

35 Years of CISG – Present Experiences and Future Challenges

National Report: Russian Federation

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1. CISG and the Contracting Parties – exclusion and inclusion

This empirical study of exclusion and inclusion of the CISG is based on:

a) interviews with lawyers from five international law firms and six major companies from metallurgical and automotive industries, which are involved in export and import,

b) two short interviews with legal professionals who attended my lectures on the CISG (about 50 lawyers from different firms),

c) a survey of the case law.

For obvious reasons this study cannot claim to be representative. It should, however, be noted that the answers provided by different respondents have proven to be largely similar and in some aspects are confirmed by case law. The outcome is as follows.

The CISG is often – but by no means always – explicitly excluded by the parties.¹ It has been repeatedly stressed that many foreign partners, especially those from Germany and Switzerland, insist on the exclusion. The main reasons for the exclusion, pointed out by the respondents, are a lack of expertise and experience with the CISG, inferiority of the CISG to national laws (an attitude especially characteristic for German partners), uncertainty caused by combining the CISG with an applicable national law if questions not governed by the CISG arise.

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¹ See e.g. the resolution of 9th Arbitrazh Appellate Court of 7 September 2009 No. 09AII-15392/2009-ITK; the awards of the International Commercial Arbitration Court at the Russian Federation Chamber of Commerce (hereinafter – ICAC at the RF CCI) of 27 May 2015 in case No. 53/2014, of 30 July 2014 in case No. 197/2013, of 23 April 2014 in case No. 16/2013, of 22 January 2014 in cases No. 35/2013, 36/2013. See also the ruling of the Supreme Arbitrazh Court of the Russian Federation of 17 December 2010 No. BAC-14379/10 (exclusion of the CISG in a construction work contract).

When the CISG is not excluded, it is because the parties want it to be applied, because they simply do not bear in mind that the CISG applies as a default rule or because they are confident in their comprehensive contractual framework, covering all the issues relevant for the industry.

Sometimes the parties expressly refer to the CISG in their contracts to ensure its applicability.²

2. CISG and the courts

For the USSR, the CISG entered into force on 1 September 1991. On 24 December 1991, the President of the Russian Federation informed the UN Secretary General that the Russian Federation was continuing the membership of the Soviet Union. Although somewhat ambiguous, the position of the Russian Federation remained unchallenged.³

A considerable body of case law has built up around the CISG since then. One of the most representative databases the 'Konsul'tantPljus' encompasses over 2600 decisions of commercial ('arbitrazh') courts at all levels that refer to the CISG in one context or another. The 'Rospravosudie', a recently established (2012) online database of all decisions published by courts on their websites – since 1 July 2010 in line with a statutory requirement,⁴ contains over 2000 decisions of courts at all levels, rendered between 1 January 2008 and 31 December 2015: over 1900 decisions of commercial courts and about 50 of general courts. About 600 published reports on awards of the International Commercial Arbitration Court at the Russian Federation Chamber of Commerce and Industry can be found in the 'Konsul'tantPljus'. Databases of the kind are a daily tool of Russian lawyers. Some of them are free of charge. Search options at hand make it easy to find the relevant CISG cases.

The CLOUT Database includes 41 judgements from Russia: 19 court decisions, 21 awards of the ICAC and 1 award of the Maritime Arbitration Commission at the Chamber of Commerce and Industry of the Russian Federation (MAC). The Pace Law School CISG Database cites over 300 cases from Russia: about 60 court decisions, about 240 ICAC awards and 1 award of the MAC. For about 230 of these cases full text translations or extensive summaries in English are available.

² As evidenced not only by the respondents, but by a considerable number of cases as well. See e.g. the resolution of the Federal Arbitrazh Court of the Volga District of 23 July 2013, case No. A65-8606/2012; the resolution of the Federal Arbitrazh Court of the Far East District of 6 Mai 2004, case No. Ф03-А51/04-1/851; the resolutions of the Federal Arbitrazh Court of the North Caucasus District of 3 October 2011, case No. А63-4588/2010, of 23 March 2006, case No. Ф08-944/2006; the resolution of the Federal Arbitrazh Court of the Moscow District of 27 July 2009 No. КГ-А40/4257-09 (standard contract terms); the awards of the ICAC at the RF CCI of 31.07.2015 in case No. 15/2015, of 11 July 2014 in case No. 46/2014, of 30 Mai 2014 in case No. 186/2013, of 25 June 2004 in case No. 120/2003.

³ See e.g. Department of Political Affairs Repertoire of the Practice of the Security Council Supplement 1989-1992 United Nations (New York 2007) 228, http://www.un.org/en/sc/repertoire/89-92/89-92_7.pdf.

⁴ <https://rospravosudie.com/>.

A closer look at this bulk of case law reveals its heterogeneous structure. The courts refer to the CISG in different contexts and with different purposes, making use of it in a variety of ways. Apart from the judgements that have applied the CISG as the applicable state law, and those expressly refusing to apply it, there is a large number of cases, where the courts have used the CISG as an aid to interpretation of the Russian law or have invoked it as an expression of universal legal principles or trends, sometimes more or less clearly and self-confidently identifying this technique. To be sure, in many instances references to the CISG were in fact unnecessary, expendable or just formal.

Thus, the leader among the first instance commercial courts as far as the number of cases explicitly referring to the CISG is concerned is the Pskov Oblast Arbitrazh Court with over 250 decisions (Pskov oblast borders with Belarus, Estonia and Latvia). The second best is the Zabaykalsky Krai Arbitrazh Court with about 120 decisions (Zabaykalsky Krai borders with China and Mongolia). However, except for only one or two cases the disputes were not those governed by the CISG. In a vast majority of cases, the courts have dealt with controversies between a contracting party and a public agency responsible for customs, taxes or currency control. While deciding whether the customs officer who considered the value of the goods to be under declared acted wrongfully, the judges from Pskov indiscriminately invoked the CISG parallel to the Russian Civil Code to endorse the principle that the price is determined by the contract. Their colleagues from Zabaykalsky Krai have likewise invoked the CISG mostly alongside other sets of rules (international instruments, Russian and Chinese laws, the UNIDROIT Principles of International Commercial Contracts /hereinafter: UNIDROIT Principles) without any specification as to which of them actually governs the contract. In most cases concerning customs (about 100 cases) the latter court seems to have reasoned that the officer may not expect a contract of international sale to comply with requirements which are not raised by any relevant authoritative set of rules. The wording of the decisions, the function of the references to the CISG as well as their regular combination with those to the UNIDROIT Principles suggest that the CISG was consulted and cited as *ratio scripta* rather than as a (possibly) applicable state law.

Even though the CISG cases are not very likely to land in general courts who lack jurisdiction over commercial disputes, a noticeable amount of decisions issued within this branch of the judiciary explicitly refer to the CISG (about 50). Only one case really did fall within the scope of the CISG (see section 5 of this paper *in fine*). Other disputes in question were purely domestic. Most of them would fall outside the scope of the CISG as determined by Article 2(a). In many cases courts had to do with contracts other than sale of goods.

In several cases courts have invoked Article 8(3) CISG in conjunction with Article 431 of the Civil Code (hereinafter: CC), which itself reproduces in its second paragraph the pertinent rule of the Convention with only slight alterations. Similarly, there are several decisions, where Article 25 CISG (in one case together with Article 7.3.1 UNIDROIT Principles) has been invoked next to Article 450(2) CC that defines

the fundamental breach of contract in nearly the same words as its model, i.e. the first part of the Article 25 CISG. One court has pointed out that the provisions of the Civil Code concerning the moment when the contract is concluded are in line with those of the CISG.

That practices established between the parties may be relevant under Russian law has been stated by a court under reference to Article 9(1) CISG. While deciding whether the goods were defective according to Russian sales law another court availed itself – in addition to the pertinent rules of the Civil Code – of the guidelines to non-conformity contained in Article 35(2) CISG. In another case the customer's right to avoid a consumer work contract in view of its anticipatory breach has been recognized. A lengthy line of reasoning with references to Articles 71-73 CISG served as justification. The duty of the aggrieved party to mitigate losses has been derived from the Civil Code with the support of Article 77 CISG. In a few cases the rules of the Civil Code on impossibility (Article 416 CC) have been interpreted in the light of Article 79 CISG. The same Article 79 CISG has occasionally helped to interpret the concept of force majeure in Article 401(3) CC.

In virtually all the mentioned cases courts were perfectly aware that the CISG was not applicable and consciously referred to it to support their reasoning in respect to Russian law. One decision stressed that both the definition and the terminology of Article 450(2) CC 'correspond' to those of Article 25 CISG. Another one stated that the relevant question was not settled under Russian law and that it was therefore necessary to consult an external source. Many decisions have introduced their excursus to the CISG with the words 'thus', 'for instance' and alike or have even quoted the provisions of the CISG as a 'certain illustration'.

Although they surely attest to a warm reception of the CISG by the Russian judges these numbers should not be overestimated and require a cautious assessment. First of all, it should be noted that judges and their assistants frequently tend to overtake phrasing from previous decisions in similar cases, thus generating strings of judgements with a similar structure and wording. An array of such strings may be identified within the body of cases with references to the CISG. Therefore, it can be assumed sometimes that there was just one case, where the CISG was actually consulted and consciously invoked by the judge, followed by dozens of decisions more or less mechanically overtaking the lucky formulation.

It is also worth remembering that referring to or getting inspired by do not necessarily go together with a correct interpretation of the respective model. Thus, in several decisions the controversial question whether under Russian law termination of contract upon a fundamental breach requires fault of the breaching party has been answered positively relying on Article 25 CISG, which is not necessarily supposed to embody this solution.⁵

⁵ Cf. for instance Ulrich Magnus, 'The Remedy of Avoidance of Contract Under CISG – General Remarks and Special Cases' (2005-2006) 25 *Journal of Law and Commerce* 423,

The CISG case law *stricto sensu*, i.e. the bulk of cases, where the CISG has been applied as the law governing the dispute, is a fraction of the above numbers. It will be addressed in more detail in other sections of the paper. Some general remarks may suffice here.

There are very few decisions explicitly refusing to apply the CISG. The number of cases, where the courts have silently ignored it, remains of course unknown.

In many cases the courts, having arrived to the applicability of the CISG, invoke nevertheless both the CISG and the Civil Code as if they would apply both at the same time.⁶ This even led to a resolution expressly challenging this style of judicial reasoning. According to it, 'parallel references to provisions of an international treaty and to the rules of a national law are not allowed'.⁷ A possible explanation of this trend might be that the judges do not feel well-versed in the CISG or in the conflict of laws and try to make their decisions appeal-proof by suggesting that whatever law would have applied the result would have been the same.

Two common stylistic features of the decision writing in Russia are particularly relevant for the present discussion. The first is a habit to describe the facts very briefly, obviously omitting those that do not fit into the legal scheme of the case the judge has in mind. The second is a tendency to pile quotations of presumably applicable provisions on top of the description of the facts and to immediately end with a conclusion after it. A decision drafted like that conceals the legal problems at stake and as a result makes it difficult if not impossible to say whether the law has been applied correctly, and is of a very limited value for the interpretation of the respective provisions in the future. Unfortunately, this is all too often the case with the decisions referring to the CISG. The explanation proposed in the previous paragraph might suit here as well.

3. The CISG and legislation, education and legal scholarship

The precedence of international treaties over statutory law is entrenched in Article 15(4) of the Constitution of the Russian Federation, which is reproduced in Article 7 CC. It does not seem to cause much controversy relevant for the application of the CISG. The courts and tribunals frequently cite these articles in support of the

425; Ulrich Schroeter, in Ingeborg Schwenzer (Ed.), *Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG)*, 3rd ed., Oxford University Press, 2010, 408.

⁶ See e.g. the resolution of the Arbitrazh Court of the Volga-Vyatka District of 16 September 2014, case No. A43-14319/2013; the resolution of the Arbitrazh Court of the Volga District of 28 Mai 2015 No. Ф06-1745/2013, case No. A72-4451/2012; the resolution of the Arbitrazh Court of the North Caucasus District of 1 July 2015 case No. A32-16598/2014; the resolution of the Federal Arbitrazh Court of the Central District of 14 July 2014, case No. A08-807/2013.

⁷ The Federal Arbitrazh Court of the Moscow District of 11 February 2002, case No. КГ-А40/274-02.

applicability of the Convention to stress that it prevails over statutory law or that it forms part of the Russian legal system.⁸

The Civil Code of 1994 – 2006 as well as its large-scale reform, which started in 2008 and is drawing to a close now, have been influenced by the CISG, directly or indirectly, i.e. through other pieces of Russian legislation or through foreign models influenced by the Convention. The processes and the extent of these influences, going far beyond the sales of goods law and ranging from direct and open borrowings to vague inspirations, cannot be discussed here in detail. For a general impression some telling observations of the draftsmen and experts who were consulted during the drafting will suffice.

To start with the fathers of the Civil Code, *Aleksandr L. Makovskij* explains that “[a]lthough the norms of the Civil Code have been designed primarily to regulate commercial transactions within Russia, they have also been drafted to conform to existing international norms, such as the 1980 UN Convention on Contracts for the International Sale of Goods (the Vienna Convention) (inter alia Articles 455, 465, 470, and 524) [...]”.⁹ He points out that the definition of *postavka*, i.e. ‘contract of supply’, commercial sale, in Article 506 CC is based on Article 2 CISG, that the provision of Article 424(3) CC, placed in the general contract law, stems from Article 55 CISG, that the fundamental breach of contract as a concept of the Russian general contract law has been borrowed from the CISG and that, for instance, Articles 469 and 470 CC were inspired by Articles 35 and 36 CISG.¹⁰ Together with another father of the Code Stanislav A. Xoxlov, he mentions that the general rules on contract formation (Chapter 28 CC) are in line with the CISG and the provisions on commercial sale ‘take the rules of the CISG into account’.¹¹ In another paper *Xoxlov* states that to

⁸ See e.g. the resolutions of the Federal Arbitrazh Court of the Moscow District of 11 February 2002, case No. КГ-А40/274-02, of 25 June 2001, case No. КГ-А40/3057-01; the resolution of the Federal Arbitrazh Court of the North Caucasus District of 19 March 2003 No. Ф08-748/03, case No. А32-12587/2002-15/354; the resolutions of the Federal Arbitrazh Court of the Urals District of 13 April 2009 No. Ф09-674/09-С5, case No. А50-14729/2007-А11, of 19 February 2008 No. N Ф09-411/08-С5, case No. А60-7156/2007-С2; the resolution of the Federal Arbitrazh Court of the West Siberia District of 11 August 2009 No. Ф04-4599/2009(12006-А70-12); the awards of the ICAC at the RF CCI of 12 August 2015 in case No. 278/2014, of 20 July 2015 in case No. 298/2014, of 26 June 2015 in case No. 206/2014, of 19 June 2015 in case No. 195/2014, of 25 May 2015 in case No. 137/2014, of 27 February 2015 in case No. 146/2014.

⁹ Alexander L. Makovskij, ‘The Russian Civil Code and Its Impact upon Commercial Transactions’ in William Simons (Ed.), *Private and Civil Law in the Russian Federation: Essays in Honour of F.J.M. Feldbrugge*, Martinus Nijhoff Publishers, 2009 1, 5.

¹⁰ Aleksandr L. Makovskij, ‘O vlijanii Venskoj konvencii 1980 g na formirovanie rossijskogo prava’ [On the Influence of the Vienna Convention of 1980 on the Formation of the Russian law] (2007) 1 *Meždunarodnyj kommerčeskij arbitraž* [International Commercial Arbitration] 9, 10 ff, 14 f.

¹¹ Aleksandr L. Makovskij, Stanislav A. Xoxlov, ‘Vvodnyj kommentarij k Graždanskomu kodeksu’ [An Introductory Commentary to the Civil Code] in *Graždanskoe*

bring Russian contract law in tune with international treaties and conventions was one of the basic goals of the codification of the mid-1990s. The only convention he names as an example is the CISG.¹²

Mixail I. Braginskij identifies many influences of the CISG on the Civil Code, not only in so far as general contract law is concerned, but even in respect to the methodology of the Civil Code and to its basic principles – the freedom of contract in particular.¹³

Multiple influences of the CISG on the sales law of the Civil Code or at least correspondences between them are recognized by two other draftsmen, experts in sales law Mixail G. Rozenberg (Articles 455(3) and 465(1) CC / Articles 14 and 55 CISG, Articles 405(2), 450(3) and 523(4) CC / Article 25 and 49(1)(a), Article 524 CC / Articles 75 and 76 CISG)¹⁴ and *Vasilij V. Vittrjanskij*.^{15,16}

zakonodatel'stvo Rossii, Meždunarodnyj centr finansovo-ekonomičeskogo razvitija, 1996, 5, 43, 46.

- ¹² Stanislav A. Xoxlov, 'Konceptual'naja osnova časti vtoroj Graždanskogo kodeksa' [The Conceptual Basis of the Second Part of the Civil Code] in Oksana M. Kozyr', Aleksandr L. Makovskij and Stanislav A. Xoxlov (Eds.), *Kommentarij k Graždanskomu kodeksu Rossijskoj Federacii (časť vtoraja)* [A Commentary to the Civil Code of the Russian Federation (Second Part)], Meždunarodnyj centr finansovo-ekonomičeskogo razvitija, 1996, 221, 224.
- ¹³ Mixail I. Braginskij in Mixail I. Braginskij, Vasilij V. Vittrjanskij, *Dogovornoe pravo. Kniga pervaja: Obščie položenija* [Contract Law. First Book. General Provisions] (Statut 2003) 139, 200, 438; id., 'Venskaja konvencija 1980 g. i GK RF' [The Vienna Convention 1980 and the Civil Code of the Russian Federation] in Mixail G. Rozenberg (Ed.), *Venskaja konvencija OON 1980 g. o dogovorax meždunarodnoj kupli-prodaži tovarov. K 10-letiju ee primenenija Rossije* [The UN Vienna Convention 1980 on Contracts for the International Sale of Goods. On the Occasion of the 10th Anniversary of its Application in Russia], Statut, 2002, 14 ff.
- ¹⁴ Mixail G. Rozenberg, 'Graždanskij kodeks i dogovor meždunarodnoj kupli-prodaži tovarov' [The Civil Code and the Contract of International Sale of Goods] in Oksana M. Kozyr', Aleksandr L. Makovskij and Stanislav A. Xoxlov (Eds.), *Kommentarij k Graždanskomu kodeksu Rossijskoj Federacii (časť vtoraja)* [A Commentary to the Civil Code of the Russian Federation (Second Part)], Meždunarodnyj centr finansovo-ekonomičeskogo razvitija, 1996, 284, 289 f, 292, 297.
- ¹⁵ Vasilij V. Vittrjanskij, 'Kuplja-prodaža (glava 30)' [Purchase and Sale (Chapter 30)] in Oksana M. Kozyr', Aleksandr L. Makovskij and Stanislav A. Xoxlov (Eds.), *Kommentarij k Graždanskomu kodeksu Rossijskoj Federacii (časť vtoraja)* [A Commentary to the Civil Code of the Russian Federation (Second Part)] (Meždunarodnyj centr finansovo-ekonomičeskogo razvitija 1996) 248, 255, 259; id. in Mixail I. Braginskij, Vasilij V. Vittrjanskij, *Dogovornoe pravo. Kniga vtoraja: Dogovory o peredače imuščestva* [Contract Law. Second Book. Contracts on Transfer of Assets], Moscow, 2006, 29, 72, 96; id. in Mixail I. Braginskij, Vasilij V. Vittrjanskij, *Dogovornoe pravo. Kniga pervaja: Obščie položenija*. [Contract Law. First Book. General Provisions], Statut, 2003, 655 f.
- ¹⁶ But see Peter B. Maggs, 'Reflections of Anglo-American Legal Concepts and Language in the New Russian Civil Code' in William Simons (Ed.), *Private and Civil Law in the Rus-*

One of the foreign experts involved in the drafting process Wouter Snijders also speaks about some inspirations from the CISG.¹⁷

As evidenced by the legislative history the CISG has influenced the reform of the Civil Code as well.^{18,19}

To be sure, no special course on the CISG is mentioned in the so-called state educational standards for lawyers. There are, however, two compulsory subjects, which are very likely to touch upon the CISG in one aspect or another: civil law and private international law.²⁰ Universities are free to include in their curricula special courses, mandatory or not, devoted to international sale of goods, unification of international contract law and the like, where the CISG would play an important role, and it does really happen here and there.²¹

sian Federation: Essays in Honor of F.J.M. Feldbrugge, Martinus Nijhoff Publishers, 2009, 197, 200: 'Despite urging by American experts [...], the provisions of Chapter 30 of the Russian Code on purchase and sale reflect relatively little of the United Nations Convention on the International Sale of Goods'.

¹⁷ Wouter Snijders, 'The Civil Codes of the Russian Federation and the Netherlands' in William Simons (Ed.), *Private and Civil Law in the Russian Federation: Essays in Honour of F.J.M. Feldbrugge*, Martinus Nijhoff Publishers, 2009, 11, 21, 25.

¹⁸ Cf for instance Andrey M. Shirvindt, 'Reforming the Russian Civil Code Reforming the Russian Civil Code – A Search for Better Law-Making' in Jürgen Basedow, Holger Fleischer and Reinhard Zimmermann (Eds.), *Legislators, Judges, and Professors*, Mohr Siebeck, 2016, 41, 57, 58.

¹⁹ The reform was concerned mainly with the general part of the Code and the general law of obligations and did not cover the sales law directly. Nevertheless, many changes (such as the newly introduced provisions inspired by representations and warranties, and indemnities) may be of crucial importance for the contracts of sale.

²⁰ See for instance the syllabi of both subjects and a case book on civil law by professors of the Lomonosov Moscow State University, where the CISG has occasionally its say: Evgenij A. Suxanov, in Evgenij A. Suxanov (Ed.), *Graždanskoe pravo: Učebnye programmy obščix i special'nyx kursov [Civil Law: Syllabi of General and Special Courses]*, 2nd ed., Statut, 2012, 22 f, 50; Anton V. Asoskov, Pavel A. Pankratov, *ibid*, 62, 70; Sergej V. Treťjakov, in Vladimir S. Em, Natal'ja V. Kozlova (Eds.), *Sbornik zadač po graždanskomu pravu: Učebno-metodičeskoe posobie. Čast' I [A Case Book on Civil Law: A Workbook and a Teacher's Guide. Part I]*, Statut, 2010, 23 f; Vladimir V. Vittrjanskij, Alëna N. Kučer, in Vladimir S. Em, Natal'ja V. Kozlova (Eds.), *Sbornik zadač po graždanskomu pravu: Učebno-metodičeskoe posobie. Čast' II [A Case Book on Civil Law: A Workbook and a Teacher's Guide. Part II]* (Statut 2010) 115 ff. My impression based on consultations with colleagues from other major universities is that they take a similar approach.

²¹ See e.g. the programmes of the Russian Foreign Trade Academy of the Ministry for Economic Development of the Russian Federation (http://www.vavt.ru/materials/filter?open&show=umkkaph&cathid=k_chp) and the Russian School of Private Law of the Sergej Alekseev Research Centre for Private Law under the President of the Russian Federation (<http://privlaw.ru/rsshpmagistratura/>).

Regardless of the theoretical discussions on the role of the academia in the legal system, the courts and arbitral tribunals do sometimes cite relevant scholarly works – with or without references. I could find no court decisions with explicit references to academic writings within the bulk of the CISG case law except for two related decisions of the same court with vague references to ‘the literature’,²² but there are some awards of the ICAC with such references.

The tribunals have cited authoritative Russian and foreign books: the ‘Vienna Convention on Contracts for the International Sale of Goods: A Commentary’ (1994) edited by Aleksandr S. Komarov,²³ the second edition of the ‘Commentary on the UN Convention on the International Sale of Goods (CISG)’ (2005) edited by Ingeborg Schwenzer and Peter Schlechtriem,²⁴ one of the first editions of John O. Honnolds ‘Uniform Law for the International Sales under the 1980 United Nations Convention’,²⁵ and the UNCITRAL Digest of case law on the CISG,²⁶ or have vaguely invoked the academia and ‘the majority of commentators’.²⁷

4. Personal scope of CISG application

A vast majority of court decisions referring to the CISG state its applicability either with no explicit justification at all or addressing only the internationality issue.

At the same time, there are several resolutions of district commercial courts²⁸ and a resolution of the Supreme Commercial Court, where it was specified that the Convention had been found applicable by virtue of Article 1(1)(a). In its resolution the Supreme Commercial Court took recourse to the rules on conflicts of laws not before it had acknowledged the applicability of the CISG.²⁹ The same structure of reasoning

²² The decisions of the Arbitrazh Court of Moscow of 18 August 2008, case No. A40-18891/08-152-187, of 13 August 2008, case No. A40-30368/08-154-377 (both affirmed by higher courts, which have, however, dropped all the references to the literature).

²³ The awards of the ICAC at the RF CCI of 24 January 2000 in case No. 54/1999, of 10 June 1999 in case No. 55/1998, of 22 October 1998 in case No. 196/1997, of 06 October 1998 in case No. 269/1997.

²⁴ The award of the ICAC at the RF CCI of 17 December 2007 in case No. 35/2007.

²⁵ The award of the ICAC at the RF CCI of 22 October 1998 in case No. 196/1997.

²⁶ The award of the ICAC at the RF CCI of 1 February 2007 in case No. 23/2006.

²⁷ The award of the ICAC at the RF CCI of 30 November 2011 in case No. 264/2010.

²⁸ The resolutions of the Federal Arbitrazh Court of the North West District of 8 February 2008, case No. A21-7862/2006 and of 17 June 2010, case No. A56-17111/2009; the resolutions of the Federal Arbitrazh Court of the Far East District of 2 November 2010 No. Ф03-7781/2010 and of 18 February 2010 No. Ф03-320/2010, case No. A73 14198/2008; the resolution of the Federal Arbitrazh Court of the West Siberia District of 23 April 2015, case No. A45-21175/2013.

²⁹ The resolution of Presidium of the Supreme Arbitrazh Court of the Russian Federation of 26 July 2005 No. 2550/05.

had already been clearly followed by the Court in an earlier resolution – that time without any explicit reference to Article 1(1) CISG³⁰ – and was afterwards upheld in an authoritative, if not binding, abstract recommendation of the Court to lower courts.³¹

By contrast, in an earlier resolution a district commercial court had argued that a conflict of laws rule contained in an international treaty enjoys prevalence over the CISG and accordingly considered the latter not applicable.³² Another court arrived to the applicability of the Convention on both grounds without making any clear distinction between them: the court had first elaborated that the CISG was applicable by virtue of the conflict of laws rules and thereafter has mentioned that both states were contracting states.³³

There are a few decisions – a resolution of the Supreme Commercial Court among them – where the CISG was found applicable both because the parties have chosen a law of a Contracting State and because the places of business of the parties were in contracting states.³⁴

Arbitration tribunals in Russia address the applicability issue in a more elaborate manner and in the absence of a choice of law clause usually consider the applicability of the CISG before determining the law applicable to the dispute according to the conflict of laws rules.³⁵

When there is a choice of law by the parties, the tribunals adhere to one of the two following schemes. In many cases they have acknowledged the applicability of the CISG according to Article 1(1)(a) even though the parties had chosen the law of

³⁰ The resolution of Presidium of the Supreme Arbitrazh Court of the Russian Federation of 20 March 2002 No. 6134/01.

³¹ The Informational Circular of Presidium of the Supreme Arbitrazh Court of the Russian Federation of 9 July 2013 No. 158 'Overview of Practice on Resolution of Disputes with a Foreign Person as a Party', para. 11.

For a decision following this recommendation see e.g. the resolution of the 19th Arbitrazh Appellate Court of 14 July 2016 No. 19АП-3445/2016, case No. A08-71/2016.

³² The resolution of the Federal Arbitrazh Court of the Central District of 19 August 2002, case No. A08-6010/01-15.

³³ The resolution of the Federal Arbitrazh Court of the North Caucasus District of 25 May 2000 No. Ф08-1183/2000.

³⁴ The resolution of Presidium of the Supreme Arbitrazh Court of the Russian Federation of 25 January 2000 No. 4626/99; the resolution of the Federal Arbitrazh Court of the Central District of 14 July 2014, case No. A08-807/2013; the resolutions of the Federal Arbitrazh Court of the Moscow District of 24 July 2000, case No. КГ-А41/3015-00 and of 16 February 1998, case No. КГ-А40/154-98; the resolutions of the Federal Arbitrazh Court of the North Caucasus District of 22 December 1999, case No. Ф08-2921/99-796А and of 22 December 1999, case No. Ф08-2924/99-797А; the resolution of the Federal Arbitrazh Court of the West Siberia District of 11 August 2009 No. Ф04-4599/2009(12006-А70-12).

³⁵ See e.g. the awards of the ICAC at the RF CCI of 30 December 2014 in case No. 191/2013, of 3 December 2014 in case No. 14/2014, of 31 July 2014 in case No. 136/2013.

a contracting state as the law applicable to their contract. The choice of law clauses have been interpreted as concerning the 'subsidiary statute' to apply to issues not governed by the Convention or not settled in it and not capable of being settled in conformity with the general principles on which it is based.³⁶ Alternatively, the tribunals start with the choice of law clause and, if it points at the law of a contracting state, apply the CISG by virtue of Article 1(1)(b), and that even in those cases, where both parties have their places of business in contracting states.³⁷

It is a firmly established stand of the courts that a parties' choice of law of a country where the CISG is applicable cannot be interpreted as an exclusion of the Convention. The Supreme Commercial Court has given a general recommendation to lower courts that, if the parties have chosen Russian law as the law applicable to their contract, the international treaties, to which Russia is a party, shall apply as appropriate.³⁸ The CISG has served as the example. The *ratio decidendi* has been that the 'international treaties form part of the Russian legislation in force' and that 'the parties' choice of the Russian law as the law governing their contractual relationship is a choice of the Russian legal system rather than that of particular statutes applicable to the pertinent relationship'.

Several cases may be cited where the courts have clearly followed this approach.³⁹

³⁶ See e.g. the awards of the ICAC at the RF CCI of 26 June 2015 in case No. 206/2014, of 19 June 2015 in case No. 195/2014, of 25 Mai 2015 in case No. 137/2014, of 26 December 2014 in case No. 105/2014, of 12 December 2014 in case No. 13/2014, of 24 September 2014 in case No. 245/2013, of 11 July 2014 in case No. 46/2014, of 20 Mai 2014 in case No. 88/2012. For earlier awards see Anton V. Asoskov, *Venskaja konvencija OON 1980 goda o dogovorax meždunarodnoj kupli-prodaži tovarov: postatejnyj kommentarij k položenijam, opredelajuščim sferu ee primenenija* [The Vienna UN Convention of 1980 on Contracts for the International Sale of Goods: An Article-by-Article Commentary to the Provisions on its Scope of Application], Infotropik Media, 2013, 41.

³⁷ See e.g. the awards of the ICAC at the RF CCI of 17 August 2015 in case No. 256/2014, of 20 July 2015 in case No. 298/2014, of 25 Mai 2015 in case No. 137/2014, of 27 February 2015 in case No. 146/2014. For earlier awards see Asoskov, *Commentary* (n. 36), 42 f.

³⁸ The Informational Circular of Presidium of the Supreme Arbitrazh Court of the Russian Federation of 16 February 1998 No. 29 'Overview of Practice on Resolution of Disputes with a Foreign Person as a Party', para. 7.

³⁹ The resolution of Presidium of the Supreme Arbitrazh Court of the Russian Federation of 25 January 2000 No. 4626/99; the resolution of the Federal Arbitrazh Court of the Urals District of 19 February 2008 No. Φ09-411/08-C5; the resolution of the Arbitrazh Court of the North Caucasus District of 1 July 2015, case No. A32-16598/2014; the resolutions of the Federal Arbitrazh Court of the North Caucasus District of 22 December 1999, case No. Φ08-2921/99-796A, of 22 December 1999, case No. Φ08-2924/99-797A; the resolutions of the Federal Arbitrazh Court of the North West District of 24 February 2005, case No. A56-39034/03 (international treaties form part of the Russian legal system; exclusion must be explicit anyway) and of 25 December 2002, case No. A05-1717/02-72/23; the resolution of the Federal Arbitrazh Court of the West Siberia District of 11 August 2009 No. Φ04-

Conversely, I could find no cases, where it is certain⁴⁰ that the opposite approach was taken.

The situation with the reported arbitral awards is the same. With⁴¹ or without emphasis on this issue the tribunals do not regard the parties' choice of the law of a contracting state as an exclusion of the CISG.

However, to get a complete picture one should consider a peculiar attitude of the ICAC based on a subtle distinction between two different ways to phrase a choice of law clause. When the parties choose the 'law' of a country using the Russian word 'право', 'pravo' (which means 'law', 'Recht', 'droit' etc.), they should be regarded as having chosen the respective legal system in its entirety, international treaties included. On the contrary, the word 'законодательство', 'zakonodatel'stvo' (i.e. 'legislation', 'Gesetzgebung' etc.), they argue, comprises only statutory provisions of the chosen law, implying an exclusion of the CISG and any other international treaty.⁴²

This way of reasoning has been criticised for its over subtlety, which does not comply with the common understanding of the words in question (even the legislator indiscriminately uses them as interchangeable) let alone the understanding of a foreign contract party, and for its contradiction to the rule '*in dubio pro conventione*' and to the CISG case law outside Russia.⁴³

The ICAC itself has in many cases ignored this distinction and applied the CISG

4599/2009(12006-A70-12); the resolution of the Federal Arbitrazh Court of the Central District of 14 July 2014, case No. A08-807/2013; the resolution of the Federal Arbitrazh Court of the Moscow District of 16 February 1998, case No. КГ-А40/154-98.

⁴⁰ It remains unclear, whether in the resolution of the Federal Arbitrazh Court of the Urals District of 21 Mai 2013 No. Ф09-2077/13 it is the contract or the court, who says that the parties have chosen the Polish law and have 'thus' excluded the CISG.

⁴¹ See e.g. the awards of the ICAC at the RF CCI of 07 December 2010 in case No. 72/2010, of 9 February 2005 in case No. 69/2004, of 24 June 2003 in case No. 151/2002, of 4 September 2002 in case No. 26/2002.

⁴² See e.g. the awards of the ICAC at the RF CCI of 30 January 2015 in case No. 83/2014, of 17 April 2013 in case No. 77/2012. Sometimes the intention to exclude the CISG is derived from the wording supported by the fact that neither party invokes the Convention: see e.g. the awards of the ICAC at the RF CCI of 14 June 2011 in case No. 194/2010.

For a long list of earlier awards see Asoskov, Commentary (n. 36), 128.

The main proponent of this view has been one of the arbitrators of the ICAC, a distinguished and influential expert in international sales law Prof. Mixail G. Rozenberg (see e.g. Mixail G. Rozenberg, *Meždunarodnaja kuplja-prodaža tovarov: kommentarij k pravovomu regulirovaniju i praktike razrešenija sporov* [International Sale of Goods: A Commentary to the Legal Framework and Practice of Dispute Resolution], 4th ed., Statut, 2010, 11 ff).

The same attitude might underlie the resolution of the Federal Arbitrazh Court of the North West District of 11 October 2010, case No. A56-22677/2005.

⁴³ Asoskov, Commentary (n. 36), 128 ff.

to a contract governed by the 'legislation' of a contracting state according to a parties' choice of law provision.⁴⁴ The same holds true for the state courts.⁴⁵

It has not happened all too often that a court or a tribunal has had to deal with a clause explicitly pointing to the CISG as the set of rules applicable to the contract. In one case of the kind the arbitral tribunal has not contested the applicability of the Convention and with reference to its Article 7(2) and to a conflicts of laws rule went over to determining the law applicable to the issues not governed or not settled by the CISG.⁴⁶

There is not much to say about the interpretation by the courts of the 'place of business in different States' as a prerequisite for the applicability of the CISG.

It has been pointed out and criticized that the courts tend to identify the place of business with the place of incorporation or registration and are reluctant to go further.⁴⁷

There are, however, exceptions to this general trend.

In a series of about 30 resolutions, all of them rendered in 2008 – 2009, the Commercial Court of the Urals District has repeatedly availed himself of one and the same phrase giving interpretation to the notion 'place of business' (in its Russian version, of course: 'коммерческое предприятие') as used by the CISG. According to the Court this concept 'involves a permanent place, where business operations are performed, and a place of business may be a place, where the head office of the legal person, its representative office or branch are situated. If a place of activities of a representative office or branch of the seller or buyer is closely related to the sale con-

⁴⁴ For a detailed discussion see the award of the ICAC at the RF CCI of 26 Mai 2014 in case No. 241/2014 (the exclusion of an international convention must be explicit; the arbitrator doubted that the parties had been aware of the difference between the two expressions, i.e. 'Russian legislation' and 'Russian law'). See also the awards of the ICAC at the RF CCI of 30 July 2015 in case No. 73/2015, of 25 December 2013 in case No. 141/2012, of 04 December 2013 in case No. 40/2013, of 27 Mai 2013 in case No. 136/2012, of 6 November 2009 in case No. 89/2008. For earlier awards see Asoskov, Commentary (n. 36), 128.

In some cases the ICAC has arrived to the conclusion that the choice of the 'legislation' of a country does not necessarily imply an exclusion of the CISG and, having taken into account that the parties to the dispute had invoked the CISG, found it applicable. See the awards of the ICAC at the RF CCI of 20 July 2015 in case No. 298/2014 and of 29 December 2014 in case No. 161/2014.

⁴⁵ The resolution of the Federal Arbitrazh Court of the Urals District of 13 April 2009 No. Ф09-674/09-С5, case No. A50-14729/2007-A11; the resolution of the Federal Arbitrazh Court of the North West District of 25 December 2002, case No. A05-1717/02-72/23.

⁴⁶ The award of the ICAC at the RF CCI of 30 Mai 2014 in case No. 186/2013.

⁴⁷ The resolution of the 10th Arbitrazh Appellate of 14 February 2012, case No. A41-20318/11, the 13th Arbitrazh Appellate of 10 March 2011, case No. A21-9774/2009.

See on that: Asoskov, Commentary (n. 36), 31id., *Kollizionnoe regulirovanie dogovornyx objazatel'stv* [The Rules on Conflicts of Contract Laws], Moscow, 2012, 430 ff.; Vladimir A. Kanaševskij, *Vnešneëkonomičeskie sdelki: material'no-pravovoe i kollizionnoe regulirovanie* [International Contracts: Substantive and Conflicts of Laws Rules], Moscow, 2008, 15 ff., 22.

tract and its performance, this place has to be regarded as the place of business for the purposes of Article 1 CISG.⁴⁸ While considering whether for some customs purposes the contracts in question were international the Court invoked the CISG and particularly the 'place of business' concept to support the conclusion that a contract between a Russian company and a Swiss company acting through its representative office registered in Russia was not international.

An arbitral tribunal considered that a Swiss branch of the English buyer had the closest relationship to the contract and thus arrived to the applicability of the CISG according to Articles 1(1)(a) and 10(a).⁴⁹ In another case a tribunal applied the CISG in a dispute between two companies incorporated in the USA taking into account that a Moldavian branch of one of them had the closest relationship to the contract and its performance (Article 1(1)(a) and 10(a) CISG).⁵⁰

I could find only one case where the CISG has been applied to a c2c contract.⁵¹ There will hardly be much more.

5. Substantive scope of CISG application – extending the CISG beyond the sales of goods contracts

Although contracts for the supply of goods to be manufactured or produced will often be regarded as work contracts under Russian law, the courts seem confident of the difference between the latter and the CISG at this point and apply the CISG as appropriate.⁵² The concept of good has not become topical in the existing case law. The transparency of the ICAC case law is limited in this respect, because the reports do not disclose the nature of the good as a rule.

Apart from cases, where the CISG has been invoked to witness general legal principles or international trends, to help interpret the Civil Code etc., these cases often falling out of the substantive scope of the CISG (see Section 2),⁵³ the CISG has rarely

⁴⁸ See e.g. the resolutions of the Federal Arbitrazh Court of the Urals District of 26 March 2008 No. Ф09-1877/08-C1, case No. A47-6315/07 and of 9 November 2009 No. Ф09-8618/09-C1.

⁴⁹ The award of the ICAC at the RF CCI of 05 November 1997 in case No. 2/1995.

⁵⁰ The award of the ICAC at the RF CCI of 24 February 2004 in case No. 136/2003.

⁵¹ The decision of the Chertanovo District Court of Moscow of 24 March 2014, case No. 2-825/2014.

⁵² See e.g. the resolution of the Federal Arbitrazh Court of the West Siberia District of 15 Mai 2006, case No. Ф04-2061/2005(22271-A03-34); the resolution of the Federal Arbitrazh Court of the Central District of 14 July 2014, case No. A08-807/2013 (sale of custom-made goods).

⁵³ In a dispute stemming from a construction work contract the court has invoked the CISG to show that according to a generally recognized principle avoidance of the contract does not affect the arbitration clause (the resolution of the Federal Arbitrazh Court of the North West District of 23 October 2009, case No. A56-45732/2008).

been openly considered applicable to contracts that do not represent sale of goods⁵⁴ and hardly ever to contracts that are not similar to the sale of goods.

There are some cases, where the inapplicability of CISG to contracts other than sale of goods was explicitly stated.⁵⁵

In one case a court qualified an agreement that obliged a party to deliver, assemble and adjust the equipment and to train personnel as a mixed contract and split it into parts, only one of which was considered as falling within the scope of the CISG, that is to say the one concerning delivery. The rest was declared void for a lack of certainty as to the initial and final time periods, which must be determined by the parties to a work or services contract under Russian law.⁵⁶

In a large number of the CISG cases the contractual penalties or the interest on the price or other sum to be paid have been at stake. The penalties and the interest rates issues have always been considered as not covered by the CISG and have consequently been decided on under the law applicable in accordance with conflicts of laws rules (at least I could find no exception).

6. Interpretation of the CISG – international and national influences

The existing CISG case law is neither marked by a pronounced effort to interpret the Convention in an international, autonomous and uniform way, nor by an open and conscious use of domestic concepts in the interpretation of the CISG.

It is hardly possible to learn whether and to what extent the courts consult foreign decisions and legal scholarship. As far as explicit references to them are concerned, I could find neither court decisions nor arbitral awards referring to foreign case law⁵⁷ and only few awards citing foreign legal scholarship (see Section 3).

⁵⁴ The resolution of the Federal Arbitrazh Court of the Moscow District of 27 July 2009 No. KF-A40/4257-09, case No. A40-13335/08-25-143 (financial leasing; the CISG applied as implemented by the Swedish Act (1987: 822) on International Sales); the awards of the ICAC at the RF CCI of 17 April 2003 in case No. 73/2002 (“a complex contract that combines features of both sale and barter”) and of 11 September 1998 in case No. 407/1996 (barter as two contracts of sale).

⁵⁵ Barter: the resolution of the Federal Arbitrazh Court of the Moscow District of 26 Mai 2003 No. KF-A40/3225-03, the award of the ICAC at the RF CCI of 9 March 2004 in case No. 91/2003; leasing: the resolution of Presidium of the Supreme Arbitrazh Court of the Russian Federation of 28 January 2003 No. 1/03; consignment agreement: the award of the ICAC at the RF CCI of 05 March 1998 in case No. 8/1997; carriage of goods: the resolutions of the 13th Arbitrazh Appellate Court of 11 February 2010, case No. A56-46757/2009, of 08 September 2009, case No. A56-12818/2009, of 17 August 2009, case No. A56-53707/2008.

⁵⁶ The resolution of the Federal Arbitrazh Court of the West Siberia District of 11 August 2009 No. Ф04-4599/2009(12006-A70-12).

⁵⁷ Except for one arbitral award referring to approaches dominating in the ‘international practice of arbitration’ generally: the award of the ICAC at the RF CCI of 27 July 1999 in case No. 302/1996.

The issue of 'good faith in international trade' referred to in Article 7(1) CISG has rarely been brought up in court practice. One court has invoked the § 242 of the German BGB in a CISG case without any reference to Article 7(1) CISG in this context, thus obviously adhering to the understanding of the latter as only a guideline for the interpretation of the CISG and not as a standard or rule applicable to the parties' relationship.⁵⁸ There seems to be only one court decision, where the good faith principle of Article 7(1) CISG has been found applicable to a party's conduct.^{59,60} This is different in the arbitration that has repeatedly applied good faith as referred to in Article 7(1) CISG in this latter way.⁶¹

As an element of Russian law, the general principle of good faith is a borrowing. It has codified as late as in 2013 during the reform of the Civil Code. The concept of the reform developed by the draftsmen justifies the introduction of the principle by invoking *inter alia* the experiences of 'international courts' and the 'documents of private international law'.⁶²

Under these circumstances it is only understandable that there is no established tradition as to the content of the principle and the way it operates. The piecemeal use of it by the courts in the recent years that started before it was recognized by the law has often occurred under explicit references to international models, such as the UNIDROIT Principles of international commercial contracts or the CISG. Thus, in its ruling, issued before the amendments to the Code introducing the good faith principle entered into force, the Supreme Arbitrazh Court argued that good faith in performing obligations was one of the fundamental values of Russian law as well as one of the elements of the Russian *ordre public* and that it was one of the 'basic principles' and 'internationally acknowledged standards' that the buyer enjoys a right to obtain valid information about the good and may resort to remedies for breach of contract in case the quality of the delivered goods does not conform to the one expected. To support its reasoning the court referred to Article 7 CISG and Article 1.7 UNIDROIT Principles 2004 'etc.'.⁶³

⁵⁸ The resolutions of the 1st Arbitrazh Appellate Court of 18 August 2011, case No. A43-30087/2010 and of 28 March 2011, case No. A43-19446/2010.

⁵⁹ The resolution of the 9th Arbitrazh Appellaate Court of 20 April 2009 No. 09AII-4907/2009, case No. A40-67638/08-13-361 (affirmed by the higher court).

⁶⁰ The resolution of the Arbitrazh Court of the Far East District of 13 May 2016 No. Ф03-1939/2016 is so elliptical that it remains unclear, whether the good faith of Article 7(1) CISG has been applied to the relationship of the parties itself.

⁶¹ The awards of the ICAC at the RF CCI of 29 December 2014 in case No. 161/2014, of 4 July 2013 in case No. 162/2012, of 27 May 2005 in case No. 95/2004, of 24 January 2000 in case No. 054/1999, of 27 July 1999 in case No. 302/1996, of 24 November 1998 in case No. 96/1998.

⁶² 'Konceptcija sovršenstvovanja obščix položenij Graždanskogo kodeksa Rossijskoj Federacii' [Concept for the Improvement of the General Provisions of the Civil Code of the Russian Federation], *Vestnik Vysšego Arbitražnogo Suda Rossijskoj Federacii* [The Herald of the Supreme Arbitrazh Court of the Russian Federation] 4 (2009) 9, 9.

⁶³ The ruling of the Supreme Arbitrazh Court of 1 August 2013 No. BAC-2211/13.

Even after the good faith principle was officially recognized the courts continued to invoke international authorities next to the relevant provisions of the Civil Code. To give perhaps the most prominent example, the Supreme Court, while basing its reasoning on the good faith principle, referred not only to Articles 1(3) and 10 CC, but to Article III.-1:103 of the Draft Common Frame of Reference, as well.⁶⁴ The pertinent passage of the ruling has become a standard formula used to invoke the principle of good faith by some judges.⁶⁵

It appears that the Russian domestic version of the principle of good faith has so far been interpreted in the light of the international models rather than the other way round. This may, however, change as soon as the courts become more experienced in handling this tool, especially considering the new tendency of the courts to qualify some particular provisions of the Civil Code as stemming from the general principle of good faith and, thus, applicable beyond the temporal scope of the law, by which they have been introduced, as if they were timeless (and ubiquitous?) just as the principle itself.^{66,67}

⁶⁴ The ruling of the Supreme Court of the Russian Federation of 22 January 2015, case No. 306-ЭС14-1977.

⁶⁵ See the resolution of the Arbitrazh Court of the Volga District of 04 June 2015 No. Ф06-24627/2015, case No. А57-12009/2014, the resolution of the 4th Arbitrazh Appellate Court of 10 June 2015, case No. А78-3833/2014, the resolutions of the 12th Arbitrazh Appellate Court of 13 July 2016 No. 12АП-6312/2016, case No. А12-55165/2015, of 12.07.2016 No. 12АП-4451/2016, case No. А12-24552/2015, of 08 July 2016 No. 12АП-6137/2016, case No. А12-616/2016, of 27 June 2016 No. 12АП-4211/2016, case No. А06-108/2016, of 05 March 2015 No. 12АП-7515/2014, case No. А06-1387/2014 and 20 other resolutions of the same court. As it seems the judges in fact consulted the ruling of the Supreme Court rather than the DCFR directly.

⁶⁶ See the resolution of the Constitutional Court of the Russian Federation of 27 October 2015 No. 28-П; the resolution of the Arbitrazh Court of Moscow District of 27 May 2015, case No. А40-101887/13; the resolution of the Arbitrazh Court of the North West District of 8 October 2015, case No. А26-8074/2014; the resolution of the Arbitrazh Court of the Urals District of 4 October 2016 No. Ф09-9278/16, case No. А34-2958/2015. Cf. also the resolution of the Arbitrazh Court of the East Siberia District of 19 July 2016, case No. А19-8098/2015 the resolution of the Arbitrazh Court of the West Siberia District of 1 April 2016, case No. А03-20637/2014; the resolution of the Arbitrazh Court of the Moscow District of 4 July 2016, case No. А40-151794/15 with a more elegant and sophisticated reasoning, yet with the same result. For an opposite view in respect to the same provision, however, without any discussion of the problem in question see e.g. the resolution of the Arbitrazh Court of the Volga Vyatka District of 18 November 2014, case No. А79-5154/2013; the resolution of the Arbitrazh Court of the East Siberia District of 31 March 2016, case No. А33-10673/2015; the resolution of the Arbitrazh Court of the West Siberia District of 18 February 2016 No. Ф04-28197/2015, case No. А27-22945/2014; the resolution of the Arbitrazh Court of the Moscow District of 26 May 2016, case No. А40-209018/2014.

⁶⁷ An approach strikingly resembling the one taken once by the German BGH (BGH, 14.10.1992 - VIII ZR 91/91; see on that Hans Jürgen Sonnenberger, 'Treu und Glauben – ein

The court decisions in the CISG cases reveal hardly any traces of the search for or of the consideration of the general principles underlying the CISG, so that it seems very likely that the courts either do not, in fact, distinguish between the matters governed by, but not expressly settled in the CISG and those not governed by it, or jump directly to the applicable domestic law as soon as they are faced with an issue governed by, but not expressly settled in the CISG.

The courts have several times invoked Article 7(2) CISG to state that the law applicable according to the conflict of laws rules applies only to issues that are not settled in the Convention and cannot be settled in conformity with its underlying principles.⁶⁸ However, I could find only two related cases before the same court, where the court has elaborated on these principles and has even tried to derive a solution to the problem at stake from them. The Arbitrazh Court of Moscow argued that according to literature the CISG is based *inter alia* on the following principles: freedom of contract, reasonableness and that of the parties being bound by the practices which they have established between themselves.⁶⁹

Several general principles in the sense of Article 7(2) CISG have been identified by arbitral tribunals: good faith in international trade,⁷⁰ reasonableness as a standard for parties' conduct,⁷¹ autonomy of the parties,⁷² cooperation between the parties,⁷³ impermissibility of unilateral change of contract unless otherwise agreed upon,⁷⁴ 'Anglo-American principle of estoppel or German principle of *Verwirkung*'.⁷⁵ It is hardly possible to say to what extent the understanding of these principles by tribunals is free from influences exerted by their domestic equivalents.

supranationaler Grundsatz?' in Reinhard Böttcher, Götz Hueck, Burkhard Jähnke (Eds.), Festschrift für Walter Odersky zum 65. Geburtstag, Walter de Gruyter 1996, 703, 704 f.

⁶⁸ The resolutions of the Federal Arbitrazh Court of the Moscow District of 11 February 2002, case No. KГ-A40/274-02, of 25 June 2001, case No. KГ-A40/3057-01 (with emphasis), of 24 August 2000, case No. KГ-A40/3632-00, of 24 July 2000, of 21 June 2000, case No. KГ-A40/2396-00 (with emphasis), case No. KГ-A41/3015-00, of 16 February 1998, case No. KГ-A40/154-98 (with emphasis).

⁶⁹ The decisions of the Arbitrazh Court of Moscow of 18 August 2008, case No. A40-18891/08-152-187, of 13 August 2008, case No. A40-30368/08-154-377 (both affirmed by higher courts, which have, however, dropped all the references to the principles).

⁷⁰ The awards of the ICAC at the RF CCI of 20 February 2014 case No. 207/2013, of 27 December 2006 in case No. 20/2006, of 2 June 2005 in case No. 131/2004, of 18 December 1998 in case No. 288/1997.

⁷¹ The award of the ICAC at the RF CCI of 20 February 2014 in case No. 207/2013.

⁷² The award of the ICAC at the RF CCI of 20 February 2014 in case No. 207/2013.

⁷³ The awards of the ICAC at the RF CCI of 20 February 2014 in case No. 207/2013, of 27 December 2006 in case No. 20/2006.

⁷⁴ The award of the ICAC at the RF CCI of 20 February 2014 in case No. 207/2013.

⁷⁵ The award of the ICAC at the RF CCI of 27 July 1999 in case No. 302/1996.

7. Reservations/Declarations (Articles 92-96 CISG)

The USSR has declared a reservation under Article 96 CISG when acceding to the Convention as from 1 September 1991. The reservation remains in effect for Russia.

Following the Soviet tradition Russian civil law has until recently prescribed that foreign economic transactions are void unless made in writing. This provision has been declared overriding, or internationally mandatory.⁷⁶

This has changed with the reform of the Civil Code that took effect on 1 September 2013. The concept of the reform explained that 'this rule has been introduced in the situation of state monopoly in international trade and has been an expression of a specific attitude of the state towards foreign economic transactions. Nowadays, provisions of this kind are rare among the developed legal orders. Fixing specific consequences for non-observance of the simple written form in respect to foreign economic transactions different from those for regular transactions cannot be justified in the present-day market situation; it puts the parties in foreign economic transactions in an unequal position *vis-à-vis* the parties in regular transactions'.⁷⁷

Under the law now in force the absolute majority of contracts⁷⁸ – domestic and international alike – must still be made in writing according to Article 161(1) CC. Yet, the situation with international contracts has changed not insignificantly. The changes brought out by the reform are twofold. First, the non-observance of the written form does not make the contract void anymore. The general rule applies that the parties may not rely on witnesses for confirmation of the contract and its terms (Article 162(1) CC). Second, the formal requirements are not overriding anymore – with effect as of 1 November 2013.⁷⁹

It has been suggested that the withdrawal of the reservation under the procedure prescribed by Article 97(4) CISG would be the natural next step to put on the agenda.⁸⁰

Be it as it may, the reservation has been there for a long time and still remains effective.

⁷⁶ Articles 162(3) and 1209(2) of the Civil Code (old version). Cf. also Articles 30(2) and 165(1) para. 2 of the Law on the Fundamental Principles of the Civil Legislation of the USSR and Soviet Republics of 1 May 1991; Articles 45 para. 2 and 565 para. 2 of the Civil Code of the Russian Soviet Federative Socialist Republic of 11 June 1964.

⁷⁷ Concept on General Provisions (n. 62) 9, 38; Konceptcija razvitija graždanskogo zakonodatel'stva Rossijskoj Federacii [Concept for the Development of Civil Legislation of the Russian Federation], Statut, 2009, 36.

⁷⁸ With the exception of small value transactions – under RUB 10.000, i.e. a bit more than USD 150.

⁷⁹ The provision of Article 1209(2) of the Civil Code has been dropped because its only *raison d'être* was to support the substantive provision of Article 162(3) abolished by the reform (see Concept (n. 77) 152 f.).

⁸⁰ Asoskov, Commentary (n. 36), 154, 217 f.

The consequences of the reservation are widely understood in a questionable manner by the courts and tribunals, subject to strong criticisms in commentaries.⁸¹ It has been stated in several decisions and awards that, given the fact that Russia is a reservation State, the CISG (its Article 12) imposes a mandatory requirement of written form.⁸² The view that it is Russian law rather than the Convention which fixes the formal requirements has been supported less frequently.⁸³

8. Challenges in the application of specific CISG provisions

Perhaps, the main general challenge for the application of the CISG and of any specific provision thereof by Russian courts is that the existing case law remains mostly opaque and elliptic on the one hand and largely ignored by the academia on the other, these two problems being for sure interdependent to some extent. While the courts do not tend to disclose the legal problems of the case in their decisions (Section 2 *in fine*), scholarly discussion on the CISG has shown so far much more interest in abstract interpretations of its text in summarizing the state of the art according to foreign literature and in often uncritical systematic expositions of the ICAC case law. A comprehensive critical assessment of case law, which would single out problems in the application of specific CISG provisions still remains to be done.

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⁸¹ Asoskov, Commentary (n. 36) 155 ff.

⁸² The resolution of Presidium of the Supreme Arbitrazh Court of the Russian Federation of 25 March 1997 No. 4670/96; the Informational Circular of Presidium of the Supreme Arbitrazh Court of the Russian Federation of 16 February 1998 No. 29 'Overview of Practice on Resolution of Disputes with a Foreign Person as a Party', para. 2; the ruling of the Supreme Arbitrazh Court of the Russian Federation of 23 December 2009 No. BAC-16382/09; the resolution of the Federal Arbitrazh Court of the Moscow District of 20 May 2014 No. Ф05-12033/2012, case No. A41-32554/11; the resolution of the Federal Arbitrazh Court of the North West District of 17 June 2010, case No. A56-17111/2009 (affirmed by the higher court); the award of the ICAC at the RF CCI of 09 June 2004 in case No. 125/2000.

⁸³ See e.g. the awards of the ICAC at the RF CCI of 17 December 2007 in case No. 35/2007, of 10 June 1999 in case No. 55/1998.

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Questionnaire

I. Introduction

Since its adoption in 1980, the United Nations Convention on Contracts for the International Sale of Goods (CISG) has been a key instrument for international commercial transactions and a role model to all future projects for legal unification. Article by article it has been scrutinized by scholars and a vast body of case law on the convention is now available in the internet. Most of the commentaries write about the CISG from a truly international perspective, disregarding the national and regional idiosyncrasies. Differences in its application are usually simplified as a general “civil vs. common law” dichotomy.

This is no wonder, since Article 7 CISG promotes an autonomous and uniform interpretation. Such a method is, however, satisfactory only concerning the “normative” aspect of legal studies. It is beyond dispute that law should be viewed not only as an ideal standard, but as a social and economic reality within its geographical and historical boundaries. In order for the CISG to be fully understood, one also has to focus on the different interpretation of its norms in specific countries and regions. In explaining the regional trends, even published case law is sometimes of no avail. The most extensive online CISG database collected by Pace Law School shows that out of more than 3000 decisions, the vast majority originates from only several jurisdictions¹.

The aim of this Conference is to explore the application of the CISG in Central and Eastern Europe. Except by mere physical vicinity, Central and Eastern European countries are connected by an extensive network of commercial transactions. Capital, services and goods are daily transferred across the national borders. Economic cooperation is, however, not always followed by legal integration on the same scale. National legal systems are deeply rooted in historical circumstances in which they were created. Even if there is a convergence, it does not necessarily encompass the whole region. Some of Central and Eastern European states are already EU Member States, some of them are in the process of accession and some of them are not a part of EU integration. Both similarities and differences between the Central and Eastern European countries can spill over and affect the autonomous understanding of the CISG.

¹ While there are 83 signatories of CISG, more than 2400 out of 3000 decisions are from only 10 jurisdictions (<http://www.cisg.law.pace.edu/cisg/text/caselit.html> as of 29.9.2014.).

The first step of the Conference will be to gather information via national reports on application of the CISG in each of the Central and Eastern European countries. After all national reports are compared, it will be established what is the real impact of CISG throughout the region. Is it applied by the courts, is it applied in a uniform way and has it influenced the national sales law provisions? Results of the national reports will be presented on the first day of the conference. They will serve as a basis for discussion and as an introduction for the second day.

Second day of the conference will focus on CISG's advantages and its imperfections. How is the application of CISG affected by the global changes in last 35 years? What would have been different if CISG was drafted today? If CISG contains certain imperfection, could they be corrected by further unification of the contract law?

II. Instructions for national reporters

- The national report should be no longer than 30 pages, including the text of the Questionnaire.
- The deadline for the delivery of the report is 7 September 2015.
- National reports should be written in the form of a paper or an essay and cover all eight major sections. Each of the sections should represent a separate subtitle. Specific questions suggested under a particular section serve only as guidelines. They should not be answered separately and they do not have to be answered, if they are not relevant for the reporting country.
- The report should present the national law as objectively as possible, based on the case law, survey of major companies' contracting practices and a survey of the relevant national literature. If an issue has not been dealt with, the reporter should acknowledge it and not replace it with his personal view. Reporters are free to disagree with a solution of their national law and judicial interpretation of articles. However, it is desirable to avoid lengthy scholarly discussions.
- Although each section is separate, they should all be reported in the light of the main goal of the Conference – to determine what is specific for a certain country, what do all Central and Eastern European countries have in common and whether this is in accordance with the autonomous and international application of the CISG.
- Reporters should also discuss possible strategies for further development of uniform interpretation of the CISG. Reporters are encouraged to discuss strategies for further harmonization and unification of contract law beyond the CISG, both in Central and Eastern Europe and internationally.
- In their national reports reporters should also take into account Convention on the Limitation Period in the International Sale of Goods (if its is applicable in their country) and describe how it affects relevant issues.

- Reporters are free to cross the limits of a specific section and to add any information that might be useful for achieving the main goal.
- The reports will be published in a single volume. In order to achieve uniformity, a couple of recommendations might be useful:
 - Font: Times New Roman, 12;
 - Paragraph, space: 1,5 lines
 - Footnotes citation style: as a general guidance Oxford Standard for Citation of Legal Authorities is recommended
(http://www.law.ox.ac.uk/published/OSCOLA_Quick_Reference_Guide_001.pdf) However, if the jurisdiction in question has a specific style of citing cases and legal journals, it would be best to retain this original citation style;
 - A brief national bibliography on the CISG.

III. Sections

1. CISG and the Contracting Parties – exclusion and inclusion

** This section of the Report should be based on an empirical survey of the process of drafting and entering into contracts.*

This could be done by reviewing standard terms of ten or more major exporters/importers, by contacting those exporters/importers directly and/or by contacting law firms which deal with international contracts of sale. Reporters should disclose their method – how many business entities and law firms have been taken into account.

- Is CISG usually an integral part of the international contracts of sale entered into by the parties from the reporting country?
- When choosing the applicable law do the parties want the application of CISG? If they do is it done by a direct reference, or by referring to a law of the country which has adopted CISG?
- Is CISG applied only as a default rule without being especially intended by the parties?
- Is the application of the CISG frequently excluded?
- If CISG is often excluded, what would be the reason for such exclusion? Do the parties consider that CISG is inferior to national sale laws? Are they worried because it does not contain comprehensive rules on all contractual problems which may arise?

2. CISG and the courts

- When did the CISG enter into force in the reporting country?
- How many court decisions have been rendered which have applied the Convention?

- Are there any court decisions which have determined the exclusion of CISG?
- To which extent are court decisions on CISG made available to the public?
- Is there an accessible collection of national CISG court decisions? Are they translated in English and available in international databases, e.g., in the CLOUT Database or the Pace Law School CISG Database?
- In the course of time, is there a significant increase or a decrease in the number of decisions? What could be the reason for an increase or decrease? For example, expansion/reduction of trade, the readiness of the courts to apply the CISG, or frequent exclusion of CISG?
- Which articles of the CISG have been most commonly applied and most commonly discussed by the courts?
- Are there any specific articles of the CISG which have caused persistent problems for the courts?

3. CISG and the legislation, education and legal scholarship

- Is CISG similar to the national sales law of the reporting country?
- What are the main differences/similarities?
- What is the status of international treaties in your national legal system? Do they have precedence over statutory law?
- Has there been a major amendment of the national sales law since the CISG entered into force?
- Has the national sales law been directly or indirectly influenced by the CISG?
- If the national sales law has been amended in accordance with CISG, can it be considered as a welcome change?
- Is there any pending legislation of national sales law inspired by CISG?
- Is the CISG taught in law schools of the reporting country? Is it a mandatory part of the curriculum?
- What are the main areas of scholarly attention in regard to CISG?
- Are the courts willing to consult and cite relevant scholarly works?

4. Personal scope of CISG application

- How do the courts arrive at application of the CISG in regard to the parties of the contract?
- Do they apply CISG directly, by virtue of Article 1(1)(a) CISG or they primarily use the rules of the private international law Article 1(1)(b) CISG?
- If the CISG is found applicable, do the courts specify whether the decision was based on Article 1(1)(a) or on 1(1)(b) CISG?
- Is the difference between Article 1(1)(a) and 1(1)(b) CISG fully recognized? What

if prerequisites for both Article 1(1)(a) and 1(1)(b) CISG are fulfilled (both states are contracting states and the private international law leads to the application of the law of a contracting state)?

- What is the role of the parties' choice of law clause?
- What if parties have chosen a law of the country where the CISG is applicable? Can this be interpreted as an exclusion of the CISG, i.e. that parties wanted to apply only statutory provisions of the chosen law? Or that the intention of the parties was to choose the entire legal system, including the CISG?
- What if parties have chosen direct application of the CISG, without any reference to the applicable national law? Is such choice interpreted as a choice of law clause or as an incorporation of CISG text into the contract?
- How is the "place of business in different States" (Article 1 CISG) interpreted? Is the notion of place of business limited by any formal requirements such as registration?
- Is CISG applied only to commercial contracts, or also to other civil contracts (Article 1(3) CISG)?
- Is CISG applied to consumer contracts despite Article 2(1)(a) CISG? Is there a divergence in the definition of consumer contracts by CISG and by the national law? Especially in regard to the fact that CISG will be applicable if "the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use".
- Is the national consumer sales law similar to CISG?

5. Substantive scope of CISG application – extending the CISG beyond the sales of goods contracts

- Can the CISG be applied to contracts that do not represent sale of goods?
- What is considered as a sale of goods? Especially, what is a good? Is it decided in accordance with the CISG or the national law rules?
- Is the CISG applicable to contracts similar to contracts of sale, e.g. licence or distribution? If it is applicable, what is the justification?
- Is the CISG applicable to the services contracts? How is Article 3 CISG interpreted?
- Is the CISG applicable to contracts which are accessory to sale of goods, e.g. suretyship?
- Can the CISG be applied to the legal issues connected with the sales of goods, but not expressly covered by CISG (e.g. validity, contractual penalties, limitations, interest, set-off)?
- What can be considered as "matters governed by this Convention which are not expressly settled in it" and what can be considered as a „general principle“ of

CISG adequate to resolve those matters (Article 7(2) CISG)? If those notions are interpreted extensively, is there a danger to exceed the intentions of the CISG drafters and the national legislators?

6. Interpretation of the CISG – international and national influences

- Is the CISG interpreted in an international, autonomous and uniform way (Article 7(1) CISG)?
- Is there an effort being made to depart from the interpretation of the domestic legal system?
- Are foreign decisions and legal scholarship consulted by the courts?
- Are foreign decisions and legal scholarship referenced in decisions of national courts?
- What is the meaning of “good faith in international trade”?
- In many national legal systems, good faith is a principle which can be directly applied to resolve situations where there are no specifically designated rules. Is good faith in international trade to be understood in such a broad manner?
- Is there a difference between domestic good faith and good faith in international trade?
- Are the general principles of the CISG interpreted in the same way as the domestic equivalents of those principles?
- Are there any problems in reconciling the CISG and the subsidiarily applicable national law?
- What suggestions would you make to improve the uniformity of interpretation in the region?
- What suggestions would you make to further harmonize and/or unify contract law in the region and internationally?

7. Reservations/Declarations (Articles 92-96 CISG)

- Were there and reservations declared by the reporting country?
- If they were, are they still in force?
- What were the reasons for those reservations and do they still exist?
- Are CISG reservations declared by the reporting country applied by the courts?
- Is there any pending legislation or movements to withdraw reservations?
- Would it make a significant difference in the application of the CISG if the reservations had not been declared?

8. Challenges in the application of specific CISG provisions

** This section intends to cover the important issues arising out of the application of CISG in the reporting country which were not encompassed by previous sections. National reporters are especially encouraged to cite court decisions which provide insight of how CISG is understood.*

Possible, but not exclusive, areas of interest in CISG application:

- **Contract formation:** offer (Article 14, 15), its revocability (Article 16), acceptance (Article 17), questions as to the contract form, i.e. entering into a contract by electronic means (Article 11);
- **Conformity of the goods:** what is considered as quality of goods (Article 35), how detailed does the examination of the goods have to be and how long is the short period of time for examination (Article 38); how detailed and in which form does the notice of non-conformity have to be (Article 39);
- **Remedies of the buyer:** which remedies are most commonly claimed; fundamental breach of the contract (Article 25), is the avoidance treated as a remedy of last resort and what is its relationship with seller's right to performance (Article 48, 49), what are the prerequisites for giving an additional period of time (Article 47);
- **Payment of the price:** what is considered as steps and formalities in regard to the payment (Article 54), payment via establishing the letter of credit, place and time of the payment (Article 57, 58), opportunity to examine the goods (Article 58(3));
- **Remedies of the seller:** what are the differences in comparison with the remedies of the buyer; the length of the additional period of time (Article 63); which characteristics of goods can be subject to buyer's specifications (Article 65);
- **Damages and interest:** relationship between the CISG and national law in determining the damages (Article 74), foreseeability (Article 74), reasonable mitigation measures (Article 77), can interest be calculated solely on the basis of CISG, or this has to be determined in accordance with the private international law (Article 78);
- **Limitations:** has the reporting country ratified Convention on the Limitation Period in the International Sale of Goods (1974)? What is its relationship with CISG?