



## CISG Advisory Council\* Opinion No. 23

### Mistake, fraud, misrepresentation and initial impossibility in CISG contracts

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## INTRODUCTION OF THE CISG AC

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

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

*At subsequent meetings, the CISG-AC elected as additional members Prof. Pilar Perales Viscasillas, Universidad Carlos III, Madrid; Prof. Ingeborg Schwenzer, University of Basel; Prof. John Y. Gotanda, Villanova University; Prof. Michael G. Bridge, London School of Economics; Prof. Han Shiyuan, Tsinghua University and Prof. Yeşim Atamer, Istanbul Bilgi University, Turkey, Prof. Ulrich G. Schroeter, University of Mannheim, Germany, Prof. Lauro Gama Jnr, Pontifical Catholic University, Justice Johnny Herre, Justice of the Supreme Court of Sweden, Prof. Harry M. Flechtner, University of Pittsburgh, Prof. Sieg Eiselen, Department of Private Law of the University of South Africa, Prof. Edgardo Muñoz López, Universidad Panamericana, Guadalajara, México, and Assoc. Prof. Lisa Spagnolo, Macquarie Law School.*

*Prof. Jan Ramberg served for a three-year term as the second Chair of the CISG-AC. At its 11th meeting in Wuban, People's Republic of China, Prof. Eric E. Bergsten of Pace University School of Law was elected Chair of the CISG-AC and Prof. Sieg Eiselen of the Department of Private Law of the University of South Africa was elected Secretary. At its 14th meeting in Belgrade, Serbia, Prof. Ingeborg Schwenzer of the University of Basel was elected Chair and at its 24th meeting in Antigua, Guatemala, Prof. Michael G. Bridge of the London School of Economics was elected Chair of the CISG-AC. At its 26th meeting in Asunción, Paraguay, Ass. Prof. Milena Djordjević, University of Belgrade, Serbia, was elected Secretary, and she was re-elected short after the 37<sup>th</sup> meeting in Rio de Janeiro. Prof. Pilar Perales Viscasillas of the University Carlos III of Madrid was elected Chair of the CISG-AC after the 37th meeting in Rio de Janeiro.*

*The meeting was kindly hosted by Kopaonik School of Natural Law - Slobodan Perović.*

## 1. OPINION

### *Article 4*

*This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:*

- a) The validity of the contract or of any of its provisions or of any usage;*
- b) The effect which the contract may have on the property in the goods sold.*

### BLACK LETTER RULES

- 1. Notwithstanding Article 4, the otherwise applicable rules of law about mistake, non-fraudulent misrepresentation, duties of disclosure, initial impossibility and questions of lesion caused by mistake do not apply to CISG contracts if the rules relate to matters governed by the Convention even if the otherwise applicable rules of law characterize them as, for example, issues of validity. In cases of fraud, however, the otherwise applicable rules of law on fraud are not excluded.**
- 2. A matter is governed by the Convention if the question is expressly settled in the Convention or is settled by the general principles on which it is based (Article 7(2)).**
- 3. The Convention applies exclusively when:**
  - a. the same factual situation is addressed by both the Convention and the otherwise applicable rules, and**
  - b. the purpose of the otherwise applicable rules is broadly the same as that of the Convention.**
- 4. Therefore, for example, otherwise applicable rules of law are excluded:**
  - a. If either party was induced to enter into the contract by a mistake or non-fraudulent misrepresentation as to any of the matters covered by Articles 35, 41 and 42;**
  - b. If either party was induced to enter into the contract by a mistake or non-fraudulent misrepresentation as to the value of the goods;**

- c. If either party was induced to enter into the contract by a mistake or non-fraudulent misrepresentation as to a matter covered by Articles 71-73;
  - d. in cases of initial impossibility; or
  - e. if the parties have entered into the contract under a shared mistake as to any matter covered by the Convention.
5. Conversely, if the mistake or non-fraudulent misrepresentation was as to a matter that is not governed by the Convention, the otherwise applicable rules of law are not excluded.
6. Otherwise applicable rules of law imposing a duty of disclosure (in the absence of fraud) do not apply to a CISG contract if they relate to a matter governed by the Convention.
7. When, in the absence of fraud, a party has made a mistake or there was a non-fraudulent misrepresentation as to
  - a. the content or meaning of a declaration, statement or other conduct, or
  - b. the identity of a party,the Convention's rules on interpretation (Article 8) and formation of the contract (Articles 14–24) apply to the exclusion of rules of the otherwise applicable rules of law.
8. The otherwise applicable rules of law include any right to avoid, rescind or otherwise invalidate the contract or to treat it as void, and any right to claim damages.
9. A party that has been induced to enter into the contract by the other party's fraud may resort to remedies under the otherwise applicable rules of law even if it also has a remedy under the Convention. It may choose the remedy it considers more favorable, or combine remedies that are compatible.
10. For the purposes of this Opinion, fraud includes giving incorrect information, whether by words or conduct, when:
  - a. the giver knew the information to be incorrect, or was aware that it did not know whether the information was correct or not; and

- b. **the giver intended to deceive the other party, or was aware that the other party might be deceived and gave the incorrect information nonetheless.**

## COMMENTS

## RULE 1

1. **Notwithstanding Article 4, the otherwise applicable rules of law about mistake, non-fraudulent misrepresentation, duties of disclosure, initial impossibility and questions of lesion caused by mistake do not apply to CISG contracts if the rules relate to matters governed by the Convention even if the otherwise applicable rules of law characterize them as, for example, issues of validity. In cases of fraud, however, the otherwise applicable rules of law on fraud are not excluded.**

*A. The issue addressed in this opinion*

- 1.1 This Opinion explains when a party to a contract that is governed by the Convention may claim a remedy under the otherwise applicable rules of law governing the contract on the basis of mistake, fraud, misrepresentation, or other doctrines that may apply in similar factual situations, namely, duties of disclosure, initial impossibility and lesion (or “gross disparity in value”).
- 1.2 This is a topic that can cause difficulty because of the limits on the application of the Convention contained in Article 4. Article 4 provides:

“This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:

- a. The validity of the contract or of any of its provisions or of any usage;
- b. The effect which the contract may have on the property in the goods sold.”

In respect of cases where the contract has been affected by mistake, fraud or misrepresentation, or where there may be a claim based on a duty of disclosure, initial impossibility or lesion under the otherwise applicable rules of law, Article 4 raises two issues.

- 1.3 The first issue is whether a party may rely on the otherwise applicable rules of law when these doctrines may be classified as raising issues of validity. As will be explained below, this depends on both the meaning of “validity” and whether the matter is “provided” for in the Convention.

- 1.4 The second issue is whether the Convention applies to claims for damages that may arise under the otherwise applicable law because there has been a mistake, fraud or other misrepresentation, etc., if the otherwise applicable rules of law treat liability of this type as non-contractual (for example, as delictual or tortious, or as statutory). This depends on whether the claim falls within the first sentence of Article 4, which provides that the Convention “governs ... the rights and obligations of the seller and the buyer arising from such a contract”.
- 1.5 This Opinion explains that even though under the otherwise applicable rules of law the facts that have occurred may give rise to an issue of validity or to a damages claim that the otherwise applicable rules classify as non-contractual, the Convention applies unless the matter is one that is not governed by the Convention; and that, if the matter is governed by the Convention, the Convention applies exclusively (or to put it in different words, the Convention displaces the otherwise applicable rules of law) except in cases of fraud. A party that has been induced to enter the contract by fraud may resort to the otherwise applicable rules of law as an alternative to, or in addition to, claiming a remedy under the Convention.

**B. *The “otherwise applicable rules of law”***

- 1.6 The phrase “otherwise applicable rules of law” means the law that governs the contract (either by choice of the parties or by virtue of the rules of private international law) other than the rules of the Convention itself. This will often be “the domestic law”, i.e. the rules of the governing law that apply to purely domestic sales. However, as the CISG-AC pointed out in a previous Opinion, the otherwise applicable law may include rules of law that do not originate from formal State sources of law.<sup>1</sup> This may occur, for example, if the parties agree that any dispute should be referred to arbitration according to a non-national set of rules, for example the UNIDROIT *Principles of International Commercial Contracts*. Many laws accept a choice of this kind as valid. Therefore in this Opinion we refer to “the otherwise applicable rules of law”. However, in many of the cases with which this Opinion deals, it is the domestic law that would be the alternative to the CISG, and so in the Comments we will frequently refer to “the domestic law”.
- 1.7 It may happen that the Convention does not apply because the parties are not in Contracting States (Article 1(1)(a)) and the rules of private international law do not lead to the application of the rules of a Contracting State (Article 1(1)(b)), but the parties agree that their contract is to be subject to the CISG. Outside arbitration (on which see the previous paragraph) the effect is that the Convention is incorporated into their contract, subject to any mandatory rules

of the applicable law.<sup>2</sup> Subject to those rules and to anything contrary in the contract, the parties may be taken to have agreed that the Convention should pre-empt the law governing the contract to the same extent as if the Convention applied directly. In this situation what is said in this Opinion applies with necessary adaptations.

### ***C. Background***

- 1.8 Article 4 excludes questions of validity from the scope of the Convention because delegates had been unable to agree on rules on validity or on adopting a Uniform Law on Validity of Contracts of International Sale of Goods<sup>3</sup> (the LUV) that had been prepared by UNIDROIT, and saw no prospect of reaching an agreement on the issues within a reasonable time;<sup>4</sup> nor were the issues thought to be likely to affect contracts for the international sale of goods at all often.<sup>5</sup> Experience has shown, however, that these issues do arise in practice and that they can be difficult to resolve. The situation which has arisen most frequently is one in which the buyer may appear to have a choice between a remedy for breach of the seller's obligations under the Convention and a remedy for mistake, misrepresentation or fraud under otherwise applicable law. The Opinion covers this and also a wide spectrum of other cases involving mistakes, misrepresentation and related issues.

### ***D. Outline and scope of Opinion***

- 1.9 The Opinion first explains the general principles that apply in this situation and why most cases of mistake, non-fraudulent misrepresentation and the like will be governed exclusively by the Convention. It then explains the implications for the case in which the buyer or the seller seeks to rely on remedies under the otherwise applicable rules of law for mistake or non-fraudulent misrepresentation in respect of the goods (see Rule 4(a)). The Opinion goes on to deal with a variety of related situations in which one or both parties acted under some form of mistake when they entered the contract: mistakes or non-fraudulent misrepresentations as to value (Rule 4(b)), mistakes as to creditworthiness or ability to perform (Rule 4(c)), questions of impossibility (rule 4(d)) and shared mistake (rule 4(e)). Conversely, it explains when mistakes and misrepresentations may fall outside the scope of application of the Convention (rule 5). Rule 6 deals with those cases in which (under some otherwise applicable laws) there may be duties of disclosure.



- 1.10 The Opinion next explains how the Convention applies to mistakes and misunderstandings over the terms of the contract (“mistakes in declaration”) and to mistakes of identity (rule 7)
- 1.11 As mentioned earlier, the Opinion also deals with the extent to which claims for damages that may arise under the otherwise applicable law in cases of mistake and misrepresentation are preempted by the Convention (Rule 8).
- 1.12 Lastly, the Opinion explains the position where there has been fraud, and what is meant by fraud in this context (rules 9 and 10).
- 1.13 The Opinion does not deal with other rules of otherwise applicable law that may be thought to fall under the heading of validity.

**E. *Validity and the “counter-expectation”***

- 1.14 The Convention does not define “validity”. It must have been intended to include the issues of mistake, fraud and threat (duress), which were the topics covered by the LUV; and it may reflect an understanding that “validity” refers more widely to any ground on which a contract, or a term a contract, may be held to be void, voidable, unenforceable or (especially in relation to individual terms of the contract) of no effect.
- 1.15 Thus “validity” might include the following doctrines found in the different laws:
  - a. the traditional *vices de consentement* – fraud, threat (or duress), mistake and misrepresentation;
  - b. breach of a duty of disclosure;
  - c. initial impossibility;
  - d. substantive unfairness that renders a contract voidable (*lésion*);
  - e. excessive advantage-taking and unconscionability;
  - f. contracts or terms that are contrary to public policy (including illegality and also those rules of public policy that seem to be aimed at protection of one of the parties, such as usury and some types of restraint of trade<sup>6</sup>);
  - g. contracts that are liable to be set aside because they were obtained by unfair means, for example by unfair commercial practices<sup>7</sup> or misleading or deceptive conduct<sup>8</sup>
  - h. terms that are invalid because of their content<sup>9</sup> (including terms excluding or restricting liability);
  - i. terms that may be invalid by reason of legislation;<sup>10</sup>

- j. penalty clauses;<sup>11</sup>
- k. formal requirements (though these are brought back into the scope of the Convention by the express provisions of Article 11);
- l. capacity; and
- m. (possibly) rights of withdrawal / cancellation.<sup>12</sup>

1.16 The difficulty is that different laws are likely to have varying conceptions of what is or is not a matter of validity.

1.17 Article 7(1) of the Convention provides

“(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade”.

To promote uniformity, the word “validity” in Article 4 must be given an autonomous meaning,<sup>13</sup> because to interpret it according to the otherwise applicable law might result in the Convention having a different scope of application from one jurisdiction to another, according to what each system regards as a question of validity.

1.18 For the purposes of this Opinion, however, it is not necessary to determine exactly which doctrines fall within “validity”. The autonomous meaning certainly includes validity on the grounds of mistake, fraud and non-fraudulent misrepresentation and the closely-related topics that are dealt with in this Opinion. This Opinion expresses no view on which other doctrines do or do not fall within validity.

1.19 Even if an issue should be categorized as one of validity, Article 4 provides a “counter-exception”: the Convention is not concerned with issues of validity “except as otherwise expressly provided in the Convention”. The wording of the counter-exception has given rise to some uncertainties, which are explored below.

### ***E. Validity and the “counter-exception”***

1.20 A similar problem of lack of uniformity would occur in respect of claims for damages under the otherwise applicable law if the claim arises from facts that may also give rise to issues of validity, but the claim is characterized as non-contractual, for example damages for *culpa in contrahendo*<sup>14</sup> or negligent misrepresentation. Article 4 provides that the Convention “... governs only ... the rights and obligations of the seller and the buyer arising from such a contract...”. This makes it possible to argue that even if the factual situation is covered by the Convention, the Convention only affects

any rights of avoidance and does not affect claims for damages under the otherwise applicable law on the basis of, for example, tort or statutory liability for negligent misrepresentation.<sup>15</sup> However, this interpretation would not lead to uniformity, as not all national laws may classify such claims as non-contractual; and indeed, as will be explained below,<sup>16</sup> this interpretation would produce incoherence.

## RULE 2

### **2. A matter is governed by the Convention if the question is expressly settled in the Convention or is settled by the general principles on which it is based (Article 7(2)).**

#### *A. Matters governed by the Convention*

- 2.1 Even if an issue is one of validity within the meaning of Article 4, the Convention governs the matter if the Convention provides for it, either expressly or by way of general principle in accordance with Article 7(2). In relation to validity, the Convention recognizes this explicitly. Article 4 provides a “counter-exception”: the Convention is not concerned with issues of validity “except as otherwise expressly provided in the Convention”. This Opinion explains that in relation to claims for damages arising from facts that might give rise to an issue of validity, whether the Convention governs must be determined in the same way.<sup>17</sup>

#### *B. Matters “expressly settled”*

- 2.2 The first question is: when does the Convention provide “expressly” for a question? It clearly does so where a provision is aimed directly at an issue that in many systems would be regarded as one of validity, e.g. Article 11, which provides that a contract of sale need not be in any particular form. But that is far from being the only case.
- 2.3 First, in the CISG-AC’s view, a question is “expressly provided” for when the Convention’s provisions address the relevant matter either in so many words or when correctly interpreted in accordance with Article 7(1), so that (in the words of Article 7(2)) the matter is “expressly settled”. For example, the Convention does not explicitly mention the effect of a mistake in declaration but, as will be explained in more detail in the Comments to Rule 7, the effect can be determined by a correct interpretation of Article 8 (in some cases, in conjunction with Article 14).

*C. Matters settled in conformity with general principles*

- 2.4 Secondly, a matter that is not “expressly settled” is still provided for by the Convention if it can be settled “in conformity with the general principles on which [the Convention] is based”, in accordance with Article 7(2).<sup>18</sup> In other words, even if the legal issue arising from the factual situation is one of validity, the otherwise applicable law will not apply if the situation is provided for by the Convention, including the general principles on which the Convention is based. An example might be<sup>19</sup> a mistake or misrepresentation as the value of the goods, to which the Convention does not refer explicitly, but which, it will be argued below,<sup>20</sup> can be solved by reference to the general principles on which the Convention is based.

*D. Matters not governed by the convention*

- 2.5 It is only when the question is not expressly settled and cannot be determined in accordance with the general principles on which the Convention is based that the matter must be determined in conformity with the rules of the otherwise applicable law (Article 7(2), last phrase). For example, a contract for the sale of machinery might require the transfer of ownership of the small area of land on which the machinery is situated. This would not prevent the Convention applying to the contract as a whole, but if there were some mistake over the ownership of the land, this would be governed by the otherwise applicable rules of law, as the Convention does not deal with sales of real property and contains no relevant general principles.<sup>21</sup>

*E. Matters: legal issues or factual situations?*

- 2.6 A second question is over the meaning and effect of the counter-exception in relation to validity: does it refer to the Convention providing for the legal issue of validity, or for a factual situation that might be seen as giving rise to an issue of validity? A similar question arises with the word “matters” used in Article 7(2). This question has provoked some disagreement among scholars and also in the case law. We address this question in the Comments to Rule 3.

RULE 3

3. **The Convention applies exclusively when:**
  - a. **the same factual situation is addressed by both the Convention and the otherwise applicable rules, and**
  - b. **the purpose of the otherwise applicable rules is broadly the same as that of the Convention.**

*A. Competing academic views*

- 3.1 Some scholars have considered that whether the Convention applies depends on how issues are traditionally categorized in the otherwise applicable law. For example, it has been argued that even in a fact situation on which the Convention has an express provision, the otherwise applicable law can apply simply because in some (or even all) systems the facts also give rise to a question of validity.<sup>22</sup> Thus if the contract is for specific goods that the buyer believed to be in conformity with the requirements of Article 35, when in fact they are not, the buyer would be able to choose between a claim under the Convention on the grounds of non-conformity and a claim based on mistake under the otherwise applicable law (if it allows such a claim).<sup>23</sup> Similarly, it has been argued that the Convention is concerned only with contractual issues, and therefore all non-contractual claims, in particular claims for negligent misrepresentation, are outside its scope and are left to the otherwise applicable law.<sup>24</sup>
- 3.2 The CISG-AC is unable to adopt an approach that depends on how issues are categorized in the otherwise applicable law, because domestic laws do not adopt a uniform categorization. To say that in a fact situation on which the Convention has an express provision, the otherwise applicable law can also apply simply because in some (or even all) systems the facts also give rise to a question of validity would lead to different solutions<sup>25</sup> according to (a) whether the particular domestic law recognizes that the facts may render the contract invalid and, if it does, (b) whether it allows the buyer to choose between remedies.
- 3.3 A more nuanced approach to the validity exception has been advocated by Hartnell, who acknowledges that allowing ready access to domestic law will not promote uniformity, but recognizes that during the negotiations there were many delegates who considered that questions of validity should be left to domestic law, because of the variety of approaches and the cultural specificity of the rules. Hartnell<sup>26</sup> argues that:

“... tribunals should be aware of the history of the Convention, including the validity exclusion, and the purposes it was designed to serve, in order to recognize the delicate nature of the conflict of laws analysis they are required to undertake, and to balance carefully the tension between domestic public policy and the needs of the international legal order.”

- 3.4 The CISG-AC cannot adopt this approach either. When the legislative history does not give a clear indication of what was intended, the agreed text should be interpreted objectively, without asking what the delegates might have intended by it. To put it another way, the Convention must be taken to have agreed on the wording, even if the delegates were not in agreement on its meaning, and to have left its meaning to be determined later by objective interpretation, without regard to the *travaux préparatoires*.
- 3.5 A third approach to the question whether a matter is “expressly provided” for in the Convention, is to ask whether the particular factual scenario is covered by the Convention, rather than how it might be categorized as a matter of law.<sup>27</sup> In an earlier Opinion, the CISG-AC said that the characterization of claims under domestic law is irrelevant in deciding whether or not the claim is excluded by the CISG.<sup>28</sup> The CISG-AC considers that the correct approach to applying the validity exclusion and the counter-exception is to ask whether the factual situation is covered by the Convention, subject to one qualification.
- 3.6 In the CISG-AC’s opinion, whether the Convention provides for a situation, and therefore pre-empts resort to the otherwise applicable law, depends on (1) whether the Convention deals with the relevant factual situation and (2) whether the legal purpose of the regulation in the otherwise applicable law is broadly the same as that of the rules of the Convention or different. We explain these points in the paragraphs that follow.

*B. The factual situation: the provisions of the Convention*

- 3.7 Adopting the approach summarized in the previous paragraph, questions of validity are normally not governed by the otherwise applicable law if the factual scenario is within the scope the Convention. This both promotes uniformity and gives judges and arbitrators relatively clear guidance.
- 3.8 Similarly, claims for damages arising from mistake or non-fraudulent misrepresentation should normally be governed by the otherwise applicable rules of law only if the factual scenario is

outside the scope the Convention.<sup>29</sup> This is discussed in more detail in the Comments to Rule 8.

- 3.9 Thus, as will be explained in detail below, where the factual situation is covered by the Convention, a party should not be able to rely on the otherwise applicable rules of law either to avoid the contract or, under Rule 8, to claim damages for mistake or non-fraudulent misrepresentation.

### *C. Case law*

- 3.10 Case law is moving towards acceptance of the “factual situation” approach. Different courts have taken different views, and certainly some have held that issues of mistake, for example, are subject to the otherwise applicable law.<sup>30</sup> In the United States it has been said in a number of cases that the Convention does not displace domestic rules of tort law, including liability in damages for negligent misstatement.<sup>31</sup> However, other cases in the US have accepted that to some extent the Convention may pre-empt recourse to the domestic law;<sup>32</sup> and the US District Court of the Northern District of Illinois has held that a buyer’s claims for misrepresentation (which were based on allegations that the seller had misrepresented, *inter alia*, the way in which it made and tested goods of the type offered, and its experience in doing so) were pre-empted by the Convention as they were supported by the same allegations as the buyer’s claims for breach of contract.
- 3.11 On the issue of whether a buyer who was mistaken over the quality or fitness for purpose of the goods can rely on mistake as an alternative to a claim for non-conformity, some domestic laws would deny relief for mistake in any event, but as will be seen below, even in jurisdictions which as a matter of domestic law would allow the buyer to choose between remedies for non-conformity and rescission for mistake, some courts have held that if the contract is governed by the Convention, the domestic rules are pre-empted.

### *D. The factual situation: the terms of contract*

- 3.12 It should be noted that if a contract is subject to the Convention, the Convention will apply to terms that have been agreed between the parties, even if those terms deal with matters on which the Convention itself is silent. This is explicitly recognized in Articles 45 and 61. Article 45 gives the buyer the standard remedies under the Convention if the seller fails to perform “any of his obligations under the contract or this Convention”; Article 62 does the equivalent for the seller.

3.13 The Convention also governs terms of the contract that do not impose obligations. If, for example, a sale is made conditional on an event that is outside the control of the parties, such as the success of an application that has been made for Government approval of the type of goods, the resulting “condition” would fall to be interpreted under Article 8, not under the otherwise applicable domestic law. It would be most unfortunate if it were to be held that the various terms of the contract were governed by different laws.

*E. The legal purpose of the rules or remedies of the otherwise applicable law*

3.14 However, even when the factual scenario is expressly provided for in the Convention or the contract, the otherwise applicable law should not be excluded if the rules of that law, or the remedies it makes available, have a different purpose to the rules or remedies of the Convention.<sup>35</sup> So recourse to the otherwise applicable law will not be prevented when, for example, the Convention is concerned to give a remedy to a contracting party while the regulation of the otherwise applicable law is primarily concerned with preserving competition.<sup>36</sup> Similarly, if the remedy provided for by the Convention aims at corrective justice (for example, damages calculated in accordance with Article 74) but, on the facts of the case, the remedy under the otherwise applicable law is aimed at deterrence (for example, if the domestic law would award punitive damages because the breach was deliberate), the legal purposes of the two differ and the buyer may resort to the otherwise applicable law in order to claim punitive damages.

3.15 In other words, deciding whether a question of validity is within the counter-exception “expressly provided for by the Convention” requires a two-stage analysis. First, a situation is to be treated as within the scope of the Convention not only when the legal question is covered expressly (as for example with form requirements, see Article 11) but also when the provisions of Convention or the terms of the contract are apt to cover the factual situation (the “factual” criterion). Secondly, however, recourse to the otherwise applicable law should be pre-empted only if the purposes of the Convention rules and of the domestic rules are broadly the same (the “legal” criterion).

3.16 The “legal” criterion just described is crucial for the distinction drawn in this Opinion between cases of mistake or non-fraudulent misrepresentation on the one hand and cases of fraud on the other. The purpose of the (non-CISG) rules and remedies of the laws that would otherwise apply to cases of mistake or non-fraudulent misrepresentation appear to be have the same legal purpose as the rules of the CISG, namely to achieve corrective justice; whereas, as



will be explained in the Comments to Rule 9, the rules on fraud do not.

3.17 The result of Rule 3 is that

- a. cases of mistake and non-fraudulent misrepresentation, including the availability of any remedies, are usually governed exclusively by the Convention;
- b. in all cases of fraud the innocent party may rely on the rules on fraud of the otherwise applicable law, even if the party also has a remedy under the Convention (see further rules 9 and 10).

3.18 This Opinion deals first with mistake or non-fraudulent misrepresentation and the other doctrines that do not depend on dishonesty (Rules 4-8); and then it deals with fraud (Rules 9 and 10).

#### RULE 4

**4. Therefore, for example, otherwise applicable rules of law are excluded:**

- a. If either party was induced to enter into the contract by a mistake or non-fraudulent misrepresentation as to any of the matters covered by Articles 35, 41 and 42;**
- b. If either party was induced to enter into the contract by a mistake or non-fraudulent misrepresentation as to the value of the goods;**
- c. If either party was induced to enter into the contract by a mistake or non-fraudulent misrepresentation as to a matter covered by Articles 71-73;**
- d. in cases of initial impossibility; or**
- e. if the parties have entered into the contract under a shared mistake as to any matter covered by the Convention.**

#### *A. Introduction*

4.1 This and the following sections of the Comments aim to explain why a party will not be able to rely on the otherwise applicable law

in many situations which that law would analyze as cases of mistake or non-fraudulent misrepresentation as to the facts, because the fact situation is covered by the Convention and the Convention and the rules of the otherwise applicable law have the same general legal purpose. As the relevant part of the otherwise applicable law will normally be the law that governs domestic sales, in what follows we will normally refer simply to “the domestic law”.

- 4.2 The section begins by distinguishing between different fact situations that may be described as raising issues of mistake.

*B. Types of mistakes*

- 4.3 Doctrines of mistake encompass a wide range of fact situations. A fundamental question for both some legal systems and the application of the Convention is whether the mistake relates to the terms of the contract (referred to in German law as “mistake in declaration”; an alternative label is “mistake in expression”) or is about the facts, for example a mistake as to the substance, quality or usefulness of the goods being sold. Within each category there are further permutations. Was the mistake on party A’s part caused by the other party (B), either intentionally or unintentionally (where B gave information that B believed to be correct but that in fact was incorrect), or was A’s mistake “self-induced”? Did B make the same mistake? Did B know that A was mistaken? And so on. Under domestic law, the questions of which doctrine might apply and whether A will be eligible for relief will often depend on the precise factual situation.
- 4.4 Rule 4 deals with mistakes and non-fraudulent misrepresentations about the facts. Mistakes in declaration are dealt with by Rule 7. In what follows, we will consider various factual situations in turn, beginning with the type of case that has given rise to the largest number of cases and the most intense discussion, viz. where the buyer has entered a contract under a mistake about the substance, quality or usefulness of the goods being sold, though there was no fraud on the part of the seller.

**Rule 4 example (a): Mistake or non-fraudulent misrepresentation as to any of the matters covered by Articles 35, 41 and 42**

**Rule 4 example (a): otherwise applicable rules of law are excluded if either party was induced to enter into the contract by a mistake or non-fraudulent misrepresentation as to any of the matters covered by Articles 35, 41 and 42.**

## A. Mistakes by the buyer and non-fraudulent misrepresentations by the seller

### (i) *MISTAKES OR MISREPRESENTATIONS*

- 4.5 Where the buyer has entered a contract under a mistake about the substance, quality or usefulness of the goods being sold, the problems that would arise were the buyer allowed to resort to domestic remedies are well known. Many domestic laws that are essentially civilian in origin provide relief to a party who has entered a contract under a mistake (or “error”) as to the substance of the subject matter of the contract.

**Example 1:** the buyer believed the goods sold were almost new, when in fact they were old and, though reconditioned, did not have features present in more recent models.<sup>37</sup>

Often the notion of mistake as to substance is extended to the usefulness of the subject-matter to the mistaken party, provided that the mistaken party’s purpose was known to and had been accepted by the other party (or, to use the formulation in Article 35(2)(b) of the Convention, it was not unreasonable for the buyer to rely on the seller’s skill and judgment).

**Example 2:** The buyer, a manufacturer of curtains, purchased a quantity of “blackout” (i.e. light-proof) material. As the seller was aware, the buyer intended to color-print the material before making it into curtains and believed it would be suitable, but in fact the material was unsuitable for color-printing.<sup>38</sup>

In some systems the buyer in example 2 would have a remedy for mistake.<sup>39</sup>

- 4.6 In contrast, most<sup>40</sup> common law systems do not give relief when party A was acting under a self-induced mistake, even if it was evident to B that A was mistaken; but if the mistake was caused by B giving A incorrect information (even innocently, i.e. without negligence, let alone fraud), rescission is normally allowed on the ground of misrepresentation. In some jurisdictions rescission may be denied if there was no fraud and the mistake was of little importance; the court should then award damages “in lieu of rescission”.
- 4.7 Thus in Example 1, if the seller had said that the machines were nearly new, in common law systems the buyer would have a remedy for misrepresentation, even if the differences between a reconditioned old machine and a “nearly new” one were not

fundamental. If however the seller had only said that the machines were reconditioned, and the buyer had simply assumed that they were nearly new or had the features found on newer machines, the buyer would not have a remedy for misrepresentation or mistake in most common law systems. Similarly, in example 2, in most common law systems the buyer would not obtain relief on the ground of mistake, but it would have a claim for misrepresentation if the seller's words or positively misleading conduct<sup>42</sup> had led it to enter the contract believing the material could be color-printed.

*(ii) A CHOICE OF REMEDY?*

- 4.8 Where the mistake or misrepresentation relates to the substance, quality or usefulness of goods being sold, the buyer is likely to have a remedy for non-conformity, provided that certain conditions are met. In Example 1, if the seller had described the machines as almost new, the buyer would usually have a remedy for non-performance because the goods would not comply with the contractual description. If the Convention applied, the case would come under Art 35(1). In Example 2, if the Convention applied and the buyer had made known to the seller the particular purpose for which the buyer wanted the goods, and it was not unreasonable for the buyer to rely on the seller's skill and judgment, the buyer would have a remedy under Art 35(2)(b). Most domestic laws will be broadly the same.
- 4.9 Some domestic laws treat the remedy for non-conformity as exhaustive and do not allow the buyer to resort to the rules on mistake, even if on the facts the non-conformity rules do not provide the buyer with the remedy it wants.<sup>43</sup> When one of these systems is the governing law, the Convention forms part of that law and the parties have not opted out of the Convention, it is clear that the buyer will only obtain a remedy for non-conformity in accordance with the provisions of Article 35, etc.
- 4.10 Other systems<sup>44</sup> allow a free choice, so that in domestic law a buyer who wishes to rely on a wider right of rescission, or a more generous limitation period applicable in cases of mistake or misrepresentation, is permitted to do so. Were the same approach to be adopted when the Convention applies to the contract, on the ground that the issue is one of validity governed by the domestic law and not by the Convention, that might result in the buyer being able to rely on mistake or misrepresentation to avoid a contract when the non-conformity was not sufficiently fundamental to justify rescission under Article 25 of the Convention, or to seek avoidance or to claim damages when the buyer had failed to give notice of the problem within the time limit imposed by Article 39(2).<sup>45</sup> Equally, it might be argued that a buyer has a remedy when it was mistaken

about the usefulness of the goods for a particular purpose that it had made known to the seller, but its reliance on the seller was unreasonable.<sup>46</sup> The result would be non-uniformity: buyers in a factual situation that falls within the provisions of Convention would be subject to different rules according to the rules of the domestic law applicable to the contract.

*(iii) COMMENTARY*

- 4.11 Scholars have therefore argued that the rules imposed by Articles 25, 35 and 39 occupy the ground and displace the rules of domestic law on the effects of mistake and non-fraudulent misrepresentation, both as to rescission and damages (where available under domestic law).<sup>47</sup>

*(iv) CASE LAW*

- 4.12 A number of courts have taken the same approach, most notably the Swiss Supreme Court.<sup>48</sup> In the *Electronic Electricity Meters* case,<sup>49</sup> after extensive citation of doctrinal writings,<sup>50</sup> the Court deliberately departed from earlier Federal decisions<sup>51</sup> to hold that a buyer who alleged that the goods delivered were defective, but who had not given notice within the time limit set by Article 39(2), could not fall back on the domestic (Swiss) law to claim relief on the ground of an error as to the quality of the goods, even though if the case had been governed by domestic law alone this would have been permitted.<sup>52</sup> The Court held that where the Convention contains a rule that is functionally equivalent to the domestic rule,<sup>53</sup> the validity exception is irrelevant.

“The Convention, with its provisions concerning the contractual condition of the object of sale, which also take into account the level of knowledge of the buyer, contains a provision functionally equivalent to the fundamental error (Art. 24 para. 1 no. 4 CO)...”<sup>54</sup>

It reached this conclusion not on the basis of the *travaux préparatoires*, which it found to be inconclusive,<sup>55</sup> nor on the basis that one rule is superior to the other,<sup>56</sup> but on the desirability of uniform application world-wide.<sup>57</sup>

*(v) CONCLUSIONS*

- 4.13 In the CISG-AC’s opinion, this outcome is the most appropriate. The factual scenario – that the buyer has not received goods of the kind, quality of fitness for purpose that he believed the goods would

have – is clearly covered by express provisions of the Convention. In addition, we can say that both the provisions of the Convention and the domestic laws of mistake or misrepresentation, though they will of course differ in detail, have broadly the same aim: to determine whether the buyer can escape the contract and/ or claim compensation, so as to provide the innocent party with corrective justice. Thus the legal criterion is also satisfied.

- 4.14 The Convention should apply, to the exclusion of domestic law, not only when the issue is whether the goods comply with the default rules on conformity set out in Article 35(2) but also when the issue is over the seller's obligations to deliver goods that are free from claims under Articles 41 (claims in general) and 42 (claims based on industrial property or other intellectual property). The factual scenarios are addressed by the Convention and the purposes of the Convention and of the domestic rules and remedies are broadly the same.

#### **B. Mistakes by the seller and non-fraudulent misrepresentations by the buyer**

- 4.15 Just as a buyer who has entered the contract under a mistake as to some fact that is dealt with in the Convention or the terms of the contract, so the seller may not resort to the domestic law of mistake or non-fraudulent misrepresentation in a factual situation that is similarly covered. The seller cannot, for example, try to avoid liability for failure to deliver goods conforming to Article 35(2) by arguing that it was mistaken about their quality: factual situations covered by Article 35(2) are governed exclusively by that Article, to the exclusion of domestic law.<sup>58</sup> In any event, most domestic laws systems prevent a seller using mistake as a way of escaping liability for failure to comply with the obligations imposed on it by, for example, legislation on sale of goods.<sup>59</sup>
- 4.16 Can a seller resort to domestic law to avoid a contract on the ground of mistake when it was mistaken in not knowing that goods were different in substance from what the seller believed (and so more valuable)?

**Example 3:** after consulting an expert, the sellers sell a painting which, despite a previously long-held belief in the family that the painting is by Poussin, they now believe to be by an unknown artist of little renown, and definitively not by Poussin. The buyer recognizes that the painting may indeed be a Poussin and (without dishonesty<sup>60</sup>) buys it at a low price. Later it is established that the painting is by the famous artist.<sup>61</sup>

On similar facts (*The Affaire Poussin*), the French court ultimately allowed the sellers to have the contract set aside for mistake on the ground that the seller's mistake was one of substance: they believed that the painting could not be by Poussin whereas in fact it might be by that artist. The Convention does not have a provision dealing explicitly with a seller who mistakenly undertakes to deliver something that is of a different and more valuable substance than it believed, which might lead to the conclusion that the seller can resort to domestic law. However (subject to Art 79, which does not apply in this case), the Convention requires the seller to deliver the goods promised and this precludes any resort by the seller to the domestic law of mistake in this factual situation.

### C. Other terms of the contract

- 4.17 The same reasoning applies to any other obligation undertaken in the contract, either expressly or by necessary implication. Article 35(1) states that the seller must deliver goods that are of the quantity, quality and description required by the contract; if the seller fails to do so, the buyer will have the normal remedies for non-conformity – so that if the buyer was mistaken or had been misled (without fraud) as to something that is the subject of one of those requirements, the Convention covers the factual scenario. Article 45 provides that the rights provided in Articles 46-52 and the remedies in damages under Articles 74-77 apply when the seller fails to perform any obligation under the contract. Article 61 has a parallel provision for failure to perform by the buyer.

**Example 4:** the seller of goods has undertaken not to supply similar goods to other buyers in the same territory. The seller has not complied with this obligation, but the breach is minor, having little effect on the buyer, and would not justify avoidance under Article 25. If it turns out that the seller's representative had carelessly (but without fraud) stated that the seller was not supplying other buyers and had no intention of doing so, but (unknown to the representative) the seller was in fact supplying others at the time the contract was made and planned to continue, the buyer should not be able to avoid the contract on the ground of the domestic law of misrepresentation; the remedy under Article 25 should be treated as exhaustive.

- 4.18 Similarly, the seller may not resort to domestic law giving relief for mistake or non-fraudulent misrepresentation when the factual situation is covered by the express terms of the contract, whether the terms impose obligations on the seller (referred to in Article 45) or on the buyer (referred to in Article 61) or are of some other kind such as a condition to the operation of the contract.<sup>62</sup>

**Rule 4 example (b): Mistakes or non-fraudulent misrepresentations as to value**

**Rule 4 example (b): otherwise applicable rules of law are excluded if either party was induced to enter into the contract by a mistake or non-fraudulent misrepresentation as to the value of the goods**

- 4.19 A party may agree to buy goods for much more than they are worth, or agree to sell them for much less than their true value. In many cases this will be the result of some form of exploitative behavior by the other party, and many legal systems permit the victimized party to set aside the contract. Often there is no question of mistake or misrepresentation: to take a classic case,<sup>63</sup> the captain of a stranded vessel who agrees to pay an extortionate amount to be towed to safety will be only too aware of the facts of his predicament, and relief is given on the ground of *violence par circonstances* or exploitation. Other cases might involve A deliberately taking unfair advantage of a mistake of some kind by B, for example as to the value of the goods that B agrees to sell to A<sup>64</sup> or the risk that B is running.<sup>65</sup> Relief might then be given on the grounds of exploitation or unconscionable behavior. This Opinion does not deal with cases of this kind.
- 4.20 Even in the absence of exploitative or unconscionable behavior by a party, the other party might agree to buy goods believing them to be worth much more than is the case, or agree to sell them for much less than their true value. In most legal systems, this will not lead to invalidity of the contract. In systems which grant relief on the ground of mistake, mistakes merely as to value generally do not give rise to relief<sup>66</sup> (unless the mistake was induced by fraud, on which see Rule 9 below); in systems that give relief for non-fraudulent misrepresentation, a statement that goods are worth a certain amount will normally be treated as a mere statement of opinion, which does not amount to a misrepresentation.



- 4.21 In a few systems, however, relief is given for lesion in a broad range of contracts, at least where the party seeking relief was excusably unaware of the disparity and did not intend to make a gift.
- 4.22 Where there has been no exploitative behavior by a party, and the other party has simply made a mistake as to the value of the goods, the factual situation is covered by the Convention. The Convention does not provide for this problem explicitly but as a matter of its general principle (see Art 7(2)) the goods must be delivered and paid for at the agreed price. The “mistaken” party may not resort to domestic law.<sup>68</sup>

**Rule 4 example (c): Mistakes as to creditworthiness or ability to perform**

**Rule 4 example (c): otherwise applicable rules of law are excluded if either party was induced to enter into the contract by a mistake or non-fraudulent misrepresentation as to a matter covered by Articles 71-73.**

- 4.23 A party might seek a remedy under domestic law on the ground that it entered the contract under the belief (self-induced or as the result of a non-fraudulent misrepresentation by the other party) that at the time the contract was made, the other party was creditworthy or was in a position to perform the contract. No business will enter a contract when it is already aware that the other party cannot or will not perform; so, for example, in almost every case in which party A turns out to have been insolvent when the contract was made, party B will be able to argue that it was mistaken about A’s creditworthiness. Subsequent changes in A’s position will not give rise to remedies for mistake or misrepresentation in any event
- 4.24 This factual situation is expressly covered by Articles 71-73 of the Convention, dealing with anticipatory breach and breach of instalment contracts. Therefore neither a mistake nor a non-fraudulent misrepresentation as to a party’s ability or willingness to perform as the result of insolvency or other factors will give rise to a right to avoid the contract under domestic law. When A’s inability to perform “becomes apparent”, B will have only the remedies set out in Articles 71-73.<sup>69</sup>

**Rule 4 example (d): Initial impossibility**

**Rule 4 example (d): otherwise applicable rules of law are excluded in cases of initial impossibility**

- 4.25 Under some domestic laws, where the parties have entered a contract under certain kinds of fundamental mistake, the contract may be void for impossibility: for example, if a seller agrees to supply specific goods which, unknown to either party, have ceased to exist at the time the contract is made. In some legal systems the contract may be treated as voidable by either party on the ground of mistake; but in others the contract is said to be void for impossibility, at least where the seller was not at fault.<sup>70</sup> The same reasoning may apply when the contract is impossible to perform because the goods, though not specific, were to come from a particular bulk that has ceased to exist, or were to be procured directly from a sole source that is not in fact available.<sup>71</sup> Some systems apply the same rule when the goods do not belong to the seller.<sup>72</sup> These cases also might fall within the “validity exception” unless the Convention provides for the situations. As explained in the next two paragraphs, the CISG-AC’s opinion is that in all these cases the Convention contains express provisions covering the factual situation and therefore applies to the exclusion of domestic law.
- 4.26 Where the goods no longer exist at the time the contract was made, several articles of the Convention are relevant. Article 68, which deals with goods sold in transit, deals specifically with the case where the goods have been lost or damaged at the time the contract was made, and provides that if the seller knew or ought to have known of the loss or damage but did not disclose this to the buyer, the seller will bear the risk.<sup>73</sup> Whether the seller will be excused from liability for non-delivery will depend on whether the seller can bring itself within Art 79 (which seems unlikely). More generally, Article 30 imposes an obligation to deliver the goods. Where the goods were specific and do not exist, or have ceased to exist, whether before or after the contract was concluded, the seller will be unable to fulfil its obligation. Again the seller’s liability is governed by Article 79. If the seller could not have known that the goods did not exist, and the reason for their non-existence was beyond the seller’s control, then the seller may be excused. So the Convention provides for the case of goods that do not exist, or have ceased to exist, when the contract was made.
- 4.27 The case where the seller does not own the goods is also covered by the Convention. Article 41 is explicit that the seller has a contractual obligation to deliver goods that are free from any right or claim of a third party, unless the buyer has agreed to take the goods subject to the third party’s right or claim. This has the result that the Convention displaces any rule of domestic law to the effect that the contract is void.<sup>74</sup>

#### **Rule 4 example (e): Other shared mistakes**

**Rule 4 example (e): otherwise applicable rules of law are excluded if the parties have entered into the contract under a shared mistake as to any matter covered by the Convention**

- 4.28 The parties may have entered the contract under a shared mistake which is not about the possibility of performing the contract (see example (d) above) but which is about something else affecting the contract. At least if the mistake was to something fundamental to the contract, some domestic laws will allow either party to avoid the contract;<sup>75</sup> others may even treat the contract as void.<sup>76</sup> Yet another approach is to apply a doctrine of change of circumstances, even though there has not been a change of circumstances since the contract was made: if in the true situation the contract has turned out to be seriously unbalanced so that to enforce it would cause hardship to one of the parties, the court may adjust or terminate the contract.<sup>77</sup>
- 4.29 This situation is also covered by the Convention: Article 79 applies.<sup>78</sup> Therefore neither party may rely on the domestic law to seek a remedy.

**RULE 5**

- 5. Conversely, if the mistake or non-fraudulent misrepresentation was as to a matter that is not governed by the Convention, the otherwise applicable rules of law are not excluded.**
- 5.1 The displacement approach adopted in this Opinion does not, however, preclude all reference to the domestic law of mistake or non-fraudulent misrepresentation. The domestic law may apply if the factual situation is not governed by the Convention (see Rule 2) nor covered by the terms of the contract (see para 3.1 above). This is likely to be very rare, because in most cases even if the situation is not provided for by the Convention, it will be dealt with by the terms of the contract itself. But it is possible to think of examples.

**Example 5:** The contract is to sell a used machine. The seller is aware that it is vital to the buyer that there is a competent maintenance and repair company in the buyer's country, and they both believe this to be the case. There is no mention of this matter in the contract. In fact, unknown to either party, the only company in the buyer's country capable of maintaining and repairing the machine had gone out of business just before the contract was signed. The buyer may be able to invoke the domestic law on mistake or non-

fraudulent misrepresentation,<sup>79</sup> as this factual scenario is not covered by the contract or the Convention.

**Example 6:** A buyer is unwilling to pay the price of \$125,000 demanded by the seller, until the seller gives the buyer a document produced by the buyer's Government, which states that the Government will pay a subsidy of \$25,000 to companies in the buyer's country that import the type of goods in question. The seller honestly believes this to be the case but it should have known that the subsidy scheme has recently been withdrawn without warning. The buyer agrees to pay the price demanded by the seller, believing that it will be reimbursed \$25,000 by its Government. There is no reference to a subsidy in the contract documents. The buyer may be able to invoke the domestic law on mistake or misrepresentation, as again this factual scenario is not covered by the contract or the Convention.

As in these examples the matters are not governed by the Convention, the buyer's only remedy in these cases, if there is one, will be under the otherwise applicable rules of law.

## RULE 6

- 6. Otherwise applicable rules of law imposing a duty of disclosure (in the absence of fraud) do not apply to a CISG contract if they relate to a matter governed by the Convention.**
- 6.1 Several legal systems now recognize that a party – typically a party who has professional knowledge, or information that the other party cannot reasonably be expected to have or discover – may have a duty (or obligation) to disclose it, even though no fraud is involved.<sup>80</sup> Failure to do so may lead to liability in damages but may also give the uninformed party the right to avoid the contract.<sup>81</sup> This means that it may be regarded as a question of validity.
- 6.2 When a seller failed to disclose some crucial fact about the quality, fitness for purpose, etc, of the goods, provided that the seller was not acting fraudulently,<sup>82</sup> the Convention will apply, so as to exclude remedies under domestic law. In effect the seller's duties of disclosure are set out in the Convention. To avoid liability under Article 35(2), the seller will have to inform the buyer of any problem of quality or general fitness of which the buyer did not know and could reasonably have been unaware; and the seller will also have to reveal anything that renders the goods unfit for the buyer's particular purpose, so far as the buyer has made the purpose known and it was not unreasonable for the buyer to rely on the seller to ensure that the goods were fit for the buyer's purpose.

- 11.1 Conversely, the Convention will not affect a duty under domestic law to disclose a matter on which neither the Convention nor the contract contains any provision. So if in examples 5 and 6 the seller knew the true facts and had a duty of disclosure under domestic law, the buyer would be able to rely on it because the matters are not ones governed by the Convention. This might be the case even if the non-disclosure related directly to the goods:

**Example 7:** S sells a vehicle to B. B wants the vehicle for use rather than for immediate resale, but the parties do not discuss the purpose of B's purchase. The vehicle meets all the requirements of the express terms of the contract and of Article 35(2) of the Convention; but the seller (without being dishonest) did not think to tell the buyer that the model vehicle supplied was about to be replaced by a much improved model, so that the vehicle supplied will be more expensive to operate than a newer one. The vehicle will also have less second-hand value if and when B wants to sell it. If the domestic law imposes a duty on the seller to disclose the information that the model sold is about to be superseded, the buyer may rely on that duty to claim a remedy.

- 6.4 It is also possible that domestic law requires disclosure of information about the goods for a different legal purpose from that of the Convention. For example, it might require the seller to provide information about the flammable nature of the product sold, not in order to protect the buyer but for the buyer to pass to the fire services, in order to protect the public by ensuring that the fire services have the information they need in case of a fire where the product is stored.<sup>85</sup> In this case the "legal criterion" of the two-stage test might not be satisfied, so that if there is a domestic remedy for breach of the duty to disclose, it could be invoked, even though any remedy that might have been available under Art 35 has been lost because of lapse of time or the like.

## RULE 7

7. **When, in the absence of fraud, a party has made a mistake or there was a non-fraudulent misrepresentation as to**
- a. **the content or meaning of a declaration, statement or other conduct, or**
  - b. **the identity of a party,**
- the Convention's rules on interpretation (Article 8) and formation of the contract (Articles 14–24) apply to the**

**exclusion of rules of the otherwise applicable rules of law.**

#### **A. Mistakes in the declaration**

##### *(i) POSSIBLE FACT SITUATIONS*

7.1 We now turn to the cases in which one or both parties have entered the contract under some form of mistake or misunderstanding over the terms of the contract (often described as a “mistake in declaration” or “mistake in expression”), and the parties are now in dispute as to which terms apply or, perhaps, whether there is any contract at all. There are a number of possible factual situations.

- I.** The parties both meant their contract to require *x* but they used words that normally mean something else (*y*), or (probably a more common situation) they embodied the agreement in a document that does not record accurately what they had agreed (see (ii) below).
- II.** They agreed on terms that are ambiguous, party A intending one meaning and party B the other (see (iii) below)
- III.** A made a mistake such that what A said or is written in the relevant documents is not what A actually meant (see (iv) below). Here we need to consider three distinct situations, according to B’s position:
  - (a)** B knew that A was making a mistake;
  - (b)** B did not know that A had made a mistake;  
and
  - (c)** though B did not know that A was making a mistake, B reasonably should have been aware that A’s declaration was mistaken.

7.2 In the domestic laws these problems are often said to raise potential questions of validity, though in practice they are frequently resolved without reference to the rules on validity, by applying other doctrines – in particular, rules of formation and principles of interpretation. Thus, in each case, in order to determine whether the

issue is to be decided under the rules of the Convention or is left to domestic law, it is necessary to address the question whether, even if this is an issue of validity, does it fall within the counter-exception for matters “expressly provided” for by the Convention?.

7.3 To answer the question, the “two-stage” approach described earlier should be applied, so that both the “factual” and the “legal” criteria should be satisfied, though the CISG-AC considers that the legal criterion will seldom be relevant in the absence of fraud.

7.4 We will consider the fact situations in turn.

*(ii) BOTH PARTIES MAKE THE SAME MISTAKE*

7.5 As indicated earlier, it can be said that both parties are mistaken over the terms of the contract in at least two possible factual situations. One is where the parties both mean their contract to require *x* but they have used the wrong word to express their intended meaning.

**Example 8:** in their contract of sale the parties (who are not Norwegian speakers) use the Norwegian word *baakjöringsköd* (a kind of sharkmeat) when they actually mean to buy and sell whalemeat. The seller delivered sharkmeat.<sup>84</sup>

In this kind of case it seems that in civil law systems it will normally be held that as a matter of interpretation the contract is on the terms the parties actually intended, with the result that the seller is in breach of the contract; as the German Reichsgericht put it, *falsa demonstratio non nocet*.

7.6 It may be that each of the parties made the mistake spontaneously, or that one told the other (without fraud) that *baakjöringsköd* meant whalemeat. The outcome will be the same: clearly both parties thought they were dealing in whalemeat. It is believed that common law systems will reach the same result, at least when the contract is oral or not embodied in a document.

7.7 There may be a complication, however, when the parties’ agreement has been embodied in a document that does not record their intentions accurately.

**Example 9:** The parties agree on a price of 10,000.00 Canadian dollars but they sign the contract document without noticing that it states the price as US\$10,000.00.

In the civil law systems the solution seems to be the same as when the contract is oral, but in the common law systems, which give primacy to the written contract, rather than simply holding that the contract is actually for whalemeat or for Can\$10,000.00, the solution is to grant “rectification” of the document. This raises two

problems. The first is that the remedy is “equitable” and therefore rectification can be refused if the party claiming it has delayed so long that to grant rectification now would prejudice the other party unfairly, or possibly if the claimant has behaved badly in other respects. If rectification is refused on such grounds, the parties will remain bound by the terms set out in the writing. The second problem is that rectification is commonly discussed under the general heading of “mistake”, which is thought of as a ground for invalidity.<sup>86</sup> However, in this type of case it seems that the contract is not invalidated, and in functional terms the doctrine of rectification seems to serve the same purpose as the rules of interpretation in the civil law systems.

- 7.8 Therefore the case where both parties make the same mistake over the terms does not raise an issue of validity within the (autonomous) meaning of Article 4.
- 7.9 In any event, these factual situations are expressly provided for in the Convention.<sup>87</sup> Article 8 provides:

(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

Where parties intend  $x$  though they have said or written  $y$ , each will be aware of the other’s actual intention, so the contract is to be interpreted as requiring  $x$  not  $y$ .

*(iii) THE AGREEMENT IS AMBIGUOUS*

- 7.10 The next case to consider is where the parties’ ostensible agreement is ambiguous.

**Example 10:** The seller is based in the US, the buyer in Canada. They agree on a price of \$10,000.00 for the goods. It later transpires that the seller meant US \$, the buyer Canadian \$. Neither was aware of the other’s actual intention at the time the contract was made.

In this type of case, the first question will generally be one of interpretation: taking into account the factors mentioned in Art 8(3), was one party’s interpretation more reasonable than the other? If the buyer had ordered the goods from the seller’s website, or if negotiations had taken place based on the seller’s sales literature and price list for domestic sales, the buyer should reasonably have understood the prices as being in US\$. But if negotiations were by transnational phone calls, it may not be clear which party’s



understanding was the more reasonable one. If each party's interpretation were as reasonable as the other's, the supposed agreement might simply be held to be insufficient to amount to a binding contract: it would be too uncertain to be enforced.<sup>88</sup> Again, on the face of it, no issue of validity arises; and if even it does, the factual situation falls within Article 14(1) of the Convention, which requires a proposal to be "sufficiently definite". So again the Convention applies, to the exclusion of domestic law.

- 7.11 Where one party's interpretation (the seller's interpretation, say) is held to be the more reasonable one, and therefore the contract is on those terms, that does not necessarily end the issue. The situation is now that, unknown to the seller, the buyer did not intend to agree to what has been held to be the meaning of the contract. We consider this below.

*(iv) ONE PARTY MAKES A MISTAKE IN DECLARATION*

(aa) A has made a mistake in declaration; B knows

- 7.12 This situation encompasses a number of possible scenarios. A may have made a mistake in its offer, for example by a "a slip of the pen" or its modern equivalent, or by using the wrong words to express its intended meaning.

**Example 11:** The buyer is concerned that the parties to whom it intends to resell the goods may discover the price the buyer is paying. So rather than accept the seller's quoted price for goods, the buyer offers a higher price but in return asks for a "consulting fee" from the seller that was intended to off-set the price increase in full. Because of a typing error, the consulting fee is much less than the increase in price. The seller was aware of this mistake.<sup>89</sup>

- 7.13 In most laws the seller will not be allowed to hold the buyer to the low consultancy fee stated in the contract. This result may be reached as a matter of good faith; of fault in the contracting process;<sup>90</sup> on the grounds that the seller cannot accept an offer that it knows the buyer did not intend<sup>91</sup> or that the contractual document must be rectified to match what the seller knew the buyer meant;<sup>92</sup> in systems which in principle require subjective agreement between the parties, on the ground that the parties had not reached an agreement;<sup>93</sup> or on the ground of mistake.<sup>94</sup>

(bb) A has made a mistake in declarations; B does not know and had no reason to know that A has made a mistake

7.14 We treat this case separately from (aa) because in this case the various laws reach different solutions. In civil law systems, it might be held that the lack of subjective agreement again prevents a contract from coming into existence;<sup>95</sup> or that A can avoid the contract on the ground of mistake,<sup>96</sup> though if A avoids the contract, A may be liable to compensate B for its reliance loss.<sup>97</sup> In contrast, in many common law systems A will not be given relief: B can enforce the contract in the terms to which A reasonably appeared to be agreeing.<sup>98</sup>

(cc) A has made a mistake in declarations; B does not know but should have known that A has made a mistake

7.15 In the civil law systems the outcome seems to be the same as in (bb), but within the common law systems there seems to be divergence. Some laws apply a rule of equity that A may be able to avoid the contract, at least if there has been sharp practice or unconscionable conduct;<sup>99</sup> some seem to reach a similar conclusion as a matter of common law;<sup>100</sup> In others again, A seems to be denied any relief.<sup>101</sup>

*(v) DISCUSSION*

7.16 In the various cases of mistake in declaration set out in paragraph 7.1 above, if the otherwise applicable rules of law give any relief is given to the mistaken party, it is most frequently given on the ground of mistake, with the result that the contract is either void or voidable. Therefore the situations fall within the meaning of “validity” in Article 4 of the Convention.

7.17 However, the parties may not resort to domestic law because the fact situations are covered by Article 8, paragraphs (1) and (2) of the Convention. These paragraphs provide:

“(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances”.

In other words, Article 8 has the effect that A is bound by a contract that means what a reasonable person of the same kind as B would have understood in the same circumstances, unless B knew or could not have been unaware of A's actual intention.<sup>102</sup>

- 7.18 Although on its face Article 8 refers only to the interpretation of the contract, implicitly it covers all three situations described above. There are two reasons for this.
- 7.19 First, in a large proportion of the cases in which A tries to argue for a meaning that is different to what B understood the contract to mean, either A or B will have been “mistaken” as to the meaning of the words used at the time that the contract was entered into.<sup>103</sup> Thus when the Convention provided that the contract must be interpreted according to one or other meaning, it must have been intended that the parties would be bound by that meaning even though one or other party had a “mistaken” understanding of the words used. In other words, applying the “two-stage” test, the factual criterion is met. As the purpose of the provision is to regulate when the contract is binding and what terms, the legal criterion is met also.
- 7.20 The second reason is that interpretation of Article 8 must take into account Article 7(1). This requires interpretation of the Convention to have regard to the need to promote uniformity. Were Article 8 to be interpreted as dealing only with interpretation and not covering the issue of mistake, domestic laws would apply and, as we have seen, there would be very different solutions according to which law applied. The greatest differences between the domestic laws are in the case in which A's statement did not express what A intended but B was unaware of A's mistake, but the domestic laws' solutions in the other cases also vary from jurisdiction to jurisdiction. If Article 8 is interpreted as covering all three factual situations, a uniform solution will apply.
- 7.21 It should be noted, however, that Article 8(1) does not mean that the contract will be on the terms that A intended merely because B might have realized, or indeed should have known, that A has made a mistake in its declaration. The contract is to be interpreted according to A's intent only if B “knew or could not have been unaware what that intent was”. That formulation should be contrasted with the words “knew or ought to have known”, which are used in a number of other articles of the Convention.<sup>104</sup> A party “could not have been unaware” if they willfully shut their eyes to the obvious or willfully and recklessly failed to make such inquiries as an honest and reasonable person would make; or possibly if, though not acting willfully, they failed to appreciate something very obvious.<sup>105</sup> But a mere lack of care on B's part will not prevent B from relying on what a reasonable person in B's circumstances

would understand A's words or the words written in the contract to mean, if that is how B understood them.

### **B. Mistakes as to identity of a party**

- 7.22 A somewhat similar problem arises in the (probably rare) case in which one party argues that it should be able to avoid the contract because it was mistaken as to the identity of the other party.
- 7.23 In many cases of mistaken identity, party A's "mistake" as to who he was dealing with will have been induced by fraud: B pretended to be X, with whom A was willing to contract, when A would not knowingly have contracted with B. As is explained later, in cases of fraud the victim may resort to domestic law remedies, so A will be able to avoid any contract with B on that ground.
- 7.24 In some systems a mistake of identity that was not induced by fraud may be a ground for relief in the same way as other mistakes as to the substance of what was being contracted for; in other words it is a question of validity.<sup>106</sup> In other systems, especially the common law, relief is narrower: if there was no fraud, or if the remedy for fraud has been lost, there will be relief only if A's mistake prevented the formation of a binding contract.<sup>107</sup> A mistake of identity will have this effect only if the offeree knew or must have realized that the offer was only open to acceptance by the person the offeror believed they were dealing with (or that the acceptance was an acceptance of only an offer from the person the offeree thought they were dealing with).<sup>108</sup>
- 7.25 In common law doctrine cases of mistaken identity are normally discussed under the rubric of "mistake", so it can be said that relief for mistake of identity is seen as raising a validity question in the broad sense, but the applicable rules turn out to be a restatement of the common law's rules on formation and interpretation.<sup>109</sup>
- 7.26 Thus it seems correct to treat cases of mistaken identity as a question of validity. The question remains whether mistake of identity when there is no remedy on the grounds of fraud is a factual situation addressed by the Convention.
- 7.27 In the CISG-AC's opinion, Article 8 provides for this situation also. A party may rely on an offer or acceptance that a reasonable person in the same situation would understand to be addressed to him, unless he knew or could not be unaware that the offer or acceptance was addressed only to some other person with whom the other party thought that they were dealing. Therefore the mistaken party may not rely on the otherwise applicable law.

## **RULE 8**

8. **The otherwise applicable rules of law include any right to avoid, rescind or otherwise invalidate the contract or to treat it as void, and any right to claim damages.**
- 8.1 This Opinion has explained that where a party has entered a contract as the result of a mistake or non-fraudulent misrepresentation,<sup>110</sup> or a non-disclosure that was not fraudulent,<sup>111</sup> which raises an issue of validity under the otherwise applicable rules of law, the party may not rely on the otherwise applicable rules of law unless the mistake, misrepresentation or non-disclosure relates to a matter that is not governed by the Convention.<sup>112</sup> This means that, in the absence of fraud,<sup>113</sup> in most cases the party may not rely on the otherwise applicable rules of law to avoid the contract or treat it as void.
- 8.2 As indicated earlier,<sup>114</sup> the CISG-AC takes the view that the same approach must apply to claims for damages under the otherwise applicable law on the basis of facts that give rise to an issue of validity, for example damages for *culpa in contrahendo* or negligent misrepresentation.<sup>115</sup> Even if the otherwise applicable law classifies such claims as non-contractual (e.g. as tortious or statutory liability for negligent misrepresentation), the claim will fall within the Convention unless the facts involve a matter that is not governed by the Convention. To say that a party that has suffered a loss as the result of a negligent misrepresentation by the other party may claim damages under the otherwise applicable law simply because that law treats the claim as non-contractual would lead to different results according to how the domestic laws categorizes the damages claim. If the damages claim arises from a mistake, non-fraudulent misrepresentation or non-disclosure, impossibility, etc, the Convention will apply exclusively.
- 8.3 It is true that the LUV drew a distinction between validity as a ground for avoidance and claims for damages, and treated them differently. Article 9 of the LUV excluded avoidance under the domestic law:

“The buyer shall not be entitled to avoid the contract on the ground of mistake if the circumstances on which he relies afford him a remedy based on the nonconformity of the goods with the contract or on the existence of rights of third parties in the goods”.

Article 14 of the LUV, in contrast, stated:

“(3) Where a party avoids a contract for mistake, fraud or threat, he may claim damages according to the applicable law”.<sup>116</sup>

The CISG-AC is unable to adopt the LUV's approach to claims for damages because it would produce results that are unacceptable for two reasons. Take the example of a buyer who agrees to buy goods in the mistaken belief that the goods have a certain quality which they do not in fact possess, so that under Article 35(2) the goods do not conform to the contract. The buyer's mistake was caused by the seller carelessly giving incorrect information to the buyer. We have seen that under the Convention the buyer's right to avoid the contract under the otherwise applicable law is pre-empted by the Convention, just as it would be under Article 9 of the LUV. In other words, the buyer will have the right to avoid the contract only if Article 25, for instance, is satisfied. Alternatively or in addition, the buyer will have a claim for damages for non-conformity, subject again to the rules of the Convention, for instance the two-year "cut-off" period in Article 39(2). As explained earlier, these outcomes are in line with the majority view of the effects of Article 4 of the Convention and are endorsed by this Opinion.

- 8.4 However, if the approach taken by Article 14(3) of the LUV were also to apply to the example just given, the buyer's right to claim damages for *culpa in contrahendo* or negligent misrepresentation would not be pre-empted, so that it would not be subject to the two-year period under Article 39(2) but to whatever rule applies under the otherwise applicable law. This would be unacceptable (1) because it would lead to different results in different jurisdictions and (2) because to require the buyer's claim for damages under the Convention to comply with the Convention's restrictions but to allow the buyer to avoid those restrictions by claiming damages under the otherwise applicable law would be incoherent.
- 8.5 Thus where the factual situation is covered by the Convention, a party should not be able to rely on the otherwise applicable rules of law either to avoid the contract or to claim damages for mistake or non-fraudulent misrepresentation, non-fraudulent non-disclosure or impossibility.<sup>117</sup>

## RULE 9

9. **A party that has been induced to enter into the contract by the other party's fraud may resort to remedies under the otherwise applicable rules of law even if it also has a remedy under the Convention. It may choose the remedy it considers more favorable, or combine remedies that are compatible.**

### A. Fraudulent misrepresentation

- 9.1 It is accepted almost without question by both commentators<sup>118</sup> and courts<sup>119</sup> that a buyer who has been induced to enter the contract by

a fraudulent misstatement about the goods by the seller can rely on domestic law, even though the buyer has a claim under the Convention for non-conformity:<sup>120</sup> there will be “concurrent liability” in the sense that the buyer may choose which set of remedies to pursue.<sup>121</sup> Similarly, where during negotiations a party has made fraudulent statements about its intention to perform the contract, or its capacity to do so, it has been held that the other party may have a remedy under the domestic law as remedies for non-performance.<sup>122</sup>

- 9.2 The CISG-AC shares this view. However, it may be helpful to explain why, when the fraudulent statement was about the quality or fitness for purpose of the goods within Article 35(2), or their quantity, quality or description as required by the contract (Article 35(1)), the situation is not governed exclusively by the Convention, as it is when the seller’s statement was made without fraud. There are a number of possible explanations.
- 9.3 The first rests on the legislative history. Certainly fraud is one of the those topics on which there are cultural and legal differences that would be hard to resolve and that delegates might have wished to reserve for domestic law.<sup>123</sup> However, some uncertainty over the legislative intention remains. Article 8 of the Uniform Law on International Sales (ULIS) provided that:

“The present Law shall govern only the obligations of the seller and the buyer arising from a contract of sale. In particular, the present Law shall not, except as otherwise expressly provided therein, be concerned with the formation of the contract, nor with the effect which the contract may have on the property in the goods sold, nor with the validity of the contract or of any of its provisions (...)”

Article 89 of ULIS provided:

“In case of fraud, damages shall be determined by the rules applicable in respect of contracts of sale not governed by the present Law”.

The two Articles read together suggest that under a contract governed by ULIS the victim of fraud could rely on any right to avoid the contract and any right to damages for fraud under the otherwise applicable rules of law. Article 8 of ULIS is very similar to Article 4 of the 1980 Convention, but Article 89 of ULIS was not adopted as part of the 1980 Convention. It has been said that nonetheless it was intended to apply,<sup>124</sup> but this cannot be proven. The CISG-AC concludes that the *travaux préparatoires* alone do not give a sufficiently clear justification for allowing a party who has

been the victim of fraud to resort to remedies provided by domestic law.

- 9.4 A second possible argument is that the duty of honesty exists independently of agreement.<sup>125</sup> That is quite true, but in many systems the duty to avoid negligent misstatements or *culpa in contrahendo* also exists independently of agreement.<sup>126</sup> In any event, the argument speaks only to damages, not to avoidance.
- 9.5 Rather, the CISG-AC's opinion is that the case of fraudulent statements is to be distinguished from those of mistake and non-fraudulent misrepresentation in two ways.
- 9.6 First, it may be said that the factual situation is different.<sup>127</sup> In cases where the sale has been induced by a fraudulent misrepresentation, the seller has deliberately made a statement which both positively leads the buyer into a mistaken evaluation of the goods and is likely to put the buyer off from investigating further. It is often said that "fraud unravels all". That is because most people feel that deliberate dishonesty moves things onto a different plane, different even from even gross carelessness. This is reflected in the fact that many laws do not allow a party to exclude or limit its liability, or the other party's remedies, for fraud, when that may be permitted in cases of mistake or non-fraudulent misrepresentation.<sup>128</sup> The CISG-AC concludes that the Convention does not regulate this extreme factual situation.
- 9.7 Secondly, the CISG-AC takes the view that the purposes of many domestic rules on fraud are different to those on mistake and non-fraudulent misrepresentation. Applying the two-stage approach set out in Rule 3, the Convention rules displace the domestic rules only if (a) the provisions of Convention are apt to cover the facts (the "factual" criterion) and (b) the purposes of the Convention rules and of the domestic rules are broadly the same (the "legal" criterion). In the case of a fraudulent statement the legal criterion is not met, because the purpose of many of the rules on fraud is different from those of mistake and non-fraudulent misrepresentation.<sup>129</sup>
- 9.8 In many systems, in cases of fraud the rules go beyond the normal principles of corrective justice and aim to deter fraud or to punish the fraudulent party. This is most evident in respect of damages. For example, in many laws the normal rules of foreseeability or remoteness do not apply,<sup>130</sup> and in some systems exemplary or punitive awards can be made. The same may also be said of the rules of avoidance for fraud. In many civilian laws, a mistake that is self-induced or induced by a non-fraudulent misrepresentation will be grounds for avoidance only if it is as to the substance or an essential characteristic of the subject-matter of the contract, as opposed to the buyer's motive or the value of the goods.<sup>131</sup> These restrictions often do not apply in cases of fraud.<sup>132</sup> The common law, which



gives a generous right of avoidance even in cases of non-fraudulent misrepresentation, is even more liberal in case of fraud. There is no statutory power to refuse rescission even for minor misrepresentation that was made fraudulently,<sup>133</sup> and (in English law at least) the fraudulent statement does not have to satisfy the normal “but-for” test of causation: it is enough that the statement had some influence on the mind of the misrepresentee, even though he might have entered the contract anyway.<sup>134</sup> The time-limit for avoidance for fraud is often longer than for mistake or non-fraudulent misrepresentation, if only because time does not start to run until the fraud has been discovered.<sup>135</sup>

- 9.9 Thus applying the “two-stage” approach, a distinction should be drawn between cases of mistakes and non-fraudulent misrepresentations (whether negligent or wholly innocent) over the conformity of the goods and cases of fraudulent misstatement, on either the factual or the legal criterion, or both.
- 9.10 In many cases of fraud, the incorrect information or misleading conduct will relate to the correct description of the goods, their fitness for common purposes or the buyer’s purpose, or to some other factual issue that is covered by either the provisions of the Convention or the express terms of the contract. The fact that the victim of the fraud may resort to remedies provided by domestic law does not deprive them of a remedy under the Convention. The victim may choose which remedy or remedies to pursue. The victim may even combine remedies (for example, by avoiding the contract under Article 49 and claiming damages for fraud) provided that it does not choose remedies that are inconsistent with each other (e.g. avoiding the contract under domestic law and claiming damages for breach of contract under Article 74).

## **B. Fraud by silence**

- 9.11 National systems differ in whether they recognize “fraud by silence”. If A knew that B was mistaken about or did not know some fact, and that B would not enter the contract if it knew the truth, but A says nothing, some systems say that A’s silence amounts to fraud, at least if A had a “duty to inform” B of the relevant fact or keeping silent was contrary to good faith.<sup>136</sup> In the Comments to Rule 10 we explain that in some circumstances a party to a contract governed by the Convention who has been the victim of “fraud by silence” may also resort to remedies provided by domestic law.
- 9.12 Applying the “two-stage” test, the first question is whether the factual situation is covered. We saw earlier that this is parallel to the answer in the case of mistake and non-fraudulent misrepresentation: many situations are governed by the rules of the Convention or by

the express obligations under the contract.<sup>137</sup> For example, the Convention covers the fitness of the goods for the buyer's particular purpose and provides that the goods must be

“fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement.”<sup>138</sup>

So if the conditions in the Article are met but the goods turn out to be unfit for the buyer's purpose, the seller will be liable under the Convention unless it disclosed that the goods will not serve the buyer's purpose, or have some characteristic that would render them suitable.<sup>139</sup>

- 9.13 However, just as there may sometimes be a mistake about a matter that is not governed by the Convention, so in some domestic laws there may be a duty to disclose a matter that is relevant to the contract but is not governed by the Convention or the contract terms. For instance, in example 5 or example 6 above,<sup>140</sup> if the seller had known the truth, knew that the buyer was acting under a mistake and had deliberately not warned the buyer, the buyer's only remedy, if any, would be under the otherwise applicable rules of law, because the matter is not governed by the Convention.<sup>141</sup>
- 9.14 Even if the factual situation is addressed by the Convention, it is necessary to apply the second stage of the test, whether the legal regulation of “fraud by silence” has the same purpose as that of the Convention or is different, as is the case with domestic rules on fraud by positive misrepresentation.
- 9.15 Fraud by positive misrepresentation and fraud by silence might be distinguished on the ground that some legal systems are less ready to grant avoidance for fraud by silence than when there has been a positive false statement. In French law the courts have held that an error induced by *réticence dolosive* need not go to the substance of the thing being sold,<sup>142</sup> but they refused to allow avoidance where the information that was not revealed was merely the value of the items sold,<sup>143</sup> even though an error as to value suffices if it was induced by a fraudulent statement.<sup>144</sup> The first revision of the Code civil in 2016 did not include such a restriction but after a lively debate it was reimposed when the changes to the Cciv were ratified in 2018.<sup>145</sup> This in effect brought the law on *réticence dolosive* on this point into line with the duty to inform.<sup>146</sup> However, this appears to be the only difference in the treatment of the two kinds of fraud; other rules applicable to fraud by silence, such as that the fraud need not go to the substance of the thing contracted for, appear to be the same as those for positive fraud. To that extent they serve a different legal

purpose to those of the Convention, deterrence rather than merely compensation. Therefore domestic law on fraud by silence as to quality, fitness for purpose, etc, or on other matter covered by the Convention or the terms of the contract, is not governed exclusively by the provisions of the Convention; the victim may resort to remedies under the domestic rules of the governing law, if that law provides a remedy for fraudulent non-disclosure as alternative to , or as well as, claiming a remedy under the Convention.

## RULE 10

10. **For the purposes of this Opinion, fraud includes giving incorrect information, whether by words or conduct, when:**
  - a. **the giver knew the information to be incorrect, or was aware that it did not know whether the information was correct or not; and**
  - b. **the giver intended to deceive the other party, or was aware that the other party might be deceived and gave the incorrect information nonetheless.**

### A. An autonomous definition

- 10.1 As explained under Rule 9, a party who has been the victim of fraud by the other party may rely on the exclusion of validity from the Convention to claim a remedy in domestic law. This is because, applying the two-stage test set out in Rule 3 above, the Convention implicitly draws a distinction between cases of fraud on the one hand, and cases of mistake and non-fraudulent misrepresentation on the other.
- 10.2 must be made clear, however, what is meant by fraud in this context. Again, in order to promote uniformity of outcomes in cases in which the Convention applies exclusively, this question cannot be left to domestic law. Some legal systems may, for example, hold that there is fraud only when the person giving the incorrect information either knew that it was incorrect or was reckless as to whether it was correct or not, and hold that carelessness, however serious, does not amount to fraud, while other systems may treat gross carelessness as fraud.<sup>147</sup> Therefore what counts as fraud for this purpose must, so far as possible, be determined autonomously. However, the autonomous definition should reflect the reason why it is to be treated differently from cases of mistake and non-fraudulent misrepresentation - as was explained, this is because the remedies available in domestic law often go beyond compensation of the

victim and seek to deter dishonest behavior. It should also reflect the most widespread understanding of the concept in national laws.

- 10.3 It should be noted that the Opinion is addressing only fraud affecting the formation of the contract. It does not address what is sometimes called “fraud in performance”, e.g. a seller who knowingly supplies goods that are not in conformity with the requirements of the contract.<sup>148</sup>

#### **B. Fraudulent misrepresentations (statements or positive conduct)**

- 10.4 Comparative study suggests that a large majority of national laws take the view that there has been fraud, and may then apply rules aimed at deterrence, when a party (A) has acted dishonestly in giving incorrect information, or in taking positive actions that are misleading, which influenced the other party’s (B’s) decision to enter the contract. It seems that in almost every law, there will be fraud if A knew that the information it was giving was incorrect and Intended to deceive B. Most also adopt the approach that there is also fraud if A deliberately gives information to B that A knows may or may not be true, or if A is aware that the information or conduct may deceive B, but nonetheless gives the information or acts without any warning to B.<sup>149</sup> In other words, it suffices that A was reckless as to the truth of the information or the consequences of A’s actions - or as to both elements.
- 10.5 On the other hand, most systems do not require that A intended to gain a benefit, nor intended to cause a loss to B, at least when B is merely seeking to avoid the contract.<sup>150</sup> It is A’s deception of B that is considered to be dishonest and which is likely to lead to the application of rules and remedies that seem to be aimed at deterrence.
- 10.6 Comparative study also shows that fraudulent conduct can take a variety of forms: not just making a verbal statement that is known to be incorrect but also acting in a way that conveys false information, such as telling a misleading half-truth (e.g. when the seller tells the buyer that a vehicle has recently had a test for roadworthiness, but does not say that the vehicle failed the test); the seller making a statement that was true at the time but which, by the time the contract is concluded, the seller knows to be no longer correct but deliberately not correcting the earlier statement; and the seller actively covering up a defect in the goods that are being offered for sale to the buyer. All these are ways of giving information and fall within the definition above.
- 10.7 Whenever the criteria set out in Rule 10 are satisfied, the victim may rely on the otherwise applicable law as an alternative, or in addition to, any remedies under the Convention.<sup>151</sup> What remedy will be

available under the otherwise applicable rules of law will depend on those rules.

### C. Fraudulent non-disclosure

- 10.8 However, the CISG-AC considers that it is not feasible to give an exhaustive definition of fraud. As explained earlier, in most common law systems mere non-disclosure does not amount to fraud; non-disclosure is rarely a ground for avoidance, and certainly not in contracts for the sale of goods.<sup>152</sup> In contrast, many civilian systems now recognize fraud by silence as a ground for avoidance: in other words, A may be able to avoid the contract if B knew that A was entering the contract under a mistaken belief and that A would not do so if it knew the truth, but B deliberately failed to warn A. The CISG-AC does not believe that recourse to the otherwise applicable rules of law should be limited to cases that fall within the narrow common law definition of fraud.
- 10.9 It is very difficult to give a precise definition of when a party should be able to resort to the otherwise applicable rules of law when the only fraud took the form of deliberately remaining silent. The problem is that A's right to avoid on the ground of "fraud by silence" is almost always subject to restrictions of some kind, not just as to the nature of the mistake (e.g. that the mistake must not be merely one of the value of the goods<sup>153</sup>) but that in some circumstances it is seen as legitimate not to disclose some facts even though if A knew of them it would not enter the contract, or not on the same terms. Thus it may be required that B had a duty to disclose the information,<sup>154</sup> or that B's silence was contrary to commercial good faith.<sup>155</sup>
- 10.10 In the international sale of goods, duties of disclosure of this kind will very seldom apply. Take for example the case in which the goods turn out to be unfit for the buyer's purpose. By implication, if the buyer has not made its particular purpose known to the seller, or if for other reasons it would be unreasonable for the buyer to rely on the seller, there is no duty on the seller to disclose information about the fitness of the goods for the buyer's purpose. This is certainly the case under the Convention, and (given that on this point the Convention broadly reflects most national laws) is likely to be the same under domestic law. Similar arguments can be made in respect of the other Articles that impose "objective" criteria for conformity of the goods.
- 10.11 Thus there are likely to be very few relevant cases; and it is almost impossible to predict what their facts might be. In the circumstances, the CISG-AC thinks it best to leave the question of precisely when non-disclosure falls within the autonomous definition of fraud to be developed by the courts. Thus Rule 10

states that fraud *includes* statements and conduct that were dishonest, so that in such cases the victim may rely on the otherwise applicable rules of law, but leaves open the possibility that the same may be permitted in appropriate cases of non-disclosure, if the tribunal decides that in the circumstances the non-disclosure was so dishonest that it should be treated as falling within the autonomous definition of fraud. Again, what remedy if any the victim may have under the otherwise applicable rules of law will vary according to that law.