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ANALYSIS OF ARTICLE 1 OF CISG IN TERMS OF PRIVATE SALES TRANSACTIONS

AUTHORED BY - RISHIT

ABSTRACT

The United Nations Convention on Contracts for the International Sale of Goods (CISG) or Vienna Convention is a multilateral treaty brought about by the United Nations for establishing a uniform framework to govern international trade. It was signed on 11 April 1980 and made effective on 1 January 1988. As of September 2023, 95 countries accounting for two-third of the world trade have ratified the treaty.

Article 1 of the CISG is the subject-matter of discussion here. It describes in what situations a contract falls within the jurisdiction of the CISG.

Clause 1 of Article 1 provides that the Act would apply to contracts of sale of business is between parties whose places of business are in different States in two situations – when the states are party to the CISG or when the rules of Private International law require application of the law of a state which is party to the CISG.

Clause 2 provides that the fact that the parties have their places of business in different states is to be disregarded if the same is not disclosed from the contents of the contract, the dealings between them or from the information disclosed by them before or at the time of completion of the contract. Clause 3 provides that the nationality of the parties or the nature of the contract or parties whether it is of civil or commercial character is not relevant in determining the applicability of the CISG. Article 1 of the CISG is the perfect example of why business lawyers involved in international sales transactions need to understand the nuances of the CISG.

The project will analyze and study the applicability, use and impact of Article 1 of the CISG on private sales transactions.

Keywords: CISG, Private Sales Transaction, Vienna Convention, International Trade, Commercial Transactions

LITERATURE REVIEW

1. Md. Zahidul Islam, *Applicability of the Convention on Contracts for International Sale and Goods (CISG)*

This article analyses Article 1 of the CISG to understand in what situations the CISG will be applicable while taking into account in the judicial position on the topic around the globe.

It attempts to answer the following questions:

- When the CISG will be applicable and when it will not be applicable?
- What is the requirement for application of CISG?

2. Petra Butler, *Article 1 CISG – The Gateway to the CISG*

This article looks at Article 1 from the perspective of finding out before entering into a sale of goods contract whether the final transaction would be governed by the provisions of CISG and in what situations it can be questioned whether CISG is applicable or not.

3. Marlene Wethmar-Lemmer, *Applying the CISG via the rules of private international law: Articles 1(1)(b) of the CISG*

This article analyses the applicability of CISG as provided for by Article 1 in relation to Article 95 which provides that ‘any state may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph (1)(b) of article 1 of this Convention.’ It tries to resolve the paradox caused in interpretation of the jurisdiction of CISG caused by interpreting both these articles together.

4. James P Quinn, *The Interpretation and Application of the United Nations Convention on Contracts for the International Sale of Goods*

This paper discusses the interpretive techniques which commentators suggest will enable courts to accurately interpret the CISG to bring uniformity in interpretation of the extent of its jurisdiction. It identifies the current difficulties in interpreting Article 1 of the CISG and proposes solutions.

5. Jacob Ziegel, *The Scope of The Convention: Reaching Out to Article One and Beyond*

The article analyses Article 1 of the CISG to find answer to the ongoing challenges regarding interpretation and application. It looks into how common law jurisdictions have dealt with the applicability of the CISG.

6. John F. Coyle, *The Role of The CISG in U.S. Contract Practice: An Empirical Study*

The Article draws upon a hand-collected dataset of more than 5,000 contracts, along with interviews with several lawyers who had a hand in their drafting, in an attempt to better understand the role that the CISG plays in U.S. contract practice.

7. Claire M. Germain, *The United Nations Convention on Contracts for the International Sale of Goods: Guide to Research and Literature*

This article covers research strategies and provides research ideas related to interpretation of the CISG.

8. Franco Ferrari & Stefan Kröll, *The CISG's Sphere of Application: Articles 1-3 and 10*

This book provides an in-depth analysis of Article 1 of the CISG, including their interpretation and application in practice.

9. Franco Ferrari & Harry Flechtner, *The CISG and Its Impact on National Legal Systems*

This book provides an analysis of the CISG and its relationship to domestic laws and international trade.

CHAPTER I: INTRODUCTION

In recent decades, there has been a consistent growth in international instruments aimed at establishing uniform rules for international contracts. This unified approach to governing the law applicable to international sales transactions offers three distinct advantages. Firstly, it helps mitigate the escalation of transaction costs for parties involved. Complex private international law regulations and, for instance, restrictions on liability can create significant challenges for parties in understanding their legal standing. Secondly, the divergence in domestic contract laws can distort competition among businesses operating in different states, creating an uneven playing field. Lastly, many domestic contract laws are ill-suited for the complexities of international transactions.¹ Given these developments, one might assume that choice of law rules has only a minimal role in resolving disputes related to international sales of goods. However, this assumption is incorrect.² Even in the context of the 1980 United Nations Convention on the International Sale of Goods (CISG), which is the foremost instrument in this area, the analysis of choice of law remains highly relevant.³ It is through the process of choice of law that a court or tribunal can determine the applicability of the CISG or identify the governing law for matters falling outside the scope of the Convention.

The United Nations Convention on Contracts for the International Sale of Goods (CISG) is a significant outcome of the diplomatic endeavours led by the United Nations Commission on International Trade Law (UNCITRAL) to establish consistent international trade regulations. In contemporary times, CISG has gained substantial popularity, with a rapid increase in the number of countries ratifying it. Nevertheless, there remains an ongoing debate about the specific circumstances under which CISG should be applied. Numerous legal cases have been filed to determine its applicability, and in many instances, judges have provided clarifications regarding its scope. Despite these efforts, there is still considerable uncertainty surrounding the precise conditions for the application of CISG, leaving us in a state of ambiguity.

Given the large number of contracting states, representative of all legal traditions, as well as its important subject matter, the CISG is one of the most influential international conventions to date.

¹ 2 K.P. Berger, *The Creeping Codification of the New Lex Mercatoria* 19-20, 21-26 (Kluwer Law International B.V. 2010).

² 3 F. Ferrari, *PIL and CISG: Friends or Foes?* 21-22 (University of Pittsburgh Press 2010).

³ S. Kröll, L. Mistelis & P.P. Viscasillas, *UN Convention on Contracts for the International Sale of Goods* 10-12 (Bloomsbury Publishing 2011).

This article has tried to focus that, when the CISG will be applicable and when it will not be applicable. This article also attempts to highlights that, what is the requirement for application of CISG?

CHAPTER II: APPLICATION IN LITIGATION

a. Introduction

One of the most fundamental considerations for parties entering into an international sales contract is whether the contract will be governed by the CISG (United Nations Convention on the International Sale of Goods). This determination hinges on two key questions:

- i. **Choice of Law:** The first question is whether the CISG applies based on the choice of law. This can occur either through Article 1(1)(a) or (b) of the CISG itself or by following the choice of law rules of a non-contracting state.
- ii. **Scope of the Convention:** The second question is whether the transaction or the dispute falls within the scope of the CISG, as outlined in Articles 2 to 5 of the Convention. Alternatively, it may involve issues that are not covered by the CISG.⁴ This discussion will primarily focus on the first question, which pertains to the choice of law and how it determines the applicability of the CISG.

b. Global Applicability

Article 1(1) of the CISG establishes a crucial requirement for its application: the parties involved must have their places of business in different states.⁵ While this provision doesn't function as a conventional choice of law rule, it addresses a key issue that typically falls under the jurisdiction of the forum's private international law rules.⁶ Specifically, it determines whether a dispute qualifies as international, thereby triggering a choice of law consideration. This provision acts as a filter for the CISG's application, potentially excluding the Convention in cases that still necessitate a choice of law determination according to the forum's private international law rules. The CISG doesn't provide a precise definition of what constitutes a "place of business." Generally, a place of business is understood to involve a genuine and effective connection of a business with

⁴ United Nations Convention on Contracts for the International Sale of Goods, 1980, Art. 7(2), Acts of United Nations, 1980 (UN).

⁵ S. Kröll, L. Mistelis & P.P. Viscasillas, UN Convention on Contracts for the International Sale of Goods 33, 37 (Bloomsbury Publishing 2011).

⁶ 3 F. Ferrari, PIL and CISG: Friends or Foes? pt. IV. (University of Pittsburgh Press 2010).

a location where it engages in regular commercial activities.⁷ In situations where the identity of the parties in the sales contract is uncertain, such as when one party is represented by an agent, the determination of whether a place of business requirement is met must be made based on standard choice of law rules before establishing the international character of the contract under Article 1(1).⁸ To satisfy the internationality requirement, it must be evident either from the contract itself, the parties' interactions, or information disclosed by the parties before concluding the contract.⁹ Importantly, the parties don't necessarily need to have actual knowledge that their places of business are located in different states for this requirement to be met.¹⁰ It's essential to note that the application of the CISG doesn't hinge on whether goods physically cross-national borders or where the place of performance is located.

c. Contracting States

Article 1(1)(a) of the CISG stipulates that the Convention applies to contracts for the sale of goods between parties whose places of business are in different states, but with a caveat: it applies "when the States are Contracting States." This provision can be seen as a one-sided choice of law rule that mandates the application of the CISG as part of the forum's legal framework.¹¹ Alternatively, in terms of its effect, the CISG can be viewed as either an overarching mandatory law of the forum or a self-executing treaty. In essence, paragraph (a) of Article 1 overrides the usual choice of law rules that would typically apply to international contracts by enforcing the CISG for all cases that fall within its scope. Consequently, when a dispute is covered by the Convention, there's no need to determine the law that would otherwise be applicable. However, an important exception to this unilateral forum rule is the principle of party autonomy. If parties from different contracting states have chosen the law of a non-contracting state or have explicitly excluded the CISG, this choice generally prevails in accordance with the forum's rules on party autonomy. In such cases, the parties' express choice of law takes precedence over the default application of the CISG.

⁷ S. Kröll, L. Mistelis & P.P. Viscasillas, UN Convention on Contracts for the International Sale of Goods 23, 43 (Bloomsbury Publishing 2011).

⁸ S. Kröll, L. Mistelis & P.P. Viscasillas, UN Convention on Contracts for the International Sale of Goods 27, 45 (Bloomsbury Publishing 2011).

⁹ United Nations Convention on Contracts for the International Sale of Goods, 1980, Art. 1(2), Acts of United Nations, 1980 (UN).

¹⁰ 3 F. Ferrari, PIL and CISG: Friends or Foes? 3 (University of Pittsburgh Press 2010).

¹¹ P. Schlechtriem, Requirements of Application and Sphere of Applicability of the CISG, 36(4) VUWLR 781, 781-784 (2005).

d. Effect of the rules of private international law

Article 1(1)(b) of the CISG presents an interesting aspect of its application. It states that the Convention applies "when the rules of private international law lead to the application of the law of a Contracting State." There has been some debate about whether this provision, when the forum itself is a contracting state, directly applies the CISG or designates the CISG as part of the foreign law to be applied. One viewpoint, as articulated by Schlechtriem & Schwenger, argues that if the forum state is a CISG Contracting State, the Convention is not treated as foreign law but as law created by an international convention and enacted by the forum State as its own law.¹² In this interpretation, paragraph (b) does not require the forum state to give effect to its private international law rules at all. The alternative interpretation, which is believed to be the correct one, views paragraph (b) as a simple reference to the choice of law rules of the forum. According to this interpretation, the forum must apply the CISG when its choice of law rules points to the law of a contracting state, and it does so in the same manner as the foreign court would apply it. This interpretation aligns with the wording of paragraph (b), which calls for the "application" of the law of the contracting state, indicating that the forum's choice of law rules should be followed. The distinction between these two interpretations becomes significant in cases where party autonomy in choosing the applicable domestic law can be constrained, particularly in countries where conflict of law rules are considered mandatory. For example, in Brazil, Article 9 of the Introductory Law to Provisions under Brazilian Law dictates that a judge must apply the law of the place where the parties entered into the contract (*lex loci contractus*) when they are present, or the law of the jurisdiction where the offer was made when they are not in each other's presence (*contract inter absentes*), such as in email communications. The interpretation of Article 1(1)(b) as advanced in this discussion could potentially lead to a more limited application of the CISG by Brazilian courts compared to courts in other member states. In cases governed by Brazilian conflict of laws rules, which prioritize extrinsic criteria over party autonomy, the law of a non-contracting state might apply instead of the CISG. It's important to note that the distinction between these interpretations also comes into play when the CISG is not yet in force in the foreign contracting state. In such cases, following the forum's choice of law rules would mean that the CISG should not be considered part of the foreign governing law. This is especially relevant in situations where the contracting state has entered a reservation to paragraph (b) under Article 95, indicating that it will not be bound by this paragraph. Several countries, including the United States and China, have made such reservations. It's worth noting that an Article 95 reservation

¹² F. Ferrari, *PIL and CISG: Friends or Foes?* 42 (University of Pittsburgh Press 2010).

does not necessarily prevent the courts of a reservation country from applying Article 1(1)(b). The reservation merely gives them the option not to apply it. Courts in reservation states have respected party autonomy when parties have expressly agreed to the CISG or the law of a CISG contracting state, even when one party's place of business is in a non-member state.¹³ The question arises about whether the CISG should be considered part of the law of an Article 95 reservation state if the forum's private international law rules lead to the application of the law of an Article 95 reservation state. The CISG Advisory Council argues that the Convention still applies in such cases, as the Article 95 declaration does not affect the declaring state's status as a "Contracting State." However, some authors contend that when the forum's private international law rules lead to the application of the law of an Article 95 CISG reservation state, the court should apply the domestic law of that reservation state without invoking the CISG. They argue that the law referred to by the forum's choice of law rules should be applied in the same way as a judge in that state would apply their domestic law, which, in the case of a reservation state, means not applying the CISG. In the author's view, the reasoning put forth by the CISG Advisory Council is persuasive. Article 1(1)(b) explicitly states that the Convention applies when the forum's private international law rules point to the law of a Contracting State. It specifies "this Convention," meaning the CISG itself, should be applied in such cases, irrespective of whether the contracting state has made an Article 95 declaration. This interpretation aligns with the intent of the CISG to create uniformity in international sales law.

e. Non-Contracting States

Since the CISG is an international treaty that only applies among contracting state parties, a non-contracting state's court is not obligated to consider an Article 95 reservation. Whether a non-contracting state will apply the CISG when its choice of law rules indicates the law of a contracting state depends on how the CISG is treated within the applicable law of that non-contracting state. If the applicable law recognizes the CISG as part of its legal framework, the non-contracting state's forum typically follows its own choice of law rules and gives effect to the CISG.¹⁴ This approach is consistent with the rejection of renvoi in contract law because it doesn't involve the foreign forum's choice of law rules; rather, it depends on substantive law considerations.¹⁵ For example, a case in point is the Brazilian Superior Court of Justice's decision in the *Atecs v. Rodrimar* case,

¹³ *Japan Taiping v. Jiangsu Shuntian*, Jiangsu Higher People's Court, 2001, Case No. 011 (2001);

Japan Xingsheng v. Ningxia Capital Steel, Ningxia Huizu Higher People's Court, 2002, Case No. 003 (2002).

¹⁴ 3 F. Ferrari, *PIL and CISG: Friends or Foes?* 20 (University of Pittsburgh Press 2010).

¹⁵ 3 F. Ferrari, *PIL and CISG: Friends or Foes?* 20 (University of Pittsburgh Press 2010).

which concerned an enforcement proceeding for an arbitral award. The court held that the inclusion of a convention incorporated into Swiss law, like the CISG, does not violate the boundaries of the arbitration clause or Brazilian public policy for recognition purposes. According to Brazilian law, a treaty or convention ratified by a contracting state is treated similarly to national law in that country. To ensure that the CISG applies to their dispute, parties may consider selecting a forum that is a contracting state, as this increases the likelihood of the CISG being the applicable law.¹⁶

f. Clause in contract to opt for CISG

A related question concerns the impact of parties directly choosing the CISG as the governing law when the conditions of Article 1(1)(a) are not met, and the otherwise applicable law is not that of a contracting state. In most legal systems, courts are obligated to identify and apply the law of a specific state.¹⁷ Since the CISG is essentially a set of legal rules, unless it is part of the applicable law, a direct choice of the CISG might not typically be an effective choice of law in these situations. However, this doesn't imply that the choice of the CISG can be entirely disregarded. Instead, the CISG should be incorporated into the parties' contract to the extent allowed by the applicable law. This process of "incorporation" takes place within the framework of the applicable law's contract law. For instance, in a dispute governed by English law, an English court would respect a direct choice of the CISG to the extent that its rules do not conflict with fundamental mandatory provisions of English law—those provisions that parties are unable to contract out of. The pro-CISG choice approach not only upholds party autonomy but also aligns with the views of the delegates at the diplomatic conference, who believed that party autonomy should suffice for parties to opt into the CISG. For parties who want to ensure that their transactions are governed by the CISG, the most secure option is to select the law of a contracting state, possibly accompanied by a direct choice of the CISG. This clarifies that the parties intend to include the CISG in their contract and are not seeking to exclude it, especially when the forum is not a contracting state.

¹⁶ 13 T.K. Graziano, *The CISG before the Courts of Non-Contracting States? Take Foreign Sales Law as You Find It* 165 (European Law Publishers 2011).

¹⁷ *Beximco Pharmaceuticals Ltd v. Shamil Bank of Bahrain* [2004] EWCA Civ 19 [2004].

g. Clause in contract to opt out of CISG

Article 6 of the CISG is a provision that offers parties the ability to exclude or, within certain limits, deviate from the application of the Convention. This provision operates at two levels:¹⁸

- i. **Choice of Law Level:** First, it allows parties to exclude the CISG's application by choosing the law of a non-contracting state, following the forum's principle of party autonomy.
- ii. **Substantive Level:** Second, it permits parties to remove the CISG from governing their contract within the framework of the applicable law.

Regarding the aspect of Article 6 that deals with choice of law, its primary purpose appears to be to prioritize the forum's rules on party autonomy. It doesn't grant parties the authority to select the applicable law themselves. The unilateral choice of law rule in Article 1(1)(a) is not activated when parties opt for the law of a non-contracting state as per the forum's choice of law rules. Some have argued that the exclusion of the CISG should still be determined by Articles 14-24 of the Convention.¹⁹ However, it's debatable whether the CISG is even applicable to choice of law agreements, which are typically considered separate from the underlying sales contract.²⁰ There is uncertainty as to whether Article 6 was designed to bifurcate the law governing the choice of law agreement in this manner, potentially conflicting with the forum's choice of law rules. The prevailing opinion suggests that the indirect exclusion of the CISG through the choice of law of a non-contracting state is not regulated by the CISG's contract rules. On the substantive level, Article 6 becomes particularly significant. Issues can arise when parties have not clearly expressed their intention to exclude the CISG.²¹ For example, it remains an open question whether explicitly choosing the law of a contracting state can be interpreted as an implied exclusion of the CISG.²² Additionally, courts and arbitral tribunals have grappled with the situation where parties litigate a dispute solely based on domestic law even though the CISG is applicable to the dispute. It is unclear whether it should be the CISG or the relevant national law that determines this question.²³ The most prudent approach for parties is to explicitly agree on whether they intend to include or exclude the CISG to avoid ambiguity and disputes.

¹⁸ S. Kröll, L. Mistelis & P.P. Viscasillas, UN Convention on Contracts for the International Sale of Goods 103-104 (Bloomsbury Publishing 2011).

¹⁹ 3 F. Ferrari, PIL and CISG: Friends or Foes? 104-105 (University of Pittsburgh Press 2010).

²⁰ Huber & Mullis, The CISG: A New Textbook for Students and Practitioners 61 (European Law Publishers 2007).

²¹ 3 F. Ferrari, PIL and CISG: Friends or Foes? 103-104 (University of Pittsburgh Press 2010).

²² J. Fawcett, J. Harris & M. Bridge, International Sales in the Conflict of Laws 683-684 (Oxford University Press 2005).

²³ Huber & Mullis, The CISG: A New Textbook for Students and Practitioners 63 (European Law Publishers 2007).

CHAPTER III: APPLICATION IN ARBITRATION

a. Introduction

For parties who find their domestic legal system too restrictive and want to ensure that their choice of non-national legal rules is upheld, arbitration can be a valuable alternative to litigation in domestic courts.²⁴ In some jurisdictions, arbitration is the standard method for resolving commercial disputes, and it's increasingly chosen even in countries like the United Kingdom and Germany, where civil litigation in commercial matters has been common. Even sectors that traditionally preferred litigation, such as finance, have turned to arbitration to resolve disputes.²⁵ One significant advantage of international arbitration is that it operates independently of domestic legal systems.²⁶ The choice of law rules applicable to the merits in arbitral disputes may differ from those applied by courts.²⁷ Most importantly, parties who opt for arbitration generally have more autonomy and flexibility than those who go to court. International arbitration is built on the foundation of contract. Unlike courts, arbitral tribunals do not automatically apply the substantive law of the seat of arbitration. Instead, the seat of arbitration determines the *lex arbitri*, which, in turn, governs the procedural aspects of international arbitration, including the rules for determining the applicable law to the substance of the dispute.²⁸ This greater degree of party autonomy can be seen, for example, in Section 46 of the UK's Arbitration Act 1996, which allows parties to agree to submit their dispute to considerations other than the law of a specific country. Similarly, Article 21(1) of the ICC Rules states that "the parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute."²⁹ Parties who choose arbitration as their preferred method of dispute resolution can, therefore, directly select the CISG or soft-law principles like the UNIDROIT Principles as the law governing their contract.³⁰ In cases where parties haven't specified an applicable legal framework for their contract, arbitrators, unlike judges, have more freedom to determine the applicable substantive law. Once again, the ICC Rules provide a good example of this discretion. They state in Article 21(1) that "In the absence of any

²⁴ 2 G. Born, *International Commercial Arbitration* 2661 (Kluwer International, Netherlands 2014).

²⁵ Richard Fentiman, Guest Editorial: Fentiman on "Private International Law and the Downturn", *Conflict of Laws . net* (Sept 14, 2023, 12:39 PM), <https://conflictoflaws.net/2010/guest-editorial-fentiman-on-private-international-law-and-the-downturn/>.

²⁶ 2 G. Born, *International Commercial Arbitration* 1903 (Kluwer International, Netherlands 2014).

²⁷ 3 L.W. Newman & R D Hill, *The Leading Arbitrators' Guide to International Arbitration* 437, 442-443 (Juris Publishing 2014).

²⁸ *Sapphire International Petroleum Limited v. National Iranian Oil Company*, (1967) 35 ILR 136.

²⁹ 5 N. Blackaby et al., *Redfern and Hunter on International Arbitration* 3223 (Oxford University Press 2009).

³⁰ 3 L.W. Newman & R D Hill, *The Leading Arbitrators' Guide to International Arbitration* 437, 452 (Juris Publishing 2014).

such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate." This means that arbitrators have the flexibility to select the most appropriate legal rules to govern the dispute when parties haven't made a specific choice.

b. Conditions for Application

The CISG offers a neutral set of rules specifically crafted for international business transactions. Article 1 of the CISG, as mentioned earlier, defines when the CISG applies to parties in a sales contract. Concerning the application of the CISG by an arbitral tribunal, three distinct scenarios need to be addressed:

- i. **Party Choice:** In the first scenario, commercial parties willingly choose the CISG as the governing law for their sales of goods contract. In this case, an arbitral tribunal typically upholds their choice. Unlike the Rome I Regulation or many national laws, an arbitral tribunal can directly apply the CISG as the chosen law of the parties, especially when acting as amiable compositeurs or when the lex arbitri allows or even mandates the application of legal rules rather than a specific domestic law.³¹
- ii. **Default Application:** In the second scenario, when the parties haven't agreed on an applicable governing law for their relationship in an international sale of goods transaction, the CISG can still be validly applied by an arbitral tribunal. However, there is controversy surrounding the circumstances in which an arbitral tribunal can and should apply the CISG in the absence of a specific agreement.³²
- iii. **Impact of Domestic Law Choice:** Finally, the question arises regarding how the parties' selection of an applicable domestic law affects the application of the CISG by an arbitral tribunal.

c. Applicable law not provided in the Agreement

Certain arbitration rules grant arbitrators substantial discretion when parties have not specified a domestic law applicable to their contract. For instance, Article 28(2) of the UNCITRAL Model Law slightly restricts the arbitral tribunal's discretion by specifying that "the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable."

³¹ 2 St. Vogenauer, Commentary on the UNIDROIT Principles 110 (Oxford University Press, 2015).

³² Schwenzer, Y. Atamer & P. Butler, Current Issue in CISG and Arbitration 59 (Eleven Publishing 2013).

Article 1(1)(a) CISG

Article 1(1)(a) of the CISG states that the CISG applies when parties to a sales contract have their businesses in different member states, and this provision can be interpreted in several ways when it comes to arbitration.³³ One view is that Article 1(1)(a) of the CISG doesn't apply in the context of arbitration. This interpretation is based on the understanding that Article 1(1)(a) is an international treaty binding only states and their organs, particularly courts, but not international arbitral tribunals.³⁴ However, another perspective, which the author supports, suggests that the CISG can indeed be applied by an arbitral tribunal, despite it being an international treaty. In fact, it can be argued that the application of Article 1(1)(a) is broader in international arbitration than in litigation.³⁵ In litigation, Article 1(1)(a) can only be applied if the forum state is a CISG member state. Arbitral tribunals, as mentioned earlier, are generally not bound by the law of the forum state.³⁶ From this viewpoint, Article 1 of the CISG, including Article 1(1)(a), can be seen as a unilateral conflict of laws rule. This approach aligns with the idea that using international conflict of law rules to determine the applicable law in arbitration can help avoid the complexities of national legal systems and promote neutrality, efficiency, predictability, and effective international enforcement.³⁷ The CISG, like international arbitration, provides uniform, neutral international principles for international sales of goods transactions, which is often desired by the business world. Moreover, if one considers the CISG as a self-executing international treaty, then an international arbitral tribunal, as part of the international legal order, is bound by the CISG. Law is the foundation of international arbitration, and the legitimacy and effectiveness of the arbitral process rely on it. In essence, the CISG, as part of the international legal order, should not be ignored by an international arbitral tribunal when parties to a sales contract have their businesses in different CISG member states. It's worth noting that parties can choose to opt out of the CISG if they don't want it to apply to their sales of goods transaction.³⁸ This analysis takes into account the Vienna Convention on the Law of Treaties (1969), which stipulates that international treaties bind only the contracting states that are parties to those treaties.³⁹ Businesses in CISG member states are inherently part of the legal order of their respective member states and,

³³ P. Schlechtriem, Requirements of Application and Sphere of Applicability of the CISG, 36(4) VUWLR 781, 784 (2005).

³⁴ 3 F. Ferrari, PIL and CISG: Friends or Foes? 22 (University of Pittsburgh Press 2010).

³⁵ Schwenzer, Y. Atamer & P. Butler, Current Issue in CISG and Arbitration 59, 65 (Eleven Publishing 2013).

³⁶ Janssen & M. Spilker, CISG in the World of International Commercial Arbitration, 77 *RabelsZ* 131,131,138,139 (2013).

³⁷ 2 G. Born, International Commercial Arbitration 2651 (Kluwer International, Netherlands 2014).

³⁸ 2 G. Born, International Commercial Arbitration 2657 (Kluwer International, Netherlands 2014).

³⁹ Janssen & M. Spilker, CISG in the World of International Commercial Arbitration, 77 *RabelsZ* 131,131,137 (2013).

consequently, part of the international legal order as well.⁴⁰ This aligns with international human rights treaties and neutral international principles for international sales of goods transactions⁴¹, which is consistent with the intention of parties using international arbitration as their preferred method of dispute resolution.⁴²

Article 1(1)(b)

It is widely accepted that Article 1(1)(b) can be applied by an international arbitral tribunal without controversy.⁴³ Article 1(1)(b) directs the application of the CISG when the private international law rules of the forum lead to the application of the law of a CISG member state that incorporates the CISG. Article 1(1)(b) is not a choice of law rule; rather, it grants the CISG domestic law status and prevents any potential renvoi. The directive provided in Article 1(1)(b) to an arbitral tribunal is the same as that for any court: if the private international law rules applied by the arbitral tribunal lead to the law of a CISG member state, the CISG will be applicable.⁴⁴ It's important to note that, in the context of Brazilian law, it is recognized that arbitral tribunals are not bound by the mandatory nature of Brazilian conflict of law rules.

Rules of Law

In addition to the analysis of Articles 1(1)(a) and 1(1)(b) as discussed earlier, many arbitration rules provide the arbitral tribunal with the authority to select the applicable law by permitting the direct choice of 'rules of law' that the tribunal deems 'appropriate.' Consequently, even if one does not adhere to the analysis presented earlier for the reasons outlined therein, a tribunal entrusted with such authority should directly apply the CISG.⁴⁵

Parties choose to be subjected to a domestic law

Given the broad mandate provided by some arbitration laws and rules, a question arises regarding whether an arbitral tribunal is free to apply the CISG even in cases where the parties have explicitly chosen a domestic law. The applicability of the CISG depends on the choice made by the parties:

⁴⁰ Schwenger & P. Hachem, *The CISG – Successes and Pitfalls*, 57 *Am. J. Comp. Law* 457, 461-462 (2009).

⁴¹ J. Crawford, *Brownlie's Principles of International Law* 24-25 (Oxford University Press 2012).

⁴² Schwenger, Y. Atamer & P. Butler, *Current Issue in CISG and Arbitration* 375 (Eleven Publishing 2013).

⁴³ Schwenger, Y. Atamer & P. Butler, *Current Issue in CISG and Arbitration* 191 (Eleven Publishing 2013).

⁴⁴ Janssen & M. Spilker, *CISG in the World of International Commercial Arbitration*, 77 *RabelsZ* 131, 131, 139 (2013).

⁴⁵ Janssen & M. Spilker, *CISG in the World of International Commercial Arbitration*, 77 *RabelsZ* 131, 141 (2013).

- i. If the parties have chosen the domestic law of a CISG member state, the CISG is applicable as part of that country's domestic law, as per Article 1(1)(b), unless the parties have expressly excluded it.⁴⁶
- ii. If the parties have selected the domestic law of a non-member state of the CISG, this choice generally implies that the parties have excluded the applicability of the CISG.⁴⁷

However, an arbitral tribunal can still apply the CISG even when the parties have chosen the domestic law of a non-member state if the tribunal has the authority to act *ex aequo et bono*. To apply the CISG in such a scenario, the tribunal would need to find that there is a gap in the chosen domestic law that cannot be filled from within that domestic legal system.

CHAPTER IV: SUMMARY AND CONCLUSION

Summary

While the CISG has not yet achieved the status of customary international law, it has been ratified by a significant number of states and stands as one of the most successful international commercial conventions. In cases where the parties have not explicitly chosen an applicable domestic law, arbitral tribunals should apply the CISG, unless there is a clear indication that the parties intended not to apply it or the *lex arbitri* mandates the selection of a national law. The CISG offers a set of neutral rules designed with international business transactions in mind, and the presumption should be that, in the absence of contrary indications, the CISG is sufficient to govern the contractual relationship between the parties.

Conclusion

Article 1 of the CISG serves as the entry point to the convention. Parties involved in international trade should pay particular attention to its requirements. If the parties have their businesses located in different member states, the CISG will automatically apply unless they have expressly excluded its application. Unfortunately, parties and their legal representatives are often unaware of the CISG's automatic applicability in such cases. Anecdotal evidence suggests that in some regions, domestic contract law is frequently applied even when the CISG should be the applicable law. Choosing arbitration as the dispute resolution mechanism provides a broader scope for the application of the CISG to various types of contracts.

⁴⁶ P. Schlechtriem & P. Butler, *UN International Sale of Goods 1.6* (Springer, Heidelberg 2009).

⁴⁷ P. Schlechtriem & P. Butler, *UN International Sale of Goods 1.6.1* (Springer, Heidelberg 2009).