

CISG AND ARBITRATION IN THE HUNGARIAN LEGAL PRACTICE

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Abstract

During 2015 an extensive empirical research has been made on the Hungarian jurisdiction and legal practice of the CISG. As a result, it became clear that in the contractual routine many of the legal representatives advise the jurisdiction of an arbitration tribunal rather than the traditional court system. As we examine the awards of the most popular Hungarian arbitration court and compare them with the decisions of the national courts the reasons of this tendency become self-understanding. The paper analyses the differences between the arbitration and the traditional court system in working on the field of international sales contracts.

Keywords

CISG; Jurisdiction; Arbitration; International Sales Contracts.

1 Introduction²

International sale contracts are the engines of commercial activities. It is obvious, that the regulation and harmonization of these contracts are in the basic interest of countries who are – or want to be – a part of the global market. This is even more evitable for those countries tend to raise their activities on international commercial grounds, like the so-called V4-countries.

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On 15 February 2016, the Visegrad Group (“V4”) celebrated the 25th anniversary of its establishment. In 1991, only two years after the fall of a totalitarian regime, hardly anyone expected this project of a regional cooperation to survive quarter-century as well as Poland, Hungary, the Czech Republic and Slovakia to successfully complete the transformation of society and take an important place in the system of international relations.³ As international surveys show, even the citizens of these countries believe that this regional formation’s main goal is economic and trade cooperation.⁴ Far from exhausting the possibilities, but V4 initiative is a well-working and developing regional cooperation.⁵ On the field of trade cooperation, the basic legal instrument is the CISG. The purpose of the CISG is to provide a modern, uniform and fair regime for contracts for the international sale of goods. Thus, the CISG contributes significantly introducing certainty in commercial exchanges and decreasing transaction costs. At the time of writing this study, 85 contracting states are involved in this unification, including the most important trading partners of the world: USA, China, Japan, Russia, Germany, Australia. Although, some important countries are missing: from the EU Great Britain, Portugal and Malta did not join the CISG so far, India and many African countries are also not on the list of contracting states.

During the formation and adoption of the CISG, Hungary was striving to play an active role in the unification of law right from the early sixties. Hungarian legal scholars and academics, based upon a century-old sophisticated legal culture, were never willing to accept the idea and reality of a divided world and their country’s isolation behind what was called the Iron Curtain. They all shared the dream of more unified legal rules for international transactions not only because there was a universal need and aspiration for this, but also because the unification of civil law, at least relating to cross-border contracts, opened a window of opportunity to break out

³ GYÁRFÁŠOVÁ, Olga, MESEŽNIKOV, Grigorij. *25 Years of the V4 as Seen by the Public* [online]. Bratislava: Institute for Public Affairs, 2016, p. 7 [accessed on 2017-04-26].

⁴ *Ibid.*, p. 13.

⁵ DANCÁK, Bretislav, GNIAZDOWSKI, Mateusz, HAMBERGER, Judit, HUDEK, Adam (chief eds.). *Two Decades of Visegrad Cooperation: Selected V4 Bibliography* [online]. Bratislava: International Visegrad Fund, 2011, p. 288 [accessed on 2017-04-26].

of the political, economic and legal isolation of Hungary.⁶ I believe that this was all the same by the other countries of the V4, and as a proof of this, these countries joined the CISG among the first ones. The CISG entered into force on 1 January 1988 in Hungary, in the Czechoslovakia on 1 April 1991, the Czech Republic and Slovak Republic succeeded to the convention as of 1 January 1993. In Poland, it came into force on 1 June 1996, so at least the Polish legal system has more than 20 years of experience so far.

We can say that the V4-countries commercial regulation is highly influenced by the CISG. As Zell states “*the Vienna Sales Convention has been influential in shaping the path of development taken by contract law in Central and Eastern Europe*”⁷ – especially in countries of the V4 group. The Hungarian new Civil Code is literally naming the CISG as a role model on regulating the contractual liability.⁸ Jurčová points out that the Slovak commercial law has changed in many ways “*becoming more unified, or is shifting toward the system of the uniform model of breach in the regulation of sales contracts based on the Vienna Convention*”.⁹

If we are looking at the statistical data of commercial activities among the V4 countries, we can find how interconnected these economies are. We should also underline the importance of Germany in this field, which country is the most valuable export partner for all V4 country. However, it should also be mentioned, that with only one except (United Kingdom) the mentioned states are “all” Contracting States of the CISG!

⁶ MARTONYI, János. Introduction. In: *Thirty-five Years of Uniform Sales Law: Trends and Perspectives*. Proceedings of the High Level Panel held during the Forty-eighth Session of the United Nations Commission on International Trade Law Vienna, 6 July 2015. New York: United Nations, 2015.

⁷ ZELL, Fryderyk. The Impact of the Vienna Convention on the International Sale of Goods on Polish Law, With Some References to Other Central and Eastern European Countries. *Rabels Zeitschrift für Ausländisches und Internationales Privatrecht*, 2007, No. 1, p. 98.

⁸ See in details: FUGLINSZKY, Ádám. *Kártérítési jog*. Budapest: HVGORAC, 2015.

⁹ JURČOVÁ, Monika. *The Influence of Harmonisation on Civil Law in the Slovak Republic*. *Juridica* [online]. 2008, No. 1, pp. 166–172 [accessed on 2017-04-26].

Figure 1: Top 10 export partners of the V4 counties (in order of importance)¹⁰

Top 10 export partners of Czech Republic	Top 10 export partners of Hungary	Top 10 export partners of Poland	Top 10 export partners of Slovakia
Germany	Germany	Germany	Germany
Slovakia	Romania	United Kingdom	Czech Republic
Poland	Italy	Czech Republic	Poland
United Kingdom	Austria	France	Hungary
France	France	Italy	France
Austria	Slovakia	Russia	Austria
Italy	United Kingdom	Netherlands	Italy
Russia	Czech Republic	Belgium	United Kingdom
Hungary	Poland	Sweden	Russia
Netherlands	Russia	Hungary	Spain

During the year 2015 a unique survey has been made among the Hungarian legal practice. With a questionnaire sent directly to the most significant international law firms, to the Hungarian National Chamber of Attorneys and to the Győr-Moson-Sopron County Chamber of Attorneys, the process of drafting and entering of international sales contracts has been examined. As in Hungary the participation in the Chamber is mandatory for all the lawyers practicing, the survey reached the complete field of experts. At the same time, a parallel research has started in the judicial field. 150 sheets of printed questionnaires were sent directly to the Courts, and parallel the National Office of the Judiciary sent the questionnaire via email to the heads of the Courts, altogether 49 questionnaires arrived with appraisable content. Parts of this survey has already been published in Hungarian, in this study I only focus on the subject of applying the CISG and the choice of the forum and applicable law for international sales contracts.

¹⁰ The Observatory of Economic Complexity (OEC), MIT, 2014.

2 Choice of Jurisdiction and Applicable Law for International Sales Contracts

In the upper mentioned questionnaire, a group of questions highlighted the jurisdiction issues of international sales contracts. All 35 answerers from legal representatives agreed to adopt a clause of jurisdiction in the sales contract, and the results on the chosen forum can be seen on Figure 2. The questionnaire included answer on alternative dispute resolution (“ADR”) as: *“I specify alternative dispute resolution (arbitration, mediation, other ADR).”* At this point we can see a very important difference between the smaller and the bigger law firm’s contractual design: the law firms dealing with more than 10 contracts in a business year are choosing ADR in 65, 21% in comparison with the average 57,14%, and the choice of the Hungarian forum is less (56,52%) than the average (65,7%).

Figure 2: Choice of jurisdiction in the sales contracts

Which jurisdiction do you chose?	Answers	%	Choice of jurisdiction by law firms with more than 10 contracts/year	Answers	%
Hungarian	23	65,70%	Hungarian	13	56,52%
Contracting partner’s country’s	8	22,85%	Contracting partner’s country’s	4	17,39%
Other country’s	2	5,70%	Other country’s	2	4,34%
ADR	20	57,14%	ADR	15	65,21%

For direct exclusion of a certain country’s forum only two participants (both with more than 20 contacts/year) stated that they used to exclude specific jurisdiction. Both participants also excluded the use of CISG in the contractual terms with the argument that the international application of CISG is incoherent, one of the answerers wrote that in his/her practice: *“Almost every contract contains the exclusion of the CISG because in the international practice it is not accepted for many reasons.”*

As for the application of the CISG, it is may be more important how the contracting parties agree on the applicable law for the contract. Figure 2 is showing the result for the question which focus was the choice of applicable law.

Figure 3: Choice of applicable law in sales contracts

Choice of applicable law for the contract	Answers	%	Choice of applicable law for the contract by law firms more than 10 contracts/year	Answers	%
Hungarian	35	100	Hungarian	23	100
Contracting partner's country's	9	25,71	Contracting partner's country's	7	30,43
Other country's law or refer to international convention	10	28,57	Other country's law or refer to international convention	6	26,08
Law of the arbitration body	11	31,42	Law of the arbitration body	9	39,13
Other	0		Other	0	

As a common ground, we can see that the Hungarian law is the mostly used applied law in the contracts. Here we also face a difference between the major law firms and the smaller one: from all the answers, the choice of the law of the arbitration court can be found in almost 40% by major law firms, and only plus 2 of the smaller ones chose also that answer – this can be seen from the answers in comparison. The previously studied question and this one together reflects the same way in the position and part of dispute resolution of arbitrators: the bigger the law firm is the more likely they use the jurisdiction and applicable law of arbitration court.

A problematic issue in the Hungarian legal practice is the exclusion of the CISG. However, this is not a unique phenomenon in the international field. As Rozebnalová reports in 2008, among the Czech Republic and Slovakia, the practicing lawyers tend to exclude the application of the CISG tendentiously. The reasoning is the misunderstanding in the national and international jurisdiction of some articles (she names Article 4) and the regulation of lump-sum damages.¹¹ Homeward trend is an often-cited *terminus technicus* of Honnold representing the interpretation difficulties of the CISG.¹²

¹¹ ROZEHNALOVÁ, Naděžda. Czech Republic. In: FERRARI, Franco (ed.). *CISG and its Impact on National Legal System*. Munich: Sellier, 2008, pp. 107–108.

¹² See in details HONNOLD, John O. *Documentary History of the Uniform Law for International Sales*. Kluwer Law and Taxation Publishers, 1989.

It reflects the fear that national courts will ignore the mandate of autonomous and international interpretation of the CISG in favor of interpretations influenced by national law. It is difficult for the courts to “become a different court that is no longer influenced by the law of its own national state”.¹³ Honnold still believed in 1999, that the uniform interpretation is not illusory: “To read the words of the Convention with regard for their »international character« requires that they be projected against an international background. With time, a body of international experience will develop through international case law and scholarly writing.”¹⁴ Although joining Honnold’s optimism I am afraid this time has not yet come, and we should wait for even longer, if the practitioners are excluding the CISG this often.

According to the results of the questionnaire, the Hungarian legal practitioners explained the exclusion with the followings:

Figure 4: Excluding certain legal order and the reasons of such exclusion

Do you tend to exclude the use of certain country’s law or any other legal orders or conventions for the disputes?	Reason or comment on exclusion
I exclude the CISG at the request of the client.	Comment: “Fundamentally I have positive experiences. The Convention is easy to use for a continental lawyer, the Hungarian and foreign language (basically German) commentary literature is useful help. But at the same time during the civil procedure neither the judges nor the clients realize the need for applying the regulations of the CISG, they have to be noticed on this fact during the process.”

¹³ DiMATTEO, Larry A., DHOOGHE, Lucien, GREENE, Stephanie, MAURER, Virginia. The Interpretive Turn in International Sales Law. *Northwestern Journal of International Law and Business* [online]. 2004, No. 24, pp. 302–303 [accessed on 2017-04-26].

¹⁴ HONNOLD, John O. *Uniform Law for International Sales under the 1980 United Nations Convention*. 3rd ed. The Hague: Kluwer Law International, 1999, pp. 88–89.

Do you tend to exclude the use of certain country's law or any other legal orders or conventions for the disputes?	Reason or comment on exclusion
I exclude the CISG.	Reasoning: "In case of international sales contract in many concrete cases it is favorable for the seller to use only the Hungarian law. Without direct excluding of the Vienna Convention it must be applied, and as the Convention does not govern all relevant fields, in disputes this doubles the applicable laws, which may lead to confusion in the judgement." Comment: "The main problem of the Convention is the lack of uniform application, which is the result of the phenomenon that the national courts interpret the Convention based on national laws."
I exclude the CISG almost all the time.	Reasoning: "The Convention is not accepted in the international practice for many reasons, almost every time its applicability is excluded."
I exclude the CISG.	Reasoning: "The application of the CISG is internationally rare"
If the client is the seller, I exclude CISG.	Reasoning: "The Hungarian civil law is more in favour of the seller in particular situations."
The clients expressing the will for excluding the CISG.	Comment: "Despite of the fact that the Convention's regulations are clear, the Courts have inconsistent practice of interpretation, or simply do not use the Convention though it is mandatory in the process."

Summarizing the reasons for exclusion, we must say that the commonly known arguments can be found in the Hungarian legal practice as well: lack of uniform interpretation and inconsistent judicial practice. Here I must refer to the work of *Koehler* and *Guo* summarizing the reasons of exclusion.¹⁵ They stated the main problem was lack of knowledge of the CISG. Our results show that both the lack of uniform interpretation and the

¹⁵ KOEHLER, Martin F., GUO, Yujun. The Acceptance of the Unified Sales Law (CISG) in Different Legal Systems. *Pace International Law Review* [online]. 2008, No. 1, pp. 45–60 [accessed on 2017-04-26].

inconsistent judicial practice are more dominant reasons for excluding the CISG; however, the attorneys also stated that the courts do not realize the mandatory use of the CISG.

In comparison within the V4 countries we found proof that the upper criticized lack of uniform interpretation is familiar in the other countries' practice as well. *Jurewicz* stated in 2009, that the Polish Supreme Court made a great step towards fulfilling the criteria named in Article 7 of the CISG, but also refers to the fact, that this is unique in previous the jurisprudence. She summarizes: *“The approach taken by the Court shows tremendous progress in building useful international jurisprudence since its first decision in 2003, where the Court abstained from discussing several issues that were at the heart of the case.”*¹⁶

3 Arbitration in Hungary

According to the UNCITRAL Model Law an arbitration is international, if the following criteria are fulfilled:

1. the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states; or
2. one of the following places is situated outside the state in which the parties have their places of business:
 - a) the place of arbitration if determined in, or pursuant to, the arbitration agreement;
 - b) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or
3. the parties have agreed expressly that the subject matter of the arbitration agreement relates to more than one country.¹⁷

Hungary has regulated the modern arbitration first in 1994, and the regulation is fully harmonized with the UNCITRAL Model Law.¹⁸ This first

¹⁶ JUREWICZ, Aleksandra. A Milestone in Polish CISG Jurisprudence and Its Significance to the World Trade Community. *Journal of Law and Commerce*, 2009, No. 1, p. 74.

¹⁷ Article 1(3) of the UNCITRAL Model Law.

¹⁸ See in details OKÁNYI, Zsolt, BIBÓK, Péter. Arbitration in Hungary. In: LÖRCHER, Torsten, PENDELL, Guy, WILSON, Jeremy (eds.). *CMS Guide to Arbitration* [online]. CMS Legal Series EEIG, Fourth Edition, 2012, pp. 389–416 [accessed on 2017-04-29].

regulation is in force ever since, but the concept of the new Hungarian Civil Procedure Code has already mentioned that the revision of the current regulation is very up-to-date to make the arbitration system even more efficient.¹⁹

In Hungary, the enforcement of arbitration agreements is basically governed by three legal sources:

- New York Convention (implemented to the Hungarian law by Law Decree 25 of 1962),
- Act III of 1952 on the Civil Procedure Code (changing from 1 January 2018 according to the new Act CXXX of 2016 on Civil Procedure Code) and
- most importantly the Hungarian Arbitration Act LXXI of 1994 on Arbitration (“Arbitration Act”).

During the formation of the new Civil Procedure Code the Drafting Commission of the Code raised the question of implementing new arbitration rules into the Civil Procedure Code in according to show more faith in the institution. The concept of this laid on the presumption that this will ensure the international investors that the Hungarian Government takes arbitration seriously. If we take into consideration the TTIP²⁰ negotiations, we can easily see that the Commission had the right idea – but with the wrong timing. Not surprisingly the accepted version of the Act did not contain this concept, and the regulation remained the same.

According to the Arbitration Act a matter can be brought to arbitration if: (i) at least one of the parties is a person professionally engaged in economic activity, and the legal dispute is in connection with this activity; (ii) the parties may dispose freely over the subject-matter of the proceedings; and (iii) the arbitration was stipulated in an arbitration agreement.

From 1 January 1997, the most favoured standing arbitration tribunal in Hungary is the Arbitration Tribunal attached to the Hungarian Chamber of Commerce and Industry (“ATHCCI”), it is dealing with most of the

¹⁹ *Concept of the New Hungarian Civil Procedure Code accepted on 14th January 2015* [online]. Hungarian Government, p. 28 [accessed on 2017-04-29].

²⁰ Transatlantic Trade and Investment Partnership (TTIP) Agreement between the EU and the US; unfortunately frozen this time being.

international cases. In 2017, there are the following specified arbitration forums operating: Arbitration Court of Money and Capital Markets, Permanent Arbitration Court for Sport, Arbitration Court attached to the Hungarian Agricultural Chamber, Arbitration Court of Electronic Communications and Arbitration Court of Energy. There is legal possibility for *ad hoc* arbitral tribunals of course, but it is very rare in the Hungarian legal practice.²¹

As the inspected area of this study is the international sales law and the arbitration, we will focus on the ATHCCI and its case law. As pointed out previously in the research, there is a common trust among legal practitioners in the ATHCCI. Examining the awards there is clear evidence on the cause of this: the awards given by the arbitrators are far more fitting to the international case law, than those coming from the traditional judicial system. There is no legal tradition of case law in Hungary, so the courts are not bound by other sentences. Unfortunately, this means that they are not primarily forced to take into consideration the international case law as well – not speaking about the Court of Justice’s decisions of course. As a result on the CISG, this has serious effects. Article 7 says “*In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.*” However, this rule can hardly be detected in the court decisions. But the arbitral awards are very different. As a model-award we can cite the arbitral decision from 1997, which cites Hungarian and German scientific literature, and in the text is referring expressively to “other countries’ case law”²². Unfortunately, it is not easy to study the Hungarian arbitration cases, as almost all of them is protected by referring to trade secrets and therefore the Chamber refuses to allow even the scientific research on the texts. However, the Chamber is publishing some anonymized cases, and the upper conclusion can be drawn even from that few awards.

Observing the publicly available case law of Hungarian courts and the arbitration awards, in the case of the most referred articles of the CISG (which

²¹ See in details: HORVÁTH, Éva. *Nemzetközi választottbíráskodás*. Budapest: HVGORAC, 2010.

²² VB/9638, BH1997/10 (available only in Hungarian).

are Articles 1, 38, 74 and 78) we must agree that there is common and proper, uniform interpretation. We also find one common phenomenon in interpretation: the consequent and recurring use of the Hungarian Civil Code, and in general the Hungarian civil law, while applying the CISG. From the examined 38 cases, in 13 (34%) the Hungarian forum cited the CISG, but in the argumentation or in evaluating the court used the terms or the terminology of the Hungarian Civil Code, sometimes parallel with the articles of the CISG.

In the Hungarian legal system, a decision rendered by a lower court can be reversed or overruled by a higher court declaring the lower court's decision (as well as the result or the argumentation) wrong. In some cases, we can still observe that the lower courts did not apply the CISG at all, and only the second (rarely the third) instance gave attention to the CISG. We can see the same in some cases on the jurisdiction and applicable law governed by EU law. In many cases when the parties have domicile in EU Member States when searching for the legal basis of jurisdiction the court applies Act 13 of 1979 (Hungarian Code on International Private Law) to decide the jurisdiction and the applicable law as well, while it is the Brussels Ibis Regulation that should have been applied. Luckily, in case of international sales contract, the regulation and the Hungarian Act both use the same principles.

4 Concluding Remarks

Although Hungary is among the first contracting states of the CISG, the proper and internationally influenced application of it is still far from satisfactory. This is not a unique phenomenon in the region, the so-called "V4" counties are reporting the same based on empirical evidences: lack of knowledge on the side of legal representatives, regularly used clause on opting out of the CISG in the export contracts. An expansive survey made in 2015 in the Hungarian legal practice and its cross-border simultaneous surveys across Europe show that the CISG is used in the legal practice under its value. Examining the reasoning of excluding the CISG we find out lack of knowledge, uncertainty of case law, and special request of exclusion from the contracting partners.

In my belief, we can name three main reasons of the lack of relevant legal experience on the CISG in Hungary:

1. lack of detailed knowledge on the CISG and its international case law;
2. the courts are not motivated enough to be up-to-date with relevant national and international scientific literature and international decisions;
3. the legal representative's accidental application of the CISG rules and lack of knowledge of foreign languages.

It is crucial for export and import companies settled in a country like Hungary (but we could speak about the whole V4 region) to be aware of the legal framework of international sale contracts, and among this knowing the possible positive and negative effects on business routine of application or opting out of the CISG. As for a Hungarian company, we can summarize, that being on the seller's position the CISG – under specified circumstances – offers better legal position than the national regulation. This is not true however being on the buyer side, while the duty of examination of the goods governed by Article 38 and 39 of the CISG is much stricter than the national law. But if the legal representative – and sometimes the court itself – does not know about the differences, it can be a serious disadvantage for the business transactions.

Analysing the arbitral awards and arbitration system in Hungary we can see, that according to the survey made among law firms, the bigger a Hungarian law firm is the more likely it is choosing arbitration as resolution for international disputes. If we compare the decisions we came to the result that although there is no case law in Hungary, the arbitral tribunals, especially the most favoured ATHCCI, the awards contain references on national and international scientific literature, citations on international case law – which makes this arbitration forum working much more like an international dispute settlement body, than the traditional judicial forums.

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