

## CISG Advisory Council\* Opinion No. 12

### LIABILITY OF THE SELLER FOR DAMAGES ARISING OUT OF PERSONAL INJURIES AND PROPERTY DAMAGE CAUSED BY GOODS AND SERVICES UNDER THE CISG

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

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

*At subsequent meetings, the CISG-AC elected as additional members Prof. Pilar Perales Viscasillas, Universidad Carlos III, Madrid; Professor Ingeborg Schwenger, University of Basel; Prof. John Y. Gotanda, Villanova University; Prof. Michael G. Bridge, London School of Economics; and Prof. Han Shiyuan, Tsinghua University. Prof. Jan Ramberg served for a three-year term as the second Chair of the CISG-AC. At its 11th meeting in Wuhan, People's Republic of China, Prof. Eric E. Bergsten of Pace University School of Law was elected Chair of the CISG-AC and Prof. Sieg Eiselen of the Department of Private Law of the University of South Africa was elected Secretary. At its 14th meeting in Belgrade, Serbia, Prof. Ingeborg Schwenger of the University of Basel was elected Chair of the CISG-AC.*

## **Article 5 CISG**

This Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person.

## **OPINION**

**1. When loss is caused to the buyer by delivery of non-conforming goods, the seller is liable to the buyer for damages under Article 45(1)(b). The buyer is entitled to full compensation subject to the limitations as set forth in Article 74.**

**2.1 According to Article 5, the CISG does not govern the liability of the seller for death or personal injury caused by the goods to the buyer or any other person.**

**2.2 When a contract entailing labour or other services is a contract of sale in accordance with Article 3(2), the CISG does not govern the liability of the seller for death or personal injury caused by such services to the buyer or any other person according to Article 5.**

**2.3 Claims of the buyer against the seller to be indemnified against the buyer's liability for death or personal injury of a third person caused by goods or services supplied by the seller are claims for pecuniary loss of the buyer, and are not claims for "liability of the seller for death or personal injury caused by the goods to any person" under Article 5. These claims are governed by the CISG to the exclusion of any claims based on the applicable domestic law, whether contractual or not.**

**3.1 Liability of the seller for damage to the property of the buyer caused by goods or services supplied by the seller is governed by the CISG.**

**3.2 If the damage is caused to the goods themselves, the liability of the seller is governed by the CISG to the exclusion of any claims based on domestic law, whether contractual or not. The same applies if the damage is caused to property which is attached to the goods, or with which the goods are combined or commingled, or which are**

**processed by the goods, in the normal course of business or in the course of normal use.**

**3.3 However, if the damage is caused to other property of the buyer, any liability under the applicable domestic law is not excluded by the CISG.**

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## **COMMENTS**

**1. When loss is caused to the buyer by delivery of non-conforming goods, the seller is liable to the buyer for damages under Article 45(1)(b). The buyer is entitled to full compensation subject to the limitations as set forth in Article 74.**

### **Comment**

- 1.1. If the seller delivers non-conforming goods to the buyer, the buyer is given the remedies listed under Article 45. These include damages (Article 45(1)(b)), the amount of which is determined in accordance with Article 74 which sets forth the principle of full compensation subject to the limitation of foreseeability. On further interpretation of Article 74, the Advisory Council has already issued CISG-AC Opinion No. 6, Calculation of Damages under CISG Article 74. Rapporteur: Professor John Y. Gotanda, Villanova University School of Law, Villanova, Pennsylvania, USA.
- 1.2. However, Article 5 provides a carve-out for seller's liability for "death or personal injury" (hereinafter collectively referred to as "personal injury") caused by non-conforming goods or services. For such loss, the governing law is the applicable domestic law. Paragraphs 2.1-2.3 of this Opinion deal with interpretative issues relating to that provision.
- 1.3. For loss other than that carved out under Article 5, contractual liability is governed by the CISG when the CISG is applicable to the particular contract. However, there remains the question whether the CISG excludes the application of domestic law, especially tort law, when property damage is caused by the goods or services supplied by the seller. Paragraphs 3.1-3.3 deal with these interpretative questions.

## **2. Liability of the Seller for Personal Injuries (Article 5)**

**2.1. According to Article 5, the CISG does not govern<sup>1</sup> the liability of the seller for death or personal injury caused by the goods to the buyer or any other person.**

### **Comment**

#### ***A. Introduction***

2.1.1. Article 5 provides that the CISG “does not apply to the liability of the seller for death or personal injury caused by the goods to any person.” This does not mean that the buyer is left with no remedy for such losses. The recovery of damages will be governed by the law applicable by virtue of the rules of private international law. If, in addition to personal injury, other damage such as loss of profit or damage to property has also been caused by the same goods, domestic law is applicable to seller’s liability for personal injuries, while the CISG is applicable to seller’s liability for other types of damage<sup>2</sup>.

2.1.2. The question of whether Article 5 covers situations where personal injury is caused by the seller’s labour or services, rather than by the goods, is dealt with in Paragraph 2.2. Paragraph 2.3 discusses whether Article 5 applies to a recourse claim brought by the buyer against the seller.

#### ***B. Policy to leave product liability to domestic law***

2.1.3. The policy of Article 5 is demonstrated in its legislative history<sup>3</sup>. Article 5

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<sup>1</sup> This Opinion uses the term “does not govern” instead of “does not apply” which is the language used in Article 5. This is because, despite the language of Article 5, the CISG still “applies” to the contract from which the liability of the seller for personal injury arises. The legal consequence of Article 5 is that personal injury claims become matters not governed by the CISG, in the same manner that matters relating to validity and proprietary effects of the contract are not governed by the CISG under Article 4 even if the CISG applies to the contract.

<sup>2</sup> Peter Schlechtriem, in Peter Schlechtriem & Ingeborg Schwenzer eds., *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 2<sup>nd</sup> (English) Edition (Oxford: Oxford University Press, 2005), Art 5, para 6; Ingeborg Schwenzer & Pascal Hachem, in Ingeborg Schwenzer ed., *Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG)*, 3<sup>rd</sup> Edition (Oxford: Oxford University Press, 2010), Art 5, para 5.

<sup>3</sup> The deliberation most relevant to this Opinion took place at the 3<sup>rd</sup> Meeting of the First Committee of the Diplomatic Conference. A summary record of the deliberation appears in

was added to the CISG at the 1980 United Nations Diplomatic Conference, and therefore may not have experienced rigorous deliberation in the Working Group meetings that culminated in the 1978 UNCITRAL Draft. The current Article 5 stems from proposals made by Finland, France and the USA, which were later consolidated into a joint proposal to add the following provision to the Draft CISG: "This Convention does not apply to the liability of the seller for death or injury caused by the goods to any person." <sup>4</sup>

2.1.4. The purpose of the joint proposal was to accommodate domestic legal rules designed to protect victims of defective products, i.e., product liability rules in particular. The understanding at the Diplomatic Conference was that, without Article 5, different results with respect to applicable law would arise depending upon the characterization of "product liability" claims under domestic laws. It was considered that, under domestic law characterizing product liability claims in tort, the buyer would, in addition to the protection by the CISG, be able to resort to domestic product liability law in tort; while on the other hand, under domestic law characterizing "product liability" claims as contractual, the CISG would take priority over domestic law (Article 7(2))<sup>5</sup>. Article 5 was intended to ensure that, in every jurisdiction, the seller's liability for "personal injury" arising out of non-conforming goods would be governed by domestic law and not by the CISG. The underlying assumption that domestic "contract law" claims are excluded by the CISG but domestic "tort law" claims are not, however, is subject to scrutiny. On this issue, see para 2.1.6 below.

2.1.5. During the deliberation of the current Article 5, an additional proposal was made to extend Article 5 so as to carve out all product liability claims,

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A/CONF.97/C.1/SR.3, paras 11-34, in *United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March – 11 April 1980, Official Records* (U.N. Document No: A/CONF.97/19; United Nations, Vienna, 1981; Sales No. E.81.IV.3) (hereinafter cited as "*Official Records*"), pp. 245-246, reproduced in John Honnold ed., *Documentary History of the Uniform Law for International Sales*, (Deventer: Kluwer, 1989) (hereinafter cited as "*Documentary History*"), pp. 466-467.

<sup>4</sup> A/CONF.97/C.1/L.51 cited in A/CONF.97/11, in *Official Records* (supra note 3), p. 85, reproduced in *Documentary History* (supra note 3), at p. 657. The language "personal" was inserted before the word "injury" at a later stage. A/CONF.97/C.1/SR.35, in *Official Records*, p. 423, reproduced in *Documentary History*, p. 644.

<sup>5</sup> For such understanding, see e.g., Peter Schlechtriem, *Uniform Sales Law* (Vienna: Manz, 1986), pp. 34-35; Fritz Enderlein & Dietrich Maskow, *International Sales Law* (New York: Oceana Publications, 1992), Art 5, para 1.1.

including claims for recovery in respect of property damage, from matters governed by the CISG. This proposal was unsuccessful. See para 3.1.2 below.

### **C. Fallacy in the underlying assumption**

2.1.6. The underlying assumption in the discussion of Article 5 in the drafting process, that domestic “contract law” claims are excluded by the CISG but domestic “tort law” claims are not, relied on the domestic characterization of claims. That was a questionable assumption both from the viewpoint of the purpose of the CISG and the design of the CISG. First of all, it runs counter to the goal of uniformity since it would be up to each jurisdiction to decide which domestic law claims would remain intact even when the CISG was applicable. Uniformity is better served by an interpretation that does not rely on domestic characterization; the interpretation should focus on the “interests” sought to be protected by the CISG. Secondly, such an assumption also runs counter to the design of the CISG which, in principle, excludes the application of domestic law with respect to matters already governed by the CISG (Article 7(2)). Thus, the better view is that the characterization of claims under domestic law is irrelevant in deciding whether the claim is excluded by the CISG or not<sup>6</sup>.

2.1.7. In addition, it is not clear whether and how the difference between legal systems that adopt the *cumul* rule and those that adopt the *non-cumul* rule was taken into account in the deliberative process<sup>7</sup>. Most jurisdictions adopt the *cumul* rule, which is a rule that allows concurrence of claims arising from the same facts, typically contract and tort claims, and allows parties to elect one or more of the claims. The argument that product liability claims sounding in tort are not excluded by the CISG seems to presuppose a *cumul* rule regime. On the other hand, the *non-cumul* rule (*non-cumul des responsabilités contractuelles et délictuelles*) does not allow concurrence of claims. Under that regime, if both contract and tort claims potentially arise from the same facts,

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<sup>6</sup> Schwenzler/Hachem, *supra* note 2, Art 5, para 15.

<sup>7</sup> For a brief comparative overview of these rules in the context of product liability claims, see Mathias Reimann, “Liability for Defective Products at the Beginning of the Twenty-First Century: Emergence of a Worldwide Standard?”, 51 *American Journal of Comparative Law* 751 (2003), at pp. 798-799.

contract claims take priority over tort claims, and the parties are not allowed to make an election of the tort claim. For example, this used to be the rule adhered to in France, one of the proposers of Article 5, at the time of the 1980 Diplomatic Conference<sup>8</sup>. In the absence of Article 5, the result under the *non-cumul* rule would be that domestic product liability claims, irrespective of their characterization, would not be allowed: domestic contract law claims would be excluded by the CISG (Article 7(2)), while domestic tort law claims would also be excluded by the *non-cumul* rule. Thus, the reasoning given by the French delegate that different results will ensue depending on the characterization of domestic law claims does not fit *non-cumul* rule regimes. The French delegate's explanation that problem will arise "in countries which based liability for defective goods on the seller's latent defects guarantee" may have meant to refer to countries which adopted the *non-cumul* rule, but that is not how the explanation was understood by the other delegates or later commentators<sup>9</sup>.

#### ***D. Policy not to exclude domestic law claims for recovery of "extra-contractual interests"***

2.1.8. If the underlying assumption was questionable, there remains the question of what policy Article 5 actually entertains. The practical consequence of applying the CISG to buyers' remedies is that the buyer will be subject to the requirements imposed by the CISG. Most notably, except for cases where Article 40 applies, Articles 38 and 39 will bar the buyer from bringing damages claims when notice of the defect in the goods is not given within a reasonable time frame (although Article 44 may ameliorate this result to some extent), or when the accident caused by defects occurs more than two years after the goods were handed over to the buyer. These limitations may be appropriate for the protection

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<sup>8</sup> The French rule was built on a combination of *non-cumul* rule and a product liability regime based on contract law (*action directe*). See e.g., Jean-Sébastien Borghetti, "The Development of product liability in France", in Simon Whittaker ed., *The Development of Product Liability* (Cambridge: Cambridge University Press, 2010), pp. 93-94. The implementation of the 1985 EU Directive on Product Liability provides a specific exception to the *non-cumul* rule; a product liability claim based on Art. 1386-1 Code Civil no longer excludes tort liability. Simon Whittaker, *Liability for Products* (Oxford: Oxford University Press, 2005), p. 96.

<sup>9</sup> For example, see the accounts of some of the delegates to the Diplomatic Conference: Schlechtriem, *supra* note 5, pp. 34-35; Enderlein/Maskow, *supra* note 5, Art 5, para 1.1.

of “contractual interests” created by the contract and for which the parties bargained, but they may be inappropriate for the protection of interests such as “death and personal injuries,” which are not created by the contract and for the protection of which the parties did not bargain or waive.

2.1.9. The policy behind Article 5 is thus to ensure that the liability of the seller is not limited by the CISG with respect to extra-contractual interests: i.e., claims under domestic law that protect such interests are allowed irrespective of their characterization. This policy also has implications for property damage which will be dealt with in para 3.2 below.

2.1.10. Some commentators argue that a seller may agree to assume an additional contractual obligation to protect the life and limb of the buyer, and that Article 5 would not exclude the application of CISG in case of breach of such obligation. These are situations where, for example, the seller promises to warn the buyer of certain dangers in using the goods. In such cases, the seller may have impliedly undertaken an obligation to pay for injuries caused by a failure to perform this obligation<sup>10</sup>. This would amount to a contractual derogation (under Article 6) from the provision of Article 5. However, there remains the question, not addressed in this Opinion, whether the parties may validly agree to limit the liability of the seller for personal injuries. Whether such contract terms exclude the otherwise applicable domestic remedies is a matter to be decided according to the rules on validity of the applicable domestic law<sup>11</sup> (Article 4(a)).

**2.2. When a contract entailing labour or other services is a contract of sale in accordance with Article 3(2), the CISG does not govern the liability of the seller for death or personal injury caused by such services to the buyer or any other person according to Article 5.**

## Comment

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<sup>10</sup> Rolf Herber, in Peter Schlechtriem ed., *Commentary on the UN Convention on The International Sale of Goods (CISG)*, 2d edition (in translation), (Oxford: Oxford University Press, 1998), Art 5, para 5; Schlechtriem, supra note 2, Art 5, para 5; Schwenger/Hachem, supra note 2, Art 5, paras 6-7; Loukas Mistelis/John Ribeiro, in Stephan Kröll, Loukas Mistelis, & Pilar Perales Viscasillas eds., *UN Convention on Contracts for the International Sale of Goods (CISG) Commentary* (München: C.H. Beck, 2011), Art 5, paras 7-8.

<sup>11</sup> Schlechtriem, supra note 2, Art 5, para 10.

- 2.2.1. According to Article 3(2), the CISG applies to a contract of sale of goods that entails the supply of labour or other services, provided that the supply of labour or other services is not the preponderant part of the obligation of the party furnishing the goods. Those contracts are considered to be sale of goods. On further interpretation of Article 3(2), the Advisory Council has already issued CISG-AC Opinion no. 4, Contracts for the Sale of Goods to Be Manufactured or Produced and Mixed Contracts (Article 3 CISG), 24 October 2004. Rapporteur: Professor Pilar Perales Viscasillas, Universidad Carlos III de Madrid.
- 2.2.2. In such a contract, personal injury may be caused by the labour or other services, rather than by the furnished goods. This gives rise to the question whether claims for recovery of personal injury caused by labour or services is governed by the CISG, or whether that is a matter not governed by the CISG under Article 5. This is possibly a gap that the drafters of the CISG did not foresee<sup>12</sup>. In such case, the liability of the seller for the death or personal injury should, in accordance with Article 5, not be governed by the CISG<sup>13</sup>. Although a literal reading of Article 5 may lead to a different result, the policy of Article 5 to leave the recovery of personal injury to domestic law carries equal weight irrespective of whether personal injury is caused by defects in goods or by defective services. There is no reason to distinguish these two cases<sup>14</sup>.

**2.3. Claims of the buyer against the seller to be indemnified against the buyer's liability for death or personal injury of a third person caused by goods or services supplied by the seller are claims for pecuniary loss of the buyer, and are not claims for "liability of the seller for death or personal injury caused by the goods to any person" under Article 5. These claims are governed by the CISG to the exclusion of any claims based on the applicable domestic law, whether**

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<sup>12</sup> Schlechtriem, supra note 2, Art 5, para 5; Schwenger/Hachem, supra note 2, Art 5 , para 7.

<sup>13</sup> **Switzerland** 26 April 1995, HG Zürich, CLOUT case no. 196, CISG-Online no. 248 (floating device case). However, this case concerned property damage caused by defective improper services rather than personal injury.

<sup>14</sup> Schlechtriem, supra note 2, Art 5, para 5; Schwenger/Hachem, supra note 2, Art 5 , para 7; Ingeborg Schwenger, in Ingeborg Schwenger ed., *Slechtriem & Schwenger Commentary on the UN Convention on the International Sale of Goods (CISG)*, 3<sup>rd</sup> Edition (Oxford: Oxford University Press, 2010), Art 74, para 32.

## contractual or not.

### Comment

2.3.1. Personal injury caused by goods or services to any third person other than the buyer, such as a sub-purchaser, manager, employee, or family member of the buyer, is personal injury caused by the goods or services to “any person”. Thus, if the buyer has compensated those third parties for personal injury, against whom the buyer is liable under the applicable law, and then turns to the seller for recourse or indemnification, it may seem that such recourse or indemnification claims are claims for liability of the seller for “personal injury caused by the goods to any person” and therefore not governed by the CISG. This interpretation, supported by many commentators<sup>15</sup>, is consistent with the French delegate’s statement at the Diplomatic Conference that the words “to any person” were “introduced in deference to the wishes of certain delegations in order to clarify the meaning of the provisions of [Article 5] on the question of a claim by one of the parties to the contract against the other resulting from a claim against the former asserted by a third party.”<sup>16</sup>

2.3.2. However, the better interpretation is that such recourse or indemnification claims of the buyer are not excluded by Article 5, and that these claims are governed by the CISG to the exclusion of any claims based on the applicable domestic law, whether contractual or not<sup>17</sup>. According to this view, which finds support in one German

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<sup>15</sup> This is the majority view. E.g., Schlechtriem, supra note 5, p. 34; Schlechtriem, supra note 2, Art 5, para 7 (however, Professor Schlechtriem has later revised his view; see footnote 17); Warren Khoo, in C.M. Bianca & J.M. Bonell eds., *Commentary on the International Sales Law* (Milan: Giuffrè, 1987), Art 5, para 2.2; Bernard Audit, *La vente internationale de marchandises* (Paris: L.D.G.V., 1990), p. 36; Franco Ferrari, “The Interaction between the United Nations Convention on Contracts for the International Sale of Goods and Domestic Remedies (Rescission for Mistake and Remedies in Tort Law)”, 71 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 52 (2007), p. 73; Herber, supra note 10, Art 5, para 7.

<sup>16</sup> A/CONF.97/C.1/SR.35, para 42, in *Official Records* (supra note 3), p. 423, reproduced in *Documentary History* (supra note 3), p. 644.

<sup>17</sup> Joseph Lookofsky, “In Dubio Pro Conventione? Some Thoughts about Opt-outs, Computer Programs and Preemption under the 1980 Vienna Sales Convention (CISG)”, 13 *Duke Journal of Comparative and International Law* 263 (2003), at p. 287 footnote 119; Michael Bridge, *The International Sale of Goods*, 3d ed., (Oxford: Oxford University Press, 2013), para 10.27; Michael Bridge, in James Fawcett, Jonathan Harris, & Michael Bridge, *International Sale of Goods in the Conflict of Laws* (Oxford: Oxford University Press, 2005), para 16.79; Mistelis/Ribeiro, supra note 10, Art 5, paras 13-14. Professor Schlechtriem’s revised view (for his former view, see supra note 15) is that such recourse claims are governed by the CISG, but concurrent domestic claims are also allowed. Peter Schlechtriem & Petra Butler, *UN Law on International Sales* (Berlin-Heidelberg: Springer, 2009), pp. 39-40. See also

decision<sup>18</sup>, the buyer is claiming damages for its economic loss or “balance sheet loss”<sup>19</sup>. The policy of Article 5 is not disturbed by such interpretation because the sub-purchaser or any third person who was injured has already been compensated by the buyer, and therefore is not in need of further protection.

- 2.3.3. This interpretation may seem, on its face, to ignore the language “to any person” in Article 5. However, the question of who suffered “death or personal injury”, and the question of whether the seller’s liability is “for death or personal injury” are two separate questions.
- 2.3.4. The latter question is discussed in para. 2.3.2 above. On the other hand, with respect to the first question, death or personal injury caused to, for example, sub-purchasers admittedly is “death or personal injury to any person”. Thus, Article 5 would seem to exclude a seller’s liability to those third persons from the purview of the CISG. However, there may have been some confusion in the drafting of Article 5, because the CISG does not govern such direct claims against the seller with whom the third person has no contractual relationship. The CISG governs “the rights and obligations of the seller and the buyer”, but not the legal relationship of those parties to the contract with third parties (Article 4).
- 2.3.5. For the same reason, this Opinion does not deal with the question of the third person’s claim against the buyer, or the seller’s recourse claim against the manufacturer or its supplier. These are questions that must be resolved according to the law applicable to their relationship.

### **3. Liability of the Seller for Property Damage**

#### **3.1 Liability of the seller for damage to the property of the buyer caused by goods or services supplied by the seller is governed by the CISG.**

##### **Comment**

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Schwenzer/Hachem, *supra* note 2, Art 5, para 10.

<sup>18</sup> **Germany** 2 July 1993 OLG Düsseldorf, CLOUT case no. 49, CISG Online no. 74 (veneer cutting machine case). The court ordered the seller to pay damages and to indemnify the buyer against the loss it suffered in satisfying injury claims brought by a third party (sub-purchaser) for damage caused by defects in the goods.

<sup>19</sup> Bridge, *supra* note 17 (International Sale of Goods), para 10.27; Schwenzer/Hachem, *supra* note 2, Art 5, paras 8-10; Mistelis/Ribeiro, *supra* note 10, Art 5, paras 13-14.

## **A. Claims for property damages governed by the CISG**

3.1.1. Article 5 does not exclude claims based on the CISG for property damage caused by the goods or services supplied by the seller. Under Article 74, damages for such loss are recoverable under the CISG, and therefore, this matter is governed by the CISG<sup>20</sup>. Whether that results in the exclusion of domestic law claims is considered in paras 3.1.4 et seq.

3.1.2. When the current Article 5 was under deliberation at the Diplomatic Conference, there was a proposal to extend Article 5 to all product liability claims, including claims for property damage<sup>21</sup>. There was some support for an expansive Article 5, but this proposal was not adopted, mainly due to difficulties in defining “product liability”<sup>22</sup>. The Swedish delegate also pointed out the drawback of such a provision for uniformity of law, stating that “it would remove from the purview of the [CISG] such cases as the supply of defective spare parts for aircraft or defective raw materials which damaged the final product. It would then not be clear which rules prevailed in those cases. Problems of the choice of law would arise and parties to contracts of sale would have to inform themselves about unfamiliar systems. That would be a setback for efforts at legal unification”<sup>23</sup>. Similarly, the French delegate explained, from the viewpoint of the core interests protected by the CISG, why the proposal which later became Article 5 did not exclude property damage from the coverage the CISG: “[I]t was the sponsors’ opinion that [damage to property] was included in commercial or economic loss and not a failure on their part to recognize its importance. If damage to property were to be excluded there would be a conflict with other provisions of the Convention including those which covered the conformity of goods.”<sup>24</sup>

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<sup>20</sup> **Switzerland** 26 April 1995, HG Zürich, CLOUT case no. 196, CISG Online no. 248 (floating device case).

<sup>21</sup> A/CONF.97/C.1/SR.3, paras 14 et seq., in *Official Records* (supra note 3), pp. 245-246, reproduced in *Documentary History* (supra note 3), pp. 466-467.

<sup>22</sup> Ibid.

<sup>23</sup> A/CONF.97/C.1/SR.3, para 20, in *Official Records* (supra note 3), p. 245-246, reproduced in *Documentary History* (supra note 3), pp. 466-467.

<sup>24</sup> A/CONF.97/C.1/SR.3, para 26, in *Official Records* (supra note 3), p. 246, reproduced in *Documentary History* (supra note 3), p. 467.

3.1.3. Thus, if property damage was caused by seller's breach of contract and if that result was foreseeable, it would fall within the scope of damage claims under the CISG. However, whether or not the CISG completely excludes domestic law claims for property damage, especially tort law claims, has been subject to continuous debate<sup>25</sup>. Paragraphs 3.2 and 3.3 address this issue with the conclusion that although domestic claims for property damage are normally not excluded by the CISG (para 3.3), i.e., concurrence takes place, there are situations where domestic law claims are excluded (para 3.2).

### **B. Exclusion of domestic law claims**

3.1.4. The question whether the CISG excludes domestic law claims is a matter to be decided under the CISG<sup>26</sup>. This question concerns the permissibility of concurrence of claims based on the CISG and claims based on domestic law. Comparable questions of concurrence may also arise in situations other than those relating to property damage. For example, there is question of concurrence between claims under the CISG and claims based on negligence, negligent misrepresentation, tortious interference with a contract<sup>27</sup>, etc. under domestic law. This

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<sup>25</sup> “**Concurrence**” is supported by e.g., Schlechtriem, supra note 2, Art 5, paras 9-10; Lookofsky, supra note 17, pp. 285-288; Joseph Lookofsky, *Understanding the CISG*, 4<sup>th</sup> (worldwide) ed. (The Netherlands: Kluwer, 2012), para 4.6; Ferrari, supra note 15, pp. 74-78, while “**exclusion**” is supported by e.g., John Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, 4<sup>th</sup> ed., edited and updated by Harry Flechtner (The Netherlands: Kluwer, 2009), para 73; Enderlein/Maskow, supra note 5, Art 5, note 1.2; Mistelis/Ribeiro, supra note 10, Art 5, paras 24-27.

<sup>26</sup> Khoo, supra note 15, Art 4, para 3.3.5 and Art 5, para 3.2; Peter Schlechtriem, “The Borderland of Tort and Contract – Opening a New Frontier?”, 21 *Cornell International Law Journal* 467 (1988), p. 428; Schlechtriem, supra note 2, Art 5, para 12; Schwenger/Hachem, supra note 2, Art 5, para 15.

<sup>27</sup> Most of the case law to date dealing with the issue of concurrence of claims relate to those other situations They tend to rule that the CISG does not exclude domestic tort claims: e.g., **United States** 29 August 2000, Federal District Court, Eastern District of Pennsylvania (*Viva Vino Import Corp. v. Farnese Vini S.r.l.*), CLOUT case no. 420, CISG-Online no. 675; **United States** 10 May 2002 Federal District Court, Southern District of NY (*Geneva Pharmaceuticals Technology Corp. v. Barr Labs. Inc.*), CLOUT case no. 579, CISG-Online no. 653; **Australia** 17 January 2003 Supreme Court of Western Australia (*Ginza Pte Ltd v Vista Corp. Pty Ltd*), CISG-Online no. 807; **United States** 10 October 2006 Federal District Court, Southern District of Ohio (*Miami Valley Paper, LLC v. Lebbing Engineering & Consulting GmbH*), CISG-Online no. 1362 (“the CISG does not prevent Plaintiff from pleading negligent misrepresentation and fraudulent inducement.”); **United States** 23 August 2006 Federal District Court, Southern District of NY (*TeeVee Tunes, Inc. v. Gerhard Schubert GmbH*), CISG-Online no. 1272; **United States** 18 March 2008 Federal District Court, Eastern District of Kentucky (*Sky Cast, Inc. v.*

Opinion does not address those issues.

- 3.1.5. However, it should be noted that, even if it is decided, under the CISG, that domestic claims are not excluded, the permissibility of resorting to concurrent claims will ultimately depend on whether the applicable law adopts the *cumul* rule or the *non-cumul* rule<sup>28</sup>. If the applicable law adopts the *cumul* rule, concurrent claims will be allowed. However, if the applicable law adopts the *non-cumul* rule, it is likely that only claims based on the CISG will be allowed. This outcome is beyond the reach of the CISG.
- 3.1.6. In considering whether domestic law claims for property damage are excluded, the basic concern is not to upset the balancing of interests and uniformity of law achieved under the CISG by allowing the application of domestic remedies<sup>29</sup>. On the other hand, a countervailing consideration is to avoid overreaching by the CISG; since the CISG is designed to balance the contractual interests of the seller and buyer, which are created by the contract, the protection of extra-contractual interests

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*Global Direct Distribution, LLC*), CISG-Online no. 1652; **United States** 26 March 2009 Federal District Court, Southern District of Ohio (*Miami Valley Paper, LLC v. Lebbing Engineering & Consulting GmbH*), CISG-Online no. 1880.

Some decisions are more nuanced in their rationale: **Israel** 17 March 2009 Supreme Court of Israel (*Pamesa Ceramica v. Yisrael Mendelson Engineering Technical Supply, Ltd*), CISG-Online no. 1980 (“there is a basis for distinguishing between rights that were created by the parties to the contract, whose protection we should restrict solely to the scope of the convention, and general interests that the law of torts was intended to protect, which make it possible to sue for damage under domestic law. [...] If [the seller] was indeed negligent in this way, this is not a negligent performance of an obligation under the contract, but a negligent performance of a general duty of care of manufacturers that does not derive from the agreement between the parties. Therefore prima facie there should not be an absolute bar against such a claim.”); **United States** 23 December 2009, Federal District Court, Eastern District of Arkansas (*Electrocraft Arkansas, Inc., v. Super Electric Motors, Ltd*), CISG-Online no. 2045 (A tort claim is excluded if it is “a breach-of-contract claim in masquerade”. In that case, one of the claims the buyer brought was a claim based on negligence/strict liability for breach of seller’s duty to deliver conforming goods. It was held that such claim was excluded. On the other hand, the court held that the buyers claim for damages based on “misrepresentation, fraud, betrayal and intentional harm to economic interests” and on “tortious interference with business expectancy” are not preempted by the CISG).

For discussion of these case law (as well as scholarly writings), see Joseph Lookofsky, “Not running wild with the CISG”, 29 *Journal of Law and Commerce* 141 (2011); Pascal Hachem, “Property Damages under the CISG”, in Ingeborg Schwenzer & Lisa Spagnolo eds., *State of Play* (The Hague: Eleven International Publishing, 2012).

<sup>28</sup> Schlechtriem, *supra* note 5, p. 35; Schlechtriem, *Borderland* (*supra* note 26), p. 470; Schlechtriem, *supra* note 2, Art 5, para 10; Schwenzer/Hachem, *supra* note 2, Art 5, para 14.

<sup>29</sup> E.g., Honnold/Flechtner, *supra* note 25, pp. 73-76; Enderlein/Maskow, *supra* note 5, Art 5, para 1.2.

should not be exclusively dealt with by the CISG<sup>30</sup>. Extra-contractual interests exist independently of the contract. If the protection of such interests were to be governed exclusively by the CISG, “the conclusion of an international sales contract would amount to a partial disclaimer of tort liability”<sup>31</sup>, which is a result that the buyer should not be assumed to have bargained for<sup>32</sup>.

**3.2. If the damage is caused to the goods themselves, the liability of the seller is governed by the CISG to the exclusion of any claims based on domestic law, whether contractual or not. The same applies if the damage is caused to property which is attached to the goods, or with which the goods are combined or commingled, or which are processed by the goods, in the normal course of business or in the**

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<sup>30</sup> This basic idea was advocated in Schlechtriem, *Borderland* (supra note 26), p. 473, Schlechtriem, supra note 2, Art 5, para 10. See also, Ferrari, supra note 15, pp. 74-76; Lookofsky, supra note 17, pp. 286-288. A similar argument was put forward by the French delegate at the deliberation of the Diplomatic Conference. See text accompanying supra note 24. Although the scope of the French delegate’s statement should be restricted to certain types of property damage (compare paras 3.2 and 3.3), it does make the point that certain property damage is to be covered exclusively by the CISG when it is part of the bargain.

**Contra**, Honnold/Flechtner, supra note 25, para 73; Khoo, supra note 15, Art 5, para 3.2; Audit, supra note 15, p. 36; Enderlein/Maskow, supra note 5, Art 5, para 1.2; Herber, supra note 10, Art 5, para 9; Mistelis/Ribeiro, supra note 10, Art 5, paras 25-26.

<sup>31</sup> Schlechtriem, supra note 2, Art 5, para 10.

<sup>32</sup> Instead of focusing on the nature of the “interest” that is protected, this line of analysis sometimes focuses on the nature of the “duty” breached by the seller: i.e., whether the duty breached by the seller was a “contractual duty” or whether it was a “general duty” not created by the contract. See, Schlechtriem, *Borderland* (supra note 26), p. 473; Schwenger/Hachem, supra note 2, Art. 5, para 14. See also, **Belgium** 14 April 2004 Appellate Court Antwerp (*ING Insurance v. BVBA HVA Koeling and Fagard Winand; HVA Koeling BVBA v. Fagard Winand and Besseling Agri-Technic BV*), CISG-Online no. 1634 (“A contracting party that commits a fault in the performance of the agreement, 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.”) (English translation quoted from <<http://cisgw3.law.pace.edu/cases/040414b1.html>> ); **Israel** 17 March 2009 Supreme Court of Israel (*Pamesa Ceramica v. Yisrael Mendelson Engineering Technical Supply, Ltd*), CISG-Online no. 1980, see supra note 27.

In essence, these two approaches analyze two sides of the same coin. The breach of “general duty” will result in an infringement of “extra-contractual interests”. See Schlechtriem, *Borderland* (supra note 26), p. 473. This Opinion adopts the approach focusing on the “interest” created by the contract, because this is more in harmony with the basic methodology of the CISG. Cf. Article 25, which focuses on “what [the aggrieved party] is entitled to expect under the contract” in determining whether there is a fundamental breach, and Article 74, which focuses on foreseeability “at the time of the conclusion of the contract” in determining the scope of damages.

## course of normal use.

### Comment

3.2.1. If a defect in the goods results in destruction or damage to the goods themselves, the CISG governs to the exclusion of any domestic remedies<sup>33</sup>. This is because the buyer's remedial scheme under the CISG is designed precisely to deal with such a situation. If concurrent domestic remedies are allowed, the purpose of Articles 38 and 39 to expedite resolution of sales disputes would be overturned.

3.2.2. Likewise, if a defect in the goods causes damage to other property which, in the normal course of business or in the course of normal use, is expected to be used together with the goods, the CISG governs to the exclusion of any domestic remedies. What is "normal" should be decided according to the criteria set forth in Article 35, because this is a question of whether the protection of such property is incorporated as a "contractual interest". Thus, if the parties have agreed that the goods will be attached, combined, commingled with other property, or that the goods will be used to process other property, that is a use in the normal course of business or in the course of normal use (Article 35(1)). Similarly, if the goods are of a kind ordinarily used together with other property (Article 35(2)(a)), damage to such other property is exclusively protected under the CISG. This is because the well-being of such property is usually taken into consideration in the bargain between the parties, and thus becomes a "contractual interest" for which uniformity of law was intended. For example, if a defective battery in a laptop computer catches fire and destroys the laptop, the liability of the seller should be governed exclusively by the CISG. If defective glue damages the thing to which it is "attached" or "combined", that property damage should be governed exclusively by the CISG. If live fish infected by virus

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<sup>33</sup> **Accord**, for the reason that this is not an extra-contractual interest: Ferrari, supra note 15, p. 76. The same conclusion is also supported by commentators who consider CISG exclusively applicable to property damage: Honnold/Flechtner, supra note 25, para 73; Audit, supra note 15, p. 36; Herber, supra note 10, Art 5, paras 9-10.

**Contra**, Schlechtriem, supra note 5, p. 35; Schlechtriem, Borderland (supra note 26), pp. 473-474; Lookofsky, supra note 17, p. 287. The difference between this Opinion and the views of Professors Schlechtriem and Lookofsky lies in the evaluation of whether protection of the goods themselves is an extra-contractual interest or not. This Opinion considers such interest as "contractual" for the reasons set forth in paras 3.2.1 to 3.2.3. One court has taken this view: **Canada** 14 November 2003 Superior Court of Justice, Ontario (*Shane v. JCB Belgium*), CLOUT case no. 533, CISG-Online no. 805 (purchased tractor burned due to negligent manufacturing).

are sold and “commingled” in the normal course of business with other live fish of the buyer, causing damage to all the fish, that property damage is exclusively governed by the CISG<sup>34</sup>. The same principle applies if the goods are used “to process” other property<sup>35</sup>. For example, if a defective saw damages wood, the seller of the saw will be liable for property damage under the CISG alone. These are all cases where the possibility of damage to the property should be taken into account by the seller.

3.2.3. The same principle applies to situations where the buyer made known to the seller, at the time of the conclusion of the contract, any particular purpose for which the goods are to be used, unless the circumstances indicate that the buyer did not rely, or that it was unreasonable for the buyer to rely, on the seller’s skills or judgment (Article 35(2)(b)).

3.2.4. For the purpose of this Opinion, the terms “attached”, “combined” or “commingled” are not concerned with proprietary effects<sup>36</sup>. Goods are “attached” or “combined” if they are physically joined together, but it is irrelevant whether the goods belong to different owners or if they become inseparable or not. “Commingling” includes situations where goods (whether solid, liquid or gas) are put together resulting in a mixture. It is irrelevant whether it is impossible or economically unreasonable to separate the mixture into its original constituents. It is also irrelevant whether the ownership of the original constituents belonged to different persons or not.

### **3.3. However, if the damage is caused to other property of the buyer, any liability under the applicable domestic law is not excluded by the CISG.**

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<sup>34</sup> **Germany** 26 May 1998 OLG Thüringen (live fish case), CLOUT case no. 280, CISG-Online no. 513.

<sup>35</sup> A Belgian court decided to the contrary in a case where defective cooling sensor damaged fruits. **Belgium** 14 April 2004 Appellate Court Antwerp (*ING Insurance v. BVBA HVA Koeling and Fagard Winand; HVA Koeling BVBA v. Fagard Winand and Besseling Agri-Technic BV*), CISG-Online no. 1634, supra note 32.

<sup>36</sup> For an analysis of comparative European law of the proprietary effects of combination and commingling, see Christian von Bar and Eric Clive eds., *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)*, Full edition, Volume 5 (Munich: Sellier, 2009), pp. 5116-5139.

## Comment

- 3.3.1. When damage to property other than that described in para 3.2 is caused by the goods or services provided by the seller, the CISG governs but does not exclude domestic law claims. As already explained in para 3.1.6 above, the protection of such property is a protection of an extra-contractual interest that exists independently of the contract. Rather, the existence of the contract is only incidental to such damage, and the CISG should not exclude the liability of the seller under domestic law when such disclaimer was not part of the bargain of the parties<sup>37</sup>.
- 3.3.2. This policy is already implied in Article 5, and arguably a general principle upon which the CISG is based (Article 7(2)) may be derived from Article 5: i.e., the applicability of domestic law is not excluded with respect to extra-contractual interests. With respect to claims for personal injuries, which are question of extra-contractual interests, Article 5 completely leaves the matter to the applicable domestic law. Even under *non-cumul* rule regimes, the applicability of domestic law is preserved. On the other hand, with respect to claims for property damage, the CISG still applies, but that does not alter the principle that the protection of extra-contractual interests under domestic law should not be precluded by the CISG (see paras 2.1.9 and 3.2)<sup>38</sup>. Whether the buyer may elect domestic remedies ultimately depends on whether the applicable law adopts the *cumul* rule or the *non-cumul* rule, but that is a choice for the domestic law to make. However, if the parties validly incorporate

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<sup>37</sup> Some uniform contract law conventions specifically provide that the rules on “limitation of liability” under the convention also apply to domestic law claims “whether founded in contract, tort or otherwise”. Cf. Article 7(1), 1978 United Nations Convention on the Carriage of Goods by Sea (the “Hamburg Rules”); Article 7(1), 1991 United Nations Convention on the Liability of Operators of Transport Terminals in International Trade; Article 4, 2008 United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the “Rotterdam Rules”). Since the CISG does not have that kind of provision, the door remains open to the interpretation presented in the text above.

<sup>38</sup> Professor Flechtner makes an interesting point that this will result in “a strange set of priorities” where property damage claims are favoured over personal injury claims, and that this cannot have been the choice made by the drafters of the CISG. Flechtner, in Honnold/Flechtner, supra note 25, at p. 100.

However, the reality is perhaps more nuanced. First of all, the reason that the drafters decided not to exclude property damage lay in the difficulty in distinguishing various types of property damage and in defining product liability. It is more reasonable to say that it was a “second-best” choice for the drafters. See para 3.1.2, and Schlechtriem, supra note 2, Art 5, para 10. Secondly, it was generally viewed that domestic product liability rules were more favourable to the buyers, and preserving claims based on the CISG in the context of product liability was not viewed as anything particularly favourable to the buyer. Thirdly, for jurisdictions that adopt the *non-cumul* rules, the “strange set of priorities” would not materialize.

interests that are otherwise extra-contractual into their contract, that will be protected and exclusively governed by the CISG (see paras 2.1.10 and 3.2.2).