Applicability of the CISG to Asset Deals

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Abstract

The United Nations Convention on Contracts for the International Sale of Goods (CISG) plays a crucial role in facilitating international trade by providing a uniform legal framework for the sale of goods. However, its applicability to asset deals remains a subject of debate. This article examines this issue, focusing on the sphere of the CISG and its approach to defining "goods", as well as the implications of Article 3(2) CISG, which addresses mixed contracts. The analysis considers the classification of aggregated assets, the significance of the preponderant part in such

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transactions and the importance of the parties' intent. The article concludes that the CISG can, under certain conditions, apply to asset deals, particularly where the preponderant part of the assets involved falls within the CISG's sphere.

Keywords: CISG, Asset Deals, Mergers and Acquisitions (M&A), Aggregated Assets, Mixed Contracts, Applicability of the CISG

A. Introduction

The United Nations Convention on Contracts for the International Sale of Goods (CISG) is a treaty that provides a uniform set of substantive rules for contracts for the international sale of goods.[1] It aims to facilitate international trade by reducing legal obstacles and promoting a common understanding of the rights and obligations of sellers and buyers across different legal systems.[2] The CISG has been adopted by 97 Contracting States and has the potential to cover over 80 per cent of the global trade in goods.[3]

The importance of the CISG as a treaty, which has been ratified by many countries, is undeniable. Thus, it is also important to determine when the CISG shall be applicable. The scope and sphere of application of the CISG are regulated between Art. 1 and 6. Pursuant to Art. 1(1) CISG, the CISG applies to "contracts of sale of goods". Also, for the CISG to apply, the parties to the sales contract shall have their places of business in different states and there must be a connection with the law of a Contracting State.[4] The applicability of the CISG is a complex topic, as there are different views on which properties fall under the definition of "goods" within the meaning of "sale of goods".[5] Even as technology develops, new properties come into question whether they are within the sphere of the CISG or not, such as software and other digital goods like music or video files, etc.[6] Asset deals are one of these controversial topics.[7]

There are different ways for a company to catch up with the market conditions, increase its market share, grow, expand, restructure, or consolidate its operations

1 *Kröll/Mistelis/Perales Viscasillas,* in: Kröll/Mistelis/Perales Viscasillas (eds.), Introduction to the CISG, paras. 10-11; *Huber,* in: Westermann (ed.), CISG Vorbemerkung, para. 1.
2 *Kröll/Mistelis/Perales Viscasillas,* in: Kröll/Mistelis/Perales Viscasillas (eds.), Introduction to the CISG, para. 2.
3 *Kröll/Mistelis/Perales Viscasillas,* in: Kröll/Mistelis/Perales Viscasillas (eds.), Introduction to the CISG, para. 1; *Droese*, p. 25; *Saenger*, in: Hau/Poseck (eds.), CISG Präambel, para. 2; *CISG-Online*, CISG Contracting States by Entry into Force, available at: https://cisg-online.org/cisg-contracting-states/chronological-order (8/6/2025).
4 *Atamer*, p. 47; *Kaya*, pp. 28–32.
5 *Mistelis*, in: Kröll/Mistelis/Perales Viscasillas (eds.), Art. 1, paras. 36-40; *Saenger*, in: Ferrari/Kieninger/Mankowski/Otte/Saenger/Schulze/Staudinger (eds.), Art. 1, paras. 6-7; *Huber,* in: Westermann (ed.), CISG Art. 1, paras. 13-18.
6 *Huber,* in: Westermann (ed.), CISG Art. 1, paras. 19-23.
7 *Saenger*, in: Ferrari/Kieninger/Mankowski/Otte/Saenger/Schulze/Staudinger (eds.), Art. 1, para. 6; *Huber,* in: Westermann (ed.), CISG Art. 1, para. 18.

and mergers & acquisitions (M&A) are one of these ways.[8] An asset deal is a way to do an acquisition, where the acquisition of selected/specific assets occurs.[9]

The applicability of the CISG to asset deals is a controversial and complex issue that has not been explicitly addressed by the CISG itself. However, it is an issue that needs to be resolved as there are many CISG Contracting States and the asset deal has a big share in the M&A market on a global scale. According to DLA Piper's Global M&A Intelligence Report 2024, asset deals accounted for less than 10 per cent of European deals in 2023. In the United States of America (USA), however, they accounted for more than 30 per cent of the USA deals surveyed.[10] Even though these numbers might seem low, considering that the global M&A deal value was around $3.5 trillion in 2022 and $3 trillion in 2023, the asset deal market cannot be underestimated.[11]

Asset deals typically involve the transfer of various types of assets, such as tangible and intangible goods, real estate, contracts, claims, liabilities and goodwill.[12] This leads to the question of whether the CISG can govern the sale of such assets, either as a whole or in part and under what conditions. If it is determined that the CISG can govern asset deals, it would imply that the CISG applies to cross-border M&A when the parties to the asset deal have their places of business in different states and there is a connection to the law of a Contracting State.

This article aims to examine the arguments for and against the applicability of the CISG to asset deals. In order to achieve this, the definition of the goods and Art. 3(2) CISG will be examined. This will enable an understanding of the rationale behind the circumstances in which the CISG is applicable, thereby providing a foundation for the question of whether the CISG can be applied to asset deals. Finally, this article will conclude with an analysis of the applicability of the CISG to asset deals, the prerequisites for such an application and the potential consequences thereof. However, this article will not examine the territorial requirements of the CISG, as there are no particularities specific to asset deals in this regard.

B. Goods within the meaning of the CISG

The CISG does not contain a definition of "goods" and therefore, it has to be interpreted autonomously according to Art. 7(1) CISG, also the definition shall not be

8 *Pulaşlı*, p. 71.
9 *Rosengarten/Burmeister/Klein*, p. 53; *Jaletzke*, in: Jaletzke/Henle (eds.), p. 2.
10 *DLA Piper*, Global M&A Intelligence Report, p. 26, available at https://www.dlapiper.com/en-br/news/2024/07/dla-piper-global-ma-intelligence-report-2024 (10/5/2024).
11 *PitchBook*, 2023 Annual Global M&A Report, p. 4, available at https://pitchbook.com/news/reports/2023-annual-global-ma-report (10/09/2024).
12 *Meyer-Sparenberg*, in: Meyer-Sparenberg/Jäckle (eds.), § 41, para. 34; *Jaques*, in: Ettinger/Jaques (eds.) D. Phase 3:Verhandlung Und Abschluss Des Kaufvertrags I. Kaufgegenstand, para. 9; *Weber*, in: Hölters (ed.), Kapitel 9, paras. 9.91-9.109; *Rosengarten/Burmeister/Klein*, pp. 53–54.

determined by the *lex rei sitae*.[13] According to the case law and the literature, goods within the sphere of the CISG are usually new or used, existing, manufactured or created, regardless of form, inanimate or alive, tangible or even maybe intangible (discussed below) goods that are movable at the time of delivery.[14] Live animals,[15] petroleum and petroleum products,[16] gas,[17] organic and inorganic chemicals,[18] medicinal and pharmaceutical products (such as vaccines),[19] and prefabricated buildings[20] are examples of "goods" within the sphere of the CISG. The status of an immovable is dependent on whether the goods are attached to land at the time of delivery and are intended to remain so, for example land or an apartment is not considered to be "goods" under the CISG.[21] The sale of rights is considered to fall outside the sphere of the CISG, e.g. copyrights or licenses.[22]

13 *Mistelis*, in: Kröll/Mistelis/Perales Viscasillas (eds.), Art. 1, para. 36; *Tarman*, p. 36; *Zeytin*, p. 48; *Ferrari*, in: Schwenzer/Schroeter (eds.), Art. 1, para. 34; *Huber,* in: Westermann (ed.), CISG Art. 1, para. 13; *Mankowski*, in: Grunewald (ed.), Art. 1, para. 24; *Wagner*, in: Ball (ed.), CISG Art. 1, para. 9.

14 OLG Köln 26.8.1994 – 19 U 282/93, NJW-RR 1995, 245, CISG-Online 132; OLG Köln 21.5.1996 – 22 U 4/96, BeckRS 1996, 122644, CISG-Online 254; *Freiburg*, p. 41; *Piltz*, NJW 2005/30, p. 2127; *Schlechtriem*, Victoria University of Wellington Law Review 2005/4, p. 786; *Mistelis*, in: Kröll/Mistelis/Perales Viscasillas (eds.), Art. 1, para. 37; *Tarman*, p. 37; *Zeytin*, p. 48; *Saenger*, in: Ferrari/Kieninger/Mankowski/Otte/Saenger/Schulze/Staudinger (eds.), Art. 1, para. 6; *Ferrari*, in: Schwenzer/Schroeter (eds.), Art. 1, para. 34; *Huber,* in: Westermann (ed.), CISG Art. 1, para. 13; *Durak*, pp. 20–21; *Mankowski*, in: Grunewald (ed.), Art. 1, para. 24; *Lookofsky*, p. 19; *Droese,* p. 142; *Wagner*, in: Ball (ed.), CISG Art. 1, para. 9.

15 LG Flensburg 19.1.2001 – 4 O 369/99, BeckRS 2001, 17005, CISG-Online 619; *Mistelis*, in: Kröll/Mistelis/Perales Viscasillas (eds.), Art. 1, para. 37; *Zeytin*, p. 48; *Saenger*, in: Ferrari/Kieninger/Mankowski/Otte/Saenger/Schulze/Staudinger (eds.), Art. 1, para. 6; *Ferrari*, in: Schwenzer/Schroeter (eds.), Art. 1, para. 34; *Huber,* in: Westermann (ed.), CISG Art. 1, para. 13; *Mankowski*, in: Grunewald (ed.), Art. 1, para. 25.

16 Arbitration Court of Latvian Chamber of Commerce and Industry 7.7.2011 – 2011/144, CISG-Online 2647; *ThyssenKrupp Metallurgical Prods. GmbH v. Energy Coal, S.p.A.* Supreme Court of the State of New York 14.10.2015 – 653938/14, CISG-Online 2793.

17 Oberster Gerichtshof (Austrian Supreme Court) 6.2.1996 – 10 Ob 518/95, CISG-Online 224; *Mistelis*, in: Kröll/Mistelis/Perales Viscasillas (eds.), Art. 1, para. 37; *Saenger*, in: Ferrari/Kieninger/Mankowski/Otte/Saenger/Schulze/Staudinger (eds.), Art. 1, para. 6; *Mankowski*, in: Grunewald (ed.), Art. 1, para. 26.

18 LG Kleve 11.6.2014 – 2 O 119/13, BeckRS 2014, 12748, CISG-Online 2544; OLG Köln 21.8.1997 – 18 U 121/97, CISG-Online 290.

19 Netherlands Commercial Court (Court of Appeal) 19.1.2024, – 200.334.272, CISG-Online 6753; *Janssen/Wahnschaffe*, EuZW 2021/20, p. 878; *von Bary*, ZIP 2021/37, p. 1903.

20 Obergericht des Kantons Aargau (Court of Appeal Canton Aargau) 3.3.2009 – ZOR.2008.16 / eb, CISG-Online 2013.

21 *Mistelis*, in: Kröll/Mistelis/Perales Viscasillas (eds.), Art. 1, para. 39; *Zeytin*, p. 48; *Saenger*, in: Ferrari/Kieninger/Mankowski/Otte/Saenger/Schulze/Staudinger (eds.), Art. 1, para. 6; *Magnus*, in: Kaiser (ed.), CISG Art. 1, para. 53; *Ferrari*, in: Schwenzer/Schroeter (eds.), Art. 1, para. 35; *Droese,* p. 142.

22 *Mistelis*, in: Kröll/Mistelis/Perales Viscasillas (eds.), Art. 1, para. 39; *Saenger*, in: Ferrari/Kieninger/Mankowski/Otte/Saenger/Schulze/Staudinger (eds.), Art. 1, para. 6; *Magnus*, in: Kaiser (ed.), CISG Art. 1, para. 56; *Ferrari*, in: Schwenzer/Schroeter (eds.), Art. 1, para. 36; *Huber,* in: Westermann (ed.), CISG Art. 1, para. 16; *Brunner/Meier/Stacher*, in: Brunner/Gottlieb (eds.), Art. 2, para. 2; *Wagner*, in: Ball (ed.), CISG Art. 1, para. 10; *Zeytin*, p. 50.

There are discussions regarding the intangibles such as know-how or software about whether they can be considered "goods". According to the broadly interpreted view, "goods" can be all kinds of things that are movable, definable and transferable, regardless of whether they are tangible or not.[23] Because the CISG does not limit its sphere to tangible goods and Art. 2(f) CISG expressly excludes electricity, it can be concluded that there is no categorical exclusion of all intangible goods.[24] Moreover, according to the preamble to the CISG, the CISG should be kept open to future developments which can only be achieved by a broad interpretation.[25] A second view is that for an intangible to fall within the sphere of the CISG, it must be embodied in writing or in an electronic form on a physical storage medium such as a disk, USB, or a CD.[26] A third view is of the opinion that intangibles fall outside the sphere of the CISG as they lack the ability to be physically delivered in accordance with the provisions of the CISG.[27] A final view is that an interpretation should be made for each specific case and subject matter.[28]

There are many discussions in the literature about some specific intangible objects. For example, in the case of know-how, the prevailing opinion is that it can be subject to the CISG if it is embodied,[29] whereas there is the opinion that it can be considered a good even without being embodied.[30]

The prevailing view is that, under certain conditions, aggregated assets (*Sachgesamtheiten*) may also fall within the sphere of the CISG.[31] If it also includes other properties that are outside the sphere of the CISG, the applicability should be determined according to Art. 3(2) CISG and if the preponderant part is goods within the sphere of the CISG, then the CISG would be applicable.[32] However, according to a minority opinion, Art. 3(2) CISG only serves to distinguish the contract of sale from other types of contracts and the type of object of sale is irrelevant for Art. 3 CISG and therefore the CISG cannot be applied regardless of whether the preponderant part is goods within the sphere of the CISG or not.[33]

23 *Zeytin*, p. 50; *Schmitt*, Computer und Recht 2001/3, p. 151.
24 *Lookofsky*, p. 23; *Droese,* p. 144; *Schmitt*, Computer und Recht 2001/3, p. 151.
25 *Schmitt*, Computer und Recht 2001/3, p. 151.
26 *Mankowski*, in: Grunewald (ed.), Art. 1, para. 26.
27 *Mistelis*, in: Kröll/Mistelis/Perales Viscasillas (eds.), Art. 1, para. 38.
28 *Wagner*, in: Ball (ed.), CISG Art. 1, para. 10.
29 *Saenger*, in: Ferrari/Kieninger/Mankowski/Otte/Saenger/Schulze/Staudinger (eds.), Art. 1, para. 7; *Ferrari*, in: Schwenzer/Schroeter (eds.), Art. 1, para. 38; *Brunner/Meier/Stacher*, in: Brunner/Gottlieb (eds.), Art. 2, para. 3; *Wagner*, in: Ball (ed.), CISG Art. 1, para. 10; *Droese,* p. 147.
30 *Huber,* in: Westermann (ed.), CISG Art. 1 para. 23.
31 *Saenger*, in: Ferrari/Kieninger/Mankowski/Otte/Saenger/Schulze/Staudinger (eds.), Art. 1, para. 6; *Magnus*, in: Kaiser (ed.), CISG Art. 1, para. 51; *Ferrari*, in: Schwenzer/Schroeter (eds.), Art. 1, para. 34; *Huber,* in: Westermann (ed.), CISG Art. 1, para. 17; *Brunner/Meier/Stacher*, in: Brunner/Gottlieb (eds.), Art. 2, para. 2; *Achilles*, in: Achilles (ed.), Art. 1, para. 4.
32 *Magnus*, in: Kaiser (ed.), CISG Art. 1, para. 51; *Huber,* in: Westermann (ed.), CISG Art. 1, para. 17.
33 *Piltz*, p. 55.

C. Contracts for Services, Art. 3(2) CISG

Pursuant to Art. 3(2) CISG, the CISG "does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services". As a result of this provision, mixed contracts in which the sale element is the preponderant part will fall within the sphere of the CISG.[34]

A discussion exists for Art. 3(2) CISG as to what constitutes a preponderant part. One approach is to compare the economic value of the sale element and the other non-sale part of the contract.[35] Accordingly, the interest and will of the parties should only be considered if it is impossible or inappropriate to apply the comparison of the economic value.[36] Most of the scholars are of the opinion to follow a second approach which takes into account not just the economic value, but also the interest and will of the parties and argues that if the sale part is more important for the parties, then the CISG should apply even though the economic value of the sales part is not preponderant.[37] It is also disputed when a preponderant part exists with regard to economic comparison. The majority view argues that the value of the sales element should exceed 50 per cent and the minority view argues that the value must be significantly greater than 50 per cent.[38] However, as there is no certain percentage, it is hard to determine when there is a significant exceedance when the minority view is followed.[39] The German Federal Court has held that the interest and will of the parties are of essential importance and that if the non-sale part is the main focus from the point of view of the buyer, as recognizable by the supplier, it is not necessary that the economic value of the non-sale part reaches the value of the sale part.[40] The German Federal Court also stated that a "preponderance" is always to be assumed if the value of the non-sale part (significantly) exceeds the value of the sale

34 *Saenger*, in: Ferrari/Kieninger/Mankowski/Otte/Saenger/Schulze/Staudinger (eds.), Art. 3, para. 6; *Magnus*, in: Kaiser (ed.), CISG Art. 3, para. 21.

35 CISG-AC Opinion No 4, *Perales Viscasillas*, Contracts for the Sale of Goods to Be Manufactured or Produced and Mixed Contracts (Article 3 CISG), para. 3.3; *Brunner/Feit*, in: Brunner/Gottlieb (eds.), Art. 3, para. 8; *Zeytin*, p. 56; *Siehr*, in: Honsell (ed.), Art. 3, para. 7.

36 CISG-AC Opinion No 4, *Perales Viscasillas*, Contracts for the Sale of Goods to Be Manufactured or Produced and Mixed Contracts (Article 3 CISG), para. 3.3; *Brunner/Feit*, in: Brunner/Gottlieb (eds.), Art. 3, para. 8.

37 *Mistelis/Raymond*, in: Kröll/Mistelis/Perales Viscasillas (eds.), Art. 3, para. 20; *Saenger*, in: Ferrari/Kieninger/Mankowski/Otte/Saenger/Schulze/Staudinger (eds.), Art. 3, para. 6; *Magnus*, in: Kaiser (ed.), CISG Art. 3, para. 21; *Atamer*, p. 40; *Ferrari*, in: Schwenzer/Schroeter (eds.), Art. 3, para. 14; *Huber,* in: Westermann (ed.), CISG Art. 3, para. 14; *Mankowski*, in: Grunewald (ed.), Art. 3, para. 13; *Wagner*, in: Ball (ed.), CISG Art. 3, para. 10; *Tarman*, p. 53; *Czerwenka*, pp. 144–145.

38 *Magnus*, in: Kaiser (ed.), CISG Art. 3, para. 22; *Ferrari*, in: Schwenzer/Schroeter (eds.), Art. 3, para. 14; *Huber,* in: Westermann (ed.), CISG Art. 3, para. 14; *Brunner/Feit*, in: Brunner/Gottlieb (eds.), Art. 3, para. 8.

39 *Magnus*, in: Kaiser (ed.), CISG Art. 3, para. 22.

40 BGH, VII ZR 101/14, para. 44.

part.[41] It remains unclear whether this renders the assessment of the parties' will and interest unnecessary.[42]

The consequence is that the CISG applies to the contract in its entirety, even to the non-sale parts.[43] If the CISG does not involve provisions for some specific questions regarding the non-sale parts, then such questions should be settled in conformity with the general principles of the CISG and in the absence of such the national provisions shall apply pursuant to Art. 7(2) CISG.[44] If, however, two separate contracts are involved instead of one uniform contract, the CISG applies to the sales contract and national law applies to the non-sales contract.[45]

D. Sphere of Application of the CISG and Asset Deals

I. Asset Deal

In order to assess the applicability of the CISG to asset deals, it is first necessary to define asset deals.

A company may be acquired in one of two ways: an asset deal or a share deal.[46]

In a share deal, the shares themselves constitute the object of the sale and it is the acquisition of shares in a corporate vehicle.[47] Should a sufficient number of shares be purchased to enable control of the company, then it may be asserted that an acquisition (*Unternehmenskauf*) has occurred.[48] Pursuant to Art. 2(d) CISG, shares are excluded from the sphere of the CISG. Consequently, the CISG cannot be applied to share deals, as the purchase of shares is explicitly excluded.[49] Some authors argue that the CISG cannot be applied to share deals on the grounds that it constitutes a sale of rights.[50] While this conclusion is correct, the primary reason for the exclusion of share deals from the sphere of the CISG is the explicit exclusion of sales of shares under Art. 2(d) CISG. As a share deal is a sale of shares, there is no

41 BGH, VII ZR 101/14, para. 44.
42 *Huber*, in: Westermann (ed.), CISG Art. 3, para. 14.
43 *Saenger*, in: Ferrari/Kieninger/Mankowski/Otte/Saenger/Schulze/Staudinger (eds.), Art. 3, para. 7; *Magnus*, in: Kaiser (ed.), CISG Art. 3, para. 29; *Ferrari*, in: Schwenzer/Schroeter (eds.), Art. 3, para. 16.
44 *Saenger*, in: Ferrari/Kieninger/Mankowski/Otte/Saenger/Schulze/Staudinger (eds.), Art. 3, para. 7; *Ferrari*, in: Schwenzer/Schroeter (eds.), Art. 3, para. 14.
45 *Saenger*, in: Ferrari/Kieninger/Mankowski/Otte/Saenger/Schulze/Staudinger (eds.), Art. 3, para. 7; *Brunner/Feit*, in: Brunner/Gottlieb (eds.), Art. 3, para. 9.
46 *Beisel*, in: Beisel/Klumpp/Schindler (eds.), § 4 Der Kaufgegenstand Beim Unternehmenskauf, para. 5; *Kästle/Oberbracht*, p. 3; *Heckschen*, in: Reul/Heckschen/Wienberg (eds.), § 4, para. 1351; *Frey/Fichtner*, in: Prinz/Kahle (eds.), § 27, para. 8; *Rosengarten/Burmeister/Klein*, p. 53.
47 *Beisel*, in: Beisel/Klumpp/Schindler (eds.), § 4, para. 5; *Kästle/Oberbracht*, p. 3; *Frey/Fichtner*, in: Prinz/Kahle (eds.), § 27, para. 10; *Picot*, in: Römermann (ed.), § 21, para. 84.
48 *Eigler*, in: van Kann (ed.), p. 90; *Pasli*, p. 202; *Esin*, pp. 163–164.
49 *Schwenzer/Hachem*, in: Schwenzer (ed.), Art. 1, para. 21; *Honnold/Flechtner*, para. 56.5; *Brunner/Meier/Stacher*, in: Brunner/Gottlieb (eds.), Art. 2, para. 12 fn. 95.
50 *Magnus*, in: Kaiser (ed.), CISG Art. 1, para. 51; *Huber,* in: Westermann (ed.), CISG Art. 1, para. 18; *Wagner*, in: Ball (ed.), CISG Art. 1, para. 16.

need to classify it as a sale of rights and then exclude it from the CISG. The legal basis for this exclusion is important as it may play a role in the application of the CISG to asset deals.

An asset deal is the acquisition of selected and specific assets.[51] In order for an asset deal to be considered an acquisition (*Unternehmenskauf*), it is necessary for all or at least the essential elements of the company's assets to be purchased; otherwise, the sale of only a few non-essential elements does not constitute an acquisition, but rather a sale of some assets.[52]

An asset deal is more complicated than a share deal because the parties have to identify each object.[53] In asset deals, the assets subject to transfer shall be specified all individually in the asset purchase agreement and they are transferred on an individual basis.[54] Although the share deals are the more common way of an acquisition,[55] asset deals also play a role in the M&A market as evidenced by the findings of the DLA Piper Report referenced above.[56]

A reason to pursue an acquisition by way of an asset deal is that the parties can freely choose which assets and liabilities the buyer wants to acquire, which allows the buyer to acquire only a part of the company, avoiding the acquisition of certain liabilities and risks while avoiding the necessity for any restructuring measures such as carve-outs.[57] The buyer has the opportunity to purchase only those assets that align with his/her specific interests, whereas, in the case of an acquisition by way of a share deal, all assets and liabilities of the company are economically assumed.[58]

In the case of an acquisition by way of an asset deal, the object of the sale contract is regarded not to be single items sold to another party, but rather an aggregated asset, a collective group of items (*Sachgesamtheit*) consisting of all tangible and intangible elements of the business attributable to the company.[59] These include, for instance, movable assets, intellectual property, know-how, goodwill,

51 *Rosengarten/Burmeister/Klein*, p. 53; *Jaletzke*, in: Jaletzke/Henle (eds.), p. 2.
52 *Frey/Fichtner*, in: Prinz/Kahle (eds.), § 27, para. 9.
53 *Rosengarten/Burmeister/Klein*, p. 62; *Beisel*, in: Beisel/Klumpp/Schindler (eds.), § 4, para. 33.
54 *Rosengarten/Burmeister/Klein*, p. 53; *Kästle/Oberbracht*, p. 3; *Beisel*, in: Beisel/Klumpp/Schindler (eds.), § 4, para. 33; *Jaletzke*, in: Jaletzke/Henle (eds.), p. 2. There are also different jurisdictions, where a transfer on an individual basis might not be necessary, see *Merkt/von Teichman*, para. 377; or see Turkish Commercial Code Section 11(3).
55 *Jaletzke*, in: Jaletzke/Henle (eds.), p. 1; *Pasli*, p. 199; see *DLA Piper*, Global M&A Intelligence Report, p. 26, available at https://www.dlapiper.com/en-br/news/2024/07/dla-piper-global-ma-intelligence-report-2024 (10/5/2024).
56 See *DLA Piper*, Global M&A Intelligence Report, available at https://www.dlapiper.com/en-br/news/2024/07/dla-piper-global-ma-intelligence-report-2024 (10/5/2024).
57 *Meyer-Sparenberg*, in: Meyer-Sparenberg/Jäckle (eds.), § 41, para. 32; *Rosengarten/Burmeister/Klein*, p. 62.
58 *Rosengarten/Burmeister/Klein*, p. 62; *Kästle/Oberbracht*, p. 4.
59 *Jaques*, in: Ettinger/Jaques (eds.) D. Phase 3:Verhandlung Und Abschluss Des Kaufvertrags I. Kaufgegenstand, para. 9; *Frey/Fichtner*, in: Prinz/Kahle (eds.), § 27, para. 9; *Picot*, in: Römermann (ed.), § 21, para. 85; *Korch*, JuS 2018/6, p. 522; *Schmitz*, RNotZ 2006/12, p. 562; *Beisel*, in: Beisel/Klumpp/Schindler (eds.), § 4, para. 5.

brands, logos, immovables, contracts such as rental agreements, license agreements, or liabilities such as warranty obligations or liabilities from contracts.[60]

II. Applicability of the CISG to Asset Deals

The applicability of the CISG to asset deals is a disputed topic with regard to the substantive sphere of application of the CISG. It is evident that in cases where the parties conclude separate contracts for individual assets (which is typically not the case), the CISG would be applicable to the contracts encompassing goods within the sphere of the CISG.[61] However, there is no explicit provision for the case where there is only one single contract.[62]

The prevailing view among scholars is that the CISG cannot be applied to asset deal acquisitions.[63] Nevertheless, there is also a strong scholarly opinion arguing that if the preponderant part of the assets can be classified as "goods" in accordance with the CISG, then the CISG may be applicable.[64]

Some authors argue that the applicability of the CISG to asset deals should be denied, on the grounds that the companies lack the necessary marketability.[65] It is first necessary to state that there is no requirement such as marketability for a contract to fall within the sphere of the CISG.[66] Even if marketability were a

60 *Meyer-Sparenberg*, in: Meyer-Sparenberg/Jäckle (eds.), § 41 para. 34; *Jaques*, in: Ettinger/Jaques (eds.) D. Phase 3:Verhandlung Und Abschluss Des Kaufvertrags I. Kaufgegenstand, para. 9; *Weber*, in: Hölters (ed.), Kapitel 9, paras. 9.91-9.109; *Rosengarten/Burmeister/Klein*, pp. 53–54.

61 *Merkt*, ZVglRWiss 1994/2, p. 365; *Mankowski*, in: Grunewald (ed.), Art. 1, para. 29; *Göthel*, in: Reithmann/Martiny (eds.), § 33, para. 33.50; *Baum*, Mergers and Acquisitions, Max Planck Encyclopedia of European Private Law, available at: https://max-eup2012.mpipriv.de/index.php/Mergers_and_Acquisitions (8/6/2025).

62 *Göthel*, in: Reithmann/Martiny (eds.), § 33, para. 33.51.

63 *Herber*, in: Schlechtriem (ed.), Art. 1, para. 24; *Schwenzer/Hachem*, in: Schwenzer (ed.), Art. 1, para. 21; *Westermann*, in: Krüger/Westermann (eds.), CISG Art. 1, para. 6; *Mistelis*, in: Kröll/Mistelis/Perales Viscasillas (eds.), Art. 1, para. 39; *Saenger*, in: Ferrari/Kieninger/Mankowski/Otte/Saenger/Schulze/Staudinger (eds.), Art. 1, para. 6; *Ferrari*, in: Schwenzer/Schroeter (eds.), Art. 1, para. 36; *Piltz*, p. 33 para. 57; *Durak*, p. 21; *Meyer-Sparenberg*, in: Meyer-Sparenberg/Jäckle (eds.), § 40 para. 68; *Droese,* p. 143; *Lorenz*, in: Witz/Salger/Lorenz (eds.), Art. 1, para. 8; *Groh/Nath/Kraft*, p. 140 para. 40; *Achilles*, in: Achilles (ed.), Art. 1, para. 4; *Wetzler*, in: Hölters (ed.), Kapitel 18, para. 18.54; *Baum*, Mergers and Acquisitions, Max Planck Encyclopedia of European Private Law, available at: https://max-eup2012.mpipriv.de/index.php/Mergers_and_Acquisitions (8/6/2025); *Göthel*, in: Göthel (ed.), § 6, paras. 17-21; *Vischer/Huber/Oser*, para. 361.

64 *Merkt*, ZVglRWiss 1994/2, p. 368; *Huber,* in: Westermann (ed.), CISG Art. 1, para. 18; *Magnus*, in: Kaiser (ed.), CISG Art. 1, para. 51; *Brunner/Meier/Stacher*, in: Brunner/Gottlieb (eds.), Art. 2, para. 5; *Schlechtriem/Schroeter*, pp. 43–44 para. 79; *Mankowski*, in: Grunewald (ed.), Art. 1, para. 29; *Wagner*, in: Ball (ed.), CISG Art. 1, para. 16; *Schäuble*, in Hausmann/Odersky (eds.), § 16, para. 14. Suggestion for the parties who do not want the CISG to be applicable to exclude the CISG if preponderant part is CISG see *Göthel*, in: Reithmann/Martiny (eds.), § 33, para. 33.51.

65 *Merkt*, ZVglRWiss 1994/2, p. 363; *Göthel*, in: Göthel (ed.), § 6, para. 21.

66 *Merkt*, ZVglRWiss 1994/2, p. 364.

requirement, the marketability of companies should be accepted, particularly in light of the growing significance of cross-border M&A in recent years.[67]

Some authors deny the applicability of the CISG to asset deals on the grounds that the goods within the sphere of the CISG typically do not constitute a preponderant part in cases of asset deals and therefore the entire contract should not be subject to the CISG.[68] This opinion, however, fails to provide a satisfactory answer to cases, where the preponderant part of the transaction is goods within the sphere of the CISG. For some companies, it may be challenging to determine whether the preponderant part is goods within the sphere of the CISG or not. To illustrate, one may consider the example of a company engaged in the rental construction equipment business, which owns machinery and construction equipment such as cranes and rents them to third parties. The most valuable asset of such companies may be movable machinery and equipment. It is also not uncommon for rental car businesses to own a significant number of vehicles. In such a case however, it is also necessary to consider the immovables owned by the rent-a-car company. For example, an office located at or near an airport may be of significant value. Nevertheless, when one considers the number of vehicles owned by these companies, it becomes evident that it is not straightforward to conclude that the preponderant part is not considered goods within the sphere of the CISG. There are logistics companies that may have a preponderant part of their assets in the form of trucks. In such cases, the preponderant part of the asset deal may indeed constitute goods within the sphere of the CISG. This is also the case with bus companies. This view in the literature does not provide satisfactory answers to such cases.

A further significant argument against the applicability of the CISG to asset deals is that asset deals include goods outside the sphere of the CISG such as immovables and therefore, asset deals do not fall within the substantive sphere of the application of the CISG and that the companies cannot be considered goods under the CISG.[69]

In order to ascertain whether asset deals fall within the substantive sphere of the CISG, it is essential to consider their legal nature. As previously stated, asset deals are aggregated assets.[70] Therefore, asset deals should be treated in a manner consistent with the treatment of aggregated assets. As previously stated, the prevailing view regarding aggregated assets is that they may fall within the scope of the CISG if

67 *Merkt*, ZVglRWiss 1994/2, p. 364.

68 *Schwenzer/Hachem*, in: Schwenzer (ed.), Art. 1, para. 21; *Herber*, in: Schlechtriem (ed.), Art. 1, para. 24; *Lorenz*, in: Witz/Salger/Lorenz (eds.), Art. 1, para. 8; *Göthel*, in: Göthel (ed.), § 6, para. 19.

69 *Herber*, in: Schlechtriem (ed.), Art. 1, para. 24; *Saenger*, in: Ferrari/Kieninger/Mankowski/Otte/Saenger/Schulze/Staudinger (eds.), Art. 1, para. 6; *Achilles*, in: Achilles (ed.), Art. 1, para. 4; *Groh/Nath/Kraft*, p. 140 para. 40; *Wetzler*, in: Hölters (ed.), Kapitel 18, para. 18.54; *Meyer-Sparenberg*, in: Meyer-Sparenberg/Jäckle (eds.), § 40, para. 68; *Durak*, p. 21; *Göthel*, in: Göthel (ed.), § 6 Bestimmung des Vertragsstatus, in Grenzüberschreitende M&A-Transaktionen, paras. 18-20.

70 *Jaques*, in: Ettinger/Jaques (eds.) D. Phase 3:Verhandlung Und Abschluss Des Kaufvertrags I. Kaufgegenstand, para. 9; *Frey/Fichtner*, in: Prinz/Kahle (eds.), § 27, para. 9; *Picot*, in: Römermann (ed.), § 21, para. 85; *Korch*, JuS 2018/6, p. 522; *Schmitz*, RNotZ 2006/12, p. 562; *Beisel*, in: Beisel/Klumpp/Schindler (eds.), § 4, para. 5.

the preponderant part consists of goods within the sphere of the CISG.[71] The same rationale should apply to asset deals, given that they are also aggregated assets.[72]

The CISG does not contain any specific provisions regarding asset deals.[73] However, asset deals typically include goods within the sphere of the CISG.[74] In order to fill this gap, a first attempt should be to adopt an analogical approach.[75] Therefore, a new principle must be established by extending an existing legal norm, that is applicable to a comparable set of circumstances.[76]

As previously stated, pursuant to Art. 3(2) CISG, mixed contracts in which the sale element constitutes the preponderant part will fall within the sphere of the CISG.[77] In essence, such a contract comprises two distinct parts: one that falls outside the sphere of application of the CISG and another that falls within it. This case is also similar to aggregated assets, where certain elements of the contract may fall within the sphere of the CISG, while others may not. It would not be fair to not apply the CISG in a case where the preponderant part is goods within the sphere of the CISG, thereby depriving the parties of the advantages of a uniform law.[78] It would be inequitable to impose the application of a national law of one party or a law that private international law leads to, on the parties simply because there is a part of the contract that does not fall within the sphere of the CISG and is of lesser importance than the part that does fall within the sphere. Furthermore, if the CISG is applicable to contracts with unfamiliar non-sale obligations when the sale element is preponderant, then it must also be applicable to mere sales contracts that have as their object both goods within the sphere of the CISG and other objects of sale.[79] It is this author's opinion that it is appropriate to apply Art. 3(2) CISG by analogy to aggregated assets and therefore to asset deals.[80] This leads to the conclusion that if

71 *Saenger*, in: Ferrari/Kieninger/Mankowski/Otte/Saenger/Schulze/Staudinger (eds.), Art. 1, para. 6; *Magnus*, in: Kaiser (ed.), CISG Art. 1, para. 51; *Ferrari*, in: Schwenzer/Schroeter (eds.), Art. 1, para. 34; *Huber,* in: Westermann (ed.), CISG Art. 1, para. 17; *Brunner/Meier/Stacher*, in: Brunner/Gottlieb (eds.), Art. 2, para. 2; *Achilles*, in: Achilles (ed.), Art. 1, para. 4.

72 *Huber,* in: Westermann (ed.), CISG Art. 1, para. 18.

73 *Merkt*, ZVglRWiss 1994/2, p. 366; *Göthel*, in: Reithmann/Martiny (eds.), § 33, para. 33.51.

74 *Merkt*, ZVglRWiss 1994/2, p. 366.

75 *Ferrari*, International Business Law Journal 2003/2, p. 227; Demirsatan, Türkiye Adalet Akademisi Dergisi 2025/62, pp. 340-341.

76 *Groh*, in: Weber, Allgemeine Rechtsbegriffe, Gerichtsverfassungsrecht, Handels- Und Gesellschaftsrecht, Insolvenzrecht, Recht Der Freiwilligen Gerichtsbarkeit, Rechtsgeschichte, Rechtsphilosophie, Zivilprozess, Analogie.

77 *Saenger*, in: Ferrari/Kieninger/Mankowski/Otte/Saenger/Schulze/Staudinger (eds.), Art. 3, para. 6; *Magnus*, in: Kaiser (ed.), CISG Art. 3, para. 21.

78 For such advantages see *Kröll/Mistelis/Perales Viscasillas,* in: Kröll/Mistelis/Perales Viscasillas (eds.), Introduction to the CISG, paras. 47–49.

79 *Merkt*, ZVglRWiss 1994/2, p. 368.

80 *Honnold/Flechtner*, para. 56.5; *Brunner/Meier/Stacher*, in: Brunner/Gottlieb (eds.), Art. 2, para. 5.

the preponderant part of the asset deal is constituted by goods within the sphere of the CISG, the CISG will be applicable.[81]

It may also be proposed that Art. 2(d) CISG should be applied by analogy. The rationale for this proposition may be found in the fact that share deals are excluded from the sphere of the CISG based on Art. 2(d). It may, therefore, appear reasonable to conclude that asset deals should be excluded as well. A more similar case for asset deals would be Art. 2(d) CISG rather than the Art. 3(2) CISG, given that both share deals and asset deals are a way to do an acquisition. If one is excluded, then the other should be excluded as well. However, Art. 2 CISG contains an exhaustive list, which therefore cannot be applied by analogy.[82] Consequently, it is not possible for Art. 2(d) to be applicable to asset deals and for asset deals to be subject to the same exclusion as share deals. Furthermore, it is important to note that Art. 2 CISG excludes not only share deals but even the sale of individual shares, regardless of whether they are transferred as part of a company acquisition or as a standalone transaction. This distinction is significant because the rationale for excluding shares from the sphere of the CISG lies in their characterisation as financial instruments, which are inherently subject to complex national legal provisions and regulatory frameworks.[83] This rationale cannot be applied to asset deals, as the latter do not exhibit the same characteristics as shares. Another rationale behind this rule is that the sale of shares constitutes a sale of rights, which is outside the sphere of the CISG.[84] Asset deals, on the other hand, involve the transfer of tangible or intangible property, not only the transfer of rights in the same sense as shares. This fundamental difference between the share deal and asset deal further highlights why the rationale behind the exclusion of shares under Art. 2(d) CISG cannot be applied to asset deals.

The result is also unsurprising in the context of US sales law, given that the prevailing opinion in the USA is that the Uniform Commercial Code for the sale of goods (Art. 2 Uniform Commercial Code) also applies to asset deals if the goods are the predominant asset in an overall view of the company's assets and this approach can be easily applied to the CISG.[85]

81 *Merkt*, ZVglRWiss 1994/2, p. 370; *Honnold/Flechtner*, para. 56.5; *Brunner/Meier/Stacher*, in: Brunner/Gottlieb (eds.), Art. 2, para. 5; *Mankowski*, in: Grunewald (ed.), Art. 1, para. 29; *Wagner*, in: Ball (ed.), CISG Art. 1, para. 16.

82 *Spohnheimer*, in: Kröll/Mistelis/Perales Viscasillas (eds.), Art. 2, para. 4; *Saenger*, in: Ferrari/Kieninger/Mankowski/Otte/Saenger/Schulze/Staudinger (eds.), Art. 2, para. 1; *Magnus*, in: Kaiser (ed.), CISG Art. 2, para. 7; *Achilles*, in: Achilles (ed.), Art. 2, para. 1; *Ferrari*, in: Schwenzer/Schroeter (eds.), Art. 2, para. 5; *Huber,* in: Westermann (ed.), CISG Art. 2 para. 2.

83 *Spohnheimer*, in: Kröll/Mistelis/Perales Viscasillas (eds.), Art. 2, para. 36.

84 *Spohnheimer*, in: Kröll/Mistelis/Perales Viscasillas (eds.), Art. 2, para. 36; *Huber,* in: Westermann (ed.), CISG Art. 2 para. 18.

85 *Göthel*, in: Göthel (ed.), § 6, para. 23.

E. Preponderant Part

Once it has been established that the CISG can be applied to asset deals in cases where the preponderant part of the transaction are goods within the sphere of the CISG, it is necessary to determine the specific circumstances under which such a preponderant part exists in the context of asset deals.

I. Decisive Factor for the Preponderant Part of Asset Deals

The discussions regarding the preponderant part in cases of Art. 3(2) CISG are relevant here because that is the provision that applies to asset deals by analogy. It was previously stated that one opinion was in favour of conducting an economic value comparison between the sale element and the other non-sale part of the contract and considering the party interest solely in cases where it is impossible or inappropriate to apply the comparison.[86] The majority opinion was to take the interest and will of the parties into consideration as well.[87]

In the context of asset deals, the majority of scholars who are in favour of the application of the CISG to asset deals follow the economic value comparison approach and argue that if more or significantly more than 50 per cent of the value of an asset deal is goods within the meaning of the CISG, then the CISG should be applicable.[88] It is this author's view that this approach should be rejected on two grounds.

Firstly, an economic value comparison is impractical and would not result in fair results.

One possible method for conducting a comparison would be to evaluate the economic value of the goods within the sphere of the CISG in relation to the sum of the value of assets owned by the company based on financial statements.[89] Nevertheless, it is unlikely that such a comparison can lead to satisfactory or fair results. Such a comparison would be more focused on the value of the assets in

86 CISG-AC Opinion No 4, *Perales Viscasillas*, Contracts for the Sale of Goods to Be Manufactured or Produced and Mixed Contracts (Article 3 CISG), para. 3.3; *Brunner/Feit*, in: Brunner/Gottlieb (eds.), Art. 3, para. 8; *Zeytin*, p. 56; *Siehr*, in: Honsell (ed.), Art. 3, para. 7.

87 *Mistelis/Raymond*, in: Kröll/Mistelis/Perales Viscasillas (eds.), Art. 3, para. 20; *Saenger*, in: Ferrari/Kieninger/Mankowski/Otte/Saenger/Schulze/Staudinger (eds.), Art. 3, para. 6; *Magnus*, in: Kaiser (ed.), CISG Art. 3, para. 21; *Atamer*, p. 40; *Ferrari*, in: Schwenzer/Schroeter (eds.), Art. 3, para. 14; *Huber,* in: Westermann (ed.), CISG Art. 3, para. 14; *Mankowski*, in: Grunewald (ed.), Art. 3, para. 13; *Wagner*, in: Ball (ed.), CISG Art. 3, para. 10; *Tarman*, p. 53; *Czerwenka*, pp. 144–145.

88 *Merkt*, ZVglRWiss 1994/2, p. 369; *Magnus*, in: Kaiser (ed.), CISG Art. 1, para. 51; *Brunner/Meier/Stacher*, in: Brunner/Gottlieb (eds.), Art. 2, para. 5.

89 Although this issue is not directly related to the CISG see for example the Communiqué on Common Principles Regarding Significant Transactions and Exit Right in Turkey, which compares the value of the assets subject to transaction and the value of the total assets based on the publicly disclosed financial statements to determine if a transaction is significant or not.

question on an individual basis. However, when examining asset deals, it becomes evident that the combined value of the assets exceeds that of their individual value.[90] The existence of multiple methods for calculating the purchase price of a company demonstrates that the value of a company and its assets collectively cannot be determined solely by examining the figures presented in the financial statements on an individual basis.[91] Although the goods within the sphere of the CISG may constitute the preponderant part on an individual value basis based on the financial statements, goods outside the sphere of the CISG might create a greater value and constitute the preponderant part when the other assets are considered collectively. Therefore, a comparison between the economic value of the goods within the sphere of the CISG and the value of the other assets owned by the company based on financial statements is not a valid approach.

An alternative means of comparison would be between the collective economic value of the goods within the sphere of the CISG and the real economic value of the company, which is also a challenging proposition. As previously stated, real economic value of the company cannot be determined by the figures presented in the financial statements. As it is challenging to determine the real value of a company,[92] the purchase price can be used as a point of reference for comparison. This, however, gives rise to the question of how the collective value of the goods that fall within the sphere of the CISG should be determined. As previously stated, while the value of the goods within the sphere of the CISG can be determined on an individual basis using financial statements, this approach does not accurately reflect the combined value of them. A comparison of the value of the goods within the sphere of the CISG based on the financial statements individually with the real value of the company not based on the financial statements would not lead to satisfactory results. Calculating the real value of the goods within the sphere of the CISG however, would be also challenging, impractical and time consuming. Therefore, an economic value comparison approach for asset deals is inappropriate.

Secondly, even if the aforementioned issues could be resolved, it would be challenging to categorise all those different types of assets involved in an asset deal as either goods or not within the meaning of the CISG. As previously stated, there is an ongoing debate as to whether certain assets fall within the definition of goods or not. In the context of asset deals, a number of different types of assets may be involved, including intellectual property, goodwill, know-how and all other objects. Consequently, there would be a great deal of debate regarding which of these assets would fall within the sphere of the CISG. It would be again impractical to classify all these different asset types as goods or not. It would require a significant investment of time and effort on the part of the parties or courts to accomplish such a classification.

90 *Kästle/Oberbracht*, pp. 64–66.
91 *Kästle/Oberbracht*, pp. 64–70.
92 See *Kästle/Oberbracht*, pp. 64–70 for all different types of company valuation methods.

In conclusion, if the first one of the previously mentioned approaches is followed (economic value comparison), it would be inappropriate to conduct a comparison and therefore the will and interest of the parties would be the decisive factor in the preponderant part. As the decisive factor for the second approach is also the same, both approaches would lead to the conclusion that the preponderant part of asset deals should be determined by the interest and will of the parties and not by the comparison of the economic value of assets.

II. Determining the Interest and the Will of the Parties in Asset Deals

The question thus arises as to how one might determine the interest and will of the parties involved in asset deals and thereby determine whether the goods within the meaning of the CISG hold greater significance for them.

1. Role of the Preamble

In order to ascertain the interests and the will of the parties involved, it is first necessary to examine the preamble of the asset purchase agreement. The preamble of an asset purchase agreement provides an overview of the background and purpose of the transaction.[93] It assists with the interpretation of the clauses within the contract and provides guidance to the judge in litigation with regard to the interpretation of the contract.[94] Consequently, it enables the determination of the interests and the will of the parties, as well as the identification of the parts of the company that are of greater significance to them. If it can be established from the preamble that the goods within the meaning of the CISG are of greater significance in an asset deal for the parties involved, then it should be concluded that the CISG is applicable to the contract in question.

2. Qualitative Approach

However, it may not always be possible to determine which part is of greater significance to the parties from the preamble alone. In such instances, it is necessary to establish a framework for evaluating the interest and the will of the parties and determining which part of the assets is of greater significance to them.

In order to establish such a framework, it would be reasonable to first determine what constitutes a significant part of the company, as the asset deal is the sale of a company. In the event that the significant part of a company constitutes goods within the meaning of the CISG, then it may be reasonably presumed that the part of the company with assets within the meaning of the CISG holds greater importance for the parties.

93 *Beisel*, in: Beisel/Klumpp/Schindler (eds.), § 4, para. 9; *Kästle/Oberbracht*, p. 28.
94 *Beisel*, in: Beisel/Klumpp/Schindler (eds.), § 4, para. 9; *Kästle/Oberbracht*, p. 28.

However, this raises the question of what constitutes an important part of a company. This is a question that is not addressed in the CISG or in the literature on the CISG. Nevertheless, it is possible to conduct a comparative analysis by reviewing other legal areas, other countries' laws and their corresponding literature regarding what constitutes a significant part of a company's assets, thereby transferring the insights gathered from these sources to the context of the present case. While such discussions can be found in many countries, this article will focus on the literature on Turkish and German company law.

Pursuant to Section 408(2)(f) Turkish Commercial Code (*Türk Ticaret Kanunu* –TCC), the wholesale of a significant amount of a company's assets is listed among the exclusive and unassignable rights and duties of the general assembly of the shareholders in a stock corporation. Pursuant to Section 179a German Stock Corporation Act (*Aktiengesetz* – GSCA), "a contract by which a stock corporation enters into obligation to transfer the entirety of the company's assets … requires a resolution to be adopted by the general meeting …". While the wording of Section 179a GSCA requires an obligation to transfer the entirety of the company's assets, the relevant provision also applies to contracts when the company is obligated to sell a significant part of its assets and only an insignificant part of the assets remain in the company.[95] It is noteworthy that both provisions address the question of what constitutes a significant and an insignificant part of a company's assets. It is also worth noting that it is disputed whether these provisions apply to limited liability companies in both jurisdictions.[96] It is evident that these provisions are unrelated to the CISG and serve no similar purpose. Consequently, the significant part within the meaning of these provisions may not lead to a satisfactory outcome for the significant part framework that this article strives to achieve. Nevertheless, despite the possible inapplicability of these provisions to other business entity forms and despite the fact that these provisions are unrelated to CISG, the discussions held regarding what constitutes a significant and an insignificant part of the company's asset may still offer valuable insights.

95 *Holzborn*, in: Spindler/Stilz (eds.), § 179a, para. 19; *Ehmann*, in: Grigoleit (ed.), § 179a, para. 5; *Wachter*, in: Wachter (ed.), § 179a, para. 11; *Haberstock/Greitemann*, in: Hölters/Weber (eds.), § 179a, para. 4; *Koch*, § 179a para. 4; *Seibt*, in: Schmidt/Bayer/Vetter (eds.), § 179a, para. 8.

96 *Çamoğlu*, in: Kırca/Gürel/Şit İmamoğlu/Yener/Tekin/Bektaş (eds.), p. 330 fn. 2. For Turkish literature which is in favour of applying the provision to limited liability companies see *Hamamcıoğlu/Biçer*, Kadir Has Üniversitesi Hukuk Fakültesi Dergisi 2013/1, p. 49; *Dural*, in: Erdem/Ayoğlu/Altay/Dural/Yusufoğlu/Yüksel (eds.), p. 227 fn. 3; *Saat*, p. 215. For Turkish literature which is not in favour of applying the provision to limited liability companies see *Helvacı*, in: Kaya/Tokcan/Aşıkoğlu/Özsoy/Evlek, pp. 47–48. For German literature which is in favour of applying the provision to limited liability companies see *Holzborn*, in: Spindler/Stilz (eds.), § 179a, para. 12; *Wagner*, in: Heidel (ed.), § 179a, para. 20; *Zetzsche*, in: Zöllner/Noack (eds.), § 179a, para. 23; *Stein*, in: Goette/Habersack (eds.), § 179a, para. 14. For German literature which is not in favour of applying the provision to limited liability companies see *Ehmann*, in: Grigoleit (ed.), § 179a, para. 2; *Wachter*, in: Wachter (ed.), § 179a, para. 6; *Koch*, Aktiengesetz (n. 95) AktG § 179a para. 1.

One approach to determining the significant part of the company's assets within the meaning of Section 408(2)(f) TCC and Section 179a GSCA is to apply quantitative criteria in both jurisdictions and to compare the value of the transferred assets to the value of the company's assets. In the Turkish literature percentages between 10 per cent and 84 per cent have been recommended as indicative of a significant part of the company's assets, however, the prevailing range would be between 50 per cent and 80 per cent.[97] In contrast, the German literature suggests higher percentages, ranging from 85 per cent to 95 per cent.[98] This approach is based on a value comparison, which is similar to the method employed by scholars who accept the applicability of the CISG to asset deals.

However, the prevailing opinion in German literature and the view of the Turkish Court of Cassation suggests a qualitative approach should be adopted and it should be assumed that the assets shall be regarded as a significant part of the company if they are essential for the company's survival and if the absence of the assets renders it impossible for the company to continue pursuing its purpose as defined in the articles of association.[99] Therefore, the decisive factor is whether the company can continue to pursue its purpose, even if to a limited extent.[100]

As previously stated, these provisions are not related to the CISG. Furthermore, these discussions are focused on defining what constitutes a significant part of a company, without any reference to the CISG. Nevertheless, the qualitative approach appears to be a suitable approach for determining the will and the interest of the parties in cases where the applicability of the CISG to the asset deals is in question as well. It thus follows that a general rule shall be established as follows: if the company subject to the asset deal is unable to pursue its purpose as defined in the articles of association, not even to a limited extent, when the goods within the sphere of the CISG are disregarded, then it may be assumed that the part of the

97 *Saat*, pp. 113–21. See *Tekinalp*, p. 309 for 20 per cent. According to the Communiqué on Common Principles Regarding Significant Transactions and Exit Right, if the value of the assets subject to transaction in the last publicly disclosed financial statements exceeds 50 per cent of the value of the total assets in the last publicly disclosed financial statements, the transaction is deemed significant. See *Çamoğlu*, in: Kırca/Gürel/Şit İmamoğlu/Yener/Tekin/Bektaş (eds.), p. 333 for the opinion that although this provision is not directly applicable, it shall be a reference for the judge to exercise his discretion. See *Hamamcıoğlu/Biçer*, Kadir Has Üniversitesi Hukuk Fakültesi Dergisi 2013/1, p. 41 for the opinion that a regulation could have been enacted to define a threshold for the sale of company assets, with a figure exceeding 60 per cent being considered significant.

98 *Stein*, in: Goette/Habersack (eds.), § 179a, para. 18; *Seibt*, in: Schmidt/Bayer/Vetter (eds.), § 179a, para. 8; *Zetzsche*, in: Zöllner/Noack (eds.), § 179a, paras. 72-74; *Wagner*, in: Heidel (ed.), § 179a, para. 6.

99 Turkish Court of Cassation decisions: Yargıtay 11. HD, E 2020/8038, K 2022/4957, T 16.6.2022; Yargıtay 11. HD, E 2019/2449, K 2021/552, T 28.1.2021; Yargıtay 11. HD, E 2016/3810, K 2017/3294, T 1.6.2017; Yargıtay 11. HD, E 2005/1362, K 2006/1253, T 13.2.2006; for the German literature: *Holzborn*, in: Spindler/Stilz (eds.), § 179a, para. 19; *Wachter*, in: Wachter (ed.), § 179a, para. 11; *Haberstock/Greitemann*, in: Hölters/Weber (eds.), § 179a, para. 4; *Koch*, Aktiengesetz (n. 95) AktG § 179a para. 4.

100 *Holzborn*, in: Spindler/Stilz (eds.), § 179a, para. 19; *Koch*, Aktiengesetz (n. 95) AktG § 179a para. 4; *Wagner*, in: Heidel (ed.), § 179a, para. 4.

transaction within the sphere of the CISG is of greater importance to the parties and that the CISG shall be applicable to the asset deal transaction.

3. Final Remarks on the Preponderant Part

As an example of the results achieved, a real-life example can be presented. In 2019, FlixBus, a mobility provider, acquired Kamil Koç, a Turkish bus provider.[101] It is unclear whether the transaction was a share deal or an asset deal. If it were an asset deal, then the applicability of the CISG would be open to question. Given that Flixbus is a German company and Kamil Koç is a Turkish company,[102] it can be assumed that the territorial requirements were fulfilled without any further information, given that the places of business of both companies are in different states and that Germany and Türkiye are both Contracting States.[103]

To determine whether the CISG would be applicable in this case, it would be first necessary to evaluate the preamble and determine which part of the assets is of greater importance to the parties. If it can be established that the acquisition of Kamil Koç by FlixBus was motivated primarily by the desire to leverage the brand and reputation of Kamil Koç in Türkiye, or to make use of its customer base in Türkiye, rather than by the desire to utilise the buses themselves, then it may be concluded that the CISG would not be applicable. Nevertheless, if the purpose of FlixBus was primarily to obtain a substantial number of buses in another country, enabling itself to enter the market there under its own name rather than that of Kamil Koç, then it could be concluded that the CISG would be applicable. If this information cannot be obtained from the preamble or any other means of interpretation, then the general rule previously mentioned would apply. In this case, it is evident that Kamil Koç cannot continue its bus providing business without its buses. As the buses are considered goods under the CISG,[104] it should be assumed that the part of the transaction within the sphere of the CISG is of greater importance for the parties and the CISG should be applied. However, this conclusion is based on a number of assumptions, given the lack of available information regarding the case.

As can be observed, this solution also partially, though not entirely, addresses the criticism that has previously been expressed regarding the economic value comparison approach and problem of the classification of all assets of a company as goods or not under the CISG. In such instances for example, once it is evident that

101 *Daily Sabah*, German FlixBus Moves to Acquire Prominent Turkish Bus Company Kamil Koç, available at: https://www.dailysabah.com/tourism/2019/08/21/german-flixbus-moves-to-acquire-prominent-turkish-bus-company-kamil-koc (8/6/2025).

102 *Daily Sabah*, German FlixBus Moves to Acquire Prominent Turkish Bus Company Kamil Koç, available at: https://www.dailysabah.com/tourism/2019/08/21/german-flixbus-moves-to-acquire-prominent-turkish-bus-company-kamil-koc (8/6/2025).

103 *CISG-Online*, CISG Contracting States by Entry into Force, available at: https://cisg-online.org/cisg-contracting-states/chronological-order (8/6/2025).

104 OLG Köln 24.5.2006 – 16 W 25/06, CISG-Online 1232; see also the used car OLG Köln 17.2.2017 – 19 U 101/16, CISG-Online 2946.

the buses constitute the preponderant part of the transaction, it is unnecessary to classify the remaining assets of the company as goods or not.

In cases like this, it is unlikely that the CISG would be applicable because, when a large and established company is acquired, it is evident that intangible assets such as know-how, goodwill and the brand name of the company will play a significant role in the transaction. These elements are unlikely to fall within the sphere of the CISG. However, if a company aims to enter a foreign market and chooses to acquire a smaller or mid-sized enterprise – one that may not have a strong name in the country but possesses a substantial number of physical assets which are considered goods under the CISG, such as buses – then an asset deal could fall under the CISG. For example, if FlixBus were to acquire a smaller regional Turkish bus company primarily to leverage its fleet of buses, rather than its brand or customer base, the transaction would likely be governed by the CISG.

F. Consequences

As the provision applied by analogy is Art. 3(2) CISG, the consequences of it shall be applicable, but in a suitable way for asset deals. As previously stated, the consequence is that the CISG applies to the contract in its entirety.[105] Therefore, the CISG will also apply to the assets, which do not fall within the scope of the CISG. If the CISG does not involve provisions for some specific questions regarding the assets not within the sphere of the CISG, then such questions should be settled in conformity with the general principles of the CISG and in the absence of such the national provisions shall apply pursuant to Art. 7(2) CISG.[106]

Most importantly, the rights and obligations of the seller and the buyer shall be governed by the CISG. Consequently, issues such as whether the object of the sale is defective, as well as the parties' respective rights in cases of defects, delay, or breach of contract will all be resolved in accordance with the CISG.

This conclusion is advantageous. Because the Part II Formation of Contract section of the CISG is formulated in such general terms that it can be used for any type of contract,[107] which also can be used for the sale of any object. Similarly, the system of remedies for breach of contract established by the CISG can be used for any type of contract.[108]

It is evident that assets outside the sphere of the CISG will complicate the transaction, particularly in the case of immovables.[109] One example of this is the form

105 *Saenger*, in: Ferrari/Kieninger/Mankowski/Otte/Saenger/Schulze/Staudinger (eds.), Art. 3, para. 7; *Magnus*, in: Kaiser (ed.), CISG Art. 3, para. 29; *Ferrari*, in: Schwenzer/Schroeter (eds.), Art. 3, para. 16.

106 See *Saenger*, in: Ferrari/Kieninger/Mankowski/Otte/Saenger/Schulze/Staudinger (eds.), Art. 3, para. 7; *Ferrari*, in: Schwenzer/Schroeter (eds.), Art. 3, para. 14 for the consequences of direct application of Art. 3 (2) CISG.

107 *Magnus*, in: Kaiser (ed.), CISG Einleitung CISG, para. 2.

108 *Magnus*, in: Kaiser (ed.), CISG Einleitung CISG, para. 2.

109 *Honnold/Flechtner*, para. 56.5.

requirements for immovables under the relevant domestic law, while Art. 11 CISG stipulates that there are no form requirements to conclude a contract of sale. However, it is generally accepted that Art. 11 CISG does not apply to the real property in the mixed contracts and the form requirements of the domestic law apply to the real property.[110] The same shall also be the case for asset deals to which the CISG is applied. Furthermore, as previously stated, domestic law may apply to some assets outside the sphere of the CISG if there is no provision for a specific question regarding that asset or a general principle within the CISG. It can thus be argued that it is not beneficial and not convenient to apply the CISG to some parts of the asset deal and another sales law to other parts.[111] But it is important to note that the national law will be applicable only in exceptional cases where the CISG does not have a provision or a general principle for that specific question, or where there are some problematic areas with the form requirements, such as in the case of real properties. Therefore, the national law will be applicable to a minor part of the transaction. This is not a disadvantageous position when weighed against the advantage of the application of the uniform law to a majority part of the contract. It is a preferable position for a party to apply mostly a uniform law and only for some specific questions a foreign national law, rather than applying the foreign national law to the whole contract.

When the CISG is applied in the cases of asset deals, the divisibility of the seller's performance within the meaning of Art. 51 CISG shall be rejected since the assets involved in an asset deal belong together functionally.[112] This is also the case for the aggregated assets.[113]

G. Conclusion

The objective was to determine whether asset deals fall within the CISG's sphere of application of the CISG. The difficulty arises from the fact that asset deals include various types of assets that are not covered by the CISG. The applicability of the CISG to asset deals is therefore disputed. Nevertheless, when the legal nature of the asset deals as aggregated assets is considered, it can be argued that Art. 3(2) CISG should apply by analogy, given that it provides a similar case to asset deals where a

110 *Schmidt-Kessel*, in: Schwenzer/Schroeter (eds.), Art. 11, para. 34; *Honnold/Flechtner*, para. 127.2; *Saenger*, in: Ferrari/Kieninger/Mankowski/Otte/Saenger/Schulze/Staudinger (eds.), Art. 1,1 para. 6.

111 *Vischer/Huber/Oser*, para. 361.

112 *Elliott/Vischer*, Sachgesamtheiten Unter Den Regeln Des CISG, dRSK, pp. 2–3, available at: https://cisg-online.org/files/commentFiles/Elliott_Vischer_dRSK_30Januar2013_1.pdf (8/6/2025).

113 *Elliott/Vischer*, Sachgesamtheiten Unter Den Regeln Des CISG, dRSK, pp. 2–3, available at: https://cisg-online.org/files/commentFiles/Elliott_Vischer_dRSK_30Januar2013_1.pdf (8/6/2025); *Saenger*, in: Ferrari/Kieninger/Mankowski/Otte/Saenger/Schulze/Staudinger (eds.), Art. 51, para. 2; *Magnus*, in: Kaiser (ed.), CISG Art. 52, para. 4; *Müller-Chen*, in: Schwenzer/Schroeter (eds.), Art. 51, para. 2; *Huber*, in: Westermann (ed.), CISG Art. 51, para. 3.

part of the contract falls outside the sphere of the CISG, while other part falls within it.

In order to apply Art. 3(2) CISG, it is necessary to determine which part of the asset deal is the preponderant part and whether that part is considered goods within the sphere of the CISG. One possible approach would be to compare the economic value of the assets of the company. However, this would lead to unsatisfactory results due to the complex valuation methods of the companies and their assets.

This article argued that a qualitative approach is more appropriate than a purely economic value comparison. Accordingly, the preponderant part shall be determined in accordance with the will and the interest of the parties and whether the goods within the sphere of the CISG are of greater significance to them. A preliminary reference point for determining this would be the preamble of the asset purchase agreement.

In the event that this cannot be determined by the preamble or by any other means of interpretation, it would be reasonable to examine whether the company is able to continue pursuing its purpose as defined in the articles of association without the assets within the sphere of the CISG. If the company is unable to do so, then it should be concluded that the goods within the sphere of the CISG are of greater importance to the parties and thus the CISG should be applied to the asset deal.

The application of the CISG to asset deals can provide parties with the benefits of a uniform legal framework, thereby reducing the necessity to engage with the complexities of foreign domestic law. Nevertheless, some obstacles remain due to the absence of explicit provisions for asset deals and for certain assets included in such deals.

In conclusion, while the CISG's application to asset deals is not straightforward, this article supports the view that it can be applicable when the preponderant part of the assets falls within the sphere of the CISG.

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