CISG AND INTERNATIONAL ARBITRATION — A FRUITFUL MARRIAGE?

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Abstract

International Arbitration — CISG — Autonomous Interpretation (of the CISG) — Survey of Arbitral Awards and Judgments

The article discusses the relationship between international arbitration and the CISG. The premise the article explores is that international arbitral tribunals should be better able to truly interpret the CISG autonomously demanded by art 7 of the CISG. The author used an empirical study, surveying 240 arbitral awards and 800 judgments, to test the premise.

I INTRODUCTION

The 1980 UN *Convention on Contracts for the International Sale of Goods* (*CISG*) and international arbitration both aim at the promotion, unification, and facilitation of international trade.[1] The *CISG* does so by minimising the risk of commercial disputes and arbitration by settling commercial disputes once they have arisen in a manner most akin to the needs of commercial, internationally operating parties.[2] Furthermore, the *CISG* and arbitration also share the salient feature of being based on the principle of party autonomy.[3]

When interpreting the *CISG*, regard has to be had to its international character, the aim of promoting uniformity in its application, and the observance of good

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1 See Jeffrey Waincymer, 'The CISG and International Commercial Arbitration: Promoting a Complementary Relationship between Substance and Procedure' in Camilla B Andersen and Ulrich G Schroeter (eds), *Sharing International Commercial law across National Boundaries: Festschrift for Albert Kritzer* (Wildly, Simmonds & Hill, London, 2008) 582. Approximately 80 per cent of international sale contracts fall within the ambit of the *CISG*: Nils Schmidt-Ahrendts, 'CISG and Arbitration' (2011) 3 *Belgrade Law Review* 211, 220.

2 However, see the critical analysis of Gilles Cuniberti, 'Is the CISG benefiting anybody?' (2006) *Vanderbilt Journal of Transnational Law.*

3 Waincymer, above n 1, 582. Loukas Mistelis, 'CISG and Arbitration' in André Janssen and Olaf Meyer (eds), *CISG Methodology* (Sellier, 2009) 375, 395.

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faith in international trade (*CISG* art 7(1)). The international character of the *CISG* requires the court or arbitral tribunal to avoid interpreting the *CISG* based on rules of interpretation found in domestic laws. National concepts and approaches should not play a role in the interpretation of the *CISG*. Uniformity in the application of the *CISG* — based on its autonomous meaning — is the ultimate goal.

Two scholarly contributions[4] have used quantitative analysis to establish that the *CISG* is proportionately more often applied by arbitral tribunals than by national courts and that a significant percentage of international arbitration disputes are governed by the *CISG*.[5] This paper will explore the quality[6] of the arbitral awards applying the *CISG* in comparison to the judgments handed down by national courts.

The hypothesis of this paper is that international arbitral tribunals are better equipped to deliver decisions that reflect the autonomous meaning of the *CISG*. Potential factors that support the hypothesis are that:

1. 'International tribunals' are usually composed of arbitrators from different jurisdictions and should, therefore, be particularly able to achieve a truly uniform (international) interpretation and application of the *CISG* because they will be less inclined to rely on national preconceptions of sales law.
2. Arbitral tribunals are typically constituted by the parties to the dispute themselves, making it more likely that experts in international sales law will adjudicate the dispute than in the national system where judges exercise more general jurisdiction and may well have limited/no expertise in international sales law.

At the same time, however, a number of factors could undermine the hypothesis, including:

1. Unlike national judges, arbitral tribunals generally do not operate within a system of appellate review. The consequence is that often arbitral awards contain meagre exegesis of the relevant *CISG* provisions, jurisprudence and commentary than the judgments of

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[4] Schmidt-Ahrendts, above n 1, 211; Mistelis, above n 3, 375.

[5] As Schmidt-Ahrendts' research in 2011 has shown, the databases of Pace, CISGonline, and Unilex suggest that approximately 25 per cent of *CISG* cases are decided by arbitral tribunals. A review of ICC awards supports the database-based findings: in 155 out of 3000 cases randomly selected from a certain period of time, the *CISG* was applied. Considering that the 3000 cases involved all kinds of disputes and not only international sales disputes the number is actually surprisingly high (213).

[6] Quality refers to the 'correctness' and the reasoning of the decision.

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national courts. In turn, the intellectual rigour of arbitral awards and, therefore, their ability to contribute to the stable body of global *CISG* jurisprudence might be limited.

2. National judges, unlike most members of arbitral tribunals, are full-time adjudicators whose professional task is to give fully reasoned judgments on disputes brought before them. Their professional experience and expertise (in judgment writing) may mean a better quality of reasoning than that shown by arbitral tribunals.

To test the hypothesis, the paper sets the scene by describing the methodology used to evaluate 240 arbitral awards and 800 judgments (of the same period) and to briefly describe what is seen as a 'good' award before summarising and detailing the findings of the examination of the arbitral awards and judgments.[7]

II METHODOLOGY

Loukas Mistelis wrote in 2009 that of the 2000 decisions concerning the *CISG* that had been published in major collections by 2008, 26 per cent had been decided by arbitral tribunals.[8] This assessment was repeated by Nils Schmidt-Arendts in 2011.[9] Neither of the two articles, however, considered the quality of those identified awards in any depth. The aim of this project, therefore, has been to record with as much detail as possible, the approach taken to the application of the *CISG* by international arbitral tribunals in each of these cases, and undertake a qualitative assessment of the tribunals' performance, in particular with respect to the rules of interpretation contained in art 7 of the *CISG* — the autonomous interpretation the *CISG* requires especially in regard to filling gaps. Particular attention was paid to the reasoning by which tribunals came to apply the *CISG* and the roles that they gave to the *CISG* in terms of deciding the case, especially relative to the roles that they gave to domestic law.[10] The main focus of this article is, however, the arbitral awards — judgments are used as a comparator and as illustration.[11]

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7 The survey is available through: <http://www.victoria.ac.nz/law/about/staff/petrabutler>.

8 Mistelis, above n 3, 386–7.

9 Schmidt-Arendts, above n 1, 213.

10 The empirical research was conducted in accordance with King and Epstein's four rules essential to reaching valid inferences: (1) identify the population of interest; (2) collect as much data as is feasible; (3) record the process by which data came to be observed; (4) collect data in a manner that avoids selection bias: Lee Epstein and Gary King, 'Empirical Research and the Goals of Legal Scholarship: A Response' (2002) 69 *University of Chicago Law Review* 1, 99; see also Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press, Edinburgh, 2007) 33.

11 Please refer to the following website to view a brief analysis of all awards and judgments: <http://www.victoria.ac.nz/law/about/staff/petrabutler> [not live yet].

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The current study considers all arbitral decisions and judgments published on the websites of Pace, *CISG*–Online and Unilex between 1 January 2003 and 17 August 2009: 240 arbitral awards and 800 judgments in all. The arbitral awards make up around 23 per cent of the total cases concerning the *CISG* decided during that period. This method takes the most neutral approach in defining the sample awards. The result of the sample taken was slightly surprising in that 77 per cent of the awards can be attributed to just two (relatively new) arbitral institutions (see below). Therefore, the study considers in particular and separately all 83 ICC awards concerning the *CISG* available on the three websites to ascertain whether the quality of awards might change with the arbitral institution.[12] In contrast, the published judgments of the same period come from all corners of the world: from Austria to Australia and from Chile to China.

As already mentioned, 77 per cent of the total published awards between 2003 and 2009 were issued under the China International Economic and Trade Arbitration Commission (CIETAC, 87 cases) and the Tribunal of International Arbitration at the Russian Federation Chamber of Commerce and Industry (MKAC, 98 cases). Of the 45 cases that make up the remaining 23 per cent, 16 were decided by the Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, 14 were decided by the Tribunal of International Commercial Arbitration at the Ukraine Chamber of Commerce and Trade (U–ICA), and 13 were decided by the Court of Arbitration at the International Chamber of Commerce.[13] The picture in regard to judgments is more varied — most judgments published on the pertinent websites were issued by the German courts (14 per cent) followed by the Netherlands, Switzerland (9.25 per cent) and the United States (8.3 per cent). Chinese judgments only made up 6.1 per cent of judgments overall, and judgments of the Russian Federation contributed a mere 0.75 per cent of the sample.

The award text of nine of the 240 awards was not available on any of the websites mentioned above. A further 22 cases did not have English language translations available. For six cases an abstract only was published online. In nearly all cases, however, specifics were provided on the countries of the parties involved, the manner in which the *CISG* was found to be applicable, and the

[12] The period encompasses 1 January 1989 to 30 June 2011.

[13] Of the remaining 12 cases, two were decided by the International Centre for Dispute Resolution of the American Arbitration Association, two were decided by the Netherlands Arbitration Institute, and one was decided by each of the Arbitral Institute of the Stockholm Chamber of Commerce, Alexandria Center for International Arbitration and the Chambre Arbitrale de Paris. There was one ad hoc arbitration, and four cases from various Russian arbitration Courts.

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provisions of the *CISG* that were in issue. Most cases therefore carried some statistical value for the purposes of this project, even if the decisions could not be studied in depth. The availability of judgments in English varied substantially from country to country: for example while 86.6 per cent of German judgments featured at least a limited translation, and all Chinese judgments had at least some English coverage available, not even half of the judgments of Dutch courts were translated. Overall, however, the rate of availability of accessible judgments for which at least some valuable English coverage was available averaged about 90 per cent.

After the data was tabulated and sorted, three topics stood out as areas where the diversity in the approaches of international arbitral tribunals was particularly visible. The first concerned the chain of reasoning by which tribunals determined that the *CISG* itself applied. The second was the approach to awarding interest to parties recovering under art 78 of the Convention. The third was the approach to the application of contractual penalties in international sales disputes — an area of some controversy within *CISG* jurisprudence. The *CISG* stipulates that interest is payable, but is silent in regard to other important aspects of interest such as the rate of interest payable. While the *CISG* does not provide for penalty clauses, there is also no indication that penalty clauses contravene the *CISG* framework. An adjudicator's response to these two issues therefore requires autonomous interpretation of the *CISG*.

The interest issue is common between arbitral tribunals and national courts,[14] but the variety of legal issues that surfaced in the survey of the courts' decisions was more diverse than in arbitral awards.[15] Courts situated in the European Union, for example, often had to determine the place of performance in accordance with the *CISG* to ascertain whether they had jurisdiction under art 5

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[14] For example, the Chinese courts had to decide in 9 cases (18.4 per cent) about interest rates; in the German courts the interest rate was at issue in 20.5 per cent of cases.

[15] For example, the German court decisions discussed breach of contract, standard form contracts, setoff, notification, interest; Dutch courts discussed breach of contract, interest, notification, suspended performance, standard form contracts; Chinese courts discussed breach of contract, notification, damages, interest, standard form contracts, jurisdiction, agency, contract formation; Austria discussed art 5 of the *Brussels Regulation* (ie, jurisdiction), damages, trade usage, standard form contracts, notification, price reduction, scope of the *CISG*, right to withhold payment, breach of contract, art 82 of the *CISG*, application of the *CISG*, 'Zug um Zug'; and Belgian courts examined hardship (*CISG* art 79), breach of contract/non-payment, interest, notification, application of the *CISG*, damages, standard form contracts, art 5 of the *Brussels Regulation* (jurisdiction). In the United States the courts' discussions reflect to a certain extend the federal nature of the US and its common law background, matters before the courts were, for example, distributorship agreements, prejudgment interest, the influence of the UCC, scope and application of the *CISG*.

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of the Brussels Regulation to hear the case.[16] Breach of contract (including issues of non-payment and fundamental breach) and notification were issues concerning courts across jurisdictions.[17]

As noted earlier, the analysis undertaken in this project relies largely on translations of arbitral decisions rendered in languages other than English. It is therefore appropriate to add the disclaimer that some aspects of arbitral tribunal and court performances that come in for criticism in this paper will not necessarily be able to be laid solely at the feet of the tribunals in question. There may be errors or losses of meaning in translation, and indeed the analysis of those translations, that were not present in the original decisions. That said, it is important that arbitral tribunal decisions and judgments provide reliable authority in whatever language they might be published and therefore interpretation errors cannot be weighted too heavily.

The author is also aware that the limit of the investigation lies with the nature of arbitration and the function of the arbitral tribunal. Arbitral tribunals are bound first and foremost by party submission. Further, the aim of the arbitral process to reach an arbitral award not to develop the law or even to correct the parties' understanding of the law. As one arbitrator pointed out: 'even if both parties plead the wrong law the arbitral tribunal will not correct the parties' legal analysis if the use of the correct law will come to the same result.' Taking the arbitral process and the aim of the arbitral tribunal into account does not distract from the underlying investigation presented in this article which is testing the hypothesis that international arbitral tribunals are better equipped to deliver decisions that reflect the autonomous meaning of the *CISG*. It might be that due to the features of the arbitral process that the hypothesis is proven wrong.

III The Arbitral Award

One obvious challenge in examining the hypothesis of this paper lies in the determination of the (reasonable) quality criteria of an arbitral award. To take some guidance from the arbitration rules of the institutions, art 43 of the *CIETAC Arbitration Rules* (2005), for example, states:

> 1. The arbitral tribunal shall independently and impartially make its arbitral award on the basis of the facts, in accordance with the law and the terms of the contracts, with reference to international practices and in compliance with the

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16 For example, in 21 per cent of Austrian judgments place of performance was an issue.

17 For example, breach of contract concerned German courts: 67 per cent; Belgian courts: 54.6 per cent; Chinese courts: 47 per cent; Dutch courts: 13.5 per cent; Austrian courts: 9.5 per cent. Notification was an issue in 25 per cent of German court decisions; in 21.8 per cent of Belgian decisions; in 9.5 per cent of Austrian court decisions; in only 5.4 per cent of Dutch court decisions; and in only 2 per cent of Chinese decisions.

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> principle of fairness and reasonableness.
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> 2. The arbitral tribunal shall state in the award the claims, the facts of the dispute, the reasons on which the award is based, the result of the award, the allocation of the arbitration costs and the date on which and the place at which the award is made. …

Similarly, art 49(2) of the *Rules of the Foreign Trade Court of Arbitration* at the Serbian Chamber of Commerce requires the arbitrator(s) to render an award in which, the reasons in terms of the facts and law are stated. And the ICC *Rules of Arbitration* in art 31(2) just require that '[t]he Award shall state the reasons upon which it is based'. Most jurisdictions and institutional rules require the award to contain reasons.[18] The best that can be taken from the rules is that an arbitral award should outline the facts and contain at least the key reasoning to allow parties to follow how the arbitrators arrived at their decision. However the importance of the quality of the award has been confirmed by the 2010 Queen Mary and White & Case study *2010 International Arbitration Survey: Choices in International Arbitration,* where the quality of awards was found to be the third most important criterion in regard to the appointment of an arbitrator.[19]

Specific academic scholarship seems to be non-existent.[20] The *Chartered Institute of Arbitrators' Practice Guideline for Arbitrators on the Formalities for Drafting an Arbitral Award* sets out exactly that — the formalities in regard

[18] Chartered Institute of Arbitrators, 'Practice Guideline 18: Guidelines for Arbitrators on the Formalities for Drafting an Arbitral Award' (2011) <www.ciarb.org> at [5.1]. It should be noted that exceptions are generally recognised in regard to the agreement of the parties or in regard to the award merely recording the terms of settlement agreed by the parties. The major exception in regard to the rules is the US *Federal Arbitration Act* which does not require reasons to be given.

[19] Paul Friedland and Loukas Mistelis, *2010 International Arbitration Survey: Choices in International Arbitration* (White & Case, London, 2010) 26.

[20] A search of legal databases like Westlaw and LexisNexis as well as the Kluwer arbitration journals and SSRN has not resulted in one relevant article. On the other hand, probably not unsurprisingly, the content of judgments has been the subject of judicial and academic debate: see, eg, *Ambard v Attorney General for Trinidad and Tobago* [1936] AC 322 (PC), 335, where Lord Atkin remarked '[j]ustice is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men'; Heidi Li Feldman, 'Objectivity in Legal Judgment' (1993) 12 *Mich L Review* 1187; Wesley Newcomb Hohlfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (Yale University Press, 1919); Hiroshi Hoh, 'How Judges Think in Japan' (1970) 18 *Am J Comp L* 775; Jean Louis Goutal 'Characteristics of Judicial Style in France, Britain and the USA' (1976) 24 *Am J Comp L* 43; Moshe Bar Niv and Zvi Safra, 'The Undesirability of Detailed Judicial Reasoning' (1999) 7 *European Journal of Law and Economics* 161; R David Broiles, 'Toward a Reasoned Judicial Decision' (1966) 4 *The Southern Journal of Philosophy* 41; Kent Roach, 'Judges and Free Speech in Canada' in H P Lee (ed), *Judiciaries in Comparative Perspective* (Cambridge University Press, Cambridge, 2011) 175, 185 et seq.

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to whether reasons have to be included in an award — but is silent what that reasoning entails.[21] A Google search produced one relevant source: Geoffrey Beresford Hartwell describes a quality arbitral award as one in which the reasoning is clear.[22] According to Hartwell a clear award firstly satisfies the losing party that its case was heard and considered and, so far as possible, that the arbitrator or arbitral tribunal has been fair and that the award has interpreted the law correctly. Secondly, the award is intended for any court which may have to enforce it. That requires the award to be clear in its legal reasoning, and it requires it to be set out clearly so that the court can see precisely what is intended. Thirdly, an arbitral award is a documentary instrument that has legal effect. Therefore, it should be cogent,[23] complete,[24] certain and final. In addition, if it is to attract the benefits of support and enforcement within a legal system, it must be substantively compliant[25] and procedurally compliant.[26]

Relying on the *Hartwell criteria* this paper defines a quality award as an award that identifies the legal issue in regard to the *CISG* and provides a sustained reasoning for its conclusion on the issue, drawing guidance from other awards and court decisions or academic writing.[27]

IV The Findings

The advantage or disadvantage of an unbiased empirical study is that the result can be unexpected. In this case the surprise lay (for the *CISG* lawyer) in the finding that 77 per cent of all arbitral awards in the time period in question were rendered under just two arbitral institutions, CIETAC and MKAC. Furthermore,

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21 Chartered Institute of Arbitrators, above n 18[5].

22 Geoffrey M Beresford Hartwell, 'The Arbitration Award' (2001) *The Nationwide Academy for Dispute Resolution* <www.nadr.co.uk>. Note that 9 per cent of surveyed counsel in the Friedland and Mistelis survey, above n 19, cited poor reasoning and lack of knowledge or expertise as the leading reason for disappointment with the arbitrator; and 8 per cent cited tardiness on the part of the arbitrator in rendering the award.

23 The award must be compelling or convincing in its reasoning.

24 The award must deal with all issues properly submitted to the arbitrator (exception maybe a partial award)

25 Broadly speaking, the decisions in the award should be consonant with the laws or rules of law that the parties have selected. Otherwise, the court may not enforce them. There may be other questions, which I discuss later. The extreme case is that of public policy, which is one of the grounds that may persuade a court not to enforce a foreign award under the *New York Convention*.

26 For example, formal requirements, such as that the award shall be signed and the seat of the arbitration recorded on the award. Some jurisdictions require awards to be notarised, some require them registered in the court.

27 It should be noted at this point already that the before mentioned databases provide invaluable resources since they not only contain awards and judgments but also a substantive body of academic writing on the topic.

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one would have expected more than three themes to emerge in the arbitral awards. It is interesting that the conformity of the goods with the contract (*CISG* art 35) has gotten comparatively little attention in the surveyed awards whereas it is one of the more contentious issues in national court judgments. The reason for the lack of scholarly exegeses in the award samples seems to be that the factual matrix does not yield such an exegesis. The majority of awards concerning the *CISG* were rendered under the auspice of CIETAC and MKAC rules. Those institutions are not among the most preferred arbitration institutions according to the recent Queen Mary and White & Case survey. Therefore, it seems opportune to survey all awards concerning the *CISG* under the arbitration institution which, according to the Queen Mary and White & Case survey, was the most favoured institution — the ICC.[28]

A *2003–2009 Arbitral Awards*

Three themes will be explored in the following pages. The first is the chain of reasoning by which tribunals determined that the *CISG* itself applied. The second is the approach to awarding interest to parties recovering under art 78 of the Convention. The third is the approach to the application of contractual penalties in international sales disputes — an area of some controversy within *CISG* jurisprudence.

1 *Application of the CISG*

Article 1 of the *CISG* provides for two ways in which the *CISG* may be applicable to an international sales dispute. Firstly, the *CISG* may be automatically applicable due to the disputing parties having their places of business in different *CISG* Member States: art 1(1)(a). Secondly, the applicable rules of private international law may lead to the application of the law of a Member State: art 1(1)(b). Parties to an international sales contract may also, of course, agree between themselves, either in their contract or at the time a dispute arises, that the *CISG* should apply to their dispute, even if neither party is based in a Member State.

When an arbitral tribunal is tasked with determining whether the *CISG*, or any other system of law, applies to a contract, the first task will be to determine what the parties have chosen themselves.[29] The recorded sample reflects the well-known fact that parties to international commercial contracts rarely include a choice of law provision — in 41 per cent of cases the arbitral tribunal recorded that the parties had made no stipulation in their contract as to the

[28] Friedland and Mistelis, above n 19, 21 and 22.
[29] Mistelis, above n 3, 381.

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substantive law applicable to their disputes. The tribunal recorded a selection of *CISG* as the applicable substantive law in just 14 cases, compared with 56 cases (23 per cent of the total) where the parties were found to have selected another system of private law. In five cases the parties were found to have excluded the *CISG* as per art 6. In 23 cases — just under one in ten — the arbitral tribunal failed to address the choice of law question.[30]

Where the parties themselves select the *CISG* as applicable law the tribunal's work is easy. However where the parties do not stipulate the applicable law, or where they select the substantive law of a Contracting State to the *CISG*, the tribunal's role becomes more complicated.

(a) Where there is no Provision in the Contract for Choice of Law

Where the parties make no stipulation at all as to choice of law the arbitral tribunal will be required to decide what substantive law should apply to the dispute.[31] The contrast in the approaches of the CIETAC and MKAC tribunals, as the two largest contributors of decisions to the sample under examination, is interesting.

(i) CIETAC Arbitrations

China has made a reservation under Article 95 of the *CISG* against art 1(1)(b). CIETAC tribunals therefore rarely apply the *CISG* on the basis of private international law.[32] Upon determining that there is no choice of law stipulation, CIETAC tribunals typically take a simplistic approach, noting that both parties to the dispute have their places of business in different Contracting States and therefore the *CISG* applies.[33] Of the 49 cases where the CIETAC tribunal applies the *CISG* in the absence of a choice of law stipulation from the parties, art 1 of the Convention is cited in just 14. Treatments of the applicable law in

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30 To round out the statistics, six cases involved the parties making an agreement regarding the applicable substantive law postcontract, and in 37 cases there was insufficient information to determine the tribunal's approach to choice of law.

31 Mistelis, above n 3, 383; see art 21(1) and (2) *ICC Rules of Arbitration*: '1. 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. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate. 2. The arbitral tribunal shall take account of the provisions of the contract, if any, between the parties and of any relevant trade usages.'

32 Conceivably they could do so if required to apply the procedural law of a non-contracting state, but there are no examples of this in the sample studied.

33 China has made a reservation under art 95 of the *CISG* against art 1(1)(b), so the *CISG* is found to apply usually only on the basis of both parties having their places of business in Contracting States under art 1(1)(a).

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many cases resemble the following example:

> **1 Applicable law**
>
> The parties did not stipulate the applicable law in the Contract. The Arbitration Tribunal deems that because the places of business of the parties are both in Contracting States of the *CISG*, and because the parties did not exclude the application of the *CISG*, the *CISG* shall therefore be applied. [34]

In the six cases where the CIETAC tribunal did not decide to primarily apply the *CISG* in the absence of a firm choice of law by the parties, two involved contracts between parties that were not based in different contracting states.[35] The tribunals in the remaining four cases all recognised the applicability of the *CISG* because of the parties' places of business, but appeared to treat the *CISG* and Chinese law as being applicable *alongside* one another:

> **1 Applicable law**
>
> The Tribunal notes that in the Contract, the parties did not agree on the law applicable to the present dispute. However, the foreword of the Contract states that 'this contract is concluded between the Buyer and the Seller according to Chinese laws'. At the same time, considering the fact that the Contract was signed in Dalian, China, and the destination of the delivery of the goods was in China, as well as the fact that both parties based their arguments on Chinese laws in the arbitral hearings, the applicable law to the arbitration and the Contract shall be laws of the People's Republic of China.
>
> The places of business of the [Seller] and [Buyer] are France and China, respectively. Both France and China are Contracting States of the United Nations Convention on Contracts for the International Sale of Goods (1980) (hereinafter, the '*CISG*'). Further, the parties did not expressly exclude the application of the *CISG*. Thus, the *CISG* shall be applicable to the present dispute. Therefore, while Chinese laws are applicable, the *CISG* is applicable to the case as well.[36]

This appears to be in direct contradiction to art 142 of the General Principles of the Civil Law of the People's Republic of China, which provides:

> If any international treaty concluded or acceded to by the People's Republic of China contains provisions differing from those in the civil laws of the People's Republic of China, the provisions of the international treaty shall apply, unless

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[34] 'China 7 July 2003 CIETAC Arbitration proceeding (*Stroller and diaper case*) [translation available]' Pace Law School Institute of International Commercial Law <www.cisg.law.pace.edu>.

[35] The non-contracting states involved were Japan and Albania, both of which have recently ratified the *CISG*. See 'China 23 July 2003 CIETAC Arbitration proceeding (*Telephone machine case*) [translation available]' and 'China 24 December 2004 CIETAC Arbitration proceeding (Medical equipment case) [translation available]' Pace Law School Institute of International Commercial Law <www.cisg.law.pace.edu>.

[36] 'China 21 October 2005 CIETAC Arbitration proceeding (*FFS production line case*) [translation available]' Pace Law School Institute of International Commercial Law <www.cisg.law.pace.edu>.

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the provisions are ones on which the People's Republic of China has announced reservations.

(ii) MKAC Arbitrations

MKAC arbitral tribunals, by contrast, identify the appropriate provision of art 1 in 80 per cent of cases where the parties do not stipulate a choice of law. On the whole, MKAC tribunals are much more careful to lay out the precise reasoning by which they come to decide on the applicable law:

> **3.4 Applicable law**
>
> The respective States (Russia and Australia) where the places of business of the parties are located are Contracting States to the *Vienna Convention of 1980*. Thus, the *Vienna Convention of 1980* shall be applicable to the relations of the parties by virtue of art 1(1)(a) thereof. At the same time, by virtue of art 7(2) of the *Vienna Convention of 1980*, issues which are not directly settled by the Convention and cannot be settled based on its general principles shall be governed by the provisions of the national law determined by the norms of private international law.
>
> According to art 28(1) of the *Law of the Russian Federation* 'On International Commercial Arbitration' and para 13(1) of the *Rules of the Tribunal*, the Tribunal shall decide the disputes based on the applicable provisions of the substantive law determined by the consent of the parties. However, the Tribunal found that the Contract concluded by the parties did not contain any clause related to the applicable law. In view of that, the Tribunal determined the subsidiary applicable law based on the conflict–of–laws norm which it believed to be applicable, in particular, art 1211 of the *Russian Civil Code*. The law to be thereby applied subsidiary to the *Vienna Convention* is the *Law of Russian Federation*, as the law of the [Seller] under the Contract (art 1211(3) of the *Russian Civil Code*).[37]

MKAC tribunals also generally apply art 1(1)(b) of the *CISG*:

> **3.4 Applicable law**
>
> The applicable law was not determined by the parties. Following art 28(2) of the *Law of the Russian Federation* 'On the International Commercial Tribunal' and para 13(1) of the *Rules of the Tribunal*, the Tribunal holds that it is appropriate to apply the conflict of laws norms of Russian law, in particular art 1211 of the *Civil Code of Russian Federation* in order to determine the applicable law.
>
> According to art 1211(1) of the *Civil Code of the Russian Federation*, in the absence of the agreement on applicable law, the law of the State with which the contract is most closely linked shall apply. Following assumptions of paras 2 and 3(1) of art 1211, this law is the law of the country where the place of business of the company carrying out fulfillment of the acts of decisive

[37] 'Russia 13 January 2006 Arbitration proceeding 137/2004 [translation available]' Pace Law School Institute of International Commercial Law <www.cisg.law.pace.edu>.

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> importance for the contract is located. The seller is regarded as the party which carries out such fulfillment under a sales contract (the Russian company in this case). Based on the above, the Tribunal concluded that Russian law is to be applied to this dispute.
>
> Taking into account that the Russian Federation is a Contracting State to the *Vienna Convention* which according to art 15(4) of the *Constitution of the Russian Federation* and art 7 of the *Civil Code of the Russian Federation* is a constituent part of the legal system of the Russian Federation and that provisions of the international agreement predominate over the norms of the national law, following art 1(1)(b) of the *Vienna Convention*, the Tribunal holds that the *Vienna Convention* shall be applicable to the relations in the present dispute.
>
> By virtue of art 7(2) of the *Vienna Convention*, questions which are not expressly settled in the Convention are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the Russian law.

There were, however, examples where MKAC tribunals took a similarly simplistic approach to that commonly found in CIETAC arbitrations:

> 3.3 Since in their contract the parties failed to set forth the applicable substantive law and since the Russian Federation and Germany are *CISG* Contracting States, the Tribunal finds that the *CISG* should be applied when arbitrating this dispute.[38]

(iii) Other Tribunals

Nine cases in the sample of cases where a choice of law agreement was absent were decided by tribunals of the Foreign Trade Court of Arbitration Attached to the Serbian Chamber of Commerce. Article 1(1) is cited in three of these cases. The Serbian tribunals exhibit an interesting predisposition to dispose of the private international law question *before* considering the automatic application of the *CISG* under art 1(1)(a):

> The parties failed to insert in the Contract a clause on the applicable law.
>
> Pursuant to Article 48(2) of the Rules, in the absence of the parties' agreement on the applicable law, the arbitrator is to apply the law or the rules of law determined by the conflict of laws rules that the arbitrator deems most appropriate to the case. The arbitrator considers that it is most appropriate to apply the law that is most closely connected to the Contract in the present case. The language of the Contract (Serbian), the fact that the place of performance of the substantial part of contractual obligations was in Serbia, and the fact that the Serbian company owned by the [Seller] was obviously active in the performance of the Contract point to the Serbian law as applicable. It is also important that the parties have agreed on the jurisdiction

[38] 'Russia 26 June 2003 Arbitration proceeding 85/2002 [translation available]' Pace Law School Institute of International Commercial Law <www.cisg.law.pace.edu>.

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> of the Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce in Belgrade. On the other hand, the fact that the [Seller], as the performer of the characteristic (non-pecuniary) contractual obligation, has its seat in Switzerland, and that the obligation of the [Buyer] (payment) is to be performed at a Swiss account of the [Seller] point to the Swiss law.
>
> On the basis of the evaluation of the mentioned circumstances, the arbitrator concludes that the most closely connected law is the Serbian law. Since Serbia ratified the *UN Convention on Contracts for the International Sale of Goods* (the *Vienna Convention*), which thereby became an integral part of Serbian law, the arbitrator finds that the *Vienna Convention* should be primarily applied to the Contract, since all the conditions for its application are fulfilled pursuant to Article 1(1) of the Convention: the Contract is of international character, it is a contract for the sale of goods, and the applicable law is the law of a Contracting State (Serbia). In addition, Switzerland is also a Contracting State to the *Vienna Convention*. The provisions of the Serbian law are subsidiarily applicable.

This approach is technically accurate, but leaves room for doubt as to the basis upon which the *CISG* is being applied.

One case in the sample was decided by the U–ICA:

> There is no agreement of the parties on the law applicable to Contract # 23. According to art 28(2) of the *Law of Ukraine 'On International Commercial Arbitration'*, the Arbitration Tribunal shall apply the law determined on the basis of the conflict of laws rule which it regards applicable if a different arrangement is not agreed to by the parties.
>
> In the Tribunal's opinion, it is reasonable to apply conflict of laws norms of Ukrainian legislation. According to art 6 of the *Law of Ukraine 'On External Economic Activity'*, in the absence of the agreement of the parties on the applicable law, in a sales contract the law of the country in which the seller is located shall be applied. Since under Contract # 23 of 28 March 2003, [Seller] is a Ukrainian business, the substantive law of Ukraine shall be applicable to the legal relations in question.[39]

The dispute in this case was between a Ukrainian seller and a Hungarian buyer. Both Ukraine and Hungary are Contracting States to the *CISG*. The tribunal did apply some *CISG* provisions to the dispute, but it appears to have overlooked establishing the legal basis for its application here. It is notable that of the 14 cases decided by this tribunal since 2003, 12 involve agreement between the parties as to the applicable substantive law prior to the hearing, which suggests the tribunal in this case may have been somewhat out of practice.

[39] Ukraine 27 October 2004 Arbitration proceeding (*Lavatory paper case*) [translation available] Pace Law School Institute of International Commercial Law <www.cisg.law.pace.edu>.

Electronic copy available at: https://ssrn.com/abstract=2738236

(b) *Where the Contract Provides for the Application of the Domestic Law of a Contracting State*

As stated above, the *CISG* applies automatically where the States in which the disputing parties have their places of business are Member States. This is so even where the contract in question provides for the choice of law of a Contracting State.[40] CIETAC tribunals in particular appear to struggle with this:

> The Contract stipulated that 'the Contract shall be governed pursuant to the laws of the People's Republic of China.' The parties did not dispute this.
>
> The Arbitration Tribunal noted that the [Seller]'s place of business and the [Buyer]'s place of business were in China and Switzerland, respectively. Both China and Switzerland are Contracting States of the *United Nations Convention on Contracts for International Sales of Goods* ('*CISG*'), and the parties did not exclude the application of the *CISG*. Therefore, the *CISG* also applies to this case except where the laws of the People's Republic of China apply.[41]

This is incorrect. Where the parties have their places of business in Contracting States the *CISG* should take precedence, with the selected national law applying where there is no *CISG* coverage.[42] This approach is reflected in art 142 of the *General Principles of the Civil Law of the People's Republic of China*, as discussed above. The following example reflects a similarly flawed approach:

> Article 18 of the Contract stipulates that the law of the People's Republic of China shall apply to any disputes arising out of the Contract. Considering that both parties cite the *CISG* in the written statements, arguments and responses, the Arbitration Tribunal held that it sustains the parties' intent to apply the law of the PRC as well as *CISG*. Therefore, the law of the PRC shall apply to this case; if the law of the PRC does not provide, *CISG* shall apply. If both the law of the PRC and *CISG* provide, both shall apply. Since Article 18 of the Contract stipulates that the applicable law is the law of the PRC, when there is a conflict between the law of the PRC and *CISG*, the law of the PRC shall apply.[43]

This case involved a Chinese seller and a German buyer — both China and Germany are Member States. Despite both parties citing the *CISG* in argument

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[40] Stefan Kröll, Loukas Mistelis and Pilar Perales Viscasillas (eds), *UN Convention on Contracts for the International Sale of Goods (CISG)* (Hart, Oxford, 2011) 105.

[41] 'China 20 July 2005 CIETAC Arbitration proceeding (*Elevator material case*) [translation available]' Pace Law School Institute of International Commercial Law <www.cisg.law.pace.edu>.

[42] Kröll, Mistelis and Viscasillas, above n 40, 105.

[43] 'China May 2006 CIETAC Arbitration proceeding (*Canned oranges case*) [translation available]' Pace Law School Institute of International Commercial Law <www.cisg.law.pace.edu>.

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the tribunal was unwilling to recognise it as the primarily applicable law.

These examples represent two of the three cases in which CIETAC tribunals were required to consider the law applicable to a dispute where the contract provided for the application of a Member State's law. In the third, the tribunal took the proper approach:

> Article 9 of the Contract stipulates that 'this contract shall be construed in accordance with and governed by the law of PR China.' Therefore, the Arbitration Tribunal holds that the law of PR China applies to this case. For matters that are not covered by such laws, international usages shall apply. If an international treaty concluded or acceded to by the People's Republic of China contains provisions differing from those of such laws, the provisions of the international treaty shall apply, unless the provisions are ones on which China has announced reservations. Since China and Singapore, where the parties are incorporated, respectively, are parties to the *United Nations Convention on Contracts for the International Sale of Goods* (1980) (hereinafter, the '*CISG*'), the *CISG* shall apply to the case. Although the parties held different opinion on the application of the *CISG* at the first hearing, the Arbitration Tribunal finds that unless otherwise prescribed, where provisions of the law of China differ from those of *CISG*, the *CISG* shall apply.[44]

Notably, in three other cases the CIETAC tribunal was required to consider the law applicable to contracts where the contract had clearly contemplated a subsidiary role for the *CISG*:[45]

> Article 15 of the Contract signed by the [Seller] and the [Buyer] on 26 April 2004 states:
>
> > 'The applicable law is the law of the People's Republic of China, and may also refer to the *United Nations Convention on Contracts for International Sales of Goods* ('*CISG*') and international trade customs.'
>
> According to the parties' stipulation, the Arbitration Tribunal decides that the applicable law is Chinese law, and if Chinese law does not prescribe some matters, the *CISG* and international trade customs may be referred to.

This is the correct approach.

MKAC tribunals considered 33 cases where the parties had made their own

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[44] 'China 25 July 2006 CIETAC Arbitration proceeding (*Bleached softwood Kraft pulp case*) [translation available]' Pace Law School Institute of International Commercial Law <www.cisg.law.pace.edu>.

[45] 'China September 2006 CIETAC Arbitration proceeding (*Printing machine case*) [translation available]' Pace Law School Institute of International Commercial Law <www.cisg.law.pace.edu>. See also 'China 14 January 2004 CIETAC Arbitration proceeding (*Printing machine case*) [translation available]' and 'China 23 March 2007 CIETAC Arbitration proceeding (*Offset printing machines case*) [translation available]'

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choice of substantive law in their contract. In all cases Russian law was the law chosen. The Russian tribunals were typically very good at identifying the application of the *CISG* to disputes with contracts stipulating Russian substantive law, as well as justifying the legal basis for the *CISG*'s prevalence:

> Considering the issue of the law applicable to the relations of the parties under the contract, the Tribunal found that para 6.4 of the contract foresees application of Russian law.
>
> Following art 28(1) of the Law of the *Russian Federation 'On International Commercial Arbitration'* and para 13(1) of the *Rules of the Tribunal*, according to which the Tribunal settles the disputes on the basis of the applicable norms of substantive law determined by the agreement of the parties, the Tribunal holds that Russian law is the applicable law.
>
> The Tribunal takes into account that the contract from which the present dispute arose is an international sale contract, and that the Russian Federation is a Contracting State to the *Vienna Convention of 1980* which, as an international agreement to which the Russian Federation is party, is a constituent part of its legal system by virtue of the *Constitution of Russian Federation* (art 15(4)).
>
> According to art 1(1)(a) of the *Vienna Convention*, 'This Convention applies to contracts of sale of goods between parties whose places of business are in different States when the States are Contracting States.'
>
> Based on the aforesaid, the Tribunal finds that the provisions of the *Vienna Convention* apply to the present dispute.
>
> Taking into account that according to art 7(2) of the *Vienna Convention*, 'Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law', in the course of the adjudication of the present dispute, as Russian law was selected by the parties, it shall apply as the subsidiary law.
>
> Based on the above and following para 13(1) of the *Rules of the Tribunal*, the latter concluded that the provisions of the *Vienna Convention of 1980* and subsidiary Russian law shall apply to the dispute between the parties.[46]

In two cases, MKAC tribunals held that a reference to 'Russian legislation' as the applicable law for the contract amounted to an implicit exclusion of the *CISG* under art 6.[47] In case 155/2003 the tribunal held:

> In art 14.6 of the contract, the parties have noted that in execution of contractual obligations they shall be guided by legislation of the Russian

[46] 'Russia 27 April 2005 Arbitration proceeding 5/2004 [translation available]' Pace Law School Institute of International Commercial Law <www.cisg.law.pace.edu>.

[47] 'Russia 16 March 2005 Arbitration proceeding 155/2004 [translation available]' and 'Russia 12 April 2004 Arbitration proceeding 11/2003 [translation available]' Pace Law School Institute of International Commercial Law <www.cisg.law.pace.edu>.

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> Federation and in 10.4 they provided that liabilities of the parties not regulated by the present contract are to be settled by acting legislation of the Russian Federation. …
>
> In view of this, the Tribunal believes that in designating the applicable law to be the acting legislation of the Russian Federation, the parties' intent was to opt out from application of the Convention. Based on this, the Tribunal concludes that law applicable to the rights and obligations of the parties from this international commercial transaction — the contract dated 20 September 2001 and additional agreement to it No 4 dated 19 October 2001 — is the internal legislation of the Russian Federation.

In a third case where the contract had referred to both the *CISG* and 'Russian legislation', the tribunal applied both concurrently.[48]

The other tribunal to decide a significant amount of cases of this type was the U–ICA, which decided eight cases, all of which involved contracts stipulating Ukrainian law as the applicable law. In three of those cases the tribunal applied the *CISG* on the basis that the parties had their places of business in different Member States. In one case the tribunal found that the choice of the law of Ukraine, a Member State, led to the application of the *CISG* through art 1(1)(b). Of the remaining four cases, three did not discuss the application of the *CISG* at all (although at least two cited *CISG* provisions in their judgments) and one stated that the *CISG* applied, but did not say why.

(c) Declarations of 'Subsidiary Law' and Recognition of Article 7

In 116 of the cases in the sample arbitral tribunals can be seen to declare a subsidiary law that will apply to the dispute in relation to matters with which the *CISG* does not deal. In most cases it is necessary for a subsidiary law to be selected because the scope of the *CISG* is limited — according to art 4 it governs 'only the formation of the contract and the rights and obligations of the seller and the buyer arising from the contract'. Article 4 expressly provides that the validity of the contract and its effect on the property in the goods it concerns are not matters with which the *CISG* is concerned. Therefore when matters arise for determination which fall outside of the *CISG*'s scope, some other set of rules must be referred to.

Article 7 of the *CISG* recognises that there is a distinction between matters which are governed by the *CISG* and matters which are directly addressed by it. The extent to which courts and arbitral tribunals applying the *CISG* have appreciated that distinction has been cause for some concern, in the sense that there is a risk that courts and tribunals might resort too quickly to domestic law

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[48] Russia 15 November 2006 Arbitration proceeding 30/2006 [translation available] Pace Law School Institute of International Commercial Law <www.cisg.law.pace.edu>.

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solutions instead of interpreting the *CISG* autonomously wherever possible.[49] Recourse to domestic law is inevitable where there are issues in dispute which are outside the scope of the *CISG*, but art 7(2) requires that where there are questions concerning matters that *are* governed by the *CISG* they ought to be settled in conformity with the general principles upon which the *CISG* is based. It is only where consideration of those general principles does not yield a solution that recourse to domestic law is permitted.

Out of the 116 cases where the arbitral tribunal identifies a subsidiary law, only 16 refer to the requirement that general principles should be referred to before resorting to the subsidiary law. Although there is always the possibility that the error is in the translation rather than the tribunal's decision, many decisions appear to misunderstand the concept that it is only where the matter is outside the *scope* of the *CISG* that immediate recourse may be had to domestic law. For example, in the *False Hair Case* of 3 December 2003, the CIETAC tribunal deciding the case held that:

> Because the [Seller]'s place of business, the place of loading, and the place of arbitration are all in China, pursuant to the proximate connection principle set forth in international private law, Chinese law shall be applied when there is no *stipulation* in the *CISG*.

This approach appears to gloss over the fact that while the *CISG* might not stipulate a particular rule, that is not to say that the matter is not governed by the *CISG*. The *CISG* does not, for example, stipulate the place of payment for restitution of the price paid by the buyer after the contract has been avoided, but restitution of the price paid is clearly a matter covered by the *CISG* (under art 81).[50] It would therefore not be legitimate to apply Chinese law to this issue, even though there is no stipulation in the *CISG*.

An arguably more alarming example is found in the *Chemicals Case* of May 2005:

> The Contract did not stipulate the applicable law for dispute resolution. The [Seller] and the [Buyer] are Korean and Chinese legal persons respectively. As both Korea and China are Contracting States to the *CISG*, the Arbitration Tribunal holds that *CISG* should be applied to resolve the contractual dispute in this case. The Arbitration Tribunal also notes that both Parties' Opinions of

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49 See, eg, Frank Diedrich, 'Maintaining Uniformity in International Uniform Law via Autonomous Interpretation: Software Contracts and the CISG' (1996) 8 *Pace Int'l L Rev* 303; John E Murray, 'Neglect of *CISG*: A Workable Solution' (1997–1998) 17 *J L & Com* 365; Shani Salama, 'Pragmatic Responses to Interpretive Impediments: Article 7 of the CISG, an InterAmerican Application' (2006) 38 *U Miami InterAm L Rev* 225.

50 Cesare Massimo Bianca and Michael Joachim Bonell, *Commentary on the International Sales Law* (Giuffrè, 1987) 78.

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> Attorney cited Chinese laws for reference, therefore, the laws and regulations of China and international trade customs should be applied to the matters not expressly settled in the *CISG*.[51]

The words 'expressly settled' are taken directly from art 7(2), but the tribunal makes no reference to the need to consider the general principles of the *CISG* before turning to domestic law.[52] At face value, this passage indicates that the *CISG* will only be applied where it is *expressly* applicable, with the implication that there will be no role for general principles. In fact, the tribunal in this case then went on to apply Chinese law to the issue of whether the Seller could terminate the contract — an issue that *is* expressly covered by the *CISG* in art 64.

In other examples tribunals appear to misinterpret art 7 and apply it as authority for the notion that domestic law may be applied where the *CISG* does not expressly provide:

> Taking into consideration that, when the contract was made, the [Seller]'s and [Buyer]'s enterprises were located in *CISG* Contracting States and that the parties did not exclude the application of the *CISG* to the relationships following from the contract, and since the [Seller]'s position, which is stated in the complaint, that the *CISG* governs the present dispute, is well supported, the Tribunal concludes that, pursuant to Article 1(1)(a) *CISG*, the parties' relationships in the present dispute are governed by the *CISG*.
>
> Pursuant to Article 7(2) *CISG*, the Tribunal also finds that issues not directly settled in the *CISG* are governed by the rules of international private law.[53]

This reasoning was found in nine cases in total, all of which were decisions of MKAC tribunals.

As mentioned above, proper reference to the autonomous interpretation process is made in 16 out of 116 cases. In case 167/2003 of 28 June 2004 the MKAC tribunal made the following assessment when deciding on subsidiary law:

> The grounds for application of the *Vienna Convention of 1980* are art 15(4) of the *Constitution of Russian Federation* and art 7(2) of the *Russian Civil Code* as well as art 1(1)(b) of this Convention. By virtue of art 7(2) of the *Vienna Convention of 1980*, norms of *Russian Civil Code* are to be applied subsidiary to the issues which are not directly regulated in the Convention and cannot be solved by the general principles on which the Convention is based.

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51 'China May 2006 CIETAC Arbitration proceeding (*Chemicals case*) [translation available]' Pace Law School Institute of International Commercial Law <www.cisg.law.pace.edu>.

52 In fairness, it is possible that the reference to 'international trade customs' was a reference to the general principles that has been lost in translation.

53 'Russia 17 February 2003 Arbitration proceeding 168/2001 [translation available]' Pace Law School Institute of International Commercial Law <www.cisg.law.pace.edu>.

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In case 12460 of 2004 an ICC tribunal held that the *UNIDROIT Principles of International Commercial Contracts* could be referred to as general principles of the *CISG*:

> *CISG*, as per its Article 7, may be supplemented by those general principles which have inspired its provisions and particularly those which have been substantiated and codified in the *UNIDROIT Principles of International Commercial Contracts* and actually used in relation with the *CISG* implementation. This can be observed in arbitral jurisprudence (see ICC Publication No 642.2002) and in various ICC precedents. At the hearing, the Tribunal raised the issue with the parties whether they might be relevant. The Tribunal has accordingly concluded that the *UNIDROIT Principles* should provide guidance.
>
> Finally, for any legal question not treated in the *CISG* or the *UNIDROIT Principles*, the Tribunal will apply the laws of France.

2 *Interest*

Article 78 of the *CISG* provides for a party's right to recover interest from another party in respect of unpaid sums. The ability to recover interest compensates the unpaid party for the inability to earn interest on money that rightfully belonged to it.

Article 78 is an excellent example of the kind of compromise that was necessary to achieve a uniform international sales law that would be widely accepted. A consequence of this compromise is that there are obvious gaps in the *CISG*'s coverage of the interest issue, the most stark of which is the issue of how the interest rate should be determined. The issue was highly divisive during the negotiation process, and the general rule now provided in art 78 is really a product of the inability of the negotiating delegations to agree on a more detailed provision.[54]

The general nature of art 78 has given rise to a further controversy — given that the *CISG* covers interest, is the applicable interest rate therefore an internal gap in the *CISG* that ought to be filled by reference to the general principles on which the *CISG* is based? Or does the fact that the delegations in Vienna chose *not* to agree on a more detailed provision indicate that the issue is more appropriately considered as being outside the scope of the *CISG*?[55] Both

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[54] Franco Ferrari, 'Uniform Application and Interest Rates Under the 1980 Vienna Sales Convention' (1995) *Pace Law School Institute of International Commercial Law* <www.cisg.law.pace.edu>.

[55] Peter Schlechtriem and Petra Butler, *UN Law on International Sales: The UN Convention on the International Sale of Goods* (Springer, 2009) [318].

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approaches are represented in arbitral and judicial decisions.[56]

The answer to this controversy is outside the scope of this paper, but what should be clear is that an arbitral tribunal's approach to the issue of interest should be principled and transparent.

From the sample of 240 cases examined, 52 were identified where the issue of interest under art 78 was considered by the tribunal — a statistic which supports the assertion that the issue 'has produced as much litigation as any under the Convention'.[57] Despite this, 11 of the 53 cases do not mention the *CISG* at all on the subject of interest. In the CIETAC decision *India rapeseed meal case*, the tribunal made the following finding as regards interest:

> The Arbitration Tribunal holds that the [Seller] shall pay the interest on the aforesaid RMB 1,091,640 calculated from 17 September 2002 to the day of actual payment. However, the interest rate alleged by the [Buyer], 7.56%, is too high, and the Arbitration Tribunal holds that 6% annual interest rate is reasonable.[58]

In addition to failing to refer to the coverage of the *CISG* on the interest issue, the tribunal did not cite any authority regarding what amounted to a 'reasonable' interest rate, or where it derived its authority to adjust the interest rate to reflect such reasonableness.

Other tribunals were clearer in their reasoning on setting the interest rate, but nevertheless failed to involve the *CISG* at any stage in the reasoning:

> [T]he Arbitral Tribunal supports the [Seller]'s claim for interest. However, the contract does not stipulate the specific method to calculate such interest. The [Seller] alleged in its counterclaim, 'to calculate it at the rate of 0.021% per day, from 15 December 2001, which is the day that the entire amount should have been paid to the day of actual payment'. The Arbitral Tribunal holds that the rate claimed by the [Seller] is too high and does not support that rate. Referring to the provisions in the judicial interpretation of the Supreme Court and the standard for calculating interest on late repayment, the Arbitral Tribunal decides that it is proper to calculate the interest at the rate of 5% per year, from 16 December 2001, which is the day after the day that the entire amount should have been paid to the day of actual payment.[59]

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56 Kröll, Mistelis and Viscasillas, above n 40, 1049–50.

57 Michael Bridge, *The International Sale of Goods: Law and Practice* (Oxford University Press, 2nd ed, 2007) [11.35].

58 'China 29 September 2004 CIETAC Arbitration proceeding (*India rapeseed meal case*) [translation available]' Pace Law School Institute of International Commercial Law <www.cisg.law.pace.edu>.

59 'China 21 October 2005 CIETAC Arbitration proceeding (*Sheet metal producing system case*) [translation available]' Pace Law School Institute of International Commercial Law <www.cisg.law.pace.edu>.

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Of the cases that do cite art 78, 23 tribunals failed to recognise in their reasoning that a gap exists in the *CISG*'s application in relation to calculation of the interest rate. All of the 21 CIETAC tribunals that considered interest under art 78 either failed to apply art 78 at all, or failed to point out, having identified the unpaid party's entitlement to interest under art 78, that the interest rate was not a matter that was set out expressly in the *CISG*. Often the tribunal simply referred to a local standard:

> Article 78 of the *CISG* stipulates that: 'If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it ...'
>
> Therefore, based on this article, the [Seller] is entitled to interest on the payment in arrears. Referencing the RMB bank loan interest rate of Chinese domestic commercial banks, the [Seller]'s calculating of interest at 0.021% day after exchanging the payment in arrears into RMB is reasonable, which the Arbitration Tribunal accepts.

Although MKAC tribunals recognised the gap more often than not, there are nevertheless some similar examples of applying domestic standards without clear recognition that the *CISG* does not apply:

> Pursuant to Article 78 *CISG*, Article 395(1) of the *Russian Federation Civil Code*, Clause 52 of the Resolution issued by the Russian Federation Supreme Court and Higher Arbitration Court No 6/8 of 1 July, 1996 on Recovery of Annual Interest on Short–term Loans in Hard Currency, as well as to the Resolution of the Russian Federation Supreme Court and Higher Arbitration Court No 13/14 of 8 October, 1998, the Tribunal finds that the [Seller]'s claim to recover from the [Buyer] interest for the use of another's funds should be granted in the amount claimed by the [Seller]. [60]

Even where the gap was recognised, MKAC tribunals usually failed to take a clear position on whether or not the *CISG*'s omission to expressly address the interest rate issue meant that reference to domestic law was appropriate. Almost invariably, MKAC tribunals applied art 395 of the *Russian Civil Code*. The following example from case 69/2004 of 9 February 2005 is typical:

> The Tribunal states that art 78 *CISG* entitles the [Seller] to interest on the sum that is in arrears, which the [Buyer] failed to pay in due time. However, as the *CISG* does not settle the procedure of calculation of the interest rate, the Tribunal applied art 395 of the *Russian Civil Code* as part of the subsidiary statute.
>
> In accordance with art 395(1) of the *Russian Civil Code*, the interest rate is to be determined by the discount rate of the bank interest existing at the creditor's place of business as of the date on which the pecuniary obligation or

[60] 'Russia 17 February 2003 Arbitration proceeding 168/2001 [translation available]' Pace Law School Institute of International Commercial Law <www.cisg.law.pace.edu>.

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a corresponding part thereof is to be performed. [61]

In case 100/2002 of 19 May 2004 the tribunal interestingly invoked the *UNIDROIT Principles* to assist its consideration of the interest rate issue, but only *after* reference to Russian domestic law had failed to provide a satisfactory answer:

> In respect of interest rate to be applied, the Tribunal stated that the *CISG* does not provide for interest rate nor for the method of its calculation (art 78 *CISG*). Art 395 of the *Russian Civil Code* provides that the interest rate is to be determined with respect of bank–rate in the country of the creditor's place of business on the day on which the payment was performed. ...
>
> As in Russia, creditor's ([Buyer]'s) place of business, there is no interest rate in Indian rupees, the Tribunal made a recourse to an international practice established in such situations and which is reflected in the *UNIDROIT Principles* (art 7.4.9(2)). In accordance with this practice, '[t]he rate of interest shall be the average bank short–term lending rate to prime borrowers prevailing for the currency of payment at the place for payment, or where no such rate exists at that place, then the same rate in the State of the currency of payment'. [62]

This particular holding is interesting because it indicates that the tribunal was cognisant of the *UNIDROIT Principles*, but in the sense that the Principles represented an internationally established practice,[63] and not in the sense that they might be used to inform the general principles upon which the *CISG* is based for the purpose of autonomous interpretation.

Out of the 53 cases where arbitral tribunals' approaches to interest rates were examined, only one made clear reference to art 7 and the general principles underpinning the *CISG*. The case was decided by the Foreign Trade Court of Arbitration at the Serbian Chamber of Commerce, and concerned delayed payment by an Albanian buyer for medicaments supplied by a Serbian seller:

> In accordance, with Article 78 of the *CISG*, [Seller] is also entitled to interest on the purchase price [Buyer] failed to pay. Article 78 of the *CISG* does not provide for the exact rate to be applied. [Seller] requested 'domicile' interest rate for the sum requested in Euros. Since the matter of interest rates is governed, but not settled by the *CISG*, there is no need to examine [Seller]'s request in the light of any national law, but rather examine whether it is within the checks provided in Article 7 of the *CISG*. Therefore, the proposed rate has

61 'Russia 9 February 2005 Arbitration proceeding 69/2004 [translation available]' Pace Law School Institute of International Commercial Law <www.cisg.law.pace.edu>.

62 'Russia 19 May 2004 Arbitration proceeding 100/2002 [translation available]' Pace Law School Institute of International Commercial Law <www.cisg.law.pace.edu>.

63 Parties are deemed to have bound themselves to internationally established practices by *CISG* art 9(2).

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> to be determined in accordance with the principles underlying the *CISG*… . One of the main principles of the *CISG* is the principle of full compensation. However, another principle suggests that compensation should not put creditor in a better position than he would be had the contract been performed. [Seller]'s request is fully in line with the above mentioned principles.
>
> In order to determine exact 'domicile' (Serbian) rate for euro, one should not resort to Serbian law, since it regulates and is appropriate for local currency (RSD) rates only and would result in overcompensation if applied to sums denominated in Euro. Rather, it is more appropriate to apply interest rate which is regularly used for savings, such as short–term deposits in the first class banks at the place of payment (Serbia) for the currency of payment, as this represents rate on a relatively riskless investment. After examining interest rate figures and indicators on short–term Euro deposits in Serbia, Sole arbitrator finds that the appropriate rate would be 6 percent annually. [64]

Overall the approaches taken by the arbitral tribunals examined in this project were poor. While it is not entirely clear whether autonomous interpretation is appropriate for determining the applicable interest rate in *CISG* cases, the fact that the matter is controversial calls for a principled and carefully elucidated approach. An approach where tribunals turn readily to private international law in *CISG* cases without considered explanation of why they are doing so is destructive of the uniformity that the *CISG* seeks to create, whether or not private international law is ultimately the proper means of filling this gap.

3 *Penalties*

A penalty clause is a contractual term which requires a party who breaches the contract to pay a sum of money to the non-breaching party in circumstances where the amount payable is not directly referable to loss suffered by the non-breaching party. At common law a clause requiring payment in the event of breach is enforceable only to the extent that the clause amounts to a genuine attempt to estimate in advance the loss that the non-breaching party would be likely to suffer.[65] The codes of civil law countries do not tend to share this

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[64] 'Serbia 28 January 2009 Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce (*Medicaments case*) [English text]' Pace Law School Institute of International Commercial Law <www.cisg.law.pace.edu>. The case is not the only one to insist on an international standard for determining the interest rate — in the *Fashion products case* of 2003 an ICC tribunal held that: 'As a matter of fact, by submitting the Agreement to the *CISG*, the parties have clearly indicated their intention to avoid their respective internal law rules, and to resort to neutral solutions.' The tribunal held that the London Inter Bank Offered Rate, being a generally accepted interest rate applied on international financial markets, was an appropriate standard. 'ICC Arbitration Case No 11849 of 2003 (*Fashion products case*) [English text]' Pace Law School Institute of International Commercial Law <www.cisg.law.pace.edu>.

[65] H G Beale (ed), *Chitty on Contracts* (Sweet & Maxwell, 30th ed, 2008) [26–125].

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attitude, and penalty clauses tend to be enforceable under this legal system unless they are excessively high.[66]

The coverage of the *CISG* in relation to penalties in contracts for the international sale of goods is much less clear cut than it is in relation to interest, which is clearly addressed in art 78. There is no *CISG* provision which expressly addresses the issue of penalties, but nor can it definitively be said that penalties do not come within the coverage of the *CISG*.

One aspect of penalties that the *CISG* clearly does not cover is the question of validity. Article 4(a) clearly excludes the issue of a contract's validity from the scope of the *CISG*, so the question of whether a penalty clause in a contract for the international sale of goods is valid must be answered by reference to private international law.

However the *CISG* does cover the measures available to a party in case of a breach of contract by the other party, so it is at least arguable that the *CISG* covers penalties to the extent that they fit within this rubric. From this perspective it has been argued that a general principle may be derived from art 74 of the *CISG* that the goal of damages under the *CISG* is to compensate rather than enrich, and therefore the *CISG* ought to disallow recovery of contractual penalties which go beyond compensation for loss.[67] On the other hand, one might also argue that where parties have agreed on a penalty clause in their contract this agreement should be respected in recognition of the principle of freedom of contract which is encapsulated in art 6.[68]

In any event it is safe to say that the question of whether penalties come within the coverage of the *CISG* is not clear cut. Therefore an arbitral tribunal tasked with determining the recoverability of a penalty under a contract to which the *CISG* applies ought to be clear about its position on the *CISG*'s coverage and the law it relies upon in determining the question. The evidence indicates that many arbitral tribunals do not achieve this standard.[69]

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66 See, eg, *La Code Civil* arts 1226–1233 (France); *Bürgerliches Gesetzbuch* arts 340 and 341 (Germany); *Chinese Contract Law* art 114; *New Civil Code* arts 330–331 (Russia).

67 Bridge, above n 57, [11.39]. Article 74 of the *CISG* relevantly provides that: 'Damages for breach of contract by one party consist of a sum *equal to the loss*, including loss of profit, suffered by the other party as a consequence of the breach. Such damages *may not exceed the loss* which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract …'.

68 Ibid [11.39].

69 Michael Bridge has commented, in a general rather than arbitration limited context, that 'it seems fair to say that the reported cases dealing with penalty clauses are bereft of any attempt to handle the *CISG* in an intelligent way as a source of general principle.' Ibid.

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Twenty–seven cases were identified from the sample as dealing with the issue of penalties. Only 10 discussed the application of the *CISG* in this context. Undoubtedly the 17 tribunals that did not discuss the *CISG* would most likely have taken the view this was not an area where the *CISG* could assist, but a statement to that effect would nevertheless still carry value for the purposes of uniform application. Simply ignoring the *CISG* is unhelpful.

Interestingly, all three CIETAC tribunals that faced the penalty issue supplied a view on the *CISG*'s coverage, although all three immediately resorted to Chinese law to resolve the issue. In the *DVD machines case* of 9 November 2005 the CIETAC tribunal made the following determination in relation to a claim for a contractual penalty in relation to the Chinese seller's delay in delivering DVD machines to the Australian buyer:

> The *CISG* has no stipulation on penalties. Article 114 Section 1 of the *Contract Law of China* states that: 'The parties may determine a contract violation fee that the party breaching the contract should pay to the other party based on the extent of violation, and they may also determine the method of calculating damages caused by violation of the contract.' Article 6 of the purchase order clearly stipulates the penalty for delay in delivery and the method of calculating it, which is that there shall be a 'penalty of 3% of the entire price for 1–7 days delay; 5% for 8–10 days delay; and 10% for 11–15 days delay.' Based on the aforesaid, the Arbitration Tribunal deems that the [Buyer]'s claim that the [Seller] shall pay US $35,955 as a penalty for delayed delivery has sufficient factual and legal basis, which the Arbitration Tribunal supports.[70]

This decision is still not particularly useful, as it appears to turn straight to domestic law upon failing to find express provision in the *CISG* without any analysis of the *CISG*'s *coverage* of the issue, but it is more useful than ignoring the *CISG* altogether. It is at least identifiable from this judgment that the tribunal has founded its approach on a determination that the *CISG* does not provide an answer to the penalty issue. While the method by which it reached that foundational point may be criticised, it has more to offer for the purposes of uniform application than the approach taken by the MKAC tribunal in case 175/2002 of 4 June 2003:

> Based on Clause 9.2 of the contract, the [Seller] has a right to recover from the [Buyer] penalties for the delay in payment of the price of goods in the amount of 3% of the sum in arrears. Therefore, the said claim should be granted.

Thirteen of the 20 cases in which MKAC tribunals considered penalties made no mention of the *CISG* in that context. These tribunals usually turned

[70] 'China 9 November 2005 CIETAC Arbitration proceeding (*DVD machines case*) [translation available]' Pace Law School Institute of International Commercial Law <www.cisg.law.pace.edu>.

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immediately to Russian law:

> According to para 6.1 of the contract, in case of payment delay the [Buyer] shall pay the [Seller] penalty in the amount of 0.1 % of the sum of the delayed payment for each day of delay, which conforms to arts. 330 and 331 of the *Civil Code of the Russian Federation*. ... Taking into account the above and following art 333 of the *Civil Code of the Russian Federation* which entitles the Tribunal to reduce the penalty under such conditions, the Tribunal held that reduction of the penalty was appropriate.[71]

In more recent cases, however, MKAC tribunals have shown some willingness to adopt an autonomous interpretation approach, although none have gone so far as to apply the principle of compensation over enrichment as articulated above. In case 175/2003 of 28 May 2004, however, the tribunal did have regard to the principle of compatibility of remedies in its analysis:

> The *CISG* does not expressly settle the issue of recovery of sanctions of the type provided for in section 10.4 of the contract. However, in the Tribunal's opinion, a general principle on which the *CISG* is based and which is applicable by virtue of art 7(2) of the *CISG* is the principle of compatibility of admissible remedies to which parties resort in individual situations. This general principle is particularly established in a number of provisions of the *CISG* (including arts 46–50, 62–64, 82–83).
>
> The Tribunal holds that the claim of the [Buyer] for recovery of the sanctions for delay in delivery is not compatible with [Buyer]'s claim for refund of the price of the goods, which follows from the fact of avoidance of the contract in respect of the first installment of the goods established by the Tribunal.
>
> Based on the above, the Tribunal rejects [Buyer]'s claim for recovery of contract sanctions for delay in delivery.[72]

In that case the Egyptian seller had failed to deliver goods to the Russian buyer, who had avoided the contract and sought a refund of the amounts already paid under the contract. The tribunal held that allowing the buyer to recover a contractual penalty for delay in delivery was incompatible with a remedy based on avoiding the contract, as avoidance releases the parties from any further obligation to perform under it.[73]

Two other MKAC cases have recognised the application of general principles as relevant to the issue of penalties, although not to the same extent as in case 175/2003. In case 137/2004 of 13 January 2006 the tribunal referred to the general principle of reasonableness in denying the Russian seller's claim for a

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[71] 'Russia 27 April 2005 Arbitration proceeding 5/2004 [translation available]' Pace Law School Institute of International Commercial Law <www.cisg.law.pace.edu>.

[72] 'Russia 28 May 2004 Arbitration proceeding 175/2003 [translation available]' Pace Law School Institute of International Commercial Law <www.cisg.law.pace.edu>.

[73] *United Nations Convention on Contracts for the International Sale of Goods* (opened for signature 11 April 1980, entered into force 1 January 1988), art 81.

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penalty based on a percentage of the total cost of goods delivered, rather than of the cost of goods not paid for by the Australian buyer:

> Considering [Seller]'s claim for the recovery of the penalty foreseen in ... the Contract, the Tribunal, with due regard to the provisions of the Contract and art 330 of the *Russian Civil Code* which entitles a party to recover a contractual penalty and following art 8 of the *Vienna Convention of 1980* and general principle of reasonableness on which the *Vienna Convention of 1980* is based, concluded that the penalty may be recovered only in relation to the delayed sums and not based on the total cost of the delivered goods as was contended by the [Seller].[74]

In case 105/2005 of 13 April 2006 the tribunal recognised the autonomous interpretation approach, but did not consider that the general principles upon which the *CISG* is based were helpful:

> In accordance with clause 14.1 of the contract, if a party to the contract fails to properly perform its obligations under the contract and/or breaches the contract, the latter shall reimburse the other party all possible damages as well as pay the penalty in the indicated amount. Since the *CISG* does not settle the question of penalties and this question cannot be settled on the basis of the general principles on which the *CISG* is based, the Tribunal deems it possible to refer to the provisions of the Russian substantive law applicable as the subsidiary statute.[75]

One could take issue with the ease with which the tribunal disregarded the utility of general principles in this case, but again this judgment and the two quoted above it may be seen as valuable at least because the tribunals go about determining the penalty issue in a clear and principled way. The question of whether and how the *CISG* applies to penalties is complex, but it will only be solved if tribunals can be seen to at least attempt to grapple with the problem. A ecision which ignores the *CISG* and turns immediately to private international law is of no value in this regard.

B *ICC Awards*

An interesting examination was that of all of the 83 published ICC awards. ICC awards after 2003 were also included in the survey under A. The picture they portray is mixed. First, it has to be noted that for 33 per cent, 28 out of 83, the text of the award was not available. However, what could be ascertained was that parties who chose to arbitrate under the ICC had in 40 per cent of cases had

[74] 'Russia 13 January 2006 Arbitration proceeding 137/2004 [translation available]' Pace Law School Institute of International Commercial Law <www.cisg.law.pace.edu>.

[75] 'Russia 13 April 2006 Arbitration proceeding 105/2005 [translation available]' Pace Law School Institute of International Commercial Law <www.cisg.law.pace.edu>.

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also chosen an applicable law. In 30 per cent of the awards available on the websites it could not be ascertained why the *CISG* applied (due to the lack of information). And in 13 per cent of awards available the parties had made no stipulation in regard to the applicable law, had selected the *CISG* as the applicable law, or the *CISG* was not applied to the facts at all. Argumentation difficulties arose for the arbitral tribunals when a party had their place of business in a state that had signed up to the Convention after the contract was signed.[76] The tribunal was also somewhat ambivalent regarding the applicable law in situations where application of either the domestic law or the *CISG* would in substance lead to the same result.[77] In awards for which at least an abstract was available the tribunal can usually be seen to afford attention to the application of the *CISG* and exhibit a general awareness of the legal issues it creates.[78] A wide variety of legal issues are considered, with breach of contract being a particularly frequent topic.[79] Interestingly, ICC tribunals did not shy away from relying on *UNIDROIT Principles* and trade usages to aid their decisions.[80]

Generally the available decisions were carefully and extensively reasoned and often included references to leading academic texts. The *Machine case* of 2002, involving an Italian seller and a Canadian buyer, provides a good illustration:

> Because the 1980 *Convention on the International Sale Goods* (*CISG*) entered into force in Canada after the conclusion of the contract, the *CISG* did not apply by the sole virtue of Art 1(1)(a) which provides that the Convention applies when both contracting parties have their place of business in Contracting States. However, according to Art 1(1)(b) the Convention would also be applicable if the rules of private international law led to the application of the law of a Contracting State. The relevant private international law is that of the forum state which in this case was France. Because arbitrators are, however, not bound by the conflict of laws rules of the forum, the principle of party autonomy prevails. Unless the parties had agreed to exclude the *CISG*, the reference to French law would mean that the Convention applied. After examining relevant doctrine and case law, the arbitral tribunal held that the reference to French law did not suffice to exclude the application of the *CISG*.

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76 'ICC Arbitration Case No 11333 of 2002 (*Machine case*) [English text]' Pace Law School Institute of International Commercial Law <www.cisg.law.pace.edu>.

77 'ICC Arbitration Case No 8204 of 1995', Pace Law School Institute of International Commercial Law <www.cisg.law.pace.edu>.

78 See, eg, 'ICC Arbitration Case No 9781 of 2000 (*Waste recycling plant case*) [English text]'; 'ICC Arbitration Case No 10329 of 2000 (*Industrial product case*) [English text]'; 'ICC Arbitration Case No 10377 of 2002 (*Textile product machines case*) [English text]' and 'ICC Arbitration Case No 11333 of 2002 (*Machine case*) [English text]' Pace Law School Institute of International Commercial Law <www.cisg.law.pace.edu>.

79 In 40 per cent of the available awards.

80 See, eg, 'ICC Arbitration Case No 8502 of November 1996 (*Rice case*) [English text]' Pace Law School Institute of International Commercial Law <www.cisg.law.pace.edu>.

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> Nor did the fact that the parties had agreed on a limitation period different from that in the *CISG* suffice to exclude the application of the Convention.[81]

The survey suggests that the other two themes of 'interest' and 'penalties' have not played a significant role in the ICC awards during the surveyed period. Issues that yielded some analysis were for example, in the *Machine* case, the application of arts 39 and 40, or in the *Textile product machines case* of 2002 art 82 of the *CISG*. And in the *Processed food product case* of 2000 'force majeure' was the issue that required examination. The arbitrator did consider interest in the *Processed food product case*, and interestingly employed an international standard for the interest rate despite failing to acknowledge the existence of a gap in the *CISG* in relation to interest rates:

> For these reasons the arbitral tribunal rejects claimant's request that the interest rate should be based on the rates of seller's country and decides that interest should be calculated on the basis of the average rate of the LIBOR 3 months over the period from 27 August of the year in which the default occurred until 1 November 2000, ie, on the basis of an annual interest rate of 3.887%.

This leads one to presume that the arbitrator, despite omitting to set it out in his reasoning, had some level of awareness of the issue in regard to the provision (or the lack thereof) for determining the interest rate under art 78. However familiar bad habits arose in the *Copper cable case* of 20 December 1999:

> Under Art 78 *CISG*, a party is entitled to interest if the other party fails to pay the price or any other sum that is in arrears. The *CISG* is silent on the applicable rate of interest. According to the leading doctrine, the interest rate is governed by the applicable domestic law. In this case, the parties have designated Swiss law in their order of arbitration. Arts 73 and 104 of the *Swiss Law of Obligations* provide that claims are subject to an annual interest rate of 5%, unless a different interest rate has been designated by contract, statute or common practice. Since [Seller] has not demonstrated the application of a different interest rate, its claim will be subject to an annual interest of 5%.[82]

After examining the ICC awards the following observations can be made:

- Parties who chose to arbitrate under the ICC were more likely to also have agreed on the applicable law of their contract.
- About half of all ICC awards were rendered by a sole arbitrator.
- Generally the reasoning is good and often reference to academic writing is made.

It might be just an unfortunate coincidence — the award, whose reasoning

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81 'ICC Arbitration Case No 11333', above n 76, 117.

82 'ICC Arbitration Case of 20 December 1999 (*Copper cable case*) [translation available]' Pace Law School Institute of International Commercial Law <www.cisg.law.pace.edu>.

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applies Austrian law and the *CISG* simultaneously and which seemed to lack an understanding of the sphere of application of the *CISG*, is an ICC award rendered by a three member arbitral tribunal.[83]

C *2003–2009 Judgments*

In its last chapter this paper will contrast the findings in regard to the arbitral awards with the findings in regard to national court judgments. As indicated already earlier the 800 judgments do not deliver such consistent issues as the arbitral awards do and only the issue of interest is of significant mutual concern to both arbitral tribunals and courts.

Overall European courts have little difficulty applying the *CISG* — there are very few cases where the *CISG*'s applicability is overlooked. In some cases, however, courts were not all that clear in their analysis of why the *CISG* applied, although this may merely reflect the fact that many judgments are appellate judgments where the applicable law has been decided in the courts below and is not significantly at issue on appeal. Chinese courts, in contrast, appeared to be much less comfortable with the *CISG*, with its application being apparent only in just over half of the 49 published cases.[84] Interestingly, this figure is roughly comparable with the application rate of CIETAC arbitral tribunals.

In regard to interest, especially the interest rate, the most significant observation is that European courts appear to rely considerably on academic authority indicating that domestic law should apply. Very few judgments go so far as to examine the question of whether the interest rate is an internal or external gap in the *CISG*. Out of the nine Chinese judgments[85] where the interest rate was in issue, eight recognised that the *CISG* applied to interest, but none took the analysis any further than that. Interestingly, while five cases determined the rate

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83 'ICC Arbitration Case No 9083 of August 1999 (*Books case*) [translation available]' Pace Law School Institute of International Commercial Law <www.cisg.law.pace.edu>.

84 Although in seven cases it was unclear from the coverage whether the *CISG* had been applied or not.

85 *Wuhan Zhongou Clothes Factory v Hungary Wanlong International Tradet Company; Panda Srl v Shunde Westband Furniture Co Ltd*; *Shanghai Nuo Bo Metal Products Ltd v Tevel International Trading*; *Singapore Company v Dongling Trade Company, Shanghai Xuyang Trade Company, Yingfang Xi & Yunli, Luo*; *Yiwu Ma Jia Import & Export Co Ltd v Y&Q International Group*; *Salem Street North American LLC v Shang Shang Stainless Steel Pipe Co Ltd*; *Salem Street North American LLC v Shang Shang Stainless Steel Pipe Co Ltd (Case 2)*; *Salem Street North American LLC v Shang Shang Stainless Steel Pipe Co Ltd (No 3)*; *Salem Street North American LLC v Shang Shang Stainless Steel Pipe Co Ltd (No 4)*; and *Xi'an Yun Chang Trade Ltd v An Tai International (USA)* Pace Law School Institute of International Commercial Law <www.cisg.law.pace.edu>.

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according to the loan interest rate at the Bank of China and four referred to LIBOR, no court cited Chinese domestic *law* in relation to the interest rate.

As indicated, the latter finding is in stark contrast to the courts dealing most prolifically with the *CISG*, namely the courts of Germany and Switzerland. Both countries' courts in general readily resorted to domestic law in regard to the question of interest rate.

Interest was at issue in around one third of German judgments. Where a determination on the applicable interest rate was required the standard approach in German courts was to apply the subsidiarily applicable domestic law. The quality of analysis of a possible autonomous application varied. Most courts identified that the *CISG* had provisions applicable to interest, but only around 39 per cent of decisions where interest rate was at issue actually identified that the *CISG* does not speak directly to the applicable interest rate. Only four cases could be identified where the court went on to consider whether the gap was one that could be filled by reference to the general principles underlying the *CISG*,[86] and even in those cases the invariable conclusion, as noted above, was that domestic law should decide the interest rate. Many decisions did refer to scholarly authority for this conclusion, but many others appear to regard the applicability of domestic law as read. The analysis of the District Court at Bamberg in the *Plants Case* of 23 October 2006 is a good example:

> Art 78 *CISG* gives the seller the right to claim interest on outstanding claims without any further requirement. … The *CISG* itself only governs interest claims on their merits but is silent concerning particular interest rates. If the parties to a sales contract governed by the *CISG* have not themselves agreed on a certain interest rate and if — as in the case at hand — no relevant trade usage applies under Art 9 *CISG*, interest rates are governed by the complementary domestic law.[87]

Although it is understandable that courts will adopt the prevailing scholarly opinion on interest rates under the *CISG*, it is still disappointing that German courts largely fail to undertake a comprehensive analysis of the question. Most courts do not even recognise that art 7(2) of the *CISG* directs them to consider

86 'Germany 13 April 2005 District Court Bamberg (*Furnishings case*) [translation available]'; 'Germany 12 December 2006 District Court Coburg (*Plants case*) [translation available]'; 'Germany 20 July 2004 Appellate Court Karlsruhe (*Shoes case*) [translation available]'; 'Germany 1 June 2004 District Court Saarbrücken (*Pallets case*) [translation available]' Pace Law School Institute of International Commercial Law <www.cisg.law.pace.edu>.

87 'Germany 23 October 2006 District Court Bamberg (*Plants case*) [translation available]' Pace Law School Institute of International Commercial Law <www.cisg.law.pace.edu>.

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the possibility of gap–filling through general *CISG* principles.[88]

Although the issue was less prominent in US courts,[89] the District Court of the Northern District of Illinois provided an interesting discussion of the issue in *Chicago Prime Packers Inc v Northam Food Trading*:

> The court's research has revealed that the interest issue under the *CISG* has been the subject of great controversy. In fact, '[t]he interest issue, while relatively mundane–sounding, has been the subject of up to 30 percent of total *CISG* cases worldwide.' Tom McNamara, *UN Sale of Goods Convention: Finally Coming of Age?*, 32–FEB Colo Law 11, 19 (February, 2003) (citation omitted); *see also* Louis F Del Duca & Patrick Del Duca, *Practice Under the Convention on International Sale of Goods (CISG): A Primer for Attorneys and International Traders (Part II)*, 29 UCC LJ 99, 157 (1996) (stating that '[42] of the 142 cases reported thus far involve issues as to what interest rate should be applicable to overdue payments or refunds'). One author outlined nine different approaches that courts have used (or authors have suggested) in determining the rate of interest under the *CISG*, including using the law applicable to the contract in the absence of the *CISG*, the law of the creditor's place of business, the law of payment currency, trade usages observed in international sale, general principles of full compensation and the law of the forum. See Christian Thiele, *Interest on Damages and Rate of Interest Under Article 78 of the UN Convention on Contracts for the International Sale of Goods*, <http://www.cisg.law.pace.edu/cisg/biblio/thiele.html> (updated July 5, 2001). Another author, finding that the current approaches do not fully satisfy the objectives of a default rule (such as international uniformity), suggests that adjudicators should 'customize' the rate by awarding the actual borrowing or savings rate or the lending rate in the absence of evidence of borrowing costs. Karin L Kizer, *Minding the Gap: Determining Interest Rates Under the UN Convention for the International Sale of Goods*, 65 U Chi L Rev 1279, 1302– 05 (Fall 1998).
>
> However, because there is no single approach used by all courts and the parties have failed to address the interest issue or provide information necessary to 'customize' a rate, this court will award interest according to the principles used by federal courts in determining choice of law issues.[90]

Despite the detailed treatment, this decision is another example of a court identifying the issue and discussing the different legal perspectives, only to ultimately revert back to principles used (and approved) at domestic law.

Overall the bulk of decisions were concerned with alleged breaches of international sale of goods contracts. The picture that developed across jurisdictions is similar. Many decisions, and in particular the more recent ones,

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[88] Yesim Atamer is preparing a CISG Advisory Council opinion on interest (see CISG Advisory Council, 'Schedule of Work' (2008–2012) <http://cisgac.com>).

[89] Nine per cent of US judgments dealt with interest.

[90] *Chicago Prime Packers Inc v Northam Food Trading Co* 320 F Supp 2d 702 (ND Ill 2004) [10].

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refer to available academic literature but also to decisions of other courts or arbitral tribunals.[91]

V CONCLUSION

Some observations can be made: judgments, arbitral awards and scholarly articles, and other supporting material are freely available via the internet.[92] UNICITRAL has published a Digest of case law on the *CISG*, an article by article commentary, which is also freely available on the internet together with the traveaux prepartoire of the *CISG*.[93] The CISG Advisory Council has published authorotative opinions on some of the most pressing issues concerning the *CISG*.[94] In summary, resources, expertise, and comparative analysis is freely available to any arbitral tribunal to help with the analysis of the issues arising in regard to the *CISG*. The Queen Mary and White & Case survey identified the quality of the award as an important criterion in regard to the choice of an arbitrator.[95] It seems, therefore, inexcusable that arbitral tribunals do not use their opportunity to foster the autonomous interpretation of the *CISG* and play a part in the creation of a truly autonomous sale of goods law. The survey appears to reveal a picture of disinterest and neglect between the *CISG* and arbitration, rather than a fruitful marriage. By comparison, national court decisions appear to be more cognisant of the variety of scholarly material is available to assist adjudicators in relation to the application and interpretation of the *CISG*, but not always to the extent that such material promotes truly autonomous interpretation. The result is that while national court decisions do, as suspected, tend to exhibit more robust reasoning and greater support from established authorities, a disappointing disposition to yield to more familiar domestic law may still be observed 'when the going gets tough'. In sum, while the expertise and quality control mechanisms that are found in national courts will often produce a better quality judgment, it may not necessarily follow that they are of any greater assistance in getting us closer to true uniform application.

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91 See, eg, *Takap BV v Europlay Srl* Tribunale di Rovereto n 914/06, 21 November 2007 where the court used the cisgonline database for its research and referred to other Italian but also German decisions.

92 Institute of International Commercial Law '*CISG* Database', Pace Law School <www.cisg.law.pace.edu>; '*CISG*online.ch' Global Sales Law <www.globalsales law.org>; 'UNILEX on *CISG & UNIDROIT Principles*: International Case Law & Bibliography' UNILEX <www.unilex.info>.

93 United Nations Commission on International Trade Law, 'UNCITRAL Digest of case law on the *United Nations Convention on the International Sale of Goods*' (2012) <www.uncitral.org>.

94 See 'CISG Advisory Council' <www.cisgac.com>.

95 See Friedland and Mistelis, above n 19.

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However, as indicated at the beginning this rather harsh *CISG* lawyer's criticism of arbitral tribunals is mitigated by acknowledging the limitation of the undertaken survey and the realities of the arbitral process. However, a conclusion that can be drawn from the research is that it would be desirable that more arbitral awards that apply the *CISG* are published to foster a truly international and autonomous interpretation of the *CISG* by allowing a discussion of awards. It might not be the duty and function of an arbitral tribunal to contribute to the development of the law, however, if Mistelis' and Schmidt-Ahrendts' estimates are correct that about 25% of *CISG* cases are decided by arbitral tribunals,[96] arbitral tribunals could and should feel an obligation to help to shape international sales law.

[96] Schmidt-Ahrendts, above n 1, 211; Mistelis, above n 3, 386–7.

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