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Is CISG Applicable and Suitable in Service Contracts?

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Abstract

Purpose – This paper studies whether CISG can be a suitable governing law for pure service contracts. When CISG was first drafted, there was little disagreement on the fact that contracts for the sale of goods and those for the provision of services were two different types of contract. Based on this understanding, CISG explicitly provides that the Convention will apply to contracts where the preponderant part of the contractual obligation is on the sale of goods, not services. However, as more sales transactions have come to include more elements of services, mainly due to the advancement of the IoT industry, the distinction between goods and services became more blurred. Based on the observation of recent changes, some scholars even argue that such a change supports the applicability and suitability of CISG to even pure service contracts. The purpose of this paper is to critically analyze and evaluate their argument.

Design/methodology – This paper focuses on two separate but related issues: CISG's 'applicability' and 'suitability' to service contracts. For the first issue, this paper will examine the rules of interpretation of international treaties under the Vienna Convention on the Law of Treaties of 1969, and will apply its rules to find the proper answer. For the second issue, this paper will perform logical and empirical analyses on the reasoning employed by scholars claiming the suitability of CISG to service contracts.

Findings – This paper concludes that CISG does not, and should not, apply to pure service contracts. The argument that CISG applies to pure service contracts directly contravenes Article 3(2) of the Convention, which expressly states that it does not apply to a contract wherein the preponderant part of its obligation is about services rather than sales. Similarly, CISG is not a suitable governing law for pure service contracts because it aims provide rules specifically tailored to the needs of transactions of sales of goods, not services. Servitization of sales of goods transaction does not change this conclusion.

Originality/value – This paper presents different views from those offered by some eminent scholars on the issue of applicability and suitability of CISG to service contracts. By doing so, it is hoped that the confusion caused in discussions so far are clarified. Hopefully, this paper can also provide practical guidance to practitioners engaged in the fields of international sales, services, and IoT industries.

Keywords: Service Contract, Sales Contract, Mixed Contract, preponderance, CISG Article 3(2), Vienna Convention on the Law of Treaties
JEL Classifications: K12, K40

1. Introduction

Simply because legislation is not a living organism does not necessarily mean that it is free from the life cycle of birth, aging, and death. Although some legislation, including treaties (sometimes also called conventions in international law), seem to live long,[1] most lose effect or are repealed after coming into being.[2] There are many which are simply forgotten over the time, although technically still alive.[3] Also, even for legislation that remains in effect for a long time, aging is inevitable, and adaptation to changes is required for them to stay relevant.[4]

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1.1. The Aging of CISG since Adoption

Since its adoption in 1980, the United Nations Convention on Contracts for the International Sale of Goods (hereinafter referred to as 'CISG' or 'the Convention') has been praised as a worldwide success.[5] As of October 2022, it has 95 states as parties[6], and it is thought to cover more than 80% of world trade.[7] Many countries with different political, cultural, and economic backgrounds have adopted the Convention. For example, the Convention came into force in South Korea in 2005, and in 2020, it did in North Korea as well. CISG also has had a significant impact on domestic and regional legislation on the subject of sale of goods.[8] Therefore, it would be no exaggeration to call it a "crucial historical development and accomplishment for international private trade law unification."[9]

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[1] For example, the Constitution of the United States which was ratified in 1788, and the Napoleonic Code (the French Civil Code), which came into effect in 1804, are still in force.

[2] The Jim Crow laws which mandated racial segregation in public facilities is a good example. The Jim Crow laws were made and enforced since the 1870's in some Southern states of the United States. They stayed effective for about a hundred years, but eventually they were repealed by various Supreme Court cases such as *Brown v. Board of Education of Topeka, 347 U.S. 483 (1954),* and federal legislation such as the Civil Rights Act of 1964 and the Voting Rights Act of 1965.

[3] It would be difficult, if not impossible, to uncover all of the forgotten yet living laws around the world, but the following book contains an interesting list of such laws in the United States: Nathan Belofsky, *The Book of Strange and Curious Legal Oddities: Pizza Police, Illicit Fishbowls and Other Anomalies of the Law That Make Us All Unsuspecting Criminals*, Penguin Group (2010).

[4] The French Civil Code went through a major reform in 2017, and much of the law of obligation was rewritten. *See* Horatia Muir Watt, "The Reform of the French Civil Code at a Distance: An International and Comparative Perspective." *European Review of Contract Law* 13.4 (2017).

[5] See e.g., Joseph Lookofsky, "The 1980 United Nations Convention on contracts for the International sale of goods. u: Herbots Jacques.", in Blanpain Roger [ur.] *International Encyclopedia of Laws: Contracts*, The Hague: Kluwer Law International 18 (2000), p.18; János Martonyi, Introduction, in UNCITRAL, *THIRTY-FIVE YEARS OF UNIFORM SALES LAW: TRENDS AND PERSPECTIVES* 1, 5 (2015) ("[The] CISG may therefore be not only a bridge between treaty made uniform law and international commercial practice, not only between common law and civil law, not only—in a more general sense—between different legal cultures, concepts, and languages, but also between the past and the future. In other words, it is not only a bridge, but an anticipation and anchor for the future").

[6] United Nations Treaty Collection, Depositary, Status of Treaties, Chapter X International Trade and Development, 10. United Nations Convention on Contracts for the International Sale of Goods, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10 (last visited: October, 17, 2022).

[7] Schwenzer, Ingeborg, Julian Ranetunge, and Fernando Tafur, "Service Contracts and the CISG", *JL & Com.* 38 (2019), p. 171.

[8] See Kwang Hyun Suk, "Korea's Accession to the United Nations Convention on Contracts for the International Sale of Goods", *Korean Commercial Law Association*, 21 (2) (2002); Michael Joachim Bonell, "The CISG, European contract law and the development of a world contract law", *The American Journal of Comparative Law*, 56 (1) (2008); Fryderyk Zoll, "The impact of the Vienna Convention on the International Sale of Goods on Polish law, with some references to other Central and Eastern European countries", *Rabels Zeitschrift für ausländisches und internationales Privatrecht/The Rabel Journal of Comparative and International Private Law H.* (2007); Ole Lando, "CISG and Its Followers; A Proposal to Adopt Some International Principles of Contract Law", *American Journal of Comparative Law,* 53 (2005); Peter Schlechtriem, "25 Years of the CISG: An International lingua franca for Drafting Uniform Laws, Legal Principles, Domestic Legislation and Transnational Contracts", in Harry M. Flechtner et al. eds., *Drafting Contracts Under the CISG* (2008).

[9] Anastasiia Bolshakova, "THE NEW DIMENSIONS OF INTERNATIONAL COMMERCIAL TRANSACTIONS: THE CISG IS A "FRIEND" TO SERVICES", Central European University, LLM Capstone Thesis (2021), p. 3.

Despite its remarkable success, CISG cannot escape the natural aging process. The biggest factor which contributed to the problem was the emergence and advancement of various technologies, including the "internet of things" ("IoT"). When the drafting of the Convention began in the late 1960's,[10] what amounted to the Internet did not exist. It was no more than a concept being researched in government laboratories up until the late 80's. It was not until 1989, when a computer scientist at CERN developed the World Wide Web, that the Internet could be widely used by the public.[11] For about a decade thereafter, the Internet was extensively used as a means to facilitate communications, seemingly not affecting the essence of the "international sale of goods", which revolved around the traditional idea that "goods" were something different from "services". Although, with the growth of the importance of computer-based industry, issues such as whether intangible things like "software" could also be seen as "goods" began to emerge,[12] it was still firmly believed that "goods" and "services" were two different concepts.

However, in 1999, the term "Internet of Things" was coined, and "smart-goods" began to make an appearance in the market.[13] In 2007, Apple showed its first iPhone, and the IoT market took off. Since, the aging process of CISG has been expedited. IoT devices are not like other traditional "goods". Although the hardware of such devices is still important for the assessment of value, the provision of services which enable them to properly function is also considered crucial. Due to the advancement of the IoT industry, the sale of goods became more "servitized".[14] This change in the market began to demand answers to questions which were considered to be too obvious to be asked just a decade ago: what are the differences between "goods" and "services"? Are they really different? Why do we need to treat them differently? Should there be different laws for the regulation of services and sales, or is it possible or preferable to use pre-existing laws devised for sales transactions in order to regulate servitized transactions?

These questions troubled domestic or regional legislation, but CISG had problems with its own viability because the Convention was intended as legislation for the regulation of the sale of "goods". This is evident from its name, and also from its content. Also, it is quite obvious that the Convention is based upon the traditional idea that a good is something distinguishable from a service. Additionally, CISG expressly states that it will not apply if the preponderant part of a contract is about the provision of services.[15] Therefore, it is natural to

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[10] Leandro Tripodi, *Towards A New CISG: The Prospective Convention On The International Sale Of Goods And Services*, BRILL (2015), pp. 26-33; Kyujin Kim, "Is Now the Ripe Time to 'Fix' the CISG?- In Celebration of the 40th Anniversary of the CISG and the 30th Anniversary of KITLA-", *Korean Forum on International Trade and Business Law*, 30 (2) (2021), pp. 4-8.

[11] Cern, "The Birth of Web", available at https://home.cern/science/computing/birth-web (last visited: October 17, 2022).

[12] Marcus G. Larson, "Applying uniform sales law to international software transactions: the use of the CISG, its shortcomings, and a comparative look at how the proposed UCC article 2b would remedy them", *Tul. J. Int'l & Comp. L.* 5 (1997); Edgardo Muñoz, "Software technology in CISG contracts." Uniform Law Review 24.2 (2019).

[13] Kevin Ashton, "That 'internet of things' thing." RFID journal 22.7 (2009), p. 97.

[14] Lay, Gunter, ed. *Servitization in industry*. Springer (2014); Shin-yi Peng, "A new trade regime for the servitization of manufacturing: rethinking the goods-services dichotomy." *Journal of World Trade* 54.5 (2020); Zlatan Meskic, and Nevena Jevremovic. "From Product-Centered to Servitized Industry: Placing Product-Service Integration Model Under the Umbrella of the UN Convention on Contracts for the International Contracts for Sale of Goods", *U. Pitt. L. Rev.* 83 (2021).

[15] Article 3(2) of CISG.

worry about the possibility of demise, whether slow or fast, of the usefulness of the CISG, considering especially the skyrocketing rise of the IoT industry and the blurring distinction between goods and services.

1.2. Prior Studies on CISG and Services

Prior studies on the topic of the CISG and services mostly focused on the interpretation Article 3(2), which excludes "contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services"[16] from the scope of the Convention."[17]

Article 3(2) reflects commercial practices which can sometimes be observed in international sales transactions. Often, a seller of goods performs services which can be ancillary to sales, such as packing and concluding a transportation contract. In other cases, a seller of goods undertakes further services, such as installation or the assembly of goods, or the training of personnel for the use of the goods.[18] The provision of such services can be regulated by the same contract that regulates the provision of goods, or it can be regulated by a contract separate from the relevant sales contract. Article 3(2) provides a rule to decide when CISG can be applied to such a transaction. According to Article 3(2), if the provision of services and goods are regulated by a single contract, then CISG may apply to the contract only if the provision of services is not the "preponderant part" of the contract. Therefore, prior studies on the topic of the CISG and service contracts mainly focused on the following two issues: (i) how to decide whether obligations to provide goods and services are in a single "mixed" contract or in separate contracts, and (2) how to interpret the term "preponderance" in Article 3(2).[19] Despite the valuable opinions and insights, these prior studies generally fall short in addressing how to deal with the new issue of the servitization of the sale of goods.

1.3. Recent Arguments that CISG is Suitable and Applicable to Pure Service Contracts

Seeing the need to discuss the issue of servitization, some scholars began to discuss Article 3(2) from different angles. Some explored whether CISG was suitable to be applied not only to sale of goods contracts but also to service contracts,[20] and others explored how to amend

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[16] Article 3(2) of CISG.

[17] CISG Advisory Council Opinion No. 4: Contracts for the Sale of Goods to Be Manufactured or Produced and Mixed Contracts (Article 3 CISG), para. 3.1.; Schroeter G. Urlich, "Vienna Sales Convention: Applicability to "Mixed Contracts" and Interaction with the 1968 Brussels Convention", *Vindobona Journal of International Commercial Law and Arbitration*, 5 (2001); Toni Deskoski and Vangel Dokovski, "Quo Vadis CISG-Interaction between the Vienna Convention on International Sales of Goods of 1980 and Mixed Contracts", *Iustinianus Primus L. Rev.* 6 (2015); Hyung-Jin Chung, "Study on CISG Article 3", Journal of Business Administration & Law, vol. 20, no. 4 (2010).

[18] Advisory Council Opinion No. 4, para. 3.1.

[19] CISG Advisory Council Opinion No. 4, supra note 17, para. 3.1.; Schroeter G. Urlich, "Vienna Sales Convention: Applicability to "Mixed Contracts" and Interaction with the 1968 Brussels Convention", *Vindobona Journal of International Commercial Law and Arbitration*, 5 (2001); Deskoski et al, supra note 17; Hyung-Jin Chung, "Study on CISG Article 3", Journal of Business Administration & Law, vol. 20, no. 4 (2010).

[20] Ernst Karner und Helmut Koziol, Zur Anwendbarkeit des UN-Kaufrechts bei Werk- und Dienstleistungen : am Beispiel der Maschinen- und Industrieanlagenlieferungsverträge, Sramek (2015).

CISG in order to make it applicable to service contracts.[21] Although dealing with a new issue, scholars respect the current text of CISG, especially Article 3(2), which excludes a contract preponderant, part of which is service obligation from the scope of the current CISG. Therefore, these opinions pose less controversy.

Recently, however, a more controversial and radical argument was presented by a group of prominent academics headed by Professor Ingeborg Schwenzer. In an attempt to save CISG from obsolesence, these scholars argued that CISG is applicable not only to "mixed contracts" that contain features of both sale and service but also to "pure service contracts", which have no relationship to sale of goods transactions.[22]I In a joint paper written by Professor Ingeborg Schwenzer, Julian Ranetunge, and Fernando Tafur, it was argued that CISG is an applicable and suitable law for pure service contracts, as argued below.[23]

First, they argued that the fact that "domestic jurisdictions…failed to provide a clear and consistent basis upon which to distinguish" sales and service transactions supported the conclusion that sales transactions and service transactions were not distinguishable from each other. Because sales transactions and service transactions are not distinguishable, there is no reason for domestic jurisdictions to treat them differently, although as a matter of fact, they do apply different legal consequences to each of these transactions. Therefore, they concluded that there was no real reason for CISG, which is largely affected by domestic jurisdictions, to exclude service contracts.

Secondly, they argued that CISG was suitable to govern service contracts in its current form because the Convention already contains several provisions applicable to service obligations, and the application of CISG to pure service contracts would further promote the goal of CISG to "remove legal barriers".

In conclusion, these scholars argued that CISG, in its current form, is applicable and suitable to govern all types of service contracts, whether a mixed contract for the sale of goods and services, or a pure service contract.

Such an argument is against the current text of Article 3(2) of CISG, and therefore has garnered little support so far. However, Such a proposition is too valuable to simply dismiss, because it came from a sharp observation of today's changing landscape in international transactions.

1.4. The Focus of the Study

Based on the belief that there needs to be a timely discussion on the issue of whether CISG can and should be extended to pure service contracts, this paper intends to critically assess the arguments presented by the proponents of applying the CISG to pure service contracts (hereinafter referred to as "proponents"), and to prove the following points.

First, although CISG might be applied to some issues related to services when they arise out of "mixed contracts", it can't apply to "pure service contracts".

Second, even if admitting that it could apply to service contracts, CISG is not a suitable law

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[21] Leandro Tripodi, supra note 10.

[22] Ingeborg Schwenzer, Julian Ranetunge, and Fernando Tafur, "Service Contracts and the CISG", JL & Com. 38 (2019); Anastasiia Bolshakova, "The New Dimensions of International Commercial Transactions: The CISG Is a "Friend" to Services", Central European University, LLM Capstone Thesis (2021).

[23] Ingeborg Schwenzer, Julian Ranetunge, and Fernando Tafur, supra note 22.

for the regulation of international service contracts.

To prove these two arguments, this paper will first analyze if service contracts are indeed distinguishable from sales contracts by looking into various model contracts and domestic or international legislations. It will then examine the rules and theories on international treaty interpretation to find whether the CISG can be applied to pure service contracts as well as mixed contracts. Lastly, this paper will closely examine and evaluate the arguments of proponents that believe that the CISG is a suitable governing law for international service contracts.

2. What are "Service Contracts"?

2.1. Definition of Service Contracts

Discussing the possibility and desirability of the CISG's application to service contracts first requires the definition of service contracts. At first glance, this task seems to pose no trouble: a service contract is a contract wherein one of the parties provides a service[24]. However, what exactly does the term "service" mean?

One may first consult pre-existing domestic and international legislation. However, the definition of service or service contract cannot be found in such a manner,[25] because unlike sales contracts,[26] it is hard to find legislation containing general contract law principles tailored to cover "service contracts" in a comprehensive manner.[27] For example, much of the domestic legislation of the civil law countries, including France and South Korea, provide different rules for specific types of service contracts, such as employment or work contracts, without having provisions generally applicable to types of service contracts. Worse is the fact that relevant legislation oftentimes does not provide the general definition of "service contracts" or "services".

The United Kingdom has legislation called the "Supply of Goods and Services Act of

[24] Schwenzer, supra note 22, p. 175; Bolshakova, supra note 22, p. 10.

[25] Even in the General Agreement on Trade in Services ("GATS"), one of the main international treaties on the rules regulating international trade in services, provides the definition of "trade in services" without defining the term "services". An attempt to legally define the term "service" can be found from a legislative guideline called the Principles of European Law on Service Contracts ("PEL SC"), and a model law called the Draft Common Frame of Reference (the "DCFR"). Maurits Barendrecht, Chris Jansen, Marco Loos, Andrea Pinna, Rui Cascao, and Stephanie Van Gulijk, *Principles of European Law: Service Contracts*, OUP Oxford (2007)(hereinafter referred to as the "PEL SC"); Byung-Mun Lee, "A Study on the Principles of European Law on Service Contracts: Focusing on the Service Provider's Duty to Provide Service in Conformity with Contract", *Comparative Private Law*, vol. 17 issue 3 (2010).

[26] For example, Section 2 (1) of the Sale of Goods Act 1979 of the United Kingdom defines a sales contract as follows: "[a] contract of sale of goods is a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price." Also, Article 563 of the Korean Civil Act gives an indirect definition of a sales contract by providing "[a] sale shall become effective when one of the parties bagrees to transfer a property right to the other party and the other party agrees to pay the purchase-price to the former."

[27] PEL SC, supra note 25, Preface to this volume, xv, ("Drafting common principles on the law of service contracts was a novel experience for everyone involved. The existing codes only deal with a limited number of services, so to some extent we had to invent a method of "codification ourselves"). For a general observation on the attitudes of European countries in the matter of the regulation of service contracts, *See* PEL SC, supra note 25, pp. 148-153.

1982"[28], which includes provisions on the duty of a supplier of services to exercise reasonable care. The UK Act applies to all service contracts in general.[29] However, this law does not provide a comprehensive set of rules that can apply to all stages of a service contract relationship, or the general definition of "service contracts" or "services".

The Russian Civil Code stands out as an exception; it provides a general definition of a service contract as a contract wherein the service provider agrees to carry out certain actions or activities, and the customer agrees to pay for these in return.[30] It also provides comprehensive rules applicable to service contracts in general.[31] Service contracts regulated by these rules include a wide range of service transactions, including communication, medical, veterinary, audit, consulting, information, instruction, tourist, and other services.[32] However, even this law excludes certain types of service contracts, such as those for carriage, transport forwarding, loans and credit, and financing from its application.[33]

Expanding the scope of the review, we find the Draft Common Frame of Reference (the "DCFR").[34] Unlike the Draft Regulation on Common European Sales Law (CESL), which provides rules for only service contracts that have a direct link to sales contracts, DCFR regulates service contracts more extensively. It provides general rules applicable to all service contracts, along with more detailed rules for six types of service contract: construction, processing, storage, design, information and advice, and treatment. Most importantly, it provides the definition of a service contract as a contract under which one party undertakes to supply a service to the other party in exchange for remuneration. Despite its relevance to scholarly discussions and legal practices, however, DCFR exists as a model law without the force of binding legislation.

This paper will now take a different approach to find what service and service contracts mean, and how they are different from, or similar to, goods and sales contracts. It will first compare sales contracts with the service contracts. It will then compare legislation on sales contracts and service contracts. In this way, the meanings of service and service contracts can be clarified. Also, such a process will help find the answer to the question of whether service contracts and sales contracts are truly distinguishable.

2.2. Comparison of Sales and Service Contracts

For the purpose of the comparison of sales and service contracts, this paper will compare

[28] Supply of Goods and Services Act 1982, 1982 Chapter 29.

[29] Supply of Goods and Services Act 1982, Clause 12.

[30] Russian Civil Code, Article 779, para. 1 ("Under the contract of repayable rendering of services the executor shall undertake to render services (to perform certain actions or carry out certain activity) according to the customer's assignment, while the customer shall undertake to pay for these services.").

[31] Russian Civil Code (Article 779, para. 2) provides that "the rules of this Chapter shall be applicable to the contracts of rendering the communication services, medical, veterinary, audit, consulting, information, instruction, tourist and other services". Such rules include provisions on the definition of service and service contract (Article 779(1)); the general provisions on the duty of a service provider to provide services (Article 780 provides that the service provider must render services in person unless agreed otherwise); and the duty of the customer to make timely payment (Article 781). It also provides rules on grounds to unilaterally refuse to perform (Article 782).

[32] Russian Civil Code, Article 779, para. 2.

[33] Ibid.

[34] Byung-Mun Lee, "A Study on the Service Provider's Duty to Provide Services in Conformity with the Contract under the DCFR", The International Commerce & Law Review 50 (2011).

the "ICC Model Contract - International Sale (Manufactured Goods)"(hereinafter referred to as the "ICC Sales Contract"),[35] prepared by the International Chamber of Commerce (the "ICC"), to the "Notes on the Main Issues of Cloud Computing Contracts"(hereinafter the "Cloud Computing Service Contract"),[36] prepared by the secretariat of the United Nations Commission on International Trade Law ("UNCITRAL") to:

> "address the main issues of cloud computing contracts between business entities where one party (the provider) provides to the other party (the customer) one or more cloud computing services for end use."[37]

As their names suggest, the former is an example of a sales contract, and the latter a service contract. Out of the many types of service contracts, the Cloud Computing Service Contract was chosen because it is most removed from a traditional sales contract, and therefore can be used as good evidence to refute the argument that there is no difference between sales and service contracts. For easy comparison, this paper suggests the diagram below.

Table 1. Contract Terms Compared

ICC Sales Contract	Cloud Computing Service Contract
General characteristics	General considerations
Scope of application	Identification of contracting parties
Applicable law	Defining the scope and the object of the contract
Modifications to be evidenced in writing	**Right's to customer data and other content**
Shipment and Delivery Conditions	**Audits and monitoring**
Time of delivery	Payment terms
Payment conditions	**Changes in services**
Documents to be provided by the seller	**Suspension of services**
Retention of title	**Subcontractors- sub-providers and outsourcing**
Warranty to consumers	Liability
Inspection and examination	Remedies for breach of the contract
Infringement of intellectual property rights as element of conformity	Term and termination of the contract
Limitations of liability	**End-of-service commitments**
Avoidance of contract by the buyer in case of breach	Dispute resolution
	Choice of law and choice of forum clauses
Force majeure	Notifications
Resolution of disputes	Miscellaneous clauses
	Amendment of the Contract

[35] ICC, "ICC Model Contract - International Sale (Manufactured Goods)", available at https://2go.iccwbo.org/icc-model-contract-i-international-sale-manufactured-goods-config+book_version-Book/#table_of_content (last visited: October 17, 2022).

[36] UNCITRAL, "Notes on the Main Issues of Cloud Computing Contracts", available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09103_eng.pdf (last visited: October 17, 2022).

[37] Although this is a note on issues to be covered by cloud computing contracts, it provides a clear look at how regular cloud computing service contracts.

Table 1 shows issues covered by the two contracts. The bolded and underlined issues can be found only in one of the contracts. Like most contracts for the sale of goods, the ICC Sales Contract is focused on setting terms for issues regarding the seller's obligation to properly deliver the goods, present required documents to the buyer, the buyer's obligation for timely payment and inspection, and the retention of title and the warranty of goods. All these provisions are expected to be seen in any sales contract because the essence of the sale and purchase of goods is to deliver and make payment for said goods.

The Cloud Computing Service Contract deals with different issues from the ICC Sales Contract. First, it contains a provision regarding the service provider's right to access customer data to the extent that such access is necessary for the proper provision of services.[38] Such a provision does not exist in a sale of goods contract; a purchaser of goods would not allow the seller to access its computerized data because such a right is irrelevant to the transaction.

The Cloud Computing Service Contract includes each party's right to monitor and audit the other party's activities in order to ensure proper compliance with the contractual terms.[39] Such a provision is unnecessary for a sales contract because one party's compliance with the contractual terms can be determined by his or her performance itself. If the promised goods are not delivered in time, or a different product is delivered, then there is a breach on the part of the seller. The buyer need not monitor the seller in order to make sure the seller performs. The seller will not normally agree to allow a buyer to audit and monitor its activity.

The Cloud Computing Service includes provisions regarding changes and the suspension of services. The provisions for changes in service are included because the terms of a contract of cloud computing services "are by nature flexible and fluctuating."[40] Under a sales contract, things are different. Once the goods to be sold are specified in quantity, quality, and delivery terms, it is not normally expected to change. The price may be intentionally left to be set by the market, but price and payment terms as such will not normally change, either. As can be inferred from the fact that Cloud Computing Service contracts contain provisions for the suspension of services, there is often found a term which reserves the right of the provider to "suspend services, at its discretion, at any time".[41] Such a term, again, is most likely not included in a sales contract.

Lastly, unlike a sales contract wherein the contractual parties' relationship comes to a natural end once all requirements are completed, under a Cloud Computing Service Contract, the service provider may still need to provide "end-of-service commitment" even after the contractual relationship is over.[42]

By comparing the two model contracts, this paper can safely conclude that the core issues covered by a sales contract are different from those corresponding in service contracts. This is because the focal points are different. In the case of sales contracts, the parties' attention lies in getting the right goods delivered at the right time. In the case of service contracts, the concern lies in getting the right "services". Such a comparison shows that it is quite evident that "services" are different from "goods", although it is still hard to tell what a service is. Such

[38] Cloud Computing Service Contract, pp. 20-21.
[39] Cloud Computing Service Contract, pp. 24-25.
[40] Cloud Computing Service Contract, p. 27.
[41] Ibid., p. 29.
[42] Ibid., P. 39.

difficulty in distinguishing the two does not prevent one from recognizing obvious differences.

The fact that this paper only explored one type of service contract, the cloud computing service contract, will not weaken the conclusion. Rather, it strengthens the argument. Even among contracts which can be largely grouped as "service contracts", there are significant differences depending on the type of service. There are simply too many types of service: construction, maintenance & repair, operation, transportation, communication, medical, consulting, information, education, tourist, financial, art, IT, and so on. The list is simply not exhaustible. A contract for one kind of service will not fit for other types of service. Therefore, a contract for the sale and purchase of goods is not fit for service transactions. These findings allow us to conclude that services are different from goods, and that a contract for the sale of good is not suitable to be used for the transaction of services.

2.3. Comparison of Laws for Sales and Service Contracts

A stark difference which can be first detected when comparing the legislation on sales contracts with service contracts is the abundance of the former, and the scarcity of the latter. It is not difficult to find legislation on sales contracts. Most civil law countries have special sets of provisions specifically made to apply to sales contracts in their civil codes.[43] Common law countries also have legislation, although in separate forms, for sales contracts; the US' Article 2 (Sales) of the Uniform Commercial Code[44] and the UK's Sale of Goods Act 1979[45] are good examples. Such laws on sales contracts are typically lengthy and provide detailed rules concerning issues like formation, effects, performance, breach, remedies, and others. While there might be general contract law rules which cover the same issues, laws targeting sales contracts provide special rules best tailored to regulate contracts for the sale of goods. On top of domestic legislation, there are international or regional uniform laws specifically made to regulate the international sale of goods, such as CISG.

The things are vastly different when it comes to the task of finding legislations on service contracts. As we have seen above, most countries do not have comprehensive rules to govern service contracts in general. Rather, they offer special sets of rules for some services such as work, employment, finance, and others. The only exceptions are e the Russian Civil Code and the DCFR, which provide general rules covering a wide range of services. However, the Russian Civil Code is not intended to cover every type of service contract, and DCFR is only model legislation.[46]

Despite the fact that little special legislation for service contracts can be found, it is undeniable that domestic jurisdictions treat service contracts differently from sales.[47]Many

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[43] The Korean Civil Act, for example, provides special rules for sales contracts in Chapter 2 (Contracts), Section 3 (Sales).

[44] Article 2 (Sales) of the Uniform Commercial Code (2002), available at https://www.uniformlaws.org/committees/community-home?CommunityKey=403dd218-8f13-42e2-97b8-d630cd775eba (last visited: October 17, 2022).

[45] Sale of Goods Act 1979, available at https://www.legislation.gov.uk/ukpga/1979/54 (last visited: October 17, 2022).

[46] It may be worthwhile to compare the provisions of the DCFR on service contracts with those of the same document on sales contract or with CISG, but it was not done in this paper because it exceeds the scope of this study.

[47] Schwenzer, supra note 22, p. 174.

cases show that courts reject the application of legislation for sales contracts wherein the contract at issue is largely focused on the performance of services rather than the sale of goods. [48] Therefore, we can safely say that sales contracts are understandably treated differently, and are distinguishable from service contracts, irrespective of the existence of separate or comprehensive legislation.

Nevertheless, proponents of the idea that CISG can and should cover pure service contracts argue that the fact that domestic laws do not provide the definition of services to allow them to be easily distinguished from "goods", and that there is not a comprehensive sets of rules for service contracts as there are for sales contracts, proves that there is no real reason to distinguish service contracts from sales contracts.[49]

This paper argues otherwise. The mere fact that there is no easy answer to the question of how to define a "service", along with there being no comprehensive legislation for service contracts is not enough to invoke to deny existing laws that distinguish service contracts from sales contracts. Also, the need to have a different set of rules for each type of contract cannot be so easily denied.

The reason why there is no comprehensive legislation for service contracts is not because services are not different from goods, and therefore sales law may cover service transactions. Rather, it is because it is too difficult to draft a generally applicable set of rules appropriate for all service contracts because of their inherent diversity. Sales contracts focus on something more homogenous: delivery of goods, payment, assumption of risk, transfer of title, and others. This focus is not shaken, even when the subject matter of a sale changes. Service contracts are different. For example, if one compares contracts for the provision of medical services to construction or education services, it can be easily felt that the interest at stake for each type of service contract is vastly different. Therefore, it goes without saying that it would be too difficult to codify special contract law rules applicable to all types of service contracts in a uniform manner. Under these circumstances, it will be wasteful and inefficient if one attempts to create comprehensive codification for service contracts. It is natural that legislation on the matter of service contracts could not have been developed to the extent of sales contracts.

Further, law tailored specifically to need to regulate sales contracts is not a good fit for service contracts. Courts have repeatedly found that laws for sales contracts cannot apply to service contracts. [50] If the courts had found that sales laws provided adequate and interchangeable rules for service contracts, they would have reached a different conclusion. In light of the above findings, this paper concludes that service contracts are different from sales contracts, and that as a legal result, different laws are being applied to each.

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[48] See e.g., *J.O. Hooker & Sons Inc. v. Roberts Cabinet Co. Inc.*, 683 So 2d 396 (1996) ("There appear to be no Mississippi cases directly on point, but this Court finds that, although the transaction in this case did involve a sale of goods, the dispute in this case actually concerns the performance of services and the delegation of duties under a contract.").

[49] Schwenzer, supra note 22, p 178 ("In conclusion, neither civil nor common law has found a way to clearly and consistently distinguish between sales and services contracts. This suggests that there are more similarities than differences between the two, a view supported by the analogous application of sale of goods provisions to service contracts in the common law.").

[50] 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, at para 1.4.

3. Possibility of CISG Application to Service Contracts

The title and text of CISG evidently show that the Convention is intended for the regulation of sales contracts. However, Article 3(2) thereof indirectly suggests the possibility of its application to contracts which are not purely about the sale of goods. According to Article 3(2), CISG "does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labor or other services."[51]

These words naturally make us wonder if the CISG can be applied to a so-called "mixed contract", wherein a seller is obligated to provide not only goods but also services if the service is not the preponderant part of the obligation. In addition, one can go further and ask if the CISG could apply to pure service contracts, which do not include the obligation to sell "goods" at all. In the earlier days of the Convention, such a possibility was not frequently discussed. However, since the advent of the IoT industry, some sales transactions began to include more elements of services. Observing such a change in goods transactions, proponents began to argue that CISG could apply to pure service contracts because the trend of the servitization of goods shows that there is no need to distinguish goods from services.[52]

Below, the possibility of CISG's application to mixed and pure service contracts will be analyzed. Because this is a question of treaty interpretation, the rules thereof will be first explored. Then, the soundness of the argument that CISG can apply to mixed and pure service contracts will be separately assessed by applying the rules.

3.1. Rules for Treaty Interpretation

CISG is a treaty, which requires that it be interpreted in accordance with international law. The prime source from which one may find the rules on treaty interpretation is the Vienna Convention on the Law of Treaties of 1969 (hereinafter referred to as the "Vienna Convention"). Having been ratified by 116 states as of September 2022,[53] the Vienna Convention is considered the very most important treaty embodying the rules regarding treaty interpretation.[54] Article 31 provides for a "general rule of interpretation", and Article 32 provides for a "supplementary means of interpretation"; these are generally accepted as reflecting the rules of customary international law on treaty interpretation.[55]

The basic rule of interpretation is that a treaty shall be interpreted based on its terms in order to find common intention that existed at the time of its conclusion.[56] To be more exact,

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[51] CISG, Article 3(2).

[52] Bolshakova, supra note 22, p. 5 (""The result of new trends is a merger of services and sales into product-service system (PSS). The boundaries between goods and services are fading.").

[53] United Nations Treaty Collection, Depositary, Status of Treaties, CHAPTER XXIII, LAW OF TREATIES, 1. Vienna Convention on the Law of Treaties, available at: https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en (last visited: October 17, 2022).

[54] Anthony Aust, "Vienna convention on the law of treaties (1969)", Max Planck Encyclopedia of Public International Law (2006).

[55] Richard Gardiner, "Part II Interpretation Applying the Vienna Convention on the Law of Treaties. A the General Rule, 5 The General Rule:(1) The Treaty, its Terms, and their Ordinary Meaning", (2015) ("While it is now beyond question that the Vienna rules (ie articles 31–33) are rules of customary international law").

[56] ICJ, a case concerning the Dispute regarding Navigational and Related Rihts (Costa Rica v. Nicaragua),

Article 31 states that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty."[57] This shows that the terms of the treaty are the most important thing to consider when interpreting said treaty.[58]

However, terms in the treaties which are written in a certain language (or sometimes languages) may be vague or have more than one meaning. In order to determine the ordinary meaning of a term when it is equivocal, its context and the object and purpose of the treaty must be considered.[59]

Article 31 further provides that when determining the context to find the ordinary meaning of the terms, (i) the treaty's preamble and annexes, (ii) "any agreement relating to the treaty which was made between all the parties", and (iii) any instrument relating to the treaty which was made by one or more parties and accepted by the other parties shall be considered.[60] In addition, any subsequent agreement or practice between the parties regarding the treaty's interpretation will be considered.[61]

The use of supplementary means of interpretation under Article 32 is only allowed when interpretation according to Article 31 results in ambiguity or manifest unreasonableness. In this case, Article 32 allows a supplementary means of interpretation, such as preparatory work and the circumstances of the treaty conclusion to be considered.[62] Below, these Articles of the Vienna Convention will be replied on for the proper interpretation of the CISG.

3.2. Applicability of CISG to Mixed Contracts

Article 3(2) of CISG expressly states that CISG does not apply to a contract wherein the "preponderant part of the obligations" of the seller is focused on the provision of services rather than the delivery of goods.[63] The Article, therefore, seems to exclude a "mixed contract" in which the preponderant part of the seller's obligations is the provision of services from the scope of application of the Convention. A converse question follows; can this provision be interpreted to mean that CISG is applicable to mixed contracts wherein the preponderant part is sales rather than services?

Academics say "yes" to the question with one voice.[64] Such a conclusion can be reached by simple textual interpretation. Article 1(1) provides that "[t]his Convention applies to contracts of sale of goods". Among contracts regarding the sale of goods, there is one wherein a seller promises to provide services, such as the training of employees or the installation of

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Judgement of 13 July 2009, para. 63.

[57] Vienna Convention, Article 31(1).

[58] Territorial Dispute (Libia/Chad), ICJ Report (1994), p. 6 at 22 (para. 41) ("Interpretation (of a treaty) must be based above all upon the text of the treaty.").

[59] Vienna Convention, Article 31(1).

[60] Vienna Convention, Article 31(2).

[61] Vienna Convention, Article 31(3).

[62] Vienna Convention, Article 32.

[63] CISG, Article 3(2).

[64] John Honnold, *Uniform law for international sales under the 1980 United Nations Convention*, 4th Edition, Kluwer Law International BV (2009) p. 67 ("The above contract would not be excluded from the Convention by Article 3(2) since the supply of labor and other services did not comprise preponderant part of the obligations of the party who furnishes the goods"); CISG Advisory Council Opinion No. 4, supra note 17, para 3.

the goods sold, under contract.[65] Article 3(2) explains which contracts are excluded from the application of the Convention. This naturally brings us to the conclusion that mixed contracts that are not excluded from the scope of the application of Article 3(2) will remain governed by CISG. Therefore, it is not difficult to conclude that CISG covers mixed contracts, provided that the preponderant part of the obligation of the seller is not about the provision of services.

Despite this straightforward conclusion, however, it is not always easy to determine if the Convention applies to mixed contracts in actual cases. First, it is not entirely clear what the term "preponderance" means.[66] Opinions are divided. Many suggest that preponderance can be measured by a comparison of the economic value of services to sales.[67] Others argue that the comparison cannot be properly made by simply considering the economic value of each, and that therefore an assessment as to which type of obligation is more essential must be done.[68] There is also a third view which claims that the better way to find the preponderance is to determine it based on the contractual intention.[69] While these suggestions have respective merits, they cannot be seen as impeccable.

Secondly, it is not easy to determine whether a contract is a mixed contract or a set of contracts in which the service contract exists separately from the sales contract. Courts may find that there is a service contract separate from the sales contract, and refuse to apply CISG to the service contract, even when the two are drafted into one instrument.[70] Even when a service contract is initially drafted separately from the sales contract, a court may find them to be one contract and decide the applicable law accordingly.[71] Considering these additional problems, it can be hard to determine whether the Convention applies to an alleged mixed contract in an actual case. One question follows: can CISG apply to pure service contracts at all?

3.3. Applicability of CISG to Pure Service Contracts (from *de lege lata*)

Against the clear-cut language of the CISG, Article 3(2), which excludes from its application a contract in which the preponderant part of the transaction is on the provision of services,[72] a small number of distinguished academics argue that the Convention is also applicable to pure service contracts.[73] First, although its name suggests that it is the law on contracts for the sale of goods, CISG "has the potential to be" a law governing international service contracts.[74] Second, whether the Convention is applicable to service contracts can be determined by looking at whether there is a real reason to distinguish service from sales for the purpose of CISG's application.[75] Third, it seems that the Convention excluded service

[65] CISG Advisory Council Opinion No. 4, supra note 17, para 3.

[66] Ibid., para 3.2.

[67] Honnold, supra note 64, p. 67.

[68] Meskic, supra note 14, p. 111.

[69] Ibid., pp. 110-111; Schlechtriem and Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, edited by Ingeborg Schwenzer, 2d edition (2005), Art. 3 para 7a

[70] Honnold, supra note 64, pp. 67-68.

[71] CISG Advisory Council Opinion No. 4, supra note 17, para 3.1.

[72] Article 3(2) of the CISG.

[73] Schwenzer, supra note 22; Bolshkova, supra note 22.

[74] Schwenzer, supra note 22, p. 170.

[75] Ibid., pp 170-175.

contracts from its scope of application because it was a common practice of domestic laws to distinguish the two at the time of its conclusion.[76] Fourth, in order to find whether there is a good reason for sales to be treated differently from services, one needs to see the actual reasoning behind of domestic laws' differeing treatments of goods and services. Fifth, domestic laws "do not provide explicit reasons for differential treatment of sales and services", and there is no good reason to believe that domestic laws treat sales differently from services.[77] Therefore, they argue that one can conclude that there is no reason to treat services separately from goods for the purpose of CISG. Some even go so far as to suggest that CISG must be seen as being applicable to pure service contracts as the purpose of the Convention would be better served.[78] In summary, they argue that although the text of the CISG says otherwise, it must be interpreted to be applicable to pure service contracts, not to mention mixed contracts, because there is no reason to treat services differently from sales. They argue that this interpretation better promotes the above-mentioned original goal of the CISG, the harmonization of different substantive laws.

Such arguments seem to be flawed. First, they seem to refuse to follow Article 31 of the Vienna Convention in interpreting CISG. It is undeniably understood that the treaty interpretation "must be based above all upon the text of the treaty".[79] The text of the CISG expressly states that:

> "[t]his Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services."[80] The language of the Convention clearly distinguishes the sales contract from the service contracts.[81]

Also, it is actually stated that the Convention does not apply to contracts wherein the preponderant part of the seller's obligation is on the provision of services. A pure service contract is evidently a contract wherein the seller or the service provider's sole obligation is the provision of services. Therefore, a sound interpretation of Article 3(2) of the CISG will only allow the conclusion that the Convention does not apply to pure service contracts.[82]

If the terms of an international treaty do not show meaning self-evidently, they need to be interpreted in light of the intentions that the parties to the treaty had at the time of conclusion.[83] However, this treaty interpretation does not allow the interpreter of the treaty

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[76] Ibid, p. 173.

[77] Ibid., pp. 174-175 ("In sum, there does not appear to be any good reason why domestic jurisdictions organise their laws such that sales are treated differently from services.").

[78] Bolshkova, supra note 22, p. 24.

[79] Territorial Dispute (Libia/Chad), ICJ Report (1994), p. 6 at 22 (para. 41).

[80] Article 3(2) of the CISG.

[81] Meskic, supra note 14, p. 88 ("The CISG recognizes the dichotomy between the sale of goods and the provision of services in its Art. 3(2)."); Deskoski et al, supra note 17, p. 14 ("Under the CISG, contracts of sale are distinguished from contracts for services.").

[82] Meskic, supra note 14, p. 136 ("Of course, we recognize that the CISG would most likely not apply to predominantly service-oriented servitization models, such as product-service systems. While the solutions in the CISG could, with a broader interpretation, even apply to pure service contracts, such interpretation goes beyond the intention of the CISG and would cross a line.").

[83] ICJ, a case concerning the dispute regarding navigational and related rights (Costa Rica v. Nicaragua), Judgement of 13 July 2009, para. 63; WTO Appellate Body, European Communities-Customs

"to revise treaties or to read into them what they do not, expressly or by necessary implication, contain".[84] The outside interpreter is not the master of the treaty; its masters are the State Parties. Therefore, the interpreter of the treaty must find the intentions from the "language of the treaty itself"[85], as:

> "[t]he fundamental rule of treaty interpretation requires a treaty interpreter to read and interpret the words actually used by the agreement under examination, and not words which the interpreter may feel should have been used."[86]

In other words, Article 31 of the Vienna Convention "neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended".[87] Any attempt to contravene the principles above would "be equivalent not to interpreting [a treaty], but to reconstructing it."[88] Whether such attempts would be more beneficial or advantageous to promoting a certain goal does not change this conclusion.[89]

Here, the States Parties' common intentions to be found in Article 3(2) are rather evident. The language of the Convention shows that the parties intended to treat service contracts differently from sales contracts. It also exposes the intention not to apply the Convention to pure service contracts. However, proponents of CISG's application to pure service contracts argue that because there is no good reason to distinguish service contracts from sales contracts, the Convention shall be interpreted to be applicable to pure service contracts, thereby discarding the clear language of the Convention. They argue that this is a desirable interpretation of the treaty because they believe that there is no real reason to distinguish services from sales. No other interpretation than this could violate the legal principles of the interpretation of international treaties. Whether there is actually no reason to distinguish service from sales will not change the conclusion based on the Vienna Convention. Even if it were true that there would be no reason to distinguish the two, the language of the Convention clearly shows that its parties intended to distinguish them in any case, and to exclude pure service contracts from the scope of the Convention's application. Under these circumstances, even the purpose-oriented or evolutionary interpretation would not allow room to include service contracts in the scope of application.[90]

In addition, the logic used in concluding that there is no reason to treat services differently

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Classification of Certain Computer Equipment, AB-1998-2, Report of the Appelate Body, WTDS62/AB/R, 5 June 1998.

[84] ILC, Yearbook of the International Law Commission, 1964, Vol. II, p. 202.

[85] India-Patent Protection for Pharmaceutical and Agricultural Chemical Products, WT/Ds50/AB/R, AB-1997-5, Report of the Appelate Body, 19 December 1997, para 45.

[86] EX-Hormones, WT/DS26/AB/R, WT/SD48/AB/R, AB-1997-4, Report of the Appellate Body, 16 January 1998, para 181.

[87] India-Patent Protection for Pharmaceutical and Agricultural Chemical Products, WT/Ds50/AB/R, AB-1997-5, Report of the Appelate Body, 19 December 1997, para 45.

[88] OCIJ, Acqusition of Polish Nationality, Advisory Opinion of 15 September 1923, PCIJ Series B. No. 7, p. 20.

[89] Ibid.

[90] *See* Yearbook of the ILC (1966), Vol, II, p. 219 ("When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted.").

from goods for the purpose of the CISG, in that they could not find relevant legislation providing explicit reasons for treating them differently, is flawed. Just because explanations about certain policies taken by legislation are not provided to the public does not mean that policies can be dismissed. As seen above, domestic legislation and the CISG distinguish services from goods. The fact that not enough explanation is given as to why services are treated differently from sales does not allow us to conclude that services and sales are actually indistinguishable. Also, as this paper suggested above, there seem to be probable explanations as to why legislation distinguishes services from sales. Unlike the sales of goods wherein issues arising from this type of transaction are roughly similar or common, regardless of the good traded, service transactions comprise a wide variety of services, each with different issues. Therefore, while it would be comparatively easy to make separate, special legislation for sales contracts, the case is different for service contracts.

Based on the considerations above, this paper asserts that CISG does not apply to pure service contracts. However, parties to a service contract may feel free to choose to apply CISG as the governing law, which is permitted by Article 6 of the Convention. If CISG were to be seen to be suitable for the purpose of the regulation of service contracts, it might be reasonable to promote the Convention's application to international service contracts by agreement of the parties. Is it desirable for CISG, as it stands now, to cover service contracts if the parties agree? Below, this question will be examined.

4. Suitability of CISG for Service Contracts (from *de lege federnda*)

Those that argue that CISG 'should' govern pure service contracts base their reasoning on the following grounds. First**,** they believe that the fact that CISG already applies to certain service obligations within sales contracts supports the argument that CISG should also govern pure service contracts.[91] Secondly, based on the legal maxim that "like cases should be treated alike unless there is a valid reason to treat them differently", they claim that pure service contracts should be governed by CISG.[92] They base such arguments on the belief that there is no reason to distinguish service contracts from sales contracts because domestic laws, when distinguishing the two, do not present sufficient reason for distinction.[93] Thirdly, based on the belief that parties to international commerce usually want "the whole of their relationship to be governed by the same system of law",[94] they point out a problem arising from the possibility of the application of different sets of laws to a 'mixed contract', and further reach the conclusion that the application of CISG to 'pure service' contracts will eliminate this problem.[95] In other words, they argue that when considering the possible confusion faced by parties in mixed contracts in deciding whether to be governed by CISG in its entirety or by CISG 'and' another service law, it is a good idea to just apply CISG to pure service contracts

[91] Schwenzer, supra note 22, pp. 183-184, p. 193 ("The Convention was expressly designed to apply to service obligations, albeit those contained within sales contracts, and it has indeed been so applied without difficulty. Hence, this supports the proposition that the Convention in its current form is suitable to govern service contracts.").

[92] Ibid., pp. 182-184.

[93] Ibid, pp. 175-179.

[94] Ibid., p. 183.

[95] Ibid., pp. 182-184.

as such. Fourthly, they argue that the application of CISG to pure service contracts would serve the goal of CISG to 'promote development of international trade' and 'contribute to the removal of legal barriers in international trade' through the harmonization of substantive law.[96] Below, this paper will examine the soundness of each argument and assess the suitability of CISG as a governing law for pure service contracts.

First, the argument that because CISG is already governing some aspects of service obligation with no trouble, it will face no problems, even when governing pure service contracts, is logically flawed. As the CISG Advisory Council's Opinion No. 4 correctly points out, Article 3(2) of CISG has been inserted in order to address the question of whether a mixed contract is governed by the Convention "if the services that could also be the subject of an independent contract ... are undertaken in the same contract that contains the obligation to deliver goods and transfer property".[97] This suggests that the drafters of the Convention believed that CISG was suitable for governing some issues related to service obligations that are not part of the main relevant contract, but this does not hold when service obligations are the main or sole part of a contract. If the drafters believed otherwise, , Article 3(2) had no reason to be inserted. Therefore, based on the existence and language of Article 3(2), it is more logical to conclude that CISG was not intended to be a suitable governing law for pure service contracts.

Further, the proposition that, because service contracts are basically no different from sales contracts, both can be governed by the same governing law, is flawed. As seen above, service and sales contracts are by no means the same or similar. It is true that they both are subject to general principles of contract law. The general principles related to formation, interpretation, performance, breach, and termination apply to both because they are contracts. However, except for issues which can be adequately regulated by general principles of contract law, legal issues that can arise from the two are different. The differeing natures of these areas led to the development of unique rules for the type of contract used. For sales contracts, many states have adopted special legislation to provide more detailed rules applicable to typical sales transactions. For service contracts, many states have separate rules for specific types of services instead of trying to create special legislation applicable to service contracts in general. Although domestic laws may not give detailed reasons as to why they distinguish services from sales, it is undeniable that they refuse to apply laws for sales contracts to service. In short, service contracts are different from sales, different sets of rules apply to each, and laws applicable to sales contracts, such as CISG, are not suitable for service contracts.

Can it be said that the recent trend of the "servitization" of the sale of goods makes sales contracts and service contracts indistinguishable, and that therefore laws regulating sales contracts are now becoming more applicable to service contracts? This paper finds that this is not the case. The servitization of the sale of goods does not make a service contract indistinguishable from a sales contract, nor does it make the former resemble the latter. Because of servitization, some sales contracts now resemble service contracts. For servitized contracts, it might be more accurate to say that traditional sales contract laws such as CISG cannot provide enough guidance. In any case, one cannot argue that because of the servitization of goods, CISG has now became a suitable norm, even for pure service contracts.

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[96] Ibid., p. 183.

[97] CISG Advisory Council Opinion No. 4, supra note 17, para 3.1.

The argument that because parties want the entirety of their case to be governed by a single law, pure service contracts must also be covered by CISG, is mixing two different issues: the desirability of applying one set of laws to a mixed contract, and the desirability of applying one set of laws to a pure service contract. It could be argued that if provisions concerning sales and services are contained in one contract, it will be desirable to have one set of laws to govern the entire contract rather than different sets of laws to govern separate parts of the same contract. The same logic cannot be extended, however, to a case in which a contract is only about the provision of services. Considering that different respective legal issues can arise, one cannot argue that the application of sales contract law to a pure service contract will provide more convenience, consistence, and predictability for the resolution of legal issues.

With regard to servitized contracts, it is more likely that parties would choose to avoid CISG if they prefer the contract to be governed by a single set of laws. For example, there may be diverse issues which can arise from a contract on the sale of IoT devices. In addition to legal issues with regard to the sale of the goods, those concerning the provision of services or compliance with regulations relevant to the IoT industry may appear. CISG does not provide "an exhaustive body of rules" for all possible issues, let alone those that "arise from international sales contracts."[98] In light of such circumstances, it is considered a better idea for parties to a sales contract of servitized goods to adopt a specific country's domestic substantive law instead of CISG as the governing law, because in such a case they can search the applicable law in question as agreed upon when encountering any issues mentioned above.[99]

By the same token, one cannot easily argue that the application of CISG to pure service contracts will remove legal barriers to international service transactions and promote international trade. CISG was never intended to apply to pure service contracts; hence, there are too many gaps existing in the Convention with regard to issues which may arise out of a pure service contract. These gaps must be primarily filled by the general principles of law on which the Convention is based, and if it is not possible, by the applicable domestic law chosen under the private international law of the relevant jurisdiction.[100] This means that the parties must go through this gap-filling process if they choose CISG as the governing law of a service contract. As compared to a case in which the parties choose to apply a specific domestic law as the governing law, this means that additional time and cost must be spent in the process, and that legal uncertainty will weigh on the parties. Based on these circumstances, CISG cannot be said to be a suitable governing law for a pure service contract.

5. Concluding Remarks

This paper examined whether CISG is a suitable governing law for international service contracts, as some scholars claim. When CISG was first drafted, there was little dispute on the

[98] Deskosky et al, supra note 17, p. 14 ("Despite a recent court decision stating that the 1980 Vienna Sales Convention on Contracts for the International Sales of Goods (CISG) constitutes "an exhaustive body of rules," the contrary is true. The CISG does not deal with all the issues that arise from international sales contracts. This can be easily derived from the text of the CISG itself.").

[99] Such a tendency could be informally confirmed by the author's interview with lawyers working at global leading companies in the IoT device industry. While they largely regard the sales contracts of IoT devices as sales contracts rather than service contracts or mixed contracts, they confirmed their internal practice of excluding CISG as the governing law.

[100] Article 7(2) of the CISG.

idea that contracts for the sale of goods and contracts for the provision of services were two different types of contract. Based on this understanding, CISG explicitly provides that the convention will apply to contracts wherein the preponderant part of the contractual obligation is on the sale of goods, not services. However, as more sales contracts have come to import more of service features mainly due to the advancement of the IoT industry, it became harder to determine whether CISG could properly govern such mixed contracts. Observing such changes, some scholars began to support the CISG's applicability to, and suitability for, pure service contracts. This paper examined such arguments by focusing on two issues; whether CISG is applicable to service contracts, and whether CISG is suitable for governing service contracts.

With regard to the first issue, this paper examined rules interpreting international treaties under the Vienna Convention, and applied them to the questions raised here. Based on this examination, it was found that the proposition that CISG applies to pure service contracts was a result of an erroneous interpretation of Article 3(2) of the Convention. Such an interpretation contradicts the express and plain language of Article 3(2), and also the common intent of the parties to the Convention to exclude its application to service contracts. No rules of interpretation of treaties support such interpretation; it specifically contravenes the rules under Article 31 of the Vienna Convention.

Regarding the second issue, this paper performed a logical and empirical analysis on the reasoning employed by the scholars claiming the suitability of the CISG to service contracts. As a result, this paper concluded that CISG was not a suitable governing law for service contracts. First, the Convention was drafted to provide rules tailored specifically to the needs of sales transactions, not service transactions. It contains several provisions which can be applied to issues related to the provision of services when such services are related to the sale of goods. Nevertheless, it does not provide a comprehensive set of rules to properly regulate contracts solely or centrally on the provision of services. Service and sales contracts are different in type of transaction, and therefore address different sets of issues. Law specially drafted to regulate sales contracts, therefore, cannot properly regulate service contracts. Some argue that there is no reason to treat service contracts differently from sales contract because domestic legislation does not provide a clear definition of a "service" or "service contract". However, a lack of definition cannot deny the obvious differentiation in law, business practice, and reality. The servitization of sales transactions will not change this conclusion. Rather, due to the servitization of some sales contracts, we can now question whether traditional sales laws, such as CISG, can still provide proper rules for servitized sales contracts.

More than 40 years have passed since CISG was adopted. Considering that it was based on previous work which began in the 1920s[101], now seems to be a good time to discuss how to maintain CISG's relevance to international business practices. In light of such circumstances, the advancement of the 4th industrial revolution and the IoT industry can be seen as a threat to the viability of the CISG. However, this might be overly pessimistic. Not all goods will become Internet connected, and not all sales transactions will become servitized. CISG remains strong as a solid law for many international contracts for the sale of goods.

CISG may eventually become actually irrelevant to business practices. If this were to be the case, the Convention might need to be amended or replaced. It would be advisable to begin the discussion of possible issues sooner rather than later. However, an attempt to virtually

[101] Tripodi, supra note 10, pp. 4-8.

change the rules by "interpreting" it in a way which directly contravenes the express text of its provisions cannot be a solution. Although the sophisticated technique of treaty interpretation may work as a bypass to the lengthy, costly. and in many cases, unsuccessful, process of treaty amendment or creation, it cannot and should not "create" a treaty. If one finds that the only way to survive an old law is to interpret the words of the law in a completely opposite meaing to what is stated, this shows that the old law has run its course. In other words, if one day it transpires that CISG can function only when its texts are interpreted in a completely opposite way, it means that CISG has lost its *raison d'être*. One cannot force businesses to adopt a law which provides no use anymore simply to extend the lifespan of the law. Therefore, the author believes that future discussions regarding the regulation of servitized or service contracts should be focused on treaty amendment or drafting rather than interpretation.

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