Gallen, INTERNATIONALES HANDELSRECHT [IHR] 2009, 161 (Switz.); Oberlandesgericht [OLG] [Court of Appeals] Cologne May 21, 1996 (Ger.); Schroeter, *supra* note 4, Introduction to Arts. 14–24, ¶ 62.

duced in the first place. A different interpretation would deprive parties that suffered fraud in addition to a breach of contract of their remedies under the CISG, a result that would be irreconcilable with the promotion of good faith that CISG Article 7(1) demands. This was also the prevailing opinion under ULIS Article 89.[208] At the end of the day, CISG contracts obtained through fraudulent misrepresentation accordingly constitute one of the rare cases that the CISG does govern, but not exhaustively.[209]

IV. CONCLUSION

Defining the exact substantive scope of the CISG is a difficult but necessary task. It is necessary because the scope determines over which domestic rules of law the CISG prevails, thereby preempting the concurrent domestic law's application,[210] and difficult because the CISG itself provides limited guidance about the method through which this definition is to be achieved. This article has discussed two approaches used in this regard in case law and legal writings on the CISG: the reliance on Article 4[211] and on dogmatic categories of domestic law as "contracts" and "torts,"[212] and found them both wanting, particularly in light of Article 7(1) calling for an internationally uniform interpretation of the CISG's scope.

Against this background, a novel two-step approach has been developed with the CISG's Article 7(1) in mind.[213] According to this approach, a domestic law rule is displaced by the CISG if: (1) it is triggered by a factual situation that the CISG also applies to (the factual criterion), and (2) it pertains to a matter that is also regulated by the CISG (the legal criterion). Only if both criteria are cumulatively fulfilled, the domestic law rule concerned overlaps with the CISG's sphere of application in a way that will generally result in its preemption. In applying this approach to remedies for misrepresentation known in common law jurisdictions, it has been demonstrated that remedies for both innocent[214] and negligent misrepresentation[215] are preempted by the CISG if—and only if—they pertain to matters already regulated by the CISG, notably the buyer's state of knowledge about features of the goods at the moment of contract conclu-

208. *See* Ronald Harry Graveson, Ernst Joseph Cohn & Diana Graveson, UNIFORM LAWS ON INTERNATIONAL SALES ACT 1967 104 (1968); Weitnauer, *Article 89, in* KOMMENTAR ZUM EINHEITLICHEN KAUFRECHT, EKG, ¶ 3 (Dölle ed., 1976).

209. Another case that falls into this general category is arguably that of contracting parties demanding a judgment for specific performance. While the CISG in principle grants such a right, Article 28 expressly authorizes the adjudicating court to refer to "its own law" in order to determine whether such a judgment should be entered.

210. *See supra* notes 1–12.

211. *See supra* notes 14–24.

212. *See supra* notes 25–63.

213. *See supra* notes 64–88.

214. *See supra* notes 93–164.

215. *See supra* notes 165–88.

sion or the parties' state of knowledge about the other party's ability to perform. Remedies for fraudulent misrepresentation, on the contrary, can always be applied alongside the CISG.[216]

The methodical approach presented here is no more than a means to a necessary end, namely the uniform and predictable definition of the borders of the CISG. As it is clear that the purpose of the CISG—the creation of a uniform international law—will be frustrated if it is possible to circumvent its provisions by bringing claims under domestic law,[217] it is hoped that the two-step approach may also prove useful in determining the relationship between the CISG and other instruments of domestic law, thereby allowing international merchants to foresee which rules will apply to their cross-border sales transactions.

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216. *See supra* notes 190–210.

217. *Cf.* CA 7833/06 Pamesa Ceramica v. Yisrael Mendelson Ltd. 27, ¶ 54 [2009] (Isr.).