The problem of cisg's ambiguity: article 2 (e)

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THE PROBLEM OF CISG'S AMBIGUITY: ARTICLE 2(E)

Master's Thesis

Mentor: Associate Professor dr. sc. Tomislav Jakšić

Zagreb, September 2023

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Iva Keblar

Summary

Today's life and trade are highly influenced by globalization and vast on-line possibilities. International trade became the center of economic development for different companies as well as entire countries. In conducting such business crossing national borders is not unusual. Taking on an international character, such transactions are subject not only to national legislation but also to international conventions. One such convention that broadly regulates international contracts is the Vienna Convention on the International Sale of Goods (*hereinafter: the CISG*). This convention resolves issues regarding contract conclusion, rights, and obligations of contracting parties as well as legal remedies. It is important to mention that CISG lists certain contracts whose merits are not covered by it. Some of them are listed in Article 2 (e) of the CISG. Based on that article, the convention does not apply to contracts concerning the sale of ships, vessels, hovercraft, and aircraft. However, it does not offer any parameters for deciding what may fall under said exemption. Consequently, the parameters for the application of the exemption must be determined by interpretation. Given that each court or tribunal is left to its own visions of proper interpretation, there is still no unified opinion on which objects fall under the exemption of the aforementioned article. The problem of uneven interpretation is increasingly coming to the fore with the modernization of various objects that can be used for different forms of transport. Questions such as whether a drone should be classified in the same category as an airplane are becoming increasingly common. If the CISG wants to maintain its relevance, it must find answers to such and associated questions promptly.

Key words: the Vienna Convention on the International Sale of Goods, the CISG, Article 2 (e), international sale of goods, ships, vessels, hovercraft, aircraft, drones, interpretation, sphere of application

Sažetak

Današnji život i trgovina pod velikim su utjecajem globalizacije i golemih online mogućnosti. Međunarodna trgovina postala je središte gospodarskog razvoja različitih tvrtki, ali i cijelih zemalja. U obavljanju takvih poslova prelazak državnih granica nije neuobičajen. Poprimajući međunarodni karakter, takve transakcije podvrgnute su ne samo nacionalnom zakonodavstvu već i međunarodnim konvencijama. Jedna od takvih konvencija koja široko uređuje međunarodne ugovore je Bečka konvencija o međunarodnoj prodaji robe (*nadalje: Bečka konvencija*). Navedena konvencija rješava pitanja vezana uz sklapanje ugovora, prava i obaveza ugovornih strana te pravnih lijekova. Važno je napomenuti da navodi i određene ugovore u čiji meritum ne ulazi. Neki od njih navedeni su u Članku 2 (e) Bečke konvencije. Temeljem tog članka konvencija se ne primjenjuje na ugovore koji se tiču prodaje brodova, plovila, lebdjelica i zrakoplova. Međutim, ne nudi nikakve parametre za određivanje toga što sve može potpadati pod navedeno izuzeće. Slijedom toga, parametri za primjenu izuzeća moraju se utvrditi interpretacijom. S obzirom na to da je svaki sud ili tribunal prepušten svojim vizijama pravilne interpretacije još uvijek ne postoji jedinstveno mišljenje o tome koji sve objekti potpadaju u izuzeće navedenog članka. Problem neujednačenog tumačenja sve više dolazi do izražaja modernizacijom raznih objekata koji se mogu koristiti za različite oblike transporta. Pitanja poput treba li se dron svrstavati u istu kategoriju poput aviona sve su češća. Želi li Bečka konvencija zadržati svoju relevantnost, mora brzo pronaći odgovore na takva i slična pitanja.

Ključne riječi: Bečka konvencija o međunarodnoj prodaji robe, Bečka konvencija, Članak 2(e), međunarodna prodaja robe, brodovi, plovila, lebdjelice, zrakoplovi, dronovi, interpretacija, područje primjene

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1. INTRODUCTION

International trade presents the sale and purchase of goods and/or services by parties in different countries. Its importance is evident in raising living standards, supplying employment, enhancing the world economy as well as the economy of individual countries. Considering that international trade holds such importance, it is of no surprise that there was action taken in regulating that matter. The key treaty being the United Nations Convention on Contracts for the International Sale of Goods (*hereinafter: the CISG*), also referred to as the 'Vienna Convention.' Created to form a uniform convention or model law for international trade, it is frequently used to govern international sales agreements. The CISG is often described as 'one of the greatest achievements of international trade legislation that has been able to unify international sales law.'[1] Its articles provide flexibility both to Contracting States, in deciding whether to take reservations on some articles, and parties to a specific agreement, in deciding their rights and obligations. However, the ambiguity of CISG's articles can also result in complications in its application. One of such articles that provided complications in practice is Article 2 (e) of the CISG. It excludes the application of the CISG to sales of 'ships, vessels, hovercraft and aircraft.' The difficulty arose from the fact that the CISG does not define the meaning of a ship, an aircraft or any vehicle stated in Article 2 (e). More specifically, it arose from modern vehicles which cannot be subsumed under a specific category so easily, for example Unmanned Aerial Systems i.e., drones. This paper will focus on how judicial and arbitral practice as well as scholars and commentators of the CISG deal with the interpretation of Article 2 (e). Namely, what are the requirements for excluding the vehicles stated in the aforementioned Article. First, it will provide a brief introduction to what the CISG is and why the exclusion in Article 2 (e) was even drafted. Next, it will focus on the way courts and arbitrators interpret this Article. And finally, it will provide the requirements stated by numerous scholars as relevant for defining the vehicles in Article 2 (e) and its interpretation.

[1] Gordon Jason, 'Convention on Contracts for the International Sale of Goods (CISG) – Explained', The Business Professor (April 4th, 2023), available at: https://thebusinessprofessor.com/en_US/122296-law-transactions-amp-risk-management-commercial-law-contract-payments-security-interests-amp-bankruptcy/contract-for-the-international-sale-of-goods

2. THE UN CONVENTION FOR THE INTERNATIONAL SALE OF GOODS

The CISG is a result of UNCITRAL's work on uniform sales law. Adopted in 1980, it deals with contract formation and obligations of the parties while also providing remedies in case of non-performance. As of September 24th, 2020, 94 States have adopted the CISG.[2] Because of its wide acceptance, it is the core of international trade law conventions. The drafters of the CISG also secured its application in as many cases as possible. Article 1 of the CISG provides its direct application when the case regards parties whose places of business are in different States. The CISG's application can be considered in one of two cases. The first is if those different states are Contracting States. The second is if the rules of private international law led to the application of the law of a Contracting State. In that case the state where a party has its place of business has not adopted the CISG, but the state whose law is to be applied has. It is important to note that the CISG trumps over national law in the cases where it is applicable. The articles stating its sphere of application require that there is an international element in the form of different places of business. Meaning that purely domestic contracts, i.e., parties whose places of business are within a single state, are not affected by it.

Other than that, parties can always choose to apply the CISG to their contract if they so wish, regardless of whether their places of business are in Contracting States. Party autonomy is especially important since the parties have the ability to exclude the CISG's application. Article 6 of the CISG states that option. Meaning that the CISG's nature is clearly non-mandatory.[3] However, there has been extensive practice made regarding Article 6 of the CISG. Many have questioned how that exclusion should be made in order to be considered sufficient. When parties

[2] Alper Gizem, 'CISG: Table of Contracting states', IICL (May 5th, 2022), available at: https://iicl.law.pace.edu/cisg/page/cisg-table-contracting-states

[3] An express reference to the non-mandatory nature of the CISG can be seen in CLOUT case No. 1401 [Tribunal cantonal de Vaud, Switzerland, November 24th, 2004], available at: https://www.uncitral.org/clout/clout/data/che/clout_case_1401_leg-2681.html ; CLOUT case No 904 [Tribunal cantonal du Jura, Switzerland, November 3rd, 2004], available at: https://www.uncitral.org/clout/clout/data/che/clout_case_904_leg-2649.html ; CLOUT case No. 240 [Oberster Gerichtshof, Austria, October 15th, 1998] (see full text of the decision), available at: https://www.uncitral.org/clout/clout/data/aut/clout_case_240_leg-1463.html ; CLOUT case No. 199 [KantonsgerichtWallis, Switzerland, June 29th, 1994] available at: https://www.uncitral.org/clout/clout/data/che/clout_case_199_leg-1088.html

chose to 'opt-out' of the CISG or its part, such a choice must be clear[4], unequivocal[5], and affirmative[6]. It must also come as the result of an agreement between the parties[7]. Article 6 differentiates between derogation and exclusion. On one hand, the parties can derogate some of CISG's provisions. Multiple courts approved the parties' derogation of CISG's provisions, such as Article 39 (1), (2), Article 55, Article 57 *et cetera*.[8] On the other hand, the parties can exclude the CISG's application in its entirety. Such an exclusion can be made expressly or impliedly. An express exclusion can come either with or without a simultaneous choice of the applicable law. An implicit exclusion is a bit more problematic. The party's intent to exclude the CISG must be clear[9] and real[10]. Such an intent is examined on a case-by-case basis. One of these examples is if the parties include a choice of law clause. Courts have recognized that, if the parties agree on the law of a non-Contracting State, they impliedly excluded the CISG's application.[11] But, if they choose the law of a Contracting State, such a choice must be more precise in order for it to be considered as an implicit exclusion of the CISG.[12] If not, the CISG will apply as part of the substantive law

[4] For example, in CLOUT case No. 1025 [Cour de cassation, France, November 3rd, 2009] available at: https://www.uncitral.org/clout/clout/data/fra/clout_case_1025_leg-2728.html ; CLOUT case No. 904 [Tribunal cantonal du Jura, Switzerland, November 3rd, 2004] available at: https://www.uncitral.org/clout/clout/data/che/clout_case_904_leg-2649.html ; CLOUT case No. 575 [U.S. Court of Appeals (5th Circuit), United States, June 11th, 2003, corrected on July 7th, 2003] (see full text of the decision), available at: https://www.uncitral.org/clout/clout/data/usa/clout_case_575_leg-1394.html ; CLOUT case No. 433 [U.S. District Court, Northern District of California, United States, July 30th, 2001], Federal Supplement (2nd Series) vol. 164, p. 1142 (Asante Technologies v. PMC-Sierra), available at: https://www.uncitral.org/clout/clout/data/usa/clout_case_433_leg-1658.html

[5] For example, Federal Supreme Court of Austria (Oberster Gerichtshof), July 4th, 2007 [2 Ob95/06 v], available at: http://www.cisg.at/OGH%2004.07.2007en.pdf ; Oberlandesgericht Linz, Austria, January 23rd, 2006, available at: https://www.unilex.info/cisg/case/1234

[6] *Ibid.*

[7] For example, CLOUT case No. 828 [Hof 's-Hertogenbosch, the Netherlands, January 2nd, 2007], available at: https://www.uncitral.org/clout/clout/data/nld/clout_case_828_leg-2571.html

[8] UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods (2016 Edition), p. 33 § 6

[9] For example, CLOUT case No. 904 [Tribunal cantonal du Jura, Switzerland, November 3rd, 2004] available at: https://www.uncitral.org/clout/clout/data/che/clout_case_904_leg-2649.html ; CLOUT case No. 575 [U.S. Court of Appeals (5th Circuit), United States, June 11th, 2003, corrected on July 7th, 2003] (see full text of the decision), available at: https://www.uncitral.org/clout/clout/data/usa/clout_case_575_leg-1394.html; CLOUT case No. 605 [Oberster Gerichtshof, Austria, October 22nd, 2001], available at: https://www.uncitral.org/clout/clout/data/aut/clout_case_605_leg-1799.html?lng=en

[10] See CLOUT case No. 904 [Tribunal cantonal du Jura, Switzerland, November 3rd, 2004], available at: https://www.uncitral.org/clout/clout/data/che/clout_case_904_leg-2649.html

[11] For example in CLOUT case No. 483 [Audiencia Provincial de Alicante, Spain, November 16th, 2000] the parties implicitly excluded application of the Convention by providing that their contract should be interpreted in accordance with the law of a Non-contracting State and by submitting their petitions, statements of defense, and counterclaims in accordance with the domestic law of the forum (a Contracting State), available at: https://www.uncitral.org/clout/clout/data/esp/clout_case_483_leg-1708.html

[12] See Oberlandesgericht Linz, Austria, January 23rd, 2006, available at: https://www.unilex.info/cisg/case/1234

of that Contracting State.[13] In a case between a seller from China and a buyer from Germany, the Arbitral Tribunal explicitly held 'the CISG applicable as part of the substantive law of a Contracting State, since the parties had chosen Swiss law as to one governing the contract.'[14]

3. ARTICLE 2 (E)

With that in mind, the CISG is not a never-ending, all-inclusive convention that would apply to all contracts of sale. Article 2 of the CISG provides six types of goods whose sales are not covered by the CISG. Those are, in order:

1. goods bought for personal, family or household use…
2. goods sold by auction
3. goods sold by execution or otherwise by authority of law
4. stocks, shares, investment securities, negotiable instruments, or money
5. ships, vessels, hovercraft, or aircraft
6. electricity.[15]

Generally, the exclusions in Article 2 of the CISG can be grouped into 3 categories:

1. 'those based on the purpose for which the goods were purchased'
2. 'those based on the type of transaction'
3. 'those based on the kinds of goods sold.'[16]

Each of these exclusions, of course, has a reason as to why they exist. However, the focus of this paper will be on the fifth exclusion in Article 2 (e) regarding ships, vessels, hovercraft and aircraft.

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[13] See, for example, CLOUT case No. 1513 [Cour de cassation, France, September 13th, 2011], available at: https://www.uncitral.org/clout/clout/data/fra/clout_case_1513_130911.html ; CLOUT case No. 1057 [Oberster Gerichtshof, Austria, April 2nd, 2009], available at: https://www.uncitral.org/clout/clout/data/aut/clout_case_1057_leg-2696.html ; CLOUT case No. 575 [U.S. Court of Appeals (5th Circuit), United States, June 11th, 2003, corrected on July 7th, 2003] (see full text of the decision), available at: https://www.uncitral.org/clout/clout/data/usa/clout_case_575_leg-1394.html ; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, Russian Federation, April 27th, 2005, available at: https://www.unilex.info/cisg/case/1201

[14] See Arbitral Award No. 9187 (UNILEX) [ICC Court of Arbitration, June 1999], available at: https://www.unilex.info/cisg/case/466

[15] See Article 2 (a)-(f) of the CISG

[16] UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods (2016 Edition), p. 17 § 2

The stated exclusion can only be explained historically.[17] In order to understand it, one must consult the CISG predecessor, the Convention relating to a Uniform Law on the International Sale of Goods (*hereinafter: the ULIS*), adopted in 1964.[18] The ULIS had a similar exclusion in its Article 5 (1) (b) as the CISG. The main reason the exclusion was added is because these vehicles are not considered as 'goods' according to all national laws. Some national laws place ships, vessels and aircraft in the same regime as immovables. Since the CISG (and earlier, the ULIS) does not apply to immovables[19], the logic was that it could also not apply to objects which are in the same regime as immovables. Additionally, in a lot of legal systems some ships, vessels and aircraft are subject to registration requirements. That is also why the ULIS specifically excluded its application to 'registered' vehicles or those that 'will be subject to registration.' While drafting the CISG, a similar reasoning behind the exclusion was kept. This can be corroborated with the Secretariat Commentary on Article 2 of the 1978 New York Draft which preceded the CISG.[20] However, looking at the text of the CISG, two main differences are noticeable in comparison to the ULIS.

First, the CISG also excludes its application to hovercraft. They were excluded upon the insistence of representatives from India.[21] Representatives pointed out that Indian national law treats hovercraft the same way as aircraft or ships. It is apparent that drafters of the CISG also wanted to classify those vehicles the same way, considering that their legal character is doubtful. Everything regarding ships or aircraft can also be applied to hovercraft. Therefore, this paper will not specifically deal with them.

Second, the CISG does not explicitly state the requirement of registration. Mr. Wagner, a German representative at the Vienna Diplomatic Conference, pointed out that the registration requirement

[17] Schlechtriem Peter, 'Internationales UN-Kaufrecht', Mohr Siebeck (2007), fourth edition, p. 26 § 30

[18] UNIDROIT, Convention relating to a uniform law on the international sale of goods, available at: https://www.unidroit.org/instruments/international-sales/ulis-1964/

[19] See Schwenzer/Hachem/Kee, 'Global sales and contract law', Oxford University Press (2012), p. 98 § 7.06; see Mistelis Loukas in Kroll/Mistelis/Perales Viscasillas, 'UN Convention on Contracts for the International sale of Goods (CISG)', C.H. Beck/Hart Publishing (2014), p. 32 § 39

[20] Commentary on the Draft Convention on Contracts for the International Sale of Goods, prepared by the Secretariat (UN Doc. A/CONF.97/5), 'United Nations Conference on Contracts for the International Sale of Goods', Vienna, March 10th – April 11th, 1980, Official Records: Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committees, New York: United Nations (1991), p. 16 § 9

[21] Schlechtriem Peter, 'Uniform sales Law – The UN - Convention for the International Sale of Goods', Manz, Vienna (1986), available at: https://iicl.law.pace.edu/sites/default/files/cisg_files/schlechtriem.html#b%2075, pp. 30-31

is not a sufficient reason for excluding ships, vessels, aircraft, and hovercraft from the CISG.[22] Precisely because registration is no longer explicitly stated in the CISG, Article 2 (e) came across some problems in its application. To avoid conflict with national law, the registration requirement was dropped.[23] But, by doing so, the drafters created a new problem. How should the scope of Article 2(e) now be determined?

The CISG in and of itself does not provide explicit barriers for Article 2 (e). It neither gives the definition of vehicles within said article nor provides an explicit requirement for when they should or should not be excluded from its application. Not to mention that years have passed since the CISG was adopted. The technological development that happened and keeps rapidly evolving made a world vastly different from the one 40 years ago. And with modern problems requiring modern solutions, the CISG must produce creative answers in order not to fall short.

4. INTERPRETING THE CISG

When interpreting any convention, such interpretation must stem from the convention itself. Article 7 (1) of the CISG gives such guidelines on how to interpret the CISG. It states that in the interpretation of the CISG '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.' In that wording, Professor Huber discerns three main guidelines for interpreting the CISG.[24]

First, the CISG has an international character. Its interpretation cannot simply be based on everyday, ordinary meaning of words. It also cannot be based on the meaning given in a certain domestic legal system. Considering that domestic legal systems tend to differ greatly; such interpretation also poses a threat of legal uncertainty. The words and phrases within the CISG must be interpreted autonomously. They should be given a meaning based on the structure and the underlying policies of the CISG. The drafting and negotiating history of the CISG can serve as a

[22] Legislative History, 1980 Vienna Diplomatic Conference, IICL (March 13th, 2021), available at: https://iicl.law.pace.edu/cisg/scholarly-writings/first-meeting , § 63
[23] See Hachem Pascal in Schwenzer/Schroeter, 'Commentary on the UN Convention on the international sale of goods (CISG)', Oxford University press, fifth edition (2022), pp. 70-71 § 28
[24] See Huber/Mullis, 'The CISG a new textbook for students and practitioners', Baker&McKenzie (2007), p. 7 § 1

great starting point. There are also certain bodies, such as the CISG-Advisory Council, whose opinions on matters relating to the CISG can give guidelines for its interpretation.

The next guideline in Professor Huber's opinion, focuses on the need to promote uniformity.[25] The CISG should be interpreted and applied in the same or at least similar way to comparable cases. Courts should consider the interpretations given by foreign case law as well as scholarly writings. This is, of course, hard to achieve since courts can disagree with the foreign interpretation and there is no supranational court to decide, with binding effect, which interpretation is 'correct.'

Finally, when interpreting the CISG, regard is to be had towards good faith in international trade. What exactly the CISG means with this is not entirely clear, as it usually happens with 'good faith.' Given that its meaning is so unclear, good faith, within the CISG, has a limited role. It could help with determining a concrete interpretation of a provision when there are multiple interpretations possible. In that way, it could give a more in depth look into what the CISG means exactly. With that in mind, the good faith guideline cannot be used as a one-stop-shop for jamming whatever comes to mind within the CISG. As stated by Professor Huber, it should not be used as 'a super-tool to override the rules and policies of the Convention whenever one regards the solution to a particular case or problem as inadequate.'[26]

Other than that, interpretations provided for Article 2 (e) and the CISG in general cannot be absurd or lead into absurdity. Unreasonable examples that have no way of becoming an actual problem in practice have no place as the CISG's interpretations. For example, the question of whether an origami paper plane should be an aircraft since it can 'carry' a light pencil should not even be considered as relevant. Such a standard is also set in the Vienna Convention on the Law of Treaties (*hereinafter: the Treaty Convention*). It was adopted and opened for signature in 1969 and entered into force in 1980.[27] The Treaty convention applies to contracts concluded between states. And while its *ratione materiae* is narrower when compared to the CISG, its rules of interpretation can be applied to the CISG. First because since the CISG 'only applies to sales of goods between

[25] *Ibid.*
[26] Huber/Mullis, 'The CISG a new textbook for students and practitioners', Baker&McKenzie (2007), p. 8 § 1
[27] United Nations Treaty Collection, Status of Treaties, chapter XXIII; Law of treaties, available at: https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en#top

merchants'[28], it also governs contracts where a state is a party when said state acts as a merchant, i.e., only *iure gestionis* and not *iure imperii*.[29] And second, they were both drafted as a result of works within the United Nations. It can be assumed that, when considering interpretation of their conventions, the UN would not impose different rules for said conventions.

The Treaty Convention sets the rules for interpretation in Article 31 (1). It states that: 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.' It frames the standard as one based on good faith and within the ordinary meaning of the terms stated in the convention. However, while applying the rule of ordinary meaning, the focus should still be on the object and purpose of a certain convention. Taking inspiration from the Treaty Convention, there are two main rules to consider when interpreting the CISG. One, the interpretation cannot be absurd. And two, the interpretation must be kept within the meaning and purpose of the CISG. It is also important to note that scholars support the idea of restrictive interpretation.[30] For example, in the opinion of Professor Schwenzer, Hachem and Professor Kee the exclusion 'does not exclude all water vehicles from the Convention.'[31] Meaning that it was not the drafters' intention to exclude everything that can float or be used on water.

5. REQUIREMENTS ACCORDING TO JUDICIAL AND ARBITRAL PRACTICE

In accordance with the uniform interpretation of the CISG, in finding the meaning of vehicles in Article 2 (e) one must consult the practice regarding said article. In that sense, practice is still unclear about the specific requirements needed for a vehicle to be a ship or an aircraft. A lot of judges and arbitrators tend to rule on their personal view of a vehicle without providing much

[28] Thomson Reuters Practical law, 'UN Convention on Contracts for the International Sale of Goods (CISG)', available at: https://uk.practicallaw.thomsonreuters.com/6-503-3686?transitionType=Default&contextData=(sc.Default)&firstPage=true#:~:text=The%20CISG%20only%20applies%20to,application%20in%20the%20applicable%20contract

[29] Mankowski Peter, 'International and European Business law by Shuulze/Iehmann, Commercial law, Article by Article commentary', Beck Hart Nomos (2019), p. 17 § 31

[30] For example, Hachem Pascal in Schwenzer/Schroeter, 'Commentary on the UN Convention on the International Sale of Goods (CISG)', Oxford University press, fifth edition (2022) on p. 63 § 8 states, in regard to Article 2(a) of the CISG that: 'as the provision is an exception, and in the interest of legal certainty, it should be interpreted narrowly.' The same analogy can be applied to Article 2 (e) of the CISG, considering that they are both part of the same exclusion.

[31] Schwenzer/Hachem/Kee, 'Global sales and contract law', Oxford University press (2021), p. 102 § 7.21

reasoning behind such a ruling. An example can be made with the IICL case no. 236/1997[32] where the tribunal stated that the CISG cannot apply to the contract as 'the object of the contract between the parties to this dispute is a ship' without providing any substance as to *why* it is a ship. The same can be said for the courts' ruling in the Private leisure boat case[33] and Flat-bottomed boat case[34]. And while it is obvious that a Boeing 747 is an aircraft or that the Titanic was a ship the same cannot be said for large scale drones and boats. In light of this, the focus will be on those few rulings where the court or the tribunal stated a reason as to why they consider a vehicle is a ship or an aircraft.

5.1. Possibility of staying afloat

One of the first cases regarding the interpretation of Article 2 (e) of the CISG is CLOUT case no. 1115 of December 18th, 1998.[35] The ruling tribunal was the Maritime Commission at the Chamber of Commerce and Industry of the Russian Federation. The case regarded the sale of a submarine between a seller from the Russian Federation and a buyer from Canada. The parties subjected the contract to Russian law. After the submarine was decommissioned, it was towed to Canada by sea. The buyer was under the obligation to demolish the submarine by breaking it into iron-scrap but instead made it an afloat exhibit. The seller claims that, by doing so, the buyer breached the contract.

The tribunal first had to determine the applicable law. Considering that the parties formed a choice of law clause, the applicable law was Russian law. Since Russia is a Contracting State of the CISG, the tribunal had to assess whether this is an issue where the CISG trumps over national law. For that it questioned the characteristics of the sold submarine. In that regard the arbitrators held that 'as long as this submarine has the possibility to be afloat, though with assistance of other exterior

[32] See IICL case no. 236/1997 [The International Commercial Arbitration Court at the Russian Federation Chamber of Commerce and Industry, Russian Federation, April 6th, 1998], available at: https://iicl.law.pace.edu/cisg/case/russian-federation-april-6-1998-translation-available

[33] See Private leisure boat case [Court of Appeal Piraeus, Greece, 2008], CISG-online number 3277, available at: https://cisg-online.org/search-for-cases?caseId=9191

[34] See Flat-bottomed boat case [Court of Appeal Arnhem, Netherlands, September 12th, 2006], CISG-online number 1736, available at: https://cisg-online.org/search-for-cases?caseId=7654

[35] See CLOUT case No. 1115 [Maritime Arbitration Commission at the Russian Federation Chamber of Commerce and Industry, Russian Federation, December 18th, 1998], available at: https://www.uncitral.org/clout/clout/data/rus/clout_case_1115_leg-2886.html

appliances, it is to be regarded as a sea vessel.' The tribunal therefore ruled that the CISG is not applicable since the sale of a submarine is excluded pursuant to Article 2 (e) of the CISG.

This ruling was criticized on multiple occasions. Professor Saidov made a valid point by bringing to attention that according to this interpretation, even inoperative sea vessels would be excluded pursuant to Article 2 (e) of the CISG.[36] He also highlighted that the purpose of the transaction cannot be irrelevant for interpretation. According to Saidov, the fact that the submarine was 'not intended to be used as a means of transport' indicates that it does not fall under Article 2 (e)'s exclusion. Hachem also states that 'floating in itself does not qualify a structure as a ship' and that the 'intended use must be continual movement.'[37] The requirement of continual movement in relation to transportation will be examined in more detail later in the paper.

5.2. Intended to be used on the high seas

The Sailing yacht case[38] from April 2nd, 2008, brings the next requirement highlighted by a court. The dispute arose between a buyer from Germany and a seller from the Netherlands. The parties agreed that their contract would be governed by Dutch law. Since the Netherlands are a Contracting State of the CISG, such a choice of law clause did not exclude the application of the CISG. The District Court of Middelburg, therefore, recognized that 'this does not exclude the application of the Vienna Sales Convention.'[39] It gave an opinion in line with the idea that choosing the law of a Contracting State does not imply the exclusion of the CISG, as was elaborated earlier in the paper. The District Court of Middelburg also recognized that the CISG does not explain the meaning of a seagoing vessel. In its interpretation, the Court held that it 'must be assumed that by this it means a vessel intended for use on the high seas.' It uses the criteria of whether a sailing yacht is 'seaworthy.' The Court ruled that the sailing yacht should be regarded as a seaworthy vessel and that the CISG does not apply to the purchase agreement.

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[36] Saidov Djakhongir, 'Cases on CISG Decided in the Russian Federation', IICL (July 22nd, 2004), available at: https://iicl.law.pace.edu/cisg/scholarly-writings/cases-cisg-decided-russian-federation , p. 9, § 3.2

[37] See Hachem Pascal in Schwenzer/Schroeter 'Commentary on the UN Convention on the International Sale of Goods (CISG)', Oxford University press, fifth edition (2022), p. 71 § 29

[38] See Sailing yacht case [District Court Middelburg, Netherlands, April 2nd, 2008], CISG-online number 1737, available at: https://cisg-online.org/search-for-cases?caseId=7655

[39] *Ibid.*

Again, the specific parameters of a 'seaworthy' vessel are not made. If using the simple definitions provided by dictionaries, a seaworthy vessel is one 'in a good enough condition to sail on the sea.'[40] Again, such an interpretation provides too broad of a meaning which would lead to excluding even smaller boats. In a different opinion, the courts' ruling in the Ship case II[41] and Auto-Moto Styl S.R.O. v. Pedro Boat B.V.[42] applied the CISG to the sale of a ship and six motorboats respectfully. The aforementioned courts deemed that the CISG should still apply to the vehicles in question even though they are 'seaworthy.' Meaning that whether a vehicle is in good enough condition to sail on the sea is not a majorly accepted requirement for determining the scope of Article 2 (e) of the CISG.

5.3. Being movable and tangible

The final important case is the Barge case[43] of July 28th, 2010. In that instance, the dispute arose between a seller from the Netherlands and buyers from Belgium. A question that was raised was should a barge 'Fellowship' be considered as movable and tangible property? Such a problem arose since said barge was an inland vessel registered in the Dutch shipping register. The District Court of Rotterdam applied the ordinary linguistic meaning of the term movable and tangible and, therefore, provided two points for the interpretation of Article 2 (e). It stated that an inland vessel meets the standard of being moveable and tangible. Meaning that, regardless of whether vehicles in Article 2 (e) are in a similar regime as immovables, they still remain movable and tangible property. If such vessels were not considered as movable and tangible, the exclusion under Article 2 (e) would be redundant as the CISG does not apply to immovables. The Barge case also provides that fixed stations such as oil rigs cannot be considered as ships or vessels, supporting the requirement of continual movement as well. In the end, the court concluded that the barge should

[40] Cambridge Dictionary, available at: https://dictionary.cambridge.org/dictionary/english/seaworthy ; Merriam-Webster Dictionary, available at: https://www.merriam-webster.com/dictionary/seaworthy ; Collins English Dictionary, available at: https://www.collinsdictionary.com/dictionary/english/seaworthy

[41] See Ship case II [District Court Midden-Nederland, Netherlands, January 8th, 2020], CISG-online number 4775, available at: https://cisg-online.org/search-for-cases?caseId=12689

[42] See Auto-Moto Styl S.R.O. v. Pedro Boat B.V. [Gerechtshof Leeuwarden, Netherlands, August 31st, 2005], available at: https://www.unilex.info/cisg/case/1045

[43] See Barge case [District Court Rotterdam, Netherlands, July 28th, 2010], CISG-online number 2421, available at: https://cisg-online.org/search-for-cases?caseId=8336

be considered as a ship in the sense of the CISG. Therefore, the law that was applied to the case was domestic, Dutch law.

But in explaining its decision, The District Court of Rotterdam provided an important opinion. Namely, it held that the registration requirement is not crucial for determining the scope of Article 2 (e) of the CISG. More specifically, 'the ship does not lose its movable and tangible character by being registered.' In that light it provided a judiciary opinion in line with the opinions of scholars. Professor Mankowski[44], Professor Schwenzer, Hachem, Professor Kee[45] and Professor Ferrari[46] all state that registration is no longer a relevant requirement or state some other requirement that is more preferable over registration. Namely, registration was relevant while the CISG's predecessor, ULIS, was still in action. In its Article 5 (1) (b), ULIS specifically excluded those ships, aircraft, hovercrafts, and vessels which are or will be subject to registration. The CISG purposefully left that out in its wording in Article 2 (e). The reason being, as provided by multiple scholars, the problems with national registration. On the one hand it was difficult to determine which law would govern registration. Would it be the law of the selling country, the buying country, the country where the vehicle would be used or some other law? On the other hand, it also made CISG's application depend on national law. In that sense national law could subject a plethora of vehicles to registration and exclude them from the CISG's application. The registration requirement unavoidably points to defining the CISG's scope according to national law and not according to CISG itself. Such an approach cannot be accepted. That would not only be contrary to autonomous interpretation of the CISG, but it would also lead to legal uncertainty. The same kind of ship could in one instance be subject to registration, and therefore excluded from the CISG and in the other not be subject to registration and therefore not excluded from the CISG.

[44] Mankowski Peter, 'International and European Business law by Shuulze/Iehmann, Commercial law, Article by Article commentary' Beck Hart Nomos (2019), p. 23 § 18

[45] Schwenzer/Hachem/Kee, 'Global sales and contract law', Oxford University Press (2021), pp. 102-103, §§ 7.20-7.21

[46] See Ferrari Franco in Schlechtriem/Schwenzer/Schroeter 'Commentary on the UN Sales Convention (CISG)', seventh edition (2019), pp. 87-89

6. REQUIREMENTS ACCORDING TO COMMENTATORS OF THE CISG

Considering the ambiguity of Article 2 (e) of the CISG, commentators also tried to establish a definitive criterion for vehicles falling under the said Article. A lot of different views were presented, from using transportation as a relevant requirement to falling on criteria such as size or registration.

The registration requirement was already stated as irrelevant. The size criterion on the other hand can only be used as an indicator and not as a requirement on its own. However, even in that sense it could be disregarded. CISG's interpretation should provide legal certainty and not more confusion. Hachem states that 'in light of the provision's history, it is no longer possible to focus on the size of the object, which generally determines the obligation to register, in order to interpret the provision.'[47] In that way, indirectly stating that registration was a requirement, but no longer is. And that size used to be an indication of what is to be registered but can no longer be used in such a way since registration itself is irrelevant. Other authors also state that, since the wording of the CISG does neither foresee a minimal size nor a duty to register, it would be more favorable not to require a minimal size for the exception to apply.[48] Hachem further goes to elaborate that 'interpretation should focus on whether it is principally intended as a means of transport or sporting equipment.' Clearly supporting the criterion of transport as 'any restriction can only be derived from the concept of the ship itself.'[49]

In light of that, the main focus will be on the criterion of transportation which was repeatedly stated as the one relevant for determining the scope of Article 2 (e) by persuasive scholars and commentators. Their opinions, however, differentiate around the specifics regarding said transportation, i.e., whether that transportation is looked at objectively or subjectively.

[47] See Hachem Pascal in Schwenzer/Schroeter 'Commentary on the UN Convention on the International Sale of Goods (CISG)', fifth edition (2022), p. 72 § 31

[48] See Sponheimer Frank in Kroll/Mistelis/Perales Viscasillas, 'UN Convention on Contracts for the International Sale of Goods (CISG)', Beck Hart Nomos (2014), p. 50 § 39

[49] See Hachem Pascal in Schwenzer/Schroeter 'Commentary on the UN Convention on the International Sale of Goods (CISG)', fifth edition (2022), p. 72 § 31

6.1. Objective criteria of transportation

Some highlight that a vehicle must primarily serve the purpose of transport. Professor Huber states that whether a vehicle primarily serves the purpose of transport must be determined according to 'abstract and objective criteria and not according to the use assumed in the contract.'[50] His support of the objective criteria of transport is also visible from the fact that he deems as irrelevant that for which a vehicle is used. Whether it is used for pleasure, sport, or commercial transportation, if it was intended to primarily serve for transport of people or things, regardless of the motive, it is a ship. He also states that the members of the working group when drafting the CISG were well aware that small leisure boats now also fall under exclusion.[51] In that way joining the other authors that deem size as an irrelevant factor. Hachem supports the idea that any restriction can be derived from 'the concept of the ship itself'[52] as well. He also differentiates vehicles according to their intended service - is it principally intended as a means of transport or sporting equipment. The former being excluded, the latter being included in the CISG's application. The comparison of a vehicle being intended to serve for transport *versus* intended to serve as a sporting equipment was highlighted by other authors as well.[53]

Such an interpretation is acceptable considering that the interpretation of the CISG must not only be focused on its purpose and meaning but also done in an autonomous way. Its interpretation cannot depend on the behavior of parties, the same way that it cannot be brought into question by national regulations and definitions. If the motive of the parties or the use which they intended for the vehicle was relevant, the CISG's application could, again, be jeopardized and uncertain. If, for example, a party buys a helicopter longer than 10 meters, capable of transporting 6 people and in general built as a means of transport but decides to use it as a museum exhibit, does that mean that such a helicopter is not an aircraft because in that instance it would not be used for transport? And if so, what if the party does not declare what it will use the helicopter for? Where should one turn for interpretation? Because of these examples, the objective use of a vehicle cannot be fully ignored. However, since party autonomy is one of the most important principles of contract law, it

[50] Huber Peter, 'Munchener Kommentar zum BGB', eighth edition (2019), § 22
[51] *Ibid.*
[52] See Hachem Pascal in Schwenzer/Schroeter 'Commentary on the UN Convention on the International Sale of Goods (CISG)', fifth edition (2022), p. 72 § 31
[53] See for example, Ferrari Franco in Schlechtriem/Schwenzer/Schroeter, 'Commentary on the UN sales convention (CISG)', pp. 87-89; Schlechtriem Peter, 'Commentary on the UN Convention on the International Sale of Goods (CISG)', second edition, pp. 50-52

also cannot be fully disregarded. In what way subjective criteria of transport ties in with objective criteria of transport will be elaborated further on in the paper.

Hachem highlights the same objective criteria of transport for aircraft as well. Only objects destined for air transport should be regarded as aircraft within the meaning of the CISG.[54] He also specifically states that 'drones should not be considered aircraft at all.'[55] Professor Mankowski supports the same idea.[56] The simple name of a vehicle is, however, not relevant for the interpretation of Article 2 (e). Greater meaning should be given to whether an object is destined for air transport. If it were the other way around, one could simply start calling an airplane a 'drone' and in that way avoid the CISG's application.

Therefore, drones destined for air transport should be considered as aircraft in the sense of Article 2 (e). Especially considering that drones are increasing in popularity for their transportation purposes and not just their surveillance purpose. Drone transport was first used by the military for conducting combat and for humanitarian aid.[57] It was not long before that purpose of drones was being translated to the commercial world as well. Companies such as Walmart, UPS and even Domino's are integrating drones as their way of delivering smaller packages.[58] Because of that, cargo drones such as the Black Swan[59], Flying basket[60] and DeltaQuad Pro #CARGO[61] are being developed every day. The existence of these drones further fuels the need to add a more specific interpretation of Article 2 (e) of the CISG in order to adapt it to modern times.

[54] See Hachem Pascal in Schwenzer/Schroeter 'Commentary on the UN Convention on the International Sale of Goods (CISG)', fifth edition (2022), p. 72 ft. 121
[55] *Ibid.*
[56] Mankowski Peter, 'International and European Business law by Shuulze/Iehmann, Commercial law, Article by Article commentary', Beck Hart Nomos (2019), p. 23 § 21
[57] Scott Judy E., Scott Carlton H., 'Drone Delivery Models for Healthcare', Proceedings of the 50th Hawaii International Conference on System Sciences (2017), available at: https://pdfs.semanticscholar.org/622a/d97506e882bf30ba4dab9c0748ce540ecee3.pdf , p. 3298, § 2
[58] Insider Intelligence, 'Why Amazon, UPS and even Domino's is investing in drone delivery services', (January 1st, 2023), available at: https://www.insiderintelligence.com/insights/drone-delivery-services/
[59] Dronamics, 'The black swan', available at: https://www.dronamics.com/theblackswan
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[61] Deltaquad, 'The long range cargo UAV', available at: https://www.deltaquad.com/vtol-drones/cargo/

6.2. Subjective criteria of transportation

As already stated, party autonomy is an important principle when dealing with any question that concerns contract law. That being said, what the party intended to use a vehicle for is important for interpretation in order to restrict the scope of objective criteria of transport. If that were not the case, tribunals and courts could stretch the stated interpretation to cover anything that was primarily made as a means of transport regardless of whether it is actually still capable of such transport. Such extensive interpretation cannot be accepted, regardless of whether it would or would not result in the CISG being applied. Professor Saidov states the importance of the purpose of the transaction in his commentary regarding IICL case no.236/1997 and CLOUT case no.1115.[62] He states that those contracts were, in essence, contracts for the sale of iron-scrap and not for the sale of a ship, vessel or other vehicle that would fall under Article 2 (e). The parties intended to disassemble the objects of the contracts into iron-scrap, not to use them as a means of transport. Professor Saidov states that this should indicate that a vessel 'did not fall within Article 2 (e).' Such a correction is necessary especially considering the reasoning that the tribunal in CLOUT case no. 1115 gave for why it still considered the submarine to be a vessel. In the mentioned case the submarine was towed to the buyer in Canada, barely staying afloat with the assistance of other exterior appliances. Such an object that can barely stay afloat on its own, let alone transport anything, cannot be considered as a vessel in the sense of Article 2 (e) of the CISG. The objective criteria of transport cannot go as far as to consider anything that has the capability of staying afloat as a vessel.

6.3. Problems with the transportation requirement

While the transportation requirement is the best presented one, it still does not provide answers to all questions regarding Article 2 (e). Neither the CISG nor the authors backing said requirement give a definition on what should or should not be considered as transport. Also, there is no minimum threshold provided for how much cargo or passengers should be transported in order to fulfill the role of a ship, vessel, aircraft… In the absence of a better understanding of Article 2 (e), this paper shall try to provide adequate solutions for both of these questions.

[62] Saidov Djakhongir, 'Cases on CISG Decided in the Russian Federation', IICL (July 22nd, 2004), available at: https://iicl.law.pace.edu/cisg/scholarly-writings/cases-cisg-decided-russian-federation , p. 9-10, § 3.2

6.3.1. What is transport?

For starters, how should transportation be defined? As stated, neither the CISG nor the mentioned authors provide a specific definition of transportation. The closest explanation that brings to such a definition is the requirement of 'continual movement.' Namely, Professor Sponheimer uses that phrase as a decisive factor considering that size and registration provide legal uncertainty.[63] The meaning of continual movement can be derived from Professor Sponheimer's wording as something that is not intended for local use at the same place.[64] The requirement of continual movement is mentioned by other authors as well.[65] The meaning behind continual movement must be carefully examined in order not to misinterpret it. Namely, it is hard to imagine that these authors meant to cover vehicles that would move only in a locally restricted area. If that was the case, then a ship that only sails within the borders of a single town would not be considered as a ship in the sense of the CISG. Furthermore, would the classification of said ship suddenly change if it sailed from one town to another? Continual movement is being used to differentiate actual ships, aircraft *et cetera* from constructions such as floating docks, oil rigs or restaurant boats. While the latter might look like ships, they are not capable of continual movement as they are fixed to the ground or nearby shore. They are, therefore, not under the exclusion in Article 2 (e) of the CISG. Scholars that back the requirement of continual movement such as Professor Sponheimer, Hachem, Professor Ferrari and Professor Schlechtriem state that the object must be intended to be moved on water. They additionally highlight that it is irrelevant whether that object is propelled or not.[66] By doing so, they also indirectly criticize the ruling in CLOUT case no. 1115 where simply the 'possibility to stay afloat' was enough to consider something as a submarine. Since the submarine was not capable of moving on water on its own, it could not be a vessel in the sense of Article 2 (e) of the CISG.

However, simple common sense should dictate that the definition of transport entails continual movement. How can a vehicle transport anything if it is not able to move? In lack of better

[63] See Sponheimer Frank in Kroll/Mistellis/Perales Viscasillas, 'UN Convention on Contracts for the International Sale of Goods (CISG)', second edition (2018), pp. 50-51 § 39
[64] *Ibid.*
[65] See Ferrari Franco in Schlechtriem/Schwenzer/Schroeter 'Commentary on the UN Sales Convention (CISG)', seventh edition (2019), pp. 87-89; Schlechtriem Peter, 'Commentary on the UN Convention on the International Sale of Goods (CISG)', second edition, pp. 50-52; See Hachem Pascal in Schwenzer/Schroeter 'Commentary on the UN Convention on the International Sale of Goods (CISG)', fifth edition (2022), p. 71 § 29
[66] Schlechtriem Peter, 'Commentary on the UN Convention on the International Sale of Goods (CISG)', second edition, pp. 50-52

definition, should everyday dictionaries define the meaning of transport? In that case 'transport' can be defined as the 'movement of people or goods from one place to another.'[67] Again, such a definition would not be in line with restrictive interpretation of Article 2 (e) of the CISG. Not every object that moves something from one place to another can automatically be considered a vehicle in the sense of said article. Because of that, such movement of people or goods must be further narrowed down.

6.3.2. How much cargo/passengers must be transported?

The aforementioned definition brings to the second problem with transport. What is the minimum amount of cargo or passengers that must be 'moved' for it to be considered as 'transport.' If there is no bare minimum of 'goods being moved,' then kayaks could be considered as ships since they can move a person from one place to another. While a minimal threshold must exist, the CISG, again, does not provide it. Scholars and practice are also silent regarding that issue. In light of that, other conventions could be used as a persuasive authority for determining the scopes of transport.

One such convention is the Convention on International Interests in Mobile Equipment (*hereinafter: The Cape Town Convention*) and its Protocol on Matters Specific to Aircraft Equipment (*hereinafter: The Aircraft Protocol*). Both were concluded in Cape Town on November 16th, 2001, and as of June 16th, 2016, have sixty-five parties.[68] Additionally, Article 6 (1) of the Cape Town Convention states that 'this Convention and the Protocol shall be read and interpreted together as a single instrument.' Their main focus is on resolving the problem of obtaining certain and opposable rights to high-value aviation assets, namely airframes, aircraft engines and helicopters.[69] The importance of the Cape Town convention can be seen in its Aircraft Protocol. For starters, in its Article I (2) (a) the Aircraft Protocol defines 'aircraft' as 'either airframes with aircraft engines installed thereon or helicopters.' Furthermore, in the same article, it later provides the minimal threshold for something to be considered as an airframe with aircraft engines or a helicopter. That being said, Article I (2) (e) of the Aircraft Protocol states that airframes with

[67] Cambridge Dictionary, available at: https://dictionary.cambridge.org/dictionary/english/transport ; Collins English Dictionary, available at: https://www.collinsdictionary.com/dictionary/english/transport

[68] ICAO Economic Development, 'Cape Town Convention and Protocol', available at: https://www.icao.int/sustainability/Pages/Capetown-Convention.aspx

[69] *Ibid.*

aircraft engines must be able to carry at least eight passengers or 2750 kilograms of cargo. Moreover, Article I (2) (l) of the Aircraft Protocol provides that helicopters must be capable of carrying at least five passengers or 450 kilograms of cargo. Hachem also points to the Cape Town Convention while defining the scope of the CISG.[70] Some authors even go as far as to call the CISG and the Cape Town Convention 'sister treaties.'[71] Meaning that the Cape Town Convention and the Aircraft Protocol can serve as examples of how to define the meaning of an 'aircraft.' Specifically, they can serve for determining the scope of Article 2 (e) of the CISG. However, it should still be kept in mind that there is no explicit connection between the CISG and the Cape Town convention. Because of that, these definitions remain, at best, suggestive. The courts are still free to define the meaning of 'transport' and of vehicles in Article 2 (e) however they consider most fits the meaning of the CISG and the intention of drafters. Whether they will consider the opinions of scholars, other judges and arbitrators or the Cape Town Convention is entirely up to them.

7. CONCLUSION

There have been many debates on the scope of Article 2 (e) of the CISG. Since the CISG came into effect different requirements were brought into light in order to restrict the cited article. From seaworthiness and staying afloat to size and registration. While all of them have some foundation as to why they were considered, the requirement of transportation remains the most secure one for this task. It seems that the best way to restrict Article 2 (e) is to focus on the function of a vehicle both objective and subjective. A vehicle must be made for transport, but it should also be considered what the parties intended to use the vehicle for. The objective and subjective criteria should be looked at as a whole. One must restrict the other and *vice versa*.

That being said, more focus should be given to better defining the meaning of transport since not everything that moves an object from one place to another can be considered a ship. While waiting for a more specific understanding of transport within the CISG itself, other international

[70] See Hachem Pascal in Schwenzer/Schroeter 'Commentary on the UN Convention on the International Sale of Goods (CISG)', Oxford University press, fifth edition (2022), p. 72 ft. 121

[71] Havel Brian F./Mulligan John Q., 'The Cape Town Convention and The Risk of Renationalization: A Comment in Reply to Jeffrey Wool and Andrej Jonovic', Cape Town Convention Journal (2014), p. 87 § 4

conventions can serve as an adequate solution. One such convention is the Cape Town Convention and its Aircraft Protocol which very precisely defines what an aircraft is and what it carries.

Still, the application of the CISG cannot indefinitely remain as uncertain as it is now. Conventions must keep up with modern times and technology, otherwise what was even the point of drafting them? The CISG Advisory Council, judiciary, and arbitrary practice as well as scholarly writings must produce an agreeable and adequate requirement for determining the scope of Article 2 (e) of the CISG and, for the last time, give an answer to what exactly is an aircraft within the CISG.

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