VIENNA SALES CONVENTION: APPLICABILITY TO "MIXED CONTRACTS" AND INTERACTION WITH THE 1968 BRUSSELS CONVENTION

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1 INTRODUCTION

The United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980 (the "Vienna Sales Convention" or "CISG") is arguably one of the most successful international uniform law conventions ever adopted. While representing an important contribution to the facilitation of international trade relations, the Vienna Sales Convention governs, as stated in Article 4 CISG, "only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract". It is thus neither concerned with all legal questions that may arise in connection with an international contract of sale (some of which may instead be governed by other international conventions), nor does it apply to every international trade transaction that involves the delivery of goods.

A recent decision of the Oberlandesgericht München[1] (OLG) involving a German-Italian contract for the production, delivery and installation of a plant

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1 Oberlandesgericht München, 3 December 1999, 23 U 4446/99. The English translation of this decision is presented *infra* at 131.

invites us to consider some of the issues pertinent to the Vienna Sales Convention's applicability to "mixed contracts" and its interaction with the 1968 Brussels Convention governing the jurisdictional aspects of international contractual relationships in Europe.

2 MIXED CONTRACTS UNDER THE CISG

The first issue addressed by the OLG is the Vienna Sales Convention's general applicability to so-called "mixed contracts"[2], *i.e.* on one hand to contracts under which the party who pays for goods still to be manufactured also has to supply materials for its production, and on the other hand to contracts obliging the party who has to deliver the goods to also perform services. As mixed contracts are common in international trade, the drafters of the Vienna Sales Convention had to address the question under which circumstances such a contract is to be considered an "international contract of sale" in the sense employed by the CISG, thus rendering the Convention's rules applicable.[3] The relevant provision is to be found in Article 3(1), (2) CISG.

2.1 ARTICLE 3(1) CISG – CONTRACTS FOR GOODS TO BE MANUFACTURED

According to Article 3(1) CISG, a contract for the delivery of goods which still have to be manufactured is generally treated as a contract of sale and thus falls into the scope of the Convention. An exception is only made for cases where the party who orders the goods – the "buyer" – supplies a substantial part of the materials for the production, as the drafters of the Vienna Sales Convention assumed that in these cases the manufacturer's obligations mainly consist in work and are accordingly different in nature from the main obligations of a typical seller outlined in Article 30 CISG (namely to deliver the goods, hand over relating documents and transfer the property).

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2 This expression is used by R Herber, in P Schlechtriem (ed.), *Commentary on the UN Convention on the International Sale of Goods (CISG),* 1998 Oxford University Press, Oxford, Art. 3 para 2; U Magnus, in Staudinger, *Julius von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen: Wiener UN-Kaufrecht (CISG),* 1999 Sellier/de Gruyter, Berlin, Art. 3 para 5.

3 Cf. J O Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention,* 3rd ed., 1999 Kluwer, The Hague, para 58.

The relevant test under Article 3(1) CISG is whether a "substantial part" of the materials is to be supplied to the manufacturer by the other party. The OLG held that two elements have to be taken into account: The value of the materials and their function. The court reaches this result based on a comparison of the English and the French text of the Vienna Sales Convention[4]: While the English term "substantial" seems to refer exclusively to the material's monetary value[5], the French expression "essentielle" is able to accommodate other factors as well, such as the nature of the materials and the particular interest of the parties.[6] In the present case little turned on this point, as the buyer merely had to contribute a few tools, which under these standards respectively was insubstantial and inessential.

In this context another issue under Article 3(1) CISG deserves consideration, namely the fact that only materials "necessary for such manufacture or production" may be taken into account under this provision. The wording of Article 3(1) thus makes clear that materials needed by the seller for the performance of other obligations – for example, packaging and transport – are irrelevant and cannot exclude the Vienna Sales Convention's applicability.[7] The same consideration has to apply to materials needed for an acceptance test (a "trial run" at the seller's factory) agreed upon by the parties in the present case. Although this is not entirely clear from the facts of the case, it seems likely that the tools were necessary for the acceptance test rather then the production of the plant, as they only were to be delivered to the manufacturer 20 days before the test and the plant was a standard model. Should this assumption be correct, then the OLG's evaluation of Article 3(1) CISG was at best unnecessary.

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4 The German version of the Convention's text – Article 3(1) uses the term "wesentlich" – is merely a translation, albeit one authorized by the German government, and is not "authentic" in the sense employed by the CISG's witness clause.

5 Most commentators consider the relationship between the value of the items to be delivered by each party to be decisive: F Enderlein & D Maskow, *International Sales Law,* 1992 Oceana, New York, Art. 3 note 3; R Herber, in Schlechtriem, *Commentary,* Art. 3 para 3; J O Honnold, para 59; K H Neumayer & C Ming, *Convention de Vienne sur les Contrats de Vente internationale de Marchandises,* 1993 CEDIDAC, Lausanne, Art. 3 para 3; K Siehr, in H Honsell (ed.), *Kommentar zum UN-Kaufrecht,* 1997 Springer, Berlin, Art. 3 para 3.

6 B Audit, *La vente internationale de marchandises,* 1990 L.G.D.J., Paris, 26; F Ferrari, in P Schlechtriem (ed.), *Kommentar zum Einheitlichen UN-Kaufrecht,* 3rd ed., 2000 Beck, Munich, Art. 3 para 8.

7 F Ferrari, in Schlechtriem, *Kommentar,* Art. 3 para 6 footnote 23; U Magnus, in Staudinger, Art. 3 para 20.

In any event, the technical specifications and drawings of the types of windows to be produced by the plant do also not qualify as "materials" in the sense used by Article 3(1) CISG.[8]

2.2 ARTICLE 3(2) CISG – CONTRACTS FOR THE SUPPLY OF SERVICES

Article 3(2) CISG deals with mixed contracts where the party furnishing the goods additionally has to perform services of some kind: if the latter constitute the preponderant part of this party's obligations, the Vienna Sales Convention does not apply.

Article 3(2) does not provide any explicit standards for the assessment of what is the preponderant part of obligations; however, a comparison with the wording of Article 3(1), which uses the term "substantial part", shows that the test under Article 3(2) CISG ("preponderant part"[9]) is somewhat stricter[10]: it requires the share of services to be clearly in excess of 50 per cent of the total value of the party's obligations in order to render the Sales Convention inapplicable.[11] This is in essence also the holding of the OLG, although the court uses a negative wording ("[a]n approximately identical value of the different obligations is sufficient to render the Convention applicable").

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8 But see Cour d'appel Chambéry, 28 May 1993, *A.M.D. Electronique v. Rosenberger SIAM S.p.A.,* CLOUT No. 157: In this case, the goods were to be manufactured on the basis of designs provided by the buyer and checked in accordance with the quality-control standards adopted and communicated by the buyer. The Court held that the CISG was inapplicable to the disputed contract as the party placing the order supplied "a substantial part of the materials necessary for such manufacture or production" in the sense of Article 3(1) CISG.
The Cour d'appel's interpretation of Article 3(1) CISG is commonly considered to be incorrect; cf. M J Bonell & F Liguori, "The UN Convention on the International Sale of Goods: A Critical Analysis of Current International Case Law", *Uniform Law Review* 1996, 147, 151; F Ferrari, in Schlechtriem, *Kommentar,* Art. 3 para 10; P Schlechtriem, *Internationales UN-Kaufrecht,* 1996 Mohr, Tübingen, para 26; C Witz, *Les premières applications jurisprudentielles du droit uniforme de la vente internationale (Convention des Nations Unies du 11 avril 1980),* 1995 L.G.D.J., Paris, 34.

9 In French text uses the terms "part essentielle" as opposed to "part prépondérante".

10 F Enderlein & D Maskow, *International Sales Law,* Art. 3 note 5; R Herber, in Schlechtriem, *Commentary,* Art. 3 para 3; J O Honnold, para 59; W Khoo, in M J Bianca & C M Bonell (eds.), *Commentary on the International Sales Law: The 1980 Vienna Sales Convention,* 1987 Giuffrè, Milan, Art. 3 note 2.3.

11 Enderlein & Maskow, Art. 3 note 5; R Herber, in Schlechtriem, *Commentary,* Art. 3 para 4; J O Honnold, para 60.1; but see F Ferrari, in Schlechtriem, *Kommentar,* Art. 3 para 15, who considers it doubtful if the service part needs to be "clearly" in excess of 50 per cent.

The question whether, apart from the obligations' value, regard is to be had to additional factors arises under Article (3)(2) CISG in the same way as it does under (1) of the provision. The OLG places the emphasis on the value of each element, but additionally allows the purchasing party's particular interest to be taken into account. This approach seems to be in conformity with the dominant opinion among scholarly writers.[12]

In the present case, the test under Article 3(2) CISG resulted in the CISG being clearly applicable, as the services to be performed by the Italian manufacturer – the assembly and the putting into operation of the plant – were relatively unimportant compared to the obligation to produce the technically complicated and comparatively expensive plant. Other decisions on the Vienna Sales Convention confirm that this is a common result in cases involving assembly of a plant.[13]

3 INTERACTION OF THE VIENNA SALES CONVENTION WITH THE 1968 BRUSSELS CONVENTION

The second issue of importance the court had to deal with was the determination of the place where the seller had to perform his obligation to deliver the window production plant. Only if the place of performance was at the buyer's place of business, the German courts – or, more precisely, the Landgericht Passau – had international jurisdiction over the present dispute.

3.1 ARTICLE 5 NO. 1 OF THE BRUSSELS CONVENTION AND THE CISG

The interaction of Article 5 No. 1 of the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and

12 Cf. F Ferrari, in Schlechtriem, *Kommentar,* Art. 3 para 13; R Herber, in Schlechtriem, *Commentary,* Art. 3 para 5; Schlechtriem, *Internationales UN-Kaufrecht,* para 27.

13 Handelsgericht Zürich, 26 April 1995, HG 920670, CLOUT No. 196; ICC Arbitration Case 7153 of 1992, CLOUT No. 26; ICC Arbitration Case 7760 of 1994, 26 August 1994, CLOUT No. 302.

Commercial Matters[14] (the Brussels Convention) with the Vienna Sales Convention's rules on the place of performance, *i.e.* Articles 31 and 57 CISG, is of great practical importance. This results primarily from the fact that the Brussels Convention is in force in all 15 Member States of the European Union (Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxemburg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom), while all of them with the exception of Ireland, Portugal and the United Kingdom are also Contracting States to the Vienna Sales Convention. Additionally, the Lugano Convention of 16 September 1988 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, which has been ratified – apart from the abovementioned EU Member States – by Iceland, Norway, Switzerland and, recently, by Poland (the future accession of other Eastern and Middle European States is expected[15]), contains in its Article 5 No. 1 a provision with identical wording.

It is thus no surprise that national courts in Europe frequently apply the Vienna Sales Convention when ruling on jurisdictional issues, and that the European Court of Justice (ECJ), which has been charged with the interpretation of the Brussels Convention, likewise had to deal with related questions. The ECJ held in *Custom Made Commercial*[16] that, if an international sales contract is governed by a uniform sales convention as the proper law of the contract, the place of performance in the sense used by Article 5 No. 1 of the Brussels Convention has to be determined in accordance with the sales convention's rules. Although the ECJ's decision concerned a contract of sale that was subject to the ULIS[17], it is commonly accepted that the same reasoning applies in case of the CISG, and courts in numerous EU States have confirmed this.[18]

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14 Text of the provision:
"A person domiciled in a Contracting State may, in another Contracting State, be sued:
1. in matters relating to a contract, in the courts for the place of performance of the obligation in question; […]."

15 Particularly Hungary and the Chech Republic are likely to acceed to the Lugano Convention in the near future, cf. E Jayme & C Kohler, "Europäisches Kollisionsrecht 2000: Interlokales Privatrecht oder universelles Gemeinschaftsrecht?", *Praxis des Internationalen Privat- und Verfahrensrechts* 2000, 454, 462; M Kengyel, "Das ungarische Internationale Zivilverfahrensrecht und die Perspektiven für einen Beitritt zum EuGVÜ oder zum Lugano-Übereinkommen", in E Jayme (ed.), *Ein internationales Zivilverfahrensrecht für Gesamteuropa. EuGVÜ, Lugano-Übereinkommen und die Rechtsentwicklungen in Mittel- und Osteuropa,* 1992 Müller, Heidelberg, 121, 128 et seq.

16 European Court of Justice, 29.6.1994, Case C-288/92 – *Custom Made Commercial* v. *Stawa Metallbau*, *European Court Reports* 1994, I-2913 et seq.

17 Uniform Law on the International Sale of Goods of 1 July 1964.

18 See for Belgium: Rechtsbank van koophandel Kortrijk, 27 June 1997, 651/97; for Denmark: Østre Landsret København, 22 January 1996, B-3122-95; for France: Cour d'appel Grenoble, 29 March

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3.2 THE PLACE OF PERFORMANCE UNDER ARTICLE 57 CISG

The interaction of Article 5 No. 1 of the Brussels Convention with the CISG's rules on the place of performance has been the subject of some criticism[19], which is mainly directed at the unfortunate result achieved by combining the jurisdiction rules of the Brussels Convention with Article 57(1)(a) CISG governing the place where the buyer has to perform his obligation to pay the price: Doing so invariably results in the courts at the seller's place of business having jurisdiction over actions brought by the seller in his "home court" demanding payment from the buyer.

This outcome, however, can hardly be blamed on the Vienna Sales Convention which is not concerned with fixing the appropriate place of performance for procedural issues[20], but rather on the Brussels and the Lugano Conventions

1995, 93/2821; for Germany: Oberlandesgericht Köln, 21 August 1997, 18 U 121/97; for the Netherlands: Gerechtshof s'-Hertogenbosch, 26 October 1994, 26/94/RO; for Switzerland (which is not an EU State, but a Contracting State of the Lugano Convention): Bundesgericht, 18 January 1996, *Firma T. S.r.l. v. Firma S. AG*.

19 See S O'Malley & A Layton, *European Civil Practice,* 1989 Sweet & Maxwell, London, para 17.14; G Hager, in Schlechtriem, *Commentary,* Art. 57 para 11 with further references; and recently M De Cristofaro, "Critical remarks on the Vienna Sales Convention's impact on jurisdiction", *Uniform Law Review* 2000, 43 et seq.

20 In order to avoid the described link between the place of payment and jurisdiction, the German delegation at the 1980 Vienna Conference even proposed that today's Article 57 CISG should state expressly that the place of performance does not found jurisdiction. The proposal was rejected on the ground that matters of jurisdiction are outside the scope of the Convention; cf. United Nations Conference on Contracts for the International Sale of Goods, *Official Records: Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committees,* 1981 United Nations, New York, 122 and 369; D Maskow, in Bianca & Bonell, Art. 57 note 1.2.

which "borrow" the CISG's substantive rule[21] to resolve the corresponding jurisdictional issue.

3.3 THE PLACE OF PERFORMANCE UNDER ARTICLE 31 CISG

As the present case involved a proceeding started by the buyer against the seller who allegedly breached his obligation to deliver the goods, not Article 57, but Article 31 CISG was the applicable provision. The OLG correctly held that according to Article 31 CISG the parties' contractual agreement prevails[22] (the position is the same under Article 57 CISG[23] – contracting parties, however, only rarely seem to include a clause on the place of payment in their contract). Where the parties have agreed on a place of performance "other" than the one laid down in Article 31 CISG, this provision loses its relevance for the establishment of the jurisdictional place of performance.

The disputed question was if the clause "price calculated ex works Rimini" lead to the place for delivery being Rimini, as the trial court had held. The OLG denied this, as the abovementioned clause was only concerned with price calculation and, implicitly, stipulated that any costs for the transport of the window production plant was not included in the agreed price. According to the OLG, the fact that the seller had to install the plant at the buyer's place of business on the other hand meant that S./Germany had been contractually agreed upon as the place of performance. As the buyer is claiming damages for non-performance of the seller's obligation to deliver the goods, this means that the court treated the seller's obligations to install the plant and to have it put into operation by his personnel as part of his delivery obligation in the sense used by Article 31 CISG.

It seems doubtful if the court's approach is correct. A clear distinction between the obligation to deliver the window production plant on one hand and the

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21 H Bernstein & J Lookofsky, *Understanding the CISG in Europe,* 1997 Kluwer, The Hague, London, Boston, § 2-11 footnote 104.

22 Cf. the wording of Article 31 CISG: "If the seller is not bound to deliver the goods at any other particular place...".

23 Cf. the wording of Article 57 CISG: "If the buyer is not bound to pay the price at any other particular place...".

additional obligations to install it and to put it into operation on the other hand is required, and the place of performance for both obligations is not necessarily the same[24]: As the OLG correctly points out, the relevant obligation under Article 5 No. 1 of the Brussels Convention is the one on which the Claimant bases his claim, and as far as a claim for damages is concerned, the obligation which the Defendant allegedly has failed to perform is decisive.

The obligation to install the plant and supervise it for a period of six weeks could arguably only have been performed at the buyer's place of business, where the plant at that point would have been physically located. However the buyer in the present case did not demand damages because this obligation had been ill-performed; rather it demanded compensation for the losses suffered because of the seller's failure to deliver the plant in the first place. This obligation was to be performed at the seller's place of business in Rimini/Italy. Assuming that the OLG was correct in deciding that the clause "price calculated ex works Rimini" did not influence the place for performance of the delivery obligation at all, this follows from Article 31(a), (c) CISG. The outcome seems to be the same if the clause is, with the trial court and against the OLG, considered relevant for the question at issue, as it would – like the Incoterm "EXW" (Ex works) – mean that the seller fulfils his obligation to deliver when he has made the goods available at his premises to the buyer[25], *i.e.* at his factory in Rimini.

In such a context, it cannot be assumed that the existence of an obligation to install the goods results in the delivery obligation becoming an obligation to deliver the goods to the buyer[26], as the OLG apparently did. The OLG's approach would mean that, by agreeing to assemble and install the plant, the seller would also have implicitly accepted to release the buyer from his obligation to bear the transport risk under Article 67(1) CISG. Such an interpretation is, in this author's opinion, in conflict with the express contractual clause "ex works" indicating that the Italian seller's delivery obligation, the non-performance of which is the subject of the present dispute, was fulfilled at the moment the goods were handed over to the buyer or his carrier at the factory in

[24] U Huber, in Schlechtriem, *Commentary,* Art. 31 para 86a.

[25] This is at least true as far as the trade term EXW under the Incoterms 1990 is concerned. The term "Ex Works" may, however, be interpreted differently in certain countries, cf. O Lando, in Bianca & Bonell, Art. 31 note. 2.2.

[26] U Huber, in Schlechtriem, *Commentary,* Art. 31 para 86a.

Italy. Construing the delivery obligation under the Vienna Sales Convention correctly would thus have lead to the court in Rimini/Italy having international jurisdiction.

4 FUTURE DEVELOPMENTS

A revision of the Brussels Convention recently lead to its adoption in the form of a European Community Council Regulation[27], which will enter into force on 1 March 2002 and from that date will replace the Brussels Convention for all EU Member States with the exception of Denmark.[28] Moreover, the outcome of the Brussel Convention's revision is almost necessarily going to lead to a "parallel" revision of the Lugano Convention.[29]

One of the provisions which underwent a substantial change in this context is Article 5 No. 1, which now reads as follows:

Article 5

A person domiciled in a Member State may, in another Member State, be sued:

1) a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;

b) unless otherwise agreed, the place of performance of the obligation in question shall be:

- in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,

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27 Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *Official Journal of the European Communities* of 16 January 2001, No. 12/1 et seq.

28 Denmark is the only EU Member State that did not participate in the adoption of the new Regulation and is therefore not bound by it nor subject to its application. Between Demark and the other EU States the Brussels Convention remains in force; cf. Recitals 22 and 23.

29 See A Burgstaller, *Internationales Zivilverfahrensrecht,* 2000 Orac, Vienna, para 2.7.

- in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided,

c) if point (b) does not apply, then point (a) applies;

[...].

To what extent will the future interaction between the new "Brussels Regulation" and the Vienna Sales Convention yield results different from those described above? The only novelty is the introduction of Article 5 No. 1(b) of the Brussels Regulation: in its first indent, this provision fixes the place of performance for *all* obligations arising out of a contract of sale – buyer's and seller's obligations alike – at the place where the goods were or should have been delivered, thus avoiding any reliance on the Vienna Sales Convention for the determination of the place of performance by fixing the place *itself*. This means that the frequently criticised interaction of Article 57(1)(a) CISG with Article 5 No. 1 will, under the new provision, lose much of its relevance, as will the effect of its counterpart, Article 31 CISG.

The scope of the described Article 5 No. 1(b), first indent, of the Brussels Regulation is, however, more limited than it may at first seem. Firstly, it only applies to cases in which the place of delivery is in a Member State of the EU – if, for example, the contract of sale between a French seller and an Austrian buyer calls for the delivery of the goods in Switzerland, Article 5 No. 1(b) does not apply.

Secondly, the parties' agreement on a place of performance prevails ("unless otherwise agreed"), which in turn means that clauses like "price calculated ex works Rimini" will still have to be interpreted by the courts as they may lead to a place of performance different from that provided for in Article 5 No. 1(b), first indent.

Thirdly, the new provision refers to the place where the goods were to be delivered "under the contract". In this context it is not entirely clear which

effect a contractual choice of law clause calling for the application of the CISG[30] would have on the place of performance: Does this mean that the jurisdictional place of performance is to be determined according to Articles 31 and 57 CISG? This construction would severely reduce the practical effect of Article 5 No. 1(b), first indent, of the Brussels Regulation and is probably not what the drafters of the regulation envisaged; on the other hand, the express reference to the "contract" would make no sense if it only applied to specific agreements on the place of performance, as those are already dealt with by the preceding term "unless otherwise agreed".

In all cases in which Article 5 No. 1(b) does not apply, point (c) declares Article 5 No. 1(a) to be applicable, which adopts the wording of Article 5 No. 1 of the Brussels Convention. Accordingly, the interaction of the Brussels Convention with the Vienna Sales Convention described *supra* will in effect continue within the scope of Article 5 No. 1(a) of the Brussels Regulation even after the Convention is replaced by the Regulation on 1 March 2002, as the new Article 5 No. 1(a) is likely to be interpreted along the lines of its predecessor. The outcome in the case decided by the OLG München would also be the same under the new Brussels Regulation, as the court's reasoning with respect to the seller's obligation to install the plant and to put it into operation would mean that S./Germany had been contractually agreed upon as place of performance.

The determination of the jurisdiction of the courts at the place of performance under the new Brussels Regulation poses one last potential problem as far as mixed contracts under the Vienna Sales Convention are concerned: according to Article 3(2) CISG, contracts involving service obligations on the part of the seller are, under certain circumstances, as a whole treated as contracts of sale and thus subject to the Vienna Sales Convention's rules. Article 5 No. 1(b) of the Brussels Regulation, on the contrary, clearly distinguishes between contracts for the sale of goods (first indent) and contracts for the provision of services (second indent), and thus can lead to different courts having jurisdiction depending on the question if a mixed contract is, under the Brussels Regulation,

[30] Contractual clauses that explicitly declare the Vienna Sales Convention to be applicable are relatively rare in practice; however, the choice of the law of a Contracting State – a case of considerable practical importance, as the abundant case law shows – is generally considered to lead to the application of the CISG; see Bundesgerichtshof, 23 July 1997, VIII ZR 134/96; F Ferrari, in Schlechtriem, *Kommentar,* Art. 6 para 22 with further references.

considered to be a sale, a contract for services or (possibly) both. It remains to be seen how the courts deal with this question which arises only because the new Article 5 No. 1(b) attempts to fix just one place of performance for contracts involving several obligations. In the end, the revised rules of the Brussels Regulation might therefore create more problems than they solve.