Highlights

Some Obstacles Regarding the Application of the CISG in Latin American Countries

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The United Nations Convention on Contracts for the International Sale of Goods (CISG) was adopted in a diplomatic conference held in Vienna in 1980 under the auspices of the UN General Assembly. The CISG is the result of long-standing efforts carried out by numerous international organizations, and finally led by the UN Commission on International Trade Law (UNCITRAL),[1] in order to harmonize the law applicable to contracts of this kind.[2] It has been deemed as one of the most successful instruments for the development of international trade.[3] Currently, 95 countries have adopted the CISG as their national law applicable to contracts for the international sale of goods[4], including several Latin American states.[5] These 95 countries may currently represent more than 80% of the international commerce worldwide.[6]

Some general scenarios about the application of the CISG

The application of the CISG to a sales contract, may arise from a wide range of expected and unexpected circumstances. For example, it may be applicable to the contract as a national law, when parties having their places of business in contracting states choose the law of one of their states to govern their business transaction.[7] In these cases, the CISG may become the *lex specialis* applicable to the contract despite the choice of a national applicable law, thereby replacing or displacing those local national rules that would otherwise be applicable (e.g., a national commercial code).[8]

It may also be characterized as a "non-national" system of law, as a result of being a neutral set of uniform rules promulgated by an international organization. Thus, when the parties enter into a contract of sale having an arbitration agreement, they may select the CISG as the applicable rules of law to their agreement, even if their places of business are not located in a CISG state.[9] In other words, party autonomy in international commercial arbitration allows the parties to choose non-national rules of law in relation to the merits of their dispute,[10] irrespective of the seller's and the buyer's location at the time of concluding the contract.

Conversely, the parties may exclude the CISG in cases where it would undoubtedly be applicable.[11] Thus, a Colombian seller and a Canadian buyer could choose the law of a non-CISG state (e.g., English law), despite having their places of business in CISG states.

When the parties do not choose any system of law to govern their sales contract, the CISG may also be applicable. A court of law, applying the conflict of laws rules of its forum, may decide that the contract is subject to the national law of a given country which has adopted the CISG, in which case it may apply the CISG as *lex specialis*.[12] The CISG endorses this possibility.[13] An arbitral tribunal may reach the same conclusion based on the flexible approach that most rules contain in this field.[14]

Despite the wide range of scenarios for the application of the CISG and of the latter's notable success, the case law on the matter has had a slow -but steady- development in Latin American countries. Argentina, Brazil, Chile and Mexico lead the number of CISG cases in the region.[15] Other countries like Colombia, Ecuador, Peru and Paraguay are lagging behind.[16] In stark contrast with the Latin American case law, countries like United States, Germany and France have reported a significant amount of CISG cases.[17]

A more robust growth of CISG case law in Latin America, may neither depend on the region's participation in international commerce, nor on the volume of sales between Latin American countries within their regional markets. It may depend on other legal or cultural circumstances, which are also present in other regions of the world.[18]

First issue: finding an implied exclusion of the CISG

The CISG may be directly applicable to a contract of sale if the seller and the buyer have their places in different Latin American CISG states. It may also apply if said parties, having their places of business in different Latin American CISG or non-CISG states, choose the national law of a CISG country.[19]

However, in one case an Argentinian buyer raised a claim against a Chilean seller, before a Chilean court, alleging the breach of contract and requesting the payment of damages[20]. Both parties based their submissions on the local Chilean law, without resorting to the CISG. The Chilean courts involved in the case -including the Supreme Court- dismissed the claim under local Chilean law. When the claimant contended belatedly that the CISG was applicable, it was held that, under the CISG,[21] the lack of reference to its provisions amounted to its exclusion.[22]

In this case, the different courts involved ignored the application of the CISG, which could have been the *lex specialis*. Under the well-known principle of *iura novit curia* in civil law countries -*the judge knows the law*-,[23] the competent courts should have ascertained the applicable law despite the parties 'silence during the judicial proceedings. In international matters, sometimes neither the state judge nor the parties know the law.[24] This could explain the wide interpretation given by the Chilean courts to the implied exclusion of the CISG, despite the growth of the Chilean CISG case law.[25]

Second issue: unnoticed non-application of the CISG

This is the case where the seller and the buyer have their places of business in two Latin American CISG countries. Thus, the CISG should be directly applicable as *lex specialis*, irrespective of the parties' silence as to the choice of applicable law, or of their express choice of the law of one of the two countries involved without excluding the application of the CISG.

It is a fact that during recent years most Latin American companies -many of them from CISG states- have targeted their exportations to their regional markets.[26] However, the scarce case law reported in various Latin American countries may indicate that those who intervene in regional contracts of sale may be inadvertently ignoring the CISG.

From a practical standpoint, in the Latin American region it is common to find that several state courts and companies involved in international trade — including local counsel — ignore the existence of the CISG as a *lex specialis* within their own national laws. Consequently, when the law chosen is the national law of one of the countries involved, companies *a priori* believe that their rights, duties and liabilities should be addressed under a civil or commercial code. The mere existence of the CISG comes as a surprise when their managers seek specific advice, either at the time of negotiating the contract or, most commonly, once a dispute has arisen as a result of a breach of contract. The courts, especially at the lower levels of the judiciary, are generally not familiar with uniform instruments of international trade.

Third issue: the "homeward trend"

Being a uniform instrument of international trade, the CISG provides that its interpretation must take account of the convention's international character and of the need to promote uniformity in its application and the observance of good faith in international trade.[27]

Even if a state court does not ignore the existence of the CISG, there is always a risk of the so-called "homeward trend" at the time of interpreting and applying the convention. This trend, which is not exclusive to Latin American courts, has been defined as the *"(...) tendency to think that the words we see are merely trying, in their awkward way, to state the domestic rule we know so well*".[28] As a result, the state judge may be tempted either to disregard the CISG as a whole despite knowing its applicability[29], or simply to "adapt" the CISG to domestic rules of law rather than to international standards.[30] This reluctance to applying the CISG turns into a sort of a *favor legis domesticae*.

Conclusion

The CISG has been adopted by numerous Latin American countries. There is a slow but steady growth in the CISG case law reported in the region. However, these numbers seem to contrast with the volume of international sale of goods contracts involving Latin American parties.

The scarce case law reported in various Latin American countries may be caused by different legal and cultural circumstances or barriers, most of which encompass the lack of familiarity with the CISG and the reluctance to apply its rules. These circumstances, which are not exclusive to Latin America, involve companies, legal practitioners and state courts. They include (i) the unnoticed non-application of the CISG both during contractual negotiations and also

once a dispute has arisen between the seller and the buyer; (ii) a potentially high number of cases where the CISG is impliedly excluded during judicial proceedings (e.g., when the parties have chosen the national law of a CISG to govern their contract); and (iii) a homeward trend which reacts against the application of international and uniform rules of international trade, like the CISG.

Overcoming the lack of familiarity with the CISG in the legal community, is necessary in order to solve these cultural and legal barriers. Law schools in the Latin American region should permanently address issues of international trade law. Legal practitioners and state courts should also become aware of the multiple digests and sources, specifically focused on the CISG, which facilitate the interpretation and application of its rules.

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[1] JOHN HONNOLD & HARRY FLECHTNER, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED CONVENTIONS 4-10 (4th ed, 2009).

[2] It also applies (i) to long-term contracts for the supply of goods and (ii) to contracts for the sale of goods and services, in so far the preponderant part of the obligations of the party who furnishes the goods (the seller) does not consist in the supply of labor or other services. United Nations Convention on Contracts for the International Sale of Goods art. 3, Apr. 11, 1980, S. TREATY DOC. No.98-9, 1489 U.N.T.S.3. (1983).

[3] STEFAN KROLL, LOUKAS MISTELIS & PILAR PERALES-VISCASILLAS, UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS – COMMENTARY 19-20 (Stefan Kroll et al. eds., 2011).

[4] The CISG takes a formal approach regarding the internationality of a sales transaction. This international character is based on the location of the parties' principal places of business: CISG, *supra* note 2, art. 1.1.

[5] Some of the members of the CISG are Australia, Canada, China, France, Germany, Israel, Italy, Japan, Netherlands, Portugal, Republic of Korea, Russian Federation, Spain, Singapore, Switzerland, Argentina, Brazil, Chile, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Peru, Paraguay, Uruguay and Venezuela, among many others: *Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG)*, https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status (last visited May 29, 2023).

[6] ULRICH SCHROETER, "*Empirical Evidence of Courts' and Counsels' Approach to the CISG (with Some Remarks on Professional Liability)"* in INTERNATIONAL SALES LAW: A GLOBAL CHALLENGE 649-668 (Larry A. DiMatteo ed., 2014) stating that when the CISG had 83 members, they represented between 75% and 80% of the worldwide international commerce.

[7] CISG, *supra* note 2, art. 1.1.a).

[8] A Korean court held that a contract of sale over some fabrics and components for a window shade, between a Korean seller and an American buyer, was subject to the CISG and not to the Korean laws, despite the fact that the parties had chosen Korean law to govern the agreement. The court highlighted that the CISG was the applicable *lex specialis*, within the national law of said country, to the transaction at hand: District Court of Korea. Decision of September 21, 2012, in: Republic Of Korea September 21, 2012 District Court | Institute of International Commercial Law (pace.edu); *logging in required*). Also: FRANCO FERRARI, *La Convención de las Naciones Unidas sobre los contratos de compraventa internacional de mercaderías y la ley aplicable al arbitraje comercial internacional: comentarios sobre tres supuestos comunes*, 8 Revista de Arbitraje Comercial y de Inversiones 687, 690-695, 704 (2015) (Fr.).

[9] That may be the case of an English seller and a Bolivian buyer. See SANTIAGO TALERO-RUEDA, ARBITRAJE COMERCIAL INTERNACIONAL: INSTITUCIONES BÁSICAS Y DERECHO APLICABLE 562-565 (2022) (Fr.).

[10] Several national laws and arbitration rules endorse this possibility. See, e.g., United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration 1985: with amendments as adopted in 2006* (Vienna: United Nations, 2008) art. 28(1), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf; French Code of Civil Procedure art. 1511; Spanish Arbitration Law (2003), art 34(2); Colombian Arbitration Law (2012), art. 101; Chilean Arbitration Law (1998), art. 28(1); Peruvian Arbitration Law (2008), art. 57(2); Argentinian Arbitration Law (2018), art. 79; Mexican Code of Commerce, art. 1445;

International Centre for Dispute Resolution (ICDR) Rules of Arbitration (March 1, 2021), art. 34(1), https://www.icdr.org/sites/default/files/document_repository/ICDR_Rules_1.pdf?utm_source=icdr-website&utm_medium=rules-page&utm_campaign=rules-intl-update-1mar; International Chamber of Commerce (ICC) Rules of Arbitration (Jan. 1, 2021), art. 21(1), https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/; The London Court of International Arbitration (LCIA) Rules (Oct. 1, 2020), art. 22(3), https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx; Hong Kong International Arbitration Centre (HKIAC) Rules of Arbittration, art. 36(1),https://www.hkiac.org/arbitration/rules-practice-notes/hkiac-administered-2018; Chamber of Commerce of Lima (CCL) Rules of Arbitration (Jan. 1, 2017), art. 21(1), https://www.arbitrajeccl.com.pe/wp-content/uploads/2022/07/ARBITRATION-RULES-AND-STATUTES.pdf; Chamber of Commerce of Bogota Arbitration (CAC) Rules, art. 3.29.1, https://www.centroarbitrajeconciliacion.com/content/download/37204/file/Rules%20of%20procedure%20for%20international%20commercial%20arbitration.pdf; and Madrid International Arbitration Center (CIAM) Rules of Arbitration (Jan. 1, 2020), art. 26(1), https://madridarb.com/wp-content/uploads/2020/09/Arbitration-rules-EN.pdf, among many others.

[11] See: CISG, *supra* note 2, art. 6.

[12] For example, in a case between a Peruvian seller and a Spanish buyer, a Spanish court may apply article 4.1.a) of the Regulation (EC) No 593/2008 of the European Parliament and of the Council of June 17, 2008 on the law applicable to contractual obligations (Rome I), which resorts to the law where the seller has his habitual residence (Peru). Since Peru has adopted the CISG in relation to contracts of this kind, the Spanish court may apply it as the *lex specialis* in order to solve the business dispute.

[13] CISG, *supra* note 2, art. 1.1.b).

[14] See, e.g., French Code of Civil Procedure, art. 1511; Spanish Arbitration Law (2003), art. 34(2); Colombian Arbitration Law (2012), art. 101; Peruvian Arbitration Law (2008), art. 57(2); Argentinian Arbitration Law (2018), art. 80; Mexican Code of Commerce, art. 1445; ICDR Rules (2021), art. 34(1) [as in reference 10]; ICC Rules, *supra* note 10, art. 21(1); LCIA Rules, *supra* note 10, art. 22(3); HKIAC Rules, *supra* note 10, art. 36(1); CCL Rules, *supra* note 10, art. 21(1); CAC Rules, *supra* note 10 art. 3.29.3; and CIAM Rules, *supra* note 10, art. 26(1), among many others.

[15] Courts in Argentina, Brazil, Chile and Mexico have issued 70, 17, 27 and 18 CISG decisions respectively. See: https://iicl.law.pace.edu/cisg/search/cases?case-terms=&exact_date=&start_date=&end_date=&descriptors=&jurisdiction%5B%5D=98; *(logging in required*).

[16] Ibid.

[17] Courts in United States, Germany and France have issued 399, 649 and 292 CISG decisions respectively. See: https://iicl.law.pace.edu/cisg/search/cases?case-terms=&exact_date=&start_date=&end_date=&descriptors=&jurisdiction%5B%5D=98; *(logging in required*).

[18] For example, there has been a so-called "homeward trend" in the application of the CISG by European or US courts. See, *inter alia*, Delchi Carrier SpA v. Rotorex Corp, 71 F.3d 1024 (2nd Cir, 1995); Playcorp Pty Ltd v Taiyo Kogyo Ltd [2003] VSC 108 (Austl.); Corte di Appello di Milano, 20 March, 1998 (Iti.); BRUNO ZELLER, *Analysis of The Cultural Homeward Trend in International Sales Law*, 10 VULJ 131,136 (2021).

[19] CISG, *supra* note 2, art. 1.

[20] Argentina and Chile are parties to the CISG, *supra* note 2.

[21] CISG, *supra* note 2, art. 6.

[22] Industrias Magromer Cueros y Pieles S.A. v. Sociedad Agrícola Sacor Ltda. Supreme Court of Chile. Decision of 22 September 2008 (Chile).

[23] *Iura novit curia* is neither the rule in common law jurisdictions nor in international commercial arbitration in most cases. See: GISELA KNUTS, *Jura Novit Curia and the Right to Be Heard - An Analysis of Recent Case Law*, 28 Arbitr. Int. 669, 671 (2012); RODRIGO JIJÓN & DANIELA PÁEZ, *Cabe la aplicación del principio iura novit curia en el arbitraje comercial?*, Revista Ecuatoriana de Arbitraje 161, 167-168 (2013); NIGEL BLACKABY & RICARDO CHIRINOS, *Consideraciones Sobre La Aplicación Del Principio Iura Novit Curia En El Arbitraje Comercial Internacional*, 6 Anuario Colombiano de Derecho Internacional [ACDI] 77, 82-84 (2013); and TALERO-RUEDA, op. cit 575-578..

[24] MARTIN DAVIES & DAVID V. SNYDER, INTERNATIONAL TRANSACTIONS IN GOODS, GLOBAL SALES IN COMPARATIVE CONTEXT 42 (2014).

[25] Some reported cases in Chile, address the scope of the reservations contained in arts. 12 and 96 of the CISG, whereby Chile declared that the CISG provisions allowing *"(…) a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing, would not apply where any party had his place of business in its territory*.":
UN, *supra* note 5.
[26] U.N. Economic Commission for Latin America and the Caribbean, Perspectivas del Comercio Internacional de América Latina y el Caribe [International Trade Outlook for Latin America and the Caribbean] (Jan. 2020), https://www.cepal.org/es/publicaciones/46613-perspectivas-comercio-internacional-america-latina-caribe-2020-la-integracion.
[27] CISG, *supra* note 2, art. 7.1.
[28] JOHN HONNOLD, *The Sales Convention in Action: Uniform International Words: Uniform Applications?*, 8 *J.L. & Com 207*, 208 (1988). For a criticism of the homeward trend, see: HARRY FLECHTNER & JOSEPH LOOKOFSKY, *Nominating Manfred Forberich: The Worst CISG Decision in 25 Years?*, *9 VJ* 199, 203 (2003).
[29] However, ZELLER. op.cit, 136, contends that ignoring or disregarding the application of the CISG amounts to the application of a wrong law, and not to a homeward trend as such.
[30] Sometimes it may be necessary to resort to domestic rules of law, but not as a result of a homeward trend in the interpretation of the CISG. This may take place within a gap-filling exercise (e.g. when the CISG provides that questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law: CISG, *supra* note 2, art. 7.2.)

Private International Law and Voices of Children

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On June 1, 2023, International Children's Day, the American Society of International Law Private International Interest Group hosted an online webinar discussing the issue of children's welfare and voices in private international law (PIL) in collaboration with conflictoflaws.net. In the first part of the webinar, five experts were invited to share their views on the status quo, challenges, and potential solutions to protect the welfare of children in the international and transnational context. The second part of the webinar involved a roundtable discussion among the experts. This event was moderated by Dr. Jeanne Huang, Associate Professor at the Sydney Law School. The guest speakers were as follows:

- **Mr. Philippe Lortie**, co-head of the International Family and Child Protection Law Division at the Hague Conference on Private International Law Permanent Bureau. Mr. Lortie has more than 30 years of experience in the field of child protection.
- **Professor Lukas Rademacher**, Professor of Private Law, Private International Law, and Comparative Law at Kiel University, Germany. Professor Rademacher read law in Düsseldorf and Oxford and obtained a PhD in Münster. He wrote his postdoctoral thesis at the University of Cologne.
- **Ms. Miranda Kaye**, Senior Lecturer at the University of Technology Sydney. Ms. Kaye is a member of Hague Mothers, a project aiming to end the injustices created by the Hague Child Abduction Convention. She also has experience in public service (Law Commission of England and Wales) and as a practicing solicitor (family law in the UK).
- **Ms. Anna Mary Coburn**, former attorney for the US Government (USG) involving the Hague Children's Conventions and a Regional Legal Advisor and Foreign Service Officer for USAID. Ms. Coburn now has her own legal practice in private international family law, focusing on children's rights.
- **Ms. Haitao Ye**, lawyer at the Shanghai office of the Beijing Dacheng Law LLP specializing in marriage and family dispute resolution, as well as wealth inheritance and management. She is a former experienced judge in civil and commercial trials at the Shanghai Pudong New District People's Court.

Mr. Lortie opened the webinar by introducing the Hague Conference on Private International Law (HCCH), an intergovernmental organization with a mandate to develop