GOING HYBRID: HOW HYBRID CHOICE OF LAW CLAUSES CAN SAVE THE CISG

Dr. Yehya Badr[*]

INTRODUCTION

This Article examines the use of a hybrid choice of law clause coupled together with an arbitration clause within international contracts of sale to overcome the shortcomings of the United Nations Convention on Contracts for the International Sale of Goods ("CISG" or "Convention"), making it relevant to international trade. This Article argues that the CISG suffers from uniformity issues resulting from unclear scope of application, lack of inclusiveness caused by internal and external gaps within the CISG's provisions, and undefined freedom of choice between opting in or out of the CISG, which all hinder international trade. On the other hand, this Article examines the choices that the parties to an international contract of sale can choose as a remedy to the CISG's shortcomings, which include: (1) Choosing a national domestic law to govern the contract, an option marred by the difficulties associated with applying foreign law by national courts; (2) Choosing non-state rules to govern the contract such as the Incoterms and the UNIDROIT Principles of International Commercial Contracts ("UPICC"), which are neither capable of overcoming the CISG shortcomings nor are considered an acceptable choice of law under most national legal systems; and (3) finally, a hybrid choice of law that combines the application of the CISG with a domestic law coupled with an arbitration clause, since most national arbitration laws give the parties full freedom to choose the rules governing their contract, with certain restrictions, and allow the parties to overcome the CISG shortcomings with rules of their choice, enabling the CISG to remain relevant in international trade.

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[*] SJD Tulane Law School, LLM Cornell Law School, LLB Faculty of Law, Alexandria, Egypt. Currently the acting Vice Dean and Head of Department at the College of Law, University of Business & Technology, Jeddah, Saudi Arabia on secondment from the Faculty of Law, Alexandria University, Egypt. I dedicate this article to the memory of my father Dr. Ikram Badr (10/24/1947–2/25/2022).

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I. THE CISG SHORTCOMINGS

Despite the great efforts made by the CISG drafters' goal to lay down a comprehensive regulation for international contracts of sale, the fact is that the CISG suffers from several shortcomings that have hindered it from achieving that goal. These shortcomings include the CISG's lack of uniformity due to how the rules governing the CISG's scope of application were drafted and the CISG's inability to be an inclusive regulation of international contracts of sale caused by the internal and external gaps within the CISG's rules. Finally, there is the absence of clear choice of law rules that define the parties' scope of freedom to opt out or into the CISG, which hinders the parties' ability to determine the rules governing their contract beforehand.

A. The Uniformity Issues

In this section, I examine the reasons why the CISG is not applied uniformly to all international contracts of sale by the national courts. There are several factors behind this unfortunate situation. First, the convention's articles on its scope of application failed to provide clear rules on when the CISG should be applied. Second, the CISG adopted a limited criteria determining when a contract of sale is governed by the CISG that resulted in excluding a considerable number of contracts of sale from the CISG's scope of application. Third, the CISG's lack of definition in several crucial articles governing the CISG's scope of application opened the door for multiple and contradicting national interpretations of the CISG that prevented the uniform application of the CISG by national courts. Finally, reservations made by several states on certain articles of the CISG or the application of the CISG as a whole to certain international contracts of sale led to the emergence of multiple domestic versions of the CISG.

1. Non-uniform Scope of Application

Article 1 of the CISG defines its scope of application. It states that the CISG will be applicable to the contract sale if the seller and the buyer's places of business are in different states when those states are contracting states or when the forum's choice of law rules lead to the application of the law of a

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contracting state. However, Article 1 has not succeeded in establishing uniform application of the CISG for several reasons.

First, the text of the CISG in French uses the term "établissement" while the Arabic and English texts use the term "place of business." This has led to variation in the manner the courts apply Article 1(a) since the term "place of business" puts emphasis on the place where the parties exist when they concluded the contract of sale, while the term "établissement" revolves around the physical establishment, such as the factory or workshop involved in concluding, and later on enforcing the contract, rather than the place where the seller and the buyer carry out their business.[1] In contrast, the Serbian text of the CISG uses the term "seat," which refers to the seat of a party, a concept that is quite different from "établissement."[2]

Second, Article 1(b) of the CISG relies on the forum's choice of law rule as a conduit for applying the convention to contracts of sale that has not fulfilled the requirements under Section (a). However, choice of law rules vary considerably from one state to another.[3] For example, contracts of sale have a specific choice of law rule within the European Choice of Law regime under the Rome I regulation, while Egypt and several other Arab states deal with contracts by a generic choice of law rule.[4] Furthermore, Article 1(b) will lead to the application of CISG to contracts of sale of a purely domestic nature, which by its nature, does not arise out of a choice of law issue,[5] since Article 1 does not require the movement of goods across international borders

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[1] *See* MOSHEN SHAFIQ, اتفاقية الأمم المتحدة بشأن البيع الدولي للبضائع :دراسة في القانون التجاري [THE UNITED NATIONS CONVENTION ON INTERNATIONAL SALE OF GOODS: A STUDY IN COMMERCIAL LAW] 56 (1988).

[2] *See* Vladimir Pavić & Milena Djordjević, *Application of the CISG Before the Foreign Trade Court of Arbitration at the Serbian Chamber of Commerce—Looking Back at the Latest 100 Cases*, 28 J.L. & COM. 1, 6 (2009).

[3] *See* Pilar R. Viscasillas, *Applicable Law, the CISG, and the Future Convention on International Commercial Contracts*, 58 VILL. L. REV. 733, 747 (2013).

[4] See Law No. 131 of 1948 (Civil Code), *al-Jarīdah al-Rasmīyah*, vol. 29 July 1948, art. 19 (Egypt); Law No. 22 of 2004 (Civil Code, *al-Jarīdah al-Rasmīyah*, vol. 11, 8 Aug. 2004, art. 27 (Qatar); Sultani Decree No. 29 of 2013 (Civil Transactions Code), *al-Jarīdah al-Rasmīyah*, vol. 1012, 12 May 2013, art. 20 (Oman).

[5] *See* James E. Bailey, *Facing the Truth: Seeing the Convention on Contracts for the International Sale of Goods as an Obstacle to a Uniform Law of International Sales*, 32 CORNELL INT'L L.J. 273, 301 (1999).

Vol. 41, No. 1 (2022) ● ISSN: 2164-7984 (online) ● ISSN 0733-2491 (print)
DOI 10.5195/jlc.2022.251 ● http://jlc.law.pitt.edu

or the accomplishment of acceptance and offer in different states as a condition precedent for applying the CISG.[6]

Third, several member states, such as China[7] and the United States ("U.S."),[8] opted to use their right under Article 95 and to limit the application of the CISG to contracts of sale made by parties who have their place of business in two different contracting states. To make matters worse, Article 95 of the CISG did not state the effects of the reservation on the law governing the contracts of sale that do not fulfill the criterion of Article 1(a). Should the courts of a reserving state apply the national law indicated by its domestic choice of law rules, even if the state in question is a contracting party?[9] Or, should the court of a reserving state apply the CISG if its domestic choice of law rules directed those courts to apply the law of a contracting state?[10] This is a question that has been left with no answer.

Finally, the CISG allows the personal knowledge of the parties to interfere with the convention's scope of application.[11] Article 1(2) clearly states that if one party to the contract of sale is unaware that the other party's place of business is located abroad, which triggers the application of the CISG according to Article 1(1)(a), then the convention will not apply. This means that the application of the CISG hinges on a subjective criteria, the parties' awareness of the international character of their contract, that the court must ascertain on a case-by-case basis.[12]

Therefore, the CISG's scope of application is not determined by a single choice of law rule because Article 1 is no longer a well-defined choice of law capable of defining the convention's scope of application in a precise and predictable manner as envisaged by the CISG's drafters.[13] On the contrary,

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[6] *See* Christopher Berrasconi, *The Personal and Territorial Scope of the Vienna Convention on Contracts for the International Sale of Goods (Article 1)*, 46 NETH. INT'L L. REV. 137, 142 (1999).

[7] *See* Chez Weizuo, *The Conflict of Laws in the Context of the CISG: A Chinese Perspective*, 20 PACE INT'L L. REV. 115, 119 (2008).

[8] See Amin Dawwas & Yousef Shandi, *The Applicability of the CISG to the Arab World*, 16 UNIF. L. REV. 813, 830 (2011).

[9] *See* Ibrahim Gül, *Freedom of Contract, Party Autonomy and Its Limit Under CISG*, 6 HACETTEPE U. L. REV. 77, 94–95 (2016).

[10] *See* Marlane Wethmar-Lemmer, *Applying the CISG via the Rules of Private International Law: Articles 1(1)(b) and 95 of the CISG—Analysing CISG Advisory Council Opinion 15*, DE JURE 58, 65 (2016).

[11] *See* Dawwas & Shandi, *supra* note 8, at 819.

[12] *See* Berrasconi, *supra* note 6, at 148.

[13] *See id.* at 150.

Vol. 41, No. 1 (2022) ● ISSN: 2164-7984 (online) ● ISSN 0733-2491 (print)
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we have several versions of Article 1 depending on the language of the text used by the court, and several versions of the CISG depending on the reservations made by various contracting states. Each version will determine the CISG's scope of application in a manner that might differ than the other version. In addition, the circumstances of the case might drive the court to disregard the CISG under the excuse of protecting the parties' justified expectations.

2. Limited Criteria for Internationality of the Contract of Sale

The CISG determines the internationality of the contract of sale through the parties' place of business without regard to the connections between the contracting state and the contract or with the parties to the contract.[14] This approach is considered by some scholars as direct and objective.[15] Nonetheless, this is not the approach used by the majority of the domestic legal systems to determine whether or not a contract of sale is international. It is true that some national systems, such as China, consider the contract to be international if one party to the contract is domiciled abroad or is a foreigner.[16] However, most domestic legal systems link the international character of a contract of sale to the place where the contract is concluded or performed, either by itself or in relation to another transaction.[17] If that place was abroad, then the contract will be considered an international one, which gives rise to a conflict of laws situation.[18] This means that a contract of sale might be considered international by the CISG while it is considered as a domestic one under the domestic legal system and vice versa.

Another side effect of the CISG's internationality criterion is that it excludes a wide array of contracts of sale from the convention's scope of application, because the parties share their place of business in the same state, or one party to the contract has its place of business in a non-contracting state. Therefore, the court will have to resort to its domestic choice of law rules to

[14] *See* Dawwas & Shandi, *supra* note 8, at 819.
[15] *See* SHAFIQ, *supra* note 1, at 66.
[16] *See* Weizuo, *supra* note 7, at 117.
[17] Carolina Saf, *CISG—A Uniform Law Within the Sphere of Conflict of Laws, in* CISG Part II Conference—Stockholm, 4–5 September 2008, 99 (Jan Kleineman ed.) (Stockholm Centre for Commercial Law 2009).
[18] *See id.*

determine the law governing the contract of sale and despite being an international contract of sale, the contract will be governed by a national law and not the CISG,[19] which defeats the Convention's purpose of having international contracts of sale governed by a uniform set of rules.

3. Lack of Definitions

The provisions of the CISG do not define the concepts of "contract of sale" or "goods," despite the fact that the main objective of the convention is to provide uniform rules for international contracts of sale of goods. One noted Egyptian scholar claimed that there was no need for inserting a definition for contract of sale in the CISG because most jurisdictions agree that a contract of sale is a contract whereby the seller transfers the ownership of the goods in exchange for money.[20] However, the lack of definitions has caused confusion about the application of the CISG. For instance, some scholars have debated about whether the term "contract of sale" should include financing arrangements such as lease or buy-lease, or if the term should be confined to the more traditional forms of sale.[21]

On the other hand, Article 3 of the CISG has explicitly excluded contracts where the buyer provides the seller with the "substantial part of the materials necessary" for the manufacture of the goods and contracts where the seller's preponderant part of the obligations consists of supplying labor and/or services. Yet, the absence of a definition for "contracts of sale" makes determining when a contract of sale should be excluded according to Article 3 a difficult task.[22] The term "substantial" has widely different meanings in English; it could mean "material" or "considerable in amount, value or worth."[23] Additionally, it is not clear whether the term "preponderant" is clear is referring to cost, price of labor, value of labor, and/or service.[24]

For example, suppose a contract concluded between the seller and buyer for manufacturing a medicine, and the contract included a clause that obliges

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[19] *See* Franco Ferrari, *PIL & CISG: Friends or Foes?*, 35 J.L. & COM. 45, 60 (2012).
[20] *See* SHAFIQ, *supra* note 1, at 71.
[21] *See* MARTIN DAVIES & DAVID SNYDER, INTERNATIONAL TRANSACTIONS IN GOODS: GLOBAL SALES IN COMPARATIVE CONTEXT 54 (2014).
[22] *See* Bailey, *supra* note 5, at 307.
[23] *See id.* at 308.
[24] *See id.* at 309.

Vol. 41, No. 1 (2022) ● ISSN: 2164-7984 (online) ● ISSN 0733-2491 (print)
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the buyer to supply the seller with a key ingredient, that represents less than 10% of the mixture used in the manufacturing process. Should that contract be excluded from CISG's scope of application because the key ingredient was supplied by the buyer?[25] Or, should it be considered as a contract of sale under the CISG since the seller will provide the remaining 90% of ingredients necessary for making the medicine, without which the key ingredient supplied by the buyer would be of no use? There is no clear answer for that question, and it would be left to the domestic judge to evaluate the hierarchy of the functions within the contract to determine if it is a contract of sale or a contract for services.[26]

In fact, the CISG's lack of definition for what constitutes "goods" is also an impediment against the uniform application of the Convention. For example, the English text of the CISG allows the application of the convention to contracts involving water, gas, and software,[27] while the Arabic text of the CISG does not support that conclusion because the word بضائع refers to tangible items.[28] Even with the English text of the CISG, there is the issue of whether "things that are to be separated from land such as crops, minerals and timber," should be treated as "goods" under the CISG, because unlike the Uniform Commercial Code ("UCC"), the CISG does not address this issue in any manner.[29]

4. Domestic Variations of CISG

Although the main aim of the CISG is to unify the rules governing international contracts of sale, there are several versions of the CISG depending on the reservations made by various contracting states. In total, about 30% of the states that have adopted the CISG have made reservations

[25] *See* SHAFIQ, *supra* note 1, at 72.

[26] *See* Jonatan Echebarría Fernández, *Jurisdiction and Applicable Law to Contracts for the Sale of Goods and the Provision of Services Including the Carriage of Goods by Sea and Other Means of Transport in the European Union*, 11 CUADERNOS DE DERECHO TRANSNACIONAL [NOTEBOOKS OF TRANSNATIONAL LAW] 58, 60–62 (2019).

[27] Saf, *supra* note 17, at 90.

[28] *See* DAVIES & SNYDER, *supra* note 21, at 48.

[29] *Id.* at 50.

to opt out of certain provisions.[30] Some states such as the Scandinavian states, prefer to apply their regional or domestic rules on international contracts of sale instead of the CISG.[31] This means that the text of the CISG applied by the domestic court will defer from one state to another. The court in Egypt will apply a different text than a court in Norway or Sweden, which undermines the CISG's purpose of achieving uniformity of results and creates uncertainty.[32]

To make matters worse, in some countries, such as Australia and the United States, there has been a debate on how much the CISG should displace the local rules on contracts of sale.[33] For instance, several U.S. federal courts have ruled that the application of CISG does not preempt state law completely, which allowed the court to consider application of state laws' rules on promissory estoppel and even the UCC.[34] Thus, those courts applied a mixture of CISG and American common law rules to international contracts of sale, creating a unique version of the CISG whose content will differ from one U.S. state to another.[35]

B. Lack of Inclusiveness

A second major shortcoming of the CISG is its inability to be an exclusive source of rules that govern the international contracts of sale because of internal and external gaps within the CISG. The internal gaps are issues that the CISG should have provided a rule to govern but were left unaddressed, despite being within the Convention's scope of application.[36] External gaps are issues that the CISG has expressly excluded from its scope of application such as the validity of the contracts of sale, the parties' capacity and the proprietary effects of the contract. Regrettably, the CISG did not provide a clear guide for filling those gaps, but instead it provided for

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[30] Christopher Sheaffer, *The Failure of the United Nations Convention on Contracts for the International Sale of Goods and a Proposal for a New Uniform Global Code in International Sales Law*, 15 CARDOZO J. INT'L & COMP. L. 461, 464 (2007).

[31] *See* Saf, *supra* note 17, at 111–12.

[32] *See id.* at 112–13.

[33] *See* Andrea Arastasi et al., *An Internationalist Approach to Interpreting Private International Law? Arbitration and Sales Law in Australia*, 44 MELB. U. L. REV. 1, 35–45 (2020).

[34] *See* Caterpillar, Inc. v. Usinor Idusteel, 393 F. Supp. 2d 659, 676 (N.D. Ill. 2005); Geneva Pharms. Tech. Corp. v. Barr Lab'ys, Inc., 201 F. Supp. 2d 236, 287 (S.D.N.Y. 2002).

[35] *Id.*

[36] DAVIES & SNYDER, *supra* note 21, at 55.

Vol. 41, No. 1 (2022) ● ISSN: 2164-7984 (online) ● ISSN 0733-2491 (print)
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using the general principles and the law governing the contract of sale to fill the internal gaps. This turned out to be an inadequate solution, leaving the national courts with no other solution for external gaps but to revert to their domestic choice of law rules or their domestic laws.

1. Internal Gaps

Although the CISG aims to regulate some aspects of international contracts of sales, it does not provide a comprehensive regulatory framework. There are internal gaps within the CISG, which are issues not addressed by the Convention, despite being within its scope.[37]

a. Delivery

Despite playing a major role in an international contract of sale and in the implementation of the CISG, "delivery" is not defined in the CISG. It is not clear from the CISG's articles on delivery if it refers only to actual delivery or if encompasses both actual and constructive delivery of the goods, as argued by some scholars.[38] Another major internal gap in the CISG's regulation of delivery exists in Article 39, which regulates the buyer's right to refuse the delivery of goods for lack of conformity.[39] Article 39 does not lay down the formal requirements for the notice for lack of conformity mandated by the Article,[40] nor does it specify when the buyer should make the notice. It simply states that the notice must be made within a "reasonable time after he has discovered it or ought to have discovered it." What constitutes a "reasonable time" is not defined in the CISG.[41]

b. Contractual Remedies

The CISG has adopted the common law remedy of anticipatory breach, which is unknown in civil law jurisdictions. However, the CISG does not

[37] *See id.*
[38] *See* SHAFIQ, *supra* note 1, at 134.
[39] *See* Pavić & Djordjević, *supra* note 2, at 36.
[40] *Id.* at 37.
[41] *See* SHAFIQ, *supra* note 1, at 155.

Vol. 41, No. 1 (2022) ● ISSN: 2164-7984 (online) ● ISSN 0733-2491 (print)
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define what constitutes a fundamental breach under Article 25 of the CISG,[42] and the absence of any mention of the time and place of the seller's and buyer's performance within the provisions of the CISG[43] will make it difficult for a court to determine whether there is a fundamental breach. Furthermore, the CISG does not specify what constitutes an "adequate assurance" which a party to the contract of sale can use to prevent the avoidance if they commit a fundamental breach of the contract.[44] Finally, the CISG does not contain a definition for "impediment" as a ground for exemption from liability under the CISG.[45]

c. Currency and Interest Rate

The CISG does not have any provisions for determining the interest rate that is due to the injured party under Article 78 of the Convention.[46] Despite being a convention for governing international contracts of sale, where the use of foreign currency is expected, there are no provisions to address the issues related to the use of foreign currency, such as the currency of account, the currency of payment, or the exchange rate used by the court, such as the breach day rule or the judgment day rule.[47] This has left the courts with no choice but to resort to their domestic rules on the issues.[48]

Courts are divided on how to determine the interest rates due to one party under the CISG. Some courts have resorted to the interest rates in their domestic laws,[49] while others have determined the interest rate through the

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[42] *See* Pavić & Djordjević, *supra* note 2, at 33.

[43] *See* Michael Bridge, *Avoidance for Fundamental Breach of Contract Under the UN Convention on the International Sale of Goods*, 59 INT'L & COMP. L.Q. 911, 913 (2010).

[44] *See* M. Gilbey Strub, *The Convention on the International Sale of Goods: Anticipatory Repudiation Provisions and Developing Countries*, 38 INT'L & COMP. L.Q. 475, 495–96 (1989).

[45] *See* SHAFIQ, *supra* note 1, at 196.

[46] Ulrich Magnus, *The Vienna Sales Convention (CISG) Between Civil and Common Law—Best of all Worlds?*, 3 J. CIV. L. STUD. 67, 94 (2010).

[47] *See* SHAFIQ, *supra* note 1, at 196.

[48] BVBA v. SARL, Tribunal De Premiere Instance, 20éme Chambre, 24 June 2016 (Geneva, Switzerland).

[49] *See* Phanesh Koneru, *The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principles*, 6 MINN. J. INT'L L. 105, 132 (1997).

law governing the contract.[50] In fact, a Swiss court went as far as suggesting that the interest rate is determined by the seller's law if the seller is in arrears with his obligation to pay, and the buyer's law if the buyer is in arrears with his obligation to pay the price.[51] This is a serious internal gap because the solution provided by the national systems for issues of interest and foreign currency differs from one state to another.[52]

2. Lack of Guidance for Filling Internal Gaps

The drafters of the CISG were aware of the problems caused by the internal gaps within the Convention,[53] and the solution adopted by the Convention in Article 7 was to apply rules deducted from the general principles on which the Convention is based upon "or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law." Thus, the CISG provides us with two options for filling the internal gaps: the CISG's general principles and the law applied by virtue of the rules of private international law.

However, as I will explain in this section, this solution proved to be of little utility. As I have demonstrated, there are several internal gaps within the CISG, and this means that the CISG needs intense gap filling.[54] In addition, the CISG does not provide a uniform choice of law rule that can be used for determining a national law to fill those gaps, and resorts to the forum's choice of law rules that will lead to using various national laws to fill those internal gaps,[55] which will create more confusion in the application of the CISG.

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[50] *See, e.g.*, Chi. Prime Packers, Inc. v. Northam Food Trading Co., 320 F. Supp. 2d 702, 716 (N.D. Ill. 2004).

[51] *See* Richteramt Laufen des Kantons Berne [Judicial Office in the Canton of Berne] May 7, 1993, UNILEX, 1995 II, D.93-15 (Switz.).

[52] *See generally* Yehya Ikram Ibrahim Badr, *Choice of Law in Foreign Currency Debts: A Comparative Study*, 3 U. P.R. BUS. L.J. 186 (2012).

[53] *See* Henry Mather, *Choice of Law for International Sale Issues Not Resolved by the CISG*, 20 J.L. & COM. 155, 156–57 (2001).

[54] *See* Edoardo Ferrante, *Thirty Years of CISG: International Sales, 'Italian Style,'* 5 ITALIAN L.J. 87, 90 (2019).

[55] *See* Ferrari, *supra* note 19, at 58.

a. General Principles as a Solution for Internal Gaps

This solution presumes that the internal gaps within the CISG can be filled through deducting new rules with autonomous interpretations of the CISG by national courts and arbitral panels, the so called "four-corners approach," whereby the courts examine the provisions of the CISG to come up with new rules.[56]

Nonetheless, this solution is not very useful for several reasons. First, the technique of using "general principles to fill gaps" as suggested by Article 7(2) of the CISG is used by civil legal systems to interpret and complement the legislative rules within those systems, but this technique is not used by common law systems, where the courts rely more on the legislative history of the applicable rules and on the judicial precedents interpreting those rules.[57]

Second, as a rule, the CISG does not state, in an explicit and clear manner, the general principles that form the basis of the Convention,[58] and there is no official commentary for the CISG to rely on as a guide in the process of deducting those principles in order to forge new rules from the CISG's provisions.[59] In fact, the CISG Advisory Council is a private initiative founded in 2001, twenty years after the conclusion of CISG, and has no official standing, so its works lack any binding effect.[60] Even when the CISG states a general principle of good faith as a tenet for interpreting the convention and deducting new rules to fill the internal gaps, it remains "[an] empty pronouncement awaiting judicial decisions to give it content or unfocused aspiration which cannot be effectively applied by any court."[61]

As a result, domestic courts have resorted to various ways to fill the internal gaps. Some courts resorted to the law governing the contract according to the forum's choice of law rules directly without bothering to examine the CISG's general principles. For instance, in a dispute brought

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[56] *See* Aleksandra Jurewicz, *A Milestone in Polish CISG Jurisprudence and Its Significance to the World Trade Community*, 28 J.L. & COM. 63, 68 (2009).

[57] *See* Sheaffer, *supra* note 30, at 473.

[58] *See* Koneru, *supra* note 49, at 115.

[59] *See* Bailey, *supra* note 5, at 290.

[60] *See* Mateja Durovic, *Harmonization of Contract Law in Eastern and South-Eastern Asia: What Can Be Learned From the CISG and the ECL Experience?*, 7 GLOB. J. COMP. L. 207, 215 (2018).

[61] *See* Bailey, *supra* note 5, at 296.

Vol. 41, No. 1 (2022) ● ISSN: 2164-7984 (online) ● ISSN 0733-2491 (print)
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before a French court, the seller sold the buyer a shipment of tiles that did not contain the required levels of enamel to meet the Porcelain Enamel Institute ("PEI") 5 classification as agreed in the contract of sale.[62] The defect was not discovered until after the tiles were installed and cracks began to emerge throughout the entire premises where the tiles were used.[63] By the time the buyer managed to have the tiles examined and analyzed by a laboratory, which confirmed that the tiles did not meet the PEI 5 classification, the two-year time limit mentioned in Article 39 of the CISG had passed.[64] The issue the French Court faced was: Does the two-year time limit in Article 39 apply to instances where the buyer could not possibly have known or ought to have known of the goods lack of conformity?[65]

Instead of looking at the CISG's general principles, the French Court of Cassation stated that in the event that the text of CISG did not provide an answer, the French courts should resort to the French choice of law rules.[66] The French Court of Cassation ruled that the buyer's lawsuit against the seller concerning lack of conformity of the goods in this case was not addressed by Article 39 of the CISG and should be determined according to the applicable law, the Italian law chosen by the parties, because the general principles did not provide a solution to address the case where the buyer could not discover the lack of conformity.[67]

Some courts have resorted to international conventions related to international courts to fill the CISG's internal gaps such as the Egyptian Court of Cassation. In a recent decision, the Egyptian Court of Cassation interpreted Article 20 of the CISG in reference to the New York 2005 Convention on the Use of Electronic Communications in International Contracts to reach the conclusion that the phrase "other means of instantaneous communication" includes the use of emails and other forms of

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[62] *See* Cour de cassation [Cass.] [Supreme Court for Judicial Matters] com., Nov. 2, 2016, 14-22.114 (Fr.).

[63] *Id.*

[64] *Id.*

[65] *See id.*

[66] *Id.*

[67] *See id.*

electronic communications, despite the fact that Egypt is not a party to the New York 2005 Convention.[68]

Other courts have resorted to interpreting international conventions according to their domestic legal traditions,[69] which increases the cost of the transaction because the parties will not be able to determine beforehand how the domestic court will interpret the CISG.[70] A prime example of such "homesick courts"[71] are the U.S. courts, both federal and state. The courts in the United States tend to use the UCC commentary and case law to interpret the CISG and may give little or no regard to foreign case law on the subject.[72] Even if courts decide to interpret the CISG through an international or comparative law approach, there is no guarantee that they will reach a uniform solution because there is no common supreme court to ensure the uniform interpretation of the CISG.[73]

Third, the CISG is a rigid regulation that does not produce new rules,[74] so the number of principles and rules that can be deducted from the CISG to fill the internal gaps are limited.[75] Some issues, such as the interest rate, cannot be resolved at all by this method of gap filling.[76] In fact, some scholars are concerned that the general principles gap filling approach might lead to adopting solutions that were not envisaged by the CISG's drafters, and that a better solution is to interpret the contract of sale in question to fill the internal gaps, which entails the use of the law governing the contract.[77]

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[68] *See* Maḥkamat al-Naqḍ [Court of Cassation], case no. 2490/81 J, session of June 23, 2020 (Egypt).

[69] *See* Sheaffer, *supra* note 30, at 463.

[70] *See* Franco Ferrari, *Tendance insulaiste et lex forism malgrè UN droit uniforme de la vente* [Insuralist Tendency and Lex Forism Despite Uniform Sales Law], 2 Revue Critique De Droit International Privé [CRITICAL REV. OF PRIV. INT'L L.] 323, 332 (2013).

[71] *See* Henning Lutz, *The CISG and Common Law Courts: Is There Really a Problem?*, 35 VICTORIA U. OF WELLINGTON L. REV. 711, 719 (2004).

[72] *See, e.g.*, Marcia J. Staff, *United Nations Convention on Contracts for the International Sale of Goods: Lessons Learned from Five Years of Cases*, 6 S.C.J. INT'L L. & BUS. 1, 18 (2009).

[73] *See* Ingeborg Schwenzer & Pascal Hachem, *The CISG—Successes and Pitfalls*, 57 AM. J. COMP. L. 457, 468 (2009).

[74] *See* Ferrante, *supra* note 54, at 89.

[75] *See* Peter Schlechtreim, *Interpretation, Gap Filling and Further Development of the UN Sales Convention*, 16 PACE INT'L L. REV. 279, 292 (2004).

[76] *See* DAVIES & SNYDER, *supra* note 21, at 86.

[77] *See* Schlechtreim, *supra* note 75, at 294.

b. The Law Governing the Contract of Sale as a Solution for Internal Gaps

The second solution provided by Article 7 of the CISG to fill the internal gaps is the use of the law governing the contract of sale. Some scholars believe that this means that a court should resort to the interpretation of the contract of sale using the *lex contractus* as a solution for filling the internal gaps within the CISG, if those gaps cannot be filled by using the CISG's general principles.[78] Nonetheless, this solution will not produce uniform results since each domestic law will have a different rule for interpretation. For instance, in Belgium a reference to standard terms in the correspondence between the parties is sufficient to render them binding on the parties to the contract, while in France a mere reference to standard terms in the parties' correspondence is not enough to render them binding on the parties, unless the offeror has pointed to their existence in the offer made to the offeree.[79]

In fact, there are certain areas where internal gaps that cannot be filled through interpreting the contract of sale, such as interest rates, that are regulated by overriding mandatory rules. For instance, under Egyptian law there are two kinds of rates: the default interest rates, which are awarded as a compensation for the delay in paying a sum of money and cannot exceed 6% annually except in extraordinary circumstances,[80] and the contractual interest rates, which are the interest rates that the parties agreed upon and cannot not exceed 7% annually.[81] Even if a court finds that the interest rate is not governed by an overriding mandatory rule, it might seek to determine that rate through interpreting the contract of sale. As stated earlier, a court in Switzerland ruled that the interest rate is governed by the seller's law if he is in arrears with his obligation to pay, while the interest rate is governed by the buyer's law if he is in arrears with his obligation to pay.[82] On the other hand, arbitral panels prefer to apply the prevailing interest rate of the currency used

[78] *See* SHAFIQ, *supra* note 1, at 51; Saf, *supra* note 17, at 106.

[79] *See* Sonja A. Kruisinga, *Incorporation of Standard Terms Under the CISG and Electronic Communication*, *in* TOWARDS UNIFORMITY 69, 72 (Ingeborg Schwenzer & Lisa Spagnolo eds., 2011).

[80] *See* Law No. 131 of 1948 (Civil Code), *al-Waqā'i' al-Mis. rīyah*, 16 July 1948, art. 226 (Egypt).

[81] *See* Civil Code, art. 227 (Egypt).

[82] *See* United Nations Commission on International Trade Law CLOUT No. 201 (Richtermat Laufen Des Kantons, May 7, 1993).

by the parties in their contract irrespective of the rules of interpretation in the law governing their contract.[83]

3. External Gaps

One of the main weaknesses of the CISG is the large number of issues that are beyond the scope of the Convention, despite being related to international contracts of sale.[84] This is demonstrated through Article 4, because the common law and civil law approaches to those issues were so different that it was not possible for the CISG to reach an acceptable solution.[85] Issues such as proprietary effects of the contract of sale and the contract's validity,[86] resulting from incapacity or unconscionability, are not addressed by the CISG,[87] leaving the choice of law rules to determine which law is applicable to these issues.[88]

a. Choice of Law Rules Divergence

Attempting to fill the external gaps of the CISG means that the results will vary according to the choice of law rule used by the forum. In some national legal systems, the capacity to make a contract and the law governing the contract is determined by the same choice of law rule, while in other national legal systems the capacity to contract and the law governing the contract are governed by different choice of law rules.[89] Another issue with the use of domestic choice of law rules is that it can be tilted towards applying the national law of one party,[90] such as the case with the Rome I regulation, where the contract of sale is governed by the law of the seller's habitual residence if the parties did not choose a law to govern their contract.[91] Thus,

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[83] *See* Pavić & Djordjević, *supra* note 2, at 52.
[84] *See* Durovic, *supra* note 60, at 215.
[85] *Id.*
[86] *See* Schwenzer & Hachem, *supra* note 73, at 472.
[87] *See* Mather, *supra* note 53, at 161–62.
[88] *See* Angelo Chianale, *The CISG as a Model Law: A Comparative Law Approach*, SING. J. LEGAL STUD. 29, 32 (2016).
[89] *See, e.g.*, Civil Code, art. 11, 19 (Egypt).
[90] *See* Mather, *supra* note 53, at 182.
[91] *See* Regulation No. 593/2008 of June 17, 2008, On the Law Applicable to Contractual Obligations (Rome I), art. 4, 2008 O.J. (L 177) 6,11 (EC).

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the use of a domestic choice of law rule will give one party the advantage of applying a law they are familiar with, while depriving the other party from the opportunity to counterbalance that advantage.

On the other hand, traditional choice of law rules are not used in several U.S. states under the influence of the Restatement (Second) of Conflicts of Laws, since the federal courts use the forum state's choice of law rules to fill the external gaps within the CISG.[92] Therefore, it is not uncommon to see U.S. federal courts use the Restatement's (Second) "Most Significant Relationship contacts rule" to determine the applicable law based on the contacts between the dispute and a given state.[93] This non-rule based approach will definitely lead to unexpected results that further complicate the gap filling process.

b. Domestic Laws Variation

Leaving the task of filling the external gaps for national laws will inevitably result in solutions that will differ from one national legal system to another. For example, in both the French[94] and the Egyptian Codes,[95] the transfer of ownership occurs immediately after the conclusion of the contract of sale, a distinction from codes where the transfer of ownership cannot take place before the delivery of the goods.

C. Undefined Freedom

Unlike most international conventions, Article 6 of the CISG allows the parties to derogate from its provisions, either partially or completely, therefore placing the parties' will over its provisions.[96] However, Article 6 did not lay out, in detail, the manner through which the parties can opt out from the Convention. The answers provided by courts and scholars vary considerably on whether or not parties can opt out from the Convention. The

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[92] *See* Geneva Pharm. Tech. Corp. v. Barr Lab'ys, Inc., 201 F. Supp. 2d 236, 283 (S.D.N.Y. 2002); *see also* Forestal Guarani S.A. v. Daros Int'l, Inc., 613 F.3d 395, 400 (3d Cir. 2010).

[93] *See* Unisor Industeel v. Lecco Steel Prod., Inc., 209 F. Supp. 2d 880, 886 (N.D. Ill. 2002); *see also* Chi. Prime Packers Inc. v. Northam Food Trading Co., 320 F. Supp. 2d 702, 716 (N.D. Ill. 2004).

[94] *See* Chianale, *supra* note 88, at 31.

[95] *See* Civil Code, art. 204 (Egypt).

[96] *See* Gül, *supra* note 9, at 80–81.

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French Court of Cassation has ruled that the parties' reference to "Laws of France," knowledge of the international status of the contract, and that the contract is governed by the CISG is sufficient to opt out of the CISG.[97] A U.S. federal court ruled that the plaintiff's reliance on New York law in his pleading amounted to a consent to apply New York law instead of the CISG.[98] Another U.S. federal court ruled that arguing under New York law and presenting defenses which are not compatible with the fraud defense under the CISG was sufficient to opt out of the CISG.[99] Lastly, an Italian arbitral panel found that the parties' agreement to exclusively apply the "Italian Law" was enough to opt out of the CISG.[100]

On the other hand, some scholars argue that the parties' choice of law of a state that is a CISG signatory is not sufficient to opt out from the CISG.[101] Their arguments rest on the fact that the CISG rules, as an international treaty, have supremacy over the national rules on contracts of sale.[102] As a result, choosing a law of a signatory state amounts to accepting the CISG,[103] unless there is a clear and unequivocal indication that the parties seek to contract outside of the CISG.[104] This view has been adopted by several national courts. For instance, an Australian court found that the phrase "Australian law applicable under exclusion of UNCITRL law" precluded the application of the CISG.[105] Some federal courts have also adopted this view and ruled that the parties' selection of a U.S. state law[106] to govern their contract or the

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[97] *See* Cour de Cassation [Supreme Court for Judicial Matters] comm., Sept. 13, 2011, No. 09-70305, 121 Revue Critique De Droit International Privé [Critical Rev. of Priv. Int'l L.] (2012), 88, 89 (Fr.).

[98] *See* Ho Myung Moolsan, Co. v. Manitou Min. Water, Inc., No. 07 Civ. 07483 (RJH), 2010 WL 4892646, at *1, *2 (S.D.N.Y. Dec. 2, 2010).

[99] *See* Rienzi & Sons, Inc. v. Puglisi, 638 F. App'x 87, 90 (2d Cir. 2016).

[100] *See* Ferrari, *supra* note 70, at 350.

[101] *See* André Janssen & Matthias Spilker, *The Relationship Between the GISG and International Arbitration: A Love with Obstacles?*, 20 CONTRATTO E IMPRESA/EUROPA [CONT. AND CO./EUR.] 44, 51 (2015).

[102] *See* Gül, *supra* note 9, at 84.

[103] *See* Pavić & Djordjević, *supra* note 2, at 9–10.

[104] *See* DAVIES & SNYDER, *supra* note 21, at 64.

[105] *See generally* Olivaylle Pty. Ltd. v. Flottweg AG (No. 4) [2009] FCA 522 (SA).

[106] *See* Asante Technologies, Inc. v. PMC-Sierra, Inc., 164 F. Supp. 2d 1142, 1150 (N.D. Cal. 2001); *see also* Travelers Prop. Cas. of Am. v. Saint-Gobain Tech. Fabrics Can., Ltd., 474 F. Supp. 2d 1075, 1081 (D. Minn. 2007).

selection of law of signatory state[107] may lead to the application of the CISG, unless there is a clear statement that the parties excluded the CISG from their choice of law clause.

The discrepancy in the courts' attitude towards excluding the CISG through choice of law clauses causes uncertainty when parties wish to avoid the CISG because of its gaps, which is a trend that has been increasing.[108] This discrepancy also undermines the principle of the parties' freedom of contract within the CISG,[109] which is embodied in Article 6. This furthers the difficulty of ensuring a uniform application of the CISG by various national courts.

Unlike some international conventions, such as the Hamburg 1978 Convention,[110] the CISG is silent on the issue of opting into the Convention.[111] It is not entirely clear if the parties to an international sale of goods, which is not within the CISG's scope of application, can choose to submit the agreement to the Convention's rules. Some scholars believe that the principle of party autonomy should allow the parties to opt into the Convention, despite the Convention not being applicable to their contract.[112] Some argue that the CISG has a higher status than non-state rules, since it is an international convention enforced by several states, and the parties can submit their contract to its provisions.[113] However, others argue that Article 6 of the CISG does not allow the parties to do so because it does not possess the status of an international treaty before non-signatory states and the CISG's provisions do not provide a valid legal cause for its application by non-signatory states.[114]

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[107] *See* BP Oil Int'l, Ltd. v. Empresa Estatal Petroleos de Ecuador, 332 F.3d 333, 337 (5th Cir. 2003).

[108] *See* Sheaffer, *supra* note 30, at 469–70.

[109] *See* Koneru, *supra* note 49, at 117.

[110] *See* United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules) art. 2, Mar. 31, 1978, 1695 U.N.T.S. 3.

[111] *See generally* United Nations Convention on the Contracts for the International Sale of Goods, U.N. Doc. A/CONF.97/18, Annex 1 (Apr. 11, 1980).

[112] *See* Gül, *supra* note 9, at 84–85.

[113] *See* Bashayer al-Mukhaizeem, *Application of CISG in Kuwait*, 35 ARAB L.Q. 304, 310 (2021).

[114] *See* Viscasillas, *supra* note 3, at 740–41.

II. THE REMEDIES

There are three remedies that parties to an international contract of sale can use to overcome the shortcomings of the CISG including choosing a domestic law to govern their contract, non-state rules such as the UPICC to govern their contract, or a hybrid choice of law clause coupled with an arbitration clause. I will analyze each remedy to determine which one is most likely to succeed in overcoming the shortcomings of the CISG.

A. Choosing a Domestic Law to Govern the Contract

Opting out of the CISG by choosing a domestic law to govern the international contract of sale is the most common remedy used by parties, either because the lawyers representing the parties do not understand the CISG well enough to recommend it to their client or wish to avoid the shortcomings of the CISG altogether.[115] Another factor which drives the parties to replace the CISG with a domestic law is concluding the contract of sale within the context of a string transaction inside a commodity market.[116] These types of transactions require the parties to adhere to choosing a domestic law, which is commonly used by the traders in the commodity market in question to facilitate placing their contract in the market through intermediate transactions such as swap or forward sales.[117]

Nonetheless, this solution is not free from complications. First, there is the issue of reaching an agreement between the parties on the law governing the contract which might be a lengthy process especially when one party is from a common law jurisdiction, while the other party is from a civil law jurisdiction.[118] Civil law jurisdiction lawyers tend to distrust the choice of a common law jurisdiction since that the law is in case law and not in statutes.[119] Second, not every domestic law is suitable for use in transactions

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[115] *See* Lisa Spagnolo, *Green Eggs and Ham: The CISG Path, Dependence, and the Behavioural Economics of Lawyers' Choices of Law in International Sales Contracts*, 6 J. PRIV. INT'L L. 417, 422–23 (2010).

[116] *See id.* at 431.

[117] *See id.* at 458–59.

[118] *See* Christiana Fountoulakis, *The Parties' Choice of 'Neutral Law' in International Sales Contracts*, 7 EUR. J.L. REFORM 303, 306 (2005).

[119] *Id.*

within international trade.[120] Generally speaking, parties to international contracts of sale prefer to choose English law as the law governing the contract, because of its rules that allow for the "hair trigger" rule, which sets a strict test for termination of the contract, and the "perfect tender" rule, which limits the seller's ability to avoid liability for delivering imperfect goods through cure and price reduction.[121] However, if the contract is not connected with United Kingdom, the parties' choice of English law might not be respected by a court if a dispute arises between the parties. A court might view the parties' selection of English law, or another foreign law that has no connection with the contract, as an attempt to evade the forum's law, so the chosen law will be ignored by the court, such as in China.[122]

Finally, there is the issue of proving the content of foreign law. In some jurisdictions, foreign law is treated as a fact and therefore the court is not presumed to be aware of its content.[123] The burden of proof for the content of the foreign law is held by the party who relies on it and the documents presented to the court must be translated in the court's official language.[124] This must be done to avoid nullifying the court's decision if the court relied on documents presented in a foreign language.[125] In addition, there is a risk of misapplying the foreign law by an inexperienced domestic judge, which might be amended by appeal when foreign law is treated as fact, which escapes the authority of review by supreme courts.

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[120] *See* Mather, *supra* note 53, at 181.

[121] *See* Spagnolo, *supra* note 115, at 429.

[122] *See* Weizuo, *supra* note 7, at 127–28.

[123] *See generally* Maḥkamat al-Tāmyīz [Court of Cassation] case no. 14/1974, date 3 June 1975; case no. 55/2005, date 14 May 2006 (Kuwait); Maḥkamat al-Tāmyīz [Court of Cassation] case no. 133/2014, date 17 June 2014 (Qatar); *see also* Trevor C. Hartley, *Pleading and Proof of Foreign Law: The Major European Systems Compared*, 45 INT'L & COMPAR. L.Q. 271, 274 (1996).

[124] *See generally* Maḥkamat al-Tāmyīz [Court of Cassation] No. 47/2007, session of 20 June 2007 (Qatar); Maḥkamat al-Tāmyīz [Court of Cassation] No. 7/1993, session of 9 May 1993 (Kuwait); *see also* Maḥkamat al-Naqḍ [Court of Cassation] No. 2333/59, session of 16 Jan. 1994 (Egypt); Maḥkamat al-Naqḍ [Court of Cassation], No. 3888/62, session of 14 Mar. 2006 (Egypt); *see also* Cour de Cassation [Cass.] [Supreme Court for Judicial Matters], 1e civ., Oct. 22, 2009, 08-17.525 (Fr.); *see also* Cour de Cassation [Cass.] [Supreme Court of Judicial Matters], com., Nov. 27, 2012, 11-17.185 (Fr.).

[125] *Id.*

B. Choosing Non-State Rules

The second remedy for avoiding the shortcomings of the CISG is to choose non-state rules to govern the contract. These are rules made by trade associations, academics, and practitioners such as the UPICC and Incoterms. Parties to international contracts of sale often prefer using these rules to govern their contracts because of their level of sophistication and specialization that suits the nature of their transaction.[126]

1. Incoterms

Incoterms are non-state rules prepared by the International Chamber of Commerce ("ICC") in Paris.[127] They are described as "the world's essential terms of trade for the sale of goods[,] [w]hether you are filing a purchase order, packaging and labelling a shipment for freight transport, or preparing a certificate of origin at a port."[128] As a result, Incoterms are designed to play a complementary role with contracts of sale as there are detailed rules on delivery and passage of risk that suit various modes of transportation of goods.[129] In fact, several courts have ruled that Incoterms are an integral part of the international contracts of sale under the CISG by virtue of Article 9(2).[130]

However, the CISG does not provide a definition of what constitutes a "usage,"[131] which means that considering the Incoterms an integral part of the international contracts of sale as usage is left for national courts' discretion without clear criteria. Therefore, without a concrete explanation for considering the Incoterms a part of the usage that the parties ought to have

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[126] *See* Spagnolo, *supra* note 115, at 429.

[127] *See* Int'l Chamber of Com., https://iccwbo.org/resources-for-business/incoterms-rules/incoterms-2020 (last visited Oct. 14, 2021).

[128] *Id.*

[129] *See* Juana Coetzee, *The Interplay Between Incoterms and the CISG*, 32 J.L. & COM. 1, 20 (2013).

[130] *See, e.g.*, BP Oil Int'l, Ltd. v. Empersa Estatal Petoleos de Eucador, 332 F.3d 333, 337–38 (5th Cir. 2003); St. Paul Guardian Ins. Co. v. Neuromed Med. Sys. & Support, GmbH, No. 00 Civ. 9344 (SHS), 2002 WL 465312, at *1, *3 (S.D.N.Y. Mar. 26, 2002); China N. Chem. Indus. Corp. v. Beston Chem. Corp., No. Civ.A. H-04-0912, 2006 WL 295395, at*1, *6 (S.D. Tex. Feb. 7, 2006); Cedar Petrochemicals, Inc. v. Dongbu Hannong Chem. Co., No. 06 Civ. 3972(LTS)(JCF), 2011 WL 4494602, at *1, *4 (S.D.N.Y. Sept. 28, 2011).

[131] William P. Johnson, *Analysis of Incoterms as Usage Under Article 9 of the CISG*, 35 U. PA. J. INT'L L. 379, 394 (2014).

known, other non-state rules are ignored, such as the Uniform Customs and Practices for Documentary Credits ("UCP 500"), which are for international letters of credit, despite the fact these rules are also issued by the ICC, the same body responsible for publishing Incoterms, and are associated with international contracts of sale. For instance, throughout various decisions, the Egyptian Court of Cassation has ruled that the UCP 500 are an integral part of any international letter of credit and has never reached the conclusion that Incoterms are an integral part of the CISG, despite that the letters of credit were associated with international contracts of sale.[132]

2. UPICC

The UPICC are rules drafted by scholars and practitioners from all over the world and various legal systems under the auspices of the UNIDROIT, a specialized organization.[133] As a result, the UPICC has the benefit of using legally neutral terminology that is compatible with all major languages of the world.[134] Another advantage that the UPICC enjoys is its detailed rules on consent, "limitations on the ability to avoid the contract and remedies accompanying avoidance,"[135] and its own rules on the validity and the formation of a contract that address "merger clauses and the inclusion of standard terms" into the contract.[136] This allows it to be used as source for filling the gaps within the CISG.[137]

However, neither a civil law lawyer nor a common law lawyer will find the UPICC rules unfamiliar, since the UPICC combines rules from civil law and common law jurisdictions, rendering it incompatible with either

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[132] *See generally* Maḥ. kamat al-Naqḍ [Court of Cassation], case no. 615/72, session of 26 Mar. 2009 (Egypt); Maḥ. kamat al-Naqḍ [Court of Cassation], case no. 621/79, session of 25 June 2009 (Egypt); Maḥ. kamat al-Naqḍ [Court of Cassation], case no. 410/67, session of 13 June 2009 (Egypt); Maḥ. kamat al-Naqḍ [Court of Cassation], case no. 12823/82, session of 9 Feb. 2014 (Egypt); Maḥ. kamat al-Naqḍ [Court of Cassation], case no. 702.73, session of 27 Feb. 2018 (Egypt).

[133] *See* Michael Joachim Bonell, *The Law Governing International Commercial Contracts and the Actual Role of the UNIDROIT Principles*, 23 UNIF. L. REV. 15, 20 (2018).

[134] *See* Maria D. Mijatović, *The Currentness of the UNIDROIT Principles of International Commercial Contracts: Effects of Bottom-up Method of Law Harmonization*, 52 ZBORNIK RADOVA [PROCEEDINGS] 323, 330 (2018) (Serb.).

[135] *See* Mather, *supra* note 53, at 196.

[136] *See* Fountoulakis, *supra* note 118, at 322.

[137] Mijatović, *supra* note 134, at 332.

system.[138] In addition, the UPICC does not address the proprietary aspect of the contract of sale despite having excellent rules on the validity of the international contract of sale.[139] Finally, the non-state rules status of the UPICC has prevented it from being the applicable law under national choice of law rules,[140] which is discussed next.

3. The Status of Non-State Rules

The use of non-state rules, such as the Incoterms or the UPICC, is not an effective remedy for overcoming the CISG's shortcomings for several reasons. First, choosing non-state rules to govern the contract is a not a valid option under most domestic choice of law rules.[141] In fact, non-state rules will be subordinate to the law applicable to the contract as determined by the domestic choice of law rule.[142] For example, according to the Rome I regulation, the incorporation of non-state rules will be allowed if the parties can do so under Article 3(3).[143] Otherwise, the parties selection of the non-state rules will not be effective.

Second, just like the CISG, non-state rules have their own gaps, which cannot be filled unless there is a domestic law chosen by the parties or applied by the court.[144] The Incoterms do not regulate the issue of loss that occurs after the passage of risk because of the seller's actions or omissions, nor do

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[138] Stefan Vogenauer, *The UNIDROIT Principles of International Commercial Contracts at Twenty: Experiences to Date, the 2010 Edition, and Future Prospects*, 19 UNIF. L. REV. 481, 490 (2014).

[139] *See* Michael Bridge, *The CISG and the UNIDROIT Principles of International Commercial Contracts*, 19 UNIF. L. REV. 623, 629 (2014).

[140] *See id.* at 628.

[141] *See* Ferrari, *supra* note 19, at 102; *see also* Daniel Girsberger et al., *General Comparative Report*, *in* CHOICE OF LAW IN INTERNATIONAL COMMERCIAL CONTRACTS: GLOBAL PERSPECTIVES ON THE HAGUE PRINCIPLES 43, 44–46 (Daniel Grisberger et al. eds., 2021); *but see* Beligh Elbalti & Hosam Osama Shaaban, *Bahrain*, *in* CHOICE OF LAW IN INTERNATIONAL COMMERCIAL CONTRACTS: GLOBAL PERSPECTIVES ON THE HAGUE PRINCIPLES 414 (Daniel Grisberger et al. eds., 2021) (containing one notable exception where Art. 4 of the 2015 Bahraini Civil Code allows the parties to select non-state rules).

[142] *See* Eckart Brödermann, *The Choice of the UNIDROIT Principles of International Commercial Contracts in a "Choice of Law" Clause*, BUCERIUS L.J. (2018), https://law-journal.de/archiv/jahrgang-2018/heft-2/unidroit-principles/.

[143] *See* Christopher Bisping, *The Common European Sales Law, Consumer Protection and Overriding Mandatory Provisions in Private International Law*, 62 INT'L & COMPAR. L.Q. 463, 465 (2013).

[144] *See* Coetzee, *supra* note 129, at 16.

they regulate the buyer's duty to pay for the goods. The UPICC does not address either the issue of transfer of ownership or liability before third parties. Therefore, the choice of non-state rules as the law governing the international contract of sale is not a viable solution for the shortcomings within the CISG.[145]

C. Hybrid Choice of Law Clause Coupled with an Arbitration Clause

A hybrid choice of law clause is a clause that combines the choice of a domestic law or non-state rules with the use of the CISG. An example of a hybrid choice of law clause is Art. 1.2 of the ICC Model International Sale Contract for Manufactured Goods which states that:

> Any questions relating to this contract which are not settled by the provisions contained in the contract itself (i.e. these General Conditions and any specific conditions agreed upon by the parties) shall be governed:
>
> a) by the United Nations Convention on Contracts for the International Sale of Goods (Vienna Convention of 1980, hereafter referred as CISG), and
>
> b) to the extent that such questions are not covered by CISG and that no applicable law has been agreed upon, by reference to the law of the country where the Seller has its place of business.[146]

1. The Necessity of Resorting to Arbitration

To be able to use a hybrid choice of law clause it is necessary to include an arbitration clause within the contract of sale, because in arbitration the arbitral panel derives its powers from the will of the parties, unlike courts, which derive their power from the forum's law irrespective of the parties' will.[147] As a result, the arbitrators must invariably apply the law chosen by the parties to govern the merits of the dispute,[148] or else the arbitrator will be ignoring the parties' will, which is the cornerstone of the arbitration process,

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[145] *See id.* at 16.

[146] INT'L CHAMBER OF COM. [ICC] COMM'N ON COM. L. AND PRAC., MODEL INTERNATIONAL SALE CONTRACT FOR MANUFACTURED GOODS, at art. 1.2 (Koen Vanheusden et al. eds., 2020).

[147] *See* Giuditta Cordero-Moss, *Limits of Party Autonomy in International Commercial Arbitration*, 4 PENN ST. J.L. & INT'L AFFS. 186, 189–90 (2015).

[148] *See* Sunday A. Fagbemi, *The Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality?*, 6 J. SUSTAINABLE DEV. L. & POL'Y 221, 228 (2015) (Nigeria).

and might even result in setting the arbitral award aside for not applying the chosen law.[149]

In addition, resorting to arbitration will allow the parties to escape from the limits imposed by domestic choice of law rules, including the inability to choose non-state rules to govern the dispute,[150] since that most national arbitration laws, especially those based on the UNCITRAL Model Law on Arbitration, give the parties full freedom to choose the rules governing their dispute.[151]

As a result, hybrid choice of law clauses allow the parties to an international contract of sale will be able to make use of the uniform rules within the CISG and to fill the internal and external gaps with predetermined rules. This enhances the predictability of results if a dispute arises between the parties and helps in reducing the cost of transaction by taking advantage of swiftly resolving the dispute via arbitration, instead of a lengthy court proceeding. Nonetheless, this solution is still not perfect and does have its disadvantages.

2. The Hurdles of Hybridity

This solution is not free from its own hurdles. First, the parties' choice of law within a hybrid clause cannot violate the public policy of either the

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[149] *See* Law No. 27 of 1994 (The Law Concerning Arbitration in Civil and Commercial Matters), *al-Jarīdah al-Rasmīyah*, vol. 16, 21 Apr. 1994, art. 53(1)(d) (Egypt); Law No. 31 of 2001 (Arbitration Law of 2001), *al-Jarīdah al-Rasmīyah*, vol. 4496, 16 July 2001, art. 49(a)(4) (Jordan); Law No. 47 of 97 (The Omani Law of Arbitration in Civil and Commercial Disputes), *al-Jarīdah al-Rasmīyah*, vol. 602, 28 June 1997, art. 53(4) (Oman); Law No. 5 of 2012 (Law of Arbitration), *al-Jarīdah al-Rasmīyah*, 16 Apr. 2012, art. 50(1)(d) (Saudi Arabia).

[150] *See* Yehya Ikram Ibrahim Badr, *Party Autonomy Under the Egyptian Arbitration Code: The Freedoms and the Limits*, 28 WILLAMETTE J. INT'L & DISP. RESOL. 35, 37 (2021).

[151] *See* The Arbitration and Conciliation Act, 1996 § 28(1)(b)(i) (India); Law No. 27 of 1994 (The Law Concerning Arbitration in Civil and Commercial Matters), *al-Jarīdah al-Rasmīyah*, vol. 16, 21 Apr. 1994, art. 39(1) (Egypt); Law No. 31 of 2001 (Arbitration Law of 2001), *al-Jarīdah al-Rasmīyah*, vol. 4496, 16 July 2001, art. 36(a) (Jordan); Law No. 47 of 97 (The Omani Law of Arbitration in Civil and Commercial Disputes), *al-Jarīdah al-Rasmīyah*, vol. 602, 28 June 1997, art. 39(1) (Oman); Law No. 2 of 2017 (Law of Arbitration in Civil and Commercial Matters), *al-Jarīdah al-Rasmīyah*, 16 Feb. 2017, art. 28(1) (Qatar); Law No. 5 of 2012 (Law of Arbitration), *al-Jarīdah al-Rasmīyah*, 16 Apr. 2012, art. 38(1) (Saudi Arabia); Loi Fédèrale Sur Le Droit International Privé [LDIP] [Federal Private International Law] Dec. 18, 1987, RS 291 art. 187(1) (Switz.); Arbitration Act (1996), § 46(1) 9 & 10 c. 23 (Vict.).

state where the award was issued,[152] or the state where the award is being enforced, according to Article V(2)(b) of the 1958 New York Convention.[153] The problem with the "public policy" concept is that it is not defined and varies from one state to another depending on the ethical, social and economic considerations of each state, which means that an arbitral award can violate the public policy of one state while at the same time not violate the public policy of another state.[154] This also applies when overriding mandatory domestic rules, which reflect certain values and policies that render them binding upon all people irrespective of their nationalities or the law governing the dispute.[155] In addition, some legal systems in the Middle East mandate that the arbitral award should not violate Islamic Shariah,[156] which complicates the matter for Western trained lawyers who are not familiar with the Islamic Shariah.

Above all, the arbitrators' finding on the law is subjected to limited review by courts in most legal systems, and there is often no remedy against an erroneous application of the law by the arbitrator.[157] This means that the parties should choose the arbitrator carefully to make sure that they have the necessary qualifications and experience for applying the hybrid choice of law clause properly.

Finally, the hybrid choice of law clauses coupled with an arbitration clause will not prevent the domestic courts from ignoring the parties' choice of law. For instance, domestic courts will sometimes apply validity of title

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[152] *See* Law No. 27 of 1994 (The Law Concerning Arbitration in Civil and Commercial Matters), *al-Jarīdah al-Rasmīyah*, vol. 16, 21 Apr. 1994, art. 53(2) (Egypt); Law No. 31 of 2001 (Arbitration Law of 2001), *al-Jarīdah al-Rasmīyah*, vol. 4496, 16 July 2001, art. 49(b) (Jordan).

[153] *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V(2)(b), June 10, 1958, 330 U.N.T.S. 3 ("2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that. . . . (b) The recognition or enforcement of the award would be contrary to the public policy of that country.").

[154] *See* Akosua Serwaaah Akoto, *Public Policy: An Amorphous Concept in the Enforcement of Arbitral Awards*, 7 J. LIBERTY & INT'L AFFS. 51, 53 (2021).

[155] *See* Maḥ. kamat al-Naqḍ [Court of Cassation], case no. 371/32, session of 5 Apr. 1967, 1967 (Egypt).

[156] *See, e.g.*, Law No. 5 of 2012 (Law of Arbitration), *al-Jarīdah al-Rasmīyah*, 16 Apr. 2012, art. 55(2)(b) (Saudi Arabia).

[157] *See* Rachel Engle, *Party Autonomy in International Arbitration: Where Uniformity Gives Way to Predictability*, 15 TRANSNAT'L L. 323, 325 (2002).

retention, or *Romalpa* clauses, an area of domestic law.[158] In *Roder Zelt-und Hallenkonstrukionen v. Rosedown Park Pty Ltd*, Roder, a German seller, sold tents by installments to Rosedown, an Australian buyer, through a contract of sale that contained a title retention clause, where Roder retained the ownership of the goods until Rosedown paid the price in full.[159] Rosedown missed its payment and later on went into liquidation, which caused Roder to demand the ownership of the tents from the receiver, who refused to recognize Roder's claim because he believed that the title retention clause was not valid and was unenforceable.[160] Roder sued for the enforcement of the title retention clause and the court applied both the CISG and Australian law, the law of the place where the goods were located, to determine the legal effects of the terms of the title retention clause.[161]

Another instance where the hybrid choice of law clause will not be effective is when it affects the interests of third parties, since that issue is not regulated by the CISG. In *Unisor Industeel v. Lecco Steel Prods., Inc.*, Unisor, a French steel manufacturer, sold a special type of steel, Creusabro 800, to Lecco, an American buyer based in Illinois.[162] The contract of sale contained a title retention clause that allowed Unisor to retain the ownership of the steel until Lucco paid the price in full.[163] However, Lecco financed the sale through a loan from La Salle Bank, and the loan contract provided that La Salle had a secured interest in the steel as a security for the loan.[164] When Lecco failed to pay the installments, a dispute arose between Unisor and La Salle over whose claim prevailed over the steel.[165] The court used both § 188 of the Second Restatement and § 1-105 of the UCC, to determine that Illinois law, the law where the steel is located, governed the issue of which party's claim should prevail.[166] The court found that under Illinois law, La Salle had

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[158] *See* Kristin P. Dutton, *Risky Business: The Impact of the CISG on the International Sale of Goods. A Guide for Merchants to Limit Liability and Increase Certainty Inside and Outside of the CISG.*, 7 EUR. J.L. REFORM 239, 265 (2005).

[159] *See* Roder Zelt-Und Hallenkonstruktionen Gmbh v. Rosedown Park Pty. Ltd. [No. 3076] (1995) 1707 FCR 216, 218 (Austl.).

[160] *See id.*

[161] *See* Dutton, *supra* note 158, at 266.

[162] *See* Unisor Industeel v. Lecco Steel Prods., Inc., 209 F. Supp. 2d 880, 881 (N.D. Ill. 2002).

[163] *See id.* at 882.

[164] *See id.*

[165] *See id.* at 883.

[166] *See id.* at 886–87.

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perfected its secured interest before Unisor, causing La Salle's secured interest claim to prevail.[167]

CONCLUSION

If the CISG is to remain relevant to the international trade community, a solution must be followed to address the problems resulting from its shortcomings. In this Article, I proposed the use of hybrid choice of law clauses coupled with an arbitration clause as a solution for those problems. A hybrid choice of law clause will allow the parties to design a regulatory framework for their international contract of sale, while the arbitration clause will allow them to resort to more liberal and modern choice of law rules within the national arbitration laws. Thus, the parties can achieve certainty and predictability through inserting both clauses in their contract. However, I have noted that the use of hybrid choice of law clauses coupled with an arbitration clause does not give the parties a freehand to do as they please. Their selection may be reviewed by national courts either through the annulment proceedings within the national arbitration laws or when the arbitral award is being enforced under the auspices of the 1958 New York Convention if it violates the national public policy or an overriding mandatory rule.

[167] *See id.* at 888.

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