OPTING IN AND OPTING OUT: CAN THERE BE UNIFORM INTERPRETATION OR DOES *VARIATIO DELECTAT* GOVERN?

Ulrich Magnus[*]

I. INTRODUCTION

Franz Kafka is not known for any contribution to the CISG. But his very Kafkaesk short story "Before the Law" may well fit to our subject of opting in and opting out. In that story a man comes to a gatekeeper who sits in front of the door to the law. The man asks for entry into the law. The gatekeeper allows it but warns strongly of unknown dangers. So the man prefers to wait, in fact for all of his life. Shortly before his death he asks the gatekeeper why in all the years nobody else wanted to enter the law. The gatekeeper says to the dying man: "This entrance was assigned only to you. I'm going now to close it."—Still, many do not dare to enter the CISG. They exclude it in fear of unknown dangers, not realising the chances it offers. I will deal with the way to opt into, or out of, the CISG and whether there is an internationally uniform interpretation and application of this possibility or whether national diversity governs and perhaps should govern.

I am particularly glad and proud to contribute to a conference that honors Harry Flechtner who is one of the world's leading CISG-commentators and one of the most renowned experts of the CISG and of international commercial law in general. Invaluable is his work for the international distribution and the correct understanding of the CISG, not only but prominently under the auspices of UNCITRAL, the United Nations Commission for International Trade Law for which he was deeply involved in the preparation of the UNCITRAL Digest of CISG decisions. And by the way, to my knowledge, he is the only lawyer who gained worldwide acclaim by a law-song (the Mootie Blues) written and sung by himself. Since decades

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Harry and I had scientific contacts bridging all gaps between our continents, countries and legal systems. The CISG was the basis on which we became friends.

II. WHAT IS DESIRABLE?

Let me start with the question what is desirable in respect of the interpretation and application of opting in and out of the CISG. Is an internationally uniform interpretation or national diversity preferable? With respect to international conventions and instruments such as the CISG which strive for the unification or harmonisation of law, the answer seems to be simple and unambivalent: the aim is uniformity rather than diversity of interpretation. Any other answer would evidently undermine the objective of such unification or harmonisation instruments. Moreover, in law, variation is no general maxime, just the contrary. Law is based on certainty and reliability. A central requirement of justice is to treat like situations again and again alike and different ones differently. Variation in the sense of flexibility has its place only where social, technical, cultural or similar developments require the adaptation of old rules to new needs.

At a closer look, things appear to be more difficult. The CISG itself demands: "In the interpretation of the 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."[1] As Harry Flechtner has rightly pointed out, this means that, although the aim of establishing uniform legal rules is the primary aim of the whole Convention[2] and influences the interpretation as well, also the international character of the Convention and the good faith commandment of Art. 7 CISG have to be taken into account.[3] These further considerations may not in fact impair the aim of uniformity but may lead to greater diversification and may require finer distinctions between different case situations. In any event, the further considerations show that uniformity is not the only aim which has to be

[1] United Nations Convention on Contracts for the International Sale of Goods art. 7, *adopted* Apr. 11, 1980, 1489 U.N.T.S. 61 (entered into force Jan. 1, 1988) [hereinafter CISG].

[2] *See id.* at 59.

[3] *See generally* Harry Flechtner, *Uniformity and Politics: Interpreting and Filling Gaps in the CISG*, *in* Festschrift für Ulrich Magnus 193 (Peter Mankowski & Wolfgang Wurmnest eds., 2014).

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reached at any price. The uniformity of the interpretation and application of the CISG shall support the Convention's general aim to facilitate and promote international trade and "friendly relations among States."[4] Further, in case of conflict the reasonable interpretation should prevail over the uniform interpretation if the latter is unreasonable.

This latter principle requires on the other hand that a reasonable interpretation that is internationally established should be followed unless there are convincing or even compelling reasons not to do so. The commandment of uniform interpretation thus prescribes to follow the international mainstream as long as it is not unreasonable. This is no formally binding rule in the sense of a *stare decisis* principle but foreign judgments should be adhered to as *persuasive authority* in order to reach international accord of decisions. However, since we will probably never reach *total* global uniformity of interpretation and application—at least in the absence of a single court of last instance—in my opinion, a certain understanding or solution should already be followed if a clear majority of court decisions and/or arbitral awards from different states accepted it (and no strong reasons contradict it). And if there are no or only very few such decisions or awards the uniform view of a clear majority of legal writers should be adopted, too. In both cases, adherence to the uniform view in the described sense should not be refused because single or very few deviating voices raise possible but not compelling counter-arguments. This is a yardstick of some flexibility which is, however, unavoidable.

With respect to the interpretation of the CISG, therefore, as much as possible uniformity in this sense is needed, and as much as can be achieved without a central global instance. As long as a central global CISG-Court is lacking, the only method to achieve the most possible uniformity is to look at precedents (resp. legal writings) from other jurisdictions and follow them if there are no convincing reasons to deviate from them. UNCITRAL with its CLOUT-system and its CISG-Digest as well as with its CISG bibliography helps considerably to reach this goal. So far the ideal. How is the state of affairs when we confront the ideal with the reality?

[4] CISG, *supra* note 1.

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III. WHAT IS THE PRESENT STATUS?

A. General Applicability of the CISG

The starting point is that the CISG applies automatically where its conditions of application are fulfilled. The parties need not expressly choose the CISG; the Convention applies unless excluded by the parties. The conditions of application are normally easy to establish: the parties of the sale must have their places of business in different states and these states must be either Contracting States of the CISG or the private international law of the seized court must lead to the law of a CISG-State.[5] Under such conditions, the national court is bound to apply the CISG.

However, as Art. 6 CISG provides, the Convention is dispositive in nature and respects the parties' autonomy to the most possible extent: therefore, parties are free to entirely or partially exclude the application of the CISG (or to modify almost all of its provisions).[6] Thus, in order to opt out of the CISG the parties must become active and exclude the Convention in one form or the other (see below under III.2.). On the other hand, if the CISG's conditions of application are not fulfilled—in particular, if the parties have their seats both in Non-CISG-States and the conflicts rules do not refer to a CISG-State—it has to be decided whether and how far these parties can opt for the application of the Sales Convention (see below under III.3.). Because of the automatic application of the CISG the question of its exclusion is much more frequent and relevant in practice than the opting in-issue.

The following text examines the opt-out and opt-in practice but does not discuss whether the exclusion of the CISG is generally advantageous or disadvantageous for either the seller or the buyer or even for both. That is the subject of other contributions to this Conference. However, what should be borne in mind is that any exclusion should be consented to only after thorough consideration. Regularly, the exclusion has advantages for one party and disadvantages for the other, in particular where the CISG shall be excluded during legal proceedings. Where advocates are involved the

[5] *Id.* art. 1.
[6] *Id.* art. 6.

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thoughtless consent to such disadvantages can always raise the question of professional liability.

B. Opting Out

The validity of the exclusion of the CISG depends on a respective agreement or consensus of the parties.[7] In principle, the agreement must be determined according to the formation rules of the CISG; declarations and conduct of the parties have to be interpreted in accordance with the standard of Art. 8 CISG (the known or surely knowable intention of the declaring party is decisive, and without that actual or imputed knowledge, the understanding of a reasonable person in the same circumstances).

Furthermore, the parties' intent to exclude the Convention must be established with sufficient certainty. Real intent is necessary; a presumed hypothetical intent to opt out does not suffice.[8] The mere objection of one party against the application of the CISG is also without effect.[9] A one-sided exclusion in standard contract terms can become effective only if the terms have been validly incorporated into the contract. Also, the incorporation issue must be determined according to the CISG standard.[10] This requires that the counter-party had a fair possibility to take notice of the exclusion. The prevailing view favours the solution that for this purpose the standard terms must be made available to the party affected by them, normally either by

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[7] *See, e.g.*, OGH, June 29, 2017, *in* 18 INTERNATIONALES HANDELSRECHT [IHR] 1, 19 (2018) (Austria); OGH, July 4, 2007, 2 Ob 95 / 06v, *in* 7 INTERNATIONALES HANDELSRECHT 221, 237 (2007) (Austria); Cour de cassation [Cass.] [supreme court for judicial matters] com., Nov. 3, 2009, Bull. civ. IV, No. 1025 (Fr.).

[8] *See, e.g.*, Oberlandesgericht [OLG] [Higher Regional Court] Jan. 24, 1994, RECHT DER INTERNATIONALEN WIRTSCHAFT [RIW], 683, 1994 (Ger.).

[9] *See, e.g.*, Déguó dì sēn kè lǔ bó yějīn chǎnpǐn yǒuxiàn zérèn gōngsī yǔ zhōng huà guójì (xīnjiāpō) yǒuxiàn gōngsī guójì huòwù mǎimài hétóng jiūfēn àn (**德国蒂森克**虏伯冶金产品有限责任公司与中化国际（**新加坡**）**有限公司国**际货物买卖合同纠纷案 [ThyssenKrupp Metallurgical Products GmbH (German) and Sinochem International (Singapore) Co.], 2013 Min Si Zhong Zi No. 35 Civil Judgment (Sup. People's Ct. June 30, 2014).

[10] *See, e.g.*, OGH, June 29, 2017, *supra* note 7; Handelsgericht St. Gallen [Commercial Court], June 15, 2010, 11 INTERNATIONALES HANDELSRECHT [IHR] 149 (Switz.); Oberlandesgericht [OLGZ] [Higher Regional Court] Mar. 24, 2009, 10 INTERNATIONALES HANDELSRECHT [IHR] 225 (250) (Ger.); Rb. Rotterdam 25 februari 2009, m.nt (Fresh-Life International B.V./Cobana Fruchtring GmbH & Co., KG) (Neth.).

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sending the terms in paper or through a downloadable email link.[11] If both parties send their standard terms which both clearly and undoubtedly exclude the CISG the application of the Convention is excluded. If only one set of terms excludes the CISG while the other does not, according to the probably prevailing knock-out rule, neither the one nor the other term becomes part of the contract and the CISG remains applicable.

Whether any exclusion of the CISG must be express or can be implicit, too, is discussed below (at III.2.b). The exclusion agreement can be made at any time, and where the applicable procedural law so allows, even during court or arbitration proceedings, then generally until the last hearing III.B.2.d.

1. Express Exclusion

An express exclusion must be clear and unequivocal.[12] This is generally no problem if contract clauses are used which explicitly mention the CISG such as: "The Vienna Sales Convention of 1980 does not apply to this contract." or "Applicable law: German law (under exclusion of the CISG)."[13] Even the formulation "Australian law applicable under exclusion of UNCITRAL law" in an international sales contract has been regarded as sufficient reference to the CISG because in the perspective of the Australian Court the CISG was the only UNCITRAL instrument regulating international sales law.[14] This decision is not unproblematic because there is another UNCITRAL Convention concerning international sales, namely the UN Convention on the Limitation Period in the International Sale of Goods of

[11] *See, e.g.*, OGH, June 29, 2017, *supra* note 7, at 19; Bundesgerichtshofs [BGH] Oct. 31, 2001, 149 Entscheidungen des Bundesgerichtshofs in Zivilsachen [BGHZ] 113 (117) (Ger.); Hof's-Hertogenbosch 16 Oktober 2002, NIPR 2003, 192 m.nt. (Keunen "Bloemen en Planten" V.O.F./Productions Sicamus S.A.) (Neth.); Cour d'appel [CA] Paris, Dec. 13, 1995, JCP 1997 II 22772 (Fr.).

[12] *E.g.*, Cour de cassation [Cass.], Nov. 3, 2009, *supra* note 7; Asante Techs., Inc. v. PMC-Sierra, Inc., 164 F. Supp. 2d 1142 (N.D. Cal. 2001).

[13] *E.g.*, OGH, June 29, 2017, *supra* note 7, at 19 ("Anwendbarkeit des materiellen österreichischen Rechts unter Ausschluss des UN-Kaufrechts.") ("applicability of substantive Austrian law under exclusion of the UN Sales Law") = no valid exclusion because the standard terms with this clause was never made available to the other party.

[14] Olivaylle Pty. Ltd. v Flottweg AG [2009] FCA 522 (20 May 2009) (Austl.). Not questioned in the appeal proceedings: *Olivaylle Pty. Ltd. v. Flottweg AG* [2010] FCAFC 62 (2 June 2010) (Austl.).

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1974. It may raise doubts whether the exclusion of UNCITRAL law refers to the Convention of 1980 or to that of 1974 only or—rather likely—to both. In the interest of clarity and certainty parties should avoid a formulation that merely excludes "UNCITRAL law."

Some ambivalence is also inherent in the clause: "ausschließlich österreichisches Recht, ausgenommen internationales Privatrecht, und UN-Kaufrecht" ("exclusively Austrian law, except private international law, and UN-Sales law") because the comma after "international law" in normal writing closes the parenthesis so that the exception merely refers to private international law. Nonetheless, the highest Austrian Court held that the parties intended to exclude the CISG, too.[15]

Another problematic clause was: "All disputes and disagreements are to be settled on the basis of actual legislation of the Russian Federation." The Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry regarded the formulation as choice of the domestic Russian law and as an implicit exclusion of the CISG.[16] Since "actual legislation of the Russian Federation" comprises the ratification of the CISG as well, a *clear* intention to exclude the CISG is in my view not visible.

An also doubtful decision, this time from a U.S. court, held the following clause insufficient to exclude the CISG: "Supplies and benefits shall exclusively be governed by German law. The application of laws on international sales of moveable objects and on international purchase contracts on moveable objects is excluded."[17] The court argued that the clause did not explicitly reference the CISG and that the CISG does not use the expression "moveable objects" which in the court's view was no synonym for "goods."[18] However, it is not indispensable to use directly the

[15] OGH, in ZEITSCHRIFT FÜR RECHTSVERGLEICHUNG [ZfRV] 124 (2009) (Austria).

[16] Rozenberg, Praktika of Mezhdunarodnogo Kommercheskogo Arbitrazhnogo Suda Pri TPP RF za 2004 g. No. 2003/11 [Practice of the International Commercial Arbitration Tribunal at the Russian Federation Chamber of Commerce and Industry for 2004, No. 2003/11], VESTNIK VYSSHEGO ARBITRAZHNOGO SUDA ROSSIISKOI FEDERATSII [VESTINIK VAS RF] [Bulletin of the Highest Arbitration Court of the Russian Federation] 2005, No. 18, at 136–38 (Russ.).

[17] Roser Techns., Inc. v. Carl Schreiber GmbH, 2013 U.S. Dist. LEXIS 129242, at *4 (W.D. Pa. Sept. 10, 2013).

[18] *Roser*, 2013 U.S. Dist. LEXIS 129242, at *20 ("[T]he CISG does not use the term 'moveable objects.' The only use of the word 'objects' is as a synonym for the word 'protests' not as a synonym for

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name CISG or Vienna Sales Convention of 1980 or the like. If the Convention is identifiably described in another way this must suffice.

Where a validly incorporated but outdated standard term still explicitly excluded the unhappy predecessor of the CISG, namely the Hague Uniform Sales Law of 1964, the seized court held this exclusion ineffective. The court correctly reasoned that it was uncertain whether or not the parties' intent also covered the new UN Sales Convention.[19]

In sum, the case law on the interpretation of concrete contract clauses which shall exclude the CISG shows some doubtful decisions. This is typical—and probably unavoidable—for interpretation issues because further circumstances of the individual case influence, and may explain, the decision. It hardly evidences deep-rooted differences in the understanding of the CISG and its exclusion between different jurisdictions. The starting point that an express exclusion of the CISG will be effective only if it is formulated in a clear and unambivalent manner appears to be commonly accepted.

The express exclusion requires no specific form unless the written form reservation under Art. 96 in connection with Art. 12 CISG has to be observed.[20] If that reservation applies even the exclusion must be in writing. Apart from this exception, a clear oral exclusion agreement is effective as well. The same is true whether or not the parties designate the law that shall apply instead of the excluded CISG. If they have chosen the law and the applicable conflicts rules recognise the choice that law governs. In the absence of any choice the law applies that the conflicts rules determine.

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the word 'goods.'"). The latter sentence is evidently wrong since "objects" is also used for "things" which include "goods."

[19] Oberlandesgericht [OLG] [Higher Regional Court] Oct. 19, 2006, INTERNATIONALES HANDELSRECHT [IHR] 30, 35 (Ger.).

[20] Case law on this point is scarce: *see, e.g.*, Handelsgericht Aargau (Switzerland) 10 March 2010, CISG-online no. 2176; however, legal writers are in agreement that no form is required: see, for instance, Ferrari, *in* Schlechtriem & Schwenzer eds., Kommentar zum Einheitlichen UN-Kaufrecht—CISG—(6th ed. 2013) art. 6 n.12; Magnus, *in* von Staudinger, Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, vol. CISG (ed. 2018) art. 6 n.52; Mistelis, *in* Kröll, Mistelis & Perales Viscasillas eds., UN Convention on Contracts for the International Sale of Goods. A Commentary (2d ed. 2018) art. 6 n.10; Saenger, *in* Ferrari et al. eds., Internationales Vertragsrecht (3d ed. 2018) art. 6 CISG n.2; indirectly also Bonell, *in* Bianca & Bonell eds., Commentary on the International Sales Law. The 1980 Vienna Sales Convention (1987) art. 6 n.3.1.

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2. Implicit Exclusion

There is some diversity on whether the CISG allows not only an express exclusion but also an implicit one. In contrast to some U.S.-decisions which seem to express that the exclusion of the CISG must be explicit,[21] an implicit exclusion is admitted by the clear majority of international case law.[22] Moreover, the seemingly contrary U.S.-decisions are explained as "loose language" because they had not to deal directly with an implicit exclusion.[23] Indeed, more recent U.S.-decisions show that the formulation "explicit exclusion" shall comprise both the express exclusion as well as the alternative "(to) otherwise express a clear intent to displace the CISG."[24] The drafting history of Art. 6 also militates for the admission of an implied exclusion of the CISG. The words "express or implied" which were still contained in the parallel provision of Art. 6's predecessor[25] were merely omitted in order to prevent courts from too easy an acceptance of the exclusion of the CISG by the parties.[26] Therefore, an implicit exclusion is admitted but can only be inferred from clear and convincing indicia for a respective intent of the parties.

The implicit exclusion actually requires an examination on a case-to-case basis because the intentions of the parties in each single case must be

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[21] *See* Delchi Carrier SpA v. Rotorex Corp., 71 F.3d 1024, 1027 (2d Cir. 1995); Travelers Prop. Cas. Co. v. Saint-Gobain Tech. Fabrics Ltd., 474 F. Supp. 2d 1075, 1081–82 (D. Minn. 2007); St. Paul Guardian Ins. Co. v. Neuromed Medical Systems & Support, No. 00 CIV. 9344 (SHS), 2002 U.S. Dist. LEXIS 5096, at *14 (S.D.N.Y. Mar. 26, 2002); Helen Kaminsky Pty. Ltd. v. Mktg. Australian Products, Inc., Nos. M-47 (DLC), 96B46519, 97-8072A, 1997 WL 414137, at *2 (S.D.N.Y. 1997); Orbisphere Corp. v. United States, 13 Ct. Int'l Trade 866, 881–82 (Ct. Int'l Trade 1989).

[22] *See generally* the many decisions from Austria, Belgium, France, Germany, Greece, Italy, the Netherlands, Serbia, Spain, Switzerland and the ICC Arbitration Court documented in the UNCITRAL CISG-Digest art. 6 n.30.

[23] *See* JOHN HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION (Harry Flechtner ed., 4th ed. 2009).

[24] *See* Cedar Petrochemicals, Inc. v. Dongbu Hannong Chemical Co., No. 06 Civ. 3972(LTS) (JCF), 2011 WL 4494602, at *3 (S.D.N.Y. Sept. 28, 2011).

[25] Convention Relating to a Uniform Law on the International Sale of Goods, opened for signature July 1, 1964, 834 U.N.T.S. 107 (1972) [hereinafter ULIS] ("Such exclusion may be express or implied.").

[26] *See* Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, March 11, 1980 (United Nations publication, Sales No. E.81.IV.3) [hereinafter Official Records] (". . . the special reference to 'implied' exclusion might encourage courts to conclude, on insufficient grounds, that the Convention had been wholly excluded.").

identified. Nonetheless, there are typical situations for which generally accepted solutions have developed. They are discussed hereunder.

a. Choice of Law Agreement

There governs unanimity that, in the absence of indicia for the parties' intention to the contrary, the explicit and valid choice of the law of a Non-CISG-state constitutes an implicit exclusion of the CISG.[27] For, it can be assumed that by such choice parties normally mean the choice of the substantive law of the respective Non-CISG-state which then prevails over the actually applicable CISG. Even if both parties are seated in different CISG-states they can exclude the CISG by the choice of the law of a Non-CISG-state.[28] The choice must be valid; the validity of the choice as such is governed by the law which the private international law rules of the seized court refer to.[29]

In the rare but nevertheless realistic event that the chosen law does not exist this is not in turn an implicit exclusion of the CISG. Therefore, the following clause did not contract out the CISG in a German-Chinese sale: "law governing this agreement as per European common market (EU)," because there did not, and still does not, exist a European common market (EU) sales law which can be chosen and applied.[30] The same should be true for a law that, under the applicable private international law, cannot be validly chosen as governing law as, for instance, Roman law, the lex mercatoria or the Sharia because they do not provide a full and coherent system of rules for sales transactions.[31] By the agreement of the parties,

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[27] *See* Ajax Tool Works, Inc. v. Can-Eng Mfg. Ltd., No. 01 C 5938, 2003 WL 223187, at *2 (N.D. Ill. Jan. 30, 2003); Oberlandesgericht [OLG Linz] [higher regional court for appeals] Nov. 1, 2006, 6 R 160/05z (Austria); Tribunale di Padova, 11 gennaio 2005 (It.); Oberlandesgericht Düsseldorf [OLG] [Higher Regional Court] July 2, 1993, RECHT DER INTERNATIONALEN WIRTSCHAFT [RIW] 845, 1993 (Ger.).

[28] *See, e.g.*, *Ajax*, 2003 WL 223187, at *2.

[29] Ferrari, *supra* note 20.

[30] Oberlandesgericht Hamburg [OLG] [Higher Regional Court] Oct. 5, 1998, TRANSPORTRECHT-INTERNATIONALES HANDELSRECHT [TranspR-IHR] 845, 1993 (Ger.). The EU Commission planned a Common European Sales Law and had even prepared a proposal. However, the project was abandoned.

[31] For instance, the Rome I Regulation does not allow the choice of the mentioned "laws" as displacing the otherwise applicable law with all its mandatory provisions. As far as identifiable, rules of these "laws" have merely an effect like standard terms and remain subject to the mandatory rules of the actually applicable law; for an all-embracing discussion, see Ulrich Magnus & Peter Mankowski, art. 3

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merely specific single rules of these sets of norms, if identifiable, can replace the irreconcilable provisions of the CISG but for all the rest the CISG remains applicable. In the same vein, it is no exclusion of the CISG as a whole if the parties agree on an Incoterm like FOB or CIF or on another trade term.[32] The respective term supplants the CISG-provisions as far as the term reaches because the Incoterms do not provide a full code of sales law but merely regulate some specific aspects. The same solution applies where the parties agree on one or more specific rules which modify the corresponding CISG-rule, for instance, where they specify the length of the notice period.

There is also wide-spread agreement that, in the absence of the indication of any other intent of the parties, the choice of the law of a CISG-state does not contract out the CISG.[33] The underlying reasoning is that, by its ratification, the CISG becomes part of the law of a CISG-state and constitutes the special law for international sales which supplants the general domestic sales law of the respective state.[34] This is even the case if the chosen law is that of a territorial unit of a Federal State, provided that the federal constitution extends the applicability of international treaties to all of the units of the Federation like in Australia, Canada or the USA.[35] A further reason that the choice of the law of a CISG-state as such is no exclusion is that the Diplomatic Conference of 1980 during the negotiations of the CISG

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n.247, *in* EUROPEAN COMMENTARIES ON PRIVATE INTERNATIONAL LAW–ROME I REGULATION (Ulrich Magnus & Peter Mankowski eds., 2017).

[32] Oberster Gerichtshof [OGH] [Supreme Court] Oct. 22, 2001, 1 Ob 49/01i, INTERNATIONALES HANDELSRECHT [IHR] (Austria); Hof van Beroep [HvB] [Court of Appeal] Antwerpen, Oct. 22, 2001, 2006/AR/384 (Belg.).

[33] *See* It's Intoxicating, Inc. v. Maritim Hotelgesellschaft mbH, No. 11–CV–2379, 2013 WL 3973975, at *17 (M.D. Pa. July 31, 2013); *Ajax*, 2003 WL 223187, at *17; Asante Technologies, Inc. v. PMC-Sierra, Inc., 164 F. Supp. 2d 1142, 1150 (N.D. Cal. 2001); Bundesgerichtschof [BGH] [Federal Court of Justice] Dec. 7, 2017, INTERNATIONALES HANDELSRECHT [IHR] 65, 2018 (Peter Huber's note) (Ger.); Oberster Gerichtshof [OGH] [Supreme Court] Apr. 2, 2009, 8 Ob 125/08b, INTERNATIONALES HANDELSRECHT [IHR] (Austria). *See also* UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods.

[34] *See, e.g.*, Bundesgerichtshof (BGH) [Federal Court of Justice] Dec. 7, 2017, Zeitschrift für Wirtschaftsrecht (ZIP) 130, 2018 (Ger.) ("Die Verweisung auf deutsches Recht führt . . . grundsätzlich zur Anwendung des CISG, das als Bestandteil des deutschen Rechts und Spezialgesetz für den internationalen Warenkauf dem unvereinheitlichten deutschen Schuldrecht vorgeht.") ("The referral to German law leads . . . in principle to the application of the CISG which, as part of the German law and as special act on international sale of goods, prevails over the non-unified German law of obligations.").

[35] *See Intoxicating* 2013 WL 3973975, at *16–17 (law of the U.S. state of Georgia chosen); Travelers Prop. Cas. Co. v. Saint-Gobain Tech. Fabrics Ltd., 474 F. Supp. 2d 1075, 1081–82 (D. Minn. 2007); *Ajax*, 2003 WL 223187, at *3.

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expressly rejected a proposal according to which the choice of the law of a Contracting State should constitute an exclusion of the CISG.[36]

Nonetheless, some decisions have held that the pure choice of the law of a CISG-state excludes the CISG and must be understood as the exclusive choice of the domestic law of that state, for instance decisions of the Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry[37] but also of few state courts.[38] The main argument was that the choice of the law of a CISG-state makes sense only if the CISG is excluded because without the choice the CISG would apply anyway; its additional choice would be superfluous. This argument is too shortsighted: the choice of the law of a CISG-state remains meaningful in addition to the anyway applicable CISG because the Convention does not cover all legal aspects which may play a role. The most prominent issue is the rate of interest which the Convention leaves open[39] and for which it does not contain any general principle which could fill that gap.[40] The chosen law then fills that gap. It is therefore highly recommendable to designate the law applicable to this and other aspects not covered by the CISG.[41] For this reason, and since the deviating decisions form a clear minority and since the majority view better furthers the CISG's aim of unification and facilitation of international trade the majority view should be generally followed.

If the parties have chosen the law of a CISG-state which—like the USA—has declared the reservation under Art. 95 CISG (that the CISG shall

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[36] *See* Official Records, *supra* note 26, at 86.

[37] *See generally* the decisions of 16 March 2005, of 12 April 2004, 11 October 2002 and 6 September 2002 (all in English translation at www.cisg.law.pace.edu). However, there are also several decisions of the same Tribunal to the contrary: see the decisions of 22 October 2004, 17 September 2003, 25 June 2003 and 16 June 2003 (also all in English translation at www.cisg.law.pace.edu).

[38] *E.g.*, Xianggang Zheng Hongli Youxian Gongsi Su Ruishi ji'er bote youxian gongsi (香港正宏利有限公司诉瑞士吉尔伯特有限公司) [Zheng Hong Li Ltd v. Jill Bert Ltd. Switz.], 1999 SUP. PEOPLE'S CT. GAZ. 208 (Sup. People's Ct. 1999) (China); Hof-Hertogenbosch 13 November 2007 m.nt. (Adex international Ltd./First international Computer Europe B.V.) (Nether.) (unpublished); Tribunal cantonal [JDT] (Appellate Court) Nov. 28, 2004, Ap 91/04 (Switz.); Cour d'appel [CA] [regional court of appeal] Colmar, Sept. 26, 1995, 1B 94-00488 (Fr.); Kantonsgericht [KG] [District Court] Mar. 16, 1995, A3 1993 20 (Switz.); Trib., 14 gennaio 1993 (It.).

[39] *See* art. 78 and 84(1) CISG, *supra* note 1, 1489 U.N.T.S. at 73, 74.

[40] *Id.* at 61 (referring to when such principles are lacking the Convention allows redress to the rules of private international law in which the seized court has to apply).

[41] Such other aspects include institutes of general contract law such as assignment, prescription, some cases of set-off and rescission because of fraud, threat or error.

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not apply if the private international law leads to the law of a CISG-state) the result is not different: Again, such a choice does not clearly indicate an intention to exclude the CISG; instead the Convention becomes applicable as the relevant part of the chosen law.[42]

On the contrary, it is an implicit exclusion of the CISG if the parties explicitly agree on the non-unified internal law of a CISG-state, for instance, by a formulation such as "Es gilt BGB/HGB" ("BGB/HGB applicable," by which the German Civil Code and the German Commercial Code are designated)[43] or that the Uniform Commercial Code (as enacted in the respective U.S.-State) shall be applicable.[44] The same has been held to apply if the parties explicitly choose the "domestic" or "autonomous" law of a CISG-state because they are deemed to thereby show the "clear intention to opt-out."[45] However, the unambiguity of expressions like "domestic" or "autonomous" appears doubtful since the CISG is domestic law, either. For the sake of clarity, such expressions should be better avoided.

Where the standard terms of the parties refer to the law of different CISG-states (e.g., the one party's terms point to French law, the other's terms to Italian law) this does not lead to the exclusion of the CISG either, because the CISG is part of both laws.[46] The question which national law applies can be left open unless legal aspects outside the CISG have to be decided. Only

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[42] *See* It's Intoxicating, Inc. v. Maritim Hotelgesellschaft mbH, 2013 WL 3973975, at 16 (M.D. Pa. July 31, 2013); *see also* J. VON STAUDINGER ET AL., Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen art. 6 n.27 (2018); *but see* PETER SCHLECHTRIEM ET AL., COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 85 (Peter Schlechtriem et al. eds., 2d ed. 2005).

[43] *See* Oberlandesgericht [OLGZ] [Higher Regional Court] May 6, 1998 [1999] Oberlandesgerichts-Rechtsprechungsreport 4 (Ger.).

[44] *See* Doolim Corp. v. R. Doll, LLC, No. 08 Civ. 1587, 2009 WL 1514913 (S.D.N.Y. May 29, 2009).

[45] Honey Holdings Ltd. I. v. Alfred L. Wolf, Inc., 81 F. Supp. 3d 544, 552 (S.D. Tex. 2015); *see also* Oberster Gerichtshof [OGH] [Supreme Court] July 4, 2007, 2 Ob 95/06v, 6/2007 Internationales Handelsrecht [IHR] (Austria); Obergericht [cantonal court of appeal] Mar. 3, 2009, ZOR.2008.16 / eb (Switzerland); Oberlandesgericht [OLGZ] (Higher Regional Court) Aug. 30, 2000, Recht der Internationalen [RIW] 200, 383 (Ger.); *but see* Case No. 12365 of 2004 (ICC Int'l Ct. Arb.) (refusing to exclude CISG because CISG is part of Swiss internal law); Rb. Dordrecht 16 februari 2011, m.nt. (Crankshaft Global Services BV/Industrial & Marine Power Services LTD) (Neth.) (using the term "nationaal" in choice of law clause equal to exclusion of CISG).

[46] See Asante Technologies Tech., Inc. v. PMC-Sierra, Inc., 164 F. Supp. 2d 1142, 1150 (N.D. Cal. 2001) (applying CISG because no sufficiently clear exclusion); *see also* JOHN HONNOLD & HARRY FLECHTNER, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 108 (Harry Flechtner ed., 4th ed. 1999).

then, this battle of forms must be determined. This has to be done in accordance with Art. 19 CISG under which the knock out rule should be preferred.[47] In consequence, the objectively applicable conflicts rules—often leading to the law at the seller's seat[48]—would designate the substantive sales law.

b. Choice of Court Agreement

Not only choice of law agreements but also choice of court agreements can be and are taken to typically indicate a specific intention of the parties with respect to the applicable law and the opting-in or opting-out of the CISG. Where parties have agreed on the exclusive jurisdiction of the courts of a Non-CISG-state it has been held that in the absence of indicia to the contrary the CISG is excluded.[49] The reason behind is that many jurisdictions regard such a choice of court as a strong indication for a simultaneous choice of the law that the chosen court would regularly apply according to the maxim "*qui eligit iudicem eligit ius*."[50] For this reason, the choice of the exclusive jurisdiction of the courts of a CISG-state—including those CISG-states which have declared the reservation under Art. 95 CISG—is generally no implicit exclusion of the CISG but leads to the application of the

[47] *E.g.*, Cour de cassation [cass.] [Supreme Court for Judicial Matters], civ., July 16, 1998, 1309 P (Fr.); Bundesgerichtshof [BGH] [Federal court of Justice] Jan. 9, 2002 (Ger.); JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 192 (3d ed. 1990); INGEBORG H. SCHWENZER, COMMENTARY ON THE UN CONVENTION OF THE INTERNATIONAL SALE OF GOODS (CISG) 344 (Ingeborg Schwenzer ed., 4th ed. 2016); J. VON STAUDINGER ET AL., Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen art. 19 n.24 (2018); *Contra* Oberlandesgericht [OLGZ] (Higher Regional Court] May 24, 2006 (Ger.) (describing "last shot rule"); STEFAN KRÖLL ET AL., UN CONVENTION OF CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) (2d 2018).

[48] *See, e.g.*, Council Regulation 593/2008, art. 4, 2008 O.J. (L 177/) 11 (EC); Convention on the Law Applicable to International Sales of Goods, art. 3, June 6, 1955.

[49] Oberlandesgericht [OLGZ] [Higher Regional Court] Mar. 31, 2008, [2008] Internationales Handelsrecht [IHR] 102 (Ger.); Oberlandesgericht [OLG] [higher regional court for appeals] Jan. 23, 2006, 6 R 160/05z (Austira).

[50] *See, e.g.*, Bundesgerichtshof [BGH] [Federal Court of Justice] June 13, 1996, Neue Juristische Wochenschrift [NJW] 1996, 2569 (Ger.); Marabenu H.K. and S. China Ltd. v. Mongolian Gov't [2005] 1 WLR 2497 (Eng.).

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Convention.[51] Where the parties agree on a non-exclusive jurisdiction clause, for instance leaving the claimant the choice between courts in two or more countries the CISG is nonetheless not excluded if all countries are CISG-States. However, the inference from the court's jurisdiction to the applicable law can no longer be drawn if the courts of both CISG- and Non-CISG States are competent.

c. Arbitration Agreement

Under specific circumstances, arbitration agreements can have similar effects with respect to the applicable law as jurisdiction agreements. This follows the maxim "*qui eligit arbitrem eligit ius*." However, this is only true if it is clearly foreseeable which law the arbitration tribunal will apply. Often, this is not foreseeable, for instance, if the rules of the arbitration institution leave it to the arbitrators to determine the applicable law. If, on the other hand, the rules of arbitration prescribe the application of the law at the place of arbitration and this place is fixed at the time when the arbitration agreement is concluded,[52] then many jurisdictions take such an arbitration clause as a strong indication of an implicit parties' choice of the law at that place.[53] Transferred to the CISG, if the place of arbitration is in a Non-CISG-state and it is clear that the tribunal will apply the substantive law of that state, this militates in favor of an exclusion of the CISG, and vice versa, against exclusion if the place is foreseeably located in a CISG-state and the law of that state will be applied.[54]

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[51] *See* Cour d'appel [CA] Rennes, civ., May 9, 2012, 08/02374 (Fr); Oberlandesgericht [OLGZ] [Higher Regional Court] Apr. 2, 2009 (2/2010) Internationales Handelsrecht 59 (Ger.); Oberlandesgericht [OLGZ] [Higher Regional Court] Mar. 31, 2008 (Ger.).

[52] This will be generally only the case if a permanent arbitration institution is involved.

[53] *See* Bundesgerichtshof [BGHZ] [Federal Supreme Court] Jan. 9, 2002, 70 (Ger.); Egon Oldendorff v. Libera Corp. [1996] 1 Lloyd's Rep. 380 (Eng.).

[54] *See, e.g.*, Schiedsgericht der Hamburger freundschaftlichen Arbitrage (Ger. v. Czech) [1999] Neue Juristische Wochenschrift [NJW] 790 (Ger.); Heinz Bamberger & Herbert Roth, Party Agreement art. 6 (2018); PETER SCHLECHTRIEM ET AL., KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT: DAS ÜBEREINKOMMEN DER VERENINTEN NATIONEN ÜBER VERTRÄGE ÜBER DEN INTERNATIONALEN WARENKAUF—CISG-, art. 6 n.32 (6th ed. 2013); C. BRUNNER, KOMMENTAR ZUM UN-KAUFRECHT 48–49 (Heinrich Hornsell ed., 2d ed. 2010); INGEBORG H. SCHWENZER, COMMENTARY ON THE UN CONVENTION OF THE INTERNATIONAL SALE OF GOODS (CISG) 344 (Ingeborg Schwenzer ed., 4th ed. 2016).

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Is the arbitration tribunal bound to apply the law of a CISG-state without else, this is no opting-out of the CISG.

d. Conduct During Proceedings

The principle of party autonomy generally grants that parties can alter the law applicable to their contract after the conclusion of that contract. The Rome I Regulation expressly provides for all EU-States that the parties "may at any time agree to subject the contract to a law other than that which previously governed it."[55] Also, other international instruments contain the same or a very similar rule.[56] With respect to the CISG, it is widely accepted that parties can still exclude it at a later stage, even in court or arbitration proceedings, provided that the applicable law of procedure allows such change (which, e.g., can be precluded for untimeliness[57]). It is, however, disputed if the mere pleading on the basis of the internal law amounts to an implicit exclusion of the CISG. The probably prevailing view regards such pleading as exclusion only when sufficient signs indicate that the parties were aware that the Convention was actually applicable and that they excluded it. According to this view it is therefore no exclusion if the parties argue with domestic law only due to pure ignorance of the CISG and its applicability.[58] The contrary view suggests that pleading with domestic law is always an implicit exclusion of the CISG.[59] The first view is preferable because it takes

[55] Art. 2008 O.J. (L 177) 10 (however, the change neither alters the original form requirements nor the contractual rights granted to third parties).

[56] *See, e.g.*, Inter-American Convention on the Law Applicable to International Contracts of art. 8, 1994: ("The parties may at any time agree that the contract shall, in whole or in part, be subject to a law other than that to which it was previously subject . . . ." Art. 2(3) . . .). *See, e.g.*, Hague Principles on Choice of Law in International Commercial Contracts of art. 2(3), 2015: ("The choice may be made or modified at any time . . . .)."

[57] *See* Ho Myung Moolsan, Co. Ltd. v. Manitou Mineral Water, Inc., 2010 WL 4892646, 2 (S.D.N.Y. 2010) (the party had invoked the CISG "far too late" and was therefore insofar precluded). *See* GPL Treatment v. Louisiana Pacific Corp., 894 P.2d 470 (477) (Or. Ct. App. 1995).

[58] *See* Bundesgerichtshof [BGH] [Federal Court of Justice] Oct. 31, 2001, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 102 (104), 2001 (Ger.); Tr. di Vigevano, 12 Luglio 2000 n.40, Internationales Handelsrecht (IHR) 2000, 123 (It.). *See also* Cour de cassation [Cass.] [supreme court for judicial matters] com. Sept. 13, 2011, Bull. Civ. IV., No. 09-70305 (Fr.). *See also* UNCITRAL Comm. for the Int'l Sale of Goods Digest art. 6 nn.57, 39 (cites further decisions to this effect).

[59] *See* Regional Court Bratislava (Slovakia) 10 October 2007, CISG-online no. 1828. *See Ho Myung Moolsan, Co. Ltd.*, 2010 WL 4892646, 2 (S.D.N.Y. 2010) (however, only because the invocation of the CISG was precluded); Oberlandesgericht Koblenz (OLG) Jan. 20, 2016, Internationales

it seriously that the exclusion of the CISG requires the parties' real intention—including their knowledge—to replace the applicable law by another. Judges and arbitrators should therefore hint at the problem of the applicable law and ask whether or not the CISG shall apply if they have the impression that the parties are unaware of it.[60]

Where each party argues on the basis of the own internal (domestic) law this has been held to be no exclusion of the CISG.[61] Several courts also decided that it was no requirement for the application of the CISG that the party or parties expressly mentioned the Convention in their pleadings—and the failure to mention it is thus no implicit exclusion. It was sufficient that facts were pleaded which justified a cause of action under the CISG.[62]

e. Other Situations

There is an infinite number of factual situations which can raise the question whether the parties intended to exclude the CISG or were content with its application and each case may have its very peculiar circumstances. Apart from the already mentioned situations, there are only few other typical situations which generally allow inferring a specific intention of the parties with respect to the application of the CISG unless the inference is rebutted by additional elements to the contrary. One is the precontractual negotiations which Art. 8(3) CISG refers to as relevant. They have to be taken into account when examining the parties' intention. Thus, it can speak for the intention to exclude the CISG if a first draft of the contract contained an express reference to the CISG which, after respective discussion between the parties, the final

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Handelsrecht (IHR) 2017, 18 (with rejecting note Piltz). *See* Cour de cassation (France) D. 2001, 3607 (with rejecting note Witz); Cour de cassation (Cass.) [supreme court for judicial matters] com. Oct. 25, 2005. *But cf.* Cour de cassation [Cass.] [supreme court for judicial matters] com. Sept. 13, 2011 (French Supreme Court changed its position).

[60] Cour d'appel [CA] [regional court of appeal] Lyon, civ., Jan. 26, 2016, 14/02387 (Fra.).

[61] Landgericht [LG] [Regional Court] Saarbrücken June 1, 2004, RECHTSPRECHUNG DER OBERLANDESGERICHTE IN STRAFSACHEN 8 OLGSt 118/02, 2004 (Ger.).

[62] *See* Cour d'appel [CA] [regional court of appeal] Nimes, civ., Revue de droit des affaires internationals 2016, 208 (209) (Fra.). *See* U.S. Nonwovens Corp. v. Pack Line Corp., 4 N.Y.S.3d 868 (872) (Sup. Ct. Suffolk Cty. 2015). *See* Citgo Petroleum Corp. v. Oddfjell Seachem, 2013 WL 2289951 (S.D. Tex. 10 December 2014); St. Tropez Inc. v. Ningbo Maywood Industry and Trade Co., Ltd., 2014 WL 3512807 (S.D.N.Y. 16 June 2014). *See also* Gillette/Walt, *in* THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOOD—THEORY AND PRACTICE 69 *et seq.* (2d ed. 2016).

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contract omitted.[63] Another ground for exclusion is the situation that the contract is so intimately interwoven with instruments and concepts of a specific internal national law that the contract could not be correctly performed without redress to this internal law.[64] The mere alteration or replacement of single CISG provisions through deviating contractual terms is generally no exclusion of the CISG as a whole. This has already been mentioned for the use of an Incoterm.[65] On the other hand, the currency, the language of the contract or of the negotiations (of a CISG- or Non-CISG-state), the place of eventual negotiations each alone generally provide no clear indication from which the intention of the parties for or against the exclusion of the CISG can be inferred.[66] This is different if they all point into one direction.

3. Partial Exclusion

Article 6 CISG allows the derogation from the Convention as a whole or, "subject to article 12, to vary the effect of any of its provisions." It is *communis opinio* that the Article thus permits a partial exclusion of the Convention or of single provisions. The only explicit exception is Art. 12 which has the effect that the parties cannot vary the form requirement of writing if this is applicable in accordance with Art. 96. Also the commandment of good faith (Art. 7(1)) and the consequences of Art. 28—the court's discretion to order specific performance—can probably not be excluded.[67]

Since the text of Art. 6 CISG distinguishes between a full exclusion and partial modifications the latter evidently do not *per se* exclude the CISG as a whole but leave the application of the unaffected part of the (otherwise applicable) CISG in force.

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[63] *Id.*

[64] Bianca/Bonell/Bonell art. 6 n.2.3; Mankowski, *in* Münchener Kommentar zum Handelsgesetzbuch art. 6 CISG n.13; Schlechtriem/Schwenzer/Ferrari art. 6 n.30; Staudinger/Magnus art. 6 n.43.

[65] *See supra* III.2.b(i).

[66] *See, e.g.*, Oberlandesgericht [OLG] [Higher Regional Court] Celle May 24, 1995, CLOUT no. 136 (Ger.).

[67] *See, e.g.*, Bianca/Bonell/Bonell art. 7 n.3.3; Schlechtriem/Schwenzer/Ferrari art. 6 n.9 *et seq.* (in accord for art. 28, *contra* with respect to art. 7); Schlechtriem/Schwenzer/Müller-Chen art. 28 n.24; Staudinger/Magnus art. 6 nn.55, 57; differently for art. 28 Bianca/Bonell/Lando art. 28 n.3.1.

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The permission of partial exclusion not only comprises the possibility to replace the consequences ("effect") of single provisions by other consequences; the parties can substitute the relevant CISG provision(s) by own or other regulations, for instance, supplant the provisions on delivery and the passage of risk by an Incoterm. However, Art. 6 also allows that the parties exclude one or more single CISG provisions or even a larger part of the Convention without providing for any substitute solution. They may thus agree on the exclusion of Part II of the CISG (on formation), of Part III (on the substantive rights and obligations of the parties) or of more limited parts (for instance, all provisions on the passage of risk[68]). Part IV (diplomatic provisions) which is addressed to the Contracting States is not subject to the parties' disposition and cannot be excluded. The same should be true for a separate exclusion of Part I (general provisions) as such because it contains the non-excludable Art. 12. Thus far, the exclusion of the separate Parts or of larger groups of provisions of the CISG is apparently a merely theoretical possibility which is not used in practice whilst single provisions are not infrequently replaced, in particular by an Incoterm.

Where the parties validly exclude single or several provisions without the explicit provision of a substitute, any solution must be, first, inferred from the parties' recognizable (common) intentions. Where no such intentions can be established, then, the private international law rules of the court seized determine which law fills the gap.[69]

4. Burden of Proof

The exclusion of the CISG is an exception to the automatic applicability of the Convention. The party alleging an exclusion therefore bears the burden to prove the facts necessary for such an exclusion.[70]

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[68] Arts. 66–70 CISG. *See* United Nations Convention on Contracts for the International Sale of Goods arts. 66–70, Apr. 11, 1980, 1489 U.N.T.S. 3.

[69] *See* Bianca/Bonell/Bonell art. 6 n.3.2.2; Schlechtriem/Schwenzer/Ferrari art. 6 n.35.

[70] *See* Oberlandesgercht [OLG] [Higher Regional Court] Jan. 23, 2006, CISG-online no. 1377 (Austria); Cour d'appel [CA] [regional court of appeal] Paris, civ., Nov. 6, 2001, CISG-Online no. 677 (Fra.); Schlechtriem/Schwenzer/Ferrari art. 6 n.38; Staudinger/Magnus art. 6 n.75.

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C. Opting In

The parties may wish to apply the CISG to their contract although the Convention is not applicable by its territorial, personal, material or temporal scope of application. Case law on this question of opting in is scarce;[71] nonetheless, the issue has some practical importance. The predecessor of the CISG, the Hague Uniform Sales Law of 1964, contained a special provision which allowed the choice of the Uniform Sales Law for certain cases outside its actual scope.[72] The CISG omitted this provision, however, only because its drafters regarded the limits of the former provision as too narrow and vague.[73] The underlying policy to allow an opt-in remained uncontroversial.[74] It is therefore *communis opinio* under the CISG that in principle the parties are entitled to choose the CISG as applicable to their contract even if not all conditions for the applicability of the Convention are met.[75] Some controversies, however, exist in regard of possible limits of this freedom to choose the CISG.

First, it is questionable whether parties can choose the CISG as a legal system of its own (which excludes the mandatory provisions of the otherwise

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[71] *See, e.g.*, HR 25 september 1992, NJ 1992, 105 m.nt. Initials of Annotator (BV Machinefabriek/Sociéte Nouvelle des Papéteries) (Ned.); Xiamen Intermediate People's Court (China), 5 September 1994, CISG-online no. 464; Hoge Raad NJ 2001, 391; ICC Arbitration Award no. 11849 (2003), CISG-online no. 1421; Tr. di Padova, 11 Gennaio 2005, CISG-online no. 967 (Ita.); FPM Financial Services, LLC v. Redline Products Ltd., 17 September 2013, 2013 WL 5288005 (D.N.J.); extensively on this decision Flechtner/Brand, Opting In to the CISG: Avoiding the *Redline Products* Problems, *in* A Tribute to Joseph M. Lookofsky (2015) 95 *et seq.*

[72] Art. 4 ULIS. *See* United Nations Convention Relating to a Uniform Law on the International Sale of Goods art. 4, July 1, 1964.

[73] *See* U.N. CITRAL, 33d Sess. at U.N. Publication A/CONF.97/19 (1991) (Art. 4 ULIS permitted such choice only if the parties to the contract were not seated in different Contracting States or at all in different states. Furthermore, the choice should not affect "the application of any mandatory provisions of law which would have been applicable if the parties had not chosen the Uniform Law." (Art. 4 last part ULIS). The Diplomatic Conference of 1980 also rejected a proposal by the former German Democratic Republic that the parties should be able to choose the CISG in cases where its conditions of application were not satisfied. The rejection was mainly based on the argument that the proposal was unnecessary because the general principle of party autonomy anyway permitted the choice of the CISG in such a situation (Official Records *ibid*.)).

[74] U.N. CISG, 4th mtg. at 252, U.N. DOC. A/CONF.97/C.1/SR.4 (Mar. 13, 1980) [hereinafter *Official Record*].

[75] *See, e.g.*, HR 25 September 1992, NJ 1992, 105 (Neth.); HR 5 januari 2001, NJ 2001, 391 (Neth.); Arbitration Award, 2003 I.C.C. No. 11849; Trib., 11 gennaio 2005, Foro it. 2005 (It.); FPM Fin. Servs. L.L.C. v. Redline Prods., Ltd., CIV.A. 10-6118 MAS, 2013 WL 5288005 (D.N.J. Sept. 17, 2013);

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applicable law)[76] or merely like standard contract terms, which leave the mandatory law of the otherwise applicable law unaffected.[77] Before state courts, the answer to this question depends on the applicable private international law rules. They may require that only law in the sense of a full legal system of a particular state can be chosen. This is, for instance, the case with the Rome I Regulation.[78] There, the choice of the CISG is always complemented by an additional legal system (either also chosen or objectively applicable). In arbitration proceedings, with their generally greater flexibility as to the applicable law, the CISG may be selected to the exclusion of any other applicable law.[79]

Second, special problems can arise in connection with the reservation under Art. 95 CISG (exclusion of application of the CSIG via private international law). This reservation was declared, and is still kept, by Armenia, China, Singapore, Slovakia, St. Vincent and the Grenadines and the U.S.[80] If parties in Non-CISG-states have chosen the CISG and a court in one of the reservation-states will be presiding over litigation, the choice can only be valid if the applicable private international law permits such a

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C.M. BIANCA & M.J. BONNELL, COMMENTARY ON THE INTERNATIONAL SALES LAW—THE 1980 VIENNA SALES CONVENTION, art. 6, § 3.5 (1987); CLAYTON P. GILLETTE & STEVEN D. WALT, THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS—THEORY AND PRACTICE art. 6, para. 71 (2d ed. 2016); FERRARI ET AL., INTERNATIONALES VERTRAGSRECHT art. 6, para. 8 (3d ed. 2018); JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION art. 6, para. 78 (Harry M. Flechtner ed., 4th ed. 2009); K. SIEHR, KOMMENTAR ZUM UN-KAUFRECHT art. 6, para. 13 (H. Honsell ed., 2d ed. 2010); KRÖLL ET AL., UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) art. 6, para. 26 (Stefan Kröll et al. eds., 2d ed. 2018); MANKOWSKI & MÜNCHENER, KOMMENTAR ZUM HANDELSGESETZBUCH, art. 6, para. 16 (4th ed. 2018); SCHLECHTRIEM ET AL., KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT art. 6, para. 39 (6th ed. 2013); J. VON STAUDINGER ET AL., KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH MIT EINFÜHRUNGSGESETZ UND NEBENGESETZEN art. 6, para. 62 (2018).

[76] This is the choice of the law of a state in its full sense, sometimes termed conflicts choice of law (in German: *kollisionsrechtliche Rechtswahl*).

[77] The German expression for this is *materiellrechtliche Rechtswahl*.

[78] *See* MAGNUS & MANKOWSKI, EUROPEAN COMMENTARIES ON PRIVATE INTERNATIONAL LAW—ROME I REGULATION art. 3, paras. 223, 225, 247, 286 (2017) (ebook); SCHLECHTRIEM ET AL., *supra* note 75, art. 6, para. 42 (the Hague Principles on the Choice of Law for International Commercial Contracts permit the choice of "rules" unless the conflict's rules of the forum provide otherwise).

[79] *See* Magnus, *CISG and Arbitration Agreements*, *in* BRÜCKEN BAUEN—FESTSCHRIFT FÜR THOMAS KOLLER 513, 528 (Susan Emmenegger et al. eds., 2018); MANKOWSKI & MÜNCHENER, *supra* note 75, art. 6, para. 20.

[80] *CISG: List of Contracting States*, PACE L. SCH. INST. OF INT'L COM. L., https://www.cisg.law.pace.edu/cisg/countries/notables.html (last visited Oct. 27, 2019).

choice.[81] One can argue that this case falls under the reservation and the choice would therefore be inadmissible in these states.[82] One could, however, also argue that the reservation should not cover the case of a direct choice of the CISG, thereby respecting the all-embracing principle of party autonomy which governs the Convention all over and is accepted almost globally for international commercial contracts. The second position appears preferable.

Third, it is not entirely clear how far parties can extend the CISG's scope of application. With respect to the territorial scope, there is little doubt that parties with their places of business in different Non-CISG-states can effectively choose the CISG for their international sales transaction.[83] The same solution is, and should be, accepted if only one of the parties is seated in a Non-CISG-state[84] or if the parties have their seats in the same state.[85] The CISG did not intend to change this solution which the ULIS expressly provided for and which the Diplomatic Conference on the CISG regarded as too self-evident for mentioning it in the Convention's text.[86] In all these situations, it must be borne in mind that the applicable conflicts rules often, if not regularly, do not permit a conflicts choice of law but merely a choice of substantive law (in German so-called *materiellrechtliche Rechtswahl*). If so, mandatory rules on consumer protection in particular are not ousted by the choice of the CISG.[87]

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[81] Michael Whincop & Mary Keyes, *Putting the 'Private' Back into Private International Law: Default Rules and the Proper Law of the Contract*, 21 MELBOURNE U.L. REV. 515, 518 (1997).

[82] Harry M. Flechtner & Ronald A. Brand, *Opting In to the CISG: Avoiding the* Redline Products *Problems*, *in* A TRIBUTE TO JOSEPH M. LOOKOFSKY (Mads Bryde Andersen & René Franz Henschel eds., Djøf Publishing, Copenhagen 2015), *reprinted in* Harry M. Flechtner & Ronald A. Brand, *Opting In to the CISG: Avoiding the* Redline Products *Problems*, 95, 109 (U. of Pitt. Sch. of L. Working Paper No. 2016–15, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2765047.

[83] *See* BIANCA & BONNELL, *supra* note 75, art. 6, § 3.5.2; GILLETTE & WALT, *supra* note 75, art. 6, para. 73; HONNOLD, *supra* note 75, art. 6, para. 83; STAUDINGER ET AL., *supra* note 75, art. 6, para. 66; UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) art. 6, para. 26 (Stefan Kröll et al. eds., 2d ed. 2018).

[84] *See FPM*, 2013 WL 5288005, at *1–7 (South African and U.S. parties chose the CISG whose applicability the court erroneously finally denied); Flechtner & Brand, *supra* note 82, at 95.

[85] *See* Xiamen Trade v. Lian Zhong (Xiamen Interm. People's Ct. Sept. 5, 1994) (CISG applied to a contract between a party seated in Hong Kong with a party seated in China; choice of CISG in proceedings when Hong Kong already belonged to China).

[86] *See* Mankowski, *supra* note 64.

[87] *See* BIANCA & BONNELL, *supra* note 75, art. 6, § 3.5.1; HONNOLD, *supra* note 75, art. 6, para. 81; SIEHR, *supra* note 75, art. 6, para. 13; MAGNUS & MANKOWSKI, *supra* note 78, art. 3, para. 283; STAUDINGER ET AL., *supra* note 75, art. 6, para. 67.

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Also rather unproblematic is an extension of the temporal scope of application of the CISG when all other conditions of applicability are met. If an international sale was concluded before the CISG entered into force in the state(s) relevant for its applicability under Art. 1(1)(a) or (b), the parties can nevertheless opt for the application of the CISG. The possible restriction of conflicts rules for contractual effects towards third parties does not play a role here since the CISG does neither produce nor grant such effects.[88]

An extension of the substantive scope of the CISG poses greater problems. In principle, the parties can also choose the CISG for other than pure sales contracts. In cases covered by Art. 3 CISG (contracts for the sale of goods to be produced or manufactured and sales combined with other services) it may be often advisable to clarify that the CISG shall be applicable (or not) in order to avoid any doubt. It appears that agreements other than sales contracts can also be governed by the CISG. In *FPM Financial Services, LLC v. Redline Products Ltd* the parties had chosen the CISG for their distribution agreement, though by a poorly drafted clause.[89] The court finally applied domestic New Jersey law without closer discussion of the choice of the CISG, arguing that the parties agreed that, with respect to the disputed issues, there were no differences between the CISG and the involved South African and New Jersey laws.[90] Obviously, the court did not doubt that the applicability of the CISG could be extended to a distribution agreement. For pure contracts for work or for services, the CISG provisions may not fit in all respects; nonetheless, the parties are free to choose the CISG for such

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[88] *See, e.g.*, Commission Regulation 593/2008 (Rome I), On the Law Applicable to Contractual Obligations, 2008 O.J. (L 177) art. 3, para. 2 (providing that any change of the applicable law by the parties of a contract cannot affect any rights of third parties).

[89] *FPM*, 2013 WL 5288005, at *3. The distribution agreement contained the following clauses: "[T]he contract shall be deemed made in Cape Town, South Africa and shall be governed by the laws of that country . . . [and] will be governed by the Convention on Contracts (Agreements) for the International Sale of Goods (CISG)," and "[P]ursuant to Article 1(1)(a) and Article 10 of the CISG and this Agreement will be adjudicated in Bergen County, New Jersey, USA."

[90] The assumption of identity between these laws was evidently wrong even for the issues in dispute: the court applied the parol evidence rule of New Jersey law which prevents the introduction of oral evidence to modify the terms of a written contract, but this rule is excluded under the CISG. *See, e.g.*, MCC-Marble Ceramic Ctr. v. Ceramica Nuova D'Agostino, S.P.A., 144 F.3d 1384 (11th Cir. 1998); Mitchell Aircraft Spares v. European Aircraft Serv. AB, 23 F. Supp. 2d 915 (N.D. Ill. 1998); Transmar Commodity Grp. Ltd. v. Cooperativa Agraria Indus. Naranjillo Ltd., 721 F. App'x 88 (2d Cir. 2018); *Official Record*, *supra* note 74, at 270; INTERNATIONALES HANDELSRECHT 22 (2019); *see also* HONNOLD, *supra* note 75, art. 6, para. 110.

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a contract.[91] Moreover, they can replace unsuitable CISG-provisions by "hand-tailored" own terms. However, as already mentioned and depending on the applicable conflicts rules of the seized state court, the choice of the CISG often does not create exemptions for mandatory provisions of the objectively applicable law, particularly concerning consumer protection.[92] The choice of the CISG can also not relieve from mandatory form requirements which the applicable national law provides for other specific contract types.[93] Further, the parties cannot choose the application of the CISG to sales "on execution or otherwise by authority of law."[94] The CISG excludes these sales because of their official and compulsory character.[95] Because the authority of the state is involved, they are not subject to private disposition.

The personal scope of the CISG indirectly excludes consumers.[96] However, if both parties are consumers and would directly choose the CISG for an internal or international sale the choice would be valid as far as permitted by the applicable private international law (in the EU only a choice of contract terms subject to any mandatory law is permitted). The CISG establishes no further personal scope requirements.

Apart from the choice of the CISG as a whole also the partial choice of the CISG, for instance, of its formation part only or of its part on the parties' rights and obligations appears unproblematic.

IV. SUMMARY AND CONCLUSIONS

Our starting point was the question whether the CISG is uniformly or differently interpreted and applied in regard of the opting out- and opting in-issue. One can summarise that there are some stable rules for which almost complete unifomity can be stated:

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[91] HONNOLD, *supra* note 75, art. 6, para. 81 ("[T]here seems little reason to deny them freedom to choose.").

[92] BIANCA & BONNELL, *supra* note 75, art. 6, § 3.5.1; HONNOLD, *supra* note 75, art. 6, para. 81; SIEHR, *supra* note 75, art. 6, para. 13; MAGNUS & MANKOWSKI, *supra* note 78, art. 3, para. 283; STAUDINGER ET AL., *supra* note 75, art. 6, para. 67.

[93] *See* Peter Schlechtriem, *Einheitliches* UN-Kaufrecht 13 (Tübingen 1981).

[94] *Id.*

[95] *U.N. Convention on Contracts for the International Sale of Goods* art. 2, § (c), opened for signature Apr. 10, 1980, S. TREATY DOC. NO. 98-9 (1983).

[96] *Id.* § (a).

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- First, an exclusion of the CISG as a whole (which Art. 6 CISG permits) must be expressed in a clear and unambiguous way; otherwise it is not valid and does not replace the CISG.
- Second, the choice of the law of a Non-CISG-state regularly and without else constitutes an exclusion of the CISG.
- Third, the choice of an Incoterm is no exclusion of the CISG as a whole but merely replaces any contrasting provisions of the CISG.
- Fourth, the parties can opt in to the CISG.

In other respects, no almost complete uniformity but a clearly prevailing majority view and thus relative uniformity can be stated:

- The CISG can be excluded not only expressly but also implicitly.
- An express exclusion need not necessarily mention the term CISG or UN Sales Convention. An unequivocal circumscription suffices (for instance: the UN law that governs the formation and obligations under international sales contracts) although the correct denomination is always preferable.
- The implicit exclusion must be particularly clear and be based on significant indicia for the parties' common intention. There is no general presumption that the parties intended to exclude the CISG. Prominent among the significant indicia are choice of law clauses. In the absence of clear indicia for a contrary intention of the parties, the choice of the law of a CISG-state is deemed to lead to the application of the CISG irrespective where the parties are seated or where the contract was concluded or to be performed. Without else the choice of, e.g., Spanish or Swiss law leads to the application of the CISG and Spanish or Swiss law as filler for those gaps which the CISG leaves to internal national law. This is even true where the law of a territorial unit of a federal state is chosen (and the federal law extends the Convention to this unit). The choice of New York law therefore means: application of the CISG and New York internal law for questions outside the CISG.
- Slightly more controversial is the effect of choice of court agreements. The opinion prevails that the choice of the exclusive jurisdiction of courts of a CISG-state respectively of a Non-CISG-state is a strong indication for the parties' intention that the Convention in the former case be applied and in the latter be not applied. Although this is more controversial for arbitration agreements they can—and should—have the same effect if, at the

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time of conclusion of the contract, it is certain that the arbitration tribunal will apply the law of a CISG-state respectively a Non-CISG-state and no contrary intention of the parties is indicated.

- Other clear indicia of an implicit exclusion of the CISG are references to domestic law as a full legal system such as "applicable law: French Code civil," "applicable: BGB/HGB." A reference to a single domestic provision will often be ambiguous and is then no clear indication of the parties' intention.
- According to the prevailing though disputed view, pleading on the basis of the domestic ununified sales law in legal proceedings is as such no implicit exclusion of the CISG if it is only due to pure ignorance of the CISG and its applicability. The court or tribunal should clarify that not mere unawareness decides the case even if professional lawyers represent the parties.

Although an opting in to the otherwise not applicable CISG is a generally accepted possibility, details are still disputed. The CISG's choice instead of a national law depends on whether the applicable rules of private international law permit such a *kollisionsrechtliche* choice. In many instances, these rules merely allow a *materiellrechtliche* choice as standard terms. It is regularly unproblematic to extend the CISG's temporal and territorial scope of application. Furthermore, the Convention can generally be made applicable to contracts and goods outside its original scope of application. However, there is wide agreement that the choice of the CISG cannot circumvent mandatory provisions of the actually applicable law, in particular on consumer protection.

Probably, it is unavoidable that greater diversity appears to govern the interpretation of single contract clauses which affect the application or exclusion of the CISG. Since courts generally decide on the basis of all the circumstances of the concrete case a comparison of the mere wording of clauses and their interpretation by the court may not always reveal the true reasons of decision.

In essence, the international case-law on opting in or out of the CISG shows greater uniformity than diversity. It is the clear and globally accepted starting point that courts and tribunals should not lightly assume an exclusion of the otherwise applicable CISG. There is almost unanimity on a number of central rules and at least a clear prevailing view on many others concerning this issue. A certain degree of differences in the interpretation of single contract clauses appears unavoidable. Taken together, this is probably the

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most what can be expected in terms of uniformity as long as a world court as last instance is lacking. Coming back to Kafka's "Before the law" one can only encourage to enter the CISG and to follow the lead of Harry who explored the CISG-cosmos in all its breadth.

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